

A System of Preventive Oversight

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1. Introduction

As the Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT)¹ completes twenty years of preventive visiting, a new era of prevention of ill-treatment² is beginning, with the advent of the mechanisms established under the United Nations Optional Protocol to the Convention against Torture³ (OPCAT):⁴ namely, the United Nations Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT) at the international level and the national preventive mechanisms (NPMs), which each State Party to the OPCAT is obliged to maintain, designate or establish.⁵ It is still early to predict how these newer mechanisms will develop, but it is worth considering how the system of preventive visiting might work best in order to fulfil its ultimate goal: the eradication of torture and other forms of ill-treatment.⁵

As the SPT and the NPMs begin to operate as part of the system of regular preventive visits undertaken by independent international and national bodies, the establishment of which is the stated objective of the OPCAT,⁶ it is important that all elements, new and old, in the system adjust so as to ensure that they co-operate to optimal effect. In my opinion, they should form a protective network of mechanisms active in the field, interlocking in such a way as to fill the gaps in the safeguards for people deprived of liberty and so reduce to an absolute minimum the risks of ill-treatment.

To explore the options for an evolving system of prevention, this article considers (i) some of the lessons learnt from the experience of preventive visiting thus far, (ii) which standards are to be

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¹ The CPT, a treaty body of the Council of Europe, was established under the 1987 European Convention for the Prevention of Torture and Inhuman or degrading treatment or punishment (ECPT); it began visiting in 1989. ECPT, ETS no 126, adopted 26 November 1987. Available at <http://www.cpt.coe.int/en/documents/ecpt.htm>. Last accessed 3 December 2009.

² In this article 'ill-treatment' is used as a generic term to embrace torture and all other forms of ill-treatment including cruel, inhuman or degrading treatment or punishment; the term covers not only the intentional infliction of physical or psychological pain, but also the abuse inherent in poor conditions of deprivation of liberty.

³ UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment, adopted by the UN General Assembly, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987.

⁴ OPCAT, adopted by the UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002, entered into force 22 June 2006. Available at <http://www2.ohchr.org/english/law/cat-one.htm>. Last accessed 3 December 2009.

⁵ In accordance with OPCAT, Article 17. See fn.4

⁶ The OPCAT reaffirms that 'efforts to eradicate torture should first and foremost be concentrated on prevention'. OPCAT, Preamble. See fn.4.

⁷ OPCAT, Article 1. See fn.4.

applied in preventive visiting, (iii) how existing and developing bodies might work in harmony and to maximum effect, and (iv) which inhibiting factors and risks need to be borne in mind if an effective system is to be achieved and sustained.

2. Past Experience of Preventive Visiting

The concept of prevention remains undefined in the OPCAT as in the ECPT.⁷ However, the CPT's twenty years of empirical work have served to refine methods of prevention in different settings across the wider European region.⁸ Since other regions and other systems have as yet not attained, either qualitatively or quantitatively, the level of preventive visiting achieved by the CPT, it remains, at least for the time being, the pre-eminent example of a preventive visiting body. Although examples from one context cannot be transposed facily to others, the experience of the CPT can be informative for further development of methods applicable to settings across the regions of the world to which the OPCAT now gives entry.

The preventive idea embedded in the ECPT and in the OPCAT is that the best way to eliminate ill-treatment is to stop it before it occurs or recurs (i.e. to prevent it) and that visits play a vital part in that process. Any state that is party to the UN Convention against Torture (UNCAT)⁹ is already under an obligation to take measures for the prevention of torture and other forms of ill-treatment.¹⁰ The work of the CPT and SPT is governed by the principles of co-operation and confidentiality, on the understanding that the best approach to prevention at the international level, whether regionally or universally, involves engaging constructively with states in finding ways to improve the existing protections of people deprived of liberty.¹¹ That co-operation involves a frank, confidential dialogue about where the system of safeguards is falling short.

When engaging with international bodies, the authorities of any country tend to put their best foot forwards and are inclined to underestimate the gap between policy and practice through a natural tendency to hope that what should happen does in fact happen (all experience to the contrary). Therefore, as a basis for a realistic discussion of the failings of the system to protect against ill-treatment, the CPT includes, as a key element in its visiting methodology, the careful and objective documentation, by triangulation of information from various sources including medical forensic evidence, of examples of alleged ill-treatment as a basis for identifying systemic fault-lines. This documentation is not intended to be used to pursue perpetrators or to apportion blame in individual cases; indeed, the information is usually presented to the authorities in an anonymised form, so as to protect the identity of those who have provided the CPT with the relevant information, unless they have already lodged a formal complaint and/or have consented to full disclosure. The cases are documented by the CPT to illustrate behaviour patterns and generic problems in the system requiring the authorities to take action to improve the situation.

⁸ Unsurprisingly, the texts of the two treaties bear many similarities; the example of the ECPT was important in the drafting of the OPCAT.

⁹ The region consisting of the 47 member states of the Council of Europe, representing the whole of the larger geographic area of Europe except for Belarus.

¹⁰ All the member states of the Council of Europe are parties to the UNCAT.

¹¹ In accordance with UNCAT, Article 2(1). See fn.3.

¹² ECPT, Articles 3 and 10. See fn.1.

Experience has shown that initial hurdles need to be overcome in the dialogue about prevention of ill-treatment; chief amongst these is the denial of, or reluctance to acknowledge, some painful truths about the actual situation of people deprived of liberty. These hurdles may result from genuine or feigned lack of awareness and may be found even in States considered to be generally enlightened and dedicated to upholding human rights. The more remote officials are from the day to day reality of custodial settings, the easier it is to avoid the unpleasant facts. Even in the less rarefied air of police stations or prisons, immigration detention centres, psychiatric establishments or social homes, visiting bodies may still encounter blatant refusal to acknowledge what is a rather obvious state of affairs for those working on the ground.

Diplomacy may have a role in the preventive dialogue, especially when it is necessary for the CPT's interlocutors to preserve face by maintaining the position that they were not cognisant of the situation at hand. Whether or not senior officials, including Ministers, are aware of the problems existing at ground level, they remain ultimately responsible for what happens in places of deprivation of liberty under their authority. The dialogue may proceed on the assumption of the shared aim of preventing future recurrence of ill-treatment, even in the face of convincing evidence that examples of ill-treatment are occurring and that systemic shortcomings may be inferred. Discussions focus on what needs to be done to improve the situation. At times, the fact that clearly documented examples of ill-treatment have been presented to the authorities, but not rammed down their throats, provides an incentive for action by the state, as a demonstration of the authorities' good faith.

However, diplomacy does not always work. At times, especially when there is a repeated refusal to accept the facts as documented and/ or to take action to improve the situation, no face-saving techniques will produce the required shift in attitudes or behaviour and other methods must be tried, such as the public statement.¹² The CPT has rarely resorted to making a public statement;¹³ it has more often resorted to initiating the procedure envisaged under Article 10(2), which provides that, when the CPT is considering making a public statement, the State concerned is given an opportunity to make known its views. This process of announcing to the State the CPT's consideration of a possible public statement, and the State's representations in response, has proved to be an important opportunity to intensify dialogue; the possibility of a public statement has, in some instances, proved a strong incentive for States to reconsider their position on certain issues, or to take more concrete or accelerated action to improve a particular situation or problem. If the CPT assesses that sufficient progress has been made, it may decide to discontinue the procedure without making a public statement; in that event, the whole process remains confidential.

¹³ Article 10(2) of the ECPT provides that if a State fails to co-operate or refuses to improve the situation in the light of the CPT's recommendations, the CPT may decide to make a public statement. See fn.1. For the SPT, provision for a public statement is included, with different modalities, in Article 16(4) of the OPCAT. See fn.4.

¹⁴ The CPT has, to date, made five public statements: two early public statements in respect of Turkey in 1992 and 1996, and, more recently, three in respect of the Russian Federation in 2001, 2003 and 2007. The texts of the public statements made by the CPT can be found on the CPT website: <http://www.cpt.coe.int/en/states.htm>. At this early stage, the SPT has not made any public statements.

3. Standards

The dialogue between the CPT and member states is a continuing process aimed at prevention by incremental improvement. This approach has been criticised on the grounds that it might be seen as compromising international standards. However, those standards are always emphasised as the eventual goal in the incremental approach, which nonetheless acknowledges that, whereas there are certain absolutes to be observed for all States – the total prohibition of torture being the quintessential example – there are also many stages on the journey towards achieving the standards required for the full protection of people deprived of their liberty. States within the European region do not share the same point of departure when it comes to laws, regulations, policy and practice. Their individual journeys towards implementing common standards take different routes reflecting the diversity of their systems, cultures and histories. It is important to recognise this diversity.

Nonetheless, within the European common legal space,¹⁴ a large body of regional international standards concerning the rights of, and protections for, people deprived of liberty has developed through the evolving case law of the European Court of Human Rights,¹⁵ the recommendations of the Council of Europe, such as the revised European Prison Rules,¹⁶ and the corpus of CPT standards, derived from the recommendations in numerous CPT visit reports.¹⁷ These standards are characterised by a degree of specificity generally not found in the universal international standards, since there is an inevitable tension between specificity and universality.

At the universal level, the extent of diversity across regions and states is far greater and therefore the need for an incremental approach to implementation of standards is all the more evident. The universal standards, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners,¹⁸ are, in some respects, vague and outdated. The SPT has therefore adopted a considered approach to the application of standards based on the *pro homine* principle; thus, within a region, the SPT will refer to regional international standards, and even to national standards, to the extent that they confer greater protection of human rights.

For prevention to be effective, it is not enough to aim at keeping conduct and conditions below the threshold of actual ill-treatment. To safeguard people deprived of liberty from the risk of ill-treatment, it is important that the standards applied by independent preventive bodies reflect good practice in all types of custodial settings.

¹⁵ The region subject to the European Court of Human Rights.

¹⁶ In an increasing number of cases, the Court has cited examples drawn from CPT visit reports; see, for example, on the issue of prison conditions in the Russian Federation, *Kalashnikov v Russia*, no 47095/99, ECHR 2001-XI (extracts).

¹⁷ Recommendation (2006) 2 of the Committee of Ministers to member states on the European Prison Rules adopted by the Council of Europe's Committee of Ministers, 11 January 2006.

¹⁸ The CPT standards are available at <http://www.cpt.coe.int/en/docsstandards.htm>.

¹⁹ Standard Minimum Rules for the Treatment of Prisoners and Procedures for the Effective Implementation of the Rules, United Nations Economic and Social Council Resolution 1984/47, 1984.

4. Co-operation Between Existing and Developing Preventive Visiting Bodies

The new possibilities opened up by the OPCAT are especially intriguing in regard to co-operation between existing and new preventive mechanisms. The OPCAT encourages the SPT, and bodies established under regional conventions instituting a system of visits to places of deprivation of liberty, to co-operate with a view to avoiding duplication and preventing ill-treatment.¹⁹

In a well-ordered system, it is desirable to find scrutiny occurring

- (1) internally within the ministry or department responsible for deprivation of liberty (both at the initial stage – apprehension or taking into custody or placement – and during the subsequent stages of detention or retention or custodial care) as part of the normal process of professional management and public accountability;
- (2) externally by an independent body based within a reasonable distance of the relevant institutions that is, thus, capable of regular visiting and rapid response to changing circumstances; and
- (3) internationally, whether at the regional or universal level, bringing to bear the greater authority of the international community in order to reinforce the effect of monitoring by other bodies.

In order for changes recommended by visiting bodies to constitute lasting improvement of the situation of person deprived of liberty, there needs to be on-going vigilance both within the state and from beyond. In every state there is an ebb and flow of protections, as key individuals come and go and as the political and economic environment shifts. Slippage is a common phenomenon in the human rights arena and in the closed world of custody in particular.

A degree of overlap among the various parts of the system would be appropriate, and would not run counter to the OPCAT's exhortation to avoid duplication, since it is crucial that there should be no gaps in protection. Places where people are or may be deprived of liberty might legitimately be visited by both national and international mechanisms (whether regional or universal) and there are important benefits to such overlap. A truly independent body needs to be constantly vigilant about its own independence and impartiality, the two attributes being closely linked. A constructively critical approach requires a sustainable distance from the subject under observation. For international visiting bodies this may pose minor difficulties, whereas for national mechanisms it is likely to be a major on-going issue. Visits by bodies with different perspectives can be important for ensuring continued vigilance. However, a degree of co-ordination would also be appropriate under normal circumstances,²⁰ to avoid visiting overload.

Proximity to an institution may, with time, diminish the ability of the members of a visiting mechanism to maintain a critical perspective and to distinguish risk. Mechanisms working at the national level may become familiar with the prevailing custodial culture in their country to the extent that they cease to question the validity of assumptions made and grow inured to certain persistent shortcomings on the ground. Moreover, frequent contact with key institutional actors may affect the objectivity of those exercising scrutiny. Familiarity may also render more difficult

²⁰ OPCAT, Article 31. See fn.4.

²¹ It is possible to envisage a visiting body identifying a situation in which the risk of ill-treatment was acute; in such circumstances, a visit by a national preventive mechanism might be followed by a visit from an international body (or vice versa) to reinforce the urgency of the recommendations for improvement.

the task of conveying negative findings, especially if the visiting body has developed friendly relations with the managers of the institution. A necessary aspect of the independence of visiting bodies is their ability to deliver unpalatable conclusions; for the preventive approach to be effective this can and should be done without precluding constructive discussion about the ways forward.

Co-operation among bodies will be vital for the achievement of visiting regularity. Although there is no precise definition of the system of ‘regular’ visits envisaged by the OPCAT, it may be inferred that the objective is to ensure a frequency of visits that would guarantee effective prevention of ill-treatment. It is generally agreed that the current provision of resources for the SPT to visit – permitting three to four visits per year: in other words, one visit ‘regularly’ every 12 to 17 years to each State Party – is woefully inadequate. However, the accumulation of visits by bodies at different levels may hold the key to regularity, or increased frequency, of preventive visiting. The SPT, in deciding which States should receive visits in a particular year, takes into account the frequency of visits carried out by other preventive bodies.

5. Factors Inhibiting an Effective System of Preventive Visiting

If positive change is to happen at ground level – so that individuals deprived of liberty benefit from greater protections and the risk of their being ill-treated is reduced – improvement has to occur at many levels. It can prove a lengthy process to introduce or amend legal and regulatory provisions in line with the recommendations of a visiting body,²¹ but officials are sometimes more ready to agree to such improvements on paper as a discreet task than to face the prospect of ensuring a change in practice, since the latter involves an on-going and more open-ended commitment. Once the sometimes convoluted process of legislative or regulatory change is accomplished, there is a clear and demonstrable result on paper. Unfortunately, policy makers sometimes suffer from a severe lack of empirical understanding and an ignorance of the phenomenon of unintended consequences, thereby failing to recognise that drafting and adopting laws or regulations are only the first steps in a complex process of persuading those who implement the laws and rules to adapt their procedures and practices accordingly.

Experience indicates that, in the field of law enforcement, ways can almost always be found to operate around new laws or policies relating to deprivation of liberty, so that those who work on the ground may continue the investigative and custodial procedures and practices to which they have become accustomed. For example, it is one thing to introduce in law the right of persons who cannot afford a lawyer to be represented free of charge from the outset of deprivation of liberty, and quite another for an indigent individual to actually have access to a lawyer free of charge while in a police station. The funding, organisational and management requirements for changes on paper to produce tangible results on the ground may be poorly addressed or overlooked entirely.

It is therefore important that any visiting body with a mandate to prevent ill-treatment is aware of the need to check improvements empirically by direct, methodical observation and collation of concrete examples confirming that a pattern of practice has shifted (or not, as the case may be).

²² The NPMs are empowered to submit proposals and observations concerning existing or draft legislation under Article 19 of the OPCAT; similarly, the CPT and SPT have the power to make recommendations to States Parties, and both treaty bodies have construed this to include recommendations regarding legislative changes.

One of the factors inhibiting a rigorous empirical approach may be a reluctance on the part of some members of visiting bodies to step outside their comfort zone. It is much easier to view a prison from the cosy vantage point of the director's office than to enter the sometimes bleak, malodorous, noisy and dilapidated areas where prisoners may be held. It takes less effort to view a police station from the duty office than from a cell holding too many people in unhealthy and sometimes unsafe conditions. It is less arduous to hear about a social care home from the manager who provides detailed annual reports than to step over excrement to find elderly people wandering naked and confused in a room with the roof leaking. Equally, it takes determination to go to those parts of the institution that are omitted on the 'official' tour of the facilities and that management attempts to conceal from visiting delegations.

6. Risks of Reprisals and Repercussions

A constant concern for visiting bodies who take their mandate seriously is the unwanted consequences of their work. Apart from the 'research effect' of visiting, even when the visit is unannounced, and the rigour needed to ensure that observations made come as close to the truth as possible, a graver matter is the possible adverse consequences for people who provide information to the visiting body. The CPT has had occasion to report about the lack of co-operation encountered on some visits, when it became clear that people in custody had been warned in advance not to speak candidly to the CPT delegation or when the CPT received credible reports following a visit that people who spoke with the delegation had been the subject of reprisals. The CPT has made it abundantly clear²² that such behaviour is not in compliance with the ECPT and represents a serious breach of the obligation to co-operate.

Whereas the ECPT does not explicitly refer to the question of reprisals, the OPCAT provides that no sanctions shall be permitted or tolerated against people for communicating with the SPT and that 'no such person or organization shall be otherwise prejudiced in any way'.²³ The same provision is made for people communicating with the NPM.²⁴ The drafters of the OPCAT appear to have benefited from the hindsight gained from the experience of the CPT in this area and the broad wording of the OPCAT provisions encompasses both potential intimidation, in advance of contact with the SPT or NPM, and repercussions after such contact.

A continuing concern, however, is how to ensure such protection in practice. Although the OPCAT lays the obligation squarely upon the State Parties, preventive visiting bodies should be alert to the potential for their work to produce unintended adverse effects and must strive to reduce to a minimum the exposure of individuals communicating with them, whether they are officials or people deprived of liberty. This means not only adhering strictly to the confidentiality and anonymity principles enshrined in the ECPT and OPCAT as regards information obtained and reported, but also being circumspect as to methods of engaging in interviews: both as to selection of person to be interviewed and ensuring the privacy of interviews. The following methodological points illustrate the risks arising during preventive visits. Preventive mechanisms

²³ In its General Reports: see, for example, the 17th General Report on the CPT's activities covering the period 1 August 2006 to 31 July 2007, CPT Doc. CPT/Inf (2007) 39, para. 14, and the 18th General Report on the CPT's activities covering the period 1 August 2007 to 31 July 2008, CPT Doc. CPT/Inf (2008) 25, para.14. These reports are available at, respectively, <http://www.cpt.coe.int/EN/annual/rep-17.htm> and <http://www.cpt.coe.int/EN/annual/rep-18.htm>. Last accessed 3 December 2009.

²⁴ OPCAT, Article 15. See fn.4.

²⁵ OPCAT, Article 21(1). See fn.4.

should be aware that, when visiting in a small police station, it may be necessary to interview all persons present so as to obscure the identity of the one individual providing especially sensitive information; when in a prison, it is important not to talk about sensitive matters with individual prisoners in the presence of cell-mates who may be informers.

In addition to direct reprisals or intimidation, examples have been known of staff of an institution asking detainees who have talked with the CPT about what was said during the interview. Whereas the concern of the staff may be understandable and even innocent, it is also an indicator of the lack of comfort with oversight within the institution. It is to be hoped that, as NPMs develop and intensify their work in more and more countries, and as international visiting bodies also become somewhat more familiar actors in settings where people are deprived of liberty, there will develop, concomitantly, a healthier attitude towards independent scrutiny as a useful and necessary component of accountability.

7. The Future of Preventive Visiting

As the second annual report of the SPT pointed out,²⁵ the prevention of torture and other cruel, inhuman or degrading treatment or punishment is not cost neutral. Currently, the ability of the SPT to carry out its mandate effectively is severely restricted by virtue of the limited budget provided by the UN for its visits and the total absence of budget for its mandate to work directly with NPMs. Although the budget is due to be reviewed when the SPT membership increases to 25 in October 2010, as a result of the 50th ratification of the OPCAT,²⁶ it seems unlikely, based on past experience, that the UN will provide a budget sufficient to allow the SPT to visit every State Party on a regular basis (i.e. at least once every four or five years) and to enable the SPT to work in direct contact with NPMs, as expressly provided under Article 11(b) of the OPCAT. For the foreseeable future, it will fall to the national preventive mechanisms, the unique feature of the OPCAT, to form the front line of preventive visiting, a role they are best suited to perform, given that they are on the spot and that ‘States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.’²⁷

To date, 29 of the 50 States Parties have designated NPMs; 20 of these are in Europe, where a frequently adopted approach has been to designate existing human rights institutions to fulfil the NPM role in addition to their previous functions. Since their existing functions have frequently focused on a wide range of complaints, such bodies face the dual challenge of adapting their (often primarily) reactive and general human rights approach to the more specialised mandate of prevention of ill-treatment in places of deprivation of liberty. It remains to be seen how they will rise to this challenge, given that many of the existing bodies have received little or rather modest additional resources to carry out this extra role.²⁸

The OPCAT provides a unique opportunity for prevention of all forms of ill-treatment through the novel institution of a system of independent preventive visiting at different levels. The next

²⁶ SPT, Second Annual Report, UN Doc. CAT/C/42/2, 7 April 2009, para. 31. Available at <http://www2.ohchr.org/english/bodies/cat/opcat/annual.htm>. Last accessed 3 December 2009.

²⁷ This occurred in September 2009, when Switzerland became the 50th State Party.

²⁸ OPCAT, Article 18(3). See fn.4.

²⁸ For a more detailed discussion, see Steinerte and Murray in this volume and, in relation to non-traditional places of deprivation of liberty, Hallo de Wolf in this volume.

decade will reveal whether states are ready to embrace full accountability for what is done in the name of the public in society's most closed places by making that vision a reality.