



The preventive approach: OPCAT and the prevention of violence and abuse of persons with mental disabilities by monitoring places of detention



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ABSTRACT

Adopted in December 2002, the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The article explores how this collaboration between national and international bodies, with independent mandates to carry out such unannounced visits, represents an important effort in the process of protecting persons with mental disabilities who are detained and who are particularly exposed to exploitation and other forms of serious human rights violations, contrary to Article 16 of the Convention on the Rights of Persons with Disabilities.

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1. Introduction²

In his article entitled “*There must be some way out of here: Why the Convention on the Rights of Persons with Disabilities³ is potentially the Best Weapon in the Fight Against Sanism*,” Michael Perlin argues that the Convention on the Rights of Persons with Disabilities (CRPD) is the most revolutionary international human rights document - ever - that applies to persons with disabilities⁴. In addition, he observes that the CRPD “firmly endorses a social model of disability and reconceptualises mental health rights as disability rights – a clear and direct repudiation of the medical model that traditionally was part and parcel of mental disability law”⁵.

Especially when viewed alongside other core human rights documents, the UN CRPD strengthens the rights of persons with disabilities and, in particular, those with mental disabilities who are deprived of their liberty. The CRPD explicitly states that “the existence of a disability shall in no case justify a deprivation of liberty”⁶ and the latter applies to contexts of criminal justice, of immigration and involuntary hospitalizations in health or care-giving settings, such as hospitals, treatment centres or social-care homes.

Through Article 16 of the CRPD, States parties to the Convention have committed themselves to protect and prevent all forms of exploitation, violence, and abuse, including gender-based discrimination. Paragraph 3 of the same Article underlines State obligation to ensure that independent authorities effectively monitor all facilities and programmes designed to serve persons with disability.

In this article, we will focus on the protection and prevention of such violence as required by Article 16 of the CRPD in the context of the prohibition against torture and ill-treatment, and the potential of the two major conventions aimed at eradicating torture, namely the CRPD and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁷ (UNCAT) and its Optional Protocol⁸ (OPCAT) to contribute to this objective. We will have a particular focus on the monitoring mandate under the OPCAT and how the work performed under this instrument can strengthen the prevention of torture, ill-treatment and forms of abuse and exploitation in places of detention. Perlin and Schriver (2013) have further highlighted the relevance of both conventions to prohibit and prevent torture in relation to persons with mental disabilities: “The ratification of the Convention (CRPD) must be read hand-in-glove with the United Nations Convention against Torture (UNCAT). Together, these documents make it more likely – or should make it more likely – that, for the first time, particular attention will be paid to the conditions of confinement, world-wide of this population; to what extent those conditions regularly violate international human rights law;

and how those who are in charge of these institutions do so with impunity”⁹.

The question that will be addressed in this article is how torture and ill-treatment of persons with a mental disability can be prevented through the existing international legal framework and the measures that have been developed to strengthen prevention, in particular for persons deprived of their liberty. As independent monitoring through visits to places of detention constitutes one of the most established measures for prevention, and the OPCAT is adopted specifically with this as the main working method, the challenge is to understand how this protocol can make a difference in the field of disability rights. Given that the Committee Against Torture (CAT) has a visiting mandate limited to very specific conditions set forth in Article 20 of the UNCAT, and visits must never be unannounced, the OPCAT was adopted with the aim of allowing a more direct and proactive approach to prevention, through regular unannounced visits to *all places* where persons are held in detention.

2. Prevention of torture and ill-treatment of persons with disabilities

In the following section, the two main UN instruments to combat torture and ill-treatment will be described with a particular focus on how they relate to persons with mental disabilities.

2.1. Torture and other cruel, inhuman or degrading treatment or punishment

The UNCAT distinguishes between torture and cruel, inhuman or degrading treatment or punishment. Whereas torture is clearly defined in Article 1, other forms of ill-treatment are not, but the Convention expressly establishes 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 defined in Article 1”. Furthermore “the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment”.¹⁰ In its General Comment No.3 to Article 14 on the right to redress, the CAT also notes that victims of cruel, inhuman and degrading treatment have rights to redress under the Convention.¹¹ Because “conditions that give rise to ill-treatment frequently facilitate torture” the measures that are required to prevent torture must be applied also to prevent ill-treatment, and the CAT has thus “considered the prohibition of ill-treatment to be likewise non-derogable under the UNCAT and its prevention to be an effective and non-derogable measure”.¹²

In the first annual report of Subcommittee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (the SPT), which is the treaty body monitoring the OPCAT, the relationship between torture and ill-treatment was referred to in the following way: “The scope of preventive work is large, encompassing any form of abuse of people deprived or their liberty

² This article forms part of special issue of the journal entitled ‘which can be accessed at **’.

³ United Nations, General Assembly, *The Convention on the Rights of Persons with Disabilities*, A/RES/61/106 (13 December 2006); Retrieved from <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

⁴ M L Perlin (2013). “There must be some way out of here”: Why the Convention on the Rights of Persons with Disabilities is potentially the best weapon in the fight against sanism. *New York Law School Legal Studies*; Research Paper Series 12/13#77. 2013. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283279.

⁵ *Ibid.*, p. 2.

⁶ Article 14.1.b.

⁷ *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984, Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

⁸ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

⁹ M L Perlin & M Schriver (2013). “You that Hide Behind Walls’: The Relationship between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients. *Torture and Ill-Treatment in Health-Care Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report*, American University Center on Humanitarian Law, 2013. NYLS Legal Studies Research Paper No. 13/14 #76. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412550, p. 12.

¹⁰ *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984, *United Nations Treaty Series*, vol. 1465, p. 85, Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsg_no=IV-9&chapter=4&lang=en; art. 16.

¹¹ United Nations, Committee against Torture, *General Comment No. 3 of the Committee against Torture: Implementation of Article 14 by States parties*, CAT/C/GC/3 (19 November 2012), Retrieved from http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf, para. 3.

¹² GC 3 (n 24), para. 3.

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