Združeni narodi

Opcijski protokol h Konvenciji proti mučenju in drugim krutim, nečloveškim ali poniževalnim kaznim ali ravnanju

Pododbor za preprečevanje mučenja in drugega okrutnega, nečloveškega ali poniževalnega ravnanja ali kaznovanja

Dvanajsto zasedanje

Ženeva, 15.–19. novembra 2010

PRISTOP PODODBORA ZA PREPREČEVANJE MUČENJA

h konceptu preprečevanja mučenja in drugega krutega, nečloveškega ali poniževalnega ravnanja ali kaznovanja v skladu z Opcijskim protokolom h Konvenciji proti mučenju in drugim krutim, nečloveškim ali poniževalnim kaznim ali ravnanju

I. Uvod

1. Nobenega dvoma ni, da so države pogodbenice Opcijskega protokola h Konvenciji proti mučenju in drugim krutim, nečloveškim ali poniževalnim kaznim ali ravnanju (»Opcijski protokol«) pravno zavezane, da »preprečujejo« mučenje in drugo kruto, nečloveško ali poniževalno ravnanje ali kaznovanje. Člen 2(1) Konvencije, katere pogodbenice morajo biti vse pogodbenice Opcijskega protokola, določa, da »[v]saka država članica izvaja zakonske, upravne, sodne ali druge učinkovite ukrepe, da bi na ozemlju pod svojo jurisdikcijo preprečila mučenje«. Člen 16(1) Konvencije razširja to obveznost in določa, da »[v]saka država članica prevzema obveznost, da bo na ozemlju pod svojo jurisdikcijo preprečila druga dejanja krutih, nečloveških ali poniževalnih kazni ali ravnanja, ki niso dejanja mučenja …«. Kot je pojasnil Odbor proti mučenju v svoji splošni pripombi št. 2, »člen 2(1) zavezuje vse države pogodbenice, da sprejmejo ukrepe za zaostritev prepovedi mučenja«[1]. Čeprav ima obveznost preprečevanja mučenja in slabega ravnanja isti cilj kot prepoved mučenja, je to še vedno obveznost sama po sebi, pri čemer bi morale države, ki ne bi sprejele ustreznih preventivnih ukrepov v njihovi pristojnosti, prevzeti mednarodno odgovornost, če bi se mučenje pojavilo v okoliščinah, v katerih sicer ne bi bile odgovorne.

1 CAT/C/GC/2, odst. 2.

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Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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THE APPROACH OF THE SUBCOMMITTEE ON PREVENTION OF TORTURE

to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

I. Introduction

1. It is beyond doubt that States Parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Optional Protocol") are under a legal obligation to "prevent" torture and other cruel, inhuman or degrading treatment or punishment. Article 2, paragraph 1, of the Convention, to which all States Parties to the Optional Protocol must also be parties, provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Article 16, paragraph 1, of the Convention extends this obligation, providing that "each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment of punishment which do not amount to torture…". As explained by the Committee against Torture in its general comment No. 2, "article 2, paragraph 1, obliges each State party to take actions that will reinforce the prohibition against torture"[1]. Whilst the obligation to prevent torture and ill-treatment buttresses the prohibition of torture, it also remains an obligation in its own right and a failure to take appropriate preventive measures which were within its power could engage the international responsibility of the State, should torture occur in circumstances where the State would not otherwise have been responsible.

1 CAT/C/GC/2, para. 2.

2. Meddržavno sodišče je ob sklicevanju na člen 2 Konvencije opozorilo, da »se vsebina dolžnosti preprečevanja pri posameznih instrumentih razlikuje glede na besedilo zadevnih določb in vrste dejanj, ki jih je treba preprečiti«[2]. Odbor je navedel, da je dolžnost preprečevanja »splošna«[3] in da se vsebina te dolžnosti spreminja, ker »se razumevanje Odbora v zvezi z učinkovitimi ukrepi in priporočila o teh ukrepih stalno razvijajo«[4] , kar pomeni, da »niso omejena na ukrepe iz členov 3 do 16«[5].

3. Pododbor za preprečevanje mučenja meni, da glede na te pripombe ni mogoče oblikovati celovitega stališča o tem, kaj obveznost preprečevanja mučenja in slabega ravnanja pomeni v teoriji. Seveda je mogoče in pomembno določiti, v kakšnem obsegu je država izpolnila svoje uradne pravne obveznosti, ki so določene v mednarodnih pogodbah in imajo preventivni učinek, vendar čeprav je to potrebno, le redko zadostuje za izpolnitev obveznosti preprečevanja: to je tako praksa kot tudi vsebina zakonodajnih, upravnih, sodnih ali drugih ukrepov države, kar je temelj prizadevanja za preprečevanje. Poleg tega je pomembnejše preprečevanje mučenja in slabega ravnanja, kot pa izpolnjevanje pravnih obveznosti. V tem smislu preprečevanje mučenja in slabega ravnanja vključuje ali bi moralo vključevati čim več ukrepov, ki bi v določenih okoliščinah lahko prispevali k zmanjšanju verjetnosti ali nevarnosti pojava mučenja ali slabega ravnanja. Pri takem pristopu ni potrebno le upoštevanje oblike in vsebine ustreznih mednarodnih obveznosti in standardov, temveč je treba pozornost nameniti tudi številnim drugim dejavnikom, pomembnim za izkušnje oseb, ki jim je bila odvzeta prostost, in ravnanje z njimi, pri čemer so ti dejavniki po svoji naravi odvisni od okoliščin.

4. Zato je cilj Opcijskega protokola okrepiti varstvo oseb, ki jim je bila odvzeta prostost, kar naj se ne bi doseglo z določanjem dodatnih vsebinskih preventivnih obveznosti, ampak s prispevanjem k preprečevanju mučenja z vzpostavitvijo preventivnega sistema rednih obiskov na mednarodni in nacionalni ravni ter pripravo poročil in priporočil na podlagi teh obiskov. Cilj takšnih poročil in priporočil ni le zagotavljanje izpolnjevanja mednarodnih obveznosti in standardov, ampak tudi ponujanje praktičnih nasvetov in predlogov, kako zmanjšati verjetnost ali nevarnost mučenja ali slabega ravnanja, pri čemer bodo ta poročila in priporočila trdno temeljila na dejstvih in okoliščinah, ugotovljenih med obiskom. Zato Pododbor meni, da bo lahko največ prispeval k preprečevanju, če bo bolje razumel, kako bi najbolje izpolnil svoje naloge in pooblastila v skladu z Opcijskim protokolom, namesto da opredeli svoja stališča o tem, kaj preprečevanje vključuje ali česa ne vključuje kot abstrakten koncept ali pravna obveznost. Kljub temu obstaja več ključnih načel, ki usmerjajo pristop Pododbora k nalogi preprečevanja in ki bi jih bilo po njegovem mnenju koristno opredeliti.

2 Uporaba Konvencije o preprečevanju in kaznovanju kaznivih dejanj genocida (Bosna in Hercegovina proti Srbiji in Črni gori), temelj zadeve, sodba z dne 26. februarja 2007, točka 429.
3 CAT/C/GC/2, odst. 3.
4 Prav tam, odst. 4.
5 Prav tam, odst. 1.

2. Drawing attention to article 2 of the Convention, the International Court of Justice has observed that “the content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented”.[2] The Committee has said that the duty to prevent is “wide-ranging[3]” and has indicated that the content of that duty is not static since “the Committee’s understanding of and recommendations in respect of effective measures are in a process of continual evolution[4]” and so are “not limited to those measures contained in the subsequent articles 3 to 16[5].”

3. The Subcommittee on Prevention of Torture is of the view that, as these comments suggest, it is not possible to devise a comprehensive statement of what the obligation to prevent torture and ill-treatment entails in abstracto. It is of course both possible and important to determine the extent to which a State has complied with its formal legal commitments as set out in international instruments and which have a preventive impact but whilst this is necessary it will rarely be sufficient to fulfil the preventive obligation: it is as much the practice as it is the content of a State’s legislative, administrative, judicial or other measures which lies at the heart of the preventive endeavour. Moreover, there is more to the prevention of torture and ill-treatment than compliance with legal commitments. In this sense, the prevention of torture and ill-treatment embraces – or should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific.

4. It is for this reason that the Optional Protocol seeks to strengthen the protection of persons deprived of their liberty, not by setting out additional substantive preventive obligations but in contributing to the prevention of torture by establishing, at both the international and national levels, a preventive system of regular visits and the drawing up of reports and recommendations based thereon. The purpose of such reports and recommendations is not only to bring about compliance with international obligations and standards but to offer practical advice and suggestions as to how to reduce the likelihood or risk of torture or ill-treatment occurring and will be firmly based on, and informed by, the facts found and circumstances encountered during the visits undertaken. As a result, the Subcommittee is of the view that it is best able to contribute to prevention by expanding on its understanding of how best to fulfil its mandate under the Optional Protocol rather than by setting out its views on what prevention may or may not require either as an abstract concept or as a matter of legal obligation. Nevertheless, there are a number of key principles which guide the Subcommittee’s approach to its preventive mandate and which it believes it would be useful to articulate.

2 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment of 26 February 2007, para. 429.
3 CAT/C/GC/2, para. 3.
4 Ibid., para. 4.
5 Ibid., para. 1.

II. Vodilna načela

5. Vodilna načela so naslednja:

(a) Na razširjenost mučenja in slabega ravnanja vpliva več različnih dejavnikov, vključno s splošno ravnjo uživanja človekovih pravic in pravne države, ravnjo revščine, socialne izključenosti, korupcije, diskriminacije itd. Čeprav na splošno visoka raven spoštovanja človekovih pravic in pravne države v družbi ali skupnosti ne zagotavlja zaščite pred mučenjem in slabim ravnanjem, zagotavlja najboljše možnosti za učinkovito preprečevanje. V zvezi s tem Pododbor zelo zanima, kakšno je splošno stanje v državi v zvezi z uživanjem človekovih pravic in kako to stanje vpliva na položaj oseb, ki jim je bila odvzeta prostost.

(b) Pododbor mora pri svojem delu upoštevati širše regulativne in politične okvire v zvezi z ravnanjem z osebami, ki jim je bila odvzeta prostost, in sodelovati z osebami, ki so pristojne za te okvire. Poleg tega se mora zanimati za način prenosa teh okvirov v prakso na podlagi različnih institucionalnih ureditev, ki so vzpostavljene za ta namen, njihovo upravljanje ter način njihovega delovanja v praksi. Zato je treba sprejeti celosten pristop k temu problemu, ki med drugim temelji na izkušnjah, pridobljenih z obiski posameznih prostorov za pridržanje.

(c) Preprečevanje bo vključevalo zagotavljanje priznavanja zelo različnih postopkovnih zaščitnih ukrepov za osebe, ki jim je bila odvzeta prostost, in njihovega izvajanja v praksi. Ti ukrepi bodo povezani z vsemi fazami pridržanja, od začetnega prijetja, do končnega izpusta iz pripora. Ker je namen takšnih zaščitnih ukrepov zmanjšati verjetnost oziroma pojav mučenja ali slabega ravnanja, je sprejetje ukrepov primerno ne glede na to, ali obstajajo kakršni koli dejanski dokazi o mučenju oziroma slabem ravnanju.

(d) Poleg tega, da so pogoji pridržanja povezani z vprašanji o krutem, nečloveškem ali poniževalnem ravnanju ali kaznovanju, so lahko ti pogoji v istih okoliščinah tudi način mučenja, če se uporabljajo na način, ki je skladen z določbami iz člena 1 Konvencije. Zato imajo priporočila v zvezi z pogoji pridržanja ključno vlogo pri učinkovitem preprečevanju in bodo povezana z zelo različnimi vprašanji, vključno z zadevami, povezanimi s fizičnimi pogoji, razlogi za zasedenost in ravnmi zasedenosti, zagotavljanjem različnih objektov in storitev ter dostopa do njih.

(e) Obiski v državah pogodbenicah in posebnih prostorih pridržanja morajo biti natančno načrtovani vnaprej, pri čemer je treba upoštevati vse ustrezne dejavnike, vključno s splošnimi pravnimi in upravnimi okviri, materialnimi pravicami, postopkovnimi jamstvi in jamstvi dolžnega pravnega postopanja v zvezi s pridržanjem ter praktične okvire, v katerih se to izvaja. Način izvajanja obiskov, njihova vsebina in priporočila, ki nastanejo na podlagi teh obiskov, se lahko razlikujejo glede na te dejavnike in glede na okoliščine, da se čim bolje doseže temeljni namen obiska, in sicer čim bolj povečati možnosti za preprečevanje in učinek preprečevanja.

(f) Poročila in priporočila bodo najučinkovitejša, če bodo temeljila na temeljiti analizi in bodo dejansko dobro utemeljena. V poročilih o obiskih morajo biti priporočila Pododbora prilagojena okoliščinam, na katere se nanašajo, da se bodo zagotovili čim boljši praktični napotki. Pododbor se pri pripravi priporočil zaveda, da ni logične omejitve glede vrste vprašanj, katerih morebitna preučitev bi lahko imela preventivni vpliv. Kljub temu meni, da se je primerno osredotočiti na vprašanja, v zvezi s katerimi se med obiskom v zadevni državi pogodbenici in na podlagi njenih splošnejših izkušenj ugotovi, da so najbolj problematična, pomembna in uresničljiva.

II. Guiding principles

5. The guiding principles are the following:

(a) The prevalence of torture and ill-treatment is influenced by a broad range of factors, including the general level of enjoyment of human rights and the rule of law, levels of poverty, social exclusion, corruption, discrimination, etc. Whilst a generally high level of respect for human rights and the rule of law within a society or community does not provide a guarantee against torture and ill-treatment occurring, it offers the best prospects for effective prevention. To that end, the Subcommittee is deeply interested in the general situation within a country concerning the enjoyment of human rights and how this affects the situation of persons deprived of their liberty.

(b) In its work the Subcommittee must engage with the broader regulatory and policy frameworks relevant to the treatment of persons deprived of their liberty and with those responsible for them. It must also be concerned with how these are translated into practice, through the various institutional arrangements which are established in order to do so, their governance and administration and how they function in practice. Thus a holistic approach to the situation must be taken, informed by, but not limited to, its experience gained through its visits to particular places of detention.

(c) Prevention will include ensuring that a wide variety of procedural safeguards for those deprived of their liberty are recognized and realized in practice. These will relate to all phases of detention, from initial apprehension to final release from custody. Since the purpose of such safeguards is to reduce the likelihood or rise of torture or ill-treatment occurring, they are of relevance irrespective of whether there is any evidence of torture or ill-treatment actually taking place.

(d) Detention conditions not only raise issues of cruel, inhuman or degrading treatment or punishment but in some circumstances can also be a means of torture, if used in a manner which accords with the provisions of article 1 of the Convention. Therefore, recommendations regarding conditions of detention play a critical role in effective prevention and will touch on a wide variety of issues, including matters relating to physical conditions, the reasons for, and levels of, occupancy and the provision of, and access to, a wide range of facilities and services.

(e) Visits to States Parties and to particular places of detention should be carefully prepared in advance taking into account all relevant factors, including the general legal and administrative frameworks, substantive rights, procedural and due process guarantees pertaining to detention as well as the practical contexts in which they operate. The manner in which visits are conducted, their substantive focus and the recommendations which flow from them may vary according to such factors and in the light of the situations encountered in order to best achieve the overriding purpose of the visit, this being to maximize its preventive potential and impact.

(f) Reports and recommendations will be most effective if they are based on rigorous analysis and are factually well grounded. In its visit reports, the Subcommittee's recommendations should be tailored to the situations which they address in order to offer the greatest practical guidance possible. In formulating its recommendations, the Subcommittee is conscious that there is no logical limit to the range of issues that, if explored, might have a preventive impact. Nevertheless, it believes that it is appropriate to focus on those issues which, in the light both of its visit to the State party in question and its more general experience, appear to it to be most pressing, relevant and realizable.

(g) Učinkoviti domači mehanizmi nadzora, vključno s pritožbenimi mehanizmi, so bistveni del sistema preprečevanja. Oblike teh mehanizmov bodo različne, hkrati pa se bodo mehanizmi izvajali na več ravneh. Nekateri mehanizmi se bodo izvajali znotraj vključenih agencij, z drugimi se bo zagotovil zunanji nadzor na ravni države, s tretjimi pa se bo zagotovil popolnoma neodvisen nadzor, pri čemer bodo ti vključevali državni preventivni mehanizem, ki ga je treba uvesti v skladu z določbami Opcijskega protokola.

(h) Mučenje in slabo ravnanje je lažje preprečiti, če je sistem pridržanja mogoče nadzorovati. Državni preventivni mehanizmi skupaj z nacionalnimi institucijami za človekove pravice in uradi varuhov človekovih pravic imajo pomembno vlogo pri zagotavljanju izvajanja takšnega nadzora. To prizadevanje podpira in dopolnjuje civilna družba, ki ima prav tako pomembno vlogo pri zagotavljanju preglednosti in odgovornosti z nadziranjem prostorov za pridržanje, preverjanjem, kako se ravna s priporniki, in zagotavljanjem storitev, da bi se izpolnile njihove potrebe. Dodaten nadzor se zagotavlja s sodnim nadzorom. Državni preventivni mehanizmi, civilna družba in mehanizem sodnega nadzora skupaj zagotavljajo bistven in medsebojno dopolnjujoč način preprečevanja.

(i) Prizadevanje za preprečevanje ne sme temeljiti na izključnosti. Gre za večplastno in interdisciplinarno prizadevanje. Temeljiti mora na znanju in izkušnjah strokovnjakov na zelo različnih področjih, npr. pravo, medicina, izobraževanje, vera, politika, policija in sistem pridržanja.

(j) Čeprav vse pridržane osebe sodijo v ranljivo skupino, so nekatere skupine, kot so ženske, mladoletniki, pripadniki manjšin, tuji državljani, invalidi in osebe, ki potrebujejo nujno zdravniško ali psihološko pomoč, še posebej ranljive. Za zmanjšanje verjetnosti slabega ravnanja je potrebno strokovno znanje na področju vseh teh ranljivih skupin.

(g) Effective domestic mechanisms of oversight, including complaints mechanisms, form an essential part of the apparatus of prevention. These mechanisms will take a variety of forms and operate at many levels. Some will be internal to the agencies involved, others will provide external scrutiny from within the apparatus of government, whilst others will provide wholly independent scrutiny, the latter to include the National Preventive Mechanism (NPM) to be established in accordance with the provisions of the Optional Protocol.

(h) Torture and ill-treatment are more easily prevented if the system of detention is open to scrutiny. NPMs, together with national human rights institutions and ombudsman's offices, play a key role in ensuring that such scrutiny takes place. This is supported and complemented by civil society, which also plays an important role in ensuring transparency and accountability by monitoring places of detention, examining the treatment of detainees and by providing services to meet their needs. Further complementary scrutiny is provided by judicial oversight. In combination, the NPM, civil society and the apparatus of judicial oversight provide essential and mutually reinforcing means of prevention.

(i) There should be no exclusivity in the preventive endeavour. Prevention is a multifaceted and interdisciplinary endeavour. It must be informed by the knowledge and experience of those from a wide range of backgrounds – e.g. legal, medical, educational, religious, political, policing and the detention system.

(j) Although all those in detention form a vulnerable group, some groups suffer particular vulnerability, such as women, juveniles, members of minority groups, foreign nationals, persons with disabilities, and persons with acute medical or psychological dependencies or conditions. Expertise in relation to all such vulnerabilities is needed in order to lessen the likelihood of ill-treatment.