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Statement by Sir Malcolm Evans

**CHAIRPERSON
SUBCOMMITTEE ON PREVENTION OF TORTURE AND
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT
OR PUNISHMENT**

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Madame Chair,
Distinguished delegates, colleagues and friends,

I am pleased to be able to formally present to you the 13th Annual Report of the Subcommittee on Prevention of Torture (SPT, or the OPCAT Committee), and to do so once again in the company of Mr Modvig, the Chair of the Committee against Torture and Mr Meltzer, the Special Rapporteur on Torture. This is the 10th – and final - occasion on which that I have the privilege and opportunity of addressing the 3rd Committee concerning the work of the SPT – and it is certainly the strangest and most challenging.

Let me be blunt: updating you on our visiting programme since I last addressed you in October 2019 is relatively simple – as no visits have taken place. Let me be clear why. It is because of the failure of the UN to provide the funds necessary to permit us to carry out our convention mandate – thus effecting a clear breach of Article 25 of the OPCAT and frustrating the object and purposes of the OPCAT. States Parties and Signatory States alike comprise over half the membership of the UN and collectively carry a responsibility for this.

We fully understand the limitations on our work brought about by necessary restrictions resulting from COVID-19. However, our inability to undertake our work in visiting places of detention for the entirety of the last 12 months is not just because of such restrictions. Our visits were cancelled in the last quarter of 2019, and could not be undertaken in much of the first quarter of 2020, because there was no money available to pay for them. The SPT was the only human rights treaty body whose work was directly affected by the ‘2019’ financial crisis affecting the work of the OHCHR.

Fortunately, National Preventive Mechanisms (NPMs) established under the OPCAT framework have been able to continue to undertake their preventive work during this time, including conducting visits to places of detention, in many countries around the world. We are also very well aware that the European Committee for the Prevention of Torture has been able to recommence its programme of visiting places of detention within Europe, despite the Pandemic. Whilst we realise that it is not currently possible for us to undertake our visiting work *exactly* as before –there is no reason why we ought not to be able to exercise our visiting mandate *at all*. The reason we cannot do so is not COVID – but cash.

The SPT supports exploring innovative ways of fulfilling its mandate. Indeed, we were the first of the Human Rights Treaty Bodies to hold and complete a full treaty body session on-line in June 2020 – including a very successful online states party meeting - the first, and I believe so

far the only meeting of this type. During our online plenary we were able to hold meetings with groups of National Preventive Mechanisms in all regions of the world, and I believe the extent of our use of electronic means to connect with others is probably unrivalled within the treaty body system. This is not a new development but builds on our past practice. We are pleased that the UN Office in Geneva now has platforms which support simultaneous translation – though unfortunately our access to them is limited and much of our work still has to take place in single-language fora, which means that some members are just not able to contribute. We greatly regret this, but there is no alternative.

The SPT has been fully engaged with the 2020 Review of the Treaty Body system mandated by Resolution 68/268. Regrettably, that Review, just like the previous treaty body strengthening exercise, does not seem to be fully engaging with the needs of the SPT. Hopefully, this will be addressed in its latter phases. The SPT has always been committed to the principle that it ought to be able to visit its states parties with a regularity akin to that of the reporting cycles of the other treaty bodies. We hope that this will become a recognised operational principal – and in supported in operational practice. The SPT must not be ‘left behind’ in the strengthening process, as was largely the case in 2014.

There is, however, an important element of the emerging review that needs to be properly contextualised as far as the work of the SPT is concerned, and these are proposals for a ‘digital shift’. As I have already indicated, the SPT has been in the forefront of those who have pioneered digital engagement with states parties and others in its work. However – there are limits to this. I should like to quote a passage from my address to you last year – words spoken in October 2019, before the COVID -19 pandemic had arisen, and before the idea of a ‘digital shift’ in the work of the treaty bodies had been thought of. Last year I said to you the following, and I quote:

‘One thing, however, is completely obvious: you cannot visit a place of detention remotely. The entire point of the OPCAT system is that it allows SPT members access to closed places where persons are deprived of their liberty; to interview detainees and staff; to see the conditions of detention and to learn from those who work in detention and justice systems what happens in practice ... This just cannot be done from afar. It is just impossible’.

I make no claims to clairvoyance, but these words were prescient. The visiting work of the SPT cannot take place remotely, and whatever the future may hold for the treaty-body system as a whole, the SPT’s future work must remain focussed on the field. Indeed, the COVID-19 pandemic has made the necessity of preventive visiting to places of detention clearer than ever.

The SPT has monitored closely the response by States to the impact of COVID-19 on their detention systems. Many detention systems are chronically overcrowded, greatly magnifying the risk of transmitting the virus. Some states responded to this by taking emergency measures to reduce their prison populations and mitigate this risk. Others did nothing – whilst some have

manipulated early release schemes to allow those imprisoned for serious human rights violations to be released, whilst continuing to hold those convicted of relatively minor offences.

Most states have introduced draconian restrictions on external access – in effect cutting detainees off from the outside world. Whilst some countries have mitigated the worst effects of this by providing alternative means of communication with families and friends, and other forms of contact (such as distributing pre-programmed phones or tablet devices permitting face to face communication), many others have not. Educational, recreational, and rehabilitative programmes have been suspended – and periods of external exercise have been reduced, in some cases to vanishing point. The effect on the wellbeing of detainees has been profound. Moreover, communication concerning such restrictions has often been very poor indeed, resulting in internal disturbances and considerable (and entirely avoidable) loss of life. The truth is that states were swift to impose restrictions within places of detention – slow to put in place measures to mitigate the effects of these measure and, it seems, putting detainees at the back of the queue when it comes to easing limitations.

Against this background, the role of preventive mechanisms has never been more important. The SPT has issued an Advice concerning the response to the Pandemic by both States and NPMs. We have been in frequent contact with our NPMs to encourage them to continue in their work as best they can, and to ensure that they are able to do so. Many NPMs have responded positively to the challenge, finding new ways of working in order to ensure there is oversight of places of detention. In some cases, physical visiting continues more or less as before, in others on a more restricted basis. Some NPMs temporarily suspended their visiting work, but have now developed other means of communicating with detainees and of scrutinising detention practice. Much of this innovation has been beneficial and will be carried over into future practice. Relations between NPMs and national authorities has in some countries improved considerably as they have worked together to solve problems of access.

But some states have taken advantage of the pandemic to restrict the work of NPMs unnecessarily, seeking to deny them access to places of detention, or even permission to travel at all. We consider the work of NPMs to be an essential service which cannot be subject to general restrictions.

The experiences of the last six months have put many new questions ‘on the table’ concerning the OPCAT system of prevention. One particular issue that has arisen is whether places of quarantine are places of ‘detention’ for the purposes of the OPCAT. Let me take this opportunity to answer this clearly: they are, and access cannot be denied to them (whilst all proper precautions must also be respected). Another question concerns what amounts to a place of detention for the purposes of the OPCAT: could state imposed restrictions on leaving ones’ home convert this into a place of detention? The SPT has already touched on this in its Advice, and it will be returning to this question in the future.

More generally, we have seen States being able to do some positive things which they had previously said were impossible – such as dramatically reducing prison populations in order to reduce overcrowding, allowing phones and tables in prisons in order to enhance communications with the outside world, for example. Some countries have dramatically reduced the numbers held in immigration detention, knowing that it is just not possible for detained persons to be returned to third countries. Outside of the detention system itself, there has been a growth in the use of non-custodial sentencing – and deep-seated assumptions concerning the need for imprisonment and the use of the custodial estate are now being questioned. These are important, and positive, systemic developments.

But there is another side to this coin: delays in the criminal justice system mean that some states are either holding pre-trial detainees for longer than they ought, or they are extending the periods in which they can be held. Reduced staffing capacities within places of detention have left some detainees even more vulnerable to inter-prisoner violence. Some countries have taken the opportunity presented by there being less external oversight to ill-treat political and other detainees. Once again, this underlines the importance of allowing NPMs to fulfil their functions to the maximum extent possible.

Against this background, it is more important than ever that States parties designate their NPMs in a timely fashion. All States are obliged to establish their NPM within one year of ratification, unless they have delayed that obligation by making a declaration under Article 26 of the Optional Protocol. There are currently 90 States Parties, of which 68 have designated their NPM, and 21 are not in compliance with their obligations to do so. Moreover, for some years now the SPT has compiled a list of those countries which are more than three years overdue in establishing their NPMs, meaning that they will have had four years since the date of their ratification in which to have done so. That list has lengthened and now comprises 14 countries: Belize, Benin, Bosnia-Herzegovina, Burkina Faso, Burundi, Democratic Republic of Congo, Gabon, Liberia, Mongolia, Nauru, Nigeria and the Philippines. Since last year, Chile has been removed from the list since it has now established its mechanism, but Belize, Niger and South Sudan have had to be added. It should also be said that whilst all these countries are substantially overdue, worryingly, half of them are now egregiously so; over 10 years, in the cases of Benin, Bosnia and Herzegovina, Burkina Faso, the Democratic Republic of Congo, Gabon, Liberia and Nigeria. These states seem to lack the will to comply with their OPCAT obligations at all, thus violating not only the letter but also the spirit of the convention. There is a clear trend here: whilst most states work to establish their NPM in good time, a small number struggle to do so – and a number of these seem uninterested in doing so. This needs to be addressed, as the establishment of independent, effective NPMs is vital, not only for compliance with OPCAT obligations, but for effective prevention of torture and ill-treatment.

Even whilst we are unable to undertake our visiting programme, there is, then, much that the SPT can and should be doing. Its work is, however, further handicapped by the reduction in the size of its Secretariat during the current year. In 2014 UN Resolution 68/268 para 26(d) said

that there should be ‘An adequate allocation of financial and human resources to those treaty bodies whose main mandated role is to carry out field visits’ (that is, for the SPT). Following this, an additional legal officer was appointed, but this position is now unfunded, meaning that our complement of professional staff is exactly the same as it was when there were only 10 members and about half the number of states parties. This is no way to run a global system of torture prevention and it is imperative that the serious problem of torture in the world today be tackled with the seriousness it deserves. Currently, the resources allocated to that work show that it is not.

Despite all this, the many positives remain. During the lifetime of the SPT the number of states parties and of NPMs has continued to increase. The SPT has established itself within the UN system and greatly expanded its range of visiting and has helped refine the very concept of prevention. The work of the NPMs has increased in scale, they have become more widely known and recognised their recommendations increasingly implemented. Partnership working across the UN and between the international and national mechanisms has developed greatly, and it’s focus, rightly in my view, has shifted increasingly towards working in region and in country, bringing international human rights protection ever closer to the rights holders. Most importantly, the OPCAT system has demonstrated the importance of human rights bodies being generators of knowledge, rather being limited to recipients of information. The Special Fund under OPCAT Article 26, to support the implementation of SPT recommendations and the educational programmes of NPMs, has made great strides, though it is in need of further financial support. Relationships with our fellow UN mechanisms focussing on torture – the CAT, the Special Rapporteur, the Voluntary Fund for Victims of Torture are closer than ever, as are our relationships with regional mechanisms.

We can now see that a global network schooled and skilled in the techniques of prevention has grown to maturity. More is known than ever before about the shocking realities of the terrible ways in which detainees are treated in far too many states around the world. Inevitably, this includes many who are here today. And it includes many states who dare to complain about the costs of the UN human rights system, whilst caring not at all about the cost paid by those who are the victims of their human rights abuses. States are asked to pay in cash – detainees are made to pay with pain.

The purpose of the OPCAT system, of the SPT and of the NPMs is really very simple: it is to do all it can to prevent torture. It is a terrible responsibility, but, whatever it takes, we will continue to find ways of doing so.

Let me thank you for your kind attention and I look forward to responding to your questions.
