

The challenges to the preventive monitoring under OPCAT in the context of counter-terrorism and anti-radicalisation measures

Outcomes Paper

On 11 October 2016 the Open Society Justice Initiative and Human Rights Implementation Centre of the University of Bristol convened a round table in London on *The challenges to the preventive monitoring under OPCAT in the context of counter-terrorism and anti-radicalisation measures*. The event was a small gathering between the UN Subcommittee on Prevention of Torture (SPT) and representatives of the National Preventive Mechanisms (NPMs)¹ of Denmark, France, Norway and the United Kingdom. The event was held under Chatham House rules and this paper summarises the discussion for a wider audience.

Over the past decade and in particular since the recent terrorist attacks in Europe, many countries have adopted wide-ranging and stringent counter-terrorism measures. Counter-terrorism legislation often includes an extensive array of measures such as lengthy pre-charge detention, long periods of isolation, other stringent detention regimes and measures applied through administrative procedures. Many countries have established dedicated units within prisons² or even separate establishments³ to hold, not only those suspected or convicted of terrorist offences, but also those considered to be radicalized or at the risk of radicalisation. Measures often extend to a duty imposed on public bodies to prevent people being drawn into terrorist activities⁴, report signs of radicalisation and set up programmes to counter radicalisation.

All of these measures have significant repercussions for the work of the NPMs in relation to the preventive mandate that these bodies are charged with. There are a number of significant issues that must be discussed in the context of counter-terrorism and anti-

¹ The SPT has two primary operational functions. First, it may undertake visits to States Parties, during the course of which it may visit any place where persons may be deprived of their liberty. Second, it has an advisory function which involves providing assistance and advice to States Parties on the establishment of [National Preventive Mechanisms](#) (“NPM”), which OPCAT requires that they establish, and also providing advice and assistance to both the NPM and the State Party regarding the working of the NPM. In addition, the SPT cooperates, for the prevention of torture in general, with relevant United Nations organs and mechanisms as well as with international, regional, and national institutions or organizations.

² Establishment of separate, dedicated units has already taken place in France and Denmark, for example.

³ Recently the Kyrgyz Republic, for example, has announced holding of the radical prisoners in separate establishments. See RIA News agency report of 24 August 2016 *В Киргизии осужденных за экстремизм будут содержать отдельно* [Those sentenced for extremism offences will be held separately in Kyrgyzstan]. Available at: <https://ria.ru/world/20160824/1475147406.html> (last viewed on 18 October 2016).

⁴ Monitoring places of detention. Sixth Annual Report of the United Kingdom’s National Preventive Mechanism. 1 April 2014 – 31 March 2015; at p. 17.

radicalisation measures in relation to the NPM mandate which was the aim of the round table.

1. What are the appropriate safeguards against torture and ill-treatment in the context of counter-terrorism measures?

The question of whether the existing torture prevention safeguards are adequate to address the risks inherent in the counter-terrorism agenda was discussed.

The approach to torture prevention strategies currently involves number of safeguards which have been primarily based on the ordinary criminal justice system and are aimed at ensuring protection of individuals coming in contact with the criminal justice sector against risk of ill-treatment. These include the right to a lawyer, the obligation of the authorities to document the taking of an individual into the custody, the medical examination, holding people in designated detention places etc. These safeguards are aimed to ensure that an individual cannot be held in secret detention, that his/her whereabouts are known, that the State actors exercising the authority within the remits of the criminal justice sector adhere to a set of public rules and regulations and thereby minimising the risk of torture and ill-treatment.

In many countries counter-terrorism measures adversely impact the effectiveness of existing safeguards against torture. Often this is due to the fact that, in practice, many counter-terrorism measures operate outside the ordinary criminal justice framework e.g. through administrative measures and 'extra-judicial' approaches. This leads to a situation where the existing safeguards are insufficient, because measures are being taken that are extraordinary, exceptional, continuously changing and frequently extra-judicial. Thus the safeguards that are designed to be triggered along the course of the criminal justice system are, in terrorism related cases, not necessarily triggered leaving significant gaps. Challenges exist when working alongside national security and intelligence services, in addition to the normal criminal justice actors. It is a difficult environment within which to operate because the laws governing intelligence agencies are often broadly defined and not publically available, and whilst in most places intelligence agencies are not authorized by legislation to detain people, they often do. Oversight and accountability are thus either absent or severely restricted.

This leads to a number of significant questions: what are the appropriate safeguards against torture and ill-treatment? Is there a need for additional / tailored safeguards to address the variety of issues arising from the implementation of the counter-terrorism measures? What is the role of independent oversight bodies such as NPMs?

2. The scope of the term 'deprivation of liberty'

Counter-terrorism measures often lead to people being held through administrative measures in (quasi)/administrative detention facilities, or in secret detention facilities, which might appear not fit the definition of 'deprivation of liberty' as per Article 4 of OPCAT. This gives rise to a question as to whether NPMs have the right to visit such places under their

mandates, an issue which the NPMs and SPT must examine carefully. It must be noted in this context that the SPT:

'[...] takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function'.⁵

This raises a number of issues for the NPMs which relate both to their competence and their capacity. The NPMs present at the roundtable did not report instances where they were prevented from visiting a specific place of detention and thus it appears, that the interpretation of NPMs as to whether a particular site is a 'place of deprivation of liberty' as per Article 4, has so far been accepted. The usual test on the ground appears simple: is the person at liberty to leave? If the answer is negative, the NPMs have insisted on their right to visit and have, to date been allowed to do so.

However new counter-terrorism measures pose many challenges including, for example, the recent establishment in France of centres for de-radicalisation which presuppose people being committed on a voluntary basis.⁶ With the introduction of such centres and potentially other similar places, questions as to what is 'voluntary commitment', what are the consequences for those who do not volunteer to be committed, or the options to leave, need to be carefully considered by NPMs as they decide whether to include these, and other places in their work.

Another challenge that arises for many NPMs is the lack of knowledge of what places are used for detention/holding purposes. Many countries (i) do not have complete lists of all places of deprivation of liberty and (ii) in the context of counter-terrorism measures a variety of ad hoc detention/holding places are used. The discussion indicated that the persistence of the NPM and 'having its ear to the ground' were particularly important to address this challenge.

A further issue was raised in this context: the capacity of the NPMs to visit all such ad hoc detention/holding places and do so in accordance with the requirements of OPCAT regarding regularity, with multi-disciplinary teams etc. This raises serious concerns for NPMs with stretched resources. The risk of not being able to carry out such visits properly and the negative implications that may arise due not being able to carry out fully fledged visits was discussed.

⁵ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/C/57/4 (2016), Annex, para 3.

⁶ See news report from France 24 News Agency of 14 September 2016 *France unveils first de-radicalisation centre to tackle Islamist threat*. Available at: <http://www.france24.com/en/20160913-france-deradicalisation-centre-islamist-threat-jihadism-terrorism> (last viewed on 18 October 2016).

See also SKY News Agency report of 13 September 2014 *Inside France's deradicalisation 'boot camp'*. Available at: <http://news.sky.com/story/inside-frances-deradicalisation-boot-camp-10576794> (last viewed on 18 October 2016).

3. Operational issues in relation to the ability of the NPM to discharge its mandate as per the provisions of OPCAT

The introduction of counter-terrorism and anti-radicalisation measures has seen the imposition of strict detention regimes upon detainees suspected and convicted of terrorism related crimes and detained under administrative measures. These measures often include holding prisoners in isolation and restricting the contact of the detainee with the outside world. Such restrictions may have negative implications for the ability of the NPMs to discharge their mandates as the NPMs may:

- struggle *to find out about places of deprivation of liberty*, especially places that might be temporary, ad hoc or even intentionally secret;
- be *denied access* all together to units and/or establishments where such persons are being held;
- be unable to carry out monitoring visits with the *requisite degree of regularity* that the NPM would itself decide as appropriate;
- be unable to carry out *unannounced visits*;
- be unable to *access all places within the establishment*;
- have its *access to all the information* regarding the detainee in question, information might be restricted or even denied;
- be unable *to carry out confidential interviews* with detainees;
- be summoned to *give witness statements* or requested to *reveal confidential information* gathered during their monitoring visits and interviews;
- struggle *to make effective recommendations* in this context as well as ensure effective follow-up to the recommendations made.

The discussions revealed that the NPMs present at the roundtable had not faced overt issues concerning access to places of detention. It was however noted that NPMs must stay vigilant in this rapidly changing context and that there may be many NPMs which do face such issues. It was also noted that the introduction of counter-terrorism measures may require the NPM members to receive heightened security clearance which may impact on the NPMs ability to operate effectively if obtaining of such clearance is lengthy, cumbersome or denied. If granted however this may also present the NPMs with opportunities to access places of detention previously closed to their oversight.

Other issues around the confidentiality of communications and requests to reveal information obtained during the course of monitoring visits were flagged as areas for concern / areas where clear procedures and guidance are critical.

The issue of specialist training to enable the NPMs to visit places of detention in the context of counter-terrorism measures was discussed. For example, in the UK there are so-called TACT suites, distinct facilities attached to some police stations where those suspected of terrorism offences are held. The Independent Custody Visiting Association (ICVA), a body which is part of the UK NPM with a remit over all police stations, carries out visits to TACT suites. However given that such suites are not attached to all police stations, ICVA have a

specialist group of custody visitors with more experience and specialist training who carry out visits to TACT suites under special procedures.⁷

4. Substantive issues in relation to the manner in which the variety of counter-terrorism and anti-radicalisation measures meet the international human rights standards

The implementation of counter-terrorism and anti-radicalisation measures within prisons has the potential to create an environment within which the risk of ill-treatment is increased. Therefore the oversight by NPMs is crucial to ensure that concerns over safety and security are addressed in a manner which respects fundamental human rights and complies with international human rights standards. There have been reports of various issues arising from the implementation of counter-terrorism/anti-radicalisation measures within prisons and other places of detention including:

- *prolonged isolation* of suspected terrorists/radicals/high security prisoners which often includes detainees being held in extremely isolated and confined environments for very long / indeterminate periods;⁸
- the *use of special units* for those suspected or accused of terrorist offences / those suspected of radicalization and the standards applicable;⁹
- failure to fully *adhere to the established procedures* for placing prisoners under restricted regimes;¹⁰
- *failure to review* the imposed measures regularly and with the involvement of an independent body;
- lack of *adequate care plans* and *access to mental health services*;
- the *misuse and overuse of overly harsh security measures* such as strip searches, CCTV monitoring and the subjection of individuals to harsh detention regimes without an *individualised risk assessment*;
- lack of *detailed procedures for placing prisoners on anti-radicalisation measures* with the requisite guarantees against discrimination and stigmatisation;¹¹
- *discrimination* against those under counter-terrorism/anti-radicalisation measures;
- lack of *adequate and appropriate specialist training for prison staff*;¹²

⁷ ICVA. Annual Report and Accounts 2013. Changing Times. (2013), at p. 3; Available at:

http://icva.org.uk/uploads/publications/ICVA_Annual_Report_2013-2014.pdf (last viewed on 18 October 2016).

See also: ICVA. TACT student training manual. (2013). Available at:

http://icva.org.uk/uploads/publications/21791_ICVA_TACT_Student_Manual_V3.pdf (last viewed on 18 October 2016).

⁸ The Parliamentary Ombudsman Norway, 'Visit Report: Telemark prison, Skien branch 2-4 June 2015' (2015) at p. 14-15; Available at:

www.sivilombudsmannen.no/getfile.php/Rapporter/151111%20Visit%20report%20Telemark%20prison%2C%20Skien%20branch%20EN.pdf (last viewed on 18 October, 2016).

⁹ GCPDL, 'Avis du 11 Juin 2015 sur la prise en charge de la radicalisation islamiste en milieu carcéral' (2015). Available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030813617&categorieLien=id (last viewed on 18 October 2016).

¹⁰The Parliamentary Ombudsman Norway, 'Visit Report: Kongsvinger Prison 25-27 August 2015' (2015) at p. 14. Available at: www.sivilombudsmannen.no/getfile.php/Rapporter/150825%20Visit%20report%20Kongsvinger%20prison%20EN%20final.pdf (last viewed on 18 October 2016).

¹¹ GCPDL, 'Avis du 11 Juin 2015 sur la prise en charge de la radicalisation islamiste en milieu carcéral' (2015). Available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030813617&categorieLien=id (last viewed on 18 October 2016).

- restricted *contact with the outside world*, including family and lawyers, and especially if the prisoner is placed in units away from their home area;
- lack of guarantees against *prejudicial treatment during trial*;¹³
- analysis of the *flow of information and reporting procedures* to and from national security agencies (and the rules in relation to prison staff being informants).

The distortion of the role of prison staff was highlighted as in some countries prison staff are asked to undertake special counter-terrorism related tasks such as reporting suspicious behaviour or assessing inmates' signs of radicalisation. Obligations placed on individual prison staff, often with limited training, might cause staff to fear not reporting individuals and thus over-reporting. In addition in some countries intelligence/security staff are being placed among the prison staff without any identification of their differing role within the establishment. There is a fear that such steps disturb the relationship between the detainee and prison staff which aims to establish trust so as to ensure effective prison management. Questions were also raised regarding what information should / should not be shared with intelligence services.

The issue of specialised units was discussed. Issues were raised relating to the often automatic referral of suspects of terrorism related crimes and people suspected of radicalisation, the lack of individualised assessments and the stigmatisation and 'pre-judgment' related to being placed in such a unit. Numerous challenges were faced around lengthy isolation and harsh regimes including disproportionate searching and closed visits as a standard rule.

The adoption of state of emergency legislation in some countries following terrorist attacks as well as derogations entered by some States parties in relation to provisions of the core international and regional human rights treaties bring further complexity to the task of the NPMs. The lack of capacity among the NPMs to undertake large-scale, detailed review of counter-terrorism legislation and implementing procedures was highlighted.¹⁴

The role of others who visit prisons regularly such as NGOs and religious leaders was also discussed including how organisations or religious leaders might report signs of radicalisation. The role of religious leaders was particularly highlighted and the absence of any international guidance was noted. Questions were raised over measures in some countries to mandate all religious services be held in the official language, the training of religious leaders and insufficient number of religious leaders with knowledge and experience of working in places of detention.

¹² HMI Prisons, 'Report on an announced thematic inspection of the Close Supervision Centre System' (2015) at p. 52; Available at: www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2015/08/CSC-web-2015.pdf (last viewed on 18 October 2016).

¹³ GCPDL, 'Radicalisation islamiste en milieu carcéral: L'ouverture des unités dédiées' (2016); Available at: www.cglpl.fr/wp-content/uploads/2016/07/Rapport-radicalisation_unit%C3%A9s-d%C3%A9di%C3%A9es_2016_DEF.pdf (last viewed on 18 October 2016).

¹⁴ See, for example, attempt by the UK NPM to include the Independent Reviewer of Terrorism Legislation (IRTL) in the NPM. UK NPM Monitoring places of detention. Sixth Annual Report of the United Kingdom's National Preventive Mechanism. 1 April 2014 – 31 March 2015. London (2015), at p. 53.

Conclusion

The participants of the roundtable highlighted the rapidly changing and variety of counter-terrorism measures that are being introduced, often with little consultation and/or explanation. Additionally such measures are often being introduced against the backdrop of tragic events which makes the introduction and implementation of measures politically sensitive. This puts the NPMs in a difficult position, but it is important that the wide variety of counter-terrorism measures are scrutinised and the SPT should support NPMs with comparative information, legal standards and advice. The NPMs agreed upon the need to share and exchange information on the variety of counter-terrorism measures that are being introduced, especially emerging legal questions, and the way they impact work in practice.