

The Optional Protocol to the UN Convention against Torture (OPCAT)

A SIGNIFICANT MECHANISM FOR TORTURE PREVENTION

■ By ELLECCER 'BUDIT' CARLOS

Towards preventing torture

SINCE THE early 70s, existing primary means to combat the practice of torture have gone two separate but complementing ways. The growing concern about the widespread and systematic use of torture led to the construction of legal norms and mechanisms to prohibit and prevent its practice. The negotiations led to the 1984 adoption of the United Nation's Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) and its implementing body, the UN Committee against Torture. The UNCAT serves as the universal legal framework that bans the use of torture anywhere and under any circumstance.



Local and international civil society leaders during a forum for the ratification of the Optional Protocol to the UN Convention against Torture (OPCAT).
Photos: BALAY Rehabilitation Center, Inc.

On the other hand, a group of international organizations also envisaged a new type of international human rights body to combat torture. The idea was to prevent rather than react to violations, premised on dialogue rather than confrontation with State parties. This idea was first introduced by the freedom from torture activist and retired Swiss banker, Jean-Jacques Gautier. After assessing the existing means used to battle torture in different parts of the

world, he concluded that the methods used by the International Committee of the Red Cross in ameliorating the conditions faced by prisoners of war and political prisoners were by far the most effective in preventing abuses. Hence the proposal to establish an international visiting system was conceived that would be grounded on regular inspections by outside experts to any place of detention at any time.





The Swiss Committee Against Torture, now called the Association for the Prevention of Torture, was set up as a platform for Gautier's advocacy. The idea attracted the interest of other international NGOs, notably Amnesty International and the International Commission of Jurists (ICJ), which then forged alliances with several states.

The Optional Protocol formula

Essentially, an Optional Protocol is an addition to an international treaty adopted at the same time or after the treaty. It introduces provisions and/or procedures absent from its parent treaty which is complementary to those present. It is in essence a legal strategy for states parties interested to update, enhance or reinforce the existing provisions of the original treaty. In the case of OPCAT, only state parties to the UNCAT are eligible to adhere to the Optional Protocol.

The OPCAT is designed to be a practical additional aid to state parties in carrying out their obligations to prevent torture and other forms of ill-treatment. The Philippines' adoption and implementation of the OPCAT will ensure better and more effective compliance to its obligations set forth in Article 2 of the UNCAT - to "take effective measures to prevent acts of torture in any territory under their jurisdiction."

There is much to be done to humanize the conditions of places of detention in the Philippines.

The ICJ had pioneered the concept of a viable formula to attain a visiting scheme at the UN level. Since many states refuse admission to the UNCAT, the institution proposed that such a mechanism not be incorporated in the mother treaty but rather take the form of an Optional Protocol to the Convention. Among the Latin American states that developed an interest in this particular approach, Costa Rica took the initiative to formally submit a draft Optional Protocol to the Convention against Torture in 1980. The draft's examination was sadly postponed until after the adoption of the UNCAT.

Nevertheless, the promoters of the visiting mechanism shifted their efforts to establishing the system at regional levels. The Committee for the Prevention of Torture, through the Council of Europe's European



Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment came into force in February 1989. It has been visiting and examining places of detention since 1990 through its independent experts. The CPT's success in seeing the decline of incidents of torture and ill-treatment in Europe has validated the efficacy of regular visits to places where individuals are deprived of their liberty. Hence, the accumulated practical experience of the CPT had proven useful in providing guidance to putting the OPCAT in place.

In March 1992, the UN Commission on Human Rights established an open-ended Working Group to draft an Optional Protocol to the UNCAT. This began the ten-year process of conceiving the OPCAT at the UN, which eventually resulted in its adoption by an overwhelming majority (127 votes in favor, with only 4 against and 42 abstentions) at the UN Gen-

eral Assembly on December 18, 2002.

Under the OPCAT, 20 adhesions to the treaty are required before it could go into force and bring into practice the system of visits. In June 2006, the OPCAT finally entered into force. Currently, there are 34 signatures and 34 ratifications to the OPCAT globally. In Asia, only two countries (Maldives and Cambodia) had ratified the OPCAT.

The Philippines will be the third Asian country to ratify the Optional Protocol.

Conditions of places of detention in the Philippines

There is much to be done to humanize the conditions of places of detention in the Philippines. The subhuman existence of inmates can be ascribed to several major aspects which are deeply rooted in the Philippines' criminal justice system. The Philippine judicial system is wracked by anomalies and is



Photos: BALAY Rehabilitation Center, Inc.

awfully understaffed, making for over-congested courts and extremely slow judicial processes.

Since there is also an absence of an effective arbitration system at the community level, trivial disputes often end up as cases being filed. It is therefore not surprising why there is extreme overcrowding of remand centers or jails where individuals are awaiting or undergoing trial. Over-congestion is the most punishing aspect of doing time. It is dangerous to health and to human life. It breeds diseases, breaks down discipline, exacerbates tension and brutalizes the individual.

Dirty tap water, dingy toilets, sub-standard meals and medical facilities unfit for treating the most minor of complaints characterize the conditions in a typical facility in the Philippines.

The correctional system in the Philippines is fragmented into three custodial institutions

THE CAMPAIGN FOR OPCAT RATIFICATION

THE LOCAL campaign for OPCAT began in August 2005 when the Rehabilitation & Research Centre for Torture Victims (RCT), a Copenhagen-based institution working for the eradication of torture at the international level and focused on the OPCAT ratification in many countries in the world, sent a representative to conduct a workshop on torture prevention as well as affirm the RCT's intent to support the Philippine lobby for the instrument.

The Association for the Prevention of Torture (APT), the Geneva based human rights lobby NGO and one of the institutions that conceived and pushed for the adoption of the OPCAT at the UN level, joined the efforts in April 2006. It co-sponsored with the RCT and the Task Force Detainees of the Philippines a Freedom from Torture seminar for civil society organizations. The delegation subsequently visited high level officials of executive departments to introduce and promote the instrument.

Since then, the United Against Torture Coalition (UATC) member organizations collectively promoted the Philippines' adhesion to the OPCAT at various levels. In 2006 and 2007, the awareness raising campaign went nationwide, targeting grassroots stakeholders and regional offices of executive departments and the Commission on Human Rights to gather support for lobby efforts.

Since the concurrence of the executive departments was necessary for the President's approval of the instrument, courtesy calls with the secretaries of executive departments were made. At the same time, lobby at the legislature was also carried out.

Meetings with mid-level officials of the various executive departments such as the DILG, DOH, DOJ and DND as well as relevant committees of the House



of Representatives were also held.

All these activities led to the National Multi-stakeholders Conference for the OPCAT in November 2006. The OPCAT campaign also produced the House of Representatives' resolution recommending the Philippines' adoption of the OPCAT and the Presidential Human Rights Committee's (PHRC) resolution (signed by all concerned department secretaries) recommending to the President the approval of the treaty.

The idea of piloting a regional initiative towards supporting country level campaign for the OPCAT came into being in February 2007. A Regional Working group was formed that included participating countries such as Cambodia, Sri Lanka, Bangladesh and the Philippines. For the Philippines, BALAY Rehabilitation Center served as the focal organization for the OPCAT campaign. The regional initiative was led by the Asian Human Rights Commission, with RCT acting as the over-all anchor for the campaign.

It was serendipitous to the OPCAT campaign that the Philippines became interested in having a seat at the soon-to-be es-

tablished UN Human Rights Council (the UNHRC replaced the UN Human Rights Commission). In its bid for a seat in 2006, among the GRP's pledges was "to strengthen domestic support for the ratification of the OPCAT."

The GRP subsequently gained a one-year term at the new UN body. It reaffirmed its pledges at the end of its term in 2007 and was re-elected for another three-year term.

As a member of the UNHRC, the Philippines was among the first batch of countries subjected to the Universal Periodic Review this April. The adhesion to the OPCAT was among the human rights commitments that the Philippine mission to Geneva had highlighted during this event. Upon the mission's return to the Philippines, the President's concurrence to the OPCAT was the first human rights concern they worked on and accomplished. The OPCAT was signed by President Arroyo and transmitted to the Senate President on April 22, 2008.

On the 28th of April, the Senate President formally endorsed the OPCAT to the Committee on Foreign Relations headed by Sen. Miriam Defensor Santiago. ■



Working for an end to torture: participants in a multi-stakeholders forum on OPCAT.

Photo: BALAY Rehabilitation Center, Inc.

overseen by three main entities, the Bureau of Jail Management and Penology, the Bureau of Corrections and the provincial governments that are in charge of provincial jails. There is no national standard that serves as a guidepost in maintaining acceptable living standards in the facilities or to monitor programs that aim to effectively reform individuals for reintegration into society as productive members. Each custodial entity is left to their own operation schemes.

Corrupt, poorly trained and underpaid correctional officers are common. They make up a correctional force that is exceedingly undermanned. In order to keep the institution moving, authorities adopt an alternative system of inmate governance by default. The gang system is the dominant program of action in the Philippines where authority is delegated to senior inmates.

Jail operations manuals are selectively implemented. Although order is kept, the use of violence in administering cell justice has become customary. Without these mechanisms, the jail system would simply collapse. Notwithstanding these realities, the correctional system

remains the least prioritized sector in budget legislation. Combined with a dysfunctional policing system, this retributive and punitive setup most often harden those deprived of their liberty.

Customary instruments and legal mechanisms in the country

Local and international legal frameworks clearly delineate the obligation of the Philippine government to take measures to prohibit and actively prevent the use of torture in the country. Likewise, other cruel, inhuman or degrading treatment or punishment are proscribed in their provisions as well. They are the following:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

(Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights);

“No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommu-

Corrupt, poorly trained and underpaid correctional officers commonly make up a correctional force that is exceedingly undermanned.

nicado, or other similar forms of detention are prohibited.”

(1987 Philippine Constitution Art III. Sec. 12 (2));

The following six of the seven core UN treaties (to which the Philippines is a state party) have provisions that in one form or the other prohibit the use of torture and other forms of ill-treatment:

1. International Covenant on Civil and Political Rights and its two Optional Protocols (ICCPR)

2. International Covenant on Economic, Social and Cultural Rights (ICESCR)
3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
4. International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
5. International Convention on the Rights of the Child (CRC)
6. International Covenant on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRAMW).

The seventh core UN treaty that we have adhered to is the comprehensive legal framework that deals with the universal understanding, prohibition and prevention of torture and other cruel, inhuman or degrading treatment or punishment as well as victims’ access to restitution which is the *Convention Against Torture* or *UNCAT*.

The Standard Minimum Rules for the Treatment of Prisoners is a set of guidelines for international and domestic laws to uphold humane practices and principles in the treatment of indi-

viduals deprived of their liberty which includes the living conditions they are afforded by their custodians. Although it is not legally binding, the Philippine government institutions profess to having actively taken steps towards these universally set standards.

A novel system that is action-oriented

The operational experience of entities such as the ICRC and the European Committee for the Prevention of Torture have demonstrated how regular visits to places of detention are effective in practice. *First*, because authorities in charge of places of detention shall be subjected to external control, this will have a deterrent effect since they do not wish to be subjected to external criticism. *Second*, visits allow independent experts to examine firsthand, without witnesses or intermediaries, the treatment of persons deprived of their liberty and to observe the conditions of the places where they are kept. Based on what has concretely been observed, experts can make realistic and practical recommendations and enter into dialogue with authorities so that the problems detected may be resolved. Finally, visits carried out by independent entities and individuals are an important source of moral support to those deprived of their liberty.

The OPCAT is an action-oriented system and differs from other treaties that are part of the UN system. UN human rights instruments and their monitoring bodies define rights and set out to receive and review reports or complaints submitted by state parties and other actors. This practice of complaints and condemnation is in no way at all employed in the OPCAT's modus operandi. The OPCAT approach is to provide expert's advice based on the state's circumstances as the basis for cooperative institutional reform. Confidentiality of communication and mutual trust are key principles of the OPCAT.

The novelty of the OPCAT

VISITING COMMITTEES OPERATING IN THE PHILIPPINES

- The Philippine Alliance of Human Rights Advocates (PAHRA) Inter Agency Committee for Prisoners' Welfare & Rights, which include the Task Force Detainees of the Philippines, BALAY Rehabilitation Center and Medical Action Group.
- The Commission on Human Rights Assistance and Visitorial Office (CHR-AVO)
- Inter-Government Agency and NGO Committee for Prison Reform
- Legislative Committees at the House of Representatives and the Philippine Senate with Oversight Functions
- Department of Justice Magistrates mandated to conduct prison and jail inspections
- Office of the Ombudsman
- Public Attorney's Office (PAO)
- Prison Ministries e.g. Jesuit Prison Service (1994), the Catholic Bishops' Conference of the Philippines - Episcopal Commission on Prison Pastoral Care
- International Committee of the Red Cross (ICRC)

For more information about the OPCAT campaign in the Philippines, visit www.opcatph.com.

is emphasized in two other ways. *First*, the system that the OPCAT establishes places emphasis on preventing violations rather than reacting to them once they have already occurred. *Second*, it will establish a dual system of prevention at both the international and national levels through visiting bodies. These international and local visiting bodies will work in a complementary way. They shall meet and exchange information, if necessary on a confidential basis. The international body can offer training and technical assistance to its local counterpart to enhance their capacities. This complementary relationship is expected to ensure the effective implementation of international standards at the local level.

The OPCAT basically consists of international and local mechanisms. Visits are at the core of the mandates of the international and local arms. The international mechanism which was established in December 2006 (elections among candidates nominated by states par-

ties to the OPCAT) is called by the Subcommittee on Prevention which is directly responsible to the Committee Against Torture, its parent UN body.

Because the number of states that have ratified the OPCAT is below 50, there will be 10 independent experts that shall comprise the Subcommittee on Prevention. Upon exceeding 50 ratifications, the number of experts appointed to the Subcommittee shall become 20. The subcommittee will conduct in-country visits in all states parties to the OPCAT. Following the visits, the subcommittee will generate a report containing recommendations to relevant authorities. The report will remain confidential unless the state party gives its consent for publication.

Given the many states that the subcommittee has to visit, the bulk of the visits within countries shall be performed by the local arm, known to be the OPCAT's main engine (officially referred to by the instrument as the National Preventive Mechanism/s). When the OPCAT enters into force, within one year

of ratifying or acceding to it, states parties must have in place one or several national preventive mechanisms. The OPCAT's provisions do not specify a particular type of national preventive mechanism. It stipulates the following basic criteria:

- Functional independence, meaning they should be separated in some way from the executive and judicial administrations.
- Required capabilities and professional knowledge to carry out their mandate.
- Necessary resources to function effectively

The NPMs are to be established or existing bodies may be designated by the state based on the need of the country. Examples of institutions that were designated NPMs under the OPCAT system already installed elsewhere are the national human rights institutions, the Ombudsmen, the parliamentary commissions or the NGOs. The NPMs must be able to operate without any interference from state authorities.

It is upheld by many who have been focused on the OPCAT's design that a pluralistic, multidisciplinary composition is the most appropriate, to include lawyers, doctors (forensic specialists and psychologists), NGO representatives, as well as specialists in issues such as human rights, humanitarian law, penitentiary systems and the police.

Unlike the Subcommittee on Prevention, the NPMs may make their observations and recommendations public. Like the Subcommittee on Prevention, the NPMs are mandated to conduct regular and follow-up visits to places of detention and assess living conditions and the treatment of those deprived of their liberty. After visits, they are required to transmit their recommendations and observations to the State. The State has an express obligation to examine the recommendations of the Subcommittee or the NPM and enter into a dialogue with it on

implementing proposed measures. The Subcommittee and the NPMs are guaranteed the following powers:

- Access to information concerning the number of persons deprived of their liberty, as well as the number of places and the location;
- Access to all information referring to the treatment of those persons as well as their conditions of detention;
- Access to all places of detention and their facilities;
- An opportunity to have private interviews with persons of their choice;
- The liberty to choose the places to be visited.

The places which shall be visited by the Subcommittee on Prevention and the National Preventive Mechanisms are broadly defined by the OPCAT's provisions. They are to be all places where individuals are deprived of their liberty and should include but not be limited to: police stations; security force stations; all pre-trial centers, remand detention centers, prisons for sentenced persons; juvenile centers; immigration centers; psychiatric institutions, places of administrative detention and drug rehabilitation centers.

In essence, with the Philippines' adhesion to and effective implementation of the OPCAT, the country's places of detention will be successfully opened to independent national and international scrutiny.

OPCAT's advantages to the Philippines

As a practical tool to assist the government to comply to existing obligations

The OPCAT will be an effective aid for the Philippines to put in effect its obligations to take measures to prevent torture and other forms of ill-treatment. The instrument will help in the fulfillment of obligations to other treaty bodies besides the Convention Against Torture that also define the need to pro-

tect individuals deprived of their liberty, such as children and women.

A system to advise the government on legislative reforms

Since the Subcommittee on prevention and the NPM will be made up of recognized experts in the field concerning individuals deprived of their liberty, they will be well positioned to provide the government with useful, practical and expert advice on future legislative reforms.

A new source of international financial assistance

A special fund will be made available to states parties to finance their implementation of recommendations made by the subcommittee or the NPM. This fund is open to states which are willing to improve the conditions of places of detention but face financial limitations.

Expert advise and training

The Subcommittee on Prevention can recommend that international experts assist the NPMs in providing trainings and advise on how to enhance the competencies and professionalism of those in charge of the treatment of individuals deprived of their liberty, including the law enforcement and members of the visiting mechanism. In the Philippines, we face intricate social and institutional problems and shall definitely be in need of external technical assistance.

Credibility to lobby the OPCAT elsewhere

In adopting the OPCAT in our own territory, the Philippine government and civil society organizations have already gained moral ascendancy to lobby the OPCAT elsewhere in the world for the advancement of human rights and the protection of Overseas Filipino Workers. Many Filipinos are at risk of being subjected to torture, ill-treatment and even execution once admitted to places of detention in host countries where they have chosen to work. OPCAT adoption in other coun-

tries will help deter human rights violations that may befall our *kabayans* abroad. We might even set the tone for other countries to ratify and implement the OPCAT.

Ratification and effective implementation

While OPCAT has already been ratified, putting the instrument in place as an effective system in the Philippines is the greater challenge. The more arduous task lies in seeing through the government and civil society organizations' sincere steps to effectively implement it.

An enabling law needs to be crafted to serve as the legal framework for making the treaty operational at the country level. The most challenging aspect of local implementation is the design of an effective and appropriate national preventive mechanism that should be embedded in such a law.

Although the contractual obligation of the Philippines to the Subcommittee on Prevention is fairly simple and clearly outlines the task that lies ahead, to determine what NPM form will best work in the country is far from easy, especially that the Protocol does not elaborate how this will be achieved.

Apart from the significance of thematic independent experts, the civil society organizations' participation is also quite relevant especially with the best practices in prison visits that may be found from their experiences. Their contributions may be incorporated in the system at least for monitoring and oversight in the practice and operations of the NPM. This type of NPM structure can already be seen in other countries that have set up their own in compliance to the OPCAT.

The geographical aspect of the work that the NPM will be doing is an important factor to consider in its design. Covering an entire archipelago makes methods of visiting quite challenging. Thus, an important question that needs to be addressed is whether our country's NPM will be a highly central-

ized body or a loose aggrupation of provincial bodies - or a combination of both.

Certainly, there is a need for a central institution that would coordinate and harmonize the entire system. But the most relevant consideration is that both independent organizations and the government must put in much effort in doing the necessary research and other means to draw up a model that best suits and is advantageous. It is important to note that the Philippine government has the option to create a new NPM or appoint an existing body such as the National Human Rights Institution.

If that situation happens, there is danger that the implementation of the OPCAT in the Philippines - as with most of the treaties that the government agreed to be bound to - may be reduced to a mere charade. This is especially true if the operational procedures, the policies and practices and even the mandate of the Commission on Human Rights do not see changes that meet the criteria as stipulated in the instrument.

Non-government organizations should seriously consider establishing well grounded standpoints on effective NPM forms. This should be arrived at after a process of consultations and serious studies on the local conditions, best practices among groups already conducting visits, and the selection process for the NPM candidates, among other considerations.

At any rate, civil society organizations need to ensure that they are a part of the NPM design negotiation process every step of the way. And should CSOs decide to lobby for a composite mechanism, i.e., a system that combines existing institutions inclusive of participating experts and independent organizations, some CSOs may need to decide on the role that they would like to play within the framework of NPM's work. ■

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