Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as Adopted In 2002 by the UN General Assembly 57/1999: Implications for South Africa

By

Lovell Fernandez

CSPRI Research Paper No. 2

2003

Cape Town

This publication was funded by the Open Society Foundation (OSF) and the Ford Foundation.

Civil Society Prison Reform Initiative (CSPRI)
c/o Community Law Centre
University of the Western Cape
Private Bag X17
7535
SOUTH AFRICA

The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building. For more information and access to CSPRI Publications please see http://www.communitylawcentre.org.za/cspri/

LM Muntingh
muntingh@worldonline.co.za

J Sloth-Nielsen
juliasn@telkomsa.net

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as Adopted In 2002 by the UN General Assembly 57/1999: Implications for South Africa

by

Professor Lovell Fernandez

1. Introduction

Since 1994, when South Africa became a democracy, the country has not withheld itself from the international human rights discussion; on the contrary, the government has shown itself not only to be receptive to the international human rights dialogue, but also to be an active participant in promoting the human rights cause. At the international level, South Africa has played a prominent role in the creation of the International Criminal Court (ICC). Even before the adoption of the Rome Statute[1] (which establishes the ICC), South African lawyers were active in the running of both the International Criminal Tribunal for the Former Yugoslavia (ICTY)[2] and International Tribunal for Rwanda (ICTR)[3]. JJudge Richard Goldstone, of the Constitutional Court, was the first prosecutor (1993-96) of the ICTY. Dr Navi Pillay, a Durban attorney, was appointed as judge to the ICTR and is presently a judge of the International Criminal Court in The Hague. Professor Bongani Majola, a former Dean of Law, is presently the prosecutor at the ICTR.

As regards the ICC itself, South Africa organized a number of seminars for the Southern African Development Community (SADC) to formulate a common position on the ICC. The SADC position was important in galvanizing the support of other African states for the ICC. At the ICC negotiations in Rome, South Africa also chaired committee on the composition and administration of the Court. On the general international political plane, too, South Africa has demonstrated its eagerness to contribute to peace and to peace-making initiatives on the African continent. Together with Nigeria, Algeria, Senegal and Egypt, South has been chiefly instrumental in creating the New Plan for Africa's Development (NEPAD). South Africa is one of the first African states willing to subject itself to the organization's peer review mechanism.

At the domestic level, developments in the field of human rights have occurred across a broad front. These include the Truth Commission[4] hearings and the submission of the Final Report of the Truth Commission in 2003; the

[1] Adopted on 17 July 1998 by the UN diplomatic conference, meeting in Rome. For a comprehensive history of the negotiations, see Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute*.
[2] SC Res 827 (1993).
[3] SC Res 955 (1994).
[4] Established by the *Promotion of National Unity and Reconciliation Act*, 34 of 1995.

setting up of a Human Rights Commission[5]; the realization of the Office of Public Protector[6]; the Constitutional Court's finding that the death penalty was unconstitutional; the enactment of laws giving effect to socio-economic rights in the workplace; landmark court decisions restoring land rights to communities evicted from such land in pursuance of past Apartheid policies; the enactment of laws such as the Promotion of Administrative Justice Act[7] and the Promotion of Access to Information Act[8], both intended to render the workings of government departments more transparent and more accountable. Within the criminal justice system, an area pertinent to the topic at hand, a great deal has been done to enhance what is classically called the "procedural equality of arms" between the state and the accused. A rich and insistent High Court and Constitutional Court jurisprudence has evolved, giving concrete meaning to the notion of a fair trial.

In sum, all this points to a society grappling with matters lying at the heart of democracy. The question of torture, inhuman and degrading treatment or punishment is one such matter. The socio-political climate is ripe enough for a frank and rigorous discussion of this menacing issue. It keeps recurring in the media, manifesting its ugliness, reminding us that, despite the many constitutional accomplishments, the situation of people kept in places of detention, can become dangerously precarious when hidden from public scrutiny. Although we will never be able to eradicate the ill-treatment people detained involuntarily, we have the capacity to put into effect measures aimed at preventing torture, cruel, inhuman or degrading treatment or punishment.

A crucial conference geared towards this goal took place in October 2002 in Cape Town. This was when the Association for the Prevention of Torture (APT) and the African Commission on Human and People's Rights (ACHPR) ran a workshop under the topic Preventing Torture in Africa. The workshop resulted in the adoption of a set of guidelines and measures (*Robben Island Guidelines*)[9] aimed at helping states fulfil their international obligation to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment. Participants were drawn from various national and international associations. I have found their contributions invaluable in preparing this paper.

The topic itself suggests a discursive approach to the issue. The paper is therefore divided into three parts. *Part One* looks generally at the definition of torture under the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter UNCAT).[10] This is the Convention to which the Optional Protocol relates. *Part Two* describes the contents of the Optional Protocol itself. *Part Three* digresses to look at the way the European Committee for the Prevention of Torture (hereafter ECPT) works – a best practice example. *Part Four* examines some of the implications for South Africa if it indeed ratifies the

[5] See Sec 184 of the *Constitution of the Republic of South Africa*, 108 of 1996 (hereafter Act 108 of 1996)
[6] Ibid Sec 182.
[7] Act 3 of 2000.
[8] Act 54 of 2002.
[9] See Jean Baptiste Niyizurugero *Preventing Torture in Africa*: Proceedings of a joint APT-ACHPR Workshop, Robben Island, South Africa, 12-14 February 2002 (2003).
[10] GA Res 39/46/Annex of 10 December 1984.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter OPCAT)

.

2. UNCAT

The UNCAT came into force in June 1987. South Africa ratified it in 1998. The prime aim of the UNCAT is to reinforce the prohibition against torture by requiring states to assert jurisdiction over acts of torture under international law.[11] It obliges states not to expel or repatriate people to a country where they are in danger of being tortured; to prosecute or extradite perpetrators of acts of torture; to review systematically rules and methods of interrogating suspects; to investigate allegations of torture impartially; and not to allow to as evidence statements made under torture

UNCAT defines torture as

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[12]

The UNCAT thus obliges state parties to ensure that all acts of torture are offences under their domestic criminal law, and that the offences carry appropriate penalties. The definition of torture here is broad and is not limited to torture perpetrated as part of a large-scale or systematic pattern of crimes against humanity. It does not limit torture to conduct during in an armed conflict. However, this is not to say that the UNCAT definition of torture necessarily extends fully to other areas of international law.[13]

The torturer need not be a public official, although the act must have taken place with the| consent and acquiescence of someone in an official capacity.[14] Although the term “official capacity” does not refer to members

[11] See J Burgers and H Danelius *Handbook on the Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment* (1988) 1.

[12] Art 1 of the Torture Convention *United Nations Treaty Series (UNTS)* 113-114.

[13] See, for example, the judgment of the Trial Chamber of the ICTY in *Prosecutor v Kunarac, Kovac and Vukovic*, Case No IT-96-23/1-T, of 22 February 2001 where the Court found at Para 482 that “the definition of torture contained in the convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied”. This was confirmed by the ICTY Trial Chamber in *Prosecutor v Kvocka, Kos ,Radic, Zigic and Prcac*, Case No IT-98-30/1-T, 2 November 2001 Paras 138-139.

[14] Ibid.

of a private gang of criminals who torture their opponents to extract information from them, it would include members of organizations intent on exercising political control over territory, such as guerrilla groups.[15]

Despite having ratified the Convention, South Africa has not incorporated it into national law. According to South African law, a treaty does not become part of domestic law until it is enacted into law by national legislation.[16] South African criminal law therefore, does not define the crime of torture as an independent crime. Cases of torture are dealt with under the common law crime of assault or assault with intention to cause grievous bodily harm, or as intimidation. In February 2002, the Minister of Justice and Constitutional Development, Dr Penuell Maduna, said that the Government was not yet ready to make the Convention part of domestic law. He added, however, that the country was "getting closer to the point where" UNCAT will become part of South African law and that torture would then be dealt with as torture rather than by another name.[17]

Ratification, without incorporation into domestic law, is not enough. A reliance on other crimes to deal with what is, in fact, torture, detracts from the gravity of the crime as a crime under international law.[18] Under South African law, the common law crime of assault is prosecuted on the basis of a complaint being made by the victim to the police, followed by an investigation. Under the UNCAT the state is obliged to investigate promptly and impartially wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.[19] This is so regardless of whether a complaint has been made. Also, under South African criminal law, the crimes of common assault or assault (GBH) prescribe after 20 years.[20] The UNCAT, on the other hand, implicitly sets no limits to the period within which the crime of torture may be prosecuted. There are no exceptions[21].

Furthermore, under the Convention, jurisdiction is recognized on the principles of territoriality, active and passive neutrality, and presence.[22] Each state is required to exercise its jurisdiction and enforce the provisions of the Convention irrespective of whether the act of torture occurred in any territory under its jurisdiction, if it has obtained personal jurisdiction over the alleged torturer. The justification is that "since states are unlikely to take effective measures against their own agents someone else should be able to do so in order that torturers do not enjoy de

---

[15] Steven R Ratner and Jason S Abrams *Accountability for Human Rights Atrocities in International Law* 2d edition (2001) 119.

[16] Section 231(4) of Act 2000 of 1993.

[17] Opening Speech at Proceedings of a Joint APT-CHPR Workshop, Robben Island, South Africa, 12-14 February 2002, in Niyizurugero op cit 54-55.

[18] Amnesty International *End Impunity:Justice for the Victims of Torture* (2001) 33.

[19] Article12.

[20] Exceptions are murder, treason committed when the country is at war, robbery with aggravating circumstances, kidnapping, child-stealing; rape , or the crime of genocide, crimes against humanity and war crimes, as contemplated is Sec 4 of the Implementation of the Rome Statute of the International Criminal Law Act . See Sec 18 of the Criminal Procedure Act, 51 of 1977 as substituted by Sec 39 of Act 27 of 2002 and as amended by Sec 27(1) of Act 27 of 2002.

[21] Cf Amnesty International op cit 34.

[22] Article 5.

facto impunity".[23] The idea is to prevent torturers or so-called "live dockets" from seeking refuge in states that are party to the UNCAT.

South African courts would therefore be permitted, though not compelled, to try the crime of torture under the principle of universal jurisdiction. However, South Africa, like most states, will not prosecute a person for an international crime unless the conduct has been criminalized under municipal law.[24]

Ill-treatment and Other Forms of Inhuman and Degrading Treatment

The UNCAT describes torture but is less explicit on other forms of cruel, inhuman or degrading treatment or punishment. Although it does not define ill-treatment, it obliges states to undertake a number of measures against acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture but are committed at the instigation of or with the consent of someone acting in an official capacity.[25]

The South African Constitution guarantees everyone the right "not to be treated or punished in a cruel, inhuman or degrading way."[26] The Constitutional Court has on a few occasions dealt with this phrase and the conceptual relationship between these descriptive terms. The Court found the death penalty to be cruel, degrading and inhuman in the context of the Constitution, having regard to customary international law and the inherent arbitrariness and irrationality with which it is imposed.[27] The Court has also held that for the State to permit the removal of a person to another country where he or she may face the death penalty or punishment threatening human dignity, which would qualify as cruel and unusual in South Africa, would violate South Africa's commitment "not to be party to the imposition of cruel, inhuman or degrading punishment".[28]

As regards corporal punishment, the Constitutional Court noted an international trend denouncing court-sanctioned whipping as offensive to society's notions of decency and as invading the person's right to dignity. In view of this and the arbitrariness and the severity of the pain inflicted, the Court found that authority that legitimizes violence is inconsistent with the values underpinning the Constitution. The Court further noted that, in the absence of grounds showing a compelling interest justifying a court-sanctioned whipping, or proof of its deterrent effect, juvenile whipping is cruel, inhuman and degrading. This is so whether one looks at the concepts separately or together as a compact expression.[29]

---

[23] Malcolm D Evans "Getting to Grips with Torture" in (2002) 51 *International & Comparative Law Quarterly* 365 at 376.
[24] John Dugard *International Law* 2nd edition (2000) 141.
[25] Art 16, which also covers obligations under Articles 10,11,12 and 13.
[26] Sec 12(1)(e) of Act 108 of 1996.
[27] *S v Mankwanyane and Another* 1995 (6) BCLR 665 (CC).
[28] *Mohamed and Another v President of the RSA and Others* 2001 (7) BCLR 685 (CC) at Para 52.
[29] *S v Williams* 1995 (3) SA 632 (CC). For a general discussion of the application of the proportionality principle in the judicial interpretation of Sec 12 (1) (e) of the Constitution, see MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (2002) 162ff.

These cases dealt with high-profile matters of socio-political and educational concern. They centred on the constitutionality of the *nature* of the punishment. However, issues concerning conditions of detention are bound to force themselves before the courts in the coming years as people in overcrowded places of detention who are affected by HIV/AIDS begin assert their constitutional right "not to be punished in a cruel, inhuman or degrading way" more unrelentingly. Questions pertaining to the duration of the treatment, the physical environment and the impact this has on the mind, body, and health of people in detention may not yet be regarded as high-profile, but this does not diminish the need to deal with them urgently.

Just very recently, a Cape High Court judge, in support of his decision to grant an application of a terminally-ill patient to be released from prison said that "even the worst of convicted criminals should be entitled to a humane and dignified death".[30] One may well ask: What about the systemic sub-cultures of physical abuse that have been perpetuated to the point of being regarded as part and parcel of the "official" penal regime?

In the European judicial system, the European Commission of Human Rights and the European Court of Human Rights have from the 1960s developed an increasingly refined jurisprudence that distinguishes between *torture*, *inhuman* and *degrading* treatment or punishment in violation of Article 3 of the European Convention on Human Rights.[31] In her searching study of the European case law on the issue of inhuman and degrading treatment or punishment, Debra Long states that "the purposive element of the definition of torture, whilst still important, has been marginalised in favour of a threshold based upon a sliding scale of severity between acts".[32] More recent decisions of the European Court of Human Rights point to the fact that even the absence of the intention to debase or humiliate a person cannot conclusively rule out the possibility of a finding in violation of Article 3 of the Convention.[33] Thus, despite the absence of any evidence to humiliate and debase, the Court has found that the omission by the authorities to improve poor and inappropriate conditions of detention constituted "a lack of respect," and was therefore in violation of Article 3.[34]

In extradition or expulsion cases, the European Court of Human Rights has extended the protection of the person against ill treatment to include situations where the threat has emanated from private individuals in the receiving state,[35] or where ill treatment in the receiving state would be knowingly caused by lack of medical care, which had been rendered by the returning state.[36]

---

[30] Quoted in the *Cape Argus* 15 September 2003.

[31] See for example *The Greek Case* (1969) 12 *Yearbook: European Convention on Human Rights* 186; *Ireland v UK* (1978)European Court of Human Rights (ECHR) (Series A) No 25; *Campbell and Cosans v UK* (1982) ECHR (Series A) No 48, *Tyrer v UK* (1978) ECHR (Series A) No 26; For a comprehensive discussion of the expansive interpretation of Art 3 by the by European judicial bodies, see Debra Long *Guide to Jurisprudence on Torture and Ill-treatment - Article 3 of the European Convention for the Protection of Human Rights* (2002).

[32] Op cit 12.

[33] *V v UK* (1999) ECHR (Series A) No 9;

[34] *Price v UK* Judgment of 10 July (Cited by Long op cit) 17.

[35] *HLR v France* (1997) 26 European Human Rights Report (EHHR) 29.

[36] *D v UK* (1977) 24 EHRR No 423.

In view of the difficulties detainees have to prove a case of abuse beyond a reasonable doubt – because of a lack of supportive evidence, denial of access to medical treatment, and a lack of an effective complaints procedure – the European Court has increasingly moved to the position where states are now obliged to conduct an effective investigation into all allegations of ill-treatment because:

the general legal prohibition of torture and inhuman and degrading treatment and punishment, despites its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with real impunity.[37]

The Court has found that the notion of an effective remedy, "entails…a thorough and effective investigation…."[38] The duty to investigate is owed not only to the victims but to the relatives as well.[39]

In assessing claims that the effects of treatment or punishment are incompatible with Article 3, the European Court has held that although it might be difficult for a prisoner to prove how the conditions of detention led to suffering contemplated in Article 3, this is not necessarily the determinative factor (as to whether authorities fulfilled their obligation under Article 3), such as in the treatment of mentally ill persons "who may not be able to or capable of pointing to any specific ill effects".[40]

Since 1994, South African courts have generally not squirmed from their obligation to invoke human rights norms and the jurisprudence of international human rights judicial bodies to outlaw practices that violate human rights. The Constitutional Court, in particular, has in a number of cases it has had to decide, studied the decisions of the European Commission and Court of Human Rights for guidance.[41] The more recent decisions of the European Court on the question of inhuman and degrading treatment or punishment will no doubt be considered by South African courts when adjudicating cases of similar configuration brought before them in future. However, should the UNCAT definition of torture be incorporated into South African law, the courts would, it seems, have to develop an approach towards the purposive punishment (for example, to extract a confession) for the crime of torture on the one hand, and the purposive approach of the European court of Human Rights with regard to degrading treatment. Under UNCAT the crime of torture is distinct from inhuman and degrading treatment or punishment, and there are also distinct legal consequences flowing from this distinction.[42]

---

[37] *Assenov v Bulgaria* (1998) EHRR-III 1998, Para 102.

[38] *Selmouni v France* (1999) 95 EHRR 1999-V, Para79-80.

[39] *Kurt v Turkey* (1998) EHRR 1998-III. For a fuller discussion on the special factors the Court has taken into account when considering claims of relatives, see Long op cit 30-31.

[40] *Keenan v UK* (2001) Judgment of 3 April.

[41] Cf Dugard op cit 265-266.

[42] For a comprehensive critique of the EHHR and ECHR jurisprudence on the approach to inhuman and degrading treatment or punishment, as well as for a reconceptualized approach to torture, inhuman and degrading treatment or punishment as a matter of international human rights law, see generally Evans "Getting to Grips with Torture" op cit 365-383.

3. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[43] (hereafter OPCAT)

What is an Optional Protocol?

It is a subsidiary treaty or kind of an appendix to the original convention.[44] It is an internationally binding document, but because it is optional it binds only those states that have ratified it. States that have signed and ratified the original Convention against Torture can choose to ratify or accede to the Protocol as well.

The OPCAT has been added to the original Convention (UNCAT) to help state parties to implement their existing obligations to prevent torture. It aims "to establish a system of regular visits undertaken by independent and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment".[45] It is proactive rather than reactive, preventive rather than remedial.

The 1984 UNCAT provides for a special reactive and investigatory procedure by which an international entity, the *Committee against Torture* (CAT), can enquire into allegations of torture.[46] As is the case with other monitoring bodies established under UN treaties, CAT may express its views as whether states are complying with their obligations but may not make a legally binding finding. In this sense "it is generally seen as acting in a 'quasi judicial' capacity.[47] The problem with this arrangement is that the Committee's success in assuring adherence to the Convention has been undermined by the requirement of confidentiality and of prior consent being granted by the state concerned for fact-finding visits.[48] Apart from this the CAT has funds to cover only one on-site visit a year to inquire into systematic violation of UNCAT.[49]

The OPCAT departs from this approach by providing for a two-pronged approach to prevent torture: First, it establishes a new international entity, the international visiting mechanism (IVM), which is a sub-committee of the CAT. Second, it obliges each state party to establish one or more national visiting mechanisms (NPMs) to visit

---

[43] Adopted by the UN General Assembly on 18 December 2002 (A/RES/57/199).

[44] "Although a self-standing treaty is sometimes called a Protocol, it is more common to use that name for an amending or subsidiary treaty". Anthony Aust *Modern Treaty Law and Practice* (2002) 333.

[45] Art 1.

[46] See Part II Art 20 of the UN Convention against Torture.

[47] Evans "Getting to Grips with Torture" op cit 367.

[48] "The Torture Convention's drafters failed to break the pattern established by earlier human rights conventions. Most specifically, they retained without modification the requirement of the declaration of competence as a precondition of enforcement. Such requirement is intended to protect States against interference in their internal affairs. Its, effect, however, has been to obstruct the international enforcement of both the Political Covenant and the Torture Convention. It is a condition precedent for both inter-State and individual complaints which comprise two of the four enforcement mechanisms of the Torture Convention on the international plane".Ahcene Boulesbaa *The U.N. Convention on Torture and the Prospects for Enforcement* (1999) 294.

[49] "Current Developments" in (2003) 97 *American Journal of International Law* 373 (hereafter cited as "Current Developments").

places of detention within the state and to enter into a co-operative dialogue with the authorities in order to help them ensure that torture does not take place.

The International Visiting Mechanism (IVM)

The IVM is the international expert body mechanism established by the OPCAT to visit places of detention within states where people are deprived of their liberty by virtue of an order of a public authority.[50] The Sub-committee shall consist of 10 independent and impartial members (to be increased to 25 on the 50th ratification or accession to the Protocol)[51] with proven multi-disciplinary experience.[52] They are to serve in their individual capacity[53] and are to be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.[54] The members will be elected by the state parties[55] and the composition of the Sub-committee as a whole must reflect equitable geographic, gender and legal-system representation.[56]

The IVM advises states as to the establishment of preventive mechanisms and is required to maintain direct or confidential contact with NPMs[57]. It is also required to help states to build capacity by offering them training and technical assistance.[58] The OPCAT requires all state parties to give the international entity unrestricted access to all places of detention, including information on where persons deprived of their liberty are detained, the conditions under which they are detained, and how they are treated.[59] The state concerned must grant the international visiting body (IVM) unlimited access to such places and an opportunity for the visiting delegation to interview detainees privately (or with a translator), without witnesses being present. The IVM will be at liberty to choose the places it wants to visit and the persons it wants to interview.[60]

States may object to a visit to a particular place of detention "only on compelling grounds of national defence, public safety, national disaster or serious disorder in the place to be visited". But they may not invoke the existence of a declared state of emergency to object to a visit.[61]

The IVM is required to establish a programme of regular visits, drawn up at first by lot.[62] It does not have the power to conduct a targeted *ad hoc* visit. It may only "propose a short follow-up visit after a regular visit",[63] and

---

[50] Art 4.
[51] Art 5(1).
[52] Art 5(2).
[53] Art 5(6).
[54] Art 2(3).
[55] Art 6.
[56] Art 5 (3) and (4).
[57] Art 11 (b) (ii).
[58] Art 11 (b) (iii) and (iv).
[59] Art 14 (1) (a) and (b).
[60] Art 14 (1) (e).
[61] Art 14 (2).
[62] Art 13 (1).

must communicate its observations and recommendations s confidentially to the state party and, if relevant, to the NPM.[64] If requested by the state party, the IVM must publish its report, together with any comments by the state concerned. Only if the state party refuses to co-operate with the IVM, or to act on its recommendations, may the IVM make a public statement without the consent of the state party. But this step may only be taken after thorough consultation with the Committee against Torture (CAT) and the state concerned.[65]

Securing the co-operation of the state is the core aim of the OPCAT. Instead of upstaging and embarrassing the state, it is nudged and induced confidentially into taking measures to prevent torture. Whether states or groups of states buy into this arrangement has yet to be seen.

National Preventive Mechanisms (hereafter NPMs)

The OPCAT requires each state party to set up and maintain one or more NPMs to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment.[66] It does not prescribe any particular form that the NPM must take. Such mechanisms already exist in various states and include bodies such human rights commissions, ombudsmen, parliamentary commissions, lay peoples schemes, non-governmental organisations, as well as other composite entities. A NPM must be established not later than a year after the state has ratified the Protocol or acceded to it.[67] States must ensure that NPMs are functionally independent[68] and must provide them with the necessary resources to keep functioning.[69] State parties must ensure, too, that NPMs have the requisite professional expertise and must, when establishing a NPM, strive for gender balance and the representation of ethnic and minority groups in the country.[70] When establishing the NPM, state parties are required also to take into account the "principles relating to the status of national institutions for the promotion of human rights".[71]

Each state party must give its NPM access to all information on the number of people in detention and where they are being held, and to all information concerning their treatment and conditions of detention [72] In addition, it must

---

[63] Art 13 (4).
[64] Art 16 (1).
[65] Art 16 (4).
[66] Art 3.
[67] Art 17.
[68] Art 18 (1).
[69] Art 18 (3). On this point, the Geneva-based Association for the Prevention of Torture (APT), an international NGO immensely active in running workshops worldwide, explaining the essence of OPTEC and its mechanisms, emphasizes financial autonomy as a fundamental prerequisite for functional autonomy. APT suggests that states could be guided, when setting up a NPM, by the so-called "Paris Principles" on the Composition and Guarantees of Independence and Pluralism (…). On financial independence Art 2 says: "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not to be subject to financial control which might affect its independence". Association for the Prevention of Torture *Implementation of the Optional Protocol to the UN Convention against Torture: National Visiting Mechanisms* (2003) 9.
[70] Art 18 (2).
[71] Art 18 (4).
[72] Art 20 (a) and (b).

grant the NPM access to all places of detention and must enable it to have interviews, without witnesses, with the persons who are deprived of their liberty either personally or with a translator.[73] NPMs may, like the IVM, also choose the places they want to visit and the persons they want to interview, and they have the right to contact the IVM, meet with it, and send it information.[74] National bodies may also visit places of detention regularly and may also make recommendations to the relevant authorities after a visit.[75] The state party and NPM must then enter into a dialogue for possible implementations of the recommendations.[76] State parties are also be required to publish and distribute the annual reports of the NPMs[77]

Funding

The IVM's expenses are to be paid by the United Nations, in line with the UN Resolution that treaty bodies should be funded from the regular UN Budget.[78] This provision is intended to help paying the costs that willing, developing states would incur as a result of ratification or accession but where they would be unable to afford the cost if it were limited to state funding. A Special Fund shall be set up to help finance the implementation of the recommendations made by the IVM after a visit to a state party, including educational programmes run by NPMs.[79]

The issue of funding is crucial. The reality is that states ratifying the protocol must contribute voluntarily to the Fund to make the system work.

The OPCAT will enter into force once it has been ratified by 20 states. A ratifying state may make a declaration, postponing its obligation either in relation to the IVM or the NPM[80] but not both. As at mid-September 2003, no state has ratified the OPCAT although. seven have signed it since February 2003.

A striking feature of the OPCAT is that it breaks with the pattern of compliance procedures established by earlier human rights conventions. Its main aim is to *prevent* torture, degrading and inhuman treatment or punishment. The "practice of torture and ill-treatment", as Malcolm Evans puts it persuasively, "is not to be equated with some form of 'illness' or 'disease' that can be eradicated by prescribing the right form of 'treatment'. Rather, it is a temptation to which all of us can succumb".[81] The two main preventive means of the OPCAT, the national and the international preventative visits, seek to commit state parties through co-operation and constructive dialogue. The UNCAT alone, through its CAT, has proven to be insufficient in overcoming the hurdle posed by the principle of non-intervention. Developing states, in particular, have traditionally opposed international human rights oversight

[73] Art 20 © and (d).
[74] Art 20 (e) and (f).
[75] Art 19 (b).
[76] Art 22.
[77] Art 23.
[78] Art 25. See also UN General Assembly Resolution 47/111.
[79] Art 26(1).
[80] Art 24.
[81] "Legal Measures to Prevent Torture and Ill-treatment" in Niyizurugero op cit 61 at 71.

mechanisms on the grounds that supervision amounted to unacceptable intervention in their domestic affairs. CAT has been seen as being too intrusive. During the Apartheid period, South Africa, for one, notoriously exploited Article 2 (7) of the United Nations Charter[82] to suppress international criticism of and action against its racial policies.

4. The European Committee for the Prevention of Torture (ECPT) – best practice example

Origin: The notion of creating a universal system of preventive visits to detention facilities in Europe stems from the Article 3 of the European Convention on Human Rights[83] which states: "No one shall be subjected to torture or to inhuman or degrading punishment". In 1976, Jean-Jaques Gautier[84], inspired by the work of the International Committee of the Red Cross suggested a convention which would enable independent experts to visit all places of detention with the aim of recommending to governments ways of preventing torture or other kinds of ill-treatment. This proposal resulted in the adoption by the Committee of Ministers of the Council of Europe in 1989 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[85] This Convention established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter ECPT). To date, the Convention has been ratified by 44 member states of the Council of Europe.

The ECPT comprises one member per ratifying state. Its secretariat forms part of the Council of Europe's Directorate General for Human Rights and is based in Strassbourg, France.

Independent Experts: The CPT members are independent and impartial experts who, according to the Convention, serve in their individual capacity and are e "chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the field covered by the convention".[86] They are elected by the Committee of Ministers of the Council of Europe from a list drawn up by the Consultative Assembly of the Council of Europe. They serve for four years and may only be re-elected once.[87] Today, the Committee is made up of mix of people with a wide range of expertise: lawyers, medical doctors (psychiatrists and specialists in forensic medicine), psychotherapists, psychologists, a criminologist, a municipality

[82] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".
[83] Adopted by the Council of Europe on 4 November 1950, Rome (entered into force on 3 September 1953).
[84] Swiss banker and founder member of the Swiss Committee against Torture, today called the Association for the Prevention of Torture (APT).
[85] Adopted by the Council of Europe on 26 November 1987 It entered into force on 1 February 1989.
[86] Art 4,
[87] Art 5

health commissioner, a police officer, a director for prison and police reform, and a mathematician.[88] They meet in camera and draw up their own rules of procedure.[89]

Visits and Access to Places of Detention: The ECPT visits places of detention of all types "where persons are deprived of their liberty by a public authority". These are typically police stations, prisons and juvenile detention centres, military detention facilities, psychiatric hospitals, holding centres for asylum seekers or for immigration detainees (for example, airport holding centres[90]). The aim of the visits is to see how people deprived of their liberty are treated and to recommend improvements where necessary. Other institutions that may warrant a need for visits in the future are homes for the elderly and handicapped and so-called *homes* for children.[91]

Groups of two or more CPT members carry out the visit, accompanied by members of the Secretariat and, if necessary, by experts in a particular field and interpreters. The CPT must notify the state party concerned but need not specify when the visit will take place. The liaison officer is informed of the places to be visited only two days before the delegation arrives.[92] The visitors may decide to conduct impromptu visits, even at night, to other unlisted detention centres. In order to form a comprehensive picture, the CPT examines the regulations and procedures governing the running of the place of detention, including the registers and medical files.[93] Delegations have unlimited access to such places and to go anywhere inside them without restriction.[94] If the conditions of the individual or detainees are found to be unacceptable, the head of the CPT will inform the director of the institution of this during the visit and this observation is repeated to the government before the delegation leaves the country.[95]

Apart from the periodic visits, the ECPT may conduct special for-the-purpose visits to address particularly sensitive issues.

Reports: Recommendations and State Responses: After the visit, the ECPT draws up a comprehensive report which is sent to the state concerned with a list of recommendations and comments. The state is asked to respond to the ECPT's findings within a time limit routinely set, and to confirm that the recommendations have been implemented. Although confidentiality and co-operation are at the heart of the Convention, in practice, almost all

---

[88] www.coe.int "Members"E:\en\members\members-cv.htcm

[89] Art 6.

[90] These were first regarded by the Commission as being not places of detention for the purposes of Article 5 of the ECHR (*Amuur v France,* Comm Rep 10 January 1995) but reversed this finding in a subsequent decision (*Amuur v France* Judgment of 25 June 1996).

[91] Renate Kicker "Establishing of Effective National and other Control Mechanisms" in Niyizrugero op cit 101 at 105.

[92] Didier Rouget *Preventing Torture* (2000) 59.

[93] Ibid.

[94] Art 8.

[95] Kicker op cit 104.

states now allow the publication of the report, some taking a longer than others do so. Many countries take 18 months to authorize publication "because they want to publish their responses simultaneously".[96]

The frequency of the ECPT visits has increased very considerably in successive years. Whereas, for example, in 1996 there were 11 visits occupying 93 days, in 2001 it organized 17 visits totalling 162 days.[97] The CPTs on-site activities now stretch from Iceland in the north to Portugal in the South and from Ireland in the west to the whole of the Caucasus. According to Rod Morgan and Malcolm Evans of Bristol University, who have published what is clearly the most searching and independent analysis of the work of the CPT over the past twelve years[98], the CPT is regarded as a "resounding success".[99] Those who have come into contact with the CPT consider it generally well organized, highly professional, authoritative and valuable.[100] The CPT itself has not encountered any problems with the authorities during their visits, except very recently when it had to make a public statement - which is what happens when a state refuses to co-operate during a visit.[101] This happened during an ECPT visit to the North Caucasian region when the Russian authorities failed (a) to co-operate in allowing the ECPT delegation to conduct a thorough and independent inquiry into the events in a detention facility at Chernokozovo and (b) to uncover and prosecute cases of ill-treatment of detainees in the Chechen Republic. This was the third time only since its establishment in 1989 that the CPT had resorted to its powers to make a public statement.[102]

In their evaluation of the ECPT Morgan and Evans emphasize repeatedly the importance of reliable NGOs for the effectiveness of the ECPT's work..[103] International NGOs such as Amnesty International and Human Rights Watch play very meaningful roles alongside the ECPT, for their work traverses common ground. Even though Amnesty concerns itself more with prisoners of conscience than with prisons, its reports are routinely sent to the ECPT Secretariat and "it would appear that they frequently influence the shape of CPT visits".[104] The influence is reciprocal in that Amnesty Reports frequently cite ECPT findings, thus disseminating them widely.[105]

Other international member-based NGOs of value to the ECPT are the Geneva-based Association for the Prevention of Torture (APT) and the Prison Reform Initiative. Both organisations routinely furnish the ECPT with information and useful contacts when preparing its visits. The APT, in particular, organizes conferences across the

---

96 Malcolm D Evans and Rod Morgan *Preventing Torture* (1998) 341.
97 *!2th General Report* Cpt/Inf 15 (2002) 8.
98 Malcolm D Evan and Rod Morgan *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment* (1998)(hereafter *Preventing Torture*). Their more recent book, *Combatting Torture in Europe: The Standards of the European Committee for the Prevention of Torture*, was published in 2001.
99 *Preventing Torture* 341.
100 Ibid 352-357.
101 Article 10 of the Convention states that if a state refuse to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the state has made known its views, to make a public statement on the matter.
102 See *See !2the General Report* op cit 8.
103 Op cit 326.
104 Ibid 329.
105 Ibid.

world to discuss the work of the ECPT and to acquaint NGOs more with its work.[106] The ECPT also relies a great deal on other NGOs with national branches, such as the International Association of Christians against Torture (ACAT) and the French-based *Observatoire international des prisons,* which also publishes an annual review of prison conditions world-wide.[107] Apart from NGOs, in most member countries the ECPT turns to "motivated members of parliament or campaigning legal practitioners or academic researchers to follow up its findings and recommendations.[108]" The ECPT typically begins each periodic visit with a consultative meeting with NGOs and such individuals.[109]

In recent years, the ECPT reports have contributed considerably towards shaping the jurisprudence of the European Court of Human Rights when it comes ascertaining detention conditions and the cumulative effects of overcrowding, inadequate sanitation facilities, heating, lighting, sleeping arrangements, food, recreation and contact to the outside world.[110] In the past, both the Commission and Court relied not only on witness evidence, but also conducted on-site visits to places of detentions in respect of which complaints were received. Today, the court attaches a lot of weight to the ECPT reports.[111]

One wonders whether member states of the Council of Europe, including those anticipating being admitted to it, will be prepared to subject themselves to an additional layer of visits under the OPTEC. If the ECPT is in fact working well, why the need for yet another international visiting mechanism, and a national visiting body to boot? On the other hand, one might argue, if European states are already co-operating well with the ECPT, why would they not want to co-operate with another international visiting mechanism? After all, they both visiting mechanisms have similar goals.

The financial factor will play a big role. Who pays for what? The ECPT has performed well because the funding performance has not lagged behind. If the ECPT's budget has had to be trebled from 1990 t0 1997 (with the budget of the Council of Europe as a whole 'only' doubling in the same period) how much more would a state have to pay (in addition to what it is already paying now) to maintain (a) an *international* secretariat; (b), an IVM that travels not only on the European continent but to far away places all over the world; and (c) at least one NVM?

Whichever way one looks at it, and when the IVM does come into existence, one can confidently predict that it will necessarily need to draw very considerably upon the experience of the ECPT.

---

106 Ibid 330-331.
107 Ibid.
108 Ibid 332
109 Ibid.
110 Long op cit 34.
111 Ibid 35.

5. Some Implications for South Africa

If South Africa ratifies the OPCAT, it would have to establish a NVM. By the same token, it would be declaring its readiness and willingness to open the state's darkest and remotest cells of authority to international scrutiny. This implies that even if a state-run place of detention or placement facility, for example, a psychiatric hospital or a youth care facility, becomes privatised, it would be subject to an international preventive visit for as long as someone is placed there at the behest of a public authority. In essence, this would require the state to provide for this eventuality in a privatisation agreement.

The implications of ratifying the OPCAT and incorporating its provisions into domestic law might seem to look like a veritable challenging on the face of it. But one ought not to overlook the fact that South Africa already has a number of structures in existence that count as a plus, or that could be adapted to accommodate the requirements set by the OPCAT. For one, South Africa has an independent judiciary – a feature of democracy identified as being one that is likely to make an international mechanism effective in a state.[112] It has a Constitution which protects the dignity of the person, one's right not to be tortured, not to be treated or punished in an inhumane and degrading manner, and the right to a fair trial, including all rights accompanying it. In addition South Africa *does have* three existing national oversight mechanisms already.

However, much as these rudimentary elements are present, or partially at hand, there are features of detention culture and officially condoned detention sub-culture, as well as provisions in the law of criminal procedure that would need to be revisited in order to give effect to the preventive aim of the OPCAT.

Changing the Mind Culture

A culture cannot be jettisoned at the drop of a hat; more so where it is woven into a tapestry of bureaucracy steeped in the tradition of opaque governance that, on its side, does not tolerate public "inquisitiveness" or the notion of official accountability. Apartheid was such a system. It lasted long enough to leave its stamp on the mindset of those who oversaw the implementation of the penal regime. It was a mindset that easily deteriorated to the point where it sought to destroy the humanity of a person altogether. Nelson Mandela has described these utterly despicable detention conditions in his autobiography, *Long Walk to Freedom*.[113] Yet, he has chronicled, too, how the behaviour of prison guards can gradually change for the better through a process of dialogue and learning. It takes time, but it has virtue as it improves the human condition.

A well-grounded and sympathetic appreciation of human rights would need to be implanted and nurtured within the minds of people who administer places where others are detained; more importantly, in the minds of those who are in actual physical touch with people involuntarily deprived of their liberty. The thrust of the educational exercise

[112] "Current Developments" op cit 372.
[113] Published in 1994. See, for example, description of cells in Pretoria Local Prison at 231.

could, for example, be aimed at making people in charge of detainees understand that to a prevent ill-treatment is not only to protect oneself, but also the legitimacy of judicial and administrative decisions.

Some will justifiably argue that changing an attitude of mind takes too long and that such education should be buffered with judicial prompting here and there. Dirk Van Zyl Smit, for example, contends that the implementation of core constitutional values may possibly only occur once prisoners enforce their rights through legal actions as happened in the early history of prisons.[114]

Accelerating the Pace of Criminal Procedural Reform

Unmanageable and overcrowded places of detention generate precisely what the OPCAT seeks to prevent, namely, ill treatment through neglect. Most of the deaths by natural causes that occur in prisons (an increase of 524% from 1995 to 2001) are AIDS-related.[115]

Reducing the numbers of detainees and prisoners therefore, needs to become one of the principal means of making prisons manageable. The European Committee for the Prevention of Torture (CPT)[116] noted in its Second General Report that policies limiting prison numbers have "made an important contribution to maintaining the prison population at a manageable level".[117]

One way of doing this is to take a hard look at the Criminal Procedure Act, 51 of 1977 to see which of its provisions militate indirectly against the grain of the OPCAT by encouraging an indiscriminate overcrowding of prisons. The minimum sentences enactments and the provisions governing the reverse onus in certain bail applications are perhaps the two most readily identifiable causes of overcrowded prisons. Both sets of laws were an ill-considered response to widespread public demands for the implementation of stringent measures to deal with media reports of rising crime rates. The disappearance of the death penalty had left a void that needed to be filled. The answer came in the form of mandatory minimum sentences for certain categories of crimes and reversing the onus to fall on the accused when applying for bail in certain cases. This has resulted in curtailment of judicial discretion, with a concomitant increase in prison populations. For example, the number of prisoners serving sentences of more than 20 years rose from 1 885 in January 1995 to 7 885 in September 2002. The number of those serving sentences of 15 to 20 years rose from 2 660 in 1995 to 8 355 in January 2003, and those serving 10 to 15 years from 6 168 in 195 to 18 956 in January 2003.[118] The hurdles posed by the bail provisions and by the fact that many lack the

[114] See Dissel and Ellis op cit at Footnote 54.
[115] See (2002-2003) *Annual Survey of Race Relations* 455. See also Amanda Dissel and Stephen Ellis "Reform and Stasis: Transformation in South African Prisons" [first published in *Critique Internationale* No 16 July 2002) http://www.csvr.org.za/papers/papad&se.htm
[116] See above.
[117] Para 46.
[118] Judicial Inspectorate of Prisons *Annual Report 2002/2003*.

money to post bail necessarily lead to overcrowding. In November 2002, unsentenced prisoners made up 40% of the prison population.[119]

In Europe, the ECPT has found , too, that rising incarceration as a result of "getting tough on crime policies" encourage expectations that the " 'toughness' will be extended to the provisions of more restrictive regimes".[120] Indeed, a 1998 national survey showed that a third of South Africans supported the use force by the police to extract information from criminal suspects, with a further 25% being indifferent to the subject.[121]

There is a need therefore to revisit these enactments with the aim to diminish the adverse effects they have on the manageability of prison populations. This might look like a reactive measure, but it has a strong preventive component. The Minister of Correctional Services; Mr Ben Skosana, stated recently are 67% overfull and that this overcrowding is a breeding ground for gangsterism, undermines the safety of inmates and "leads to a spread of contagious diseases such as tuberculosis and HIV/AIDS among prisoners".[122]

Implementing Alternatives to Deprivation of Liberty

More recent developments in the area of plea-bargaining and juvenile diversion from the criminal justice system offer promise to give substantial meaning to the spirit of the Optional Protocol.

Plea-bargaining is an old South African practice[123] that was not officially sanctioned until only recently by the judiciary[124] and by Parliament.[125] As it lacked a legal foundation it was not discussed in public. The Act does not define plea-bargaining, nor do the Directives issued by the National Director of Public Prosecutions. In practice this is generally understood to mean a charge or a sentence reduction in exchange for a guilty plea. What happens is that the legal representative of the accused attempts to lighten the burden that his or her client has to bear by by tendering to plead guilty to a lesser offence, one that will have less serious implications for the accused as far as sentence is concerned.

At present, prosecutors are generally hesitant to engage in this negotiation process although it has too a large extent been endorsed by Directors of Public Prosecutions. It is still too new for many. It is, however, highly encouraging that Judge Hannes Fagan, the Inspecting Judge of the Judicial Inspectorate and himself a highly

---

[119] Ibid 435.

[120] Evans and Morgan op cit 325.

[121] Piers Pigou Monitoring Police Violence in South Africa (paper presented at the International Seminar on Indicatorsand Diagnosis on Human Rights: The Case of Torture in Mexico, April 2002) http://ww.csvr.org.za/papers/papigoul.htm

[122] *Weekend Argus* 6 September 2003.

[123] See, for example Isakow and Van Zyl Smit "Negotiaited Justice and the Legal Context" (1985) *De Rebus* 17, JJ Joubert "Anvaarding van die Skuldigpleit en Pleiteonderhandeling: Afhandeling van Strafsake Buite die Formele Verhoorproses" (1995) 8 *SALJ* 297; Clarke "Message in a Bottle for Unknowing Defenders: Strategic Plea Negotiations Persist in South African Criminal Courts" 1999 (2) *CILSA 1*.

[124] See *Northwestern Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)* 1992 (2) *SACHR* 669.

[125] Criminal Procedure Second Amendment Act, 62 of 2001.

motivated campaigner for a reduction of prison populations, is at the forefront of driving of a concrete and consistent implementation of plea bargaining nation-wide. The materialization of this objective will, amongst other things, no doubt lead to a decrease in the number of awaiting–trial detainees, hence to a less inhumane prison environment.

Implementing a NPM Framework in South Africa

Present Arrangements

If South Africa should opt more than one NPM, each will need to be clothed with the exactly the same competence, and must reflect a balanced membership. Also, each of them should work preventively and in a spirit of on-going reciprocal dialogue and co-operation with the appropriate authorities. They would need to use the same measuring rod for determining core minimum standards of treatment. In sum, they would all have to sing from the same hymn sheet.

At present South Africa has three oversight bodies: The South African Human Rights Commission (SAHRC),[126] the Independent Complaints Directorate (ICD),[127] and the Judicial Inspectorate[128], each of which works to achieve particular outcomes. The SAHRC has a broad, all-embracing mandate, which is: to promote respect for human rights, to promote their protection, development as well as their attainment: to monitor and assess their observance; and to take appropriate redress where they have been violated.

In practice, because of its wide focus and insufficient resources, the SAHRC is simply unable to monitor the treatment of people detained in various facilities. It intervenes in specific situations, but even then, only on a short-term basis, and is hard put to track the implementation of whatever it recommends in a given situation. It usually refers complaints it receives against the police or the prison authorities to the ICD and Judicial Inspectorate, respectively. It has therefore been unable, since its inception in 1996, to provide a comprehensive overview of findings and trends, systemic abuse, highlighting areas of concern and of improvements.[129]

The ICD on the other hand is the central official monitoring and investigative body of police abuses. It may investigate police misconduct on its own motion or when it receives a complaint. Thereafter, it may recommend disciplinary steps or prosecutorial action. But the police are not compelled to institute disciplinary steps; nor do the Internal Investigation Units of the various provinces provide the ICD with statistics on the outcomes of investigations its own investigations – a remarkable drawback for the work of an oversight body[130].

---

[126] Established under Sec 184 of Act 108 of 1996.
[127] Established in terms of Sec 50 of the South African Police Service Act, 68 of 1995.
[128] Established in terms of Sec 25 of the Correctional Services Act, 8 of 1959(as amended by the Correctional Services Act, 102 of 1997).
[129] Pigou op cit 10.
[130] Ibid..

A practical flaw in the work of the ICD is that the police are obliged to report *only* cases of deaths in custody to it. This excludes other acts such as assault, assault with intent to cause serious bodily harm and intimidation. This means that even though the ICD has now adopted the SAPS definition of torture, which is wider than that its definition under the Convention Against Torture, the ICD would ordinarily only act if a complaint is made to it. Otherwise such cases are investigated by the police without civilian oversight. By its own admissions the ICD considers this to be a deficit, which affects its ability "to keep proper statistics and easily analyse trends and practices".[131]

The ICD's strategic plan for the period 2002 to 2004[132] does not suggest that prevention of torture is one of its key result areas. It looks as though, for the foreseeable future at least, it will continue to be concerned more with addressing complaints against the police than with preventive visits to police stations. One reason for this is that it has limited resources. If these are not increased, this will affect the ICD's present work as well.[133]

The Judicial Inspectorate, an independent office controlled by an Inspecting Judge, was established in 1998 in order that the judge may report on the treatment of prisoners in prisons and on prison conditions.[134] In accordance with the law, the inspectorate has appointed a number of Independent Prison Visitors (IPVs) in each of the provinces. By February 2003 a total of 186 had been appointed. Each prison with more than 100 prisoners has an IVP. They are appointed from the ranks of people who are nominated by the public and community organizations. They are appointed on contract for two years. They are paid R38, 65 per hour and work. Depending on the size of the prison, they work between 14 and 67 hours per month.. They receive a three-day induction course at which they also learn the basics on the law governing prisons and prisoners' rights.[135]

IPVs are required to conduct regular visits to prisons, interview prisoners privately, and to take up complaints with the prison authorities. During 2002 calendar year, IPVs paid 7 147 visits to prisons and consulted privately with 58 907 prisoners.[136] An important feature of their work, and one which accords with the spirit of the OPCAT, is that the IPVs are required to discuss complaints with the head of the prison or the appropriate official "with a view to resolving issues internally".[137] Another very useful aspect of their role is that they report to the Judicial Inspectorate on the nature and number of the cases they receive. This provides the basis for studying trends of human rights abuses that might exist at particular prisons, and helps to identify problem areas.[138]

---

131 Karen McKenzie "Control Mechanisms to Prevent Torture" in Niyizurugero op cit 109 at 111. See also TertiusGeldenhuys and Antoinette Brink "Establishment of Regulations for the Treatment of Persons deprived of their Liberty from a Policing Perspective" in Niyizurugero op cit 89-90.
132 Strategic Plan 2002-2004 on ICD website.
133 Ibid.
134 Sec 85(1) of the Correctional Services Act, 111 of 1998.
135 See generally Judicial Inspectorate of Prisons *Annual Report for the period 1 April to 31 March 2003* 7ff.
136 Ibid 13
137 Ibid Sec 92(1).
138 Ibid 12-13.

According to the Judicial Inspectorate's 2002-2003 Annual Report, most of the complaints were resolved between the heads of prison and the IVP to the satisfaction of the prisoners. Unresolved problems are taken to the Visitors' Committee meetings, which are attended by IPVs and Regional Co-ordinators, the latter being responsible for implementing the visiting scheme and also conduct on-going IT training for IPVs. Whatever problems are not resolved at the meetings are referred to the Inspectorate's Legal Services Unit.

In practice, it seems that prisoners' complaints are related to endemic and systemic living conditions that the Inspectorate as a whole, let alone the IPVs alone, cannot solve. The "awful conditions that many prisoners have to endure"[139] persist, and heads of prison have declared under oath that overcrowding "constitutes a material and imminent threat to the human dignity, physical health or safety" of the accused.[140]

Concluding Remarks on South Africa's Oversight Bodies

With respect to the theme under discussion, a feature common to all three oversight bodies described above is that they are essentially complaints-driven. They do not appear to correlate their findings on cases of ill-treatment, nor do they appear to be in active dialogue with one another on this matter. This makes it hard to track, in a systematic way, the incidence and type of ill-treatment as it obtains in the country's detention facilities.

The fact that that the oversight bodies rely on matters being brought to their attention, coupled with the fact that the ICD and the Judicial Inspectorate address primarily the needs of persons for whose benefit they were established, means that other persons who are involuntarily deprived of their liberty, such as detained immigrants, people in psychiatric institutions, juveniles in reformatories or children's homes, soldiers in military detention facilities, are not catered for at all. For example, there is no provision for judges or magistrates to visit mental institutions.[141] The need to for independent preventive intervention in cases where people are detained as a result of administrative action is critical in the case of South Africa, where the media are traditionally precluded from reporting on conditions inside detention centres because of steep bureaucratic hurdles that first have to be overcome.

If South Africa ratifies the OPCAT it would be obliged to ensure that a NPM visits also those categories of persons not catered for under present arrangements. How such a body should be constituted and who should be elected or appointed to it, is a question that requires a comprehensive discussion. I do, however, believe that the Judicial Inspectorate is perhaps the body that could provide useful insights in discussions pertaining to the physical visits and the psychological approach one takes. It has in its young track record already established a far-flung physical presence throughout the country. It has developed a manner of interaction with detentions centres that is not

---

[139] Ibid 25.

[140] Ibid 23.

[141] For a critique of the need for the monitoring of the treatment of the mentally ill, see Nicholas Haysom, Martin Strous and Lloyd Vogelman "The Mad Mrs Rochester Revisited: the involuntary confinement of the mentally ill in South Africa (1990) 6 *South African Journal of Human Rights* 341 at 351.

abrasive or confrontational, but focussed on co-operation and getting results. For example, it has chosen, strategically, to limit its work to dealing with prisoners' complaints and not with corrupt prison practices as well – as the law requires – perhaps for fear of stretching its resources too widely and too thinly and at the expense of compromising its good relations with prison officials, which it needs to carry out its function.[142] Its expertise and experience would be helpful in conceptualising such a mechanism. Yet, however such a mechanism may be established or composed, it will necessarily have to have strong links with reliable NGOs working in various areas in respect of which it will carry out its work.

The Role of NGOs

As noted above, a key success indicator of the ECPT's work has been the extent to which it has been able to rely on the co-operation of established NGOs in its work. South African NGOs have generally relinquished the strong interest that they displayed in the past for the people held under house arrest, in police custody, or prison on political grounds. Throughout the 1980s a wide range of NGOs campaigned actively against torture and degrading treatment or punishment, and for the release of political leaders from detention and prison. The publicity they generated may not have succeeded in alleviating prison conditions for of political detainees, but it certainly helped to prevent indiscriminate rampant abuse at the hand of the authorities. The main thrust of the NGO support abated with the release of Nelson Mandela in 1990. Today, only a few, isolated citizen-based organisations are genuinely working to prevent ill-treatment. But it seems that (a) they keep a low profile purposely in order to achieve the co-operation of the authorities to achieve their goal, and (b) their focus is necessarily concentrated on people detained in police custody or prisons in a particular geographic area. This strategy of confidentiality is understandable given the short-term, region-specific goal, and is in line with confidentiality espoused by the OPCAT. However, in the main, and in the long run, in order to be taken seriously, NGOs thrive on publicity. Indeed "for most NGOs, most of the time, publicity is the oxygen of their operations".[143]

Mobilising civic awareness on this issue is hard. It does not resonate well in communities that feel victimised and "betrayed" by the criminal justice system. The cause of marginalised minorities is not a popular one. For instance, nobody talks about the fact that as recent as 31 December 2002, there were still 207 prisoners whose death sentences had yet to be converted[144] – this, years after capital punishment was found to be unconstitutional. A small but, maybe, realistic way would be for fledgling groups to share information, build reliable and verifiable data bases, and to join each other or become federated to a national body. As a concrete start, regional or provincial representatives of the ICD could begin to exchange experiences and information with the IVPs of the Judicial Inspectorate. The Child Justice Bill, which is presently before Parliament and which aims, amongst other things, to divert juvenile offenders away from the traditional criminal justice process, is a product of initiatives that started small. A handful of people involving human rights and academic lawyers, lawyers, NICRO, and representatives

[142] Cf Dissel and Ellis op cit 17
[143] Evans and Morgan op cit 360.
[144] Judicial Inspectorate of Prisons *Annual Report 2002/2003* 29.

from community organisations got together to work out ways of preventing the physical and psychic abuse of children in police custody, prisons and reformatories. They conducted incisive empirical research on this issue, documenting its incidence across the country, including the remotest areas. Their alarming findings attracted considerable media interest, prompting human rights committed officials in various government departments, including representatives of the UNDP Child Justice Project to come together to seek alternatives. This initiative has now reached the point where an Inter-Sectoral Committee on Child Justice, comprising various key role-players in the juvenile justice area, is in the process of establishing a national structure to monitor children awaiting trial for long periods, children unlawfully detained, and children sentenced to prison inappropriately.[145]

5. Conclusion

Although South Africa has ratified the UNCAT, it has not incorporated its provisions into domestic law. This means that conduct that would otherwise be regarded as falling within the rubric of torture is dealt with under the common law. This, together with a number of other factors, undermines South Africa's ability to deal effectively with torture, inhuman and degrading treatment or punishment. The government admits that it is not ready to incorporate the provisions of the UNCAT, but is confident that it is headed towards this goal. The OPCAT, which de-emphasizes a confrontational international oversight role in favour of a more preventative, confidential, and collaborative approach to ill-treatment, is nuanced towards overcoming the suspicions of countries wary of international intervention. South Africa's ratification of it would imply that to be on a firm footing, a legal basis, such as an Act of Parliament, be passed to ensure that: the national visiting mechanism is functionally independent and composed of multidisciplinary experts who are able to visit all places of detention and their facilities without restriction. The enabling law needs to stipulate the procedure for the appointment of the national experts and the transparent consultative process to be followed before the appointment. The National Visiting Mechanism (NVM) should have a stipulated source of funding and the autority to draft its own rules of procedure, and to appoint and pay its own staff.

Credibility is an important factor in this exercise. Even without having to ratify the OPCAT, South Africa has the basic legal framework and the resources which, if properly put into effect, could achieve a great deal of what the OPCAT seeks to accomplish. Admittedly, existent oversight bodies were not specifically created to fulfil the preventative role as envisaged by the OPCAT. But they provide useful starting points. Ratification is a matter of political will. South Africa is not under the same kind of pressure that the new democracies in Eastern Europe were exposed to within the framework of the Council of Europe, to sign or ratify the European Convention for the Prevention of Torture. Despite a still lingering deep-seated absence of openness by policing and penal authorities, these new democracies have opened themselves up to the ECPT. In essence, ratificationis a matter of self-interest. South Africa's ratification would, however, serve to encourage other African states that might be willing to

[145] See generally "Monitoring the New Child Justice System:- mapping the way forward" in (2003)5 *ARTICLE 40: The Dynamics of Youth Justice and the Convention on the Rights of the Child in South Africa* 4-5.

ratify the OPCAT, but hesitant to do so. Indeed, some African states have in the past shown themselves willing to co-operate with fact-finding missions operating within the framework of the African Charter. For example, Mali has implemented recommendations made by the Special Rapporteur on Prison Conditions in Africa.[146] More than this, it would add a lot more credibility to South Africa's oft declared commitment to the human rights idea. But most importantly it would give actual currency to the constitutional principle that the dignity of the person is inviolable – *End*.

[146] See Ben Kioko "Non-compliance and Human Rights Treaties" in *Visits under Public International Law: Theory and Practice* (Proceedings of an APT Workshop, Geneva, 23-24 September 1999) 133-134. For a critique of the work of the African Commission see also Rachel Murray "On-site Visits by the African Commission on Human and Peoples's Rights: A case Study and Comparison with the Inter-American Commission on Human Rights" (1990) 11 *African Journal of International and Comparative Law* 460-463, and Nelson Enonchong "The African Charter on Human and People's Rights: Effective Remedies in Domestic Law" (2002) 46 *Journal of African Law* 196-215.