

UN's national preventive mechanism for the prevention of torture

Introduction

The Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force internationally in June of 2006. The Protocol was used to create a new system of oversight with the aim of preventing torture and other degrading treatment in places of detention. The two pillar system is comprised of the new UN Subcommittee on Prevention of Torture and a National Prevention Mechanism (NPM) to be established or designated in each State Party. Both the National Prevention Mechanism and the Subcommittee on the Prevention of Torture have a mandate to visit any place under the jurisdiction and control of the State Party where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

Each State Party will establish or designate one or more NPMs to prevent torture and inhuman treatment in the State Party. Different states have devised different solutions to designating an NPM. In Denmark, for example, the Parliamentary Ombudsman was designated as an NPM, whereas France established a new body. In Slovenia, the ombudsman together with non-governmental organizations were designated as the National Preventive Mechanism.

Finland's Preparations for Ratification

Finland signed the Protocol on the 23rd of September, 2003. The Protocol entered into force internationally on the 22nd of June, 2006. Soon after the Protocol was signed, the Ministry for Foreign Affairs of Finland started making preparations for the ratification of the Protocol. In a statement request dated 4.6.2004 and addressed to various authorities, the Ministry

requested that special attention be paid to which body could function as the National Preventive Mechanism required by the Protocol, as well as what legislative changes ratifying the Protocol would necessitate.

The statement by the Parliamentary Ombudsman's office directed attention to legislation pertaining to the Ombudsman stating that the Ombudsman shall perform inspections of public offices and institutions, as well as other subjects of oversight, to familiarize his or her office with matters within his or her jurisdiction. According to the Act, the Ombudsman must perform inspections of prisons and other closed institutions to oversee the treatment of inmates. The statement considered the option of establishing a new oversight body in Finland to perform duties already included in the mandate of the Parliamentary Ombudsman problematic.

In September 2006 the Ministry for the Foreign Affairs of Finland established a committee consisting of representatives from various ministries and the Parliamentary Ombudsman's office to prepare for the national ratification of the Protocol. From the very first meetings, the preliminary position of the committee was that establishing a new body to oversee closed institutions in Finland was neither necessary nor sensible, considering the fact that the oversight of detained persons is a special duty of the Ombudsman.

At the time this article was being written it seemed likely, based on the available information, that the Parliamentary Ombudsman was going to be designated as Finland's National Preventive Mechanism. For this reason, it's of interest to look at whether the mandate and methodologies of the Ombudsman fulfill the criteria demanded of a National Preventive Mechanism by the Protocol.

Based on the Protocol, State Parties guarantee the operative independence of the NPM. The NPM's experts must retain the required level of professional competence and expertise. When choosing experts, efforts must be made to guarantee gender balance, as well as adequate representation of all ethnic and minority groups in the country.

The NPM must be provided with the jurisdiction to regularly examine the treatment of the persons deprived of their liberty in places of detention, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment. Furthermore, NPMs must have the right to make recommendations to relevant authorities on how to improve the treatment and conditions of detained persons. The NPM must also have a mandate to make recommendations and observations concerning existing or draft legislation.

In this article, I'll look at whether the Parliamentary Ombudsman of Finland fulfills the criteria for a National Preventive Mechanism. For this question to be answered, at least the following questions must be examined: Is the Ombudsman an independent body and does it have access to the multi-professional resources demanded by the Protocol? Does the Ombudsman conduct preventive inspections or are the inspections in reaction to errors and shortcomings? Are the inspections regular or does the Ombudsman also perform surprise inspections? Do the inspections have the ability to receive all the required, and if necessary confidential, information on the target of inspection? Does the Ombudsman have a mandate to make recommendations on how the target of inspection can improve its practices?

Before I examine the aforementioned questions, we must take a look at the current jurisdiction of the Ombudsman, especially as far as it pertains to the subject matter dealt with in this article. The Constitutional Provisions Pertaining to the Parliamentary Ombudsman of Finland state that the Ombudsman shall ensure that courts of law, other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfill their obligations. In the performance of his or her duties, the Ombudsman monitors the implementation of fundamental rights, liberties and human rights.

The Ombudsman submits an annual report to the Parliament on his or her work, including observations on the state of the administration of justice and on any legislative shortcomings. The tasks of the Parliamentary Ombudsman are set out in more detail in the Parliamentary Ombudsman Act. According to the act, the Ombudsman fulfills his or her duties by investigating complaints, taking matters under investigation by his or her own initiative or conducting inspections of public offices and institutions. The Ombudsman has a special duty to make on-site inspection visits to prisons and other closed institutions to oversee the treatment of inmates.

If necessary, the Ombudsman may express to the subject his or her opinion concerning what constitutes proper observance of the law, or draw the attention of the subject to the requirements of good administration or to considerations of fundamental and human rights. In a matter within the Ombudsman's remit, he or she may issue a recommendation to the competent authority that an error be redressed or a shortcoming rectified.

The Independence of the National Preventive Mechanism

For a National Preventive Mechanism to be effective, it has to be independent. The Protocol requires that State Parties guarantee the operative independence of the NPM and its staff. Independence includes, among other things, independence from other officials or courts of law, independent planning, financial independence, as well as a strong legal base that secures this independence. The European Committee for the Prevention of Torture (CPT) has emphasized the fact that members of a visiting mechanism should always be independent of the administration of the places visited.

Independence is one of the cornerstones of the Ombudsman institution. The Ombudsman and his or her staff are independent of the administration. The Ombudsman enjoys a strong constitutional mandate for his or her duties, which strengthens the institution's strong, autonomous position. The Ombudsman is free to appoint his or her staff, as well as decide on its working methodology.

Even though the Ombudsman's budget is a part of the Parliament's budget, the Ombudsman can be considered financially independent. The autonomy and transparency of the Ombudsman's functions is further supported by the fact that he or she has to submit to the Parliament a declaration of business activities and assets and duties and other interests which may be of relevance in the evaluation of his or her activity as Ombudsman. Even though the Ombudsman is elected by the Parliament of Finland, he or she does not take orders or instruction from the Parliament. The autonomy of the Ombudsman is not imperiled by the fact that the Constitution allows the dismissal of the Ombudsman before the end of his or her term, but only for extremely weighty reasons.

Regular Visits

'Regular' visits to closed institutions to inspect the treatment of detained persons is the most important duty of the National Preventive Mechanism. The purpose of regular visits is to establish a monitoring mechanism that prevents torture and other inhuman treatment in places of detention as effectively as possible. The Protocol does not define what is meant by 'regularly'. It is, however, important that visits are carried out at frequent intervals to monitor that shortcomings uncovered on previous visits are rectified and to establish a constructive dialogue with the object of inspection. The frequency and regularity of the visits are left up to the discretion of each National Preventive Mechanism. Inspection frequency is influenced

by resource availability and the legal protection afforded to persons deprived of their liberty in closed institutions.

The European Committee for the Prevention of Torture has developed criteria for interpreting the meaning of regularity. The CPT has been conducting visits to closed institutions for years and has worked on developing the principles and standards of prison inspection visits. In Member States of the Council of Europe, the jurisdiction of the CPT is much the same as that of the new UN Subcommittee on Prevention of Torture.

According to the CPT, one of the most important factors of effective prison visits are that they are both regular and unannounced. In its recommendations to Member States, the CPT considers visits to prisons carried out only once a year as decreasing the effectiveness of inspections. They do not consider this 'regular'.

In reports dealing with Finland, the CPT has pointed out that inspection visits to closed institutions should be regular and, when necessary, unannounced. The CPT has generally considered the frequency of inspections undertaken by the Ombudsman as being insufficient, as some Finnish prisons had received only one visit in three years. The Committee has also criticized Finland for the fact that the visits by the Ombudsman are not unannounced. In a report published in 2008, the CPT recommended the authorities provide the Ombudsman (or another independent party) with sufficient resources to perform regular, unannounced inspection visits to prisons.

The Association for the Prevention of Torture (APT) has also made its own recommendations on how to interpret the regularity of inspection visits. According to the APT, an effective and well co-ordinated national preventive mechanism could consist of three different kinds of inspections: thorough, multidisciplinary inspection with advance notification, surprise inspections and follow-up inspections.

Concerning the frequency of visits, APT's approach is flexible: the frequency of visits should depend on the inspection site and the inmates' need for protection or the types of problems encountered on previous visits. Information provided by NGOs should be utilized in deciding on the appropriate inspection, as should prior visits to the same closed institution by other monitoring bodies.

The UN Special Rapporteur on Torture has placed special emphasis on the importance of unannounced visits in his reports. According to his recommendations, surprise inspections provide a real and distortion-free picture of conditions at a facility. If prior notification of inspec-

tions is provided, the conditions at the site can be improved or the staff or inmates of the closed institution given inappropriate instructions with the aim of influencing the inspection.

Are the inspection visits undertaken by the Ombudsman regular in a way required by the Protocol? The Ombudsman performs approximately 70 to 80 inspections every year. In 2007, the Ombudsman inspected 69 locations and in 2008 71 locations. The biggest prisons were inspected every two or three years, closed psychiatric hospitals every few years. The refugee detention centre was last inspected in 2006. Over the last few years only a couple of police jails have been inspected annually.

The Protocol does not provide a detailed definition of the required inspection frequency. For this reason, it can be stated that the Ombudsman fulfills at least the Protocol's minimum requirements for inspection.

If the Ombudsman is designated as the National Preventive Mechanism, its inspection visit frequency should be increased and inspection methodologies developed further based on the CPT's recommendations. Owing to the amount of inspection sites that fall within the jurisdiction of the Ombudsman, this may prove difficult. The amount of inspections and their regularity can be increased if the office's staff undertake independent inspections. Inspection frequency can be improved by developing modern inspection methods, clarifying inspection objectives, improving reporting and by creating a clear set of rules for inspection follow-ups. Inspections should be continuously developed, based on good experiences. In addition to the less frequent, but thorough inspections, it's possible to perform shorter follow-up inspections or inspections based around specific themes.

From a jurisdictional point of view, no obstacles preventing the Ombudsman from performing unannounced inspections exist. Over the last few years, surprise inspections have been relatively rare. An announced inspection based on comprehensive background materials is well suited to Finland's open judicial culture. Increasing the efficiency and credibility of the inspection functions, however, requires an increase in the frequency of unannounced inspection visits. Unannounced inspection visits – in the words of a policeman, "real" inspections – undertaken alongside other kinds of inspections provide a more realistic picture of the object of inspection and its potential shortcomings, and thus improves the treatment and legal protection of the inmates.

Places of Detention

According to the Protocol, the National Preventive Mechanism must have the right to visit any place under the jurisdiction of the State Party where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. These include prisons, remand prisons, psychiatric facilities, juvenile homes or detention centres for asylum seekers.

The Protocol includes places where persons are or may be deprived of their liberty. This definition allows it to extend its jurisdiction to suspected secret places of detention. People are or may be deprived of their liberty on, for example, ships or airplanes. The Protocol's definition of what constitutes a place of detention is thus broad and covers, in principle, places of detention maintained by private parties, insofar as such exist at the instigation or with the consent of a public authority in the State Party. In other words, inspections by the National Preventive Mechanism in the State Party can't be avoided by holding persons deprived of their liberty at private or secret sites.

According to the Parliamentary Ombudsman Act, the Ombudsman shall carry out the on-site inspections of public offices and institutions necessary to monitor matters within his or her remit. Specifically, the Ombudsman shall carry out inspections in prisons and other closed institutions to oversee the treatment of inmates. Closed institutions refers to both sites maintained by public authority and private parties if they are performing a public task. In the context of an inspection, the Ombudsman and his or her representatives have the right of access to all premises and information systems of the public office or institution, as well as the right to have confidential discussions with the personnel of the office or institution and the inmates there.

The right of the Ombudsman to inspect prisons closed psychiatric institutions and other closed institutions maintained by public authority fulfills the requirements of the Protocol. The Ombudsman lacks the authority to inspect private institutions. Does the Ombudsman under its current mandate have the right to inspect an airplane present in the territory of the State Party and used to temporarily house illegal immigrants being deported from Europe?

In my opinion, the Ombudsman has the right to carry out an inspection of the airplane in this hypothetical situation. The mandate of the Ombudsman is linked to the performance of public tasks. It's difficult to imagine a situation where people are detained within a private institution, such as an airplane, with no connection to Finnish officials or public authorities. Under normal circumstances it's safe to assume that even a temporary detention of this sort

is based on an order given by a public authority or at its instigation or with its consent or acquiescence, as stated in the Protocol. As long as a connection of this kind can be made, the Ombudsman has the right, as the National Preventive Mechanism, to perform an inspection on a ship or airplane in the State Party's territory.

Inspection Methodology and Jurisdiction

The Protocol defines the rights that the National Preventive Mechanism must have in order to regularly examine the treatment of inmates in places of detention. The NPM must have access to all places of detention and their installations and facilities, as well as the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information. The NPM must also be granted access to all information referring to the treatment of those persons as well as their conditions of detention.

The Protocol does not define in any detail the meaning or scope of treatment. Does it refer to evaluating the legality of and institution's activities, monitoring the conditions or actions of the institution or issues in the allocation of financial resources related to the activities? The Committee on Prevention of Torture has stated that the body inspecting the institutions should pay attention to all issues that have a bearing on the treatment of inmates. These include physical conditions, applicable legislation, an institution's internal policies and decrees, how aware the inmates are of their rights or matters related to how events within the institution are documented.

The purpose of the Ombudsman's inspections of closed institutions is to monitor the appropriate treatment of the inmates on as broad a basis as possible. During the inspections the physical conditions, treatment of inmates, requirements stipulated by legislation and human rights treaties, disciplinary actions, health care, religious observation and treatment of minorities are all looked at. The need to monitor the treatment of inmates confined to closed institutions is also tied to legislated methods of appeal. Official actions that are subject to official redress or appeal before a court of law may require less attention from the Ombudsman than those that can't be referred to investigation by an outside party.

Within his or her jurisdiction, the Ombudsman is well suited to monitor the treatment of inmates at closed institutions. The customary brief inspections, lasting a single day at their

lengthiest, do not fulfill the APT's requirements for a thorough inspection. The Ombudsman's staff consists primarily of people with legal training and their inspections are more concerned with judicial matters than non-legal perspectives, the institution's operating methods or policy questions related to improving the operation of the institution.

As a National Preventive Mechanism, the Ombudsman would have to pay closer attention to the professional background and education of inspection delegation members. According to the Protocol the NPM's experts must "have the required capabilities and professional knowledge". Gender balance and adequate representation of minorities and ethnic groups are also required.

The inspection visits of the Ombudsman are primarily performed by lawyers specialising in questions related to the administration of the object of inspection (e.g. prison service, police, health care or alien affairs) The Association for the Prevention of Torture has stated that visiting teams should be multidisciplinary and include, for example, a doctor, a psychologist or a minority representative in addition to a lawyer.

The professional knowledge of the Ombudsman's inspection can be augmented by including outside experts. It's self-evident that experts from different fields will emphasize different aspects during inspections. This will contribute to the preventive nature of the inspection.

For the NPM to perform its duties effectively, the Protocol states that it must be granted access to all information related to the treatment and conditions of inmates confined in closed institutions. This information may be related to health care, food service, hygiene, daily routine or disciplinary records. According to the Constitution of Finland, the Ombudsman has the right to request from public officials and other parties undertaking public tasks any information he or she may require, in order to fulfill his or her legal mandate. Based on the Parliamentary Ombudsman Act, the Ombudsman or his or her representatives have the right to access all the premises and information systems of the public office or institution under inspection. This right covers all classified information and documents.

In a report in 2006, the UN's Special Rapporteur on Torture stated that one of the most important methods for acquiring information during visits to closed institutions are confidential, private interviews with inmates. The Protocol requires that the NPM must have opportunity to conduct private, confidential interviews, without witnesses, with the persons deprived of their liberty during inspection visits.

Private conversations are an integral part of the Ombudsman's inspection activities. According to the Parliamentary Ombudsman Act, the Ombudsman or his or her representative has the right to have confidential discussions with the personnel of the office or institution and the inmates there. Inmates or personnel can either sign up for these discussions in advance or the Ombudsman can choose the persons he or she wants to have a private discussion with. The Ombudsman's mandate fulfills the requirements of the Protocol on this part.

Dialogue with the Government and the Subcommittee for the Prevention of Torture

The actions of the National Preventive Mechanism carry more weight if it has a mandate to make recommendations concerning how to improve the treatment and the conditions of persons deprived of their liberty based on observations made during inspection visits. The Protocol requires that the NPM has the power to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of persons deprived of their liberty and thus prevent poor treatment. The purpose of this provision is to guarantee constructive dialogue with the NPM and the government. This allows for the continued development of the institutions' functions and advancement of adherence to national or international law. The NPM must also have the right to maintain communications with the Subcommittee on Prevention of Torture.

In matters that fall within his or her jurisdiction, the Ombudsman has the right to issue a recommendation to the competent authority that an error be redressed or shortcoming rectified. Additionally, the Parliamentary Ombudsman Act also provides the Ombudsman with the right to draw the attention of the government or other bodies engaged in preparing legislation to defects in legislation or regulations, as well as make recommendations concerning their development and the elimination of defects. As far as the right to provide recommendations concerning the treatment of inmates in places of detention, the Ombudsman's legal mandate fulfills the requirements the Protocol places on an effective National Preventive Mechanism.

It's worth mentioning that the Ombudsman's rights go beyond making recommendations. The Ombudsman can bring a charge or issue a reprimand for future guidance, if he or she concludes that the object of oversight has acted unlawfully or in error. If need be, the Ombudsman may draw the attention of the object of oversight to his or her opinion of what constitutes good governance or to considerations of fundamental and human rights.

The strong mandate of the Ombudsman provides a good legal basis for tackling all shortcomings uncovered during inspection visits. The APT has drawn attention to the fact that the National Preventive Mechanism's right to bring a charge can make establishing a constructive dialogue with the object of inspection complicated. It's easy to see how the personnel of a site being inspected may be unwilling to engage in a dialogue about possible shortcomings or errors that may result in a reprimand, police investigation or even a charge. As the NPM, the Ombudsman must take into account this question that has a potential impact on the constructive nature of the dialogue. The emphasis of the Ombudsman's actions is, however, in developing and advancing fundamental and human rights in governance. Charges brought against officials or orders of prejudicial inquiries are relatively rare. It can further be stated that a charge for neglecting an official duty can't be brought based on Finnish law if the infraction in question is minor. Thus the Ombudsman can engage in the kind of constructive dialogue with the object of inspection that the Protocol refers to, also without fear of a charge being brought.

According to the Protocol the officials of the State Parties examine the recommendations of the National Preventive Mechanism and engage in a dialogue concerning the measures required to implement its recommendations. Finnish legislation does not include provisions for the examination of the Ombudsman's recommendations. From a perspective of guaranteeing human rights and advancing good governance, it would be useful to develop a system within which the Ombudsman's recommendations and their practical implementation could be discussed with public officials. A systematic followup mechanism of this sort would be a part of the dialogue with public officials, the purpose of which is to improve the treatment of inmates of closed institutions.

The National Preventive Mechanism must also have the right to maintain communications with the Subcommittee on Prevention of Torture. According to the Protocol the Subcommittee on Prevention of Torture will maintain direct contact with the NPMs and offer them training and technical assistance with a view to strengthening their capacities for protecting those deprived of their liberty. The Subcommittee can also advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

The Ombudsman's office is very familiar with international co-operation. The Ombudsman follows the statements of international monitoring bodies for human rights treaties and recommendations provided by the Committee on Prevention of Torture, among others. According to the Protocol, co-operation with the Subcommittee on Prevention of Torture in no way

compromises the independence of the Ombudsman's activities. As a National Preventive Mechanism, the Ombudsman has the right to decide how much practical meaning it grants any recommendations or advice provided by the Subcommittee.

Conclusions

Based on the observations made in this article, I think it's safe to conclude that the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment contains no provisions that prevent the Ombudsman from functioning as the National Preventive Mechanism. In the Protocol, the requirements placed on the National Preventive Mechanism are not defined in a detailed manner, so the Ombudsman conforms to at least the minimal requirements placed on the National Preventive Mechanism. Some aspects of the Ombudsman's mandate go further than the demands of the National Preventive Mechanism. The Ombudsman's strengths as an NPM include, for example, a strong and independent position and a broad jurisdiction to investigate and take action on shortcomings detected in places of detention.

For the Ombudsman to function effectively as a National Preventive Mechanism does require that some of the traditional methodologies of the Ombudsman undergo development and re-evaluation. The biggest challenge to the Ombudsman's operational concept is probably the fact that the National Preventive Mechanism must endeavor to actively prevent inappropriate treatment and not just react to detected legal shortcomings or complaints, like a traditional guardian of the law. The Ombudsman should enter into a constructive dialogue with the object of inspection to develop the operation of the institution. A proactive approach such as this is not foreign to the modern ombudsman institution. Developing governance and advancing the respect of fundamental and human rights is one of the purposes of the Ombudsman activities.

As supervisor of legality, the Ombudsman must increase the number of inspections it undertakes, as well as develop different inspection methodologies. Inspections could be divided into thorough and brief inspections, follow-up inspections and inspections that concentrate on specific themes. The regularity of the inspections can be advanced by increasing independent inspections by the legal staff of the Ombudsman's office. The objectives and follow-up methodologies need to be clarified. Unannounced inspection visits should also be carried out with greater frequency.

The professional expertise of the office's experts needs to be broadened. This can be done by, for example, relying on outside experts. Health care experts or representatives of minorities look at the conditions of an institution from a very different perspective than lawyers. It's clear that with the help of experts from a variety of fields, it's easier to prevent problems in closed institutions.

Functioning as a National Preventive Mechanism provides the Ombudsman with an opportunity to develop and update its own operational methods. This development should be done with care and with utmost respect for the long and praiseworthy traditions of the Ombudsman. □