

What Is the Added Value of Prevention?

Wilder Tayler*

1. Evolution of the OPCAT and the SPT

By the end of 2009, the Subcommittee on the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT), established by the Optional Protocol to the Convention against Torture (OPCAT),¹ will have completed its seventh mission: a detention-monitoring visit to Honduras, to a State Party to the OPCAT.

The OPCAT was originally conceived by a prominent Genevan citizen, Jean-Jacques Gautier. He was inspired by the work of the International Committee of the Red Cross (ICRC) and proposed the creation of a system of preventive visits to places of detention in order to reduce the risk of torture. He believed that the implementation of preventive measures would be the most effective way to achieve the ultimate goal of eradicating torture. A contemporary body, the Swiss Committee against Torture (the immediate predecessor of the Association for the Prevention of Torture), and the International Commission of Jurists (ICJ), campaigned for this idea, while Costa Rica took the lead in promoting the proposal in governmental *fora* in the early 1980s. It was not until 2002 that the United Nations finally adopted the OPCAT. Prior to this, in the late 1980s, the Council of Europe set up the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT), while an early attempt to craft a similar system in the Inter-American context, around the same time, failed to garner support.

The OPCAT entered into force in June 2006. It is open to ratification by States Parties to the UN Convention against Torture. The OPCAT creates a system of preventive visits to places of detention by both the international experts of the SPT and by national preventive mechanisms (NPMs). States Parties agree to allow the SPT and NPMs unhindered access to all places where persons may be deprived of their liberty by the State (i.e. not only prisons, but also mental institutions, orphanages, etc.). The SPT can issue concrete recommendations intended to prevent torture. While it draws heavily on the experience of the CPT, as a UN body, the SPT's reach is global, and the variety of situations and challenges that it faces is, inevitably, broader.

Under the OPCAT, States also undertake to maintain, designate or create a mechanism dedicated to the prevention of torture at the national level. This innovative feature distinguishes the OPCAT from all other UN human rights treaties, which entrust monitoring of the respective treaty's implementation to international bodies only. The NPM could be an existing human rights body, an ombudsperson, or other similar institution. NGOs can also be entrusted with that

* Wilder Tayler, a Uruguayan lawyer, is Deputy Secretary-General of the International Commission of Jurists (ICJ) and member of the SPT.

¹ Optional Protocol to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, adopted by the UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002, entered into effect 22 June 2006.

function. The national mechanism must usually be created within one year of a State becoming a party to the OPCAT. NPMs are required to be independent, adequately staffed, and provided with the means necessary to carry out their tasks.

The OPCAT also establishes a Special Fund to help finance the implementation of the SPT's recommendations subsequent to country visits, as well as to support the educational programmes of the NPMs.

The SPT's work is guided by principles of confidentiality, impartiality, non-selectivity, universality and objectivity. Its mandate is specified in Article 11 of the OPCAT and is threefold: (i) to visit, on a regular basis, places where individuals are deprived of their liberty, including via follow up visits; (ii) to help countries to develop national mechanisms and work with the resulting NPMs; and (iii) to cooperate, for the prevention of torture in general, with relevant organs and mechanisms, as well as with the international, regional and national bodies working towards strengthening the protection of all persons against torture.

The SPT is composed of ten independent experts; they are supported, as needed, by medical and forensic specialists, criminologists and legal professionals. The SPT's membership will increase to 25 persons at the end of 2010 as 50 States have now ratified the OPCAT. As of August 2009, 49 States Parties have ratified the OPCAT. While not explicitly stated in the OPCAT, the expectation is that each State Party will be visited by the SPT at least once every five years and that there will also be follow up visits, depending on the situation on the ground.

2. Challenges Ahead

There are many challenges ahead, most notable those related to the ways in which the SPT will develop its working practices. Particularly delicate areas are the SPT's ability to pay unannounced visits to places of detention, as well as States Parties' willingness to voluntarily publish the SPT's reports: a practice that has been widely adopted within the European system for the prevention of torture with respect to CPT reports. The practice of publishing the SPT reports fosters an open debate on the prevention of torture in the visited country.

Another important issue is how the SPT will integrate and harmonise its work with that of other bodies and mechanisms, such as the CPT, the ICRC, and the UN Special Rapporteur on Torture. There are significant possibilities for cooperation and complementarity between these bodies, as well as with other regional and global institutions. There are many interesting avenues for cooperation; however, among the most significant are the opportunities for these bodies to cooperatively follow up recommendations to States Parties and to monitor the situation of individuals who have given testimony to the SPT during a particular visit and have reason to fear reprisals. The SPT has a particularly close association with the Committee against Torture (CAT). The SPT (and NPMs) and the CAT plan to establish a privileged partnership, discussed below. The CAT's different functions and objectives enable it to elaborate a global anti-torture doctrine, whereas the SPT and NPMs' mandates require them to take direct action, on the ground, to prevent torture. It is anticipated that these complementary roles will help to create a holistic system for protecting persons deprived of their liberty against torture. In this way, for example, the SPT's work could be enriched by the CAT's experience of examining country reports, while the practice of NPM's would benefit from the comparative perspective that the SPT's regular visits to different countries affords.

Without exhausting the list of challenges, it must be noted that an important test will be how the SPT articulates its evolving doctrine. This could, for example, take the form of General Comments or through the elaboration of other types of guidelines. Currently, however, the priority for the SPT is to be active in the field, to make visits to persons deprived of their liberty, and to establish contact, and communication systems, with NPMs.

3. The OPCAT's 'Added Value'

Some commentators have referred to the OPCAT as the first in a 'new generation' of human rights treaties because the protective impact of its mechanisms, the SPT and NPMs, is expected to surpass that of previous treaties. I agree with this assessment in principle, and believe that the creation of this preventive mechanism represents a significant advance in the global struggle against torture. In order to identify the more subtle aspects of the added value of the OPCAT, it is useful to briefly review the most important features of the current convention system for the prevention of torture.

3.1 *The UNCAT and the CAT*

The UNCAT² confirms the absolute prohibition of torture and the criminal nature of all acts of torture. The main objectives of the UNCAT are (i) to help establish the accountability of offending States by declaring them responsible for acts of torture, (ii) to facilitate and create means of inter-State cooperation in the investigation of allegations of torture, and (iii) to facilitate the apprehension and prosecution of suspected perpetrators of torture, and to deny sanctuary to persons suspected of torture. The UNCAT also establishes an enforceable right to fair and adequate compensation, as well as to rehabilitation, for victims of torture.

Underlying the system established by the UNCAT is the assumption that the unwelcome publicity generated by the attribution of responsibility for acts of torture to a given State, combined with the stigma that modern societies tend to attach to the phenomenon of torture – which is repugnant to the human conscience – will operate as an effective deterrent. This assumption has often proved true; hence the usefulness of the UNCAT, though the deterrent effect has had less impact than envisaged. However, when the UNCAT mechanisms are set in motion, it is because existing victims of torture require it. Indeed, one of the reasons behind the development of the OPCAT was the fact that the UNCAT's reactive system was less effective than expected.

In addition to the periodic reports submitted by States Parties to the UNCAT, and the General Comments issued to interpret its provisions, the UNCAT activates three procedures in response to reported acts of torture. These procedures are established in Articles 20, 21, and 22 of the UNCAT and are administered by the CAT. The procedures comprise (i) a confidential inquiry is launched under Article 20 of the UNCAT when the CAT receives information indicating that torture is being systematically carried out in the territory of a State Party, (ii) inter-State complaints in cases in which the States Parties have expressly recognised the competence of the CAT to deal with such complaints, and (iii) individual complaints by those who allege that they

² UNCAT, adopted by the UN General Assembly, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987.

were subjected to torture or ill-treatment, provided that the State in which the torture allegedly occurred has specifically recognised the CAT's competence to consider complaints from individuals subject to its jurisdiction who claim to be victims of a violation of the UNCAT. States Parties can ratify the UNCAT without necessarily ratifying this last procedure: instead, they can opt in or out of this third element. To opt in, the State must make a specific declaration under Article 22 recognising the CAT's competence to investigate individual complaints.

In such cases, the CAT can find that a State has violated its obligations under the UNCAT because torture has taken place in the State and, thus, the State is accountable for this. However, there have been no inter-State complaints to date: as such, States appear not to recognise the advantages of this mechanism, not only under UNCAT but in other monitoring systems. Most of the individual complaints that have been made to date relate to cases in which the State's obligation of *non-refoulement* was violated. The three procedures described above are essentially reactive: that is, they operate *a posteriori*, once a case of torture has taken place. However, in *non-refoulement* cases, complaints may have a preventive effect as regards specific individuals who are under threat of being sent to a State in which they are at risk of being tortured. Similarly, the CAT has also established general practices, such as mechanisms to follow-up State reports, which may have preventive effects.

However, the UNCAT (in Articles 12 and 13) does mandate States Parties to investigate alleged cases of torture. Once again, these investigations are necessarily *ex post facto*. Thus, there is no provision in the UNCAT for the implementation of prevention of torture; instead, responsibility is delegated to the States Parties in more or less generic terms. This is expressed in States' commitment to comply with certain obligations, including the adoption of legislative, administrative, and judicial measures to prevent acts of torture in any territory under its jurisdiction. The responsibility to ensure that education regarding the prohibition against torture is included in the training of law enforcement personnel and other public officials, as is the need to systematically review interrogation rules and practices, as well as arrangements for the treatment of people in the custody of the State.

The UNCAT does not allow for practical and regular verification of conditions of detention which may be conducive to torture and other forms of ill-treatment. As such, most of the monitoring provided for in the UNCAT is carried out far from the location in which acts of torture may be taking place. While the CAT may conduct missions to the territory of a State Party in a case of suspected systematic violations of the UNCAT, the UNCAT procedures were not conceived, in principle, to operate during visits *in loco*. This contrasts with the tasks now entrusted to the SPT and the NPMs set up by the OPCAT; under the OPCAT, regular monitoring of places of detention, and other places where people are deprived of their liberty, is done *in situ*. Immediacy is thus a distinctive feature of the new mechanism.

A visit conducted by the UNCAT in response to a case of systematic violations requires the agreement (i.e. prior authorisation) of the State Party concerned. This is a feature of most monitoring bodies. In the OPCAT, decisions about both the pertinence and the opportuneness of a visit are made independently by the SPT. Needless to say, since the very rationale of the OPCAT is the creation of a system of prevention based on cooperation between States, the SPT and the respective NPM, the SPT does not embark on unannounced visits to the capital of a State Party. However, the actual programme of places to be visited during a mission should not need be disclosed to the authorities, unless the SPT considers this disclosure will be helpful for the discharge of its mandate.

3.2 *Current shortcomings and future opportunities*

It is important to bear in mind that the inherent shortcomings of a primarily reactive system of protection (such as the one created by the UNCAT and similar instruments) are typical of the vast majority of international and regional monitoring mechanisms. These mechanisms have a quasi-judicial function; they issue pronouncements, in their expert capacity, on the responsibilities resulting from possible treaty violations.

The gaps that can be perceived in the existing international monitoring machinery are not the result of an inherent flaw, but, instead, are based on a concept of human rights protection that came into being and evolved after the Second World War and which gave rise to the European and American Conventions, as well as to the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The people who drafted these treaties needed to craft a system that would be accepted during the Cold War, when States and international organisations arguing for the protection of human rights confronted rigid concepts of national sovereignty and governments that were disinclined to authorise the regular presence of international monitoring bodies in their territories.

The system of visits provided for in the OPCAT has certain features that distinguish it from other protective mechanisms: it is based on the principles of cooperation, regularity, preventive action and immediacy. To a large extent, the OPCAT constitutes the next logical step in developing a universal system of protection against torture. This new system of preventive visits is important in that it complements and reinforces the current system, recognising that it is generally effective in reactive terms, though it cannot always tackle the immediate causes of torture or prevent it. The second added value of the OPCAT is that States Parties undertake to designate, create or maintain mechanisms for the prevention of torture at the national level. These mechanisms, to a large extent, mirror the functions of the SPT. However, they have a significant advantage over the latter: they can perform this task on a more regular basis, thereby ensuring continuity in their monitoring function. This is a unique feature of the OPCAT.

International human rights monitoring has, so far, been characterised by periodicity at best: for example, via treaty bodies examining State Party reports. The concept of a continuous monitoring presence dedicated to torture prevention on the ground, based on an international agreement and able to provide follow up visits (e.g. return visits to a place of detention when, for example, there is fear of reprisals against those who have given testimony to the SPT or NPM about violations), represents a significant addition to efforts to eradicate torture.

However, national monitoring organisations have other important features that an exclusively international human rights monitoring system cannot offer. The OPCAT, though an international treaty, is able to take advantage of these features via the NPMs. Closeness to both government and civil society enhances the ability of NPMs to propose, discuss and implement preventive measures in partnership with the State and civil society. From an operational point of view, quick access to relevant information (provided by local NGOs or relatives of persons deprived of liberty), as well as to decision-makers, may allow NPMs to react to early warnings or imminent crises and, thus, help avert violence and abuse. Finally, a continuous presence on the ground facilitates the building of trust between the NPM and the relevant authorities. The fact that NPMs have local staff, sensitised to relevant cultural issues and attuned to the local political situation, often helps to facilitate dialogue and to better convey some of the complex messages associated with the prohibition of torture and ill-treatment.

The NPMs and the SPT aims to operate in a complementary and coordinated manner. They are parts of the same system, share common goals and have a similar method of work. As natural partners, they must work to establish coherent, permanent and efficient lines of communication, as well as information exchange systems. This will, hopefully, allow the international and national bodies to harmonise recommendations, coordinate regular and follow up visits, and cooperate in the implementation of other preventive initiatives. However, setting up an interlocking system will take some time.

The third reason that the OPCAT represents a significant advance on prior mechanisms to prevent torture is that it is designed to maximise the protection offered by the system of visits to places of deprivation of liberty. Maximising protection through preventive work means that activities aimed at preventing torture inevitably have the knock-on effect of expanding the general reach of human rights protection. Potential victims of other human rights violations are likely to benefit from enhanced protection at the same time as their risk of torture is being examined by the international and national preventive mechanisms.

In order to discharge their mandate, the SPT and NPMs should examine, and make recommendations on, a broad range of situations affecting the human rights of persons deprived of liberty. Indeed, in analysing the weaknesses of prison or judicial systems that facilitate torture or ill-treatment, it is necessary to look, among other things, at the following rights, aspects of deprivation of liberty, and complicating factors:

- (1) the grounds and procedures authorised by law that deprive persons of liberty, as well as the safeguards required when an arrest is carried out. Many cases of ill-treatment or torture take place in the initial stages of detention, and practice has shown that this is particularly true when the arrest and detention are arbitrary.
- (2) how and when information on detainees' rights is presented to detainees and other interested parties, and how full and detailed this information is. Above all, detainees have a right to know why they are being detained: persons who are not aware of the reasons for their detention, or of their rights, cannot effectively oppose their detention or defend their rights.
- (3) the right of access to a lawyer, or to legal aid, is another important safeguard against torture and ill-treatment. Under international standards, any person who is arrested must have access to a lawyer as soon as possible: the lawyer should be present at the first interrogation session.
- (4) the right of *habeas corpus*, and other judicial remedies for the protection of detainees, help to safeguard against torture, as does the right to have access to doctors and medical care, and the right to have contact with their family. There is a substantial body of evidence that holding detainees incommunicado, and that allowing secret detention, are conducive to torture.
- (5) general safeguards during interrogations. It is vital that full records of all the relevant aspects of detention are kept as these constitute an additional deterrent to torture.
- (6) conditions of detention may amount to cruel, inhuman or degrading treatment and fall within the purview of the OPCAT's preventive mechanisms. Key amongst the

conditions that may amount to cruel, inhuman or degrading treatment are the physical state of a detention facility, quality and quantity of the food and water provided, the hygiene conditions, the availability of recreational facilities, and detainees' contact with each other and the outside world.

- (7) discipline and security measures in places where individuals are deprived of liberty should be examined regularly. Such examinations should focus on practices and systems related to the use of force, to instruments and techniques of restraint, and to the conditions under which a person can be sent into solitary confinement or subjected to other disciplinary punishments.
- (8) specific protection measures should be put in place for particularly vulnerable groups, such as women, children, foreigners or persons with disabilities.
- (9) evidentiary issues, especially those regarding the weight that a particular legal system attaches to confessions, should also be subjected to periodic review. Experience has shown that when a legal system allows a confession to be the sole basis of conviction, without requiring corroborating evidence, the incidence of torture or other ill-treatment increases.
- (10) examination of the measures against impunity and review of existing complaint mechanisms is also essential. If perpetrators believe that they can get away with torture, persons deprived of liberty become more vulnerable to abuse.

The SPT and NPMs need to make recommendations and enter into a dialogue with governments about the implementation of their obligations in relation to all the issues outlined above. The national implementation of specific recommendations, based on fact-finding and on corresponding legal analysis, will be crucial if the SPT and NPMs are to contribute effectively to securing conditions in which torture is no longer possible.

Preventive work and visits may widen the scope of human rights protection against forced disappearances, especially via the SPT's ability to pay unannounced visits to places of detention (including places where it is suspected that persons are being deprived of their liberty). In cases in which there is intent to 'disappear' a detainee, the mere fact that a monitoring body has established the person's whereabouts often has a powerful preventive effect. The 'finding' of a detainee has, on many occasions, interrupted the course of a forced disappearance, a situation that otherwise frequently ends in an extrajudicial execution. It is not by chance that some of the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance³ draw on the principle of preventive visits contained in the OPCAT. This new Convention, which was opened for signature in Paris in February 2007 and currently has 57 signatory States, creates the following duties for its States Parties: (i) 'Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available ... to any ... competent authority ... authorized ... by the law of the State Party concerned or any relevant

³ The Convention was adopted by the UN General Assembly on 20 December 2006 and was opened for signatures on 6 February 2007. As of December 2009, there were 81 signatories and 16 States Parties. The Convention will come into force following the 20th ratification. Available at <http://www2.ohchr.org/english/law/disappearance-convention.htm>.

international legal instrument to which the State concerned is a party’;⁴ (ii) States must also ‘guarantee access by the competent ... authorities and institutions to the places where persons are deprived of liberty’.⁵

The OPCAT will thus help mitigate the effects of a fragmented system of international human rights protection that is the result of the specific circumstances that surround standard-setting in this branch of international law. The main human rights instruments were drafted one by one, in different historical contexts: the International Covenants date from the 1960s, the Convention against Torture was drafted in the 1980s, while the Convention against Enforced Disappearance is fairly recent. As a result, each individual treaty created a specific and autonomous mechanism to monitor State compliance and address possible violations. In reality, however, human rights abuses usually take place in a simultaneous and interrelated manner.

To the extent that it provides for monitoring on the ground, the OPCAT moves prevention-directed legislation into line with reality, recognising the difficulties of putting goals, such as eradicating torture, into practice. Hopefully, these torture-focused developments will have a lateral effect and help to prevent other serious human rights violations.

⁴ International Convention for the Protection of All Persons from Enforced Disappearance, Article 17.3. See fn.3.

⁵ International Convention for the Protection of All Persons from Enforced Disappearance, Article 17.1(e). See fn.3.