Monitoring Places of Detention in the MENA Region – The significance of the OPCAT

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Readers of the MENA electronic Bulletin will surely need no introduction to the OPCAT, the Optional Protocol to the UN Convention against Torture. Having taken 25 years to draft, the OPCAT entered into force in 2006 and there are now 69 States Parties worldwide. It has to be said that participation of states in the MENA region is not as great as one might wish, with there being currently only three states parties from the region – Lebanon, Tunisia and Mauritania. Nevertheless, this 'headcount' of states significantly underestimates the importance of the OPCAT, and the mechanisms which it established, to the region. At the international level, OPCAT establishes the UN 'Subcommittee for Prevention of Torture (SPT)' – which, despite its name is not a subcommittee at all, and, with 25 members, is in fact the largest of ten treaty bodies established by the various UN human rights treaties. The SPT is unique within the UN human rights system in having the mandate to visit any place of detention in any state party whenever it chooses to do so, in order to determine for itself at first hand the situation of those deprived of their liberty, and to make confidential recommendations to the authorities and to have dialogue with them over their implementation. So far, the SPT has visited only one country in the MENA region – Lebanon, in 2010 – and the report and dialogue arising from that visit currently remains confidential.

If this were all the OPCAT provided for, it would be providing a very great deal. However, in addition, the OPCAT requires all states parties to establish, within one year of becoming a party to OPCAT, a 'National Preventive Mechanism' (NPM), which is wholly independent domestic body, which is also to have the same powers to visit any place where it believes persons may be deprived of their liberty within the jurisdiction of the state, have access to all relevant information and records, and to make recommendations as a result of the visits. There are other things which the NPM must also be able to do – including commenting on relevant existing and draft legislation and keeping in contact with the SPT.

This last point is worth highlighting. The NPM established under OPCAT has to be functionally independent. It also has to be able to communicate, and meet, with the SPT. As a result of this, it is not only required by the international system, but it becomes, in effect, a part of the international system of preventing torture and ill-treatment in places of detention. The SPT really does stay in close contact with the NPMs which have been established, and tries to visit them whenever possible, both formally and informally. Indeed, the SPT has recently established the practice of undertaking 'NPM Advisory Visits', in which it focuses on meeting NPMs and learning more about how they undertake their own visiting work. We frequently invite NPMs to our sessions in Geneva and discuss their work and practice with them in more detail, to learn more about the challenges they face, and how we, the SPT, might be able to help them. Why?

The answer is quite simple. We have come to realise that the 'front line' of prevention is not in Geneva, nor is it the SPT: it is in the country itself, and it is the NPM. They are the ones who are based in the country itself and are able to visit and return to places of detention on a frequent basis. We – who must be concerned with nearly 70 countries – cannot possibly do so ourselves. But by working closely with the NPMs, we can be close to the routine monitoring of places of detention in all states parties, and by working with them we can, together, support each other and be so very much more effective than we could be were we to be acting alone.

Of course, this can only work if, as the OPCAT requires, the NPM is truly 'independent' and has the necessary resources and experience, to be able to undertake its functions fully, fairly and fearlessly. Our role as the SPT is to ensure that this is the case. Indeed, the OPCAT places an obligation on the SPT to work with States Parties, advising and assisting

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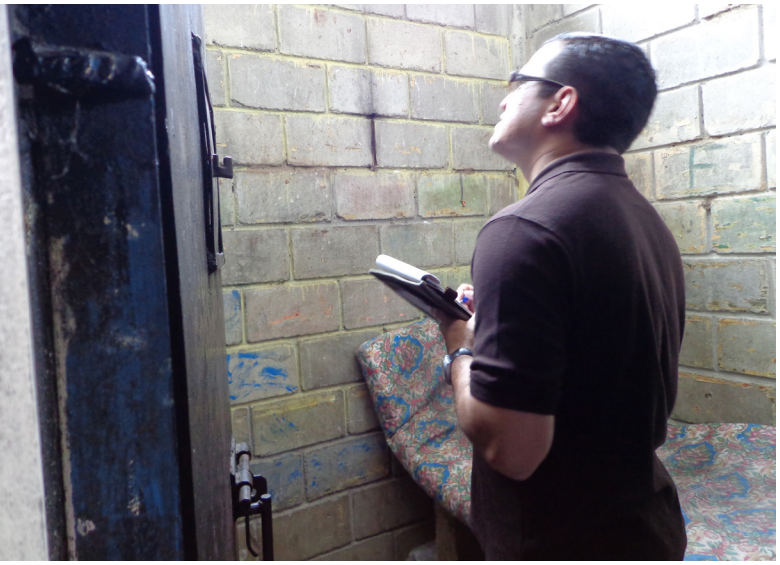
them as they establish their NPMs. Nearly 50 NPMs have now been established worldwide and so the SPT has acquired a great deal of experience in how to do this effectively.

One of the great strengths of the OPCAT is that it does not set out a single 'model' for the NPM. Every country, and every legal system, is different and so it is entirely right that each NPM may be rather different from those found elsewhere. What matters is not 'how' it is structured, but whether it is independent, whether it has a sufficiently broad mandate, whether it has the resources to be able to do its job and – something which is perhaps not stressed enough – whether it is actually listened to and taken seriously by the authorities in the State concerned.



There is, as yet, relatively little practice concerning NPMs in the MENA region. Only Tunisia has formally established an NPM, and that only in September of this year. However, there has been a great deal of discussion about NPMs, what they are to be able to do, and who might be members of them, in numerous states across the region, both in states parties and others. Extensive discussions have taken place in other states – including Algeria, Lebanon, Mauritania, Morocco - about what might be expected of an NPM under the OPCAT. In addition, in September 2013 Bahrain established by Royal Decree a new Prisoner's and Detainee's Rights Commission, the preamble to which expressly recalls the terms of the OPCAT. As this shows, OPCAT is a source of inspiration for, and a source of information on, the establishment of monitoring and preventive mechanisms in all states – not just in States Parties.

It is, then, is clear that the relevance of establishing independent mechanisms for visiting places of detention is well understood in many states within the MENA region, and that the importance of doing so in a manner which is compatible with the OPCAT is also widely appreciated. It is, then, important for all states in the region to ensure that they not only have independent systems for monitoring places of detention, but that those systems reflect the basic principles of the OPCAT system.

In order to help with this, bodies such as the APT have produced extremely valuable guides and handbooks. The SPT has itself tried to assist States, NPMs and Civil Society by producing Guidelines on National Preventive Mechanisms (CAT/OP/12/5 (2010)) and an 'Analytical self Assessment Tool' for NPMs (CAT/OP/1 (2012)). There is, however, no substitute for face to face discussions, and the SPT has found it most useful to be able to meet with civil society and with those responsible for developing and establishing NPMs early on in order to help inform them of its expectations for the NPM, allowing them to ensure that it is established in accordance with an inclusive and transparent process, which then provides a strong foundation for its future work. Experience has shown there to be a number of difficulties which frequently arise in practice. In the remainder of this Comment, I will highlight a few of these.

(a) What is a place of detention?

The entire point of the OPCAT system is to ensure that torture and ill-treatment is made less likely as a result of preventive visits to places where persons may be being deprived of their liberty by the public authorities, or with their consent or acquiescence. It is, then, important to realise that it is not only about visits to prisons or police stations, vital though these are. The list of possible places where people might be detained is – literally – endless. Many may be 'official' places; others might be unofficial places. The NPM (or SPT) might think people are being detained by public officials in basements of office blocks, factories, or bunkers in underground locations; in transit vans, trains, aircraft or flagged vessels at sea! The NPM should have the authority to visit ANY place where it suspects people might be detained by public authorities. This may include hospitals, social care homes, orphanages, military facilities, airports, seaports, immigration detention centres, border stations, and so on, depending on the legislation and practice of the country concerned. Many states try – many wanting to be helpful – to set out lists of places which fall within the mandate of the visiting body. Such lists can be useful as a reminder of the breadth of possible places of detention, but they should

not be 'prescriptive'. It is easy to defeat preventive monitoring of places of detention if there is a list which is drawn up restrictively. General language, as found in the OPCAT, is best: 'places where people are deprived of their liberty'.

(b) Who is a detainee?

The SPT is clear on this: a detainee is any person who is 'not free to leave'. If you cannot 'just walk out or walk away' from the place or official when you wish to do so, then you are being detained for the purposes of the OPCAT. Sometimes it has been argued that only those formally detained by a court order, after an appearance in Court, are formally detained: or only those who have been formally arrested, etc. This is not right. This would exclude a large number of people who are at any given moment under the power of detaining authorities and are in a position of potential vulnerability.

(c) When may visits take place?

To be effective, visiting mechanisms must be able to carry out both announced and unannounced visit at any time – day or night, weekday or weekend, workday or public holiday. After all, places of detention never close! Those in charge of such places need to know that such visits can happen – so that they know to allow the monitors in – but they ought not to know when they are going to happen. If access is ever delayed, this must be reported.

(d) Who is to undertake the visits?

The visits are, of course, to be undertaken by the members or staff of the NPM – who are to be independent of the institutions visited and of the state itself. In some countries, the members of the NPM form a team (a little like the SPT) who undertake the visits in person. In other countries the NPM is an institution – such as a National Human Rights Commission or an Ombudsman's Office – and it is then the professional staff of that body – which must itself be fully independent - which undertake the visits and produces the reports on its behalf. There are many models, but the core element is the same: the members of the NPM and those who undertake the visits should be completely independent of the detaining authorities. Obviously, those who are employed by the State to operate or administer places of detention cannot be members of the NPM; nor should serving judges, prosecutors and others involved in the administration of justice. In many countries, such figures have valuable roles as visitors in their own right, overseeing the execution of sentences. This, however, should be in addition to the NPM, and not instead of it, or as a part of it.

This ought to be clear enough (though this is not always the case). However, it is also important that those involved in preventive monitoring of places of detention have prevention as their primary focus. They are NOT a complaints mechanism, and are not investigating specific allegations or complaints. Nor are they checking up on the general working of a custodial system (ie institutional auditors). It is also important that those visiting have a broad range of expertise relevant to their role – so medical doctors, lawyers, psychologists, psychiatrists, accountants, religious figures, and many other forms of professional expertise or practical experience (including former detainees) may all have valuable insights. Gender, ethnicity and minority representation are also important factors – but above all those involved in monitoring must be able to effectively engage with all those who they find in a custodial setting – including detention staff as well as detainees. The ability to inspire the trust, and to respect the confidence, of all those who they meet and whom they engage in the course of their work is perhaps the overarching requirement of an effective monitor.

Detention monitoring under the OPCAT has the clear and precise focus on the treatment of persons deprived of their liberty, and all that might have a bearing upon this. In the words of the SPT, 'there is more to the prevention of torture and ill-treatment than compliance with legal commitments. In this sense, the prevention of torture and ill-treatment embraces – or should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific' ('The Approach to the Concept of Prevention', CAT/OP/12/6 (2010) please click here).

Detention monitoring under the OPCAT is, at one level, complex and demanding. At another, it is also extremely straightforward and there is a risk in making it seem more daunting than it is. What is really required of all involved is a willingness to be open, honest and realistic: common sense also takes you a very long way. Yet not everyone believes themselves free to speak openly, honestly and realistically about the reality of detention – and OPCAT is designed to help everyone feel their way towards becoming so.