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The Origins and Background of OPCAT

A. Introduction

The Optional Protocol to the Convention against Torture (OPCAT, or Optional Protocol) is unlike any of the other principal UN human rights treaties[1] in that it does not set out any additional substantive human rights commitments but is primarily focussed on establishing mechanisms to further the realization of the pre-existing commitment of States Parties to the UN Convention against Torture (the UNCAT) not to subject anyone to torture, or cruel, inhuman or degrading treatment or punishment.

The existence of a general obligation under international law not to subject anyone to torture, or cruel, inhuman, or degrading treatment or punishment is beyond doubt.[2] In addition to the strength of the prohibition, there is also a long history of the international community adopting innovative means of addressing torture. Although the prohibition was a central component of the human rights instruments which emerged in the years following the end of the second world war,[3] the resurgence of torture and the increased prominence that this received during the 1970s combined to create the international momentum that resulted in

[1] In this, it is of course similar to other Protocols to UN human rights treaties, such as the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), providing for the system of individual communications to the Human Rights Committee established by the principal instrument. In many ways, however, OPCAT is best understood as a free-standing treaty rather than as a Protocol to another, though a number of small but important connections to the UN Convention against Torture do exist within the text of the Protocol and as an Optional Protocol it is only open to Parties to the UNCAT. These connections will be considered in detail in Chapter 7, below.

[2] See, for example, Rodley, N, with Pollard, M, *The Treatment of Prisoners under International Law*, 3rd edn (Oxford: Oxford University Press, 2009), p 80 where, after an exhaustive survey of the materials, it says that 'it is safe to conclude that the prohibition of torture and other ill-treatment is one of general international law, regardless of whether a particular state is party to a treaty expressly containing the prohibition'. It is also noted that 'it appears that the General Assembly of the United Nations now accepts that the prohibition of torture is itself a norm of *jus cogens* or "a peremptory norm of general international law"' (ibid). There is now a wealth of authority supporting this proposition.

[3] See, for example, Article 5, UN Universal Declaration on Human Rights, GA Res 217A (III), adopted 10 December 1948 (UDHR); Article 3, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, ETS No 5; 213 UNTS 222 (ECHR); Article 7, International Covenant on Civil and Political Rights; Article 7, International Covenant on Civil and Political Rights, GA Res 2200A (XXI), adopted 16 December 1966, 993 UNTS 171 (ICCPR)—all of which address torture and ill-treatment in similar terms.

the adoption of the UN Declaration against Torture in 1975[4] and the Convention against Torture (the UNCAT) in 1984,[5] to which 147 States are currently party. The Declaration was based on a text originally discussed at the 5th UN Congress on Crime Prevention and established the concept that acts of torture ought to be criminal offences under domestic law, that where there are reasonable grounds to suspect that such acts have occurred the domestic authorities should investigate, and that, where appropriate, criminal proceedings should be brought.[6] This introduced a 'criminalizing' dynamic which was subsequently taken up, refined and expanded during the drafting of UNCAT itself.[7] In this, it follows the approach found in a number of other international conventions which had been adopted beforehand[8]—and which have been followed since[9]—in providing a definition of the forms of conduct to be tackled, requiring that States Parties make such conduct an offence subject to appropriate forms of penalty and obliging them, when persons suspected of having committed such offences are within their jurisdiction, either to submit their cases to the prosecuting authorities or, if requested, to extradite them to another State which wishes to do so.

This approach, summed up in the expression '*aut dedere aut judicare*'—extradite or prosecute—is a well-known technique of 'closing the net' on alleged offenders[10] and in the context of the UNCAT, its essential 'architecture' is as follows.

[4] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 3452 (XXX), adopted 9 December 1975 (Declaration against Torture).

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res A/RES/39/46, adopted 10 December 1984, 1465 UNTS 85 (Convention Against Torture or UNCAT).

[6] Declaration against Torture, Articles 7, 9, and 10. See Burgers, J and Danelius, H, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Hague: Martinus Nijhoff, 1988), pp 13–18.

[7] This approach had been sanctioned by the UN General Assembly which had requested the Commission to develop a text on the basis of the 1975 Declaration. See UN GA Res 32/62, adopted 8 December 1977 and Nowak, M and McArthur, E, *The United National Convention against Torture: A Commentary* (Oxford, Oxford University Press, 2008), p 23. The principal draft used by the Working Group of the Commission was that of Sweden. This was largely modelled on the 1975 Declaration and its criminalizing approach but went beyond it by providing for the exercise of universal jurisdiction. The text of the initial Swedish Draft is reproduced in Nowak and McArthur, p 1216. The other principal draft submitted as a potential basis for discussion was that of the International Association of Penal Law (IAPL). It was similar to the Swedish Draft from a jurisdictional perspective but was more limited in scope, addressing only torture and not 'cruel, inhuman or degrading treatment or punishment'. See Nowak and McArthur, ibid p 1210.

[8] The models used for the Swedish Draft and others drawn on during the drafting process were chiefly the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (860 UNTS 105), the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (974 UNTS 177), the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1035 UNTS 167), and the 1979 New York International Convention against the Taking of Hostages Convention (1316 UNTS 205).

[9] See, for example, the 1997 International Convention for the Suppression of Terrorist Bombings (2149 UNTS 256); the 1999 International Convention for the Suppression of the Financing of Terrorism (2178 UNTS 197); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (2445 UNTS 89).

[10] For a general exploration of these forms of treaty see Reydams, L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, Oxford University Press, 2004). See also

The definition of torture, for the purposes of the convention,[11] is given in Article 1(1), and provides:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 4 provides for the criminalization of such acts, providing that:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Moving on to the issue of jurisdiction, Article 5(1) of UNCAT first of all requires that States extend their jurisdiction in a range of situations reflecting the well-established jurisdictional 'heads' of 'territoriality', 'nationality', and 'passive personality'[12] before moving on to the controversial yet vital provision in Article 5(2) regarding the exercise of 'universal' jurisdiction, this providing that:

> Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8[13] to any of the States mentioned in paragraph I of this article.

Reydams, L, 'The Rise and Fall of Universal Jurisdiction' in Schabas, W and Bernaz, N (eds), *Handbook of International Criminal Law* (London: Routledge, 2010).

[11] For discussion of the scope of the definition of torture as found in Article 1 of UNCAT see, *inter alia*, *The Definition of Torture:* Proceedings of an Expert Seminar, Geneva 10–11 November 2001 (Geneva: APT, 2003); Evans, M D, 'Getting to Grips with Torture' (2002) 51 *ICLQ* 365; Nowak and McArthur, *Commentary*, n 7 above, pp 27–86; Rodley, with Pollard, *The Treatment of Prisoners*, n 2 above, pp 82–144; Rodley, N, 'The Definition(s) of Torture under International Law' (2005) *CLP* 467. See also APT/CEJIL, *Torture in International Law: A Guide to the Jurisprudence* (Geneva: APT and Washington: CEJIL, 2008).

[12] Article 5(1) provides that:

> [e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
> (b) When the alleged offender is a national of that State;
> (c) When the victim is a national of that State if that State considers it appropriate.

[13] Article 8 concerns the modalities of extradition, rather than the obligation to extradite which is found in Article 7(1).

Having provided for the establishment of the necessary definitional, criminal, and jurisdictional frameworks, Article 7(1) binds them together through the obligation to 'extradite or prosecute', providing that:

> 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

It is beyond the scope of this work to look generally at the many practical problems associated either with these jurisdictional provisions or other substantive provisions of UNCAT, though a more detailed examination of some of the provisions of UNCAT most relevant to an understanding of the Optional Protocol will be noted where relevant throughout this book.[14] This framework is presented in order to underline the extent to which the Convention against Torture is, in some ways, a hybrid instrument. Although from the outset it formed a key part of the 'canon' of international human rights treaties[15] it went significantly beyond existing instruments in the way in which it created obligations concerning the manner in which torture was to be addressed as a matter of domestic criminal law and, as will be seen, this finds echo in, and has practical implications for, the work undertaken within the framework of the Optional Protocol. It is only with the recently adopted International Convention for the Protection of All Persons from Enforced Disappearances that a similar approach has finally been taken in a subsequent UN human rights treaty dealing with a different subject matter.

Nevertheless, in common with the other principle UN human rights treaties—and unlike all the other 'terrorism' treaties[16] based on the '*aut dedere*

[14] Mention might, however, be made here of the particularly significant exploration currently before the International Court of Justice concerning the precise scope and substantive content of Article 7(1) itself in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*. This case concerns the failure of Senegal to extradite Mr Habre, formally President of Chad and who has been living in Senegal since1990, to face criminal charges in Belgium arising out of alleged acts of torture and crimes against humanity committed during his Presidency. The UN Committee against Torture (see below) had already determined that Senegal was in breach of its obligations under Article 5(2) by not being in a position to prosecute Habre for want of an appropriate domestic legal framework and under Article 7(1) for not having done so (see *Guengueng and others v Senegal*, CAT Communication No 181/2001). Although it has amended its domestic law, Senegal is yet to either prosecute or extradite Habre, as a result of which, Belgium, as a State seeking extradition, is claiming that Senegal is in breach of its obligations under the Torture Convention. In response to a request for an award of interim measures, the ICJ, whilst declining to make such an order on other grounds, has determined that it does, prima facie, have jurisdiction on the basis that there is a dispute concerning the interpretation and application of Article 7(1). See *Questions Relating to the Obligation To Prosecute Or Extradite (Belgium v Senegal)*, Provisional Measures, Order of 28 May 2009, ICJ Reports, 2009, not yet reported.

[15] The UNCAT has from the outset been serviced by and operated under the auspices of the UN Office in Geneva, now the Office of the High Commissioner for Human Rights, and understood to be a part of the human rights machinery of the UN—unlike the crime prevention and 'suppression' conventions which generally fall within the sphere of the UN office in Vienna.

[16] The Convention on Enforced Disappearances also establishes a treaty monitoring body—the Committee on Enforced Disappearances—but uniquely, in UN Human Rights instruments, Article

aut judicare' approach—the UNCAT establishes a monitoring body, the Committee against Torture (CAT), to which States are required to submit reports on a periodic basis[17] and which can consider individual and inter-state communications provided that the relevant consents have been given.[18] In addition to these fairly standard means of oversight, Article 20 of the UNCAT establishes what was at the time an extremely innovative procedure by which the CAT might undertake an inquiry *proprio motu* and consider conducting a visit to a State Party in cases where it decides, on the basis of reliable information, that there are 'well-founded indications that torture is being systematically practiced in the territory of a State Party . . . '.[19] Article 20 proved to be one of the most controversial in the convention and agreement on its inclusion was only reached at the very end of the drafting process in the UN General Assembly Third Committee when a proposal that parties be able to opt out of this procedure was adopted.[20] At the time of writing, only eight States have exempted themselves from the scope of Article 20.[21] Nevertheless, given its controversial nature, the CAT has proceeded with caution and has to date

27 of the Convention provides for a review of its effectiveness by the States Parties between four and six years after its entry into force in order to determine whether to transfer its monitoring functions to another body. The modalities for amendment are, however, such that they make this an unlikely outcome.

[17] See UNCAT Article 19. The Committee against Torture has adopted a variant on this procedure, by which it adopts in respect of each State a 'List of Issues Prior to Reporting (LOIPR)' and the State in question is invited to address those issues rather than submit a full 'periodic' report as provided for in Article 19. See 2007 Report of the Committee against Torture to the General Assembly, A/62/44, paras 23 and 24; 2009 Report of the Committee against Torture to the General Assembly, A/64/44, para 27.

[18] See UNCAT Articles 21 (inter-state communications) and 22 (individual communications). No use has ever been made of the inter-state procedure and, as of 30/11/2010, only sixty-four States had recognized the right of individual communication under Article 22. As of that date, a total of 429 cases had been lodged. 337 cases had been concluded, and of the 169 considered on the merits fifty-two had resulted in a finding of a violation (and nearly half of which concern Canada, Sweden, or Switzerland). The vast majority of cases brought concern the non-refoulement provision, UNCAT Article 3.

[19] Four other UN human rights treaties now expressly provide for an 'inquiry procedure' of this nature, these being Article 8 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women; Article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Article 11 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and Article 33 of the International Convention for the Protection of All Persons from Enforced Disappearances. In addition, the Rules of Procedure of some treaty bodies embrace the possibility of conducting country visits as a part of their 'follow-up procedures'. See, for example, Human Rights Committee Rules of Procedure, Rule 101, concerning follow-up to individual communications (CCPR/C/3/Rev.8, 22 September 2005) and, indeed, the CAT itself: Rules of Procedure, Rule 114(4) (CAT/C/3/Rev.4, 9 August 2002).

[20] See UNCAT Article 28(1). For a discussion of the drafting see Nowak and McArthur, n 7 above, pp 659–673. See also Burgers and Danelius, *Handbook on the Convention against Torture*, n 6 above, passim; Ingelese, C, *The UN Committee against Torture: An Assessment* (The Hague: Kluwer Law International, 2001), ch 6.

[21] These being Afghanistan, China, Equitorial Guinea, Israel, Kuwait, Mauritania, Saudi Arabia, and Syrian Arab Republic. See Report of the Committee against Torture (forty-third and forty-fourth sessions), UN GA Doc A/65/44, Annex II. The length of this list has varied considerably over time. Initially most Eastern European group States, and other socialist States, made declarations but following the end of the cold war these have been withdrawn (one of the last to do so being Poland in 2008). For a detailed breakdown and analysis see Nowak and McArthur, n 7 above, pp 840–843.

carried out seven inquires under the Article 20 procedure,[22] these being in respect of Turkey,[23] Egypt[24], Peru,[25] Sri Lanka,[26] Mexico,[27] Serbia and Montenegro,[28] and Brazil.[29]

It is against this general background of procedural innovation in general and the controversy over the Article 20 procedure in particular that the development of the Optional Protocol to the Torture Convention (OPCAT) must be placed and understood.

B. The Origins of the Optional Protocol

The origins of the Optional Protocol lie in the belief that torture and ill-treatment can be prevented—or the risk of such treatment occurring can be lessened—by visits to places of detention undertaken by external independent observers with appropriate powers of access and recommendation. The story is now well known.[30]

[22] The only other Committee to have conducted such an inquiry to date is CEDAW acting under Article 8 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women, in Mexico in 2003. The other inquiry provisions (see n 19 above) are of more recent origin and have yet to be used.

[23] The Committee commenced its inquiry regarding Turkey in April 1990, culminating in a visit which took place in June 1992. The CAT published its summary findings in November 1993. See CAT Annual Report, A/49/44 (1994) paras 172–177 and A/48/44/Add.1 for the summary account and Nowak and McArthur, n 7 above, p 684.

[24] This inquiry commenced in November 1991. Egypt declined permission for members to conduct an in situ visit and so the CAT produced a report on the basis of information submitted to it and published a summary account of this in May 1996. See CAT Annual Report A/51/44 (1996), paras 180–222 and Nowak and McArthur, n 7 above, p 685.

[25] This inquiry was initiated in April 1995 and resulted in a visit being conducted in September 1998. The summary findings were not published until May 2001. See CAT Annual Report A/56/44 (2001) paras 144–193 and Nowak and McArthur, n 7 above, pp 685–686.

[26] This inquiry was initiated in July 1998 and a visit took place in September 2000. Uniquely so far, the CAT concluded that whilst torture occurred, it did not amount to a systematic practice. Its findings were published in November 2001. See CAT Annual Report A/57/44 (2002) paras 123–195 and Nowak and McArthur, n 7 above, pp 686–688. The decision of the CAT on this matter prompted considerable criticism. See, for example, Rodley, with Pollard, n 2 above, p 218 where it is said that this conclusion 'defies analysis'.

[27] This inquiry was initiated in October 1998, with a visit taking place in August/September 2001. The Mexican authorities consented to the publication of the full report (along with its reply) in May 2003. See CAT Annual Report A/58/44 (2003) paras 147–153 and the report both of which are available as CAT/C/75. See also Nowak and McArthur, n 7 above, p 688.

[28] The CAT commenced its consideration in 1997 but deferred it until May 2000 due to the political situation. A visit took place in July 2002, resulting in a finding that torture had been systematic in Serbia prior to October 2000, during the presidency of Slobodan Milosevic. See CAT Annual Report A/59/44 (2004) 156–240 and Nowak and McArthur, n 7 above, p 689.

[29] The CAT initiated its inquiry in November 2002 and a visit took place, after a number of postponements, in July 2005. The Brazilian authorities consented to the publication of the full report (along with its reply) in November 2007. See CAT Annual Report A/63/44, paras 64–72 and the report, both of which are available as CAT/C/39/2.

[30] The most authoritative account of the early years is that given by the first Secretary General of the SCAT, Francois de Vargas, for which see de Vargas, F 'History of a Campaign' in International Commission of Jurists and the Swiss Committee against Torture, *Torture: How to Make the International Convention Effective* (Geneva: ICJ/SCAT, 1979). See also Evans, M and Morgan, R, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading*

In the mid 1970s a retired Swiss banker, Jean-Jacques Gautier, inspired by the model of the ICRC, proposed that an international body be established by treaty which would have the right to conduct unannounced visits to places of detention and make recommendations to the State concerned with a view to better ensuring the prevention of torture and ill-treatment.[31] In 1970 Werner Schmid, a member of the Swiss Federal Parliament, had proposed that the Swiss Federal Council prepare an international convention for the protection of political prisoners. In 1971 the Federal Council commissioned the Henry Dunant Institute in Geneva to undertake such a study and they invited Gautier to contribute. In the end, it was Gautier who drafted the report's conclusion, recommending the establishment of such a body with a more generalized remit than political prisoners alone. Though coolly received by the Swiss Federal Council, the proposal garnered considerable public support, including that of Eric Martin, a former President of the ICRC, and in 1977 Gautier established the Swiss Committee Against Torture (SCAT)[32] which later that year established a group of experts under the Chairmanship of Professor Christian Dominicé which formed Gautier's ideas into a draft 'Convention Concerning the Treatment of Prisoners Deprived of their Liberty'.

It was shortly after this that the UN General Assembly requested that the UN Commission on Human Rights commence work on the drafting of the Convention against Torture[33] and as has been seen, in January 1978 drafts were tabled by both Sweden and the IAPL.[34] There were, then, two very different approaches 'in play' at that moment, though with very different levels of support: the criminalizing approach found in the Swedish and IAPL Drafts, a model which was already foreshadowed by the UN Declaration and the terms of UN GA Res. 32/62 itself, and the very different Gautier-inspired scheme based on visits to places of detention which, though lacking official backing, had attracted influential supporters. When the Working Group met to commence its work on the convention in February 1978 it decided to focus on the Swedish Draft and, rather than try to supplant one

Treatment of Punishment (Oxford: Oxford University Press, 1998), pp 106–112 which is based on interviews with de Vargas and which also forms the basis of this current account. For the more general background see Haenni, C, *20 Ans Consacrés à la realisation d'une idée* (Geneva: Association for the Prevention of Torture, 1997). For accounts of the drafting history of the Optional Protocol itself see Evans, M and Haenni-Dale, C, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention against Torture' (2004) 4 *HRLR* 19; Nowak and McArthur, n 7 above, pp 4–7 and 935–1192; Rodley, with Pollard, n 2 above, pp 239–240. For the more general background see Haenni, C, ibid.

[31] The letters and documents which reflect the development of Gautier's thinking over time on these issues have been published in Mischler (ed), *Jean-Jacques Gautier et la Prévention de la Torture: de l'Idée à l'Action: Recueil des Textes* (Geneva: Association for the Prevention of Torture/Institut Europe, Université de Genève, 2003).

[32] In 1992 the SCAT was re-launched as the Association for the Prevention of Torture (APT) which subsequently took the lead in supporting the development of both the European Convention for the Prevention of Torture and the drafting of OPCAT. The APT continues to be the leading NGO working in the field of torture prevention and plays a leading role in supporting its practical application at both national and international levels.

[33] See UN GA Res A/RES/32/62, adopted 8 December 1977.

[34] See n 7 above.

model at the expense of the other, Niall McDermot (then Secretary General of the International Commission of Jurists) suggested to Gautier that his approach could be recast as an Optional Protocol to a Torture Convention, rather than as a rival model for such a convention.[35]

This approach was agreed upon at a conference convened by the Swiss University at St Gall in June 1978 and the text of a draft Optional Protocol was set out in the publication, *Torture: How to Make the International Convention Effective*,[36] which also contained commentary, comment, and endorsement by leading figures including not only Gautier himself but Martin and McDermott. Since details of the model proposed at that time were very different from that which formed the basis of later discussions and, of course, from the Optional Protocol as it is today, it will not be considered in detail. However, its essence is best summed up in the words of Gautier himself who considered it a relatively simple scheme in which:

> . . . an international committee elected by an assembly of the Member States of the Protocol would be empowered to send to the territory of each of these States on a regular basis delegates authorised to visit, without prior notification, any centre for interrogation, detention or imprisonment. The Committee will then inform the State concerned of the finding made by its delegates and will make an effort, if necessary, to bring about an improvement in the treatment of those in detention. In the event of disagreement as to the Committee's finding or as to the implementation of its recommendations, the Committee will be able publish its findings.[37]

Described in this fashion, the basic concept and idea is instantly recognizable as that found in the Optional Protocol today, even if much of the detail surrounding it is now very different and very much more complex than could possibly have been originally foreseen. The idea was, however, not yet 'on the table' as such as far as the official drafting process was concerned and it was not until 6 March 1980 that it became so, when Costa Rica submitted the draft of an Optional Protocol to the Working Group on the request of the ICJ and SCAT.[38]

The essence of the Costa Rica Draft, 1980 was as follows: States Parties to the Protocol would agree to 'permit visits . . . to any place . . . subject to the jurisdiction of a State Party where persons are held who have been deprived of their liberty for any reason'.[39] A Committee, initially comprising ten members, but subsequently rising to eighteen when the number of States Parties exceeded twenty-five,[40] would

[35] See McDermott, N, 'How to Enforce the Torture Convention' in *Torture: How to Make the International Convention Effective* (Geneva: ICJ/SCAT, 1979) pp 18–26.

[36] International Commission of Jurists and the Swiss Committee against Torture, *Torture: How to Make the International Convention Effective* (Geneva: ICJ/SCAT, 1979). See also above, n 30.

[37] Gautier, J-J, 'The Case for an Effective and Realistic Procedure' in *How to Make the International Convention Effective*, ibid, p 32.

[38] See Draft Optional Protocol to the Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc E/CN.4/1409. This is also reproduced in Burgers and Danelius, n 6 above and in Nowak and McArthur, n 7 above, p 1452. Hereafter this will be cited as the 'Costa Rica Draft, 1980'.

[39] Costa Rica Draft, 1980, Article 1(1).

[40] Ibid, Article 4(1).

be elected by the States Parties from lists of candidates nominated by them.[41] Members would serve in their individual capacities for four-year terms,[42] and be eligible for re-election.[43] The Committee would arrange programmes of regular visits to each State Party and, in addition, 'such further visits as may appear necessary from time to time'.[44] Visits would be conducted by delegates, who might either be members of the Committee itself or be 'members of a panel of qualified persons chosen by the Committee from among the nationals of the States Parties'.[45] It was implicit in the draft that a country would be notified in advance both of the 'mission' itself and of the identity of the delegate(s) to be involved, but it was also clear that the delegates would be 'authorised to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party'.[46] Following a visit, the Committee would consider the report of its delegates, informing the State of its findings, and 'if necessary' make recommendations and initiate consultations 'with a view to furthering the protection of persons deprived of their liberty'.[47] Once again, the essential contours of the Optional Protocol as finally adopted can be seen clearly in this very first draft tabled at the UN.

This proposal, and particularly the use of delegates, also shows the influence of the practice of the ICRC but, despite its impressive lineage, the Costa Rica Draft, 1980 was stillborn. The wide-ranging right of access to any place of detention coupled with the possibility of its findings being made public was sufficient to ensure that, no matter how useful a mechanism it might be, it was well in advance of anything that the international community was prepared to accept. When one bears in mind the controversy over the considerably less intrusive Article 20 inquiry procedure, it is easy to see why those heading up the negotiations were wary of the draft and worried that, even as an Optional Protocol, it might not only be premature but might set back, or even undermine, the prospects for the convention itself.[48] Thus when Costa Rica submitted the proposal, it did so on the express understanding that it would not be considered further until the convention itself had been adopted.[49] As a result, moves towards the creation of a preventive visiting

[41] Ibid, Articles 3(2) and 5(1).
[42] Ibid, Article 6(1).
[43] Ibid, Article 5(3).
[44] Ibid, Article 8(2).
[45] Ibid, Article 9(1).
[46] Ibid, Article 10. Later on, this principle became commonly referred to as 'any time, any place, anywhere' (a catch phrase which may have a certain resonance for readers of a certain age).
[47] Ibid, Article 11(1). The Committee would be able to publish the findings and recommendations if the State concerned gave its consent or if, in the case of a disagreement with the State concerning the findings and recommendations, it considered it appropriate to do so (ibid, Article 11(2)).
[48] It is also worth remembering that at this time—1980—the system of State reporting was itself still something of a novelty, the full implications of which were unclear. Given that States were still experimenting with the experience of having their own accounts of their compliance with their treaty obligations subjected to international scrutiny by committee in Geneva, it is hardly surprising that there should be an even greater wariness of a system under which an international body would visit, unannounced, in order to examine the situation for itself at first hand.
[49] Burgers and Danelius, n 6 above, p 28.

mechanism at the UN level stopped as soon as it started. Nevertheless, the idea was still 'on the table', even if it was not under active consideration and was clearly going to be returned to at some future date.

C. The European Convention for the Prevention of Torture

Much has been said about the relationship between the Optional Protocol to the UNCAT and its European counterpart, the European Convention for the Prevention of Torture (ECPT). In particular, there is great interest in the manner in which the work of the international bodies which they establish—the UN Subcommittee for the Prevention of Torture (SPT) under OPCAT and the Committee for the Prevention of Torture (CPT) under the ECPT—might impact on each other and these issues will be addressed in some detail later in this work.[50] It is certainly the case that both the establishment of the CPT and its practical experience have had a profound impact both on the detail of OPCAT as a legal instrument and on the work of the SPT as an international visiting body. However, it is sometimes forgotten that the origins of the ECPT are found in the hiatus in the drafting of the Optional Protocol itself. There were no moves towards there being a European Convention until the process at the UN had been halted, and to that extent it is fair to say that the European Convention represents the achievement at a regional level of the universal idea found in the Cartier proposal and the Costa Rica Draft, 1980. This is important, since, as will be seen, when the process of drafting the Optional Protocol was revived in the 1990s after the entry into force of the ECPT and the establishment of the CPT, it was sometimes thought that this was yet another example of European regional practice being extended to the global stage. This, however, was manifestly not the case. The idea all along was to establish a global rather than regional instrument and to that extent the European Convention acted as a proving ground for the idea, rather than being its precursor. For all these reasons, it is therefore important to take a short excursus into the development of the ECPT and to provide a brief overview of the experience of the CPT, in order to inform the examination of the drafting of OPCAT which is to follow.

1. Drafting the ECPT[51]

Less than a year after the tabling—and mothballing—of the Costa Rica Draft at the UN, the Parliamentary Assembly of the Council of Europe considered the Meier

[50] See in particular Chapters 7 and 8.

[51] For a full account of the drafting of the ECPT see Evans and Morgan, *Preventing Torture*, pp 112–141 (parts of which form the basis of this account). Other accounts include Cassese, A, 'A New Approach to Human Rights: the European Convention for the Prevention of Torture' (1989) 83 *AJIL* 130; MacDonald, R St John, 'The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in Bello, E and Abjibola, B (eds) *Essays in Honour of Judge Taslim Olawale Elias* (Dordrecht: Martinus Mijhoff, 1992); Vigny, D, 'La Convention européene de

Report, which examined the progress being made towards the adoption of the UN Torture Convention.[52] The report, echoing criticisms previously made by Gautier, noted that provisions found in the Swedish Draft were 'quasi-judicial in nature and carried with them the usual drawbacks of complexity and slowness'. The report argued that the Optional Protocol offered a solution to these problems and that its approach was 'the right one for strengthening the effectiveness of the Convention'.[53] The advantages were considered to be that since it was, in principle, a cooperative and confidential model, States would not be on the defensive and that it permitted rapid action, unlike the other more protracted procedures, and the report and its conclusions were endorsed by the Parliamentary Assembly early in 1981.[54]

Later that year, and in the wake of motions raising questions of torture within Council of Europe countries, the Chair of the Legal Affairs Committee, Noel Berrier, submitted an 'Introductory Memorandum' concerning torture in which for the first time was formally introduced the idea that such a system be adopted at the regional level 'without waiting for the proposal to be implemented at the world level'.[55] Pandering somewhat to a sense of European complacency and superiority, the ICJ and SCAT offered to draft a regional convention or Optional Protocol to the ECHR which, when completed, was incorporated in the final version of the Berrier Report.[56] The Parliamentary Assembly duly adopted the report and called on the Council of Ministers to adopt the draft convention.[57] The Committee of Ministers responded by requesting its Steering Committee for Human Rights (CDDH) to consider the draft convention and submit proposals to it.[58] In March 1984 the CDDH delegated this task to a Committee of Experts[59] and in November 1986—a little over two and a half years later—the CDDH finalized the

1987 pour la prévention de la torture et peines ou traitments inhumains ou dégradants' (1987) 43 *Annuaire Suisse de droit international* 62; Decaux, E, 'La Convention européene pour la prévention de la torture et peines ou traitments inhumains ou dégradants' (1988) 34 *Annuaire français de droit international* 618.

[52] See Council of Europe Doc AS/Jur (32) 22 of 8 December 1990. Mrs Meier was Rapporteur of the Legal Affairs Committee of the Parliamentary Assembly.

[53] Ibid, para 13.

[54] Council of Europe, Parliamentary Assembly Recommendation 909 (1981) on the International Convention against Torture, adopted 26 January 1981.

[55] Berrier Report, Council of Europe Doc AS/Jur (33) 18 of 9 September 1981, para 13.

[56] Ibid. The ICJ and SCAT had endorsed the idea of a regional convention, noting that 'it could serve to establish the viability and value of the system . . . Europe would once again lead the way, as it did with the ECHR' (letter from ICJ to the Clerk of the Parliamentary Assembly in Council of Europe Doc AS/Jur (24) 2).

[57] Council of Europe, Parliamentary Assembly Recommendation 971 (1983) of 28 September 1983.

[58] See Records of 366th Meeting of Ministers' Deputies, January 1984.

[59] The Committee of Experts met in May and October 1984 and again in March and May 1985. A Drafting Committee met during that summer and its work considered by the Committee of Experts in October. The CDDH reviewed progress in November and the Committee held further meetings in February and July 1986 prior to the CDDH adopting the draft in October 1986. See Cassese, n 51 above, p 132 for further details.

text and transmitted it to the Council of Ministers which adopted the convention on 26 June 1987.[60]

It is neither necessary nor desirable to recount the drafting history of the ECPT in detail. However, three issues will be looked at briefly, either because of their direct relevance to OPCAT or because of the interest which they have for understanding its development and subsequent operation. These concern (a) the advisability of having a regional convention at all; (b) the nature of the membership and the use of 'experts'; and (c) the 'focus' of the convention.

(a) Should there be a regional convention at all?

Just as there had been concerns at the UN that discussions concerning the Optional Protocol might prejudice progress on the Convention against Torture itself, there were similar concerns at the outset of the discussions that a European initiative could also slow down or jeopardize the future adoption of such a mechanism by the UN. There were concerns that developing a European instrument might be seen as an attempt to entrench a European model and European approach in subsequent negotiations—something that did indeed prove to be a very real issue both as a matter of drafting and also as regards practice during the early years of OPCAT. Allied to this were concerns that if two rather different models were ultimately adopted, one at the European and another at the UN level, then there might be a difficulty in reconciling potentially incompatible approaches. Once again, experience has shown there to be some truth in this concern as well, as will be seen later.[61] However, the prevailing mood was that there was little real prospect of progress being made at the UN level. Moreover, there was a view that a global instrument was simply unrealistic anyway and that the future lay in regional mechanisms of this nature—and thus not only was a European approach appropriate in its own right, but it also could serve as a prototype for other regions.[62] Once the UN Convention was itself adopted in 1984 some questioned the need for the European initiative (seeing it as little more than a spur to the adoption of the UN instrument) but by then there was sufficient impetus behind the project for it to be carried forward in its own right and the rationale for the project was not seriously questioned again. What is, however, clear is that from the outset potential problems of practical

[60] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), CETS No 126.

[61] See Chapters 7 and 8.

[62] See Cassese, n 51 above, p 133. This has not been borne out by subsequent developments. There is no head of steam for additional regional conventions of this nature and, although the Committee for the Prevention in Torture in Africa has been constructed on the basis of the Robben Island Guidelines on Torture Prevention in Africa, this is a very different form of mechanism with a very different legal underpinning. See Niyizurugero, J-B and Lessène, G P, 'The Robben Island Guidelines: An essential tool for torture prevention in Africa' (2010) 6(2) *Essex Human Rights Review* 91 at 112. But cf the policy paper, 'Relationship between the African Commission on Human and Peoples' Rights Robben Island Guidelines and the Optional Protocol to the UN Convention Against Torture (OPCAT)' available at (<http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/rigrelationshipwithopcat.pdf>. See also Chapters 7 and 8.

congruity with any eventual UN instrument were foreseen but, being at this stage abstract rather than real questions, they were left to the side.[63]

(b) Membership and experts

Both the Costa Rica Draft, 1980 and the ICJ/SCAT Draft found in Recommendation 971 envisaged that the 'Committee' or 'Commission' to be established by any new instrument would be comprised of a relatively small number of persons, who would issue recommendations on the basis of field work undertaken by delegates,[64] based on the model of the ICRC. As it turned out, the use of delegates proved increasingly controversial as further clarification was sought regarding their nationality, method of appointment and whether they could be refused permission to carry out a visit, and on what basis. In the light of these difficulties, the Committee of Experts decided that the new body should have seven members, rising to eleven once there had been more than fifteen ratifications and that it should be the members themselves who would undertake visits, but assisted if appropriate by other 'experts' drawn from a panel of qualified persons agreed upon by the body. The initial response from the ICJ, the SCAT and, indeed, the ICRC, was negative. They argued strongly that it would inappropriate for members to undertake visits, since they should be dealing with States on the basis of the information reported to them, and that a system of Delegates who would be professionally trained and employ a common approach was to be preferred. Nevertheless, the CDDH supported the view that the body should be small, and be assisted by experts drawn from a panel. Opposition continued, however, and in July 1986—almost at the end of the process—the Committee of Experts revived and adopted a suggestion which it had previously rejected, this being that each State Party should have a member in its own right, whilst also retaining the 'panel of experts' but expecting it to be called on less frequently given the increased pool of membership available to undertake visits. The CDDH endorsed this approach when it considered the matter in October 1986 but decided to eliminate the idea of a panel of experts entirely, replacing it with the laconic provision, now found in the convention text, that '[t]he Committee may, if it considers it necessary, be assisted by experts and interpreters'.[65]

The significance of this change can hardly be overstated. From the outset, the Gautier proposal, the Costa Rica Draft, 1980 and the Recommendation 971 Draft had all envisaged a small supervisory committee receiving reports from its experts and using them as a basis for its recommendations and dialogue. Indeed, a mere

[63] The relationship which was, understandably, of far greater concern to the drafters was that between any new Council of Europe body and the European Commission and Court of Human Rights. This has had a major and lasting legacy on perceptions of the nature of the CPT and of torture prevention more generally—and thus is of significance for an understanding of the SPT. See subsection (c) below.

[64] See Costa Rica Draft, 1980, Article 4(1) proposing a Committee of ten, rising to eighteen and Recommendation 971, Draft, Article 4, proposing a Commission of five members.

[65] ECPT, Article 7(2).

twelve months before the text took on its final form the ICJ and the SCAT were arguing that it was extremely important that the members of the committee did *not* participate in visits at all. Yet due to the exigencies of the negotiations this model—consistently adhered to throughout—was abandoned at a very late stage for an alternative in which the members themselves would be 'the experts', supplemented as necessary by external assistance of a predominantly technical nature. The result was to create an international human rights treaty body which was 'field' oriented in its mandate and functioning. Rather than relying on information provided by others, the membership itself became the data collectors as well as the official interlocutors. It has now become a fixed point in the world of international preventive visiting of places of detention that the issuance of reports and recommendations and the ensuing dialogue with State authorities is to be carried out by those who have conducted the visits to places of detention personally. It is doubtful whether the full implications of this change were fully appreciated at the time. As will subsequently be seen, OPCAT also underwent a radical reorientation during the latter phases of its drafting in order to address problems in the negotiation process, which were vigorously opposed by some of the instrument's most influential supporters and which had an equally profound and positive impact on the final outcome.

(c) Nature and scope

Finally, there are a number of interesting points to be made regarding perceptions of the nature and scope of the convention and of the visiting mechanism it created. These concern the closely inter-connected questions of whether its focus was to be principally upon torture, what the purpose of visits actually was, and as a consequence, how such visits should be planned and conducted.

First, there was a surprising degree of ambiguity—or, perhaps, confusion—within the drafting process regarding the central question of what the convention was actually addressing. From the outset, the rhetoric surrounding the process was largely focused on torture alone. Although the Meier Report accepted that 'delegates appointed by the Committee would concern themselves not only with the problem of torture, but with any cruel, inhuman or degrading treatment' it nevertheless considered the Optional Protocol mechanisms to be primarily an additional means of calling States to account for the practice of torture which was a 'crime committed by pubic officials'. It noted that even if only those countries which did not practise torture ratified the convention, it would still be a useful instrument since 'political regimes can change . . . If a democratic government ratified the Convention, it would be difficult for a totalitarian government which replaced it to denounce the Convention subsequently.'[66] The justification for the Optional Protocol and the ECPT was, then, firmly rooted in the idea of combating any current instances of torture as a discrete phenomenon in a given political situation.

[66] See Meier Report, Council of Europe Doc AS/Jur, para 21.

This was also reflected in the commentary submitted by the ICJ and SCAT on their draft for a European convention, which was incorporated into the Berrier Report: in a passage worthy of being reproduced in full they presented the case for the adoption of the draft convention in the following terms:

> Torture does still exist in Europe and in recent years there have been serious allegations of such practices in Turkey, Greece, Northern Ireland, Italy, Portugal and Spain. Even if this were not the case, merely because at any particular time there have been no obvious cases of torture in a region this is not a sufficient reason to deny that region the means to prevent or fight such an occurrence in the future. Given certain conditions, torture can break out anywhere.[67]

Although prevention is mentioned, this is secondary to 'fighting the outbreak' of torture, and does not really consider inhuman or degrading treatment or punishment at all. Whilst the commentary does point out that 'on the spot visits… cannot but have a salutary effect on conditions of detention', this was a mere aside when compared to the focus on 'torture' *per se*.[68] The focus was first and foremost to be upon 'responding to torture'.[69] So what happened during the drafting process to change this?

In brief, it appears that a significant change in emphasis was the result of pressure from the European Commission and Court of Human Rights which were concerned that the new body would assume too prominent a role in investigating and determining whether a State had acted in a fashion which amounted to a breach of their obligations under Article 3 of the ECHR. Not only would this mean that the new body would be trespassing on what they considered to be their preserve but it might also result in divergent jurisprudence—and it has certainly proven to be the case that there has been considerable interest in the congruence of the jurisprudence of the Court with the work of the CPT.[70] The Commission and the Court therefore urged that the focus of the new convention should be shifted away from determining compliance with Article 3 and towards preventive and non-judicial approaches based on non-binding recommendations.[71] It was for this reason that the Committee of Experts introduced the word 'Prevention' into the title of the convention and into the name of the body it was to establish—and it is not found elsewhere in the text of the convention at all.

The original Assembly draft had provided that '[d]uring each visit, the delegates shall ascertain that detainees are being treated in conformity with Article 3 of the ECHR'.[72] This was clearly going to be unacceptable since is amounted to an invitation to determine whether a breach of the ECHR had

[67] See (1983) *ICJ Review* 50 and Council of Europe Doc AS/Jur (36) 2.
[68] Ibid.
[69] This focus was also reflected in the report adopted by the Parliamentary Assembly (Doc 5704, para 18) which again justified the adoption of the convention on the grounds that, though a part of the world 'least affected' by torture 'Europe is not immune to this evil'.
[70] This has generated a considerable literature over the years. See, for example, Murdoch, J, *The Treatment of Prisoners: European Standards* (Strasbourg: Council of Europe Publishing, 2006), pp 46–52.
[71] See Cassese, n 51 above, p 136.
[72] Assembly Draft, Article 9(6).

taken place. It was therefore proposed that this be replaced with a version in which the body to be established 'shall examine the conditions of detention with a view to improving, if necessary, the protection of persons deprived of their liberty from torture and from inhuman or degrading treatment or punishment'. However, the reference to 'conditions of detention' was removed by the Committee of Experts, to be replaced with the word 'treatment' in order to underline that conditions were only to be looked at when relevant to questions of ill-treatment. This was further underlined by the discussion in the CDDH which rejected the idea that the new body should consider matters relating to other ECHR rights such as correspondence, family life, and hygiene, on the grounds that this would be going beyond its remit and distract from the focus on torture and ill-treatment.

It is, then, clear that it was this process of 'distancing' the new body from influencing the interpretation and application of Article 3 which led to the emphasis being placed on the 'preventive' impact of its work and its task being seen as one of 'concerning itself with situations liable to give rise to torture' rather than with instances of torture as such.[73] Indeed, it is a quite extraordinary fact that the Explanatory Report to the Convention, in a section headed 'Main features of the System' has almost nothing to say about what the Committee is to do, but focuses almost exclusively on what it is not to do, which is to act judicially.[74] Moreover, it has nothing to say regarding what 'prevention' might entail.

The need to inject 'distance' between the judicial and non-judicial roles also affected the debate concerning the size and nature of the body's membership too. Whilst it was generally agreed that members should have relevant expertise, there were differences over what forms of expertise were relevant. Some favoured this being spelt out in some detail and believed that it should include references to matters such as medical and prison administration experience. Those favouring a small body supported by delegates tended to think this too limiting and believed that the text should be more open-textured. The Commission on Human Rights argued that members should be experts in the fields covered by the convention rather than 'human rights' specialists (by which was meant 'lawyers'), largely on the grounds that they would be more likely to focus on fact finding and less likely to stray into judicial determinations, something further buttressed by the decision to create a larger body itself engaged in fact finding. In the end, the text of the convention combines both, providing that the members should be 'known for their competence in the field of human rights or have professional experience in the

[73] Paradoxically, the use of this terminology also had the practical effect of encouraging the view that 'conditions of detention' should indeed be subject to its scrutiny, despite the negativity shown to this suggestion during the drafting process.

[74] This is reflected in the Explanatory Report to the Convention which, in para 17 hammers home the message that '[i]t is not for the Committee to perform any judicial junctions; it is not its task to adjudge that violations of the relevant international instruments have been committed. Accordingly, the Committee will refrain from expressing its views on the interpretation of those instruments either *in abstracto* or in relation to concrete facts.'

areas covered by this Convention'.[75] The Explanatory Report explains that '[i]t is not thought desirable to specify in detail the professional fields from which members . . . might be drawn. It is clear that they do not have to be lawyers [ie human rights specialists]' and it goes on to mention the desirability of members having experience in fields relevant to the treatment of persons deprived of their liberty in order to make 'the dialogue between the Committee and the States more effective and facilitate concrete suggestions from the Committee'.[76] And—it might have added—to reduce the likelihood of its making quasi-judicial findings.[77]

In short, the idea of 'prevention', far from being the driving force behind the convention, was used in order to emphasize the difference between the work of the two bodies, with a clear understanding that it was undoubtedly a 'useful supplement'.[78] The best that the Report could do to explain the meaning of Article 1, which provides that 'the Committee shall by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment' was as follows:

> . . . the Committee shall not perform any judicial functions: its members will not have to be lawyers, its recommendations will not bind the State concerned and the Committee shall not express any view on the interpretation of legal terms. Its task is a purely preventive one. It will carry out fact-finding visits, and, if necessary, on the basis of the information obtained through them, make recommendations with a view to strengthening the protection of persons deprived of their liberty from torture and from inhuman or degrading treatment or punishment.[79]

Reading the text of the convention and the Explanatory Report today, one is left with a sense that there really was no very concrete idea as to what the Committee was actually going to do in practice, but a very firm idea of what it was not to do. As it happened, things turned out rather differently from what might have been expected.

[75] ECPT, Article 4(2). The use of 'this Convention' is significant, as it underlines the point that the Committee was not to stray into matters more properly associated with other EHCR articles.

[76] Explanatory Report, para 36.

[77] Nevertheless despite its rejection of a quasi-judicial role, the closest that either the text or the report comes to spelling out in anything other than the most general terms what sorts of activities the Committee might be involved in is found in its provisions on visits. After recalling that the purpose of the Committee is to undertake visits, the Explanatory Report suggests that the Committee should prioritize '*ad hoc*' visits which might be necessitated by particular sets of circumstances and, whilst not investigating individual complaints, it 'should be free to assess communications from individuals or groups of individuals and decide whether to exercise its functions upon such communications' (para 47). This suggests it would be appropriate for the Committee to respond to allegations but in a 'non-judicial' fashion, that is, by making recommendations aimed at strengthening the protection of persons deprived of their liberty. Once again there is a feeling that the job of the committee is to engage with particular instances of potential violations of Article 3, but in a manner which falls short of being judicial.

[78] To use the words found in the Explanatory Report, para 21, commenting on the Preamble to the Convention.

[79] Explanatory Report, para 25, commenting on Article 1 of the Convention.

2. The work of the CPT and some implications for the drafting of OPCAT

The European Convention entered into force in 1989 for 15 of the then 23 Member States of the Council of Europe. The CPT commenced its programme of visiting in 1989 and so has over twenty years of experience on which to draw.[80] During that time the geographic scope of its operation has expanded to embrace the now 47 Member States of the Council of Europe and by the end of 2010 it had conducted a total of 297 in-country visits of varying length and focus.[81] It is beyond the scope of this section to present and analyse its work during this time in any detail. Rather, the purpose of this section is to give a basic outline of its approach to its work, given its significance for the drafting of OPCAT. Inevitably, those involved in the drafting of OPCAT looked to the work of the CPT in order to understand what the implications of adopting such an instrument at the international level might be. Given that the ECPT was indeed something of a 'regional experiment', undertaken during the hiatus in the drafting of OPCAT, this was both perfectly understandable and perfectly appropriate. However, a number of important points tended to be overlooked.

First, and as has been seen, the ECPT is a very sparse text which actually says relatively little about what was to be expected of the mechanism it established. As a result, the model of 'preventive visiting' which it established was by no means a 'given'. It was (and remains) a potential model to follow but was not the only way of exercising such functions. Nevertheless, the CPT model became more of a benchmark than a reference point during the negotiations—and, indeed, has remained so for the SPT and others once OPCAT entered into force.[82] It is, then, fair to say that choices made by the CPT as regards both its methods and approach rapidly came to 'define' preventive visiting.[83]

Secondly, and related to this, it is often overlooked that the 'defining' work of the CPT as regards 'preventive visiting' was in its infancy when the process of drafting OPCAT recommenced in 1991. Moreover, relatively little was known of its real effectiveness and there was a tendency during the 1990s for supporters of the project to present the work of the CPT as an exemplar of success without there

[80] The CPT has given its own overview and reflection on its work in its publication *20 Years of Combating Torture*, pp 7–12, this being the 19th General Report of the CPT (CPT/Inf (2009) 27). For its most recent survey, covering the period to 1 August 2009 to 31 July 2010 see its 20th General Report (CPT/Inf (2010) 28).

[81] Of these, 179 are classified as 'regular' and 118 as '*ad hoc*' visits by the CPT. The relevance of this distinction is considered further below.

[82] For example, van Zyl Smit, D and Snacken, S, *Principles of European Prison Law and Policy* (Oxford: Oxford University Press, 2009), p 120 describe the OPCAT system as 'an interesting variation on the CPT's methods of work'.

[83] Cf Casale, S, 'A System of Preventive Oversight' (2009) 6(1) *Essex Human Rights Review* 9 at 10 who observes that whilst the CPT is currently the 'pre-eminent' example of a preventive visiting body, this may change in time and points out that the experience gained in a European context is not to be 'transposed facilely' to others. As the then President of both the CPT and SPT, Casale was ideally placed to make such an observation.

being a great deal of hard evidence to support this. As will be seen, the CPT has in fact changed its focus over the years in a number of subtle but significant ways as it has come to wrestle with differing challenges from those which faced it initially.

Thirdly, and related to this, is the point that the CPT operates within the framework of the Council of Europe which provides a very different institutional setting to that of the United Nations and which provides the operating framework for OPCAT. As will be seen, the tendency has been to see the very different UN context as a 'challenge' to be overcome in the realization of the 'preventive model' rather than as a discrete institutional setting within which to fashion a successful model of torture prevention.

Putting these factors together, one finds that a rather idealized—and possibly romanticized—vision of the CPT tended to be projected which offered up a model and manner of work which was neither expressly mandated by the convention itself nor dictated by the underlying concept on which it was based. Moreover, it was a model which was itself still a 'work in progress' and relatively untested in practice. This can be illustrated by looking at a number of key issues concerning the core practice of visiting, which show that the approach adopted by the CPT in practice did not necessarily fully map onto the expectations of the drafters or, in some ways, the letter of the text. Nevertheless, it is these approaches which became influential during the OPCAT drafting process and continue to influence perceptions today.

Article 2 of the ECPT provides that '[e]ach Party shall permit visits, in accordance with this convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority'. These are usually referred to as 'periodic' visits. This is supplemented by Article 7 which says that '[a]part from periodic visits, the Committee may organise such other visits as appear to it to be required in the circumstances', these being known as '*ad hoc*' visits. In the past, the Committee also utilized a third category of visits, known as 'follow-up' visits, which—as the name implied—were intended to pursue particular issues arising out of previous periodic visits. Over time, the difference between follow-up visits and *ad hoc* visits, and between follow-up and subsequent periodic visits has become blurred to the extent that the two-fold approach appears perfectly adequate from an operational perspective. However, in principle, follow-up visits are different to *ad hoc* visits: the former are 'checking' on the extent to which recommendations arising out of previous preventive visits have been implemented, whereas the latter are, in principle, 'responsive' visits undertaken in the light of particular concerns. Whilst now of little significance as far as the CPT is concerned,[84] the three-fold typology was in vogue during the 1990s and this has left its mark on OPCAT.

Similarly, the ECPT says nothing at all concerning the frequency or duration of visits and the Explanatory Report limits itself to observing that the Committee should 'ensure, as far as possible, that the different States are visited on an equitable

[84] Nevertheless, the three-fold categorization remains reflected in the CPT's Rules of Procedure. See Rule 31 (Periodic visits), 32 (Ad hoc visits), and Rule 33 (Follow-up visits), which were last updated in March 2008. See CPT/Inf/C (2008) 1.

basis'.[85] The CPT now spends in the order of 160 days per year conducting visits, typically conducting about ten 'periodic' visits lasting around ten days and a similar number of shorter 'ad hoc' visits.[86] This means that most countries will receive a 'periodic visit' roughly every five years, often interspersed with *ad hoc* visits. Periodic visits might themselves be limited to particular parts of a large country and may, in practice, be little different from an ad hoc visits. Indeed, some *ad hoc* visits have been as long, or longer, in duration than some of the shorter periodic visits.[87] Moreover, the balance has shifted over time towards conducting more *ad hoc* visits. Indeed, in more recent times the Committee has moved towards other forms of engagement with States altogether, including holding high level talks in countries without visiting places of detention at all.[88] Nevertheless, the general assumption—based on the early practice of the CPT—at the time of drafting OPCAT was that the work of such a body should be focused on conducting visits to places of detention with a frequency and duration which matched that found in the practice of the CPT.

It is also widely assumed that the text of the ECPT gives the Committee the right to conduct 'unannounced' visits to all places of detention and, as will be seen, this became a major issue in the drafting of the Optional Protocol. In fact, it does not. Indeed, it does the opposite. The original Parliamentary Assembly draft provided that visits were to take place 'without prior notice and at any time' but only following the notification of the State by the Committee that a visit was impending.[89] During the drafting process the words 'at any time' were dropped and Article 8 thus requires the Committee to 'notify the Government of the Party concerned of its intention to carry out a visit'.[90] The period of notification is not specified but the Explanatory Report suggests that the period in question might be 24 or 48 hours, adding that 'exceptional situations could arise in which the visit takes place immediately after the notification has been given'.[91] Whilst there is some ambiguity as to whether the report is referring to the visit as a whole or to particular places of detention, it seems clear that, read as a whole, the expectation was that the Committee would inform the authorities, in advance, of those places it wished to visit.[92]

[85] Explanatory Report, para 47.

[86] The CPT had previously aspired to move towards 200 days of visiting per year but this has proved to be an unrealistic goal.

[87] This is usually a factor of size. For example, the periodic visits to Andorra in February 2004 and to Monaco in March 2007 lasted only four days each (see CPT/Inf (2006) 32 and CPT/Inf (2007) 20 respectively) whereas the *ad hoc* visit to the Russian Federation in April 2010 lasted a week (Press Release, 26 April 2010).

[88] For example, two days of talks were held with Greece in January 2010 outside the framework of a visit. See 20th Annual General Report, CPT/Inf (2010) 28, para 19.

[89] Parliamentary Assembly draft, Article 8(1).

[90] Article 8(1).

[91] Explanatory Report, para 56.

[92] See ibid, para 58, which says that 'the fact that specific establishments are mentioned in the notification should not preclude the Committee from announcing that it also wishes to visit other establishments in the course of the visit'. This does not sound like a right to demand immediate access to places of detention.

Be this as it may, the approach subsequently adopted by the Committee, and accepted in practice, has been very different. The CPT adopted a three-stage process of notification. In the late autumn of each year it announces its programme of periodic visits for the coming year and informs the States involved of this. *Ad hoc* (or follow up) visits are never announced in this way, however. Shortly before a visit of any nature is to take place the country is informed of the proposed dates of the visit and the full composition of the delegation (this being required by Article 14(1) of the convention). Finally, a few days before the visit commences a provisional list of places to be visited is sent, though the Committee usually visits others in addition to these.[93] Arguably, this approach gives both far more and far less notice than was originally anticipated: more, in that a State may have many months' notice of a periodic visit, and a number of weeks' notice of any visit; less, in that the Committee reserves the right to decide to visit particular places of detention without giving any notice at all. Whatever the pros and cons of this approach, it does not reflect a belief that immediate and unannounced access to places of detention is an essential pre-requisite for the effective operation of the mechanism.

None of this should be taken to suggest that the approach of the CPT to the execution of its mandate is either inappropriate or ineffective. What it does do is illustrate that the Committee made important decisions concerning its working methods—the typology of visits, their duration, frequency, notification, etc—which had a major influence on the debates concerning OPCAT at the time and which still shape perceptions of its efficacy today. One cannot understand the dynamics surrounding OPCAT without an appreciation of the dynamics—and, perhaps, myths—surrounding the ECPT, however much one might wish otherwise.

[93] See Article 33 of the Rules of Procedure. This has been the practice from the outset. The Rules were originally adopted in November 1989 and the ability to phase notification was introduced to the Rules during their first revision in March 1990 before it had undertaken its first visit (which did not take place until May 1990).