Human Rights Brief

Volume 16 | Issue 4 Article 17

2009

Panel 3: Transparency and Access of Independent Experts to All Places of Detention: Expectations of the Subcommittee on the Prevention of Torture, the National Preventative Mechanisms, and the UN Optional Protocol to the Convention against Torture

Malcolm Evans

Panel 3: Transparency and Access of Independent Experts to All Places of Detention

Expectations of the Subcommittee on the Prevention of Torture, the National Preventative Mechanisms, and the UN Optional Protocol to the Convention against Torture

*Remarks of Dean Malcolm Evans**

THANK YOU VERY MUCH INDEED FOR THIS OPPORTUNITY TO SPEAK TO YOU THIS AFTERNOON. One of the difficulties of having listened to so many presentations during the course of the day is that the rather rough notes that I intended to speak from have evolved into more of a work of art than a set of speaker's notes, as they attempt to reflect and respond to the points made. Nevertheless, what I'm going to do in the time available is to attempt to address the question which is posed on the sheet: 'Expectations of the Subcommittee on the Prevention of Torture, the National Preventative Mechanisms and the UN Optional Protocol to the Torture Convention.' Although this really does require more than five minutes per topic, I shall see what can be done.

As with any academic giving a presentation who is a little unsure of quite what to do, the first thing is to deconstruct the question. The moment I saw this title, the immediate question that came to my mind was: whose expectations are we talking about here? Are we talking about the expectations of the states parties or are we concerned with the expectations of the various bodies themselves? There are a whole host of other angles and questions that could legitimately be factored in besides these, but you would be pleased to know I'm not going to do so.

As Manfred Nowak said at the start this morning, the Optional Protocol to the Torture Convention is seen as one of the most important new developments relating to torture and torture prevention for many years. I want to reflect on that just for a few moments. Although it is a 'new development' in that the Protocol only entered into force in 2006, it's not that new an idea. The idea underlying the Optional Protocol owes its origins to thinking which emerged at more or less the same time as the thinking which led to the conclusion of the Convention against Torture itself back in the mid to late 1970s. To that extent, the ideas were contemporaries, but they had very different trajectories. The Convention against Torture itself was taken forward in now what looks like a very rapid process, with negotiations beginning in the late 70s and being concluded by 1984. The idea of this Optional Protocol, which I will outline in just a few moments, was also originally conceived in the late 1970s, and was tabled alongside the negotiations for the Convention itself. However, it was immediately set aside on the grounds that what it was trying to achieve was too far in advance of what would legitimately be expected of the international community at that time: it was premature. It was then reintroduced in 1991, in the form of a draft tabled by Costa Rica to the then UN Commission on Human Rights, and the process of discussion and negotiation was not finally brought to a conclusion until 2002. So, it's fair to say that it has taken about 25 years to bring the Optional Protocol into being.

What does this tell us? First, and perhaps most importantly, it gives the lie to the impression which one could perhaps be forgiven for having received in light of the many points that have already been made during this conference, that it is obvious that the monitoring of places of detention plays a very important part in the process of addressing torture and inhuman or degrading treatment and punishment. The history of the evolution of this instrument suggests that this is an argument that has been long fought-over before it has finally been won, if indeed it has been won (and this is an important qualification).

What does the Optional Protocol require of States parties?

On one level its requirements seem remarkably, even breathtakingly, simple. The underlying idea is that the prevention of torture, inhuman, and degrading treatment can be facilitated by visits of a preventive nature to all places of detention. Whilst this sounds disarmingly simple, it is of course no such thing. As has already been made clear by others, if there is too much advanced notice of such visits, then preparations can be made, with all that that implies. In consequence, the idea evolves slightly into unannounced visits to places of the detention with absolute rights of access to be conducted at short or no notice. But this inevitably must be subject to a variety of constraints for legitimate operational reasons, and the moment one starts writing in these inevitable riders and qualifications into instruments developed in the international domain, one immediately runs into some fairly powerful problems.

The overall title of this Panel is "transparency" – and one of the paradoxes of the international monitoring system created by the Optional Protocol (and indeed in the European Convention for the Prevention of Torture, which was an early product of this line of thinking) is that the price to be paid for access to places of detention by international mechanisms of this nature – is that there has to be, in some senses, a lack of transparency. Confidentiality is the *quid pro quo* that states have demanded for the creation of these international mechanisms permitting inter-

* *Malcolm Evans is Dean of the Faculty of Social Sciences and Law at Bristol University.*

national experts to visit and have access to places of detention, and that veil of confidentiality may only be lifted by the express consent of the state itself. In many ways, this is considered less transparent than much of what else happens within the human rights world and indeed considerably less transparent than what already takes place at the domestic level in many states, where the reports or outcomes of domestic monitoring mechanisms are publicly available. This says something about the sensitive, if not controversial, nature of such mechanisms at the international level.

I ought to say, if I may, that much has been said today of the United States' experience in the international domain, and it must be said that the United States was not one of the most whole-hearted supporters of the Optional Protocol. Indeed, when the Convention was put to the UN General Assembly for adoption, it was one of the four states which voted against, being supported by the Marshall Islands, Palau and Nigeria. When the draft text had been considered by the UN Third Committee, the United States had also voted against, along with Syria, Cuba, China, Vietnam, Nigeria, Japan and Israel. It is fair to say that the U.S. has long been, at best, ambivalent with regard to this project. Once again, this underlies the need to continually rearticulate the case for preventive visits to places of detention as an element of the preventive framework of torture.

What does the Optional Protocol require?

The most innovative element of the Protocol was in some regard the product of the negotiating difficulties which surrounded it. As originally conceived and drafted, it was designed to create a single international visiting mechanism, much like that which exists in Europe, the European Committee for the Prevention of Torture. However, the opposition to a purely international mechanism was such that a compromise proposal was put forward: that the Protocol should have within it a dual system, comprising an international preventive mechanism whilst also permitting states to construct their own domestic national preventive mechanisms, which would exercise exactly the same type of powers of visit as the protocol provided for the international mechanism.

The idea of there being a choice between the international on the one hand, and the national on the other, was clearly unacceptable to many of those behind the idea of international monitoring as a preventive tool. So, over time, these two elements became drawn ever more closely together, resulting in the composite dual system that now exists. The Protocol provides for the creation of an international body, the Subcommittee on Prevention of Torture (SPT) which currently comprises ten members, but is likely soon to rise to 25 members when the number of states parties to the instrument rises from its current number of 44 to 50. The SPT has the mandate to visit any state party in order to visit places of detention as they wish, with unimpeded access; the *quid pro quo* being that their reports and commentaries are transmitted to the state in confidence and only are released with permission from the state. Alongside this, however, lies an obligation for states parties to create or designate a national preventive mechanism, or mechanisms, which have exactly the same powers of access to place where persons may be detained of their liberty by a public authority. This might require the creation of an entirely new body working at the domestic level or it might be satisfied by the designation of existing bodies where they already exist within the system. Whilst the Protocol provides a degree of detail surrounding these national preventive mechanisms, there is considerable scope for national interpretation – and hence debate – about what they required in practice.

The twin-track system created by the Convention is certainly innovative and is proving to be extraordinarily challenging, as is shown by the practice to date. It is challenging because the international committee, the Subcommittee for the Prevention of Torture, does not have the practical capacity to fulfill the full reach of its mandate. In its first annual report published last year, the Subcommittee says that it would aspire to visit all countries a party to the instrument on a cycle of around four or five years. Given that there are now 44 states, and it seems able on the resources available to it to be able to visit no more than three or four a year, it is clear this aspiration is unlikely to be realized. Before one gets too despondent about this, it has to be said that exactly the same is true in the European Theater, where the European Committee for the Prevention of Torture, which is far better resourced, has proven itself unable to match its own aspirations in terms of regularity of visiting. So, one might say that one thing states ought *not* to expect from the international committee, to avert to the title of this talk, is very frequent visit from the international body itself. For most of those working within places of detention, or within their administrative apparatus, a visit from the SPT might literally be a once in a lifetime experience.

What might be expected as a consequence of the Optional Protocol, however, is a much more developed system of inspection of places of detention from the national preventive mechanisms operating within the Convention framework. The difficulty here is working out precisely what is meant by a national preventive mechanism. This ties in with one of the most fundamental questions that the creation of the Protocol has generated: What is meant by 'preventive visits'? What is meant by the overall and overarching idea of the concept of prevention? In terms of looking at the types of bodies that deal with or address concerns within detention facilities in many countries, there is a seemingly straightforward differentiation between those mechanisms which are seen as being reactive (such as ombudsmen's offices, complaints commissions, etc., who, when there are known to be difficulties, will move in to address the problem) and those which are seen as more proactive bodies and who visit on the basis of a more general inspectoral mandate, and which, on a regular, routine basis, go into facilities to observe the conditions of detention, to observe the way in which people are treated, and to make recommendations as to how matters might be improved. This 'bright line' division between reactive and proactive certainly is one of the hallmarks of a body which is properly configured as a national preventive mechanism relating to torture and ill-treatment as opposed to a body which is, in essence, a complaints mechanism (important though these are). One needs to understand more about what is meant by the concept of prevention to understand more fully both what the practi-

cal work of the SPT should be, and also to understand what is to be expected of the national preventive mechanisms, in terms of designation and operation. On this point, it is possible to step back a little in order to isolate and identify a few more general trends which inform this. I also think that these trends concerning the development of an overarching concept of prevention are significant not only for the international visiting mechanisms or the national visiting mechanisms, but also for the work of the Committee Against Torture itself, the Special Rapporteur, and many of the other international bodies

The broader issues, very briefly, are these. First of all, if one looks at the judgment of the International Court of Justice in the *Bosnian Genocide* case a little while ago, a very interesting observation can be made about the grounds on which Serbia Montenegro was held liable. It was not because it was directly responsible for the actions of those who had committed genocide or genocidal acts in Srebrenica, but, the court tells us, for its failure to have done all it could have done to prevent those violations from taking place. In other words, in relation to the Genocide Convention (which as far as I can see in relevant terms is couched exactly the same as the Torture Convention and the torture prohibition), we find in general international law the beginnings of the emergence of a more general preventive concept. I think this is really rather important, and more needs to be done, to tease out the implications of this. (There are of course resonances with the more general concept of the 'responsibility to protect', but that lies beyond the scope of these observations). Secondly, the idea of national preventive mechanisms as a means of addressing human rights concerns is becoming more broadly applied. The UN Disability Rights Convention, for example, now has the equivalent of national preventive mechanisms written into that, and some countries, including my own, are now beginning to reflect on how they respond to that challenge. This, and any further such developments, may have a significant impact on our understanding of what national preventive mechanisms are and how they should function.

One of the issues that has arisen in some countries which have already designated national human rights commissions as national preventive mechanisms under the OPCAT is whether they should use the same bodies to fulfill the national preventive mechanism requirements of the Disability Rights Convention (and any others which come along). The answer to this is likely to depend upon what one means by prevention and how this plays out in the context of two very different sets of obligations. States, in the interests of efficiency and economy, may well seek to draw those strands together in something that will end up looking like a single overarching remit tacked on to national human rights commissions which is likely to be ill-suited to achieve the outcomes of either instrument. There is, then, very important work to be done with regard to refining our understanding of what it required.

Finally, there is some very recent practice from the UK, which I should like to draw to your attention. Last week, the House of Lords gave a very important decision concerning the British policy of 'Deportation with Assurances'. Deportation with Assurances is the current British response to the problem of what to do about a situation in which foreign nationals within the jurisdiction who one wishes to deport as they are believed to be a threat to national security but who cannot be deported due to the risk of their being subjected to forms of torture, inhuman, degrading treatment or other human rights violations. In a very interesting, and I think very important judgment given by the House of Lords last week ((RB (Algeria) and others v. Secretary of State for the Home Department [2009] UKHL 10 (18 February 2009)) it was decided that is was permissible to return a person to Jordan, despite there being a real risk that the person would be subjected to judicial proceedings in which evidence that had been the product of torture would be used against him. One of the Judges – Lord Hoffman – said the following: "As to external monitoring, a good deal has been written about its importance in enabling a court or other authority to be satisfied that the receiving state is complying with assurances about safety upon return. There is no doubt that in the absence of some provision for external monitoring, such assurances may be no more than empty words. But, there is no rule of law that external monitoring is required." The House of Lords stressed that what was necessary was some form of verification; and external monitoring, monitoring places of detention – visiting mechanisms – are only one possible form of verification that can be set aside if others sufficient means of verification are in place. In this instance, the Court felt that the provisions which were in place were adequate for this purpose, even though they did not include visiting mechanisms along the lines of those provided for in the OPACT.

I think this, once again, underlines why it is important to continue to articulate the importance of monitoring places of detention as part of the broader overarching idea of torture prevention and underscores the need to devise a more general preventive approach which embraces visits as a monitoring mechanism within a coherent overall holistic approach, rather than its being seem as a discrete subset of activity.

I wish time would allow me to say more on this topic – but I am sure you don't, and it is your wish which is going to be acceded to! Thank you for the attention. ***HRB***