



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

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## 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 or 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". 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.

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". The Committee has said that the duty to prevent is "wide-ranging" 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" and so are "not limited to those measures contained in the subsequent articles 3 to 16."

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.

### 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) 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.