

The Optional Protocol to the Convention Against Torture (OPCAT) is quite new, coming into force in 2006. Many nations have only ratified it recently, and are still working on implementation, which involves new legislation and new agencies (or changes in existing agencies). Nonetheless, some early experiences indicate its value.

Sweden

In Sweden prisoners under suspicion or awaiting trial, but not yet convicted, are sometimes denied contact with other prisoners and with anyone outside the prison other than their lawyer, on the grounds that the prisoner might interfere with the investigation or trial. This results in something close to solitary confinement.

The Subcommittee for the Prevention of Torture (SPT; see box for more information), when visiting Sweden, expressed concern about the ease with which prosecutors could establish such regimens, and the paucity of judicial oversight or avenues for recourse. The responses from Swedish authorities were a bit defensive. However, Sweden did say it was working on changes in legal procedures on this subject. Two things are evident: first, that Sweden retained full autonomy, as a nation, to make its own decisions; and second, that the SPT visit exerted an influence, pressuring Sweden toward tilting the balance a little more toward human rights and a little less toward prosecutorial convenience.

Paraguay

Paraguay, to take another example, was a dictatorship until fairly recently, with its first free elections in 1993. Its police and prisons are still in transition, and torture still occurs regularly. The SPT noted that national law defined torture very narrowly, rather than using the definition of the U.N. Convention Against Torture, which is the accepted international standard. A bill to improve the law was developed and as of June 2011 (when the most recent public report was prepared) was partway through the legislative process.

The SPT also reported that a local human rights group told them that “to file a charge of torture is to ensure the impunity of the offender,” and thus one could lay charges only of lesser crimes such as assault. There appears to be at least a little hole in this brick wall, in that a torture complaint has finally been tagged, after investigation, as substantiated, the officer involved has been fired, and the case has been referred for prosecution. Thus, while the human rights situation in Paraguay is still bad, valuable advances have been made under the influence of visits from the SPT – visits that would never have happened if Paraguay had not adopted OPCAT.

The United Kingdom

In some European countries, equivalents to the OPCAT-mandated National Preventive Mechanism (NPM; see the box for information) existed long before the country adopted OPCAT, and were quite active in protecting prisoner rights. Also, there was a European Committee for the Prevention of Torture quite similar to SPT. In these countries, the impact of OPCAT is gradual and subtle, but still real. The UK is a good example.

In Britain there had been a national voluntary association with rights of access that did informal but frequent

How Does OPCAT Work?

OPCAT is the **Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. Both the Convention Against Torture and OPCAT are treaties.

OPCAT is intended as a means to prevent the ill-treatment that the Convention prohibits. It has both national and international components.

On the national side, a country that ratifies the treaty is expected to set up a National Preventive Mechanism (NPM). The NPM regularly monitors and visits all places where people are deprived of their liberty. It has the right to unfettered access, including the ability to interview inmates in private. It then makes recommendations for change. It is supposed to be completely independent of authorities in charge of prisons and other places of detention. In many countries, more than one organization is part of the NPM; in the U.S., there would likely be at least one body in each state, others for federal detention facilities, and a coordinating and standard-setting body. Often, pre-existing organizations become part of the NPM, taking on new responsibilities.

The NPM works with the Subcommittee for the Prevention of Torture (SPT), an international body, currently with 25 members, established by the treaty. The SPT advises the NPM, and makes 3-4 visits a year, each to a country that has adopted OPCAT. During the visits, the SPT has the same free access to places of detention as the NPM. After its visit, it makes recommendations to the host country, which is expected to enter into a dialogue with the SPT about the suggestions but is not obliged to follow them unless they have to do with being in basic compliance with the treaty.

visits to detention facilities, and for about 30 years there has been an independent professional inspectorate, again with access rights, doing more in-depth examinations. Thus civilian prisons were well monitored. But OPCAT covers all places of detention, and the NPM discovered gaps in coverage.

For example, there was no mandatory monitoring of military facilities (which OPCAT includes); inspections take place by invitation. Since OPCAT was ratified, pressure to include military detention in the regime of inspections mandated by statute has increased. The NPM has even raised the question of inspecting UK military detention facilities overseas, such as those in Afghanistan. This is an area of tension, with the government maintaining that OPCAT does not apply to such facilities. Even so, the government is considering whether inspections overseas might be useful.

Another gap was police custody – in stations and holding areas. Quite likely more actual torture happened in such places than in prisons, where bad conditions were endemic a few decades ago but acute torture was rare.

Police custody areas are now systematically inspected (including getting the views of detainees) by Her Majesty's Inspectorate of Constabulary, and this has improved conditions and reduced abuse. Recently, inspections of court custody facilities began, and the poor conditions found at the outset of inspections show how much monitoring is needed. Major improvements are being asked for and are expected.

In addition to correcting gaps, the formation of a national NPM in dialogue with the SPT and other national NPMs has been invaluable. Some of the pre-existing organizations that became part of the NPM now place a higher priority on human rights than before. They learn from each other, exchanging information on problems and best practices. They harmonize standards and perform functions such as training collaboratively, saving resources. This would be extremely important in the U.S., with our 50 states, allowing some of the work of human rights to be done once, collaboratively, rather than 50 times over, separately. Contact with NPMs in other countries has also been useful, for learning about methods of monitoring and improving human rights protection.

In general, the British NPM pushes for statutory authority for visitation to all places of detention, rather than relying on ministerial decisions to grant access. For example, in Scotland there is a statutory basis for access to prisons, but not yet to police custody facilities, and the NPM is pushing this issue. The importance of statutory rather than purely administrative protection of human rights is suggested by the American situation, where Governor Romney's foreign policy advisers are advocating that President Obama's executive order banning waterboarding and most other "enhanced interrogation" methods be reversed if Governor Romney becomes President. Statutes are much harder to reverse, and more enforceable in court.

One striking part of the British experience is that opposition to OPCAT has been minimal. Another is that as more places where people are deprived of liberty have been included in regimens of visiting and monitoring, the authorities and staff in each new kind of place have found that in practice this regimen was their friend, not their enemy, bringing new information about best practices, upgrading standards, improving staff-inmate relations, and improving their standing in public opinion.

How would this work in the U.S.?

In the United States, OPCAT would make a far more dramatic difference. Only a few states have any well-institutionalized, independent system of inspections to ensure the human rights of prisoners. One that does is New York, where since 1846 the Correctional Association – a non-profit organization independent of government and getting only 10% of its funds from the state – has had a statutory right to full access to prisons (although not to speak privately with inmates). The Association continues today with monitoring, visiting about 8 prisons a year, and also advocacy. New York prisons are not necessarily any better than those in other states, but at least there are fairly good opportunities to spot patterns of gross abuse, and incentives for prison administrators to avoid them. If

New York's model becomes generalized and operates within an integrated national structure of the kind an NPM represents, greater gains in human rights are likely. Integration into international discussions of torture and visits from the SPT might bring pressure for movement (already evident in some states) away from the excessive use of solitary confinement in state and federal prisons. If our country had frequent unannounced visits to police stations like the ones that take place in Britain, torture might still occasionally occur, but systematic patterns like the torture inflicted on about 135 persons by Chicago police commander Jon Burge, over many years, would be detected and deterred. OPCAT would also apply to military prisons, both in the U.S. and ones under U.S. control abroad, and to CIA detention facilities – all of these places where there have been major abuses.

In the U.S., undoubtedly there would be many objections, expressing fears such as loss of national sovereignty or making prisons ungovernable. Looking at the experiences of countries that have adopted OPCAT should quiet such worries. There is no sign of national sovereignty being abridged or prisons anywhere becoming harder to manage. None of the visit reports indicate any problems about host countries giving the SPT access, and no country reports any negative consequences from SPT visits or the work of its NPM. To be sure, SPT and NPM recommendations do sometimes suggest changing laws or engrained practices, and this can lead to tension and significant differences of opinion. This was evident in the defensive reaction to the SPT's report on Sweden, and in the difficulty of establishing access to military prisons in Britain. But in the end, national governments make their own decisions.

The National Religious Campaign Against Torture (NRCAT) is a leading organization pushing for the U.S. to sign and ratify OPCAT. In November 2011, a delegation of senior religious leaders met with White House staff, and another meeting is planned for November 27, 2012. While NRCAT may persuade President Obama to sign the treaty, clearly the political climate is not ripe for ratification. Nonetheless, the accumulating experience of other countries will some day bring home the many advantages of becoming a party to OPCAT.

Conclusion

People deprived of their liberty are of varied kinds, including convicted prisoners, people arrested or awaiting trial (some of whom will be found guilty while others will be released or acquitted), mentally ill people confined against their will, and many others. Regardless of whether people are rightly or wrongly detained, they are children of God, with the same capacity for suffering as any of us. They have the same right to be free of torture and cruel or degrading treatment as people who are free. Their risk of ill-treatment, however, is much greater, since once detained they are powerless and largely invisible. OPCAT is a practical way to ensure that their human rights are respected.

For more information, visit:
www.nrcat.org/opcat