

OPCAT: an innovative treaty or business as usual?

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The Treaty as “Genetic Code” for a new Organism:

The OPCAT is indeed “innovative” as a treaty, but not necessarily because it contains any wholly new idea. I am suggesting, and it might seem at first to be a slightly odd proposition, that OPCAT is very innovative while at the same time having little or nothing in it that is totally “new”.

What I mean to say is that in one way or another, not only is the concept that underlies the OPCAT project as a whole (openness of place of detention to outside world reduces risk of torture / establish independent visiting mechanism therefore should reduce torture) something that has been around for decades, but the actual elements of the OPCAT text itself have been around in various forms for decades.

What the OPCAT does that is quite radical, however, is to combine the “DNA” or bits of the genetic code of several older entities in a unique and innovative way to build a blueprint for a new organism:

- Perhaps the earliest bits are the treaty provisions and practices for detainee protection through ICRC visits to places of detention, in times of armed conflict. (i.e art 126 Third 1949 Geneva Convention for PoWs and art 143 Fourth Geneva Convention for civilian internees and detainees). [Practice

even older – as early as 1864 and, more systematically, throughout first world war.] Interview without witnesses specifically provided for, as is right of delegates to decide where to go, for how long, and how frequently.

Temporary objections allowed. But unannounced visits / publicity of reports not explicitly addressed (In practice, ICRC pushing towards total confidentiality / 2005 / even if state willing to publish whole report).

- 1987, European Convention for Prevention of Torture provisions for a regional system of preventive visits by an independent expert body, to all places of detention in peacetime, not just in times of war. Similar guarantees to those provided to ICRC under Geneva Conventions. Publication of reports addressed (default = confidentiality, though in practice = usually public). Notice of country visit required but possibility once there of unannounced visits to particular places not expressly addressed. Temporary objections allowed.
- Non-binding instruments and practices relating to national human rights institutions, as well as ICCPR in terms of national institutions capable of providing remedies / acting in accord with international standards (see, e.g., HRC and ECHR on courts conducting habeas corpus needing to be able to assess compliance with ICCPR not just national law).
- UN Voluntary Fund for Victims of Torture.

A few innovative twists on the earlier formulae: eg NPMs – no express provision for objections to visits (not even temporary). Direct legal regulation of national institutions in treaty text (including reference to Paris Principles (non-binding) in treaty text [compare with UNSMR reference UN Tort Declaration vs UNCAT]).

The combination of elements derived from these various sources indeed makes the OPCAT, as a treaty, quite different from other international and regional treaties, though each of its constituent elements are to some extent “borrowed” from these earlier sources.

This is just, however, the genetic code of the OPCAT. What about the “creature” itself, the actual system of visiting mechanisms? Can we be sure that the innovative character of the OPCAT is being implemented in a manner that ensures real impact in practice?

The OPCAT as a “Living Being”:

The question becomes more difficult when assessing whether the living organisms constructed using the “genetic code” of the OPCAT will prove innovative in their actual institutional arrangements, operations, and effects, or will (in whole or in part) revert to more-or-less business as usual.

- Subcommittee

- Already quite different in working methods from other UN Treaty Bodies.
 - Visits
 - Advice and (potentially) overview and coordination of national bodies.
- Also however depends on resources to the extent that this determines the frequency of visits to each country [i.e. adequate oxygen supply].
 - At current rate, each country might receive full visit only every 20 years or so, as Malcolm Evans recently stated as SPT chairperson: “this is clearly not what was intended.”
- Unannounced visits / ad hoc missions – will also be important, this is an area currently under development by Subcommittee (message recently posted on OHCHR website), which has signalled now very clearly that it understands the OPCAT text to confer upon the right to carry out unannounced visits to particular places of detention while it is in a country. (the importance of which Manfred Nowak while he was UNSRT and various scholars had also emphasised and affirmed.)
- Depends equally on states respecting the guarantees during visits – also remains to be seen. Indeed, beyond cooperation in visits and discussing recommendations, goes further. Without other elements provided for by the UNCAT itself such as – a domestic legal framework that effectively criminalizes torture and institutions that actually prosecute cases, and public officials with the will, training

and capacity – the preventive mechanisms, including the SPT, will not be able to gain traction to actually change things (biological metaphor: nurture not just nature / environment not just genes).

- Publication of reports ? [compare ICRC strengthening opposition to publication of its reports; ECPT established practice of publishing most reports]. Thus far, SPT appears to be going in the direction of the ECPT where potentially 'conservative' treaty text does not stand in the way of a 'progressive' practice by SPT and states. An encouraging result.

- NPMs

- Lag in implementation.
- Of those designated, majority (around 70%) appear simply to add responsibility of general-purpose (and generally reactive) ombudsmen or human rights commissions rather than new specialized bodies. (and indeed 25% of NPMs are existing general-purpose institutions to which no statutory changes have been made). Only 25% are wholly new and specialized institutions.
- Creates risk of "business as usual" unless:
 - real and appropriate expansion of resources of such bodies (financial and human) ["oxygen"], sufficient to have frequent visits,
 - change in working methods to emphasise prevention rather than reaction, [here seems things are moving in right direction

though could be more complete – at present most (at least 65%) NPMs explicitly embrace a preventive approach in their visiting work]

- ensure methodology meets international standards for visit practices (ICRC, ECPT, SPT etc) and, crucially, examines situation in relation to international definitions of torture and ill-treatment / international standards on prison conditions, and not only national law [here more work to be done – frequently not explicit in bodies' mandates]
- Further, OPCAT contemplates SPT and NPMs together to form a global system of visits – this is indeed innovative and rests on premise that all will collectively be more effective if act as a system as opposed to each acting in isolation. [biological metaphor – the cells that make up our body obviously get more done working together than they would on their own!] Question for NPMs themselves, in day-to-day work do they feel part of a global system? Do they (or we) think this increases their effectiveness? Is it enough that NPMs are linked to SPT, or do they need to be linked to one another as well to form a “global system”?
- respect for requirements of independence [something on which reliance on existing mechanisms can be useful, whereas in many cases they have a track record of independence / lines already drawn]

- wide scope of experience [many NPMs built on existing institutions with a primarily legal mandate have recognised the need to have or draw upon other kinds of expertise]
- cooperation of authorities [nurturing environment]
- possibility of unannounced visits. Something worried about in advance because OPCAT does not expressly address –but happily in practice it seems states are generally interpreting OPCAT as requiring NPM to have discretion to carry out visits without prior notice to any authority.
 - Partial survey I did, by no means complete, based on the very useful (but still in development) UN and APT resources, I found that in at least 50% of NPMs either the law establishing them, or their practice as accepted by the government, expressly included the ability of the NPM to carry out unannounced visits at its own discretion.
 - SPT specifically included in its guidelines on NPMs (4th annual report / feb 2011) that states should ensure NPM is able to carry out unannounced visits at all times to all places “in accordance with the provisions of the OPCAT”.
- At national level, fact OPCAT requires all places be covered has led to a process in many countries of assessing existing mechanisms and passing laws/extending

mandates/establishing further mechanisms to ensure all are subject to visits (UK eg). This too is encouraging and indicates the potential of NPMs to push beyond “business as usual” at the state level.

- Elina Steinerte and Rachel Murray have noted the complexities of benefits/drawbacks of existing general-purpose institutions being designated as NPMs – certainly striking that of the 37 designated, nearly half are general purpose ombudspersons (on their own or in conjunction with others) and nearly a quarter are general-purpose human rights institutions. Not sure whether this is what was envisioned when OPCAT text agreed. Perhaps however setting up new institution takes longer, so reason so many existing NPMs are pre-existing generalist bodies is simply due to their being the first batch, and the ratio of new/specialized NPMs will increase over time.
- Footnote – for at least four NPM structures, States expressly contemplate that human rights NGOs will be formally involved or even part of the NPM with a mandate (and in some case authority) based in law – interesting, not necessarily widely anticipated, and certainly innovative.

- Fund
 - Only recently began accepting applications; whether innovative or not remains to be seen.
 - Along way, speculation about more 'modest' effects [use to fund visits activities of SPT itself? Limited to training/promotion programmes for NPMs?]
 - In fact, four thematic priorities set out in call for applications 2011-2012 are very focussed on proposals that aim at direct and concrete changes in actual practices 'on the ground' – ensuring detainees are informed of rights in language they understand; improve recreational/vocational activities for juvenile detainees; basic training for detention personnel including on health care; other specific recommendations for a "pressing and compelling need".
 - Very interesting that only those state parties "who requested the SPT to publish their country visit reports" are eligible to apply. Drawing these kind of strategic / forward thinking links suggests an innovative approach in practices and is encouraging.

End with quote from Malcolm Evans [current SPT chairperson] and Rod Morgan, study of ECPT in 1998, pp 140-141.

Thank you.