

OPCAT and its relationship with secret detentions: submission to the Joint Study on Secret Detention initiated by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

1. Introduction

The Optional Protocol to the UN Convention Against Torture (OPCAT) entered into force on 22 June 2006. Currently there are 46 States Parties to the OPCAT and 25 Signatories. The OPCAT establishes a practical way to realize the obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment as required by Articles 2 (1) and 16 (1) of the UN Convention Against Torture. The aim of the OPCAT is to prevent torture through the establishment of a system of visits by independent national and international bodies to all places of deprivation of liberty under a state party's jurisdiction and control.¹ Under the OPCAT, visits should thus also be carried out to official, unofficial and secret places of detention. The OPCAT research team at the School of Law, Bristol University would like to provide a brief outline of the OPCAT and its legal obligations, and how this fits in terms of monitoring and visiting secret places of detention. This is prompted by the three years research project that has been carried out by the OPCAT research team to analyze the implementation of the OPCAT at the national level and the factors that have contributed to the establishment and/or designation of national preventive mechanisms as required by the Protocol.²

2. General obligations under OPCAT: role of SPT and NPMs

To achieve the OPCAT's aim, a Subcommittee on the Prevention of Torture (SPT) was established to carry out the international component of the visits. In addition, States Parties are under the obligation to establish, designate or maintain one or more visiting bodies for the prevention of torture (national preventive mechanisms, NPMs) at the national level.³ Under Article 4 (1) of the OPCAT, states parties are under a general obligation to allow visits, in accordance with the Protocol, by the SPT and NPMs "[...] 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 (hereinafter referred to as places of detention)." The aim of visits to these places of detention is to strengthen the protection of persons deprived of their liberty against torture and other forms of ill treatment.

With regard to the SPT, states must receive the SPT in their territory and grant it unrestricted access to all the places of detention it intends to visit.⁴ This unrestricted access may be subject to objections by the state being visited "only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit."⁵ Thus a state of emergency is not a reason to object a visit of the SPT. In terms of the NPMs, which must be

¹ Article 1 and Article 4 (1) OPCAT.

² For information on the project and its publications, see <http://www.bristol.ac.uk/law/research/centres-themes/opcat/index.html>

³ Article 3 and 17 OPCAT.

⁴ Article 12 (a) OPCAT and Article 14 (1)(c) OPCAT.

⁵ Article 14 (2) OPCAT.

independent and have the sufficient resources and expertise to carry out their mandate,⁶ states parties are similarly obliged to grant them access to all places of detention.⁷ Contrary to the SPT, NPMs may not be subjected to any type of objections to their visits.

In terms of their mandate, Articles 14 (1) and 20 (a) of the OPCAT require States to provide the SPT and the NPMs with all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location. Furthermore, all the information found in those places must be handed over to both bodies at their request for inspection,⁸ and the SPT and the NPMs should also have the opportunity to meet in private with persons who are being detained in such places.⁹

3. Understanding the concept of ‘deprivation of liberty’ under the OPCAT

One of the core elements of the mandates of both the SPT and the NPMs is to visit places of deprivation of liberty in the states parties to OPCAT. It is clear however that the scope and reach of these mandates rests with the understanding of the concept of the ‘places of deprivation of liberty’. Article 4 of OPCAT states:

‘1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 [the SPT and NPMs] 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 (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.’

This is certainly a rather broad definition of ‘deprivation of liberty’ and thus the potential reach of the SPT and NPMs extends not only to ‘traditional’ establishments like prisons and police cells, but also such less ‘traditional’ places as psychiatric institutions, refugee camps, centres for juveniles, immigration centres, transit zones at international points etc. Moreover, the specifics of each country may add to the list of such places. So, for example, there may be detention due to contagious diseases¹⁰ or the specifics of the country may dictate some special detention, like in case of Ghana where the Ghanaian Commission on Human Rights and Administrative Justice carries out visits to the camps for suspected witches¹¹.

Furthermore, Article 4(1) states that the visits must be allowed to places where persons ‘are or *may* be deprived’ (emphasis added) which means that not only actual but also potential places of deprivation of liberty are subjected to the visiting scheme of both the SPT and NPMs.

⁶ Article 18 OPCAT.

⁷ Article 20 (b) OPCAT.

⁸ Article 14 (1)(b) and Article 20 (b) OPCAT

⁹ Article 14 (1)(d) and Article 20 (d) OPCAT

¹⁰ Conference Report of the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT) ‘The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards’ Law School, University of Bristol, April 19-20, 2007; p. 17

¹¹ Lilian Ayete-Nyampong ‘Challenges facing the OPCAT in the Implementation of the OPCAT in the African Region. Visiting Places of Detention- Methods’. Presentation during the Second Annual Conference ‘The OPCAT in the African Region: Challenges of Implementation’, Cape Town, South Africa, 3 - 4 April 2008; Available at: <http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/presentationayetesa.pdf> (accessed on 29 April 2009)

Moreover, Article 29 states that the provisions of OPCAT must extend to all parts of federal states without any limitations or exceptions which means that in case of federal states both federal and regional places of deprivation of liberty are subjected to the jurisdiction of the SPT and NPMs.

Therefore OPCAT contains a very broad definition of deprivation of liberty, not only covering a wide scope of detention in thematic terms but also clearly covers both official and unofficial detention throughout the territories and jurisdictions of the states parties to the OPCAT.

Consequently, the provisions of OPCAT are of direct relevance to this Study not from the perspective of documenting the phenomena but rather as a possible avenue of redressing the secret detention both from the international perspective through visits and other preventive work carried out by the SPT and from the national perspective through work carried out by the NPMs. It should also be noted that visits to places of deprivation of liberty in the wide sense as per OPCAT are being carried out by independent bodies in many states that are not parties to OPCAT. Thus the role and effectiveness of such entities as Ombudsman's Offices, National Human Rights Commissions and statutory visiting bodies ought to be taken into consideration when examining ways of dealing with the phenomena of secret detention.

The OPCAT Research Team is glad to be of assistance for the Joint Study and remains at the disposal of the Special Rapporteurs for further advice with regard to the role of the OPCAT with regard to secret detentions.

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