PREVENTING TORTURE IN EUROPE

Christine Bicknell,
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Contents

Preface

In 2001 the Council of Europe published *Combating torture in Europe* (Morgan and Evans 2001), a guide written by two of us to inform state officials, non-governmental organisation (NGO) workers, legal practitioners and others in Council of Europe member states about the standards developed by and applied to custodial situations by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In 2016 we suggested to the Council of Europe that so much of the context within which the CPT works had changed since the turn of the millennium that there was arguably a need for a new text fulfilling the same purpose as *Combating torture in Europe*. The Council of Europe, including the CPT, agreed and the three of us were commissioned to undertake the task. We soon came to the conclusion that the developments were so significant that a new work, rather than a second edition of the older work, was called for. *Preventing torture in Europe* is the result.

A feature of this new work is an appendix containing a substantial set of profiles we have drawn up for all 47 Council of Europe member states. These profiles include some basic facts about their engagement with the CPT and what the CPT has found, necessarily selective given the hundreds of pages of CPT inspection reports that have been published over 27 years. We have decided not to include as appendices a list of CPT visits, the text of the European Convention on Human Rights (ETS No. 5) ("the Convention"), the two protocols and the explanatory report to the Convention, or the CPT's Rules of Procedure. Those data and documents are today easily accessible from the Council of Europe's very comprehensive and easily navigated website. Chapters 1 and 8 describe the increasingly complex human rights monitoring landscape within which the CPT operates and wherein its relationships with other bodies, both international and national, might develop in the future. Chapter 2 considers the operating practice of the CPT, while Chapter 3 features an exploration of the increasingly reflexive relationship between the CPT and the European Court of Human Rights, a topic scarcely developed at the turn of the millennium and today of major importance. Chapters 4 to 7 set out the standards of the CPT, accompanied by a series of case studies illustrating how the CPT has applied its standards in relation to police, penal, immigration and welfare custody respectively, to selected countries.

We are grateful to several people knowledgeable about the CPT's methodology and archived experience who read and commented on early drafts of particular chapters or the country profiles. Our thanks in this regard to Patrick Müller of the CPT's Secretariat in Strasbourg, to Silvia Casale, formerly President of the CPT, and Mike Kellet, who frequently acts as an expert advisor to CPT inspection delegations and has in the past worked on attachment with the CPT. Suffice to say that any errors of fact or judgment that remain are entirely our own. We are also grateful to Emma Foley, Tomas Morochovic and Raawiyah Rifath, law students at the University of Exeter, who assisted with the painstaking task of tabulating the many judgments of the European Court of Human Rights we have cited.

At the time of writing, one of us, Malcolm Evans, is a member, and Chair, of the United Nations Subcommittee on Prevention of Torture (SPT). The opinions expressed in this book, however, are those of the authors collectively, writing in their academic capacities and not those of the SPT or of other organisations with which the authors are associated.

Finally, our thanks to Véronique Riff, our wonderfully patient editor at the Council of Europe, who continued to believe that we would finally deliver this text despite what must have appeared to be its illusory nature for many months.

Christine Bicknell, Department of Law, University of Exeter, UK.

Malcolm Evans, Department of Law, University of Bristol, UK

Rod Morgan, Professor Emeritus, University of Bristol, UK

Postscript

At several points in this work, the authors argue that the CPT and SPT should consider developing their co-operation further, taking into account Article 31 of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment. In August 2018, the CPT and SPT issued a joint communiqué setting out details of a range of additional measures agreed on to strengthen and enhance their relationship. Although it has not been possible to reflect this in the text, the communiqué, with a brief comment, is included as an addendum to Chapter 8. Comments concerning the relationship between the CPT, SPT and national preventive mechanisms should now be read in light of this new development.

List of main abbreviations/acronyms

ACFC	European Advisory Committee on the Framework Convention for the Protection of National Minorities
APT	Association for the Prevention of Torture
CAT	UN Committee against Torture
CDDH	Steering Committee for Human Rights
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CPTA	Committee for the Prevention of Torture in Africa
ECHR	only when mentioning case law : European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
ECT	Electroconvulsive therapy
EEAS	European External Action Service
EPRs	European Prison Rules
ETS	European Treaty Series (CETS – Council of Europe Treaty Series from No. 194)
FIACAT	International Federation of Action by Christians for the Abolition of Torture
FRONTEX	European Border and Coast Guard Agency
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
GRULAC	Group of Latin American and Caribbean Countries
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
IRCT	International Rehabilitation Council for Torture Victims
KFOR	Kosovo Force (NATO)

MICT	Mechanism for International Criminal Tribunals
NGO	Non-governmental organisation
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to UNCAT
SCAT	Swiss Committee Against Torture
SPT	UN Subcommittee on Prevention of Torture
SRT	UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo

Chapter 1

The European Convention for the Prevention of Torture in context

I. INTRODUCTION

The entry into force of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126) (European Convention for the Prevention of Torture)[1] on 1 February 1989 marked the beginning of a new chapter in combating torture. This truly innovative international instrument focused for the first time on preventing torture and ill-treatment and, rather than set out new obligations or normative standards, it established an international body – the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) – that has a mandate that was then unique among international human rights bodies, permitting it to undertake unannounced visits to places of detention under the jurisdiction of states parties. The European Convention for the Prevention of Torture entered into force at a time when a number of other new international mechanisms were also "finding their feet". The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[2] had been adopted by the UN General Assembly in 1984 and entered into force on 26 June 1987, the very day on which the Committee of Ministers of the Council of Europe adopted the text of the European Convention for the Prevention of Torture. In 1985, the United Nations Commission on Human Rights established the position of UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment (SRT).[3] When renewing that mandate in 1986, the UN Commission noted the proposal to establish the European Convention for the Prevention of Torture and encouraged the establishment of such visiting mechanisms in other regions.[4] In his 1987 report the UN Special Rapporteur drew attention to this, and also expressed the view that such regional systems "would not necessarily stand in the way of the conclusion of a world-wide convention" (Kooijmans 1987: paras. 83-4). This was, to say

1. Available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/126, accessed 15 August 2018.
2. Available at www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx, accessed 15 August 2018.
3. See E/CN.4/Res/1985/33, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9900, accessed on 14 November 2018.
4. See E/CN.4/Res/1986/56, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9900, accessed on 14 November 2018.

the least, unsurprising, since the origins of the European Convention for the Prevention of Torture – which at the time of writing remains the only such regional treaty-based system – lie in attempts made to establish just such a world-wide mechanism. That world-wide system finally came into being in 2006 with the entry into force of the Optional Protocol to UNCAT (OPCAT).[5] As a result, the CPT is no longer unique but exercises its visiting mandate alongside that of the UN Subcommittee on Prevention of Torture (SPT) that OPCAT establishes. OPCAT also requires states parties to establish national preventive mechanisms (NPMs), which are to operate in a similar fashion but at the national rather than international level. As a result, the CPT is today operating in a much more complex environment than when it was established almost 30 years ago.

There has also been a commensurate growth in the density and complexity of both the jurisprudence of the European Court of Human Rights and of "soft-law" standards relating to torture and torture prevention in the last 30 years. At the time the European Convention for the Prevention of Torture was adopted the European Court of Human Rights, remarkably, had not yet found that a state had committed an act of torture – the first time that happened was in the case of *Aksoy v. Turkey* in 1996.[6] Today, it is almost a commonplace.[7] During the life of the CPT the range of soft-law instruments setting out standards relating to those in detention has also grown exponentially – with key developments including the adoption of the revised European Prison Rules in 2006[8] and of the revised UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) in 2015.[9] Other key documents adopted in recent years include the 2002 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines, which led to the establishment of the Committee for the Prevention of Torture in Africa – CPTA)[10] and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).[11] There are many others.

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5. Available at www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx, accessed 15 August 2018.
6. *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI.
7. Between 2012 and 2016 the Court found that torture had occurred in violation of Article 3 in 51 cases. In 2012 there were 24 such cases, 11 in 2013, 4 in 2014, 10 in 2015 and 2 in 2016. The states and number of cases in which the Court found torture to have taken place were Armenia (1), Albania (1), Belgium (1), Bosnia and Herzegovina (1), Bulgaria (2), Greece (1), Italy (4), Russia (19), Slovakia (1), Sweden (1), the Republic of Moldova (1), "the former Yugoslav Republic of Macedonia" (3), Poland (2), Turkey (2) and Ukraine (11). In the course of 2017, cases in which the Court has made findings of torture include *Shestopalov v. Russia*, no. 46248/07, 28 March 2017; *Blair and Others v. Italy*, nos. 1442/14 and 2 others, 26 October 2017; and *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, 26 October 2017.
8. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules. Available at https://search.coe.int/cm/Pages/result_details.aspx?-ObjectID=09000016805d8d25, accessed 15 August 2018.
9. Available at www.un.org/Docs/asp/ws.asp?m=A/RES/70/175, accessed 15 August 2018.
10. See African Commission on Human and Peoples' Rights Res 61 (XXXII) 02, "Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa". See also Long and Murray (2012: 311).
11. See UN Doc A/RES/65/229. Available at www.un.org/Docs/asp/ws.asp?m=A/RES/65/229, accessed 15 August 2018.

Within the Council of Europe itself the CPT is now one of a number of bodies tasked with monitoring human rights obligations at a national level. While the nature of its treaty-based visiting mandate is still unique within the Council of Europe, the CPT now takes its place among bodies such as the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO); the European Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC); and the European Commission against Racism and Intolerance (ECRI), which also undertakes country visits as an element of its oversight activities.[12] The establishment of the Council of Europe Commissioner for Human Rights in 1999 has also provided a complementary means of addressing both thematic and in-country human rights issues (Dörr 2017). While none of these developments undermines or cuts across the work of the CPT – in many ways they strengthen and reinforce it – they all add to the increasingly complex set of institutional interrelationships within which it has to function, including the inevitable competition for scarce and finite human and financial resources.

The CPT is also operating in a transformed European landscape from that which existed at the time of its creation. There has been growth in European Union (EU) competence in relation to criminal justice issues and the introduction of the European Arrest Warrant and the Prisoner Transfer Directive reflect increasing activism in the EU's work relating to prisons and policing. The establishment of the European Border and Coast Guard Agency (Frontex) and of the European External Action Service (EEAS) following the Lisbon Treaty is important in its own right and has also increased the significance of instruments such as the EU Guidelines on Torture (Council of the European Union 2012). Moreover, Article 6.2 of the Treaty of Lisbon made EU accession to the Convention a legal obligation, and thus directly engaged with both its jurisprudence and enforcement mechanisms. However, following the rejection of the draft accession agreement by the European Court of Justice in 2015 this seems a somewhat distant prospect.[13]

Above all else, however, is the fact that during the last 15 years of its work the CPT has been working in a context that few thought possible: a context in which, despite the absolute prohibition of torture, inhuman or degrading treatment or punishment set out in Article 3 of the Convention and other international human rights instruments, arguments in favour of resorting to such practices have been advanced in the wake of the so-called "war against terror" (Levinson 2004; Roth and Worden 2005; Ginbar 2008; Greenberg 2008; Waldron 2010; Luban 2014). Europe has found itself both a facilitator of, and a destination for, "extraordinary rendition" (Council of Europe 2006; European Parliament 2006),[14] while allegations and evidence of torture and ill-treatment by States Parties to the European Convention for the Prevention of Torture – in both the more distant and recent past – continue to emerge. Indeed, at

12. For a general exploration of oversight mechanisms established by the Council of Europe, including the CPT, see Kicker and Möstl (2012).

13. Opinion 2/13 pursuant to Article 218(11) TFEU, CJEU Case C-2/13 (18 December 2014).

14. See also *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, ECHR 2012; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014.

the time of writing an application has been put in train to reopen the seminal case of *Ireland v. the United Kingdom* before the European Court of Human Rights on the basis of information unknown at the time of the previous judgment. If the purpose of the European Convention for the Prevention of Torture was to lessen an already low risk of torture and ill-treatment within member states of the Council of Europe, the reality is that it has been addressing an ever-rising tide of pressures in favour of ill-treatment and mounting evidence of ill-treatment, both past and present.

If the work of the CPT has now to be seen as part of a very much more complex institutional, normative and political matrix than was the case at the time of its adoption, it must also be acknowledged that its work has played a major role in shaping and influencing many of the more positive of these developments. In particular, the work and practice of the CPT was a major influence on the work and practice of the SPT in its early years (Casale 2009: 10-11) and continues to be of major practical significance to both the SPT and to NPMs operating within the OPCAT framework. The interrelationship between these bodies sharing a common working methodology of preventive visits to places of detention is increasingly significant and will therefore be explored in more detail later in this chapter. A second area in which the work of the CPT has had greater significance than was originally anticipated has been in relation to the work of the European Court of Human Rights. This will be outlined below and considered in more detail throughout this book. It is important to note that the subtle but significant changes in the direction and focus of the Court's work in response to caseload and other pressures from member states of the Council of Europe means that the nature of this relationship is likely to continue to develop.

The sections that follow will explore in more detail both the background to and origins of the European Convention for the Prevention of Torture, the current scope of its application, its relationship with OPCAT, including the SPT and NPMs within the Council of Europe area, and, in outline, the European Court. It is beyond the scope of this book to focus in detail on the many other, broader, contextual developments that have been briefly introduced above, but they will be drawn on at various points in the book where they help illustrate and explain the approach and practice of the CPT.

II. THE BACKGROUND AND ORIGINS OF THE CPT AND OPCAT

As mentioned above, the origins of the European Convention for the Prevention of Torture lie in proposals made for the adoption of an optional protocol to UNCAT (Evans and Morgan 1998). UNCAT was the product of a sustained international campaign against torture that gathered momentum throughout the 1970s and led to the adoption of the 1975 UN Declaration against Torture (Rodley and Pollard 2009: 18-43) and, in 1984, UNCAT itself (Burgers and Danelius 1988; Nowak and McArthur 2008). The retired Swiss banker Jean-Jacques Gautier, inspired by the work and practice of the International Committee of the Red Cross (ICRC), proposed that an international body be established that would be able to conduct unannounced visits to places where persons were deprived of their liberty, with a view to addressing concerns

relating to torture and ill-treatment.[15] The essence of what was being proposed was summed up by Gautier as being 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. (Gautier 1979: 32)

So described, this approach is instantly recognisable in both the European Convention for the Prevention of Torture and OPCAT today. But both had a long gestation. In 1977 Gautier established the Swiss Committee Against Torture (SCAT)[16] and later that year a group of experts, under the chairmanship of Professor Christian Dominicé, helped shape Gautier's ideas into a draft convention concerning the treatment of prisoners deprived of their liberty. Shortly afterwards the UN General Assembly requested the UN Commission on Human Rights to commence drafting a UN convention against torture and thought was given to this being suggested as a model for the convention itself. However, at a conference at St Gallen in June 1978, it was decided that the "visit-based" model might best be proposed as an optional protocol to a convention based on the model of other crime prevention treaties. This finally came about on 6 March 1980 when Costa Rica submitted the draft of an optional protocol to the UN Commission on Human Rights' Working Group at the request of the International Commission of Jurists (ICJ) and SCAT.[17] However, it did so on the express understanding that it would not be given any consideration until the convention itself had been adopted – and thus as far as the UN process was concerned the proposal was stillborn. It is important to note that there was a positive decision not to pursue the project at the UN level at that time, based on the belief that it was well in advance of what might be politically acceptable to the international community as a whole. It is also important to note that, at the time this decision was reached, it was also agreed by the supporters of the scheme that they should switch their focus to the regional level and try to establish such a mechanism within the Council of Europe.

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15. In 1970 Werner Schmid, a member of the Swiss Federal Parliament, 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 invited Gautier to contribute. Gautier drafted the report's conclusion that recommended the establishment of a visiting body with a broader 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. The letters and documents that reflect the development of Gautier's thinking over time on these issues have been published in Mischler (2003).
16. In 1992 SCAT was relaunched 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. 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.
17. 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.

Thus 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 Report", which examined the progress being made towards the adoption of a UN torture convention (Council of Europe 1990).[18] Echoing criticisms made by Gautier, the Meier Report argued that the optional protocol avoided the complexity and slowness of the quasi-judicial processes found in the draft convention and that its approach was "the right one for strengthening the effectiveness of the Convention" (ibid.: para. 13). The Meier Report and its conclusions were endorsed by the Parliamentary Assembly early in 1981.[19]

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 that for the first time formally introduced the idea that such a system be adopted at the regional level, commenting that "the countries of Europe might set an example and institute such a system among themselves in the framework of the Council of Europe, without waiting for the proposal to be implemented at the world level" (Council of Europe 1981a: para. 13). Pandering somewhat to this display of European complacency and superiority, the ICJ and SCAT offered to draft a regional convention or optional protocol to the European Convention on Human Rights that, when completed, was incorporated in the final version of the "Berrier Report" (ibid.).[20] The Parliamentary Assembly duly adopted the report and called on the Council of Ministers to adopt the draft convention.[21] The Committee of Ministers responded by requesting its Steering Committee for Human Rights (CDDH) to consider the draft convention and submit proposals to it.[22] In March 1984 the CDDH delegated this task to a Committee of Experts[23] and in November 1986 – a little over two-and-a-half years later – the CDDH finalised the text and transmitted it to the Council of Ministers, which adopted the European Convention for the Prevention of Torture on 26 June 1987. Perhaps the most major change in the European Convention for the Prevention of Torture from the ideas originally developed by Gautier and others was that the CPT should consist of a number of members equal to that of the number of states parties, and that those members themselves should be involved in conducting the visits to places of detention. Rather than a committee overseeing the visiting work of

18. Mrs Meier was Rapporteur of the Legal Affairs Committee of the Parliamentary Assembly.
19. Recommendation 909 (1981) of the Parliamentary Assembly of the Council of Europe on the international convention against torture.
20. 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" (Council of Europe 1981b).
21. Recommendation 971 (1983) of the Parliamentary Assembly of the Council of Europe on the protection of detainees from cruel, inhuman or degrading treatment or punishment.
22. See Records of the 366th Meeting of the Ministers' Deputies, January 1984.
23. The Committee of Experts met in May and October 1994 and again in March and May 1985. A Drafting Committee met during that summer and its work was considered by the Committee of Experts in October. The CDDH reviewed progress in November and the Committee of Experts held further meetings in February and July 1996 prior to the CDDH adopting the draft in October 1996. See Cassese (1989: 132) for further details.

others, it would be a body of international visitors. The convention was opened for signature on 26 November 1987 and quickly garnered the seven ratifications needed to trigger its entry into force on 1 February 1989.

The European Convention for the Prevention of Torture is in some ways a surprisingly sparse text that sets out the basic contours of the system it establishes with a degree of generality. This is only partially mitigated by its Explanatory Report, which also tends towards the expository rather than the elucidatory. This may at least in part be a reflection of the belief that in establishing such a system Europe was setting an example to others rather than responding to a pressing need. It may also have reflected a view that a "preventive" and "non-judicial" mechanism working co-operatively with states on the basis of confidentiality would pose few problems for European states since this was inherently less intrusive and controversial than existing judicial processes determining whether states were in breach of their obligations under the European Convention on Human Rights. The work of the CPT in its first few years was, however, enough to dispel such thoughts.

Once Europe had adopted the European Convention for the Prevention of Torture it was inevitable that attention would return to the UN sphere and that the experience of the CPT would influence the development of OPCAT. Indeed, in March 1989 the UN Commission on Human Rights justified postponing consideration of OPCAT for a further two years "in order to take note … of the experience of the Convention for the Prevention of Torture". The ICJ and SCAT responded to this challenge by hosting a seminar in 1990 that resulted in a new draft, which was tabled by Costa Rica in January 1991. From 1992 to 2002 an open-ended Working Group met for two weeks annually to develop the text of OPCAT. This is not the place to consider its drafting history in detail (Evans and Haenni-Dale 2004; Murray et al. 2011), but it is necessary to highlight one key feature of the process and the resulting text, which is of relevance for a consideration of the context in which the CPT works today. Unsurprisingly, the basic mandate of the SPT is largely similar to that of the CPT, though with some notable differences that will be touched on when necessary throughout this book. There is, however, no counterpart to the provisions in OPCAT concerning NPMs in the European Convention for the Prevention of Torture and, since NPMs now form an essential element of the landscape within which the CPT operates, it is necessary to set out in more detail the essence of their mandate, role and function within the OPCAT system.

OPCAT established what has become known as a "twin-pillar" system, combining an international and national preventive visiting system. The reason for this is that by the end of 2000 it had become clear that the very idea of a body of independent international experts having a mandate to visit places of detention in states parties in the manner provided for under the European Convention for the Prevention of Torture remained very controversial at the UN level. As a means of ending the negotiating deadlock, Mexico presented a radically different proposal (the "Mexican Draft")

on behalf of the Group of Latin American and Caribbean Countries (GRULAC).[24] In outline, the draft, dated 13 February 2001, sought to refocus the optional protocol on the role to be played by national visiting mechanisms. Rather than visits to places of detention being carried out by an international body, it proposed that states should establish a national system of preventive visits, which would be supplemented by the international visiting body should this prove necessary. It was in this way, and at what proved to be a very late stage in the drafting process, that the idea of NPMs was introduced into the OPCAT framework. Despite the hostile response that this provoked both from some NGOs[25] and state representatives, this opened up the way for a compromise that allowed for the adoption of OPCAT by the UN General Assembly the following year. The idea that national mechanisms have a role to play in protecting human rights was hardly controversial in the field of torture prevention at the time.[26] The novelty was to require states to utilise such mechanisms in combating torture as a matter of international legal obligation. Although the inclusion of NPMs into the draft of the optional protocol was in some ways merely a tactic by which to diminish either the case for, or opposition to, an international visiting mechanism, it quickly became apparent that there was an important role for both.

OPCAT does not require that states parties establish any new human rights bodies or mechanisms. Rather, Article 17 requires that states "maintain, designate or establish" within one year[27] of the entry into force of OPCAT[28] "one or several independent national preventive mechanisms for the prevention of torture". As a result, whether a state needs to create a new body depends on how comprehensive a system of appropriate mechanisms[29] is currently in place, their powers and their indepen-

24. The "Alternative preliminary draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by the delegation of Mexico with the support of the Latin American Group (GRULAC)". This can be found in the 9th Report of the Working Group, E/CN.4/2001/67, at Annex I and in the 10th Report of the Working Group, E/CN.4/2002/78, at Annex II C. It is also reproduced in Nowak and McArthur (2008: 1460).
25. The approach was strongly supported by APT, the International Federation of Action by Christians for the Abolition of Torture (FIACAT) and the International Rehabilitation Council for Torture Victims (IRCT) but other leading NGOs following the process, including Amnesty International and Human Rights Watch, voiced significant reservations.
26. See e.g. van Boven (2002: paras. 36-45) and the Joint Declaration (appended as an annex to that report) issued on 26 June 2002 by the Special Rapporteur, the Committee against Torture, the Board of Trustees of the UN Voluntary Fund for Victims of Torture and the UN High Commissioner for Human Rights, urging support for the adoption of OPCAT and endorsing its twin-pillar approach. The same bodies welcomed the adoption of OPCAT in their Joint Statement of 26 June 2003, which encouraged states to ratify and establish national visiting mechanisms (see Annex I to van Boven 2003).
27. The period of one year was specified in the Mexican Draft, Article 3 and carried over into the Chair's Draft and final text. It offers states that have not yet been able to establish or identify an NPM that accords with OPCAT criteria a period in which to do so, during which they might be able to benefit from the assistance of the SPT that in accordance with Article 11.b.i may "advise and assist States Parties, where necessary, in their establishment".
28. Unless a declaration has been made under Article 24 postponing the implementation of the obligations under Part IV.
29. It is also worth noting here that OPCAT does not require states to identify a single NPM, but permits the co-existence of "one or several" such mechanisms within each state. As will be seen later, however, the tendency is to create a single NPM, or at the very least to have a single point of co-ordination of the various NPMs. All this tends to encourage the belief that a single mechanism or entity is to fulfil this function.

dence. Article 18 obliges the state to guarantee the "functional independence" of the mechanisms and their personnel and ensure that their personnel have the abilities and resources necessary to carry out their functions.[30] Those functions are set out in Article 19.a and, unsurprisingly, focus on the need to ensure that the mechanisms can exercise a preventive mandate by conducting regular visits to places of detention as defined in Article 4 and to make recommendations to the national authorities, based on UN norms, concerning the places, conditions and forms of treatment encountered in the course of visits (Article 19.b). In addition, the NPMs are also to have a more general and more broad-ranging power to "submit proposals and observations concerning existing or draft legislation" (Article 19.c). This takes the mandate of the NPM beyond that of a "visiting body" by requiring that it also have systemic functions more akin to those more usually accorded to national human rights institutions than inspectoral bodies.

The state is obliged to "examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures" (Article 22). This is significant, since it means that the role of the NPM is not only to report and recommend, but also to engage in active follow-up of its recommendations with the state. Likewise, the state is required to respond to its recommendations in the same manner as it is to respond to those of the SPT. It is also important to note that the reports and recommendations of the NPMs are not confidential and states are required to publish and disseminate their annual reports.

OPCAT expressly provides for a number of essential capacities that NPMs must enjoy if they are to be properly configured in accordance with its framework. These largely mirror the requirements for effective access to persons and places of detention that are to be enjoyed by the SPT – as indeed the CPT under the framework of the European Convention for the Prevention of Torture – with Articles 20.a to 20.c providing for access to information concerning numbers of persons in places of detention and the number and location of the latter, access to all information referring to the treatment of detainees and their conditions of detention and, critically, "[a]ccess to all places of detention and their installations and facilities". It also ensures that it has the opportunity to interview detainees, and any others who they believe have relevant information, in private. It further confirms that the NPMs enjoy "[t]he liberty to choose the places they want to visit and the persons it wants to interview" (Article 20.e).

It is evident that NPMs represent – or should represent – a powerful new force operating at a national level in a manner akin to that of both the CPT and SPT. This inevitably raises questions concerning the relationships between these bodies and this will be looked at in section IV (de Beco 2011: 257). Before doing so, however, it is necessary to set out the extent to which there is a practical overlap between the work of these various bodies.

30. In doing so, states "shall give due consideration to the Principles relating to the status and functioning of national institutions for the promotion and protection of human rights". This is a reference to the "Paris Principles" that provide a starting point for the examination of the functional independence of the NPMs.

III. THE SCOPE OF THE WORK OF THE CPT AND OF THE SPT AND NPMS IN THE COUNCIL OF EUROPE AREA

The CPT today

When the European Convention for the Prevention of Torture was adopted in 1987 few would have foreseen how its reach would so rapidly extend across Europe – and, indeed, beyond. When it entered into force in February 1989 the convention bound only eight of the then 23 member states of the Council of Europe. But a year later, in December 1990, it had been ratified by 20 of the Organisation's then 25 member states. The political changes ushered in by the collapse of communism and the Soviet Union in central and eastern Europe opened up the prospect of further expansion and in 1993 the Committee of Ministers of the Council of Europe adopted the First Protocol to the convention, intended to permit non-member states of the Council of Europe to become, by invitation, parties to this convention. By the time the First Protocol entered into force on 1 March 2002 it had already become a dead letter.[31] The Organisation had already grown to 43 members, of which 41 were already parties to the convention.[32] The Council of Europe now has 47 members, all of whom are parties. This has not been accidental: since 1994 accession agreements to the Council of Europe have required that new member states become a party to the convention, *inter alia*, within one year of their joining and while this has not always been strictly adhered to, it has ensured that the geographic reach of the convention has, in general, kept pace with the Organisation's expanding membership.[33]

The work of the CPT is not limited to Europe, but extends to the overseas territories over which member states exercise authority. On this basis, the CPT has conducted visits to, *inter alia*, the Netherlands Antilles[34] and Aruba, Ceuta and Melilla, French Guiana, Gibraltar, Greenland, Martinique and Réunion. On the other hand, it remains the case that not all territories that fall under the jurisdiction of states parties are within the scope of the European Convention for the Prevention of Torture. Article 20.1

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31. It had been suggested from time to time that invitations might be issued to applicant countries with Special Guest Status but there are currently no countries to whom this status is accorded. Since 2009 the Council of Europe has established partnership status for states in neighbouring regions that are in democratic transition, and at the time of writing Morocco, the Palestinian National Council and Kyrgyzstan have been accorded "Partner for Democracy" status. It is an open question whether there might be merit in considering issuing an invitation to those with such status to accede to the European Convention for the Prevention of Torture. Both Morocco and Kyrgyzstan are already parties to OPCAT. It is noteworthy that the CPT formally announced its participation in meetings in Tunisia and Morocco in September 2014 within the framework of a programme on "Strengthening democratic reform in the southern neighbourhood".
32. The two member states not parties to the European Convention for the Prevention of Torture at that point were Armenia and Azerbaijan, which only became members of the Council of Europe in January 2001. Both had ratified the convention by the end of 2002.
33. See list of signatures and ratifications, available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/126/signatures?p_auth=6gzofF2p, accessed 17 August 2018.
34. In October 2010 the Netherlands Antilles was formally dissolved. Aruba became, along with Curaçao and Sint Maarten, separate countries within the Kingdom of Netherlands whilst Bonaire, Saba and Sint Eustatius became integrated in the Netherlands as special municipalities. It would appear that the CPT mandate extends to all of these territories.

permits states, at the time of signature, ratification or accession, to list the territories to which the convention is to apply and Article 20.2 to extend that list. The original ratification of the UK was in respect of the United Kingdom of Great Britain and Northern Ireland, Jersey and the Isle of Man. It was subsequently extended to Gibraltar in 1988, Guernsey in 1994 and the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus in 2013. As a result, the convention is still inapplicable to the majority of the remaining overseas territories of the UK. Indeed, it should be noted that not all places of detention under the jurisdiction of states parties are, at any given moment, necessarily within the jurisdiction of the CPT. Article 17.3 provides that:

> [t]he Committee shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8th June 1977 thereto.[35]

However, this does not appear to have been a significant limitation on the work of the CPT in practice.[36]

In some instances, the CPT also has authority to work beyond the confines of the territorial jurisdiction of its member states. For example, it has been empowered to exercise a visiting mandate in Kosovo[37] on the basis of an agreement entered into between the Council of Europe and the United Nations Interim Administration Mission in Kosovo (UNMIK) in 2004 regarding UN-run detention facilities and, as regards NATO-run Kosovo Force (KFOR) facilities, in an exchange of letters between the Council of Europe and NATO in 2006.[38] It should also be noted that the CPT has itself entered into arrangements with international criminal tribunals that have a responsibility for overseeing the implementation of sentences being served by convicted prisoners within States Parties to the European Convention for the Prevention of Torture.[39] Strictly speaking, this ought to have been unnecessary as

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35. As the Council of Europe's Explanatory Report to the European Convention for the Prevention of Torture (1998: para. 93-4) makes clear, this does not preclude visits by the CPT to places of detention that the ICRC visits by agreement in times of peace, or, indeed, in times of armed conflict if the ICRC is not visiting "effectively" or "on a regular basis".
36. The pre-trial detention facilities of the International Criminal Court in The Hague are to be visited by the ICRC on the basis of an agreement made between them in 2006. Although this would not preclude a visit from the CPT, it does not appear to have done so.
37. All references to Kosovo*, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo*.
38. The 2004 agreement makes it clear that UNMIK is not to be considered a party to the convention itself, and that the agreement is without prejudice to the status of Kosovo* that, at the time of writing is not a state party to the European Convention for the Prevention of Torture. Visits to Kosovo* continue to be made on the basis of the 2004 agreement, the most recent of which occurred in April 2015 (CPT 2016a), see www.coe.int/en/web/cpt/kosovo, accessed 17 August 2018.
39. See "Exchange of letters between the International Criminal Tribunal for the former Yugoslavia and the CPT", November 2000 (reproduced in CPT (2001b, Annex 5)), subsequently amended to reflect the transfer of responsibilities from the tribunal to the Mechanism for International Criminal Tribunals (MICT) in 2013, see CPT (2013a: paras. 16-18). In 2014 the CPT entered into a similar agreement with the Residual Special Court for Sierra Leone, and visited a convicted person under this agreement in the UK in November 2014. See CPT (2015a: para. 20). A further such agreement was entered into with the International Criminal Court in November 2017. See CPT (2018a: para. 25).