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NHRIs & the Prevention of Torture and other forms of ill-treatment

The Optional Protocol to the United Nations Convention against Torture: a practical tool for preventing torture [1]

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Introduction

The Asia Pacific region is one of great diversity, a characteristic reflected at many different levels, not least with regard to human rights protection. While certain countries in the region ensure a high level of human rights protection, including from acts of torture and other forms of ill-treatment, it is deplorable that in other states a wide range of human rights violations, including torture and other forms of ill-treatment, are commonplace. The rights to protection from torture and other forms of ill-treatment are guaranteed as a rule of customary international law as well as in several international treaties, to which states in the Asia Pacific region are State Parties. The principle that torture and other forms of ill-treatment is absolutely prohibited in all circumstances is also clearly stated in the domestic legislation of several of these same states.

Yet irrespective of these international and domestic legislative guarantees, human rights monitors have continued to document alleged acts of torture and other forms of ill-treatment of persons deprived of their liberty by public officials throughout the region. According to a range of human rights monitors, acts of torture and ill-treatment take place in various official places of detention. While the incidence of such acts may vary significantly from country to country, their loci rarely do.

Paradoxically, many states in the Asia Pacific region - as well as worldwide - could still do a great deal more to put an end to the practices of torture and other forms of ill-treatment in their countries and to build up public trust in their law enforcement agencies. The ratification of the Optional Protocol to the UN Convention against Torture [2] is an example of one simple, albeit effective measure, which States could undertake to counter such unacceptable abuses. Taken together with other torture prevention measures, the Association for the Prevention of Torture (APT) believes that the Optional Protocol to the UN Convention against Torture will help to create a culture of prevention within places of detention throughout the Asia Pacific region.

It is notable that the Torture Background Paper prepared by the Advisory Council of Jurists recommends that “[i]mmediate steps should be taken by all relevant authorities to ensure that torture and ill-treatment in whatever context cease immediately.” The ratification and effective implementation of the Optional Protocol to the UN Convention against Torture should be regarded as one such step the authorities in the region should take as a matter of priority.

The timing of this conference is especially favourable in the context of the ever-greater attention being given to the concept of the monitoring of places of detention and the ever-greater importance being attached by states to the Optional Protocol to the UN Convention against Torture. Even though the instrument was only adopted by the United Nations General Assembly in December 2002 some 11 countries have already ratified it, while a further 37 countries have signed it. [3] It is envisaged that the Optional Protocol will come into force one year after the 20th state ratifies or accedes to it, possibly sometime in 2007.

The overall aim of the presentation today is to give an introduction to the Optional Protocol and to raise a number of issues in relation to its importance to Asia Pacific region. While certain conference participants may know the Optional Protocol inside-out, the knowledge of others may be less advanced. So as not to exclude anyone from today's discussion, the presentation will initially give the conference a brief introduction to the Optional Protocol to the UN Convention against Torture before highlighting some of its more important features.

The framework of the Optional Protocol to the UN Convention against Torture

Practical experience has shown that visits to places of detention are one of the most effective means to prevent torture and to improve conditions of detention. Visits not only have a deterrent effect but they also enable experts to examine at first-hand the treatment of persons deprived of their liberty and their conditions of detention. The Optional Protocol to the UN Convention against Torture embodies this concept by creating a system of independent inspection of places of detention to prevent torture and other forms of ill-treatment and to monitor the conditions of detention found in such facilities.

Under the Optional Protocol, on the one hand, an international visiting mechanism will be created - the International Sub-Committee which will initially consist of 10 international experts - while on the other, State Parties to the Optional Protocol will have the obligation to designate, maintain or create one or more national visiting bodies - the so-called national preventive mechanisms. As will be revealed later, there are certain trends regarding the types of national visiting bodies for which states are currently showing a preference: namely most commonly, states are designating an existing visiting body, usually a national human rights institution as the domestic visiting body.

One year after the Optional Protocol comes into force both the International Sub-Committee and the national visiting bodies will conduct regular, periodic visits to places of detention. While the visits of the International Sub-Committee and its subsequent reports of its findings will not initially be public (unless a State Party agrees to declassify a report), the work and reports of the national visiting mechanisms will be available for public scrutiny. It is intended that the visits and subsequent reports of both bodies will result in a dialogue between the authorities and the monitoring mechanisms with the aim of preventing human rights violations and addressing other shortcomings.

It is important to stress that the visits are not an aim in themselves, but only the means of strengthening the protection of persons deprived of their liberty. Thus, the follow-up to visits and ability to make recommendations is really essential to the procedure. The effectiveness of such an approach has already been seen in the Council of Europe

region with the establishment of the European Committee for the Prevention of Torture.

The need for the Optional Protocol to the UN Convention against Torture?

Thus, the fundamental concept behind the Optional Protocol is quite simple. Unsurprisingly, the question has arisen from certain quarters why was there a need for another international instrument to counter the practices of torture and other forms of ill-treatment and why an Optional Protocol to the UN Convention against Torture? Regrettably, it remains very disturbing, albeit very true, that irrespective of multiple international and domestic legislative guarantees prohibiting acts of torture and ill-treatment in all circumstances, human rights monitors have continued to document alleged acts of torture and ill-treatment of persons deprived of their liberty by public officials throughout the world. Even in countries where one expects a high degree of human rights protection, human rights monitors continue to document acts of torture and other forms of ill-treatment, most commonly in official places of detention. [4]

The contexts, in which torture and other forms of ill-treatment most commonly occur, include at the moment of arrest, in police detention (often for the purpose of extracting a forced “confession” from a detainee), in pre-trial detention and in prison. Other less typical places of detention have also been the milieu for acts of physical and mental abuse by public officials, including psychiatric institutions, social care homes for mentally and physically disabled persons and centres for detained immigrants and asylum-seekers.

In addition to deliberate acts of physical and mental abuse by public officials against persons deprived of their liberty, the egregious conditions of detention found in many detention facilities have also been a source of acute concern for human rights monitors in the region. Such concerns relate to a wide range of detention facilities, including those referred to above.

Disturbingly, there is little to suggest this intolerable situation will improve in the short term. The frequent inclusion of the issue of torture prevention on the agenda of various national and international meetings in years gone by - of which the 10th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions is a case in point - is an indicator of the serious challenge which the international community faces, particularly those actors engaged in the promotion and defence of human rights. In short, the APT believes that the ratification of the Optional Protocol to the UN Convention against Torture, if implemented appropriately, is an example of an effective measure, which states could undertake to counter such unacceptable abuses.

The Optional Protocol to the UN Convention against Torture as an effective means to prevent torture and other forms of ill-treatment

The APT is actively promoting the Optional Protocol as it believes that it will prove to be an effective tool for preventing torture. The general concept underpinning the Optional Protocol is not only straightforward, but one that has existed for several decades. The approach enshrined in the instrument is based on the premise that the more open and transparent places of detention are, the less abuse will take place. Since places of detention are by definition closed to the outside world, persons deprived of their liberty are most at risk of torture, ill-treatment and other types of

abuses. Furthermore, respect for their fundamental rights depends exclusively upon the authorities in charge of the place of detention and they are dependent upon others for the satisfaction of their most basic needs. Violations to people deprived of liberty can arise from a policy of repression, such as torture and other forms of ill-treatment, as well as inadequate systems of oversight.

Opening places of detention to external control mechanisms, as the Optional Protocol does, is therefore one of the most effective means to prevent abusive practices and to improve conditions of detention. This fact is confirmed by the extensive experience of entities such as the International Committee of the Red Cross and the European Committee for the Prevention of Torture and has demonstrated how regular visits to detention facilities can be effective in practice. Such visits can be effective for a number of reasons: first and foremost, the simple fact of being subjected to external control can have an important deterrent effect on authorities that might otherwise believe that they will never be held accountable for their actions. Visits also enable independent experts to examine first-hand the treatment granted to persons deprived of their liberty and to judge the conditions in which they are detained. Based on the concrete situation observed, experts can then make realistic, practical recommendations and enter into dialogue with authorities in order to resolve any problems detected. Finally, visits from the outside world can be an important source of moral support for persons deprived of their liberty whose human rights are being violated.

Important features of the Optional Protocol to the UN Convention against Torture

As was previously illustrated, the Optional Protocol to the UN Convention against Torture creates a dual system of detention monitoring: visits conducted by an international body and those conducted by one or more domestic bodies. In reality, however, much of the monitoring of places of detention in any given country will be conducted by the domestic visiting bodies, primarily due to their permanent presence in the country. The visits of the International Sub-Committee will be conducted on a periodic, albeit less frequent basis. Nevertheless, both the international and national entities have several important features under the treaty, as the following points illustrates:

(1) Independence and composition of national preventive mechanisms

In order to guarantee the effective and independent functioning of the national preventive mechanisms and to ensure that they will be free from any undue interference, the Optional Protocol sets out for the first time in an international instrument specific guarantees and safeguards which must be respected by State Parties. These include the independence of the members of the national preventive mechanisms, the functional independence of the mechanisms (namely that their mandate and activities should not be influenced by the authorities), and their financial independence by having the necessary resources made available to them.

Regarding the composition of the national preventive mechanisms, states have an obligation to ensure a certain effectiveness of the body and take into consideration the quality of members regarding their professional background, gender balance and representation of ethnic and minority groups in the community.

(2) Authority during visits

Members of both the international and national mechanisms will be mandated to conduct visits to places of detention on a regular, periodic basis. However, the powers they have to conduct such visits are extremely significant. When a state ratifies the Optional Protocol, it gives its consent to allow both types of bodies to enter any place of detention in the territory under its jurisdiction without prior consent. Visiting experts will be allowed to conduct interviews, in private and without witnesses, with any person deprived of his or her liberty. They will also have the right to interview other persons such as security or medical personnel and family members of detainees. The members will have unrestricted access to the full records of any detainee or prisoner and the right to examine disciplinary rules, sanctions and other relevant documents such as those recording the number of persons deprived of their liberty and the number of places of detention. Finally, the visiting team will regularly inspect the entire detention facility and be allowed access to all the premises including, for example, dormitories, dining facilities, kitchens, isolation cells, bathrooms, exercise areas, and healthcare units. Thus, the powers of both types of visiting bodies are without question far-reaching.

(3) Wide range of places of detention that can be visited

The term “place of detention” is very broadly defined in the Optional Protocol. This is to ensure the full protection of all persons deprived of liberty under all circumstances. This means that visits by the national and international expert body will not be limited to prisons and police stations, but will also include places such as pre-trial detention facilities, centres for juveniles, places of administrative detention, security force stations, detention centres for migrants and asylum-seekers, transit zones in airports, check-points in border zones as well as medical and psychiatric institutions. Thus, the potential reach of the International Sub-Committee and the national preventive mechanisms is therefore very long.

(4) Obligation to enter into a dialogue in an atmosphere of openness

The Optional Protocol infers that there is an obligation for states to enter into a dialogue with both the international and domestic mechanisms on possible implementation measures. This obligation should not be underestimated. After all, if states were simply to ignore the findings of both international and domestic bodies the overall exercise would be pointless. Thus, State Parties are required to work towards implementation of these recommendations in a spirit of good faith.

Moreover, an atmosphere of openness will complement part of this dialogue, namely the exchanges between the state authorities and domestic visiting bodies. While the dialogue between the International Sub-Committee and the states will remain confidential (unless a state agrees to a report and its recommendations being made public), the reports of the national visiting bodies are not subject to this confidentiality. Moreover, State Parties have the positive obligation to publish the annual reports of such bodies. However, it is also hoped that - as has been the experience of the visit reports of the European Committee for the Prevention of Torture - most states in time will also choose to declassify the reports of the International Sub-Committee.

As the visits are not an aim in themselves, rather the means of strengthening the protection of detainees, this obligation on State Parties to enter into a dialogue in good faith with both bodies and their ability to make recommendations is really essential to this procedure.

(5) Relations between the International Sub-Committee and national preventive mechanisms

Ultimately, however, a system of inspection will only as good as the people and the structures undertaking the inspections. Fortunately, the Optional Protocol addresses this important point, as the International Sub-Committee has an innovative role to play in relation to the effective functioning of the national mechanisms. The International Sub-Committee will be mandated to advise State Parties on the establishment of national mechanisms and to make recommendations on the strengthening of their capacity to prevent torture and other forms of ill-treatment.

The International Sub-Committee will also be able to maintain direct, if necessary, confidential, contact with national mechanisms and to offer them training and technical assistance with a view to enhancing their capacities. It will also be able to advise and assist the national mechanisms to evaluate the needs and means necessary to intensify the protection of person deprived of their liberty. Importantly, a fund will also be made available to help national bodies with training needs.

The implementation of the Optional Protocol to the UN Convention against Torture into practice

The Optional Protocol will come into force one year after the 20th state ratifies or accedes to it. To briefly recapitulate, there are currently 11 ratification and 37 signatures. Of the 37 countries, which have signed the Optional Protocol it is expected that there will be a series of ratifications - as well as new signatories - in the course of 2005 and 2006. It is therefore not inconceivable that the 20th ratification may well come as soon as mid-2006.

From the outset it must be stressed that for State Parties to the Optional Protocol there is no burden to produce periodic reports, like under the UN Convention against Torture or the International Covenant on Civil and Political Rights. Thus, states should not be deterred from signing and ratifying the Optional Protocol because they feel that their ministries do not have the capacity to produce lengthy reports to the various international treaty bodies.

At the present moment many of the states, which have signed or ratified the instrument, are in the process of examining the issue of what to do in relation to the national visiting bodies. It is important to mention that the text of the Optional Protocol does not set out any particular form these mechanisms must take. Consequently, State Parties to the instrument have a significant amount of flexibility on this issue and are therefore free to create an entirely new structure or designate one or more existing visiting mechanisms. These could include human rights commissions, ombudsmen, parliamentary commissions, lay people schemes, civil society organisations, as well as composite schemes combining elements of some of the above.

Over the past two-and-a-half years since the Optional Protocol was adopted by the UN General Assembly the APT has been closely following developments at the national level, particularly in relation to the national visiting bodies, which State Parties have designated or created. From the information received by the APT it would appear that the majority of states are considering designating one existing national visiting mechanism - usually, an existing human rights commission or ombudsman's office. It is possible for such bodies to be designated as part of the national preventive mechanism foreseen by the Optional Protocol, as designation as such could greatly enhance their monitoring role.

There are also a smaller number of countries where states have or are set to designate more than one existing visiting mechanism. These states have included the United Kingdom, which has designated more than 20 existing bodies, and possibly Denmark, where there is an ongoing discussion about designating a mixture of prominent non-governmental organizations and a national human rights institution. Thus, in certain countries it is expected that non-governmental organizations will also have a vital role to play in this connection.

Finally, there are a minority of countries, which have or are considering creating an entirely new structure to function as the national visiting body, namely Switzerland and Germany, both of which are federal states. It will therefore be interesting to see whether any other states - federal or not - adopt this approach to the requirement of putting in place one or more national visiting mechanisms.

Irrespective of whether a state decides to designate one or more existing national bodies or creates an entirely new mechanism from scratch, the most important element is that such bodies fulfil the criteria laid down in the Optional Protocol text regarding their independence, composition, powers and authority. The APT is advocating that there should be a national debate or discussion on this issue with all relevant actors, including government representatives, non-governmental organizations, national human rights institutions, parliamentary commissions, and independent experts so that the most effective solution can be found. The ultimate aim of Optional Protocol is to create a system of monitoring which effectively monitors the treatment of persons deprived of their liberty and the conditions of their detention. It is there less important how many and which types of bodies carry out these activities, but whether they undertake the task effectively.

Final remarks

The essential importance of the Optional Protocol is that it provides for a system of visits to places of detention. The system to be established by the Optional Protocol places the emphasis on preventing violations rather than reacting to them once they have already occurred. The preventive approach foreseen in the Optional Protocol is based on the regular and periodic monitoring of places of detention through visits to these facilities conducted by expert bodies in order to prevent abuses. In contrast, most existing human rights mechanisms monitor the situation once they receive allegations of abuse.

The Optional Protocol is also based on a premise of collaboration with the State Parties to prevent violations, rather than on public condemnation of State Parties for violations already committed. While existing human rights mechanisms also seek constructive dialogue, they are based on the public examination of states' compliance

to its obligations through the reporting or individual communications systems. The system foreseen in the Optional Protocol is based more on a process of long-term sustained cooperation and dialogue in order to assist State Parties to implement any necessary changes to prevent torture and other forms of ill-treatment in the long term. The Optional Protocol is therefore both an important and a novel human rights instrument.

Several of the Optional Protocol's most important features are also worthy of recapitulation. Firstly, the global mandate of the Sub-Committee is unique and no other international detention monitoring body has this global reach. Moreover, not all regions of the world are currently subjected to a regular international system of inspection, the most notable exception being the Council of Europe and its European Committee for the Prevention of Torture. If the Optional Protocol is ratified globally and implemented effectively, it will symbolise a major step forward in the worldwide fight against torture and other forms of ill-treatment.

The broad definition of "place of detention" should also be regarded as a further success of the Optional Protocol, as human rights abuses by state officials do not just take place in police stations, pre-trial detention centres and prisons. There are many other contexts in which serious human rights violations may occur.

Ultimately, a system of inspection is only as good as the individuals and the structures undertaking the inspections, an issue which the Optional Protocol addresses. State Parties are obliged to grant domestic visiting mechanisms certain powers in respect of their visits to places of detention and to afford them certain safeguards to ensure their independence. The significance of these obligations should not be understated.

The information collected by national preventive mechanisms in the course of their visits to places of detention will also be of great importance. Firstly, the International Sub-Committee will be able to draw upon the information that will be made available through the more frequent visits carried out by national bodies. Secondly, the emergence of information regarding the treatment of persons deprived of their liberty into the public domain may also have a human rights awareness-raising impact within society, informing concerned individuals, members of civil society and the media, and fueling debate.

The Optional Protocol is now open for signature and ratification and will probably enter into force sometime in 2007. The APT believes that the Optional Protocol is a unique international instrument that will assist State Parties to the UN Convention against Torture to better implement their existing obligations to prevent torture and other forms of ill-treatment. After all, Article 2 (1) of the latter convention states that State Parties "shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" and the Optional Protocol is arguably one such measure.

Regrettably, however, the only country represented in the Asia Pacific Forum, which has yet signed or ratified the instrument, is New Zealand. Thus, there exists the danger that the countries of the Asia Pacific region will be significantly underrepresented among those states, which have become or are in the process of becoming State Parties to the instrument. Only the countries of the Middle-East presently remain as underrepresented as the Asia Pacific region in this respect.

The APT is actively encouraging states to be among the first 20 states to ratify the Optional Protocol. The organization believes that ratification of this important human rights instrument will send a strong signal to the international community of the importance, which each state attaches to combating torture. Moreover, it will place them in a strong position to determine the work of the International Sub-Committee. The International Sub-Committee will be comprised initially of 10 independent experts from a variety of professional backgrounds (this number will increase to 25 members after the 50th ratification). These initial 10 experts, who will be nominated by State Parties, will have an important role to play in influencing the formative work of this international body, which will directly influence its effectiveness as an international visiting mechanism and particularly how it coordinates its activities and supports the work of the national preventive mechanisms to ensure their respective effectiveness. For this reason it is essential that the Asia Pacific region is not excluded from these important discussions.

The APT is committed not only to ensuring that the Optional Protocol to the UN Convention against Torture enters into force in a timely manner, but also that it is effectively implemented in practice. To these ends the organizations is willing to offer its advice and materials and work with relevant actors who are genuinely interested in making this novel human rights instrument a reality. Interested parties are kindly urged to contact the APT about this matter.

For further information about the issues raised in this statement or to obtain other APT materials please refer to the APT website (www.apr.ch) or contact the Europe and Central Asia Programme Officer, Matthew Pringle (mpringle@apr.ch), or the United Nations and Legal Programme Officer, Edouard Delaplace (edelaplace@apr.ch), during the meeting.

[1] For further background reading to this presentation please refer to the following APT-IIHR publication, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (June 2004) and the APT Position Paper, *The Role of National Human Rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment and punishment* (February 2005).

[2] Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[3] Information accurate as of the 12th August 2005.

[4] It should also not be forgotten that in some states persons continue to fall victim to acts of torture and other forms of ill-treatment committed in non-official places of detention.