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Working Paper

Preventing Torture in the OSCE Region through Implementation of the UN Convention against Torture

3 April 2014

Introduction

Switzerland has taken the welcome decision to place the issue of torture prevention back on top of the OSCE's political agenda. Torture is *the* leading focus of the human rights component of Switzerland's 2014 OSCE Chairpersonship-in-Office. The last time torture prevention was placed this high up on the OSCE's political agenda was in 2003, during the Chairpersonship-in-Office of the Netherlands.¹ The emergence of a Supplementary Human Dimension Meeting (SHDM) specifically devoted to the issue of torture prevention can only be applauded.

Switzerland's focus on the prevention of torture in 2014 comes at a time when other states have also decided to reaffirm their commitment to preventing such abuses and to remind other states of its absolute prohibition, despite the setbacks seen in the past decade or so. On 4 March 2014, the Governments of Chile, Denmark, Indonesia, Morocco and Ghana launched a public appeal in Geneva, the so-called Convention against Torture Initiative, inviting other states to join them over the next decade to achieve universal ratification of the UN Convention against Torture, but equally as importantly, to put the Convention into concrete practice.² While all OSCE participating States have now ratified the UN Convention against Torture, much has still to be done by many to make its provisions a reality.

It is with this sentiment in mind that the APT has drafted this Working Paper and is presenting it for discussion at the Pre-meetings of civil society organizations and NPMs on the Prevention of Torture as well as the SHDM on the Prevention of Torture in Vienna in the week beginning 7 April 2014. If all OSCE participating States implemented the UN Convention against Torture and its Optional Protocol torture and other ill-treatment would be effectively prevented throughout the region.

A range of measures need to be taken to prevent abuse from taking place, which have been discussed in detail in other authoritative sources.³ Nonetheless, the APT believes that, even if OSCE participating States just implemented the three measures highlighted below in this draft Working Paper, they would go a long way to preventing abuse from taking place. The APT very much welcomes any responses to the contents of this draft Working Paper (mpringle@apt.ch).

¹ Interested persons should refer to the Outcome Report of this 2003 SHDM and the many recommendations contained therein at: www.osce.org

² For more information please see: http://www.apt.ch/en/news_on_prevention/states-launch-long-term-anti-torture-initiative/#.UzpwAp018Ss

³ For example, please see Amnesty International's Combating Torture (2003) Anything more recent?.

MEASURE 1:

Ratification and Effective Implementation of the Optional Protocol to the UN Convention against Torture (OPCAT) in the OSCE region

"OPCAT is a fundamental instrument for combating torture"

Swiss President and current OSCE Chair, Didier Burkhalter,
addressing the UN Security Council in February 2014

While it is extremely encouraging that the importance of the OPCAT as a means to prevent torture, as succinctly captured in the above comment by the Swiss President, is resonating with a steadily increasing number of states world-wide, universal ratification of the instrument is clearly still some distance away, including in the OSCE region. The universal ratification and effective implementation of the OPCAT by all OSCE participating States would be a major step forward in preventing torture throughout the OSCE's vast territory.

To date, 18 OSCE participating States have still not ratified this crucially important human rights instrument, including some of its largest geographically and most highly populated members whose treatment of persons deprived of their liberty has repeatedly come under international and domestic criticism in past years, including the Russian Federation and the United States of America.

Several OSCE participating States which are also Member States of the European Union (EU) have yet to ratify the instrument, despite regular calls by the EU on third countries to do so. Such countries include (alphabetically) Belgium, Finland, Iceland, Ireland, Latvia and Slovakia. Beyond the EU various countries, some of them with less-than-perfect track-records when it concerns the prevention of torture, remain outside of the growing number of countries to ratify the OPCAT, including Andorra, Belarus, Canada, Holy See, Monaco, Mongolia, San Marino, Tajikistan, Turkmenistan and Uzbekistan. The APT urges such states to do so as soon as possible.

Encouragingly, 39 OSCE participating States have ratified the OPCAT which is undeniably a very positive trend.⁴ Out of these 39 OSCE participating States, 36 have put in place National Preventive Mechanisms (NPMs). Thus, globally, 36 of the world's 57 NPMs can be found in the OSCE region, which is a welcome development despite the aforementioned gaps.

Notwithstanding these clear advances, certain NPMs are still not operational and others do not fully meet some of the key requirements found in the OPCAT text. While these requirements are several⁵, the APT believes that there are **three** basic, key

⁴ See the APT OPCAT Database for more information: <http://www.apr.ch/en/opcat-database/>

⁵ See Articles 17-23 and 35 of the OPCAT text.

requirements which need to be met if any NPM is to stand a chance of being effective in practice. These include the independence of the NPM, its access to adequate human, financial and material resources and the NPM's application of a preventive methodology. In practice certain NPMs lack the prerequisite functional and financial independence and are not provided with the necessary resources to fulfil their NPM mandates, while others have yet to develop an operational methodology aimed at preventing abuses before they occur by tackling system-wide shortcomings, including on the legislative and policy levels. Where NPMs do fulfil these key requirements, such mechanisms are making a discernible difference in practice to protect persons deprived of their liberty.

The Slovenia NPM puts an end to unacceptable cell searches

Having ones material world physically turned upside-down is not pleasant at any time, not least when one is deprived of one's liberty in a confined setting where private space is at a minimum. This scenario is exactly what the Slovenian NPM⁶ found in practice during cell searches in prison in 2012.

Prisoners informed the NPM during its visits that during searches of cells by staff, they would return to their cells after the search to find all their material belongings strewn across the cell floor, including clean clothes, a state of affairs, they complained was highly unacceptable. The Slovenian NPM agreed with them, finding such practices to be in breach of the principle of human dignity guaranteed by Article 21 of the Slovenian Constitution.

The NPM has since then successfully worked with the prison authorities to revise such searches. While this advance may seem trivial to some, for the detainees concerned this change in practice represents a significant change in how they are treated by the authorities.

The UK NPM successfully scrutinizes government legislation and policy

The work of NPMs is not just about visiting places of detention, as some people may think. The mandate of any NPM should encompass a range of activities, including commenting on relevant legislation and policy. These vitally important activities are a central part of any NPM's preventive methodology and can clearly have a positive impact on the lives of persons deprived of their liberty. The United Kingdom's NPM, a complex, albeit effective, arrangement of some 20 individual mechanisms, has been very active on this front.⁷

In the first five years of its existence, for example, its members commented on a range of parliamentary inquiries and bills on topics as diverse as female offenders, youth justice, the manner in which deaths are investigated following police contact and

⁶ The Slovenian NPM currently comprises the National Human Rights Ombudsperson's Office and five NGOs, more information about which can be found at the following address: <http://www.varuh-rs.si/about-us/fields-of-work/ombudsman-as-a-nmp/?L=6#c2299>

⁷ More information about the UK NPM can be found at the following website: <http://www.justice.gov.uk/about/hmi-prisons/preventive-mechanism>

local authority responsibility for children held on remand. In Scotland alone it commented on Scottish Government proposals to abolish prison visiting committees due to their OPCAT non-compliance as well as to reform policing, successfully calling on it to reform custody visiting arrangements. In the case of England and Wales members' comments on a Home Office proposals surrounding the issue of 17-year-olds in custody, resulted in a decision that various additional safeguards be put in place to protect their welfare. Finally, a joint UK NPM response was also made on government proposals to transform the youth custodial system. Quite clearly, the UK NPM views its mandate significantly wider than just visiting places of detention.

Proposed Action Points

The APT believes that the ratification and effective implementation of the OPCAT by all OSCE participating States would be a major step forward in preventing torture in the OSCE region. As such it recommends the following action points:

- All OSCE participating States should ratify the OPCAT;
- OSCE participating States should take measures to ensure the effectiveness of NPMs in practice, including by ensuring they are operationally and financially independent, provided with adequate financial, human and material resources and encourage them to develop and apply a preventive methodology;
- NPMs should develop and apply their preventive methodologies as a matter of priority and review them on a regular basis;
- OSCE-ODIHR and existing OSCE field presences have a key role to play in establishing a region-wide network of NPMs with a view to exchanging good practices and experiences. To date, no such network exists which spans the entire OSCE region;
- OSCE-ODIHR and existing OSCE field presences could also facilitate exchanges between OSCE OPCAT States Parties to exchange positive experiences regarding the implementation of the recommendations of NPMs as well as of the UN Subcommittee on the Prevention of Torture after country visits.

MEASURE 2:

Enhancing the Capacity of Police to Prevent Torture and Other Ill-treatment

“A person arrested by the police is in a situation of particular vulnerability. As the police have special powers, such as the lawful use of force, the detainee is completely in the hands of the law enforcement agents. This imbalance of power creates a situation of risk where abuse and torture may take place.”

Professor Juan Méndez, UN Special Rapporteur on Torture

The police have an essential role to play in protecting human rights. They are responsible for ensuring the security and safety of individuals through enforcing the law. Under international law they are obliged fully to respect human rights, yet they are also obligated to protect human rights against violations by other individuals. In performing these functions they are provided with a series of powers including to arrest persons, conduct searches, monitor demonstrations, detain and interrogate persons and to investigate acts of suspected crime. In carrying out these functions there are clearly risks of abuse of both persons and police powers. It is therefore essential that law enforcement officials are properly resourced in order to avert corruption, professionally trained to perform their duties and that they can be held to account.

Abuses by the police can occur for many reasons, not least because using force in accordance with the principle of proportionality is not an easy task and human rights violations may result from a flawed assessment of a given situation. Abuses can also occur when individual police officers take advantage of their powers by using force to intimidate, extort information or for other reasons. Often, police officers who perpetrate human rights violations know they will not be prosecuted or disciplined, creating a culture of impunity.

As noted by the UN Special Rapporteur on Torture, the risks of abuse in police custody are particularly high during the first few hours of detention, a time when detainees are most vulnerable and when officials are under most pressure to secure information from them. In legal systems that rely heavily on confessions, individuals arrested by the police are at even greater risk of torture and other ill-treatment.

Within the OSCE region certain countries continue to operate on such a confessions-based approach, particularly those countries of the former Soviet Union. In such countries these confession-based approaches pose a greater threat to detainees than does evidence-based policing (which relies heavily on the painstaking gathering of evidence), because they often indirectly encourage unlawful practices and contribute to a culture of abuse within the police. The UN Committee against Torture

has repeatedly felt the need during its examinations of countries from the OSCE region to comment on this fundamentally flawed approach to 'evidence' gathering.⁸

Safeguards and police who respect such safeguards in practice are therefore key to preventing torture and other ill-treatment in police detention. Key safeguards include giving detainees information on their rights, providing access to a lawyer and notifying family members and/or a third party of the person's detention. Similarly, affording someone deprived of their liberty examination by a doctor to confirm or exclude possible allegations of abuse and to render medical assistance if need be is another fundamental safeguard.

Finally, particular mention should be made more generally to the use of force by police. The lawful use of force is a legitimate function of the police, as police officers sometimes operate in a dangerous environment and are entitled to protect both the public at large and themselves. However, whenever force is used there is a potential for abuse. The role of police in executing the forced deportations of economic migrants and/or asylum-seekers and the monitoring of public demonstrations are very topical cases in point.

The highly disturbing television pictures which emerged from the protest actions and clashes between demonstrators and police on Istanbul's Taksim Square in 2013 and Kyiv's Independence Square in 2014 illustrate the critical nature of this latter context and the high risk of torture and other ill-treatment as police exercise their monopoly on the use of force. Both examples clearly underscore how badly wrong such police operations can go if police officers do not conduct themselves in accordance with international human rights law and its principles. Nonetheless, as the following example from Austria well illustrates, progress can be made in respect to how police exercise their right to use lawful force and oversight thereof.

Police use of force under enhanced scrutiny in Austria

For more than a decade-and-a-half the wider use of force by police in Austria has been subject to independent scrutiny. This provision has been in place since 1999 when the country's now defunct police oversight mechanism, the Human Rights Advisory Board (*Menschenrechtsbeirat*) was established in June 1999. This oversight body was borne out of the scandalous death during forced deportation by police of a then 25-year-old Nigerian man, Marcus Omofuma the previous month. However, prior to this senseless and avoidable death, the European Committee for the Prevention of Torture (CPT) had also urged Austria to set up an independent oversight mechanism.⁹ At around the same time Amnesty International had also expressed concern about the ill-treatment of persons by police at the time of arrest, during police custody as well as during police operations such as forced deportations, raids on centres for asylum-seekers and

⁸ For example, please see the UNCAT's examination of Kyrgyzstan in November 2013 (UN Doc. CAT/C/KGZ/CO/2, 20 December 2013 – paragraphs 5 and 13) or its examination of the Russian Federation in November 2012 (UN Doc. CAT/C/RUS/CO/5, 11 December 2012 – paragraphs 6 and 10).

⁹ For a short history of the establishment of the Human Rights Advisory Board please see chapter 2.6 of Amnesty International's *Combating Torture* (2003).

the controversial policing of public demonstrations.¹⁰ The Human Rights Advisory Board which came into being had a wide mandate to visit and monitor all of the above contexts. In doing so, it issued the police with various thematic and visit reports and related recommendations, including in respect to the use of force by police during different operations.¹¹ The CPT looked positively upon this development, stating in a report of a visit undertaken to Austria in 2009: *"The CPT welcomes the fact that major police interventions (such as large-scale raids or policing of street demonstrations) are usually monitored by members of the visiting commissions of the Human Rights Advisory Board."*¹²

In June 2012 the Human Rights Advisory Board was disestablished after Austria ratified the OPCAT and established its NPM under the auspices of the Austrian Ombudsman Board. It was notable that in its mandate the NPM has maintained the function of old to monitor the wider use of force by police, including through *"the observation of forced deportations, large-scale police raids and large events and gatherings."*¹³

Proposed Action Points

The APT believes that law enforcement officials, who are properly resourced, professionally trained and accountable and respect fundamental safeguards in practice, are key to preventing torture and other ill-treatment. As such it recommends the following action points:

- OSCE participating States should take measures to ensure that their police services are well trained, properly resourced, accountable and respect fundamental safeguards in practice;
- OSCE participating States should place a premium on ensuring that police receive adequate and on-going vocational as well as human rights training;
- OSCE participating States should engender serious, meaningful engagement and cooperation between their police services and NPMs on a range of relevant topics with a view to preventing torture and other ill-treatment;
- OSCE participating States should commit themselves to strengthen technical cooperation between their police services with a view to moving away from confession-based to evidence-based approaches to investigating crime;
- OSCE-ODIHR should ensure that annual meetings with police should include a regular theme of the role of police and the prevention of torture and other ill-treatment.

¹⁰ Amnesty International – Austria: Before the UN Committee against Torture – Allegations of Police Ill-treatment (EUR 13/001/2000), 24 March 2000.

¹¹ For more information see: http://www.bmi.gv.at/cms/BMI_MRB/mrb/berichte/start.aspx

¹² CPT/Inf (2010) 5, 11 March 2010 – paragraph 14.

¹³ More information at: <http://volksanwaltschaft.gv.at/menschenrechte/kommissionen/aufgaben>

MEASURE 3:

Effectively Protecting Persons and Groups in Situations of Vulnerability in Detention

“The EU is gravely concerned that sexual orientation and gender identity continue to be used to justify serious human rights violations around the world. LGBTI persons constitute a vulnerable group, who continue to be victims of persecution, discrimination, bullying and gross ill-treatment, often involving extreme forms of violence, including torture and murder.”

EU Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons

As has been highlighted throughout this paper, persons deprived of their liberty are vulnerable because of the imbalance of power created by the fact of detention, irrespective of the setting. However, some people find themselves in situations of specific vulnerability – often because of the social context and of their status in society. These groups include, as highlighted in the excerpt above, LGBTI persons¹⁴, but also children and adolescents, women, persons with disabilities, migrants and others. Such persons are not necessarily vulnerable *per se*, but become vulnerable in detention. This is why we generally speak of “situations of vulnerability” rather than “vulnerable groups”.¹⁵

In addition to the inherent risks posed by deprivation of liberty, any discrimination and prejudice which already exists in society in relation to certain persons and groups is often magnified when such persons and groups find themselves in a detention setting. For example, migrants and foreigners in xenophobic societies, LGBTI populations in homophobic societies, and those with mental illness or intellectual impairment in confession-led legal systems may be more at risk of torture and other ill-treatment by law enforcement officials. Similarly, the risks faced by women in prison in certain OSCE participating States are often a reflection of a wider lack of understanding, prejudicial attitudes and discriminatory practices found in wider society.

It should also not be forgotten that such persons and groups may also be at greater risk from other persons also deprived of their liberty. For example, in police detention and prison racial and ethnic issues, as well as sexual orientation, are among

¹⁴ LGBTI is an acronym standing for Lesbian, Gay, Bisexual, Transgender and Intersex persons.

¹⁵ In 2013 the APT and Penal Reform International published two directly related documents, namely *Women in detention: a guide to gender-sensitive monitoring and LGBTI persons deprived of their liberty: a framework for preventive monitoring*. For more information please see: http://www.apr.ch/en/categories_res/detention-monitoring-2/

key factors that contribute to violence found therein, despite the responsibility of the authorities to ensure that there is no violence among detainees.

Abuses are also borne out of ignorance, in instances where there is a lack of knowledge of the specific needs of certain persons and groups in detention. The plight of migrants and asylum-seekers, including children, held in detention in various OSCE participating States has been well documented in recent years.¹⁶ In other cases, neglect and abuse occur due to the absence of any adequate procedures designed to protect persons in situations of vulnerability in detention. Despite these many concerns, headway is being made to expand greater awareness about the predicament of persons and groups in situations of vulnerability and to address their specific needs.

Parliamentarians shine a light into the darkness of migration detention

In certain countries immigration detention has historically been one of the most opaque areas of public administration. There is therefore an increasing need to look at ways for a variety of actors, including parliamentarians, to work together to monitor places where migrants and asylum-seekers are held and to facilitate a greater level of transparency and accountability in such institutions.

In Europe most parliamentarians have a right to visit detention centres for migrants and asylum-seekers, as part of their mandate as national parliamentarians. Yet a survey conducted by the Council of Europe's Parliamentary Assembly (PACE) in December 2011 revealed that this right is not always known to parliamentarians or used to its full capacity. The APT, together with the Committee on Migration, Refugees and Displaced Persons of PACE, are therefore actively supporting parliamentarians to carry out visits to immigration detention centres. A first training was held in Strasbourg in December 2011 on the key principles and methodology in visiting places of detention. The project has also resulted in a practical guide, *Visiting Immigration Detention Centres*, which was launched in October 2013 to assist parliamentarians carry out such visits. It is hoped that other trainings will be replicated using the guide and video in the months to come.

EU increases protection of LGBTI detainees

The adoption of the EU 'Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons' in June 2013 represented a welcome opportunity to enhance the protection of LGBTI persons outside of the EU, including in places of detention.¹⁷ EU institutions and Member States now have to make every effort to implement this new instrument, in cooperation with civil society, in their relationship with non-EU states. It is notable that the EU Guidelines address for the first time at the EU level the enjoyment of all rights by LGBTI persons based on the principle of the universality of human rights; thus cultural, traditional or religious values cannot be invoked to justify any form of

¹⁶ For example, please see the report of the mission of the UN Special Rapporteur on Torture to Greece, UN Doc. A/HRC/16/52/Add.4, 21 April 2011.

¹⁷ For more information please see:

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf

discrimination against LGBTI persons. With the publication of the Guidelines the EU has taken a significant step forward to protect LGBTI persons deprived of their liberty outside the region.

Proposed Action Points

The APT believes that persons and groups in situations of vulnerability are at increased risk of abuse when deprived of their liberty due to the range of different factors described above. As such it recommends the following action points:

- OSCE participating States should ensure that adequate protection is given to persons and groups in situations of vulnerability and that their specific needs are addressed when deprived of their liberty;
- NPMs should pay special attention to such persons and groups when monitoring places of detention and formulate specific recommendations, including at the legislative and policy levels;
- Future OSCE Chairperson-in-Offices should consider devoting a SHDM to the issue of persons and groups in situations of vulnerability in detention;
- OSCE-ODIHR could support the above process by producing a situational analysis and/or mapping of vulnerabilities in detention throughout the OSCE region.

Final remarks

These three measures should not be the only steps taken by OSCE participating States to prevent torture and other ill-treatment. As all States have now ratified the UN Convention against Torture they clearly have an international obligation to take a much wider series of steps to do so. Nonetheless, the APT believes that the three measures outlined in this paper would reap tangible benefits in the short term and would go a significant way to implement the UN Convention in practice. When launching the Convention against Torture Initiative in Geneva less than a month ago, the Chilean Ambassador to the UN in Geneva, José Luis Balmaceda, on behalf of Chile, Denmark, Ghana, Indonesia and Morocco stated:

“All Member States of the United Nations have pledged to achieve the promise of the Universal Declaration of Human Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Torture is never, under any circumstances justified. Despite a series of advances over the last 60 years, we are still far from keeping this promise to ‘all peoples and all nations’, as proclaimed by the Declaration. Worse still, over the past ten years we have seen repeated attempts to trivialize, and even defend, the use of torture. This is why the Governments of Chile, Denmark, Ghana, Indonesia and Morocco, last week during this Council Session launched an appeal to our fellow members of the United Nations: We can and we must do a better job to protect all persons from torture and ill-treatment - in all parts of the world.”

It is with these fine sentiments in mind that the APT presents this draft Working Paper.