

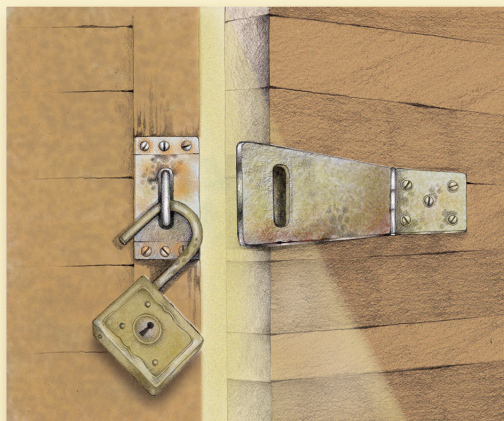
IIHR

Inter-American Institute
of Human Rights



Optional Protocol

to the United Nations Convention against Torture
and Other Cruel, Inhuman or Degrading
Treatment or Punishment



A Manual for Prevention

**Optional Protocol
to the United Nations Convention
against Torture and Other Cruel,
Inhuman or Degrading
Treatment or Punishment:**

A Manual for Prevention

*Inter-American Institute for Human Rights (I/HR)
Association for the Prevention of Torture (APT)*

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Inter-American Institute for Human Rights (I/IHR)
Association for the Prevention of Torture (APT)

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TABLE OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AI	Amnesty International
APT	Association for the Prevention of Torture
CAT	UN Committee against Torture
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CEPTA	Committee of Experts for the Prevention of Torture in the Americas
CERD	UN Convention for the Elimination of All Forms of Racial Discrimination
CHR	UN Commission on Human Rights
CINAT	Coalition of International Non-Governmental Organisations against Torture
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECOSOC	UN Economic and Social Council
EU	European Union
FIACAT	International Federation of Action by Christians for the Abolition of Torture
FIDH	International Federation for Human Rights
GA	UN General Assembly
GRULAC	UN Latin American and Caribbean Group
IACHR	Inter-American Commission on Human Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for Former Yugoslavia
IIHR	Inter-American Institute for Human Rights
ILANUD	UN Latin American Institute for the Prevention of Crime and Treatment of Offenders
IRCT	International Rehabilitation Council for Torture Victims
NGO	non governmental organisation
NHRI	national human rights institutions
OAS	Organisation of American States

ODIHR	Office for Democratic Institutions and Human Rights of the OSCE
OHCHR	Office of the UN High Commissioner for Human Rights
OPCAT	UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OMCT	World Organisation Against Torture
OSCE	Organisation for Security and Co-operation in Europe
SADC	Southern African Development Community
SCT	Swiss Committee against Torture
UN	United Nations
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Optional Protocol to the UN Convention against Torture adopted in December 2002, provides a novel and realistic approach to preventing this unacceptable human rights violation and crime against humanity. For the Inter-American Institute of Human Rights (IHR) and the Association for the Prevention of Torture (APT), it is therefore a great honour to jointly present this manual aimed at putting such an innovative and indispensable international instrument into practice. Directed towards national and regional actors dedicated to preventing torture and ill-treatment in their societies, the manual hopes to serve as a practical tool for the campaign to promote the ratification and implementation of the Optional Protocol. Although the instrument, which will establish a worldwide system of regular visits to places of detention, was successfully adopted by the UN General Assembly on 18 December 2002, a global campaign to ensure its prompt entry into force and its universal application is actively underway. For this reason the IHR and the APT are instigating the dissemination of this material within the international community.

This alliance is not the first one between our two institutions. It has to be recalled that in the past the IHR and the APT have already actively collaborated, in close coordination with several human rights entities, in the elaboration of general guidelines for effectively investigating instances of torture and other forms of ill-treatment.¹

In this context, both institutions present this Manual, which offers basic information related to the Optional Protocol, so that it can be used by a wealth of actors involved in the ratification campaign for this instrument. The first chapter introduces the reader to the Optional Protocol, stressing the need for a new international instrument of this sort within the framework of other relevant norms and mechanisms. The second chapter takes the reader through the history of the conception, negotiation and adoption of the Optional Protocol before the different bodies of the UN to gain a greater understanding of the lengthy and complex process. The third chapter is a commentary on the text of the Optional

¹ See the Manual on the Investigation and Documentation of Torture and Other Inhuman or Degrading Treatment or Punishment, better known as the "Istanbul Protocol", adopted by 25 human rights institutions and NGOs in Turkey in 2000, Office of the UN High Commissioner for Human Rights, Geneva, New York, 2001. Further, IHR published in close collaboration with Penal Reform International (PRI), in 2000, the *Manual de Buena Práctica Penitenciaria. Implemenación de las Reglas Mínimas de Naciones Unidas para el Tratamiento de los Reclusos*, IHR, San José, 2000, which has become a reference tool in the Americas for the implementation of penitentiary policies with a greater focus on international human rights standards.

Protocol, aimed at further expanding on the content of each article, including the significance and background of some of the provisions. Chapter four aims to illustrate the potential impact of a system of regular monitoring of detention facilities, by describing the two main mechanisms established by the Optional Protocol at the international and national level. The final chapter identifies the potential key actors as well as suggesting some actions for the ratification and implementation campaigns.

This publication is based on a similar manual on the Optional Protocol to the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), first published in 2000 by the IHR, which has also become an important essential reference for ratification campaigns for international human rights instruments.

Based on the success of this first manual to bolster the ratification process of the Optional Protocol to the CEDAW and their own long-standing commitment to preventing torture in the Americas region, the IHR and the APT decided to agree on a strategic partnership to produce this second manual on the Optional Protocol to the UN Convention against Torture.

While the IHR did not participate in the drafting and negotiation process of the Optional Protocol, it did follow the process closely through the remarkable participation of Judge Elizabeth Odio Benito, a member of the General Assembly of IHR since 1996, who acted as Chair of the Working Group that drafted the Optional Protocol, and to whom today, as a Judge and Vice President of the International Criminal Court, we extend our deepest gratitude for agreeing to present a foreword to this Manual. In addition to a solid track record of promoting human rights instruments, extensive experience in campaigning strategies of both universal and inter-American instruments, and an extensive network of local partners within the American continent, the IHR had a specific Program for Prevention of Torture between 1994 and 1999. Since 2002, IHR has developed in collaboration with the Center for Enforcement of Justice and International Law (CEJIL) a joint initiative aimed at providing psychological assistance to victims of torture within the inter-American system for the protection of human rights

For its part, the APT is a non-governmental organisation that was founded over a quarter of a century ago by a Swiss philanthropist, Jean-Jacques Gautier. He proposed establishing a monitoring system to open up places of detention to scrutiny thereby reducing the potential risk of torture and ill-treatment taking place. The APT managed to gradually obtain support for this practical idea from States, initially at a European level. Subsequently, the APT

promoted the adoption of a universal instrument, the Optional Protocol to the UN Convention against Torture. The APT has since then played a pivotal and influential role in every step of the process.

We would like to thank the members of the two institutions in charge of the academic coordination of this publication, namely, Gilda Pacheco, Director of the Civil Society Area for the IIHR and Claudia Gerez Czitrom, Americas Programme Officer for the APT, as well as the authors, Nicolas Boeglin Naumovic, external consultant of IIHR and Debra Long, UN & Legal Programme Officer at the APT. We would also like to thank Maylin Cordero, IIHR Assistant, Civil Society Department, and Victoria Kuhn, APT Assistant, Communications Programme, for their dedication to the administrative matters involved with this project. Last but not least, the IIHR and the APT would like to extend their deep gratitude to the Governments of Switzerland, the Netherlands, and the United Kingdom who made the publication of this manual possible with their financial support.

The final remarkable success of the adoption of the Optional Protocol was the result of collaborative efforts by committed NGOs, States and organisations devoted to the defence of human rights. In order to ensure a prompt ratification and implementation by States Parties to the Convention against Torture both the IIHR and the APT expect this publication to serve as a useful guide for members of different ministries, parliamentarians, national human rights institutions, NGOs and individuals fully engaged with the ratification and implementation of the Protocol in their own country. It is through this kind of sustained collective action, as well as many other strategies taken by actors fully committed to the Protocol, that the IIHR and the APT look forward to a global ratification of this essential treaty to put an end to torture and illtreatment across the world.

Roberto Cuéllar
Executive Director, IIHR

Mark Thomson
Secretary General, APT

San José, Geneva , 26 June 2004
International Day in Support of Victims of Torture

Torture constitutes one of the more gross violations of fundamental rights of human beings. It destroys the dignity of humans by degrading their bodies while causing injuries, some times irreparable, to their minds and their spirits. The horrific consequences of this terrible human rights violation spread to the family of the victims and into their social surroundings. Through these acts, the values and principles upon which democracy stands and any form of human coexistence lose their significance.

Throughout the years, experts, social organizations and governments have consolidated their efforts to combat the practice of torture, to sanction their perpetrators and to adopt programs that help victims and their families. However, nothing has stopped those who around the world continue to torture, with or without official consent.

The Convention Against Torture, adopted by the United Nations, signified an enormous progress by categorizing the practice of torture as an international crime and by creating the mechanisms to denounce it. However, despite efforts on the issue of prevention, progress has been small at the national and international level.

In 1980 the Government of Costa Rica began a process in the United Nations, which continued until 2002, to adopt a Protocol exclusively aimed at the prevention of torture through coordinated actions between the Governments and the international community. Governments principally from Latin America and Europe, enthusiastically and efficiently contributed in the process of the drafting of the Optional Protocol Against Torture, especially during 1999. In the same way, the Association for the Prevention of Torture (APT), based in Switzerland, played, from the very beginning, a fundamental role in the effort of drafting an instrument and convincing Governments and non-governmental organizations concerned with this issue.

I had the honour to preside over the open-ended working group of the Commission for Human Rights, which from 2000 adopted a greater enthusiasm and commitment to create the Optional Protocol and to obtain its approval by all of the organs of the United Nations. In 2002, the combined efforts of Governments, non-governmental and expert organizations, made it possible to obtain the adoption of the Optional Protocol as a new international instrument dedicated to the protection of human rights.

The national mechanisms together with the international mechanism contemplated by the Protocol, will help to prevent the practice of torture specifically in the places where it happens most frequently, namely places of detention. In all places where persons are deprived of their liberty, for whatever reason, there exists the potential risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. The efforts of the mechanisms to be created will prevent this risk from becoming a reality.

Now follows the process of ratification of the Protocol, a task that has united on this occasion two leading organizations in the fight for the protection of fundamental rights of peoples. The Inter-American Institute of Human Rights (I/AHR) and the APT, jointly prepared this publication, which I am certain will make a significant contribution to obtaining the speedy ratification of this essential instrument. This contribution made by the I/AHR and the APT honours the long tradition of both organizations and renews our enthusiasm to continue with this task at hand.

Elizabeth Odio Benito

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Former Chairperson of the UN Working Group
to draft the Optional Protocol to the UN Convention against Torture*

San Jose, 26 June 2004

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CHAPTER I

Basic Questions on the Optional Protocol to the UN Convention against Torture*

* By Nicolas Boeglin and Debra Long.

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The international community has recognized torture as one of the most brutal and unacceptable assaults on human dignity from which no region in the world has managed to free itself. The prohibition of torture, inhuman and degrading treatment or punishment is therefore expressly prohibited by countless international conventions, both universal¹ and regional,² and international law doctrine has for several decades considered this prohibition to be part of international customary law, which cannot be derogated in time of peace or war, or under the pretext of imminent danger to national security.³ Accordingly, this unconditional ban on torture is an internationally recognized obligation for every State official, regardless of whether his or her government has ratified any human rights instruments. Yet, despite this universal condemnation, these appalling abuses still persist around the world.⁴

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- 1 In addition to the Universal Declaration of Human Rights, Article 3, one may refer to the International Covenant on Civil and Political Rights, Article 7, 16 December 1966; the Geneva Conventions of 1949 on the protection of victims of armed conflicts, Articles 3.1a and 3.1c, common to all Conventions; Article 147 of the Convention on Civilians; Articles 49-51 of the Convention on the Wounded in the Field; and Articles 51-53 of the Convention on the Wounded at Sea, 12 August 1949; the UN Convention against Torture, 10 December 1984; and the UN Convention on the Rights of the Child, Articles 37 and 39, 20 November 1989.
 - 2 In the Americas, the American Convention on Human Rights, Article 5, 22 November 1969 and the Inter-American Convention to Prevent and Punish Torture, 9 December 1985; in Europe, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, the Final Act of Helsinki of 1975 (Principle VII), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, along with its Protocols I and II, 4 November 1993; in Africa, Article 5 of the African Charter on Human and Peoples' Rights, 26 June 1981.
 - 3 A growing body of opinion now exists to give weight to the idea that the prohibition of torture has attained the status as a *jus cogens* or "peremptory" norm of international law. This is defined in the Vienna Convention on the Law of Treaties (Article 53) as a norm "accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In other words States may not withdraw from their obligations under any circumstances and cannot be modified simply by a treaty. One of the most influential decisions in this respect has been the case of *Prosecutor v Anto Furundzija*, in the International Criminal Tribunal for the former Yugoslavia, IT-95-17/1-T, 10 December 1998, <http://www.un.org/icty/cases/jugemindex-e.htm>. This took a broad view of the legal effects of the prohibition of torture as a *jus cogens* norm to include the exercise of universal jurisdiction over acts of torture and the non-applicability of statutes of limitation and amnesty laws. For further reading on this issue see: SEIDERMAN Ian, *Hierarchy in International Law: The Human Rights Dimension*, School of Human Rights Research, Hart Publishing, 2000, pp 55-59, 92-93, 109-119 and Amnesty International, *Combating Torture: a Manual for Action*, London, Amnesty International Publications, 2002, pp 65-66.
 - 4 "[...] in all human societies there exists a potential for torture, and only an appropriate milieu makes it possible to control this potential." STROUM Jacques and DAUDIN Pascal, "Une analyse des facteurs qui favorisent la torture", in APT, *Vingt ans consacrés à la réalisation d'une idée. Recueil d'Articles en l'honneur de Jean-Jacques Gautier*, Geneva, APT Publications, 1997, pp.117-128.

For this very reason, during the 1970's while the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) was being negotiated, several international organisations put their efforts into finding new and more realistic ways to prevent such abuse. Inspired by the results of visits to prisons during times of war conducted by the International Committee of the Red Cross (ICRC), the Swiss philanthropist Mr. Jean-Jacques Gautier sought to create a system of regular inspections of places of detention throughout the world. Following a lengthy and arduous negotiation process, such a system will be finally established by the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereafter "the OPCAT" or "the Optional Protocol"), which was adopted on the 18 December 2002 by the UN General Assembly.⁵ It is now up to States to take another step forward in this show of support for the abolition of torture by signing, ratifying and implementing this new instrument, thus culminating a thirty-year process from the initial idea to making this practical and effective instrument a reality.

This chapter seeks to introduce the reader to the Optional Protocol to the UN Convention against Torture by answering some basic questions about the instrument. The chapter therefore begins with an overview of the first UN treaty against torture and parent instrument to the Optional Protocol: the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as well as the mechanism created by this treaty: the UN Committee against Torture. The chapter describes generally what an optional protocol is in international law, before explaining the particular need and novelty of the Optional Protocol to the UN Convention against Torture. It also describes and how the system of visits foreseen in the OPCAT will function in practice, concluding with some of the steps that must now be taken to put the Optional Protocol into practice.

1. Existing UN legal instrument on torture

a) How are acts of torture and other forms of cruel, inhuman and degrading treatment or punishment defined under international human rights law?

Under international human rights law, the most widely recognised definition of torture is contained in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "UNCAT" or

⁵ UN. Doc. A/RES/57/199, 18 December 2002.

⁶ UN. Doc. A/RES/39/46, 10 December 1984. Entered into force on 26 June 1987.

“the Convention against Torture”).⁶ Article 1 of the UNCAT defines torture in the following way:

*“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.”*⁷

From this Article, three fundamental elements that define torture can be observed:

- 1) there must be severe physical or psychological pain or suffering;
- 2) it must be for a purpose; and
- 3) it must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity.⁸

Whilst there are varying definitions of torture at the international and regional levels, these essential distinguishing features of torture, contained in the UNCAT, are common to all definitions. The accepted approach under international law has been to avoid drawing up an exhaustive list of acts that could be considered to amount to torture, because of concerns that such a list could be too limited in its scope and could fail to adequately respond to developments in technology and values within democratic societies.

The definition contained in the UNCAT does however contain a list of purposes for which an act of torture may be perpetrated. This list is not exhaustive, but rather gives an indication of the types of purposes that may lie behind the infliction of severe physical or psychological suffering. Furthermore, the process of considering whether or not such an act is sufficiently severe so as to amount to torture should be a subjective test taking into account the specific circumstances of each case.

⁷ It is important to note that an act cannot be justified as a lawful sanction merely because it is approved by national law, it must also conform to international standards.

⁸ For further information on the definition of torture please see: APT, *The Definition of Torture: Proceedings of an Expert Seminar*, Geneva, APT, 2003, and RODLEY Nigel, *The Treatment of Prisoners under International Law*, Oxford, Oxford University Press 1999, pp 75-107.

⁹ UNCAT, Article 16.

Unlike torture, acts of cruel, inhuman and degrading treatment or punishment are not expressly defined by the UNCAT or other instrument. The UNCAT simply refers to them as acts that cannot be considered to fall within the definition of torture as outlined in Article 1.⁹ This can cause some ambiguity as to what these other forms of ill-treatment actually encompass. Therefore, these acts have been largely defined by the jurisprudence of international and regional human rights bodies and human rights experts. Current interpretations consider that these acts can be distinguished from torture if they have not been inflicted for any specific purpose.¹⁰ Nevertheless, in order to be considered cruel, inhuman or degrading treatment or punishment, an act must still be inflicted by, or at the instigation of, or with the consent or acquiescence, of a public official or person acting in an official capacity.¹¹

b) What is the UN Convention against Torture?

The UN Convention against Torture was adopted by the UN General Assembly on 10 December 1984 and entered into force on 26 June 1987. The UN Convention against Torture is the only legally binding treaty at the universal level concerned exclusively with the eradication of torture.¹²

The UNCAT contains a range of obligations for States Parties aimed at prohibiting and preventing torture. It is important first and foremost because it contains an internationally recognized definition of torture and requires States Parties to ensure that acts of torture are made a criminal offence under their national law.¹³ It stipulates that torture is a non-derogable right, in other words, the prohibition of torture is to apply in all circumstances.

The Convention also obliges States Parties to take effective measures to prevent torture and other forms of cruel, inhuman and degrading treatment or punishment. In this respect it contains a range of related obligations designed to prevent and prohibit these acts within States Parties such as: the review of

10 See: APT, *The Definition of Torture: Proceedings of an Expert Seminar*, Op.cit., pp.18,58-59.

11 A body of jurisprudence exists at the international and regional levels to demonstrate that poor conditions of detention obtaining a certain level of severity can amount to cruel, inhuman and degrading treatment or punishment. For further reading on this issues see: APT, *The Definition of Torture: Proceedings of an Expert Seminar*, Op.cit., pp.40-41.

12 As of December 2003, 134 States had ratified the Convention. For a current list of States Parties, please consult the UN Office of High Commissioner for Human Rights website: www.ohchr.org/english/countries/ratification/

13 The UNCAT also stipulates that States Parties are obliged to enable the exercise of universal jurisdiction over the offence of torture (Article 5-8). Thus when these crimes occur, national courts have jurisdiction to act regardless of where the crime occurred and the nationality of the perpetrator or the victim. The central idea behind this is that certain crimes, including torture, are considered so abhorrent that perpetrators must be made accountable wherever they are and are not to be afforded any safe haven.

interrogation techniques; prompt and impartial investigations; the prohibition of the use of any statement obtained through torture as evidence in any proceedings; a right to obtain redress and compensation.¹⁴

Lastly, the Convention also establishes the UN Committee against Torture, the treaty body concerned with monitoring States Parties' compliance with their obligations.

c) What is the UN Committee against Torture?

Under the UN human rights system, specific bodies comprised of independent experts are created by treaties in order to monitor the compliance of States Parties to their international obligations contained in the treaties. The UN Committee against Torture (hereafter "the CAT" or "the Committee") is the body created by the UN Convention against Torture to monitor the observance of the specific obligations established under the UN Convention against Torture.

The CAT is comprised of ten independent experts with recognized competence in human rights.

d) What does the UN Committee against Torture do?

Treaty bodies, including the UN Committee against Torture, have established a system of periodic reporting to monitor the extent to which States Parties are respecting their obligations to implement a particular treaty. States Parties must submit a written report to the Committee every four years (though in practice many regularly fail to meet this deadline). The Committee then examines the report, including holding a formal public meeting with State representatives to clarify any questions and concerns. The CAT also receives additional information, informally, from other sources such as non-governmental organisations. The purpose of this procedure is for the Committee to gain a realistic picture of the situation of torture and ill-treatment in any given State Party and in so doing to make recommendations on ways to better implement treaty obligations to prevent, prohibit and punish the practice of torture.

In addition to the regular reporting process described above, the Committee can also carry out a confidential inquiry into allegations of a systematic practice of torture.¹⁵ Such an inquiry can only be conducted if the Committee has received *"reliable information which appears to it to contain*

¹⁴ Articles 2,10,11 and 16.

¹⁵ Article 20. See Annex 3 for a table of State Parties that have made a reservation regarding Article 20.

well-founded indications that torture is being systematically practiced."¹⁶ The State Party is invited to co-operate and, where consent is given, the inquiry could involve a fact-finding mission by the CAT to the country concerned. The Committee then submits the findings and recommendations of the inquiry to the State Party. While the proceedings remain confidential, the Committee may, after consultation with the State Party, include a summary account of the outcome of the inquiry in its annual report or publish the entire report.¹⁷

Finally, the Committee can also consider communications from, or on behalf of, individuals who claim to be victims of a violation of the UN Convention against Torture, although a State Party must make a declaration accepting this competence of the CAT before it can consider any individual communications.¹⁸

2. The Optional Protocol in international human rights law

a) What is an optional protocol?

Before entering into detail about the Optional Protocol to the UN Convention against Torture specifically, we will first review the nature of this type of legal instrument more generally. An optional protocol is an addition to an international treaty (also known as a charter, convention, covenant, or an accord) adopted either at the same time or after the primary treaty. A protocol introduces provisions or procedures that are absent from the primary treaty but which complement them. It is optional in the sense that its provisions are not automatically binding on States that have already ratified the primary treaty; they are free to ratify the protocol or not, as they see fit. Accordingly, an optional protocol has its own mechanism for ratification and entry into force that is independent from the treaty it is meant to complement.

¹⁶ In practice however, this mandate under Article 20 has not often been used.

¹⁷ The latest report published in its entirety by the CAT, with the consent of the State, is the investigation conducted under the terms of Article 20 conducted in Mexico during the 2001-2002 period. See UN.Doc. CAT/C/75, of 16 May 2003.

¹⁸ See Annex 3 for a table of State Parties that have recognized the competence of the Committee to consider individual communications under Article 22.

Many human rights instruments, both at a universal and regional level, have their own protocols.¹⁹ These optional protocols have been drafted for different purposes including:

- To enable additional means of monitoring rights contained in the original treaty. The most well-known examples include: the Optional Protocol to the International Covenant on Civil and Political Rights (both the Covenant and its Protocol entered into force in 1976) and the 1999 Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination against Women. Both of these Optional Protocols extend the competency of their respective monitoring Committees to receive communications and conduct investigations into violations of their parent treaties.²⁰ Similarly, the Optional Protocol to the UN Convention against Torture was approved for the purpose of creating new human rights bodies designed to prevent torture and ill-treatment through regular visits to places of detention.
- To remedy deficiencies or to cover additional rights or obligations that are not covered by the parent treaty. For example, the 1988 San Salvador Protocol on Economic, Social and Cultural Rights was designed to complement and expand upon the civil and political rights enshrined in the 1969 American Convention on Human Rights, while the 1990 Asuncion Protocol sought to give new force to growing worldwide opinion against the death penalty.

One could say that an optional protocol is a legal strategy or tool for States interested in updating, enhancing or reinforcing the provisions in a treaty to do so without reopening its text for discussion. By negotiating an additional agreement, States avoid the risk of debilitating, rather than strengthening, the original treaty, which is usually the result of hard-won diplomatic battles and sometimes fragile consensus.

19 At the universal level we can quote for example: the 1966 International Covenant on Civil and Political Rights has two optional protocols, adopted in 1966 and 1989; the 1951 Convention relating to the Status of Refugees was supplemented with a protocol adopted in 1967. The 1979 Convention for the Elimination of All Forms of Discrimination against Women was enhanced by its 1999 optional protocol, and the 1989 Convention on the Rights of the Child was supplemented by two optional protocols, both adopted in 2000. At the regional level: 11 protocols complement the 1950 European Convention on Human Rights, while the 1998 Optional Protocol to the 1981 African Charter on Human and Peoples' Rights establishes an African Court on Human and Peoples' Rights, which entered into force on 25 January 2004.

20 See IIHR, *Optional Protocol. Convention on the Elimination of all Forms of Discrimination against Women*, San José, IIHR/UNIFEM, 2002.

b) Who can sign and ratify an optional protocol?

Since an optional protocol is a text that complements an existing international instrument, in most instances only the States that are parties to the main treaty can ratify it. In other words, States must first ratify the parent treaty and only afterwards ratify the optional protocol to the parent treaty.²¹ This is the case of the Optional Protocol to the UN Convention against Torture, which expressly provides that only States that are party to the Convention itself may ratify its Optional Protocol.²²

c) Why was there a need for an Optional Protocol to the UN Convention against Torture?

We have seen that the UN Convention against Torture provides a solid legal framework to combat this practice, while the UN Committee against Torture is a competent body to oversee that States Parties respect their obligations to prohibit, prevent and punish torture. In addition, various norms and mechanisms against torture and ill-treatment also exist at a regional level. Nonetheless, these practices still persist and are widespread throughout the world. For this reason, an entirely new approach was sorely needed to effectively prevent these violations.

This new approach, enshrined in the Optional Protocol to the UN Convention against Torture, is based on the premise that the more open and transparent places of detention are, the less abuse will take place. Since places of detention are by definition closed to the outside world, persons deprived of their liberty are vulnerable and particularly at risk of torture and other forms of ill-treatment as well as other human rights violations. Furthermore, respect for their fundamental rights depends exclusively upon the authorities in charge of the place of detention and they are dependent upon others for the satisfaction of their most basic needs. Violations to people deprived of liberty can arise from a policy of repression as well as inadequate systems of oversight. Opening places of

21 There are some exceptions to this general practice for example: The two Optional Protocols to the Convention on the Rights of the Child, adopted on 25 May 2000 and the 1967 Protocol to the 1951 Convention relating to the Status of Refugees. The 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, allows States that have signed but not ratified the Convention on the Rights of the Child to nevertheless sign *and* ratify this Optional Protocol. The 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, goes one step further and allows any State regardless of whether it is a party or not to the Convention on the Rights of the Child itself to sign and ratify that Optional Protocol.

22 The Optional Protocol also provides that States that have signed the UNCAT can also sign its Optional Protocol, but they will be unable to ratify the Optional Protocol until they have also ratified the Convention.

detention to external control mechanisms, as the Optional Protocol does, is therefore one of the most effective means to prevent abusive practices and to improve conditions of detention.

d) How do visits to places of detention prevent torture and ill-treatment?

The extensive experience of entities such as the ICRC and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have demonstrated how regular visits to detention facilities can be effective in practice.²³ First and foremost, the simple fact of being subjected to external control can have an important deterrent effect on authorities who will not wish to be subject to external criticism and that might otherwise believe that they will never be held accountable for their actions. Furthermore, visits enable independent experts to examine firsthand, without witnesses and intermediaries, the treatment granted to persons deprived of their liberty and to judge the conditions in which they are detained. Based on the concrete situation observed, experts can then make realistic, practical recommendations and enter into dialogue with the authorities in order to resolve any problems detected. Lastly visits from the outside world can be an important source of moral support for persons deprived of their liberty.

3. Specific issues raised by the Optional Protocol

a) What is new about the Optional Protocol to the UN Convention against Torture?

The novelty of the Optional Protocol to the UN Convention against Torture, compared to existing human rights mechanisms, lies in two factors. Firstly, the system to be established by the Optional Protocol places the emphasis on preventing violations rather than reacting to them once they have already occurred. The preventive approach foreseen in the Optional Protocol is based on the regular and periodic monitoring of places of detention through visits to these facilities conducted by expert bodies in order to prevent abuses. In contrast, most existing human rights mechanisms, including the UN Committee against Torture, monitor the situation a posteriori, once they receive allegations of abuse. For

23 The CPT, created in 1987, is an independent expert body that is mandated to conduct visits to places of detention within States Parties to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in order to make recommendations for the improvement of the treatment of persons deprived of their liberty and conditions of detention. For more information about the CPT please visit: www.cpt.coe.int.

example, while the CAT can conduct visits to States Parties, it can only do so if there are well-founded indications that torture is already being systematically practiced and with the prior consent of the State.

The other novelty of the Optional Protocol is that it is based on a premise of collaboration with the States Parties to prevent violations, rather than on public condemnation of States Parties for violations already committed. While existing human rights mechanisms, including the CAT, also seek constructive dialogue, they are based on the public examination of States' compliance to its obligations through the reporting or individual communications system described above. The system foreseen in the Protocol is based more on a process of long-term sustained cooperation and dialogue in order to assist States Parties to implement any necessary changes to prevent torture and ill-treatment in the long term.

b) How will the Optional Protocol work?

Yet another novel aspect of the Optional Protocol is that it will establish a dual system of prevention at both the international and the national level. The Optional Protocol foresees the creation of an international expert body within the UN, as well as national bodies that must be established by States Parties. Both the international and national mechanisms will conduct regular visits to places of detention for the purpose of monitoring the situation, proposing recommendations and working constructively with States Parties for their implementation.²⁴

The international mechanism is the "Subcommittee on Prevention" initially will be comprised of ten independent experts from a variety of professional backgrounds, which will increase to twenty-five members after the 50th ratification. Its mandate will be to carry out regular visits to places of detention in all States Parties to the Optional Protocol. Following the visits, the Subcommittee will write a report containing recommendations to relevant authorities. The report will remain confidential unless the State Party concerned gives its consent for publication or fails to cooperate with the Subcommittee. The Subcommittee will also play an important advisory role for States Parties and national preventive mechanisms.

The national approach consists of the establishment or designation by States Parties of national bodies, which will also have a mandate to conduct regular visits to places of detention and make recommendations to competent

²⁴ The mandate and functioning of the international Subcommittee and national preventive mechanisms are explained in greater detail in Chapter IV of this Manual.

authorities. All State Parties have the obligation to create or, if it already exists, to maintain such a national system within one year after the entry into force of the Optional Protocol or, once it is in force, one year after ratification or accession. In order to guarantee the effective and independent functioning of these bodies and to ensure that they will be free from any undue interference, the Optional Protocol sets out, for the first time in an international instrument, specific guarantees and safeguards which must be respected by States Parties. The OPCAT does not establish any particular form that these mechanisms must take, thereby providing some flexibility for States Parties to designate a body of their choosing including human rights commissions, ombudsmen, parliamentary commissions, lay people schemes, civil society organisations, as well as composite schemes combining elements of some of the above.

c) What will be the relationship between the international and national mechanisms under the Optional Protocol?

The international and national bodies will work in a complementary way. To facilitate collaboration, they can meet and exchange information, if necessary on a confidential basis. An important dimension is that the international Subcommittee can provide assistance and advice directly to States Parties concerning the establishment and effective functioning of the national preventive mechanisms. Furthermore, the international mechanism can also offer training and technical assistance directly to the national mechanisms with a view to enhancing their capacities. By prescribing such a complementary relationship between preventive efforts at the international and national level, the Optional Protocol breaks important new ground and aims to ensure the effective implementation of international standards at a local level.

d) When and how will the visits to places of detention take place?

Members of both the international and national mechanisms will be mandated to conduct visits to places of detention on a regular, periodic basis. The international Subcommittee will establish a calendar of periodic visits to all State Parties in order to conduct visits to places of detention of its choosing. The Subcommittee can also propose a follow-up visit to a periodic visit if it considers it appropriate. The national preventive mechanisms will naturally be able to conduct visits on a more regular basis due to their permanent presence within the country.

When a State ratifies or accedes to the Optional Protocol, it gives its consent to allow both types of bodies to enter any place of detention in the territory under its jurisdiction without prior consent. Visiting experts will be allowed to conduct interviews, in private and without witnesses, with any person deprived of his or her liberty, as well as to interview other persons such as security

or medical personnel and family members of detainees. They will have unrestricted access to the full records of any detainee or prisoner and the right to examine disciplinary rules, sanctions and other relevant documents such as those recording the number of persons deprived of their liberty and the number of places of detention. The visiting team will regularly inspect the entire detention facility and be allowed access to all of its premises including, for example, dormitories, dining facilities, kitchens, isolation cells, bathrooms, exercise areas, and healthcare units.

e) What places of detention may be visited?

The term “place of detention” is very broadly defined by the Optional Protocol in order to ensure the full protection of all persons deprived of liberty under all circumstances. This means that visits by the national and international expert bodies will not be limited to prisons and police stations, but will also include places such as: pre-trial detention facilities, centres for juveniles, places of administrative detention, security force stations. Detention centres for migrants, asylum seekers, transit zones in airports and check-points in border zones, as well as medical and psychiatric institutions will also be subject to visits under the Optional Protocol. The scope of the mandate of the visiting mechanisms shall also extend to include “unofficial” places of detention, where people are particularly vulnerable to many kinds of abuse.

f) What happens after the visits?

At the end of their visit, the preventive mechanisms will issue a report and a series of recommendations based on their observations. The objective is to establish a lasting collaborative relationship with the relevant authorities (such as ministries of justice, the interior or security, as well as penitentiary authorities and others) in order to work towards the implementation of these recommendations. Since the OPCAT seeks first and foremost to assist State Parties in finding practical and realistic measures to prevent torture and ill-treatment, the effectiveness of the visiting system is based on the premise of such ongoing, constructive collaboration. The instrument therefore establishes a specific obligation for States to enter into dialogue with the international and national mechanisms on possible implementation measures.

In order to foster such a climate of mutual respect and collaboration, the visit report (recommendations and observations) of the international Subcommittee will remain confidential. This confidentiality gives the State Party the opportunity to correct problems and implement changes out of the limelight of public condemnation, making some States more willing to enter into dialogue than they otherwise might have been. However, a State Party can choose to

authorise the publication of the report. The Subcommittee can also publish a report in the event that a State Party makes part of the report public. Furthermore, if a State fails to cooperate with the Subcommittee, either during a visit or in improving the situation following the issuing of recommendations, then the Subcommittee can request the UN Committee against Torture to make a public statement or to publish the report, after consultations with the State Party concerned.

Conversely, the reports of the national preventive mechanisms are not subject to such confidentiality and, in fact, the State Party has the obligation to publish and disseminate the annual reports of the national preventive mechanisms.

g) What are the advantages of the visiting system for States?

The Optional Protocol is designed to be a very practical additional aid to States Parties to the UN Convention against Torture to put into effect their obligation to take measures to prevent torture and other forms of ill-treatment. Often ill-treatment occurs due to poor conditions and systems within places of detention or due to the lack of appropriate training for those in charge of the care of persons deprived of their liberty. The Optional Protocol and the mechanisms to be maintained under it, offer advisory, technical and financial assistance to States to tackle institutional problems.

The Optional Protocol is not intended to target or to point a finger of blame at States but to work constructively with States Parties to implement sustained improvements. In order to build up trust and a collaborative atmosphere the international Subcommittee can work confidentially with a State Party if that particular State so wishes. States Parties not only have an obligation to cooperate with the international Subcommittee and national preventive mechanisms but it is also in their advantage to do so. By assisting the mechanisms to determine the real requirements for strengthening the protection of persons deprived of their liberty they can also, in the long-term, demonstrate improvements, where applicable, and respond appropriately to critics.

Unlike other treaties and treaty bodies that make demands of States Parties without offering guidance as to how to implement them, the Optional Protocol offers a means to implement change at the domestic level. A Special Voluntary Fund will be established, which will provide some practical assistance to

25 For a list of current signatories and ratifications of the Optional Protocol please see:
http://www.apt.ch/un/opcat/opcat_status.

States Parties to fully implement the recommendations of the Subcommittee and support education programmes of the national preventive mechanisms.

Further, by improving the professionalism of law enforcement officials through better working conditions, training, the sharing of international expertise and other initiatives, the level of public confidence in the authorities and administration of justice should increase. The technical assistance offered by the Optional Protocol is therefore a real helping hand for many States who face complex and interlinked social and institutional problems.

4. What steps need to be taken now to put the Optional Protocol into practice?

Before the Optional Protocol can enter into force and the system of visits to places of detention be established in practice, the instrument must be ratified by at least 20 States. All States Parties to the UN Convention against Torture now have the possibility of demonstrating their political will to prevent torture and ill-treatment by ratifying its Optional Protocol.

The campaign to promote the ratification and implementation of the Protocol must involve the active participation of a broad and varied range of national and international actors. The campaign should serve as a pretext for a broad public debate about the persistent practice of torture and ill-treatment and the pressing need to eradicate it. Public opinion will, of course, play a decisive role in convincing States to approve this novel inspection system by ratifying the Optional Protocol. Civil society organisations and national human rights institutions also have a particularly active role to play in the ratification campaign and the implementation process, including the designation and possible direct participation in the national preventive mechanisms. Parliamentarians, journalists, professional organisations, committed authorities and other concerned actors can all contribute to the goal of ensuring the prompt entry into force of the Optional Protocol, thus moving closer to putting an end to torture.

Since its adoption on 18 December 2002, a real momentum in building global support for the Optional Protocol has been created and subsequently sustained.

For a list of current signatories and ratifications of the Optional Protocol please see: www.appt.ch

CHAPTER II

History of the Optional Protocol to the UN Convention against Torture*

* By Nicolas Boeglin.

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The history of the Optional Protocol to the UN Convention against Torture dates back over thirty years to the efforts of a concerned citizen who rallied the support of international NGOs and some States behind the idea of establishing an international inspection system of places of detention to prevent torture. In order to give the reader a more insightful grasp of the significance of the final and long overdue adoption, on 18 December 2002, of the Optional Protocol to the UN Convention against Torture, this chapter describes the historical process leading up to this achievement from conception to fruition.¹

The chapter commences with the reasoning behind the idea, as well as the process of building momentum within the international community to back it, and the legal form it would ultimately take. The chapter then turns to the attempts and outcomes of establishing systems of preventive visits to places of detention at a regional level, namely in Europe and the Americas, before returning to the initial idea of a system within the UN to conduct inspections worldwide. Highlights of the arduous ten-year negotiations within the UN Working Group established to draft the Optional Protocol are then covered, before the various stages of the process leading to its final adoption at the UN General Assembly are described. Given the pivotal role played by NGOs throughout the process, their contributions are covered in each of these sections.

¹ The author would like to thank the following persons, who were directly involved in negotiating the Optional Protocol, for their invaluable contributions: Elizabeth Odio-Benito, former Chairperson of the UN Commission on Human Rights' Working Group on the Draft Optional Protocol; François de Vargas and Claudine Haenni, both former Secretary Generals of APT; Debra Long, APT's UN & Legal Programme Officer; Ian Seiderman, Legal Advisor of the International Commission of Jurists; Carmen Rueda-Castañón Member of the Secretariat of the UN Committee Against Torture and Carlos Villan-Durán, Human Rights Research Project Leader, from the OHCHR in Geneva. My gratitude goes out likewise to the foreign ministry officials and members of Permanent Missions to the UN based in Geneva who so kindly agreed to be interviewed, in particular Carmen I. Claramunt Garro and Christián Guillermet (Costa Rica), Jean Daniel Vigny and Claudine Haenni (Switzerland), Ulrika Sundberg (Sweden), Susan M.T. McCrory and Bob Last (United Kingdom), Hervé Magro (France) and Norma Nascimbene de Dumont (Argentina). All errors regarding the interpretation of certain aspects of the process that led to the adoption of the Optional Protocol are mine and mine alone.

1. The origin of a process to create an international mechanism to prevent torture

a) International concerns about torture

Growing concern about the widespread, and in many cases systematic, nature of torture in countries throughout the world in the 1970s, led to significant movements within the international community to construct legal norms to prohibit and prevent the practice, as well as to create mechanisms to hold States accountable for such violations.² Amnesty International's (AI) 1973 campaign and corresponding report to combat torture, in particular, made a considerable impact on international public opinion. In this context, negotiations to draft a specific treaty against torture within the UN were initiated in 1978, leading to the final adoption, in 1984, of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and the corresponding establishment of the UN Committee against Torture.

b) The “Gautier project”

At the same time, a group of international organisations also envisaged a new type of international human rights body to combat torture, which would *prevent* rather than *react* to violations and would rest on the premise of *dialogue* rather than *confrontation* with States. Given the secretive nature of torture, which occurs largely in closed places of detention out of the public view, the system would be based on regular inspections by outside experts to any place of detention at any time.

The notion of such an international visiting mechanism was the brainchild of a Swiss banker, Jean-Jacques Gautier, who, having decided to dedicate his retirement to preventing torture, began by conducting an exhaustive assessment of the existing means used to combat the practice in different parts of the world in order to then better focus his efforts. He concluded that the methods employed by the ICRC dealing with prisoners of war and political prisoners were unquestionably the most effective at preventing abuses. He was particularly moved by the evident decline in the use of torture in Iran and Greece after the ICRC was given access to detention facilities in these countries.

2 These were the days of the Cold War when a majority of Latin American countries were governed by repressive military regimes, the horrors of the psychiatric asylums and *gulags* of the Soviet Union and socialist States were just coming to light with the testimonies of Alexander Soljenitsine and the doctrine of national security justified the inhumane conditions of detention and incarceration in the majority of countries in the South, as well as in some Northern countries.

Jean-Jacques Gautier subsequently set out to build support for installing a similar system of regular visits to places of detention, which was not restricted to the realm of situations of conflict and humanitarian law and established in 1977 the Swiss Committee against Torture (SCT, today called the Association for the Prevention of Torture) as a platform for his campaign. The idea quickly attracted the interest of several international NGOs, particularly Amnesty International and the International Commission of Jurists (ICJ), who in turn built alliances with a number of States, namely Switzerland, Sweden and Costa Rica.

c) The optional protocol formula

A viable formula for attaining a visiting scheme within the UN system was conceived by Niall McDermot, Secretary General of the ICJ, in 1978. Given the probable resistance of some States to allow unrestricted inspections of their detention facilities and their already evident resistance to a legally binding international instrument for eradicating torture then under discussion within the UN, Niall McDermot proposed that such a mechanism not be included within the text of the draft UN Convention against Torture, but rather that it take the form of an Optional Protocol to the Convention.³

Costa Rica, Barbados, Nicaragua and Panama all took interest in the proposal and agreed with this particular approach. In March 1980, Costa Rica took the initiative and formally submitted to the UN a draft Optional Protocol to the Convention against Torture.⁴ However, the draft was presented with an indication that its examination be postponed until after the adoption of the Convention against Torture itself.

2. Strategy at the regional and universal levels

a) Attempts to establish regional visiting mechanisms

Postponing negotiations about the Optional Protocol within the UN system did not compel promoters of the initiative to sit quietly waiting for discussions to be resumed at this level. They continued to move on other fronts, shifting their focus to establishing such a scheme for detention visits at a regional level. The “Jean-Jacques Gautier project” gained new impetus internationally during a seminar convened by the Swiss Committee against Torture in 1983 on the most effective ways of combating torture. In addition to agreeing on the need

³ See MACDERMOT N, “How to enforce the Torture Convention”, in Swiss Committee against Torture/International Commission of Jurists, *How to make the International Convention Effective*, Geneva, SCT/ ICJ, 1980, pp.18-26.

⁴ See UN.Doc. E/CN.4/1409, 8 March 1980.

for establishing a broad NGO network and an early warning system for the systematic practice of torture, the 70 participants from 90 countries unanimously backed the idea of visits to places of detention at a regional level.⁵

i) Europe

The idea gained particular ground within the European continent. The Council of Europe's Parliamentary Assembly had adopted, in 1981, a recommendation related to the draft UN Convention against Torture, calling on Member States to pay particular attention to the planned visiting system. Given the postponement of discussions for such a mechanism within the UN system, in 1983, the Parliamentary Assembly adopted a draft text, prepared by the SCT and the ICJ, to create a visiting system within the framework of the Council of Europe. Following debates and negotiations on the final text, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted by the Council of Europe on 26 November 1987. Ratifications ensued more rapidly than expected and, to the surprise of many, the Convention came into force within a very short time, by 1 February 1989.

The Convention establishes a body of independent experts, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), to conduct periodic and *ad hoc* visits to any place "where persons are deprived of their liberty by a public authority" within the territory of any Member State of the Council of Europe. The CPT started working in May 1990 with its first mission taking place in Austria.⁶ Over the years, the CPT has demonstrated the unquestionable impact of such a system for improving conditions of detention and preventing abuse. Based on the same foundations as the system to be established by the Optional Protocol - repeated unannounced visits to any detention facility, and cooperation and dialogue with States - the accumulated experience of the CPT was useful in drafting the text of the Optional Protocol and it will surely serve to guide the new UN system to be put in place.⁷

5 These conclusions also led to the establishment, two years later of SOS - Torture, a network of over 200 NGOs throughout the world, later renamed the World Organisation Against Torture (OMCT). Thus, the roles of the two leading international organisations dedicated to the struggle against torture were clearly distinguished: the OMCT took on a more "activist" role in denouncing violations while the Swiss Committee against Torture focused more on promoting norms and mechanisms to prevent the practice and particularly on establishing a system of regular visits to places of detention.

6 Since then the CPT has made over 170 missions to 44 countries in Europe.

7 To learn more about the work of the CPT visit: www.cpt.coe.int.

ii) The Americas

The marked success of the regional approach in Europe unfortunately did not find much echo in the American continent, where many States proved reluctant to establish a visiting mechanism. While a thematic binding instrument was adopted at a regional level in 1985, the provisions of the Inter-American Convention to Prevent and Punish Torture fell below the expectations of interested NGOs, particularly regarding the control mechanism. A far cry from the system of visits established in Europe, the thematic instrument for the Americas required only that States report to the existing Inter-American Commission on Human Rights (IACHR) on legislative, judicial, administrative and other measures adopted to implement the Convention. In fact, of the three conventions against torture adopted around the same time (by the UN in 1984, by the Organisation of American States in 1985 and by the Council of Europe in 1987), the Inter-American Convention adopted the weakest monitoring mechanism.⁸

In light of this development, the SCT and the ICJ, in coordination with the regional human rights movement, continued to work jointly to insist on a system of unannounced visits to places of detention applicable to the Americas. They thus convened a regional consultation in Uruguay in 1987 and another in Barbados in 1988⁹ and established an NGO (the Committee of Experts of the Prevention of Torture in the Americas) for this purpose.¹⁰ Nonetheless, the obstacles soon became apparent. With the exception of Costa Rica and Uruguay, few members of the Organisation of American States (OAS) proved supportive, among other reasons due to financial considerations. Furthermore, the IACHR itself was not enthusiastic about having another regional body with a human rights mandate. Supporters therefore resigned themselves to the fact that regional efforts were unlikely to prosper in the foreseeable future and once again turned their attention to the UN, where States from the Americas played a determining role in seeing the establishment of the Optional Protocol through.¹¹

8 It should be noted however that, according to the last paragraph of Article 8 of the Inter-American Convention to Prevent and Punish Torture, "...After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State." The Inter-American Court of Human Rights has interpreted this article to mean that the Court was fully competent to review cases and issue judgements based on the Inter-American Convention to Prevent and Punish Torture. See *Villagran Morales et al* (the "street children" case), Judgement of 16 November 1999, Inter-American Court of Human Rights, Ser. C, no. 63.

9 See Grupo de Trabajo contra la Tortura, *Tortura: su prevención en las Américas. Visitas de control a las personas privadas de libertad*. Coloquio de Montevideo, 6-9 April 1987, Montevideo, SCAT-ICJ, 1987, pp.47-56.

10 Chaired by Cardinal Evaristo Arns of Sao Paulo, its members included, among others, Leandro Despouy (Argentina), Nicholas Liverpool (Barbados), Denys Barrow (Belize), Belisario dos Santos (Brazil), Elizabeth Odio Benito (Costa Rica), Antonio Gonzales de León (Mexico), Diego García Sayán and Juan Alvarez Vita (Peru), and Alejandro Artucio (the Secretary General, from Uruguay).

11 The SCT and ICJ considered that the other continents of the world were not yet ready for implementing such a system.

b) A return to the universal approach

i) A new draft text of the Optional Protocol

In the light of these diverse regional outcomes and the fact that the drafting process of the UN Convention against Torture had long since concluded - with the instrument in force since 1987 - it was time to return to promoting a universal visiting system with renewed vigour. The SCT and the ICJ once again joined forces to build support and draft a new text of the Optional Protocol to the UN Convention against Torture. A series of consultations for this purpose during the late 1980s were held. They found regional allies in the Committee of Experts of the Prevention of Torture in the Americas and the Austrian Committee against Torture and together convened a conference at, none other than, the UN headquarters in Geneva in November 1990.¹²

From this process emerged a new draft of the Optional Protocol,¹³ based on the original text submitted by Costa Rica to the UN in 1980, but updated and expanded upon, based on the experience acquired by the CPT, which gave an important indication of how such a system of preventive visits could actually operate in practice. Costa Rica again volunteered to sponsor the proposal, formally submitting the draft to the UN Commission on Human Rights for its consideration in January 1991. Thus, eleven years after the first attempt, the notion of a universal visiting mechanism once again knocked at the door of the United Nations.

ii) Growing support for the universal approach

Costa Rica's new proposal found immediate support not only amongst human rights organisations, but also within the UN system itself. For instance, the UN Special Rapporteur on Torture, Peter Kooijmans, did not hesitate to state in one of his previous reports that the system of preventive visits to places of detention would be *"the final stone in the edifice which the United Nations has built in their campaign against Torture"*.¹⁴ A few years later, the Vienna Declaration and Plan of Action of the 1993 World Conference on Human Rights, called for *"the early adoption of an optional protocol to the Convention against*

12 The meeting brought together 40 experts from approximately 20 countries, among them CAT Chairman, Joseph Voyame, UN Special Rapporteur on Torture, Peter Kooijmans, and CPT Chairman, Antonio Cassese.

13 The text was the final product of numerous consultations which included a colloquium held in Graz in 1988, organised by the Austrian Committee Against Torture (whose members Manfred Nowak and Renate Kicker played a key role); and a meeting held in Florence in October 1990 in which a new draft was developed by Walter Kalin and Agnes Dormenval (of the SCT), Andrew Clapham and Antonio Cassese (European University Institute of Florence); Helena Cook (AI), Peter Kooijmans (UN Special Rapporteur on Torture) and Jean Daniel Vigny (Government of Switzerland).

14 Report by Peter Kooijmans, UN Special Rapporteur on Torture, E/CN.4/1988/17, p. 21, paragraph 65.

*Torture... which will establish a system of periodic visits to places of detention”.*¹⁵ Nevertheless, the proposal for an optional protocol was to get caught up in a particularly complex and prolonged negotiation process that would take ten years to complete before culminating in the successful adoption of the Optional Protocol on 18 December 2002 by the UN General Assembly.

3. The Working Group established to draft an optional protocol: a ten-year process

a) The establishment of a Working Group

The UN Commission on Human Rights, the principal UN body dealing with human rights issues, and composed of fifty-three Member States, dealt with the Costa Rica resolution by formally resolving, on 3 March 1992, to establish an open-ended Working Group charged with drafting an optional protocol to the UN Convention against Torture.¹⁶ Working Groups are a frequently used means employed by the UN Commission on Human Rights, to introduce, discuss, negotiate and finally approve, after some years, treaties within the UN system. Working Groups are composed of delegations of States Representatives who negotiate the final content of the future instrument. It must be noted that NGOs, international organisations and additional experts can present their views to Working Groups, although the final negotiation and adoption of the instruments is the responsibility of States. Therefore, the aim of Working Groups is to agree on a definitive text of a treaty in order that it can then be submitted ultimately to the UN General Assembly for its formal adoption.

The open-ended Working Group to draft the Optional Protocol was, as its name indicates, not bound by any specific deadline to complete its work and representatives of any State, not just members of the UN Commission on Human Rights¹⁷, could participate in its work. Participants also included international organisations, such as the ICRC, experts such as the UN Special Rapporteur on Torture, and an increasing number of human rights NGOs, including the APT and the ICJ. Within the Working Group, Costa Rica continued to play a pivotal role and acted as Chair and Rapporteur of the Working Group throughout entire 10-year period of the sessions.¹⁸

15 UN.Doc. A/CONF/157/23, paragraph 61.

16 Commission on Human Rights, Resolution 1992/43, 3 March 1992.

17 Not only Member States of the UN but also those with observer status could participate in the Working Group. For example, Switzerland participated actively in the process, although it did not formally join the UN until September 2002.

18 During a short interlude (1996-1999), the then Rapporteur and Chair, Carlos Vargas Pizarro (Costa Rica), was assisted in the task by the President of the Drafting Committee, Ann Marie Bolin Pennegard (Sweden).

b) The dynamics of the Working Group

The ten year process for the Working Group to negotiate and adopt a draft text of the Optional Protocol was characterised by a mounting level of polarization between States, who supported the establishment of a solid preventive mechanism for visits, and those resolved to either weaken its scope or to block it all together. With each passing year, each group consolidated its position and refined its arguments, leading to a stalemate in the negotiations and the extension of its work for nearly a decade.

Prolonging the process and thereby exhaust the Working Group was precisely the preferred strategy of those States most opposed to the Protocol. Their tactics involved submitting new proposals on issues that had already been resolved and presenting objections to matters discussed years earlier. Their objective was to extend the discussions and to use time to gradually wear down the efforts of the Working Group.¹⁹ For their part, States with an interest in seeing a strong Optional Protocol, focused on deflecting the dilatory tactics of opposing States and developing stronger and more sophisticated arguments in favour of the Optional Protocol.²⁰ They ultimately developed an effective advocacy strategy with the decisive support of NGOs, who provided advice on substantive matters to States delegations as well as extremely valuable material such as technical and legal opinions, and comparative charts of the different proposals, which allowed delegations to identify possible discrepancies between these proposals and to find solutions to technical traps presented by the opponents of a strong text.

To give an idea of the tension within the Working Group we can cite as an example the seventh session in 1998. This year marked the 50th anniversary of the Universal Declaration of Human Rights and, symbolically, many had hoped that it would also be the date of the final adoption of the Optional Protocol. At the end of the session a delegate of the APT expressed her *"indignation and concern about the atmosphere prevailing in the meeting room"* further observing *"an obvious lack of political will to finalize the Optional Protocol...the misunderstandings and enormous mistrust among the delegations had killed all*

19 According to the former Chair and Rapporteur of the Group, "...Year after year, the Working Group... would get marred down in Byzantine discussions about the reach of certain articles of the text. A sterile and tedious exercise which wore down the patience of those who wanted to progress on the real objectives of the Protocol." ODIO BENITO, Elizabeth, "Protocolo Facultativo a la Convención contra la Tortura", *Revista Costarricense de Política Exterior*, Vol. 3 (2002), pp.85-90, p.87.

20 As the Working Group progressed, these arguments were increasingly based on the practical experience not only of the European Committee for the Prevention of Torture, which had begun conducting visits in 1990, but also by the in-country missions conducted by other UN mechanisms, which were established by the end of the 1980s.

*spirit of cooperation as well as the expectations of the international community.*²¹ The Working Group would take another four years to overcome these obstacles and conclude its work.

c) The main points of contention within the Working Group

Divisions within the Working Group revolved around various substantive matters that emerged repeatedly during the 10-year process. The main points of contention within the Working Group are summarized below:²²

i) multiple human rights mechanisms

One of the main objections to the Optional Protocol was that creating a new body for torture prevention was unnecessary and would duplicate the work of existing international and regional human rights organs. In support of this objection some States cited the following as an over-abundance of visiting mechanisms: the Committee against Torture has the ability to conduct visits to States Parties under Article 20 of the UNCAT; at the European level the CPT is conducting visits; the Inter-American Commission on Human Rights can conduct visits in that region; and at the international level the ICRC undertakes visits by virtue of the 1949 Geneva Conventions and their additional Protocols. Some States believed that the Optional Protocol would do more harm than good by competing with these existing mechanisms.

Yet, arguments in favour of the Optional Protocol centred on the distinctive and novel character of the visiting system foreseen in the OPCAT. Whereas existing mechanisms acted after violations had occurred, the new system would intervene beforehand to prevent them. Furthermore, while existing mechanisms publicly condemned States in a climate of confrontation, the new system would assist them through a confidential process of open dialogue and cooperation. Furthermore, cooperation between existing mechanisms, including the UN Committee against Torture, and the new visiting body was amply foreseen.

ii) financial matters

Closely linked to this matter was concern over the financial burden of creating a new mechanism within the UN human rights system that already

21 Remarks made by the Association for the Prevention of Torture (APT) during the seventh session, October 1998, UN.Doc. E/CN.4/1999/59, p. 19, paragraph 107.

22 Please refer to Chapter III of this Manual, Commentary on the Optional Protocol to the UN Convention against Torture, for an article by article analysis of the final text for details about these and other points of contention.

suffered from resource limitations. States supporting this argument proposed that only States Parties to the Optional Protocol should fund the visiting mechanism, while others argued that this would be an obstacle for ratification of the Optional Protocol by States with limited resources. Furthermore, the new mechanism should be an integral part of the UN human rights system and thus depend upon the regular UN budget in order to fully guarantee its independence and impartiality and to reflect current recognised practice for funding treaty bodies.²³ The financial argument, which was recurrent throughout the negotiation process, would emerge again later during the adoption process. In the final text of the Optional Protocol, the Subcommittee on Prevention will in fact be funded by the regular UN budget and in addition, a special voluntary fund will be established to help finance the implementation of the recommendations made by the visiting bodies.

iii) unrestricted access to all places of detention and without previous authorization

The scope of the powers to be granted to the new visiting mechanism of the OPCAT was perhaps one of the most contentious points within the Working Group, due to States' sensitivity about interference in national sovereignty and issues of national security. Some States were particularly reticent about allowing unrestricted access to *any* place of detention including "non official" ones and insisted on drawing up a restricted list of places which could be visited. These same States tended also to object to allowing the visiting mechanism *unrestricted* access to detention facilities, without the need for previous authorization. States favouring a strong Optional Protocol resisted the inclusion of a list of places of detention in the text, which could never be exhaustive. Instead, they insisted on including a broad definition of "places of detention" to be visited, which was the solution finally adopted in the text of the OPCAT. These same States also reminded the Working Group that the preventive character of the system - which, after all, was the objective of the new treaty - rested precisely on its ability to make repeated unannounced visits, a view also reflected in the final adopted text.

23 It is interesting to note the experiences of the Committee against Torture (CAT) and the Committee for the Elimination of Racial Discrimination (CERD) which were initially funded only by State Parties, but the pressing financial situation of these two treaty bodies was such that, in 1994, the UN General Assembly adopted an amendment to the two instruments by means of Resolution A/Res/47/111 of 5 April 1993 calling for "financing and staffing resources" for the two bodies to be provided from the regular budget of the United Nations, as has occurred since then.

iv) reservations

Other divisions within the Working Group revolved around more technical matters such as the possibility for States to make reservations, which the final text of the Optional Protocol does not allow. In international law, reservations allow States to make a written statement to be excluded from certain provisions of a treaty, as long as these are not incompatible with the “object and purpose” of the treaty²⁴ While some States argued that allowing for reservations of the OPCAT would encourage the greatest number of ratifications, others recalled the recent tendency of not allowing for reservations of important treaties - such as the International Criminal Court, 1998, and the Optional Protocol to the Convention on All Forms of Discrimination against Women (CEDAW), 1999. Furthermore, there seemed little justification for reservations since the Optional Protocol did not create any new obligations for States and reservations could in fact erode the effectiveness of the visiting mechanism, which should remain intact.

v) domestic legislation

Another point of discussion was the need to make explicit reference to the powers of the visiting mechanisms within the domestic legislation of States Parties in order to ensure compatibility and thus balance the legitimate interests of States with the effectiveness of the visiting system. However, others argued that the mechanism should have unrestricted visiting powers and - given that it was to uphold international standards, which may not be adequately reflected in domestic legislation - no specific reference to domestic legislation should be made.²⁵ This point became superfluous with the inclusion of domestic visiting bodies to the Optional Protocol.

vi) national preventive mechanisms

The novel idea of including national preventive mechanisms in addition to the international visiting mechanism, which was absent from the original draft text, was initially proposed to the Working Group by Mexico in 2001. This proposal managed to pull the discussions out of the impasse they had reached by 1999. Those favouring the proposal for national preventive mechanisms argued that the State itself was the principal guarantor of rights and therefore had the

24 1969 Vienna Convention on the Law of Treaties, Article 19(c).

25 See UN.Doc. E/CN.4/1999/50, 26 March 1999, paragraph 49. The question of subordination to national legislation appears as a separate article in UN.Doc. E/CN.4/1999/WG.11/CRP.1, of 14 October 1999, in Annex II, p. 19.

main responsibility for ensuring implementation. On a more practical level, mechanisms functioning domestically would have a more permanent presence in any given country and thus greater possibilities for making repeated visits and ensuring adequate follow-up. In fact, the CAT and the CPT had repeatedly recommended the establishment of such bodies. Finally, States in favour recalled that principles for the impartial and independent functioning of national human rights institutions already existed.²⁶

Opponents to the initiative were apprehensive about setting precedents for the creation of domestic bodies within an international instrument.²⁷ There was also genuine concern that existing national human rights institutions did not always have the necessary independence or capacity to assume such a role and that weak mechanisms could in fact cover up State violations. The text finally adopted incorporates the obligation of States Parties to establish national preventive mechanisms, outlining a series of guarantees for them to function effectively.

d) A session by session account of the Working Group

In order to give a better idea of the chronological development of the complex negotiation and drafting process, a summary account of each session of the Working Group follows. The **first session** of the Working Group was held from 19 to 30 October 1992.²⁸ Although some States considered that the Costa Rican draft could be accepted as it was, others called for a review of the text "from a conceptual perspective", thus turning it into a "background document for discussion". The first reading and discussion of the draft text, article by article, extended into the **second session** (25 October to 5 November 1993)²⁹ and the **third session** (17 to 28 October 1994).³⁰

26 The Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, better known as the "Principles of Paris", were adopted in 1991 and endorsed by a resolution of the General Assembly, UN.Doc. A/RES.48/134, of 20 December 1993.

27 It must be recalled that references to national entities to implement objectives of international instruments on human rights are not new: see for example Article 14 (2) of the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination, which provides that States may establish or indicate a body competent for receiving and examining individual claims and the General Recommendation No XVII concerning the establishment of national institutions to assist the implementation of CERD (UN Committee for the Elimination of Racial Discrimination) of 1993. (Text available in Doc. HRI/GEN/1/Rev 6 of May 12, 2003, p. 236). The OPCAT is unique in setting out an express obligation for States Parties to establish or designate national mechanisms with a specific mandate.

28 Report by chairman-rapporteur Elizabeth Odio Benito (Costa Rica), 2 December 1992, UN.Doc. E/CN.4/1993/28.

29 Report by chairman-rapporteur Jorge Rhenán Segura (Costa Rica), 17 November 1993, UN.Doc. E/CN.4/1994/25.

30 Report by chairman-rapporteur Jorge Rhenán Segura (Costa Rica), 12 December 1994, UN.Doc. E/CN.4/1995/38.

During the **fourth session** (30 October to 10 November 1995),³¹ the Working Group completed its first reading of the draft text (Articles 1-21). However, consensus was not reached on several new proposals to the draft text, which were thus left for discussion during the following session. These included: the inclusion of experts in Subcommittee missions and eventual objections thereto by a State (Articles 10 and 12); and the possibility of the UN Committee against Torture making a recommendation public if the State in question refused to cooperate with the Subcommittee (Article 14).

The second reading of the draft text began during the **fifth session** of the Working Group (14 to 25 October 1996).³² Given the difficulty of reconciling positions regarding two key provisions (on State consent to Subcommittee visits to any place of detention within its territory - Article 1 - and on State authorization to a visit by the Subcommittee - Article 8) discussion on these matters was postponed until the following session. However, no consensus could be found during the **sixth session** either (13 to 24 October 1997).³³ Thus, the second reading continued during the **seventh session** (28 September to 9 October 1998),³⁴ although two other provisions were left for future discussion: on the compatibility of the Optional Protocol with domestic legislation (Article X)³⁵ and possible objections by a State to a Subcommittee visit under exceptional circumstances (Article 13).

By this time negotiations had stagnated to such a point that Switzerland and Sweden - then Chair of the European Union - called on Costa Rica to engage in "a renewed effort to save the Protocol".³⁶ Despite these efforts, only a few operational provisions were adopted in a second reading during the **eighth session** (4 to 15 October 1999),³⁷ while numerous long-standing sticking points remained unresolved, namely: State consent to Subcommittee visits to any place of detention within its territory (Article 1); State authorization to a Subcommittee visit (Article 8); facilities to be granted to the Subcommittee by the State (Article 12); compatibility with domestic legislation (Article X); and State objection to a Subcommittee visit under exceptional circumstances (Article 13).

31 Report by chairman-rapporteur Carlos Vargas Pizarro (Costa Rica), 25 January 1996, UN.Doc. E/CN.4/1996/28.

32 Report by chairman-rapporteur Carlos Vargas Pizarro (Costa Rica) and the chairman of the informal drafting group, Ann Marie Bolin Pennegard (Sweden), 23 December 1996, UN.Doc. E/CN.4/1997/33.

33 Report by chairman-rapporteur Carlos Vargas Pizarro (Costa Rica) and the chairman of the informal drafting group, Ann Marie Bolin Pennegard (Sweden), 2 December 1997, UN.Doc. E/CN.4/1998/42.

34 Report by chairman-rapporteur Carlos Vargas Pizarro (Costa Rica) and the chairman of the informal drafting group, Ann Marie Bolin Pennegard (Sweden), 26 March 1999, UN.Doc. E/CN.4/1999/59.

35 Article without a number proposed by China on national legislation.

36 ODIO BENITO Elizabeth, *op.cit.*, p.87.

37 Report by eighth session chairman-rapporteur Elizabeth Odio-Benito (Costa Rica), who had presided over the first session in 1992, 2 December 1999, UN.Doc. E/CN.4/2000/58.

During the **ninth session** (12 to 31 February 2001),³⁸ discussions centred on an innovative proposal by Mexico, which counted on the blessing of the Latin American and Caribbean Group (GRULAC),³⁹ to set up national mechanisms for torture prevention parallel to the establishment of the international visiting mechanism. While Mexico's proposal focused mainly on this national feature, Sweden presented another draft text on behalf of the European Union, which centred more on the original idea for an international mechanism while leaving the door open to a complementary national mechanism. These new proposals radically changed and reanimated the dynamics of the debate and, as such, were welcomed by Costa Rica as a means of breaking the deadlock.⁴⁰

The **tenth** and **final session** of the Working Group (14 to 25 January 2002)⁴¹ was characterized by mounting pressure from the UN bodies to "expeditiously complete a final and substantive text".⁴² In an attempt to draw the session to a close in the midst of the continued lack of consensus among States, the chairperson-rapporteur, Ms. Elizabeth Odio-Benito, took the decision to present an alternative text. This new compromise text drew together elements of the discussion that had received majority support during the previous ten years of the Working Group, including matters contained in both the Mexico and Swedish drafts. In this way, the Chairperson attempted to achieve an acceptable compromise without forfeiting the aims and internal cohesion of the original proposal.

As the text did not receive the unanimous support of the Working Group, some States argued that they should continue to meet for at least another session in order to find a consensual solution to the contentious issues. Nevertheless, most State delegates, as well as NGOs, believed this text was the best achievable compromise and that any further negotiations could only be counterproductive. In the words of the delegate of Costa Rica *"we should not permit that delegations not in favour of an effective preventive mechanisms - many of which have not even ratified the Convention against Torture - impose*

38 Report by chairman-rapporteur Elizabeth Odio-Benito (Costa Rica), 13 March 2001, UN.Doc. E/CN.4/2001/67.

39 GRULAC is one of the four regional groups at the UN. The other regional groups are the African group, the Asian group, and WEOC (Western Europe, United States of America, Canada, Australia and New Zealand). In addition, there are subgroups such as the European Union, Central and Eastern European States, the Community of Arab Countries, and JUSCANZ (Japan, the United States of America, Canada, Australia and New Zealand).

40 The representative of Costa Rica admitted during that session that "in view of the fact that the Working Group had for the previous nine years been unable to reach consensus over the original draft optional protocol proposed by Costa Rica, the moment had come to study new proposals. The Costa Rican delegation therefore welcomed the new ideas presented by Mexico and Sweden." UN.Doc. E/CN.4/2001/67, 13 March 2001, paragraph 17.

41 Report by chairman-rapporteur Elizabeth Odio-Benito (Costa Rica), 20 February 2002, UN.Doc. E/CN.4/2002/78

42 Resolution of the UN Commission on Human Rights of 2001, 23 April 2000, UN.Doc. E/CN.4/RES/2001/44.

their opinion and unnecessarily prolong the debate."⁴³ In the midst of this climate of tension, the chairperson-rapporteur presented for approval, at the end of the Working Group session and subsequently to the Commission on Human Rights, the final report of the Working Group with two annexes. The first was the new Draft Optional Protocol (subtitled the Proposal of the Chairperson Rapporteur). The second contained the original draft proposal and the drafts proposed during the last two years of the discussions.⁴⁴

e) The involvement of NGOs in the negotiation process

Throughout the ten years that the Working Group was constituted, a number of international NGOs were actively engaged in the drafting and negotiation process. The APT in particular, in coordination with several other organisations, attentively participated in each of the sessions of the Working Group, jointly providing technical expertise and lobbying States as necessary.⁴⁵

NGOs continued to closely monitor and contribute to the entire drafting process, attempting to orient the drafting process in accordance with international human rights standards, as well as existing practice of preventing torture through visits to places of detention. In addition to active lobbying with State delegations, this was achieved by putting forward documents on substantive matters, such as an article-by-article analysis of the draft text and a comparative chart on the various draft texts circulating by the ninth session of the Working Group in 2001. These contributions helped to ensure the formulation of solid arguments in favour of the Optional Protocol and decisively warned against the inclusion of negative proposals, which in the end contributed to the cohesive final draft presented by the chairperson-rapporteur by the finalisation of the Working Group.

43 UN.Doc. E/CN.4/2002/78, 2 February 2002, page 26, paragraph 112.

44 The following documents were included in Annex II: 1) the original draft proposed by Costa Rica in 1991; 2) the text of the articles approved by the Working Group during the first reading; 3) the alternative draft Protocol proposed by Mexico with GRULAC's approval in 2001 (comprising 31 Articles); 4) The "Proposal of New and Revised Articles to be Included in the Original Draft Optional Protocol", submitted by Sweden on behalf of the European Union in 2001 (26 Articles); and 5) a new "Alternative Draft Optional Protocol", submitted by the United States, during the last session of the Working Group, in 2002 (15 Articles), which discarded the creation of a new international visiting mechanism altogether and extended the existing competence of the CAT to carry out visits with prior consent by States. This last document was not even discussed by the Working Group.

45 The only point of significant discord amongst the principal NGOs during the ten-year drafting process was with regards to the proposal of including national preventive mechanisms, in addition to the international mechanism, in the draft text. Some were initially concerned about the addition of national preventive mechanisms being used to weaken the Optional Protocol. However all participating NGOs supported the compromise text presented by the chair.

4. The final adoption of the Optional Protocol to the UN Convention against Torture

a) The adoption process within the UN: voting or consensus?

Within the UN system, the adoption of a human rights instrument involves discussion and approval of a draft text by a succession of UN bodies, namely the Commission on Human Rights, Economic and Social Council (ECOSOC), Third Committee of the General Assembly and culminating with the plenary of the UN General Assembly. At each of these stages, an international treaty can be adopted either by consensus or by a majority vote.

Generally speaking, adoption by consensus in international law is taken to mean unanimous support for a text that is usually the end-result of a complex international negotiation process. For States favouring effective strong instruments, the process of reaching consensus can often imply the risk of seeing the most innovative aspects of a treaty diluted to the minimum common denominator in trade-offs in the negotiations process. For those States more opposed to the instrument, consensus has the advantage of guaranteeing their views are incorporated into the final text, while avoiding being put on the spot for voting against a human rights instrument.

Although consensus often hides serious disagreements amongst States,⁴⁶ it does have the critical virtue of demonstrating that the international community is formally committed to human rights. For this reason, the general practice of the UN has been to seek consensus for the adoption of international human rights instruments.⁴⁷ Nevertheless, exceptions to this rule include, none other than, the so-called “pillars” of international human rights law: the Universal Declaration of Human Rights of 1948; the International Covenant on Economic, Social and Cultural Rights of 1966; and the International Covenant on Civil and Political Rights of 1966 (as well as the Covenants’ respective Protocols).⁴⁸ More recently, the historic adoption of the Statute of the International Criminal Court, in July 1998, was by majority vote.

⁴⁶ For this reason, many international human rights instruments adopted through consensus admit a generous and large regime of reservations. This allows States who disagree with a certain provision to still accept a consensus for the general text, while not being bound by a particular obligation.

⁴⁷ These include for example: the CEDAW (1979); the UNCAT (1984); the Convention on the Right of the Child (1989); the International Convention on the Protection of Rights of Migrant Workers and Members of their Families (1990); the Optional Protocol to CEDAW (1999) and the Optional Protocols to the Convention on the Rights of the Child (2000). This is not an exhaustive list.

⁴⁸ Reaching consensus on such significant rights and supervisory mechanisms was particularly difficult during the Cold War era, given the bipolar division of international relations.

Notwithstanding these important exceptions, the general expectation, at the beginning of the process, was for the Optional Protocol to the UN Convention against Torture to be adopted by the “unwritten rule of consensus”. But in view of the prevailing differences of opinion within the Working Group, already by 1998 some actors in the process were admitting the possibility of submitting the text to a vote.⁴⁹ Several years later, as the Working Group failed to make progress, this position was in fact backed by some of the leading international NGOs.⁵⁰ Simultaneously, the most reluctant delegations immediately argued that it would be “*regrettable for such an important text to be adopted by a vote*”⁵¹ and advocated prolonging the Working Group until consensus was reached.⁵² However, by the time the chair-rapporteur of the Working Group had presented her final draft text in 2002, it became clear that if consensus had not been reached by that point, it was unreasonable to expect it in the near future.⁵³ They further reasoned that prolonging the Working Group would not only be counterproductive, but would actually mean the end of the Protocol as such.

b) The steps leading towards the final adoption of the Optional Protocol

In order for the Optional Protocol to be adopted and opened for signature and ratification by States, approval for its adoption had first to be obtained from the various UN organs, referred to above, through a series of Resolutions. Therefore, the first hurdle was to ensure the approval of a Resolution at the Commission on Human Rights, calling for the adoption of the Optional Protocol by the UN General Assembly that year.

49 “If only a small minority of countries are known to oppose the adoption of the Protocol, a vote might be considered,” stated then chairperson of the drafting committee Ann Marie Bolin Pennegard. See BOLIN PENNEGARD Anne, “An Optional Protocol based on prevention and cooperation”, in DUNER Bertil (ed.), *An End to Torture: Strategies for its Eradication*, London/New York, Zed Books, 1998, pp.40-60, p.57.

50 “... recent history shows that recourse to a vote actually leads to the adoption of strong human rights instruments supported by a majority of States...” while “...interpreting consensus as an absolute norm tends to lead to the adoption of consensus texts based on imprecise minimum standards that chiefly reflect the opinion of only the most restrictive minority...” Joint letter addressed to the Working Group Chair, Elizabeth Odio Benito, and signed by Kate Gilmore, Acting Secretary General of Amnesty International, Kenneth Roth, Executive Director of Human Rights Watch, and Louise Doswald-Beck, Secretary General of the International Commission of Jurists (ICJ), 27 July 2001 (AI reference number: 80451/004/2001s) (copy in institutional files).

51 UN.Doc. E/CN.4/2002/78, paragraph 73 (p. 19) and 88 (p. 21).

52 UN.Doc.E/CN.4/2002/78, paragraph 61, p. 16.

53 The negative effect that reaching consensus had on the two Protocols to the Convention on the Rights of the Child (1989), when these were adopted by the UN General Assembly on 24 May 2000, also reinforced the arguments of those in favour of adoption of the Optional Protocol to the Convention against Torture by majority vote.

i) The Commission on Human Rights

Following the tenth session of the Working Group in January 2002, Costa Rica subsequently decided not to request a further extension of the Group's mandate but rather to go ahead with the adoption process. Costa Rica thus submitted a resolution to the Commission on Human Rights in March of that same year, calling for the Member States to approve the draft Optional Protocol prepared by the chairperson-rapporteur and, once approved, to continue the adoption process by forwarding the text to the ECOSOC. Costa Rica submitted the resolution fully aware that, given the continued divergence amongst States regarding the procedure and the text itself, adoption was unlikely to be straightforward and that rather than adoption by consensus, a vote was likely to be called. Devising an effective advocacy strategy, with the support of numerous States and NGOs, was therefore absolutely essential in pushing the text through the eventful adoption process.

The first hurdle came on 25 April 2002, when the issue was up for approval by the Commission on Human Rights. At the presentation of the Resolution on the Optional Protocol, the Costa Rican delegation expressed their hope that the Resolution could be approved by consensus. At this point, Cuba submitted an "amendment" to Costa Rica's draft Resolution on the Optional Protocol, requesting instead for the Working Group to be granted a one-year extension, which effectively eliminated its core aims.⁵⁴ When questioned by Costa Rica as to whether this could actually be considered an amendment or was an entirely new proposal,⁵⁵ Cuba backed down on this initiative and instead proposed a "no action motion". This procedural move, which in essence implies that the Commission is not competent to rule on the subject under discussion, had been invoked in the past by States to block Resolutions regarding the human rights situation in a given country (normally under the pretext that a Resolution is politically motivated). Never before had such a motion been invoked with reference to a human rights instrument or thematic issue which was clearly within the competency of the Commission. This necessitated a vote on the "no action motion". After a lengthy debate, the motion was rejected by a small margin of 28 against, 21 in favour and four abstentions.

54 Draft resolution presented by Cuba, UN.Doc. E.CN.4/2002/L.5, eliminating all the operational paragraphs of the resolution, save for one.

55 A suggestion was made by Costa Rica to actually vote on this matter.

Immediately after this vote, on the same day, a further vote was subsequently held on Costa Rica's Resolution calling for the adoption of the draft Optional Protocol to the Convention against Torture⁵⁶ and was approved by the Commission on Human Rights with **29 votes in favour, 10 against and 14 abstentions**.⁵⁷

ii) The Economic and Social Council

In July 2002, the draft Optional Protocol came before the ECOSOC, the next step in the adoption process. Approval at this forum was also not simple, with the text meeting opposition from influential States. In particular, just before the Resolution calling for the adoption of the Optional Protocol was to be voted on by the ECOSOC, the United States submitted an amendment to the Optional Protocol Resolution aimed at reopening discussions on the draft text, which had already been approved by the Commission on Human Rights.⁵⁸ The US proposal was rejected by 29 votes, although 15 States did vote in favour and eight abstained.

Subsequently, on 24 July 2002, the resolution calling for the adoption of the draft Optional Protocol to the Convention against Torture⁵⁹ was adopted by the majority of ECOSOC members: **35 votes in favour, 8 against and 10 abstentions**.⁶⁰

iii) The General Assembly

• *The Third Committee of the General Assembly*

The draft text was then forwarded for consideration to the Third Committee of the General Assembly, a committee specialized in the consideration of social, humanitarian and cultural issues. During the vote on the Optional Protocol at the Third Committee's meeting in November 2002, it was Japan's turn to attempt to stall the adoption process. The delegation did so by submitting a motion asking for the vote to be postponed for 24 hours in order to consider the financial implications of the treaty. After a short debate, the proposal was voted down by 85 votes against; 12 votes in favour and 43 abstentions. Almost

56 Resolution of the Commission on Human Rights of April 22/24, 2002, UN.Doc. Res.2002/33

57 The UN Commission on Human Rights is comprised of 53 Member States.

58 Draft resolution proposed by the United States, UN.Doc. Res.E/2002/L.23

59 ECOSOC Resolution of 24 July 2002, UN.Doc. Res. 2002/27

60 ECOSOC is comprised of 54 Member States.

immediately after this defeat, the United States again intervened, this time by submitting an amendment to the draft Optional Protocol, proposing that the international visiting mechanism be financed exclusively by contributions from State Parties to the Protocol.⁶¹ This amendment was rejected by 98 Member States; only 11 voted in favour, while 37 abstained.⁶²

Only then was the issue itself submitted to a vote and, on 7 November 2002, the resolution calling for the adoption of the draft Optional Protocol to the Convention against Torture⁶³ was approved by the Third Committee of the General Assembly: with **104 votes in favour, 8 against and 37 abstentions**.⁶⁴

- *The Plenary of UN General Assembly*

This vote enabled the Optional Protocol to reach the final stage of the adoption process: the plenary of the UN General Assembly. Since all Member States of the UN participate in both the Third Committee and the plenary session, it was reasonable to expect that having been approved by the first forum, the Resolution would also be approved by the second. But given the precedents, seen during the adoption process, nothing could be taken for granted. It was therefore a monumental occasion when, more than three decades after Jean-Jacques Gautier had first thought of the idea of establishing a universal visiting mechanism, and more than two decades after Costa Rica had initially formally presented the proposal to the UN, resulting in a decade of drafting and negotiating the text, the Optional Protocol was finally due to be adopted by the UN.

On **18 December 2002**, the UN General Assembly adopted the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment by a resounding majority of **127 votes in favour, with only 4 against and 42 abstentions**.⁶⁵

61 See the draft proposed by the United States UN. Doc. A/C.3/57/L.39. The draft text of the Optional Protocol, which at this point had already been approved by the Commission on Human Rights and ECOSOC, foresaw that the international visiting mechanism would be financed by the regular UN budget.

62 During the vote at the General Assembly, the Norwegian delegate could not help but note that “... it is surprising that two of the richest States in the world are so worried about the financial implications about a project that has been in discussion for over ten years and was known all along to have financial implications...”, words of the Norwegian delegate to the Third Commission of the UN General Assembly, 7 November 2002. Cf. press release AG/SHC/604 of that same date.

63 Resolution of the Third Committee of the General Assembly Doc. A/C.3/57/L.30 of 7 November 2002.

64 In 2002, the UN was comprised of 191 Member States.

65 UN.Doc.A/RES/57/199, 18 December 2002

c) Trends in the adoption process

The four successive votes leading to the final adoption of the Optional Protocol demonstrate some clear trends.⁶⁶ The first is a remarkable increase in the show of support for the instrument in a short space of time, moving from the 29 votes in favour at the Commission on Human Rights in April 2002 to 35 votes in favour at the ECOSOC in July that same year, bodies comprised of a total of 53 and 54 States respectively. Within the UN General Assembly, comprised of the 191 Member States of the UN, there was a shift from the 104 votes of the Third Committee in November 2002 to the final and significant 127 votes in favour during the plenary session in December of the same year.

The increased show of support corresponds to a notable erosion in States' opposition to the Optional Protocol and the growing isolation of States attempting to mobilize resistance to the instrument. The mobilization against the Optional Protocol consisted of another trend seen throughout the adoption process: opposing States abusively resorting to procedural moves of different sorts during the voting procedure in attempts to try to block the adoption. These attempts were finally unfruitful with the vote falling from 10 votes against the Optional Protocol during the Commission on Human Rights and the ECOSOC, to 8 during the Third Committee of the General Assembly and finally to only 4 voting against the Optional Protocol during the plenary of the General Assembly (USA, Marshall Islands, Nigeria and Palau). The change of position of certain States was particularly notable including: China, Cuba, Egypt, Israel, Japan, Libya, Saudi Arabia, Syria and Sudan who had previously voted against the Optional Protocol but preferred to abstain during the final vote.

One of the most valuable lessons that can be learnt from the OPCAT adoption process, that will surely be examined for future innovative human rights instruments, is that, once the OPCAT passed the critical phase at the UN Commission of Human Rights, a very self propelling dynamic took place between States and within their regional groups, generating gradually new and firmer alliances, some of them surprising. This guaranteed overwhelming support for the Optional Protocol during the final stages of approval at the General Assembly. In other words, a snowball effect was created, so that despite the intense diplomatic efforts by some of the most powerful States on the planet to derail the process, support for the Optional Protocol continued to increase. But above all, it

⁶⁶ See Appendix 4 on the voting record by country for each of these four Resolutions.

sent a very clear message to international public opinion that *“it is time to pay attention to the majority of the international community, without the subterfuge of a consensus of questionable legitimacy”*.⁶⁷

d) The advocacy strategy during the adoption process

These positive trends and the final marked success of the adoption of the Optional Protocol clearly would not have been possible without an effective advocacy strategy headed by supporting States and committed NGOs. The strategy consisted of neutralizing opposition and gaining the broadest possible support for the text by progressively building solid alliances. This was achieved through intense lobbying efforts carried out both in Geneva and New York, as well as some national capitals and regional forums by both States and NGOs.

This approach had a notable effect. Led principally by some Latin American, European States, and later African States, in collaboration with NGOs, a positive dynamic was generated among States and regional groups as increasingly larger and stronger alliances were constructed. In this way, the growing core group of States managed to effectively block the procedural moves and diplomatic efforts of some quite influential States bent on obstructing the initiative, while simultaneously gaining the sometimes unexpected support of others. Thus, the Optional Protocol slowly but consistently garnered support as it moved through the different UN organs, beginning with the rather divisive vote at the Commission on Human Rights, but concluding with the final overwhelming support for the Optional Protocol.

The result of the advocacy strategy, which impressed outside observers and could be instructive for the adoption process of other international instruments, was due largely to the active, coordinated and persistent involvement of States and NGOs defending the Optional Protocol. The APT joined forces with its historical partners, the ICJ, AI and the OMCT, as well as other organisations committed to combating torture, forming an impressive coalition of 11 of the world's leading international human rights NGOs.⁶⁸ The coalition put its

67 Intervention of the Vice Minister of International Relations, Mrs. Elayne White, in her declaration made at the UN on behalf of the Costa Rican delegation, quoted by ODIO BENITO Elizabeth, op. cit., p. 90.

68 The coalition of international NGOs was comprised of: Amnesty International; the Association for the Prevention of Torture; Human Rights Watch; the International Commission of Jurists; the International Federation of Action by Christians for the Abolition of Torture; the International Federation for Human Rights; the International League for Human Rights; the International Service for Human Rights; the International Rehabilitation Council for Torture Victims; Redress Trust for Torture Survivors and; the World Organisation Against Torture.

full weight behind the draft text of the Optional Protocol in order to secure its immediate adoption by the UN with the broadest possible support. In a sustained advocacy campaign, the NGOs mobilized behind the Optional Protocol as it moved through the different UN organs, activating their global networks and conducting a variety of lobbying activities at all levels.

This coalition of NGOs joined forces with certain key supportive States to promote the adoption of the Optional Protocol at the international, regional and national levels. Within the UN, representatives of the NGO coalition and the supportive States extensively lobbied other State delegations in both Geneva and New York, securing their direct backing, which manifested itself during the negotiations and in actual support during the UN voting process.

At a regional level, the NGO coalition secured the endorsement of the Optional Protocol from various regional human rights bodies, including the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the Organisation for Security and Cooperation in Europe (OSCE). While these bodies are independent of the UN and as such played no direct role in the voting process, their statements were important symbolically to demonstrate a broad show of support for the instrument coming from the various regions.

Nationally, the main supportive States contacted other governments, urging them to support the process, while the NGO coalition kept local partner organisations throughout the world informed of the adoption process so that they in turn could lobby their own governments. Securing support from national capitals was essential since they instruct their delegates at the UN on a States' position on any particular issue.

By working in a collaborative way, States and NGOs were able to build upon the momentum achieved with each successful vote. This strategy enabled the supportive States and NGOs to use their influence and resources in a very targeted way and to use their various strengths to push the Optional Protocol forward. For instance, the Ambassadors and diplomats of some of the supportive States were able to use their official channels to advocate for the adoption instrument. Whereas, the NGOs could when necessary - for instance, to counter manoeuvres from some States to block the process (such as the United States) - call on the press to provide appropriate and necessary coverage of the issue. This all-encompassing and collaborative strategy directly contributed to the final adoption of the Optional Protocol by an overwhelming majority of the UN member States.

CHAPTER III

Commentary on the Optional Protocol to the UN Convention against Torture*

* By Debra Long.

This chapter provides an overview of each article of the Optional Protocol in order to provide a commentary on the meaning and objective of the text and provide guidance on the exact nature of the States Parties' obligations. In some instances, aspects of a specific article that proved to be controversial during the drafting of the Optional Protocol are elaborated in order to examine the relevance and importance of the final adopted text.¹

The Optional Protocol is divided into six substantive parts and a preamble. Part I sets out the main obligations of the States Parties in relation to both the international and national mechanisms. Part II establishes the creation of a new international body, "the Subcommittee" and elaborates upon the procedure for the appointment of its members and general functioning. Part III lays down the mandate of the Subcommittee under the Optional Protocol. Part IV establishes the obligation of States Parties to have in place one or several national preventive mechanisms and sets out the mandate, guarantees and powers these mechanisms must be afforded. Part V enables States Parties to temporarily opt-out of either Part III (concerning the international Subcommittee) or Part IV (concerning national preventive mechanisms) of the Optional Protocol, but not both. Part VI sets out the financial provisions for the functioning of the Subcommittee and establishes a Special Fund to aid States Parties to realise the recommendations made as a result of the visits by the Subcommittee and the education programmes of the national preventive mechanisms. Part VII contains some final provisions relating to the entry into force of the Optional Protocol, its scope of application and the requirements for cooperation with other relevant bodies.

1 The author would like to thank the following persons for their assistance during the drafting of this Chapter: Professor Malcolm Evans, Dean of the Faculty of Law, University of Bristol; Claudia Gerez Czitrom, APT's Americas Programme Officer; Edouard Delaplace, APT's UN & Legal Programme Advisor; Jean Baptiste Niyizurugero, APT's Africa Programme Officer; Matthew Pringle, APT's Europe Programme Officer and Barbara Bernath, APT's former Europe Programme Officer.

1. The Preamble

Preamble

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing these articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all, and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

The Preamble to the Optional Protocol provides an introduction to the treaty, setting out its main objective to establish a way in which torture and other cruel, inhuman or degrading treatment or punishment can be prevented. It cites that States Parties to the UN Convention against Torture have an express obligation to take a variety of measures to prevent torture and other forms of ill-treatment.²

Article 2(1) of the UNCAT relates to efforts that must be taken to prevent acts of torture by States Parties:

“(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”³

Article 16(1) of the UNCAT refers to acts of cruel, inhuman or degrading treatment or punishment. These are acts that do not meet the specific definition of torture set out in Article 1 of the Convention but are equally prohibited and must be prevented:⁴

“(1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”⁵

Consequently, States Parties to the UNCAT are already obligated to undertake a diverse range of preventive measures to comply with these Articles. However, the Preamble to the Optional Protocol notes that despite these existing

2 UNCAT, op.cit.

3 Article 2(1), UNCAT, Op.cit.

4 For further information on the definition of torture see APT, Definition of Torture: Proceedings of an expert seminar, Geneva, APT, 2003.

5 Article 16(1), UNCAT, Op.cit. The references to Articles 10, 11, 12 and 13 of the UNCAT relate to the following obligations:

“Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

obligations, further preventive measures are needed in order to fully realise the objective of these provisions. Therefore the Preamble sets the scene for the Optional Protocol to be used as a tool to assist States Parties to the UNCAT to better implement these prevailing obligations.

The Preamble makes a specific reference to “persons deprived of their liberty”. These persons are vulnerable and particularly at risk of being subjected to torture and cruel, inhuman or degrading treatment or punishment as well as other human rights violations, because their securement and well-being are under the responsibility of the detaining authority. These authorities should guarantee treatment and conditions of detention respecting the dignity and human rights of those deprived of their liberty. Therefore, whilst States should implement a range of preventive measures, the Preamble places the focus of the Optional Protocol upon regular visits to places of detention as a way to strengthen the protection afforded to persons deprived of their liberty.

The Preamble also highlights the need for complementary international and national efforts in order to afford effective and sustained protection for persons deprived of their liberty. This provides the basis and explanation for the approach taken by the Optional Protocol to enable regular visits to be carried out by both an international body as well as national bodies.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”

“Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”

“Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

“Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

General principles

Part I of the Optional Protocol contains four Articles that set out the key objectives of the Optional Protocol and how they are to be achieved (i.e. the mechanisms to be established), as well as the general obligations for States Parties under the Optional Protocol.

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 1 sets out the overall objective of the Optional Protocol to prevent torture and other forms of ill-treatment and the means by which it is to be achieved. As noted above, persons deprived of their liberty are at risk of being subjected to torture and other forms of ill-treatment. The approach taken by the Optional Protocol to tackle these abuses through a system of regular visits to places of detention has been influenced by practical experiences of existing bodies that have proven that visits to places of detention by independent bodies, with the competency to make recommendations, is one of the most effective means to prevent torture and improve conditions of detention for persons deprived of their liberty.

The ICRC, CPT and various national bodies have all demonstrated over the years that visiting mechanisms can work constructively with State authorities in a preventive way.⁶ These initiatives have shown that visits to places of detention not only have a deterrent effect, but they also enable experts to examine, at first

⁶ Please see Chapter II of this Manual for an overview of the history of the Optional Protocol. For further information on the ICRC visit their website: www.icrc.org. For information on the CPT please see the CPT's website: www.cpt.coe.int.

hand, the treatment of persons deprived of their liberty and their conditions of detention and to make requisite recommendations for improvements. As many problems stem from inadequate systems within places of detention, these can be improved *through regular monitoring. A system of regular visits to places of detention also provides an opportunity for sustained dialogue with the authorities concerned to work towards the full implementation of improvements.*

Article 1 also sets out the innovative approach of the Optional Protocol to establish a framework for regular visits to places of detention to be carried out by independent international and national bodies. How this will be achieved is elaborated in subsequent articles. This approach is novel as no other international treaty provides for concrete and practical international and national steps to be taken to prevent these violations from occurring within places of detention worldwide. This complementary international and national approach is aimed at providing the greatest possible protection to persons deprived of their liberty.⁷

The introduction into the Optional Protocol of an obligation for States Parties to have in place national preventive bodies was a controversial move at the time of its drafting. The original concept for the Optional Protocol only envisaged the creation of a new international body to conduct visits to places of detention and to make subsequent recommendations for improvements to States Parties. Some States that were supportive of this original idea were concerned that the inclusion of national preventive mechanisms could lead to a weakening of functions and powers of the international body.⁸

Yet, the inclusion of national preventive mechanisms, complementing the work of an international body, overcame a real obstacle in the original concept of regular visits conducted only by an international body, namely the frequency of visits. The international mechanism, due to its potential worldwide scope, will have a more limited number of days per State Party during which visits can be carried out.⁹ The national preventive mechanisms by being permanently situated within the States Parties can conduct more frequent visits and maintain a more regular and sustained dialogue with those charged with the care and custody of persons deprived of their liberty.

⁷ It is not expressly envisaged that the international and national bodies will conduct joint visits.

⁸ See Report of the UN Working Group to Draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/2001/67, §21-31.

⁹ Ibid. at §22, 23 and 28.

Article 2

1. *A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.*
2. *The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.*
3. *Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.*
4. *The Subcommittee on Prevention and the State Parties shall cooperate in the implementation of the present Protocol.*

Article 2 provides for the creation of a new international body, the “Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture” (for the purposes of the manual hereinafter referred to as “the Subcommittee”). This Subcommittee will form the international part of the system of visits to be established by the Optional Protocol.

Article 2(2) provides a general framework of reference for the Subcommittee by referring to the Charter of the United Nations and its purposes and principles. The Charter reflects a desire for cooperation and promoting respect for human rights and fundamental freedoms without discrimination.¹⁰

¹⁰ See Articles 1 and 2 of the Charter of the United Nations.

The Optional Protocol establishes that the Subcommittee is to have recourse to all relevant international norms in the conduct of its activities. This therefore enables the Subcommittee to go beyond the provisions of the UNCAT when considering appropriate means to prevent torture and other forms of ill-treatment. This reference is intended to provide the broadest possible framework for the Subcommittee, so it is guided not only by the UNCAT but other relevant legally binding instruments, as well as those that are only recommendatory in character.¹¹

There are a large number of international guidelines, standards and principles that, notwithstanding their non-binding character, could be of use as a guide for the Subcommittee when considering the effective protection of persons deprived of their liberty within States Parties and making recommendations. These resources could include, but are not restricted to, the following:¹²

- Standard Minimum Rules for the Treatment of Prisoners (1957, as amended in 1977);¹³
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975);¹⁴
- Code of Conduct for Law Enforcement Officials (1979);¹⁵
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture, and Other Cruel and Inhuman, Degrading Treatment or Punishment (1982);¹⁶
- Safeguards guaranteeing protection of the rights of those facing the death penalty (1984);¹⁷
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985);¹⁸
- Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (1985);¹⁹

11 See report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/1993/28, §44-45.

12 Please note that whilst these are non-binding on States they are universally recognised and can be seen to have a persuasive force as internationally acknowledged practice to follow.

13 UN.Doc. ECOSOC res. 663c (XXIV), 31 July 1957, ECOSOC res. 2076 (LXII), 13 May 1977.

14 UN.Doc. GA res.3452 (XXX), 9 December 1975.

15 UN.Doc. GA res. 34/69, 17 December 1979.

16 UN.Doc. GA res. 37/194, 18 December 1982.

17 UN.Doc. ECOSOC 1984/50, 25 May 1984, endorsed by UN.Doc.GA res.39/118, 14 December 1984.

18 UN.Doc. GA res. 40/34, 29 November 1985.

19 UN.Doc. GA res. 40/33, 29 November 1985.

- Basic Principles for the Independence of the Judiciary (1985);²⁰
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988);²¹
- Basic Principles for the Treatment of Prisoners (1990);²²
- Rules for the Protection of Juveniles Deprived of their Liberty (1990);²³
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1990);²⁴
- Basic Principles on the Role of Lawyers (1990);²⁵
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990);²⁶
- Guidelines for the Role of Prosecutors (1990);²⁷
- Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") (1990)²⁸
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991);²⁹
- Declaration on the Protection of All Persons from Enforced Disappearances (1992);³⁰
- Guidelines for Action on Children in the Criminal Justice System (1997);³¹
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("The Istanbul Protocol") (2000);³²

20 Endorsed by UN.Doc. GA res. 40/32, 29 November 1985, UN.Doc.GA res. 40/146, 13 December 1985.

21 UN.Doc. GA res. 43/173, 9 December 1988.

22 UN.Doc. GA res. 45/111, 14 December 1990.

23 UN.Doc. GA res. 45/113, 14 December 1990.

24 UN.Doc. ECOSOC 1989/65, 24 May 1989.

25 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 27 August - 7 September 1990.

26 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 27 August - 7 September 1990.

27 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 27 August - 7 September 1990.

28 UN.Doc. GA res. 45/112, 14 December 1990.

29 UN.Doc. GA res. 46/119, 17 December 1991.

30 UN.Doc. GA res. 47/133, 18 December 1992.

31 UN.Doc. ECOSOC res. 1997/30, 21 July 1997.

32 UN.Doc. GA res. 55/89, 4 December 2000.

Article 2(3) establishes that the Subcommittee shall work on the basis of confidentiality. This means that the outcome of the visits of the Subcommittee will not come into the public domain unless the State Party concerned agrees to its publication or fails to cooperate with the Subcommittee.³³ This is important in order to establish a collaborative framework within which to work with States Parties. The references to “impartiality”, “non-selectivity” and “objectivity” are guiding principles to ensure that the Subcommittee deals with all States on an equal basis and that they will have a balanced approach when dealing with different geographical regions, religious and cultural belief systems and legal systems.

Article 2(4) also highlights the prevailing principle of cooperation. Thus, the purpose is not for the Subcommittee to condemn States but rather to cooperate and to work constructively with them in order to strengthen the protection afforded to people deprived of their liberty. The principle of cooperation is a mutual undertaking; consequently, Article 2(4) expressly calls upon the Subcommittee and States Parties to cooperate with each other in the implementation of the Protocol.³⁴

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 3 introduces the requirement for States Parties to have national preventive mechanisms conducting regular visits to places of detention. This is an innovative aspect of the OPCAT. It is aimed at ensuring the effective and sustained implementation of international standards at the local level. It is also unique because it sets out, for the first time in an international instrument, the criteria and safeguards for the effective functioning of national preventive mechanisms.

³³ See the commentary on Article 16.

³⁴ See Article 16(4), which provides a sanction against States Parties who fail to cooperate fully with the Subcommittee.

The inclusion of this obligation was met with some concern during the negotiations on the OPCAT, as some States feared that it might set a dangerous precedent, since no other international human rights treaty includes an express obligation in respect of national mechanisms that must be in place. There was also a concern about the independence of these national bodies, which might serve as only window-dressing rather than as effective preventive bodies.³⁵

However, the inclusion of national preventive mechanisms in the OPCAT will enable a system of regular visits that will complement in a very practical way the efforts of the international Subcommittee. National preventive mechanisms will be *in situ* to conduct more regular visits than the Subcommittee, thereby providing a permanent domestic system to help protect persons deprived of their liberty.

This Article permits States Parties to take a flexible approach when seeking to comply with their obligation to have in place a system of regular visits at the national level. States Parties can therefore “set up” or create new mechanisms and indeed must do so if an appropriate body or bodies do not already exist. Conversely, where there are existing bodies that match the requirements of the Optional Protocol, these can be designated as the national preventive mechanisms. There is no particular procedure for “designating” national preventive mechanisms and the process can be achieved by States Parties simply providing a list of national preventive mechanisms to the UN when ratifying or acceding to the instrument.

This flexibility enables States Parties to choose the system of national visits that is most appropriate for their particular country context, e.g. taking into consideration their geographical context or political structure. The possibility to have several mechanisms was especially foreseen for federal states, where decentralised bodies can be designated as national preventive mechanisms.

The Optional Protocol does not specify any particular form that the national preventive mechanisms must take, therefore, the States Parties also have some flexibility in this regard. A variety of national mechanisms that are mandated to conduct visits already exist throughout the world, these include: human rights commissions; ombudsmen; parliamentary commissions; lay people schemes; NGOs; as well as composite mechanisms combining elements of some

³⁵ See Report of the UN Working Group to Draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/2001/67, §21-31.

of the above. Any of these could be designated as the national mechanisms under the Optional Protocol if they meet the criteria elaborated in Part IV of the Optional Protocol (see below).

States Parties could also decide to have several national preventive mechanisms based on a thematic rather than a geographical division. If a State already has a well functioning visiting mechanism, for example for psychiatric institutions, it could continue to operate and others could be created or designated for other types of places, although it would be advisable to have one coordinating body at the national level to harmonise the work of each type of national preventive mechanism.

Article 4

- 1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.*
- 2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.*

Article 4 establishes the obligation for States Parties to allow visits to places of detention. The reference to “*shall allow*” ensures that once a State has become a Party to the Optional Protocol it is binding itself to accept regular visits to places of detention by the international and national bodies without any further consent being required. This is a novel approach as no other UN treaty provides a means by which States can decide by ratifying or acceding to an instrument to extend an invitation to enable both international and national mechanisms to conduct visits without any further prior consent.

The issue of visits without prior consent was a controversial aspect of the Optional Protocol during the negotiations in the Working Group. Some States in defence of the concept of national sovereignty were resistant to the idea of an “open invitation” for a body to visit places of detention without prior consent.

Yet, this provision is essential to ensure the overall effectiveness of the visits by both types of mechanisms as a preventive tool. If an invitation or consent were required each time either the Subcommittee or the national preventive mechanisms planned to conduct visits to places of detention, this could weaken the preventive nature of their work as consent could be withheld unnecessarily or at times when the visits would be of the greatest assistance. Furthermore, if each visit had to be negotiated beforehand this would also be a very inefficient use of resources and expertise.

However, in relation to the Subcommittee, the practical experience of similar international mechanisms, such as the ICRC and CPT, has shown that carrying out a visit without prior consent, does not mean that the international mechanism would arrive without any notification, as pursuant to Article 13 of the Optional Protocol (see below) States Parties must be informed of the programme of visits drawn up by the Subcommittee. This will enable logistical and practical arrangements to be made with the relevant authorities of the State Parties. This provision should not be confused with the Subcommittee’s ability to choose where it wants to carry out a visit (see Articles 12 and 14 outlined below).

Article 4 also defines places of detention and deprivation of liberty. As such it sets out the scope of application of the mandates of the international and national mechanisms.

Article 4(1) defines places of detention broadly and the reference to places where persons “*may be deprived of their liberty*” ensures that the mechanisms can visit places that may not be “official” places of detention, but nevertheless where they believe persons are being deprived of their liberty. It could also include those places that are under construction.³⁶

³⁶ See Reports of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN.Doc.E/CN.4/1993/28 §38; UN.Doc. E/CN.4/2000/58 §30.

This was a controversial issue during the Working Group, with some States arguing against extending the scope of application of the visits to places where people may be held, in particular “unofficial” places of detention, on the basis that this could legitimise their existence. Yet, the majority of participants were resolute that the Optional Protocol should extend to “unofficial” places of detention wherein acts of torture and other forms of ill-treatment can be carried out.³⁷

The phrase “*under the jurisdiction and control*” of the State Party necessitates their being some link established between the places of detention and the authorities of the States Parties. However looking at the scope of application of territorial jurisdiction for a State Party to the UNCAT, a place of detention could include for example a ship, aircraft, if registered to the State concerned. It could also include a structure resting on the continental shelf of the relevant State Party.³⁸

The broad definition of Article 4(1) ensures the widest possible protection for persons deprived of their liberty. It was considered inappropriate to set out an exhaustive list of places of detention in order to avoid the Optional Protocol from being too narrow and restrictive in its categorisation of places of detention. The scope of application of Article 4 covers all *de facto* places of detention, including but not limited to: police stations; security force stations; all pre-trial centres; remand prisons; prisons for sentenced persons; centres for juveniles; immigration centres; transit zones at international ports; centres for detained asylum seekers; psychiatric institutions and places of administrative detention.

Under what circumstances States Parties can be considered to have “acquiesced” in the deprivation of liberty remains, for the moment, open and reflects Article 1 of UNCAT, which holds States Parties responsible for acts “*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.*”

Article 4(2) defines deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which that person is not permitted to leave at will by order of any judicial,

37 See Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/2001/67 §43,45.

38 Article 2 UNCAT, see by way of explanation: BURGESS J and DANIELIUS H, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1988, Martinus Nijhoff Publishers. pp. 123-124. See also Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/1993/28 §41.

administrative or other authority. The reference to “*public or private custodial setting*” is designed to ensure that visits can take place to institutions that are not operated by public authorities alone, but nevertheless, where persons are deprived of their liberty.³⁹ It therefore should include privatised places of detention.

Article 4(2) is intended to cover a broad range of instances where people are deprived of their liberty. Yet, the wording of Article 4(2) is *prima facie* ambiguous in relation to persons who are deprived of their liberty *without* any order from a judicial, administrative or any other authority but who are nevertheless not permitted to leave at will.

However, reading Article 4 as a whole it would be incongruous for Article 4(2) to have a more restrictive interpretation than Article 4(1), which makes an express reference to persons deprived of their liberty with the acquiescence of a public authority. In accordance with the Vienna Convention on the Law of Treaties, the ordinary meaning is to be given to the terms of a treaty in their context and in the light of its object and purpose.⁴⁰ If a meaning is ambiguous then recourse can also be made to the preparatory work of the Treaty.⁴¹

During the drafting of the Optional Protocol there was a strong preference for its scope of application to extend to instances where people were *de facto* deprived of their liberty, without any formal order but with the acquiescence of an authority.⁴² Thus, looking at the object and purpose of Article 4 and the Optional Protocol as a whole, the fact that the deprivation of liberty is a result of an order or not is immaterial, what must be established is that the person is deprived of his/her liberty i.e. unable to leave at will.

39 See Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/1993/28 §39.

40 Article 31 of the Vienna Convention on the Law of Treaties, Doc. A/CONF.39/27 (1969).

41 *ibid.* Article 32.

42 See Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN.Doc. E/CN.4/1993/28 §39, E/CN.4/2000/58 §30,78, E/CN.4/2001/67 §45.

The Subcommittee on Prevention

Part II comprises six Articles, which describe in detail the establishment of the Subcommittee, the election of its expert members and its officers i.e. chairperson and deputy chairperson, rapporteurs etc.

Article 5

- 1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty five.*
- 2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration or in the various fields relevant to the treatment of persons deprived of their liberty.*
- 3. In the composition of the Subcommittee on Prevention due consideration shall be given to the equitable geographic distribution and to the representation of different forms of civilisation and legal systems of the States Parties.*
- 4. In this composition consideration shall also be given to the balanced gender representation on the basis of the principles of equality and non-discrimination.*
- 5. No two members of the Subcommittee on Prevention may be nationals of the same State.*
- 6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.*

Article 5(1) sets out the number of members and the expertise they must be able to demonstrate. Initially the Subcommittee will be comprised of ten members. This number will rise to twenty-five after the fiftieth ratification. This increase will be necessary to take into account the growing number of visiting days required of the Subcommittee.

Article 5(2) outlines the necessity for the Subcommittee members to have the required capabilities and professional knowledge to effectively carry out their specific mandate of visiting places of detention to prevent torture and improve conditions.

Articles 5(3) and (4) outline the requirement for the Subcommittee to equally represent different geographical regions, legal systems and to try to ensure a balanced gender representation amongst the Subcommittee experts. This is a common provision found in UN human rights treaties establishing a treaty body and reflects the guiding principles of the UN contained in the UN Charter.

Article 5(5) is an important provision that limits the number of nationals from a State Party to one member only. This will ensure that the Subcommittee is not dominated by any one or more States Parties.

Notwithstanding their appointment by States Parties as members of the Subcommittee, Article 5(6) requires the members to carry out their functions unfettered by any political, religious or other beliefs, therefore providing a further guarantee for the independence and impartiality of the Subcommittee. This provision is common to all UN treaty bodies, whose members serve in their individual capacity.

Article 6

1. *Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.*
2. (a) *The nominees shall have the nationality of a State Party to the present Protocol;*
 (b) *At least one of the two candidates shall have the nationality of the nominating State Party;*
 (c) *No more than two nationals of a State Party shall be nominated;*
 (d) *Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.*
3. *At least five months before the date of the meeting of the State Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties that have nominated them.*

Article 6 elaborates the procedure for the nomination of members for the Subcommittee. The members are nominated by States Parties to the Optional Protocol. This is similar to the procedure for nominating members of UN human rights treaties bodies generally. These procedures are designed to ensure that non-States Parties are not represented and that any single State Party does not dominate the Subcommittee.

Article 7

1. *The members of the Subcommittee on Prevention shall be elected in the following manner:*
 - (a) *Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;*
 - (b) *The initial election shall be held no later than six months after the entry into force of the present Protocol;*
 - (c) *The State Parties shall elect the members of the Subcommittee on Prevention by secret ballot;*
 - (d) *Elections of the members of the Subcommittee shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.*

2. *If during the election process, two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:*
 - (a) *Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;*
 - (b) *Where both nationals have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;*
 - (c) *Where neither national has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.*

For commentary on this article, see the flowchart on pp. 84-85.

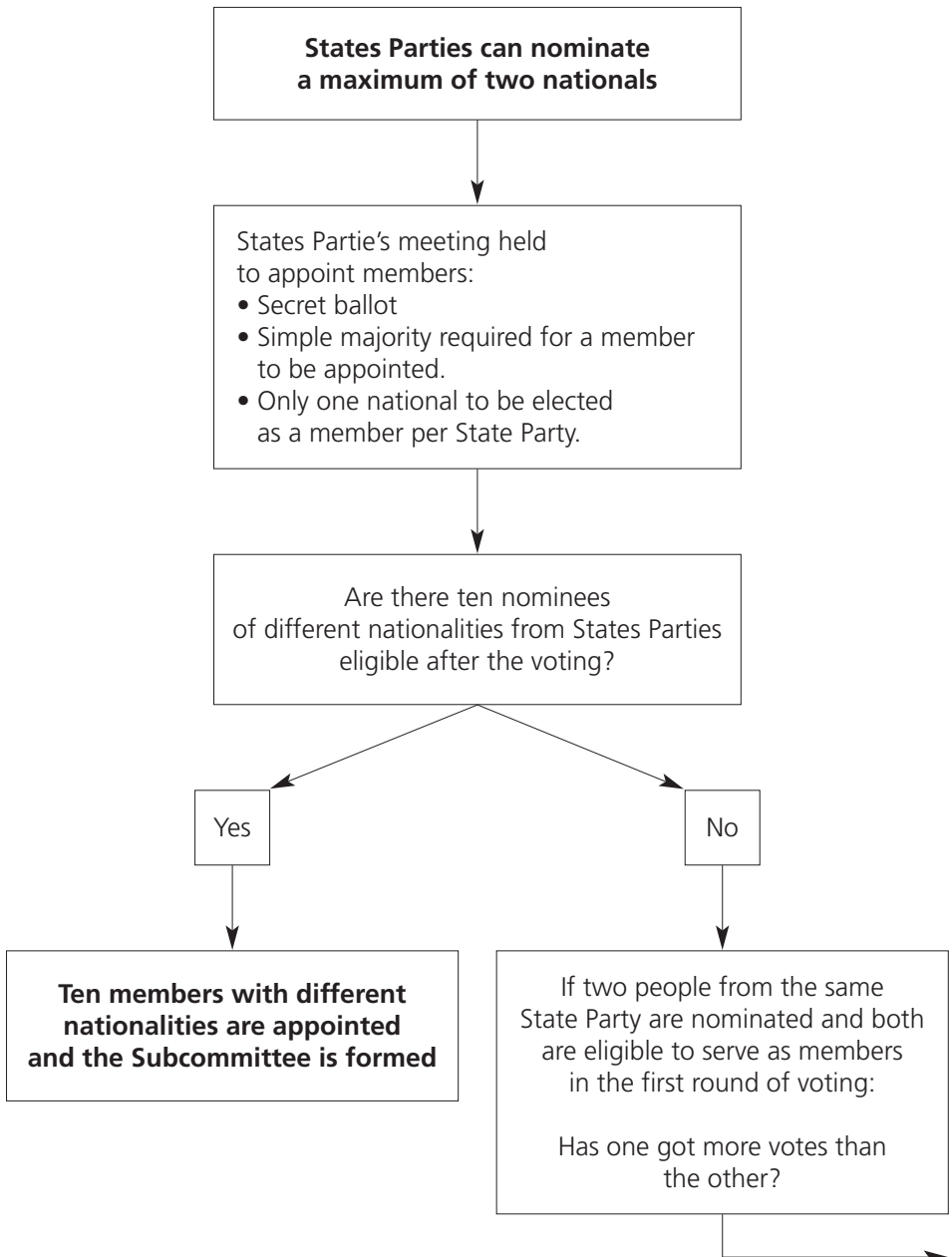
Article 8

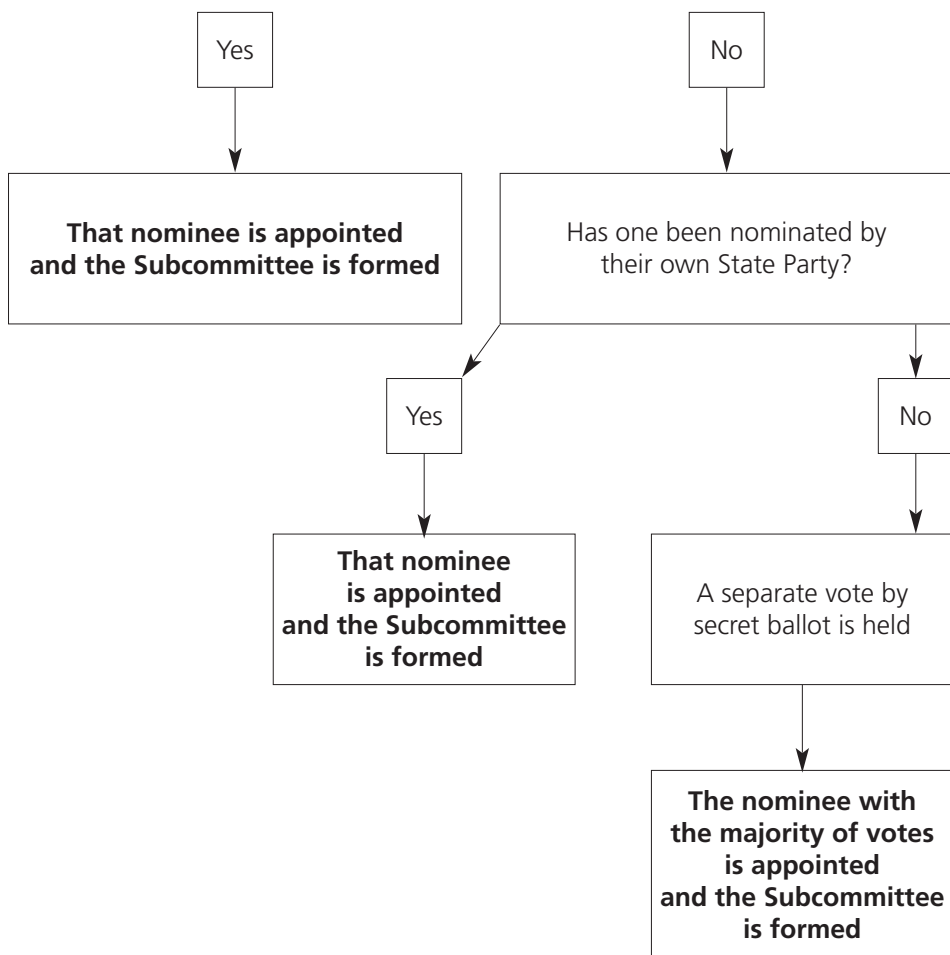
If a member of the Subcommittee on Prevention dies or resigns or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 8 establishes what is to happen should a member of the Subcommittee die or resign, or is otherwise unable to perform his or her duties. In this instance the State Party that initially nominated that expert, will propose another expert to serve until the next States Parties' meeting. The approval of a replacement member by the other States Parties shall be deemed given, unless half or more States object to the appointment within six weeks of being informed of the replacement.

This follows the common procedure for the election of experts to serve on the UN human rights treaty bodies. The reasons for a State Party objecting to a replacement member are not elaborated, but could include the fact that the appointee does not have the requisite competence provided for under Article 5. If a replacement member is rejected, the nominating State Party can propose another candidate following the procedure outline above.

Flowchart of the voting procedure for the appointment of the Sub-Committee members





Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot, by the Chairman of the meeting referred to in article 7 paragraph 1d.

In accordance with Article 9, members of the Subcommittee will be elected for a term of four years and can be re-elected once. However, when the Subcommittee is first created, half of the members will only serve an initial term of two years after which further elections will be held. Those members who will only serve for two years will be drawn by lot by the chairperson of the first State Parties' meeting. However, those members who have only served a two-year term can be re-nominated for a further term of four years.

This is standard practice for the UN treaty bodies and is designed to avoid the situation where the entire membership is due for re-election at the same time.

Article 10

1. *The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.*
2. *The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:*
 - (a) *Half the members plus one shall constitute a quorum;*
 - (b) *Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;*
 - (c) *The Subcommittee on Prevention shall meet in camera.*
3. *The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.*

Article 10 ensures that the Subcommittee members will elect their own officers, i.e. the chairperson, deputy, rapporteurs etc. Article 10 is also a key provision as it provides that the members can establish their own rules and procedures. Article 10 (2) sets out the particular provisions that must be in the rules. However many other aspects are left to the discretion of the members of the first Subcommittee that is formed. The rules of procedures will address various aspects of the Subcommittee's work, including, for example: when and how often it shall meet; the period of notification prior to a visit; the content of its annual report to CAT; what constitutes non-cooperation by a State Party; assistance to be provided to and about the effective functioning of national preventive mechanisms etc.

The members of the Subcommittee can be assisted in this process by considering the rules and procedures of existing visiting bodies, for example the CPT, ICRC as well as the UN treaty bodies and UN Special Rapporteurs of the Commission on Human Rights and Special Representatives of the UN Secretary General.

Article 10(3) ensures that at least one of the annual meetings of the Subcommittee members shall overlap with one of the sessions of the Committee against Torture.⁴³ This overlap should assist the Subcommittee members and the members of the Committee against Torture to have either a formal or informal exchange of dialogue thereby helping the process of cooperation between the two committees.

43 The Current practice is for the Committee against Torture to meet twice a year for three weeks in Geneva.

Mandate of the Subcommittee on Prevention

Part III elaborates upon the mandate of the Subcommittee and the guarantees that will enable it to carry out its mandate effectively. It comprises 6 articles that form part of the cornerstone provisions of the Optional Protocol.

Article 11

The Subcommittee on Prevention shall:

- (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;*
- (b) In regard to the national preventive mechanisms:*
 - i. Advise and assist States Parties, when necessary, in their establishment;*
 - ii. Maintain direct, if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;*
 - iii. Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;*
 - iv. Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;*
- (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working toward the strengthening of the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment.*

Article 11 outlines the mandate of the Subcommittee to conduct visits to places of detention as defined earlier in Article 4 of the Optional Protocol. Visits to places of detention are not an end in themselves; Article 11(a) expressly provides that the Subcommittee shall make recommendations to States Parties concerning strengthening the protection of persons deprived of their liberty.

Article 11(b) is extremely important as it establishes and elaborates upon the interrelationship between the Subcommittee and the national preventive mechanisms. Accordingly, the Subcommittee will have the mandate to advise and assist States Parties to establish national preventive mechanisms. The Subcommittee must also be able to have direct contact, if necessary confidential, with the national preventive mechanisms and to offer training and technical assistance to help strengthen their capacities.

Furthermore, in accordance with Article 11(b)(iii) the Subcommittee can advise and assist the national preventive mechanisms to evaluate the requirements and means to prevent torture and other forms of ill-treatment and to improve conditions of detention. This is a key provision that enables cooperative and complementary efforts between the international and national mechanisms, a unique aspect of the Optional Protocol.

Article 11(c) also requires the Subcommittee to cooperate with the relevant UN mechanisms as well as other international, regional and national institutions or organisations working towards the same goal. This is a “catch-all” provision that seeks to ensure that cooperative efforts are sought at all levels. This is complemented later by specific provisions contained in Articles 31 and 32.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid out in article 11, the State Parties undertake:

- (a) To receive the Subcommittee on Prevention in its territory and grant it access to the places of detention as defined in article 4 of the present Protocol;*
- (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;*

- (c) *To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;*
- (d) *To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.*

Article 12 outlines the obligations States Parties have to guarantee that the Subcommittee can carry out its mandate effectively, without any hindrance.

Pursuant to Article 12(a) States Parties must allow the Subcommittee into their territory and access to all places of detention. It is similar to the terms of reference for other visiting bodies such as the fact-finding missions of the UN Special Rapporteurs of the Commission on Human Rights and UN Special Representatives of the Secretary General,⁴⁴ the CPT⁴⁵ and the IACHR.⁴⁶

Article 12(b) ensures that the Subcommittee has access to all information that is relevant to its mandate, which it requests. This provision is necessary as the Subcommittee can only be effective if it has the appropriate knowledge to assess the need and specific requirements within a State Party to strengthen protection for persons deprived of their liberty.

States Parties also have an obligation to encourage and assist contact between the Subcommittee and the national preventive mechanisms. This contact will enable the process of an exchange of information between these mechanisms and is illustrative of the overall thrust of the Optional Protocol to give equal importance to international and national efforts.

In accordance with Article 12 (d) States Parties also have an express obligation *“to examine the recommendations of the Subcommittee and enter into dialogue with it on possible implementation measures”*. This is an essential provision that seeks to try to ensure that action is taken by the authorities concerned on the recommendations proposed following a visit. A refusal on the part of a State Party to comply with this provision could be considered to be a form of non-cooperation. In this instance the Subcommittee could consider making a request to the Committee against Torture to make a public statement or to publish the Subcommittee’s report, in accordance with Article 16(4) (discussed below).

⁴⁴ UN.Doc. E/CN.4/1998/45.

⁴⁵ Article 8(2), European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, European Treaty Series No. 126.

⁴⁶ Article 55(b), Rules and Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109th special session, December 4-8, 2000.

Article 13

1. *The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.*
2. *After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.*
3. *The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members can be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.*
4. *If the Subcommittee on Prevention considers it appropriate, it can propose a short follow-up visit to a regular visit.*

Article 13 elaborates the way in which the Subcommittee will establish its programme of visits and by whom they will be conducted. The aim of the Subcommittee is not to target States Parties or single one out for special attention, but rather, given the principles of universality, non-selectivity and impartiality set out in Article 3, all States Parties are to be treated equally. Therefore, the initial programme of visits will be decided by the drawing of lots.⁴⁷

Once the programme of visits has been drawn up the Subcommittee, pursuant to Article 13(2), they will notify the States Parties of its programme in order that they can make the necessary practical arrangements. This does not conflict with the general concept under the Optional Protocol of visits without prior consent. Prior notification is required in order for logistical processes to be

⁴⁷ This is the basis upon which the CPT commenced its first round of visits.

completed, such as obtaining visas, hiring translators etc. Once the Subcommittee is established, its members will, in their rules and procedures, decide upon the consultation process and period of notification given prior to a visit.

Article 13(3) establishes the requirements for the composition of the visiting delegation. It states that a visit must be conducted by at least two members of the Subcommittee. Yet, to ensure a multi-disciplinary composition or because of the potential requirement for specific expertise in certain circumstances, this provision allows a roster of additional experts to be created, whom the Subcommittee can draw upon to accompany the visiting delegation. This ensures that all relevant areas of expertise can be catered for in the visiting delegation. Nominees for the roster will be proposed not only by States Parties but also the UN Office for High Commissioner for Human Rights and the UN Centre for International Crime Prevention. No limit is placed on the number of additional experts that can be placed on the roster, although States Parties can only propose a maximum of five national experts.

Article 13(4) enables the Subcommittee to propose to the State Party concerned a short follow-up visit in between the time period for regular visits. Once again, the Subcommittee will need to consider the procedure for proposing a follow-up visit when it is drafting its rules and procedures.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfil its mandate the States Parties to the present Protocol undertake to grant it:

- (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;*
- (b) Unrestricted access to all information referring to the treatment of these persons as well as their conditions of detention;*
- (c) Subject to paragraph 2, unrestricted access to all places of detention and their installations and facilities;*
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the Subcommittee on Prevention believes may supply relevant information;*
- (e) The liberty to choose the places it wants to visit and the persons it wants to interview.*

2. *Objection to a visit to a particular place of detention can only be made on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declaration of a state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.*

Article 14 elaborates upon the rights of access to be afforded to the Subcommittee. All of these rights of access are interlinked and follow established best practice observed by other bodies conducting visits, such as the CPT, ICRC and the Commissioners of IACHR.

Articles 14(a) and (b) ensure that the Subcommittee can obtain the information it will require in order to be able to obtain a realistic picture of the situation within a State Party. It is essential for the Subcommittee to have access to information on the number and location of places of detention in order that they can draw up a programme for their visit. This information combined with data as to the number of people deprived of their liberty will enable them to consider issues such as overcrowding, what the conditions are like for the staff etc., information which they can check when conducting an actual visit.

Article 14(b) also enables the Subcommittee access to a range of information related specifically to the treatment of persons deprived of their liberty and conditions of detention, including for example: medical records, dietary provisions, sanitary arrangements and schedules, suicide watch arrangements etc. In other words information that is naturally essential to enable the Subcommittee to obtain an accurate impression of life within a place of detention.

Article 14(c) ensures that the Subcommittee members are allowed to have access not only to all places of detention but all premises or facilities within these places such as living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters. By visiting all areas within the places of detention, the Subcommittee can obtain a full impression of the conditions of detention and treatment of persons deprived of their liberty. They can visualise the layout of the detention facilities, their physical security arrangements, architecture etc., which all play an important part in the overall daily life of those persons deprived of their liberty and in the working environment of the staff.

Article 14(d) also grants the Subcommittee the power to conduct private interviews with persons of its choice. This will include staff members as well as, of course, persons deprived of their liberty. This is an extremely important provision, which will enable the visiting delegation to obtain a more complete picture of the treatment of persons deprived of their liberty, conditions of detention and working conditions and practices. This will also assist the Subcommittee to make more useful observations and recommendations. This mirrors the practice followed by existing regional bodies such as the CPT⁴⁸ and IACHR.⁴⁹

Article 14(2) provides the only circumstance in which a visit to a particular place of detention may be temporarily postponed. It must be stressed that an objection can only be to that particular place and not the entire visiting programme and it is clear that a State can not declare a state of emergency in order to avoid a visit. This provision aims to provide a safeguard against the Subcommittee being prevented from carrying out its mandate and to be free to choose the places to visit.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organisation for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organisation shall be otherwise prejudiced in any way.

This provision provides an essential safeguard against any sanctions or wrongdoing by an authority or official towards an individual or organisation communicating with the Subcommittee. Fear of being threatened, harassed or in any other way interfered with would deter individuals and organisations from providing key information, opinions or testimony to the Subcommittee.

Prohibiting any sanction against a person submitting false information is necessary to ensure that persons are not deterred in any way from communicating with the Subcommittee and its visiting delegation. The Subcommittee as an independent, professional expert body will consider all the

⁴⁸ Article 8 (3) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Op.cit. note 46.

⁴⁹ Article 55 (a) Rules and Procedure of the Inter-American Commission on Human Rights, Op.cit. note. 46.

information it receives and by conducting effective visits it can gather a full picture of the treatment of persons deprived of their liberty and their conditions of detention, as well as the working conditions for the staff.

This Article is similar to the terms of reference for fact-finding missions by UN Special Rapporteurs of the Commission on Human Rights and Special Representatives of the UN Secretary General. These state that *“no person, officials or private individuals who have been in contact with the special Rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings”*.⁵⁰ This also reflects the current practice of the ICRC, CPT and the IACHR.

Article 16

1. *The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.*
2. *The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.*
3. *The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.*
4. *If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the Subcommittee on Prevention’s recommendations, the Committee against Torture may at the request of the Subcommittee on Prevention decide by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the Subcommittee on Prevention’s report.*

Article 16 reaffirms the confidential working practice to be followed by the Subcommittee and also sets out the circumstances under which the normally confidential report of the Subcommittee can be made public. Article 16(2) also

⁵⁰ UN.Doc. E/CN.4/1998/45.

requires the Subcommittee to present to the Committee against Torture a public annual report on its activities, bearing in mind the principle of confidentiality.

Whilst the visit reports (recommendations and observations) are to be confidential in nature they can be published at the request of the State Party. However, there are also two circumstances in which publication can occur without the express request of the State Party concerned. The first instance is outlined in Article 16(2) which states that if the State Party makes public part of the report, then the Subcommittee can decide to publish the report in its entirety or in part. This is a safeguard against States Parties hiding behind the Subcommittee's principle of confidentiality and providing a false representation of its findings. In this instance the State Party, by publicising part of the report, will be deemed to have waived the requirement of confidentiality for the remainder of the report.

The second instance when the report or the Subcommittee's views can be made public is when a State Party has failed to cooperate with the Subcommittee or visiting delegation. This is to be regarded as the only sanction available in the event that a State Party fails to meet its obligations under the Optional Protocol. It is important to note that the power to authorise the publication of the report or a statement rests not with the Subcommittee, but rather with its parent body, the CAT.

If a State Party fails to cooperate either in respect of its obligations under Articles 12 or 14 (detailed above) or in the implementation of the recommendations of the Subcommittee, then the Subcommittee can inform the Committee against Torture. The Committee against Torture, will then allow the State Party concerned the opportunity to represent its views, after which a majority of the Committee against Torture can decide to authorise the publication of the report or a statement by the Subcommittee.

This is a necessary safeguard, as a State Party, which is no longer willing to comply with its obligations to cooperate, should not be able to benefit from the principle of confidentiality; the sole objective of which is to provide a framework for cooperation thereby ensuring the effective functioning of the Optional Protocol. It is also advantageous for the Subcommittee, in this specific circumstance, to be able to demonstrate that its inability to work effectively is due to the non-cooperation of the State Party concerned and not its own shortcomings.⁵¹

51 For a further explanation of this provision see: PENNEGARD Ann-Marie Bolin, *"An Optional Protocol, Based on Prevention and Cooperation", An end to Torture: Strategies for its Eradication*, ed. Bertil Duner, London, Zed Books, 1998, pp. 48.

National Preventive Mechanisms

Part IV sets out the States Parties' obligations in respect of the national preventive mechanisms. This aspect of the Optional Protocol breaks new ground as for the first time in an international instrument, certain criteria and safeguards are set out for effective national preventive mechanisms conducting visits to places of detention. It is also unique in prescribing a complementary inter-relationship between preventive efforts at the international and national level, which aim to ensure the effective and full implementation of international standards at the local level.

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralised units may be designated as national preventive mechanisms for the purposes of the present Protocol, if they are in conformity with its provisions.

This Article elaborates on Article 3 providing that States Parties must have one or several national preventive mechanisms in place. These must be in place either one year after the Optional Protocol enters into force, for those States that are amongst the first 20 to ratify or accede to it, or once the treaty is in force, within one year of their ratification or accession to the instrument.⁵²

⁵² Subject to any declaration that may be made under Article 24.

The Optional Protocol does not prescribe any particular form that the national preventive mechanisms must take. States Parties therefore have the flexibility to choose the type of national mechanisms that is most appropriate for their particular country context. The reference to decentralised units was especially foreseen for federal states, where decentralised bodies can be designated as national preventive mechanisms if they are in conformity with the provisions of the Optional Protocol.

Article 18

- 1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.*
- 2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanisms have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.*
- 3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.*
- 4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of Human Rights.*

Article 18 lays down the specific guarantees that will ensure the national preventive mechanisms are free from any interference from the State. These provisions are not mutually exclusive; they are inter-linked and must be taken together in order to ensure the independence of these bodies.

In accordance with Article 18(4), the Optional Protocol requires States Parties to give due consideration to the “Principles relating to the status and functioning of national institutions for the protection and promotion of human rights”, otherwise known as “The Paris Principles”.⁵³ The Paris Principles set out criteria for the effective functioning of national human rights institutions and provide an important resource of guiding principles for national preventive mechanisms.

⁵³ UN.Doc. GA Res. 48/134, 1993.

Article 18(1) of the Optional Protocol is the primary provision that guarantees the national preventive mechanisms their functional independence. This is essential to ensuring the effectiveness of these bodies to prevent torture and other forms of ill-treatment.

In practice this means that the national preventive mechanisms must be capable of acting independently and without hindrance from State authorities, in particular the prison and police authorities, government and party politics. It is also essential that the national preventive mechanisms be perceived as independent from the State authorities. This can be achieved by separating the national preventive mechanisms in some way from the executive and judicial administrations, allowing independent personnel to be appointed and ensuring the financial independence of the mechanisms. The members of the national preventive mechanisms should also be able to appoint their own, independent staff.

Furthermore, the founding basis of the national preventive mechanisms should also be appropriately defined so as to ensure that they cannot be dissolved or their mandate modified by the State, for example, upon a change of Government.

Article 18(2) elaborates on the necessity to have appropriate, independent experts as members of the national bodies. The Paris Principles advocate a pluralistic composition for national institutions.⁵⁴ For national preventive mechanisms it would also be appropriate to ensure a multidisciplinary composition so as to include lawyers, doctors including forensic specialists, psychologists, representatives from NGOs, as well as specialists in issues such as human rights, humanitarian law, penitentiary systems, and the police.

Article 18(3) obliges States Parties to provide the necessary resources for the functioning of the national preventive mechanisms. In line with the Paris Principles, financial autonomy is a fundamental criteria, without it the national preventive mechanisms would not be able to exercise their operational autonomy,

54 See Paris Principles, UN Doc. GA Res 48/134, 1993. Principle 2: *"The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."*

55 *ibid.* Principle 3: *"In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."*

nor exercise their independence in decision-making.⁵⁵ Therefore, as a further safeguard to preserving the independence of the national preventive mechanisms, where possible, the source and nature of their funding should be specified in their inaugural instruments. This should also ensure that the national preventive mechanisms will be financially and independently capable of performing their basic functions, as well as enabled to pay their own independent staff.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

- (a) *To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture, cruel, inhuman or degrading treatment or punishment;*
- (b) *To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture, cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;*
- (c) *To submit proposals and observations concerning existing or draft legislation.*

These provisions set out more expressly the mandate of the national preventive mechanisms to conduct regular visits to places of detention and to make recommendations in order to prevent torture and to improve the treatment of persons deprived of their liberty and their conditions of detention. Article 19(3)(c) also grants the national preventive mechanisms the power to consider existing or draft legislation and to make proposals in this respect, which goes beyond the visiting mandate and allows the mechanisms to be involved in complementary preventive legislative efforts.

What is meant by the reference to “regularly examine” in terms of actual frequency is not elaborated upon. There is therefore, some flexibility for national preventive mechanisms to determine the exact frequency of their visits, taking into account the differing types of places of detention. For example, pre-trial

detention facilities could be visited more frequently than penal establishments because of the more rapid turn over of persons deprived of their liberty and their limited contact with the outside world.

The national preventive mechanisms will also have recourse to consider, alongside the provisions of the UNCAT, other relevant international norms when making recommendations and observations to strengthen the protection of persons deprived of their liberty.⁵⁶

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

- (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;*
- (b) Access to all information referring to the treatment of these persons as well as their conditions of detention;*
- (c) Access to all places of detention and their installations and facilities;*
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the national preventive mechanism believes may supply relevant information;*
- (e) The liberty to choose the places it wants to visit and the persons it wants to interview;*
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.*

These guarantees are fundamental for the effective functioning of the national preventive mechanisms. Taken together, these provisions, when adhered to, will enable the national mechanisms to conduct their visits without hindrance from the state authorities.

⁵⁶ See earlier discussion on Article 2(2) above.

⁵⁷ See Article 14 above.

Article 20 guarantees the national preventive mechanisms similar rights of access as the Subcommittee to places of detention, information and people, thereby ensuring a consistent international and national approach and corresponding obligations for States Parties.⁵⁷ Thus, under Article 20(a) and (b), national preventive mechanisms are allowed access to specific categories of information that will, when combined with regular visits, assist them to get a full picture of the types of places of detention that exist, the situation as regards to conditions of detention, whether there is any overcrowding, what are the working conditions like for the staff, etc.

Article 20(c) ensures that the national preventive mechanisms are allowed to have access not only to all places of detention but all premises or facilities within these places such as for example: living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters. By visiting all areas within the places of detention, the national preventive mechanisms can obtain a full impression of the conditions of detention and treatment of persons deprived of their liberty. They can visualise the layout of the detention facilities, their physical security arrangements, architecture etc. which all play an important part in the overall daily life of those persons deprived of their liberty.

Article 20(d) also grants the national preventive mechanisms the power to conduct private interviews with persons of its choice. This is an extremely important provision, which will enable the visiting delegation to obtain a more complete picture of the treatment of persons deprived of their liberty, their conditions of detention and the working conditions and practices of the establishment.

This provision also enables the mechanisms to decide which places of detention they will visit and the persons they will interview. This is a further safeguard to ensure that the national preventive mechanisms act independently and are allowed to obtain a realistic picture of the treatment of persons deprived of their liberty.

It also contains a provision allowing the national preventive mechanisms to have contact with the Subcommittee.⁵⁸ This is designed to enable the international and national mechanisms to exchange information and ways in which to more effectively strengthen the protection of persons deprived of their liberty.

⁵⁸ Mirroring a corresponding provision for the Subcommittee contained in Article 11(b)(ii).

Article 21

1. *No authority or official shall order, apply, permit or tolerate any sanction against any person or organisation for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organisation shall be otherwise prejudiced in any way.*
2. *Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.*

This provision provides a necessary safeguard against the conduct of any wrongdoing by national and official authorities and mirrors Article 15, (see above) which provides the same safeguard against threats and harassment in respect of the Subcommittee.

Article 21(2) is a further safeguard to ensure respect for the right of privacy of individuals. Therefore, in accordance with this Article any confidential information collected by the national preventive mechanisms, such as medical information, must be treated as privileged and no personal data can be published by the State Parties or national preventive mechanisms without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

This provision greatly strengthens the position of national preventive mechanisms by obliging States Parties to cooperate with them in order to improve the treatment of persons deprived of their liberty and conditions of detention. It mirrors Article 12(d), in relation to the recommendations of the Subcommittee and is a further example of the Optional Protocol's aim to give equal importance to international and national efforts.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

Whilst the national preventive mechanisms are, of course, at liberty to publish their annual reports themselves, this Article provides a guarantee that they will be published and distributed. This not only enables the national preventive mechanisms to have transparent working practices but the dissemination of the reports should help to improve the long-term domestic impact of the work of these bodies. The Optional Protocol does not prescribe what will be in the annual report. As there is no specific requirement for confidentiality, the annual report could include the visit reports and recommendations of the national preventive mechanisms.

PART V

Declaration

Part V contains one Article that seeks to provide States Parties with some leeway in fully complying with their obligations under the Optional Protocol at the time of ratification or accession.

Article 24

- 1. Upon ratification, States Parties can make a declaration postponing the implementation of their obligations either under part III or under part IV of the present Protocol.*
- 2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two year period.*

In accordance with Article 24, upon ratification States Parties may make a declaration to postpone temporarily (for an initial period of three years, with the possibility of a further two-year extension), part of the implementation of their obligations either in relation to the international mechanism (Part III) or the national preventive mechanisms (Part IV), but not both.

The idea behind this Article is to afford States an opportunity to take advantage of the assistance provided by regular visits, but who, nevertheless, are not in the position at the time of ratification to accept visits by both types of mechanisms. This is important as it allows a breathing space for States to enable visits either by the Subcommittee or national preventive mechanisms. This article would seem most appropriate for those States who may have to create new national preventive mechanisms or make substantial modifications to existing national mechanisms to comply fully with their obligations under the Optional Protocol in Part IV.

If States do exercise this option, then it would still be necessary for the international and national bodies to have contact, more particularly in order that the Subcommittee can provide the necessary advice as to the establishment and effective functioning of the national preventive mechanisms. Contact between the Subcommittee and national preventive mechanisms will be achieved by virtue of Articles 11(b)(ii) and 20(f), both of which expressly allow contact between these mechanisms. By maintaining contact, the States Parties can prepare effectively for the full implementation of the Optional Protocol at the end of the opt-out period.

PART VI

Financial provisions

Part VI contains two Articles that describe how the Subcommittee will receive funding for its activities carried out in accordance with the Optional Protocol and also provides a source of funding to assist States Parties to implement improvements.

Article 25

1. *The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.*
2. *The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under the present Protocol.*

Article 25 ensures that the Subcommittee will be funded from the regular budget of the UN, as opposed to funding from contributions made only by States Parties. The regular budget is made up of contributions from all UN Member States. The amount required from each Member State is assessed on the principle of capacity to pay, therefore the wealthiest States make the largest contributions. Funding the Subcommittee, which will be a treaty body, through the regular budget is consistent with current UN practice for all treaty bodies.

The inclusion of this provision was strongly opposed by a handful of States during the negotiations on the Optional Protocol and its adoption process at the UN.⁵⁹ These States argued that it was only fair that States Parties to the Optional Protocol should fund the Subcommittee's activities. They also stated that

⁵⁹ See Report of the UN Working Group to Draft an Optional Protocol to the Convention against Torture, UN.Doc. E/CN.4/2002/78 §32-36. APT press release, 2 November 2002 "USA Putting a Price on the Prevention of Torture", <http://www.apr.ch/un/opcat/usa.htm>.

funding the Subcommittee could take funds away from bodies that were already established and they doubted the real impact the Optional Protocol would have on the prevention of torture.

Yet, the provision of funds for the Subcommittee from the regular budget is extremely important, as previous experience within the UN had shown that State Party funding was inadequate to enable treaty bodies to function effectively and had led to inconsistent approaches amongst them.⁶⁰ It was for this reason that all UN Member States had adopted a General Assembly Resolution in 1992, to guarantee that all treaty bodies received funding from the regular budget.⁶¹

Funding from the regular budget is especially important for the Optional Protocol as States Parties already have some costs to bear by having to have in place one or several national preventive mechanisms. In particular, Article 25 will assist less developed States, who might be willing to ratify the Optional Protocol, but who would be unable to do so if they were obliged to make a substantial contribution to its running costs if funding were to be restricted to State Parties only.

Article 26

1. *A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention to a State Party after a visit to a State Party, as well as education programmes of the national preventive mechanisms.*
2. *This Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organisations and other private or public entities.*

⁶⁰ For example the CAT and the Committee on the Elimination of All Forms of Racial Discrimination were originally funded by States Parties only but this had led to insufficient resources being available to these bodies.

⁶¹ UN.Doc. UN GA. Res.47/111, 1992.

Article 26 provides for a special fund to be set up to help finance the implementation of the recommendations made by the Subcommittee. This should provide some practical assistance to States Parties to fully implement the provisions of the Optional Protocol. In relation to the national preventive mechanisms, the fund is restricted to financing their education programmes.

Contributions to the fund are to be made on a voluntary basis and the category of donors is not restricted to UN Member States, but includes a wide range of organisations, agencies and companies. This should assist the process of obtaining the necessary funds to adequately respond to requests for financial assistance.

Final provisions

Part VII contains important final provisions regarding the following: the entry into force of the Optional Protocol; the process to be followed by States who wish to withdraw from or amend the instrument; a statement that no reservations will be permitted and provisions concerning the need for cooperation with other relevant bodies. It comprises 11 Articles in total.

Article 27

1. *The present Protocol is open for signature by any State that has signed the Convention.*
2. *The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.*
3. *The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.*
4. *Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.*
5. *The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.*

Article 27 establishes that only States that have signed, ratified or acceded to the UN Convention against Torture can, respectively, sign, ratify or accede to the Optional Protocol. This is essential as the aim of the Optional Protocol is to assist States Parties to the UN Convention against Torture to better implement their existing obligations to prevent torture and other forms of ill-treatment under that treaty.

Signing the Optional Protocol does not bind a State to the obligations of the Optional Protocol. Binding obligations occur only with ratification or accession. Signing the Optional Protocol is, however, a means for a State to express a willingness to consider starting the process to become formally bound by the provisions of the Optional Protocol. Furthermore, in accordance with Article 18 of the Vienna Convention on the Law of Treaties, signing the Optional Protocol, as for all treaties, creates an obligation upon the signatory State to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.⁶²

Therefore, States will be expressly bound by the obligations of the Optional Protocol when they ratify or accede to the instrument. Whilst the process for ratification and accession differs, there is no difference between the results as each process binds States equally.

Ratification is the more common process whereby a State expressly seeks approval at the domestic level to be bound by the provisions of an international treaty.⁶³ The legal process required for ratification will vary in each State⁶⁴ (please see Annex for an outline of the process of ratification in all current States Parties to the UN Convention against Torture). When approval has been received at the domestic level for ratification of the Optional Protocol, an instrument of ratification will be lodged with the Secretary General of the UN.

Accession on the other hand is the process by which a State that is not a signatory to a treaty, which is already signed by other States, nevertheless agrees, without first signing that treaty, to be bound by its provisions. It is a process that is used much less than ratification and must be expressly provided for by the respective treaty. It does, however, have the same legal effect as ratification.

62 Article 18, Vienna Convention on the Law of Treaties, Op.cit. note 40. For further information please see the UN Treaty Collection, UN Treaty Reference Guide at <http://untreaty.un.org>.

63 Article 2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties, Op.cit. note 40.

64 See annex 6 an outline of the process of ratification in all current States Parties to the UN Convention against Torture.

Whilst, accession usually occurs after a treaty has entered into force, the Optional Protocol to the UN Convention against Torture does expressly allow accessions prior to its entry into force.⁶⁵

Article 28

1. *The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession.*
2. *For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.*

This Article sets out the procedure for the entry into force of the Optional Protocol for States Parties. The Optional Protocol will enter into force i.e. its provisions will be legally and expressly binding on all States Parties, thirty days after the twentieth instrument of ratification or accession has been deposited with the UN Secretary-General. The entry into force of the Optional Protocol will also trigger the processes for the creation of the Subcommittee, i.e. the initial States Parties meeting for the election of the members to be held within six months of its entry into force.⁶⁶ Time will also start to run for current States Parties to have in place, within one year, one or several national preventive mechanisms.

For each State that ratifies or accedes to the Optional Protocol after it has entered into force, they will become legally bound by its provisions after 30 days following the deposit of their instrument of ratification or accession.

⁶⁵ Ibid. Article 2 (1) (b) and 15.

⁶⁶ Article 7 (1)(b) of the Optional Protocol to the UN Convention against Torture.

Article 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

This provision ensures that federal States Parties apply their obligations equally within all of their national states. This provision is consistent with Article 29 of the Vienna Convention on the Law of Treaties which provides that “*unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.*”⁶⁷ Thus a federal structure cannot be used by States Parties as an excuse for failing to implement their obligations fully under the Protocol. This therefore ensures consistency and equality in the implementation of its provisions at the domestic level.

Article 30

No reservations shall be made to the present Protocol.

Article 30 precludes any reservations to the Optional Protocol. This provision is particularly significant as, ordinarily, reservations may be made to international instruments so long as they are not incompatible with the object and purpose of the treaty. Notwithstanding this fact, a treaty can expressly prohibit reservations if it is deemed expedient to do so.⁶⁸

During the negotiations for the OPCAT some States argued that it should be possible for a State to issue reservations, in line with some other optional protocols such as the two optional protocols to the UN Convention on the Rights of the Child. Yet, the majority of States noted that recent practice in the field of human rights, such as the Rome Statute of the International Court of Criminal Justice 1998 and the 1999 Protocol to the 1979 CEDAW did not allowed for any reservations.

67 Article 29, Vienna Convention on the Law of Treaties, Op.cit. note 40.

68 See for example: Article 120, Rome Statute of the International Criminal Court, 37 I.L.M. 998; Article 17 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, GA Res. A/RES/54/4; Article 9 of the Supplementary Convention on the Abolition of Slavery the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S.3.

In this instance, it was considered necessary to exclude the possibility for any reservations to the Optional Protocol not only because it does not create any new substantive norms but rather creates the mechanisms by which to implement existing norms, under the UNCAT. Therefore, it was regarded that any reservation would as a matter of course, involve a curtailment of the scope of application of the Optional Protocol and its preventive mechanisms, thereby interfering with the object and purpose of the treaty.⁶⁹ This would be contrary to Article 19(3) of the Vienna Convention on the Law of Treaties.⁷⁰

Furthermore there is the option, under Article 24, for States Parties to “opt-out” of their obligations in respect of either Part III (the Subcommittee) or Part IV (the national preventive mechanisms) of the Optional Protocol for a maximum of five years. Therefore, it was considered that sufficient allowance had been given to enable States Parties to prepare to implement their obligations fully and in an appropriate manner.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 31 acknowledges that regional bodies that conduct visits to places of detention do already exist. For example the CPT in Europe conducts systematic, regular preventive visits to places of detention, while the IACHR Commissioners have the mandate to conduct visits to States Parties in the Americas. It is important, therefore, to avoid any duplication or to undermine the rights and standards established at the regional level. For that reason an encouragement for the Subcommittee to co-operate with other visiting bodies is built into the Optional Protocol. The regional bodies and the Subcommittee will therefore need to consider various ways in which to cooperate with each other in the conduct of their own mandates.

⁶⁹ Reports of the UN Working Group to Draft an Optional Protocol to UNCAT: UN.Doc. E/CN.4/1993/28 §111-112, UN.Doc. E/CN.4/2000/58 §20-22.

⁷⁰ Article 18, Vienna Convention on the Law of Treaties, Op.cit. note 40.

The CPT has already started the process of assessing how effective cooperation and consultation with the Subcommittee can be achieved. It has considered that one way to achieve this would be the possibility for States Parties to both treaties could give their consent for the visit reports drawn up by the CPT in respect of their countries, and their responses, to be systematically forwarded to the Subcommittee on a confidential basis. In this way, consultations between the Subcommittee and the CPT could be held in the light of all the relevant facts.⁷¹

It would also be advisable for the national preventive mechanisms to consider how to consult with regional bodies, although Article 31 does not expressly cover this. This would be of mutual benefit to the national mechanisms and regional bodies who can each profit from the information gathered and the recommendations made as a result of their visits.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, or the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

This is an important Article, which ensures that the Optional Protocol and its mechanisms do not compete with any obligations that States Parties may have under international humanitarian law in respect to the Geneva Convention and their additional Protocols. These involve the protection of persons during times of armed conflict and also enable the ICRC to conduct visits to places of detention. Article 32 aims to avoid duplicating or undermining the work of the ICRC in States Parties. Once again, how this will be achieved will need to be considered by the ICRC and the mechanisms under the Optional Protocol.

71 13th General Report on the CPT's activities covering the period 1 January 2002 to 31 July 2003. <http://www.cpt.coe.int/en/annual/rep-13.htm>.

Article 33

1. *Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.*
2. *Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Subcommittee on Prevention prior to the date at which the denunciation becomes effective.*
3. *Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.*

Article 33 sets out the common UN language and procedure to be followed when a State Party wishes to withdraw from a treaty. It is important to note that the obligations of a State Party will not automatically cease at the exact moment that it submits its denouncement. Its obligations in respect of the Optional Protocol continue for one more year. Furthermore, a withdrawal cannot be used to prevent the Subcommittee from continuing to look into a matter that is already under way prior to the notice of a denunciation.

Thus, the act of withdrawing from the treaty has the effect of releasing the State Party concerned from acts or situations that occur after the denunciation has actually taken effect but not for any act or situation occurring beforehand. This provides a safeguard to ensure that States Parties do not hide behind this provision to pick and choose when they shall be bound by their obligations.

Article 34

1. *Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States parties for acceptance.*
2. *An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional process.*
3. *When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.*

Article 34 sets out the common UN language for the procedure for amending provisions of a treaty.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

(72) 1 UN Treaty Series No.15, 13 February 1946.

Article 35 ensures the independence of the members of the preventive mechanisms and seeks to afford them appropriate safeguards from any harassment. The Subcommittee members are therefore guaranteed the same privileges and immunities as other UN personnel or representatives as established under section 22 of the UN Convention on the Privileges and Immunities.⁽⁷²⁾ Section 22 provides as follows:

“Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage;*
- (b) In respect of words spoken or written or acts done by them in the course of the performance of their missions, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the person concerned are no longer employed on missions for the United Nations;*
- (c) Inviolability for all papers and documents;*
- (d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;*
- (e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign government on temporary official missions;*
- (f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.*

This however is subject to Article 23 of the UN Convention on Privileges and Immunities, which ensures that the privileges and immunities are not for the personal benefit of the individual trying to rely on them. They can also be waived by the UN Secretary-General if in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN.

The privileges and immunities for the members of national preventive mechanisms are not elaborated. However Article 35 of the Optional Protocol must be read in light of the provisions of the Optional Protocol as a whole, so as to include any immunities or privileges that are necessary to ensure non-interference in the independence and mandate of the national preventive mechanisms e.g. immunity from personal arrest, detention and from seizure of their personal baggage as a result of the exercise of their functions.

Article 36

When visiting a State Party the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

- (a) Respect the laws and regulations of the visited State; and*
- (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.*

This provision ensures that the members of the visiting delegation of the Subcommittee do not exploit their status in order to avoid compliance with ordinary national laws and regulations of the State Party being visited. This Article cannot be used by a State Party to frustrate or in any way prevent the visiting delegation from carrying out its mandate. It is therefore without prejudice to the provisions and purpose of the Optional Protocol as a whole.

Article 37

- 1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.*
- 2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.*

This Article contains the standard language found in all UN treaties that ensures that the Optional Protocol is translated into all of the official languages of the UN and stresses that these translations will not alter in any way the provisions and obligations under the Optional Protocol.

CHAPTER IV

The Mandate and Methodology of the Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture*

* By Debra Long.

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Conclusion

Rather than establish new rights and obligations, the Optional Protocol will create a new system for monitoring States Parties' respect for the existing right to be free from torture and ill-treatment. This system, based on regular visits to places of detention in order to prevent abuse, is novel within the United Nations, for it foresees not only a role for an international body to be created by the UN, but also an express role for national bodies to be created or maintained by State Parties. The dual approach of working both nationally and internationally in a complementary and coordinated fashion promises to be an effective formula to help prevent the practice of torture and ill-treatment in the world.¹

This chapter seeks to bring together in one place, those provisions, examined individually under Chapter III, relating to the form, mandate and function of both the Subcommittee on Prevention and the national preventive mechanisms. Until the Subcommittee is formed and has drafted its rules and procedures much of its methodology remains an open concept. Therefore, it is not the intention of this chapter to seek to second-guess how the Subcommittee will organise its work, but rather to set out those known aspects and functions detailed in the text of the Optional Protocol itself.

In respect of the national preventive mechanisms, this chapter aims to provide a commentary on the establishment and designation of these mechanisms by States Parties. This section outlines what is established in the text of the OPCAT with regards to national preventive mechanisms and goes a step beyond, presenting some recommendations on how they can function effectively. These recommendations are based on the practical experience of bodies currently conducting visits to places of detention in various countries. The inclusion of these bodies in this manual should not be seen as an endorsement for them to be designated as national preventive mechanisms under the OPCAT. Rather, they should serve to illustrate the variety of visiting bodies that already exist throughout the world and the diverse approaches already taken in regard to this issue.²

1 The Author would like to thank Sabrina Oberson, APT's Visits Programme Assistant for her contribution to the drafting of this chapter.

2 These illustrative examples were selected on the basis of a seminar organised by the APT and the Office of the High Commissioner for Human Rights, in Geneva in July 2003.

1. The Subcommittee on Prevention

The Optional Protocol will establish a new UN treaty body, a Subcommittee of the Committee against Torture, mandated to conduct regular and follow up visits to places of detention where people are or may be deprived of their liberty within States Parties to the Optional Protocol. The provisions for the composition, mandate and methodology of the Subcommittee draws heavily, but not exhaustively, upon the experience of the ICRC and the CPT,³ both expert bodies that have demonstrated that visits to persons deprived of their liberty can substantially improve their treatment and conditions of detention.

Notwithstanding some similarities between the establishment of the Subcommittee and the ICRC and CPT, the Subcommittee has many distinct features, in particular its advisory role in relation to the effective functioning of national preventive mechanisms, and will be a novel body within the UN human rights system due to its solely preventive focus.

a) Establishment of the Subcommittee

The entry into force of the Optional Protocol following the 20th ratification will trigger the UN processes for the establishment of the Subcommittee. The UN Secretary General will then send a letter to all States Parties notifying them of its entry into force and inviting them to submit their nominations for the members of the Subcommittee.⁴ The initial election of the experts to form the first Subcommittee must take place within six months of the entry into force of the Optional Protocol.⁵

Initially the Subcommittee will consist of 10 expert members; this will increase to 25 members upon the 50th ratification.⁶ These members will be chosen by States Parties from professionals with experience in various fields relevant to the treatment of persons deprived of their liberty. The members of the

3 Since its first visits in May 1990, the CPT has made over 170 missions to 44 countries in Europe, demonstrating the unquestionable impact of such a system for improving conditions of detention and preventing abuse. Based on the same foundations as the system to be established by the Optional Protocol - repeated unannounced visits to any detention facility, and cooperation and dialogue with States - the accumulated experience of the CPT was useful for drafting the text of the Optional Protocol and can serve as a guide to the new UN system to be put in place.

4 Article 6(3), Optional Protocol to the UN Convention against Torture.

5 Article 7(b). See Chapter III of this Manual for a flow-chart explaining the process of the nomination of the members of the Subcommittee.

6 Article 5(1).

Subcommittee will usually be elected for a term of four years and are eligible for re-election once if re-nominated.

Therefore, this first Subcommittee will have a very important task of determining the way in which the members will carry out their mandate. Some issues that will need to be considered include for example: how many times and when the Subcommittee will meet; the period of notification prior to a visit; the content of the annual report to CAT; and assistance to be provided to national preventive mechanisms.

Once these details have been agreed, the Subcommittee will then establish its programme of regular visits to the States Parties. This will be decided randomly by the drawing of lots.⁷

b) Mandate and methodology of the Subcommittee

The Subcommittee is mandated to carry out regular and follow-up visits to any place of detention where people are or may be deprived of their liberty under the jurisdiction and control of a State Party.⁸ As discussed in Chapter III “places of detention” and “persons deprived of their liberty” are broadly defined within the OPCAT so that the Subcommittee can visit a wide range of places, including: police stations; security force stations; all pre-trial centres; remand prisons; prisons for sentenced persons; centres for juveniles; immigration centres; transit zones at international ports; centres for detained asylum seekers; psychiatric institutions; and places of administrative detention. The definition of places of detention can also extend to privatised places, to those that are under construction, as well as “unofficial” places of detention where it is considered that people may be deprived of their liberty.

The OPCAT establishes that at least two members of the Subcommittee shall form the visiting delegation to a State Party. These members can be accompanied by additional experts taken from a roster of experts compiled by States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention.⁹ This list of additional experts is designed to be a useful resource for the Subcommittee members to draw upon to fill any gaps in the expertise required for a particular visit.¹⁰

⁷ Article 13.

⁸ Article 4.

⁹ Article 13(3).

¹⁰ Article 13(4).

Some logistical arrangements will also need to be made prior to a visit to a State Party (for example, hiring translators, drivers, obtaining visas, booking accommodation, etc.). Therefore, the Subcommittee shall notify the States Parties of its programme in order for these practical arrangements to be made.¹¹ The Subcommittee will, within its rules and procedures, decide upon the period of notification given prior to a visit. A balance will need to be struck between enabling practical arrangements to be made by the State and the necessity to retain an element of surprise to obtain a true picture of the treatment of persons deprived of their liberty and conditions of detention.¹²

Other matters such as the exact duration of the visit, the institutions to be visited, whom to meet and others, will also need to be decided by the Subcommittee. It must be recalled that the Subcommittee is free to choose the places it wants to visit and persons it wishes to interview, without hindrance from the State Parties.¹³ When selecting the places to be visited, the Subcommittee will be able to draw upon a variety of information received from the State Party concerned, the Committee against Torture, national preventive mechanisms, NGOs, and various individuals.

In relation to access to information either prior to or during a visit, the OPCAT ensures that the Subcommittee must be given free access to a variety of relevant information to enable it to plan its visit and to make recommendations based on a full picture of the situation within places of detention.

During a visit, the Subcommittee is guaranteed certain powers namely:

- unrestricted access to all places, installations and facilities;¹⁴
- the opportunity to conduct private interviews with persons of its choice;¹⁵
- the liberty to choose the places it wants to visit.¹⁶

All of these guarantees are fundamental to ensure that the Subcommittee can obtain a comprehensive overview of the treatment of persons deprived of their liberty and conditions of detention.

11 Article 13(2).

12 By way of example in the European region the CPT has established a three-step notification process for periodic visits. The States Parties are notified of the programme of periodic visits. Two weeks prior to a visit the State Party concerned is informed of the date of the visit and its length. A few days before the start of the visit notice is given of the provisional list of places the CPT intends to visit. This list does not prevent the CPT from changing the places during the course of the visit.

13 Article 14(d) and (e), Optional Protocol to UN Convention against Torture, *Op.cit.*

14 Article 14(c).

15 Article 14(d) and (e).

16 Article 14(e).

c) Activities after a visit by the Subcommittee

After a visit, the Subcommittee is mandated to make recommendations and observations to the States Parties concerning the protection of persons deprived of their liberty.¹⁷ States Parties have an express obligation “to examine the recommendations of the Subcommittee and enter into dialogue with it on possible implementation measures”. This is an essential provision that seeks to try and ensure that action is taken by the authorities concerned on the recommendations proposed following a visit.

When considering the recommendations to be made for improving the treatment of persons deprived of their liberty and conditions of detention, the Subcommittee has a broad framework of reference, including not only the Convention against Torture but also other relevant international norms.¹⁸

The visit report (recommendations and observations) of the Subcommittee will be made on a confidential basis to the State Party and, if relevant, to the national preventive mechanisms.¹⁹ The State Party may, however, request the report to be made public. As mentioned previously, the publication of the report can also occur in two other circumstances without the express request of the State Party concerned. Firstly, if a State Party makes public part of the report, then the Subcommittee can decide to publish the report in its entirety or in part. This is a safeguard against States Parties hiding behind the Subcommittee's principle of confidentiality and providing a false representation of its findings.

The second instance is when the Subcommittee considers that a State Party has failed to cooperate. This is to be regarded as the only sanction available in the event that a State Party fails to meet its obligations under the Optional Protocol. The ultimate power to authorise the publication of the report or a statement rests not with the Subcommittee but rather with its parent body, the CAT. This will be discussed in more detail later in this chapter.

Following the drafting of recommendations and observations, whether made public or not, the Subcommittee and the States Parties must enter into a dialogue to consider how to implement them. To assist States Parties to implement the recommendations the Optional Protocol makes provision for a

¹⁷ Article 11(a).

¹⁸ Article 2(2). See Chapter III for some examples of other relevant norms of the United Nations.

¹⁹ Article 16(1).

special voluntary fund to be created.²⁰ This should provide additional practical assistance to States to execute the recommendations of the Subcommittee.

As a further aid to the implementation of recommendations or to respond to a specific situation, the Subcommittee can also propose to a State Party to undertake a short follow-up visit in between the usual timeframe for a periodic visit.

d) Cooperation between the Subcommittee and the national preventive mechanisms

The Subcommittee has an important role to play in fostering cooperation with the national preventive mechanisms. The Subcommittee is expressly enabled to have contact with the national preventive mechanisms and vice versa. Furthermore, States Parties have the obligation to encourage and facilitate these contacts.

Perhaps, most importantly, the Subcommittee also has an advisory role to play in respect of the national preventive mechanisms. It is mandated to provide assistance and advice to States Parties concerning the establishment and effective functioning of the national preventive mechanisms and to offer training and technical assistance directly to these mechanisms.²¹ Thus, the Subcommittee can help the national mechanisms to evaluate the needs and means necessary to improve the protection of persons deprived of their liberty.

These elements form the backbone of the complementary “dual pillar” approach established by the Optional Protocol between efforts at the international and national level.

e) Relationship between the Subcommittee and the Committee against Torture

The Subcommittee also has an important inter-relationship with the Committee against Torture. The information produced by the public examination of the State Party reports to the Committee against Torture will be a useful source of data for the Subcommittee to build a comprehensive understanding of the situation relating to the treatment of persons deprived of their liberty and conditions of detention within a State Party. Furthermore, if the reports of the Subcommittee are made public, either through the express or waived consent of

²⁰ Article 26.

²¹ Article 11(b).

the State Party concerned or as a sanction against non-cooperation, these will also be valuable material for the Committee against Torture in its monitoring process.

The Subcommittee must also submit a public annual report on its activities to the Committee against Torture. The exact content of the annual report will need to be considered by the Subcommittee when establishing its rules and procedures but naturally must be in line with the principle of confidentiality which guides its work.

To foster an exchange of information and close cooperation between the Subcommittee and the Committee against Torture, the Optional Protocol ensures that the Subcommittee must arrange to hold one of its sessions each year simultaneously with a session of the Committee against Torture.

The Committee against Torture also has an express role to play in the implementation of the provisions of the Optional Protocol and has two important functions and powers:

- i) public statements and publication of the Subcommittee's visit reports

In the event that the Subcommittee considers that a State Party is failing to cooperate, then it can communicate its concerns to the CAT.²² The CAT will, on receipt of such a communication, give the State Party concerned the opportunity to make its views known. However, if a majority of the CAT members consider that the State Party has failed to cooperate, then it can authorise the publication of the report or can make a public statement.

This procedure underscores the importance of the principle of cooperation, one of the basic components of the Optional Protocol, and makes it clear that non-cooperative States will not have the possibility to use the principle of confidentiality as a shield for not implementing their obligations under the Protocol.

- ii) extension of the declaration to "opt-out"

As discussed previously in Chapter III, States Parties, when ratifying the Optional Protocol, will have the possibility to make a declaration to postpone

²² Article 16(4).

their obligations in relation to either Part III (the Subcommittee) or Part IV (the national preventive mechanisms) for an initial period of three years.

After this period, States Parties may make a request to the CAT for an additional extension of two years during which part of their obligations will be postponed. Once a request is received, and after consultations with the Subcommittee, the CAT may decide to give its consent to extend this period by another two years. The grounds upon which consent is given for the extension of time will need to be considered by the CAT.

This provision aims to provide some leeway for States who are willing to become a party to the OPCAT but who may have to make some domestic arrangements before implementing the OPCAT fully. By making a declaration they can at least benefit from visits and assistance from either the Subcommittee or national preventive mechanism during this transition period.

If a State Party decides to temporarily postpone its obligations either in respect of the Subcommittee or national preventive mechanisms, this does not hinder contact between these bodies during this “opt-out” period. In fact, it would be important for the Subcommittee and national preventive mechanisms to maintain contact during this period in order to assist with the full implementation of the OPCAT.

f) Cooperation between the Subcommittee and other visiting bodies

The Optional Protocol acknowledges that regional and other bodies that conduct visits to places of detention do already exist for example the CPT, IACHR, and ICRC. Therefore, it is important to avoid any duplication or to undermine rights and standards established by these various bodies.²³ How this will be achieved in practice will be determined once the OPCAT is in force and the Subcommittee has been established. However, the CPT has already been considering ways to achieve such cooperation such as obtaining an agreement from States Parties to both the European Convention for the Prevention of Torture and the OPCAT that the visit reports drawn up by the CPT could be forwarded systematically to the Subcommittee on a confidential basis.²⁴

²³ Articles 31 and 32.

²⁴ 13th General Report on the CPT's Activities, 2003, pp.8, <http://www.cpt.coe.int/en/annual/rep-13.htm>.

2. The National Preventive Mechanisms

Upon ratifying the Optional Protocol, States Parties will be obliged to establish, designate or maintain national preventive mechanisms. Some States will need to create a new body, whilst others who may already have such a mechanism will need to consider whether it fully complies with the obligations under the Optional Protocol.²⁵

a) Timing for the establishment or designation of the national preventive mechanisms

States Parties are obliged to have national preventive mechanisms in place within one year of the entry into force of the Optional Protocol or, once it is in force, one year after ratification of or accession to the Optional Protocol.²⁶

b) The form of the national preventive mechanisms

The Optional Protocol does not prescribe any particular form that the national preventive mechanisms must take. States Parties therefore have the flexibility to choose the type of national mechanisms that is most appropriate for their particular country context, i.e. political structure or geographical structure. A variety of domestic bodies that are mandated to conduct visits are already in existence throughout the world. These include: human rights commissions; ombudsmen; parliamentary commissions; lay people schemes; non-governmental organisations; as well as composite mechanisms combining elements of some of the above. Any of these could be designated as the national preventive mechanisms under the Optional Protocol if they meet the criteria established by the instrument.

It is advisable that when a State Party decides to have several national preventive mechanisms, be they geographic or thematic, that it considers a means to achieve cooperation between them for example by designating one as a co-ordinating body at the national level to harmonise the work of each preventive mechanism.

²⁵ Articles 3 and 17.

²⁶ Unless they make a declaration under Article 24 to opt-out for three years.

c) Mandate of the national preventive mechanisms

The national preventive mechanisms are given the same mandate as the Subcommittee: to conduct regular visits to places of detention and to make recommendations in order to improve the treatment of persons deprived of their liberty and the conditions of detention.²⁷ However, they are also afforded the additional mandate to submit proposals and observations concerning existing or draft legislation, thereby enabling them to play an active role in shaping domestic legal provisions for strengthening the protection of persons deprived of their liberty.²⁸

Examples: **The Uganda Human Rights Commission**²⁹ was established in 1995 under the Constitution of the Republic of Uganda. By virtue of the Constitution it has a broad mandate to promote and protect human rights. One of its powers includes the clear mandate *“to visit jails, prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and make recommendations”* (Article 53 of the Constitution). The Commission also possesses quasi-judicial powers and is empowered to order the release of a detained or restricted person and order payment of compensation.

The Bulgarian Helsinki Committee (BHC)³⁰ is a non-governmental organisation created in 1992. In accordance with the Bulgarian Law on the Execution of Penalties, non-governmental organisations are permitted to visit places of detention.³¹ On the basis of Article 99 of this Law, the BHC negotiates agreements with relevant ministries responsible for the places of detention to enable the BHC to monitor the treatment of persons deprived of their liberty and conditions of detention.³²

27 Articles 1 and 19, Optional Protocol to the UN Convention against Torture, Op.cit.

28 Article 19(c).

29 For further information, please see: <http://www.uhrc.org>.

30 For further information, please see: <http://www.bghelsinki.org>.

31 Article 99, Law on the Execution of Sentences.

32 The BHC has agreements with several ministries in Bulgaria such as the Ministry of Justice, the Ministry of Social Welfare, the Ministry of Education and the Ministry of Health.

Although national preventive mechanisms designated under the OPCAT will focus on the prevention of torture and other forms of ill-treatment, this does not exclude the possibility for the mechanisms to have a broader mandate. Indeed, this would enable them to also take into account other related human rights violations that persons deprived of their liberty may be subjected to, (such as the right to medical assistance, to receive outside visitors, to adequate food, etc.). They can also make use of other means, in addition to visits to places of detention, to prevent torture and ill-treatment, for example, through the submission of cases to the competent authorities.

d) Places to be visited by the national preventive mechanisms

The national preventive mechanisms have the same mandate as the Subcommittee on Prevention to visit any place of detention under the jurisdiction or control of States Parties where people are or may be deprived of their liberty.³³

e) Frequency of visits by the national preventive mechanisms

The frequency of visits will be determined by the national preventive mechanisms themselves. It must be stressed that the regularity of the visits is important for several reasons, namely to monitor improvements or deterioration in conditions of detention and to protect people deprived of their liberty in general and from reprisals in particular. Furthermore, carrying out frequent visits will enable the visiting team to create a constructive dialogue with both the persons detained and the authorities and to assess the working conditions of the staff.

It is also advisable that, in order to determine the exact frequency of their visits, the national mechanisms should take into account the differing types of places of detention. For example, pre-trial detention facilities could be visited more frequently than penal establishments because of the more rapid turn-over of persons deprived of their liberty and their limited contact to the outside world.

Example: **In Argentina, the Office of Government Procurator for the Prison System**³⁴ was created in 1993 through a presidential decree and is especially mandated to protect the human rights of inmates who are part of the federal

33 Article 4, Optional Protocol to the UN Convention against Torture, Op.cit. note 1.

34 For further information, please see: <http://www.jus.gov.ar/Ppn>.

penitentiary system. In order to fulfil its mandate, the Prison Procurator conducts weekly visits (mainly in Buenos Aires where 60 per cent of the national prison population is held) and private interviews with the detainees, and thereby maintaining a constant dialogue with them and the penitentiary authorities.

Whilst the Optional Protocol does not expressly provide for the national preventive mechanisms to have access to any place of detention at any time, in order for these mechanisms to effectively prevent torture, in addition to planned regular visits, the national preventive mechanisms should be able to react to any special event and carry out ad hoc visits.

f) Criteria and guarantees for the effective functioning of national preventive mechanisms

One of the most striking aspects of the Optional Protocol is that for the first time in an international instrument, the criteria and safeguards for the effective functioning of national preventive mechanisms are established.³⁵ Accordingly, the national preventive mechanisms are to be guaranteed the following:

- Functional independence;
- Required capabilities and professional knowledge to carry out their mandate; and
- Necessary resources to function effectively.

These specific guarantees will assist the national preventive mechanisms to be free from any interference from the State.

g) Functional independence of the national preventive mechanisms

The independence of the national preventive mechanisms is essential to ensure the effectiveness of these bodies to prevent torture and other forms of ill-treatment. Yet, the Optional Protocol does not elaborate on how functional independence can be achieved. From the practical experience of existing visiting bodies and with reference to the Paris Principles the following aspects should be taken into consideration by States Parties:

³⁵ Article 18, Optional Protocol to the UN Convention against Torture, Op.cit. note.1.

i) independent basis

The national mechanisms should be separated in some way from the executive and judicial administrations in order to maintain a real and perceived independence. Therefore, their founding basis must be appropriately defined so as to ensure that the national preventive mechanisms cannot be dissolved or their mandate modified by the State, for example upon a change of Government. The legal basis for their mandate could be founded by, for example, the constitution (e.g. the Fiji Human Rights Commission and the Polish Commissioner for Civil Rights Protection)³⁶, an act of parliament (e.g. the National Human Rights Commission of Nepal and the Parliamentary Visiting Commission of the Canton of Geneva) or a presidential decree (e.g. the Senegal Committee for Human Rights and the Office of Government Procurator for the Prison System, Argentina).

Furthermore, it would be recommended that national preventive mechanisms should be able to draft their own rules and procedures and these must not be open to modification by any external authorities.

ii) independent personnel

In order to ensure the independence of national preventive mechanisms as a whole, they should be composed of independent experts who are distinct from the State authorities. These experts should also be at liberty to appoint their own staff.

iii) independent appointment procedure

Practical experience has demonstrated that a good appointment process is one that is transparent and involves effective consultations with relevant civil society groups such as non-governmental organisations, social and professional organisations, universities, and other experts in order to identify appropriate potential candidates to serve on the national preventive mechanisms. Therefore it is advantageous for an appointment procedure to determine:

- The method of appointment;
- The criteria for appointment;
- The duration of the appointment;
- Immunities and privileges;
- The dismissal and appeals procedure.

36 The South African Human Rights Commission, the Ombudsman Office of Colombia and the Uganda Human Rights Commission are also based on a Constitutional act.

Examples: **The South African Human Rights Commission**³⁷ was established in 1995 by virtue of Section 184 of the Constitution of South Africa and has a broad mandate to promote and protect human rights. Commissioners are elected by a majority of the members of the National Assembly and the President confirms the appointments. Commissioners hold office for a fixed term, not exceeding seven years. Although the Human Rights Commission Act does not specify that the appointment process should be made in consultation with civil society, in practice, this process is open and transparent, with public interviews.

The Office of the Commissioner for Civil Rights Protection (Ombudsman)³⁸ in Poland was established in 1987 by the Constitution. The Commissioner is appointed by the Sejm³⁹ upon approval by the Senate for a fixed term of five years. He or She must be a Polish citizen of outstanding legal knowledge, professional experience and enjoying high prestige due to the individual's moral values and social sensitivity. The visiting team consists of at least three or four persons and the Ombudsman has the right to call on specialists such as doctors (forensic doctors, and doctors from the private sector) to take part in the visit of an institution.

iv) financial independence

Financial autonomy is a fundamental criteria, without which the national preventive mechanisms would not be able to exercise their operational autonomy, nor exercise their independence in decision-making. Experience has demonstrated that the following aspects are important to achieve full financial independence:

- The mechanisms should have their own staff and premises;
- The source and nature of funding should be specified in the inaugural instrument of the national preventive mechanisms;
- The mechanisms should have their own budget rather than one subsumed under a government ministry or department;
- The expert member(s) should be enabled to pay their own staff.

37 For further information, please see: <http://www.sahrc.org.za>.

38 For further information, please see: <http://www.brpo.gov.pl>.

39 The Sejm is one of the two chambers constituting the Polish National Assembly. The second one being the Senate.

v) transparency

The public reporting of their work and functioning will assist the independence and perceived independence of the national preventive mechanisms. The Optional Protocol does not bind the national preventive mechanisms to a principle of confidentiality as required for the Subcommittee. This will enable the Subcommittee and relevant civil society groups to be able to have access to information concerning the work of the national preventive mechanisms and to take part in and comment upon the effective functioning and independence of these national preventive mechanisms.

h) Composition of the national preventive mechanisms

In order to ensure effective national preventive mechanisms, it is imperative that they are comprised of appropriately qualified persons with a proven commitment to human rights.⁴⁰

In this instance, because the national mechanisms will be conducting visits to places of detention a pluralistic, multidisciplinary delegation composition is the most appropriate including lawyers, doctors, including forensic specialists, psychologists, representatives from NGOs, as well as specialists in issues such as human rights, humanitarian law, penitentiary systems, and the police.

Example: **The Community Council of Rio de Janeiro, Brazil**, was created in 1992 by the Legislative Act on the execution of sentences. This Council works on a voluntary basis and has, amongst others, the power to conduct unannounced and unimpeded visits to any penal institution. It is composed of a broad variety of people from civil society and public institutions coming from a wide range of backgrounds, including representatives of NGOs, former prisoners, social workers, university personnel and public defenders. Its heterogeneous composition constitutes one of the strengths of this mechanism.

40 *Principle 1, B, Composition and guarantees of independence and pluralism*, Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles), UN Doc A/RES/48/134, 20 December 1993.

i) Guarantees and powers in respect of visits by the national preventive mechanisms

The Optional Protocol guarantees that the national preventive mechanisms are to be allowed similar rights of access to information, places of detentions, their facilities, as well as persons, as the Subcommittee.⁴¹ Thus, the national preventive mechanisms are guaranteed the following:

- Access to information concerning the number of persons deprived of their liberty, as well as the number of places and location;
- Access to all information referring to the treatment of those persons, as well as their conditions of detention;
- Access to all places of detention and their facilities;
- An opportunity to have private interviews with persons of their choice;
- The liberty to choose the places to be visited.

The importance of these provisions at the national level cannot be overstated. These minimum powers can be considered to be internationally recognised best practice for effective visits to places of detention.

j) Follow-up to visits by the national preventive mechanisms

The national preventive mechanisms are mandated not only to conduct visits but also to make recommendations to the appropriate authorities outlining the means to undertake improvements. States Parties are equally obligated to consider the recommendations of the national preventive mechanisms and to enter into a dialogue on possible implementation.⁴²

This aspect is inter-linked with the general objectives of the Optional Protocol to establish cooperation and dialogue between the relevant authorities and the national preventive mechanisms.

To assist this process, it would be good practice for the visiting delegation of the national preventive mechanism to inform the relevant authorities of the result of the visit, as soon as possible. At least an oral meeting with those directly in charge of the detention facilities after the visit should be arranged, and it would also advantageous for more formal written feedback to be provided as soon as possible after the visit. This will enable the mechanisms to make immediate recommendations for improvements and to establish a constructive working dialogue with the authorities.

41 Article 20, Optional Protocol to the UN Convention against Torture, Op.cit.

42 Article 22, Optional Protocol to the UN Convention against Torture, Op.cit.

In order to ensure sustained improvement of the treatment of persons deprived of their liberty and conditions of detention, the national preventive mechanisms must be able to report upon and disseminate their findings. Article 23 ensures that an annual report of the work of national preventive mechanisms is published and disseminated by the States Parties themselves.

This provision does not preclude national preventive mechanisms from publishing and disseminating their annual reports independently of the official State Party report. This provision simply provides a further guarantee that their reports will be made public and that there is transparency in the functioning of the national preventive mechanisms.

Examples: **The Fiji Human Rights Commission**,⁴³ was established by the 1997 Constitution of Fiji and is empowered by virtue of the 1999 Human Rights Commission Act, to investigate human rights violations and unfair discrimination in employment. According to section 42 of the Human Rights Commission Act, within three months after the end of each financial year, the Commission must present to the President of Fiji a report on its activities, which includes visits to places of detention. A copy is also presented to the Houses of Parliament. Following the tabling of the Annual Report in both Houses of Parliament, the Commission must hold a public meeting to discuss the contents of the report and the carrying out of its functions during the year.

The Ombudsman Office of Colombia⁴⁴ was established in 1991 by the Constitution. In addition to publishing its bi-annual report, the Ombudsman has the duty to denounce specific violations through official resolutions.⁴⁵ These resolutions, coupled with the “moral judiciary” which aims to mobilize public opinion through different means, including press releases, seek to compel the authorities to make positive changes in cases where they may not have otherwise implemented the recommendations.

43 For further information please see: <http://www.humanrights.org.fj>.

44 For further information please see: <http://www.defensoria.org.co>.

45 One of its resolutions was devoted to the analysis of the prison crisis in the country.

Other follow-up activities that national preventive mechanisms could consider undertaking include promotion and training activities such as organising seminars for relevant personnel concerned with or in charge of persons deprived of their liberty, as well as public awareness raising activities. The Special Fund, discussed above, that will be established once the Optional Protocol has entered into force can be used to fund the education programmes of the national preventive mechanisms.⁴⁶

k) Cooperation between the national preventive mechanisms and the Subcommittee

As discussed earlier in relation to the Subcommittee, the OPCAT enables the national and the international bodies to have substantial exchanges on methods and strategies to prevent torture and other forms of ill-treatment. Therefore, the Subcommittee and the national preventive mechanisms can meet and exchange information, if necessary on a confidential basis. The national preventive mechanisms can forward their reports and any other relevant information to the international Subcommittee.

It is envisaged that this new approach of aligning national efforts to prevent torture in cooperation with an international mechanism will assist the implementation of international standards at the local level. This approach will also provide a means to increase public awareness, as well as a national debate on the treatment of persons deprived of their liberty and the conditions of detention.

l) Cooperation between the national preventive mechanisms and other bodies

The way in which the Subcommittee and the national preventive mechanisms will work in a complementary and cooperative way has already been outlined above, however, it would also be productive for the national preventive mechanisms to establish a constructive relationship with other existing bodies such as the CAT, CPT, and ICRC. The information gathered by the national preventive mechanisms could be a useful resource for these bodies when reviewing the protection of persons deprived of their liberty within the same States. The national preventive mechanisms would be advised to work cooperatively with other national bodies monitoring places of detention, in order to enhance their complementary efforts to prevent violations to people deprived of liberty.

46 Article 26, Optional Protocol to the UN Convention against Torture, Op.cit. note 1.

Collaboration with civil society groups would also be advantageous for national preventive mechanisms, as they constitute an independent and valuable source of information, and are often highly committed and active in working towards the same goals as the national preventive mechanisms.

Example: **The Austrian Human Rights Advisory Board** was established in 1999 by a legislative amendment to the Security Police Act (1991). The Board has a general mandate to monitor and observe police activity. In order to have a dialogue on its activities and exchange information, the Advisory Board organises a meeting with NGOs twice a year.

Conclusion

The Optional Protocol recognises that for effective protection against torture and other forms of ill-treatment, sustained national as well as international efforts are required. It is envisaged that this new approach of aligning national efforts to prevent torture in cooperation with an international mechanism will assist the implementation of international standards at the local level. This approach will also provide a useful means to increase public awareness, as well as a national debate on the treatment of persons deprived of their liberty and the conditions of detention.

In relation to the two types of mechanisms to be established by the Optional Protocol, whilst much of the methodology of the Subcommittee remains to be elaborated by the members in their rules and procedures, it will be important for States Parties to ensure that they elect appropriately experienced members to the Subcommittee.

In respect of the national preventive mechanisms, States that are considering becoming a party to the Optional Protocol need to consider seriously how they can meet their obligations to have in place one or several national preventive mechanisms. The Optional Protocol deliberately takes a flexible approach to the type of mechanism or mechanisms that can be established and also enables States to designate existing bodies to perform the necessary functions. This provides an interesting opportunity for a renewed debate at the domestic level on the issue of how to effectively strengthen the protection of persons deprived of their liberty.

CHAPTER V

Campaign Strategies for the Ratification and Implementation of the Optional Protocol to the UN Convention against Torture*

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Conclusion

Now that the Optional Protocol has been adopted by the UN General Assembly, it is open for signature, ratification or accession by States Parties to the UN Convention against Torture. The Optional Protocol requires 20 ratifications or accessions before it can enter into force and the foreseen preventive mechanisms begin to operate under its terms.¹ The process to ensure the prompt ratification and the effective implementation of the Optional Protocol represents a new challenge and opportunity for the numerous actors committed to preventing torture and ill-treatment through this novel international instrument.

The two phases of the current campaign for the Optional Protocol - ratification and implementation - (unlike the previous phases of drafting, negotiating and adopting the instrument, which depended on an international negotiation process amongst States), will depend on the political will of each individual State. Although the procedure for the ratification of international instruments varies from State to State,² it tends to involve the signature of the instrument by the executive branch (usually the Head of State, the Ministry of Foreign Affairs or the Ambassador to the UN) and then its ratification by an official act of the legislature.

The implementation phase of an international instrument logically follows the ratification phase, yet in practice many States fail to fully and consistently implement their obligations domestically. While formally the Optional Protocol will not be implemented until it has entered into force, we have decided to include implementation in this chapter because we firmly believe it is essential to already be thinking ahead and making preparations for the international and national mechanisms once they begin to operate in accordance with the treaty. This is especially important for the Optional Protocol to the Convention against Torture given that it not only foresees the establishment of an international organ but also the establishment or designation of national bodies. Since the Optional Protocol leaves considerable flexibility to the States regarding the type of national mechanisms they wish to establish or appoint, the decision should involve the careful consideration of how implementation will take place domestically. It is

1 Some States can accede to instead of ratifying an international treaty. Accession is the process by which a State consents to be bound by the provisions of the treaty without first having to sign it. Accession has the same legal effect as ratification.

2 For a list of procedures for the ratification of international treaties by States Parties to the UN Convention against Torture please see Annex 6.

therefore perhaps more helpful to think of ratification and implementation as simultaneous tracks of complementary actions, rather than chronological stages of the campaign.

For the Optional Protocol to succeed in the long run, the ratification and implementation process must not be limited to a mere bureaucratic formality of communicating a State decision of ratification to the Secretary General of the UN or of announcing the appointment of a national body to prevent torture. The ratification and implementation of an international treaty signifies a solemn commitment by the State, assumed before the international community, to uphold the cause of universal human rights and respect specific obligations contained in the instrument. As such, the process should not involve only government authorities but also the beneficiaries of the instrument, that is to say, the members of society of a particular country. Campaigning activities should therefore not be limited to lobbying governments, but should also serve as an opportunity for promoting debate and raising awareness amongst the population about the grave problem of torture and ill-treatment and the pressing need to prevent it. Human rights organisations in particular, but a plethora of other actors as well, have an important role to play in the process.

This chapter aims to serve as a tool for those actors committed to promoting the ratification and implementation of the Optional Protocol. The global campaign involves interlinked national, regional and international initiatives. While not ignoring the latter, this chapter focuses more on actions accessible to national actors. The reason for this is the degree of specialization involved in many international actions, such as promoting the coordination of existing UN and regional mechanisms combating torture, lobbying UN bodies in charge of allocating the regular UN budget and providing technical assistance on the establishment of the new Subcommittee on Prevention of Torture. These are all issues that the APT is currently pursuing under its ratification and implementation campaign for the OPCAT

After describing some of the principal actors who will ideally take an active role in the campaign, the chapter describes a number of suggested actions to promote ratification and implementation. While many of these actions overlap, for didactical purposes they have been divided into those geared more towards the ratification of the instrument and those focused on its implementation. The chapter by no means pretends to present an exhaustive list of campaign actors and actions, but rather serve as a general guide. We hope that the imagination, resourcefulness and originality of different national contexts worldwide will devise many new initiatives to achieve the common goal of prompt ratification and entry into force of the Optional Protocol.

1. Key actors in the campaign

The global campaign will involve a wide variety of actors working strategically throughout the world. The importance of coordination and exchange of information amongst these actors, particularly at a national level, cannot be overstated. Below we identify some of the key actors due to their potential role for promoting the campaign, as well as their role as decision-makers for the actual ratification or implementation of the instrument.

a) national actors

i) members of the legislature

Given that ratification in most States is the result of an act of the legislative branch, members of parliament or congress have perhaps one of the most decisive roles to play in the ratification process. In addition to voting in favour of ratification, parliamentarians can also help raise awareness about the instrument amongst their colleagues, as well as other public authorities, particularly of the executive branch. Furthermore, once the instrument is ratified, parliamentarians play a key role in the implementation process, for example by making decisions on the appointment and budget allocation of the national preventive mechanism. In addition, in some countries, parliamentary committees have been established to monitor detention conditions and could eventually fulfil the function or participate in the national preventive mechanism. Finally, the legislature plays a vital watch-dog role by monitoring State compliance with the international obligations of a treaty.

For this reason, it is important to identify legislators who are sympathetic to the cause of human rights to actively support the Optional Protocol. Members of parliamentary committees, such as human rights or international affairs committees, are a good starting point since, as a general rule, they are in charge of leading the ratification process and will tend to have the greatest interest and influence on human rights matters. Parliamentarians who are members, in an individual capacity, of international or national NGOs should also be identified and encouraged to take up the issue. Identifying and working closely with a few committed parliamentarians has proven useful in securing the prompt ratification of previous human rights instruments.

ii) the executive

The ratification and implementation of an international human rights instrument of course also rests primarily with the executive. The ministries of foreign affairs, justice and human rights are usually directly responsible for human

rights instruments, such as the Optional Protocol, and can help push the instrument onto the executive's list of priorities. Within these bodies, legal advisors are particularly important figures in the ratification and implementation process. They are usually asked by the legislature to provide technical advice concerning the ratification of an international treaty, particularly to evaluate whether any changes in national legislation or even the constitution will be necessary to adjust the domestic legal arrangement in order to comply fully with the obligations of the treaty. It is therefore imperative for these legal advisors to be fully acquainted with the scope of the Optional Protocol in order to adequately orient and promote the process with sound technical arguments.

Regarding implementation, it is also necessary to identify those departments within the executive, which will play a role in designating or establishing the national preventive mechanisms, as well as those who will, perhaps, eventually directly participate in this role. The executive will, of course, largely be responsible for ensuring the effectiveness of the OPCAT by putting the recommendations of the visiting bodies into practice.

iii) national human rights institutions

A wide variety of national human rights institutions exist and are taking on an increasingly relevant role in different countries. Usually known as ombudsman offices or human rights commissions the traditional function of national institutions is to promote and protect human rights. Many of these institutions specifically have a mandate to promote the ratification of international human rights treaties. As an official state institution, they therefore have the potential to play an influential part in the campaign for the ratification of the OPCAT.

Furthermore, human rights institutions in numerous countries have the mandate to conduct visits to places of detention and in practice some have developed significant experience in this area. In the framework of implementation of the OPCAT, it is likely that some human rights institutions will be appointed as the national preventive mechanism or will form part of such a body with other actors. This may require the national institution to reorientate its work in light of the Optional Protocol. Modifications to the founding instrument of the national institution, such as the Constitution, Presidential Decree or Parliamentary Act etc., are therefore likely to be required and this will necessitate a detailed process of legal review to ensure conformity with the provisions of the OPCAT.

The Optional Protocol makes a specific reference for States to take due consideration of the Paris Principles, a set of guidelines specifically directed at

national human rights institutions. A national institution, if designated as the national preventive mechanism under the Optional Protocol, should comply with these Principles.

Additionally, during the implementation phase, national human rights institutions can actively monitor and participate in putting the recommendations of the visiting bodies into policies and actions to prevent torture and ill-treatment in a given country.

iv) existing national visiting bodies

In some States, national bodies that conduct visits to place of detention will already be in existence and functioning fully. Aside from national human rights institutions, discussed above, these bodies could include for example: parliamentary visiting commissions, independent inspectorates of places of detention, judges' inspectorates, lay people visiting schemes, NGOs etc. These mechanisms will have a crucial role to play in the national debate and consideration of the ratification and implementation of the Optional Protocol, not least because they too could be designated as the national preventive mechanisms. A review of existing mechanisms with the mandate to visit places of detention should be undertaken by each State when considering becoming a party to the Optional Protocol and these visiting bodies should be consulted in this process.

v) national NGOs and other civil society groups

Human rights NGOs working within their own countries will of course play a leading role in the Optional Protocol campaign by influencing both decision-makers and the public about the important need for this innovative tool to prevent the social ill of torture and ill-treatment. Their actions can thus have an important multiplier effect in recruiting other influential actors to the campaign. In addition to general human rights NGOs - who will hopefully make the OPCAT a top priority on their agenda - a wide range of other civil society groups should also participate actively in the campaign. Those working directly with people deprived of their liberty and victims of torture, such as: rehabilitation centres, associations of relatives of detainees, legal aid centres, prison pastoral groups and lay visiting schemes, among others, will have a special role to play, given their direct and practical knowledge of the issue. Since the Optional Protocol is not limited to visits to prisons, but to all types of detention facilities, the instrument should also be of great interest to organisations working with particular populations vulnerable to detention, such as migrants, asylum seekers, refugees, minors, women and people living with disabilities and so on. Universities, professional associations and church groups, to name only a few, can also help promote the debate about the OPCAT.

NGOs and other civil society groups should have a role at all stages of the campaign, and therefore they need to endorse the Optional Protocol and adopt it as an issue under their mandates. They can mobilise public opinion behind the instrument and lobby the government to ratify. They can also promote a debate and provide technical advice about the type of national preventive mechanisms to be appointed under the Protocol and ensure that their establishment is in line with the requirements set out in the text. Furthermore, given that the Optional Protocol does not preclude their direct participation in the mechanisms, the door is also open for the possibility of civil society organisations, with expertise in visiting places of detention, to directly participate in the national body, (although this direct participation will be dependent upon the decision of the State to include them in the national preventive mechanism structure). Once the Optional Protocol is operative, it is imperative for NGOs to continue to take on a watch-dog role, as well as to provide assistance to ensure that the mechanisms are truly effective.

vi) the media

Extensive media coverage about the Optional Protocol is essential for the ratification and implementation campaign to succeed. The media will be an indispensable channel for ensuring that the debate about the need to prevent torture is not confined to certain closed circles, but reaches broad sectors of society. The national, regional and international media should be brought into the campaign from the start, particularly those with the broadest coverage, specialist interest or particular influence. Identifying print, radio and television reporters and editors sympathetic to human rights issues can be a particularly useful strategy. The media should be kept informed of all pertinent activities and newsworthy events related to torture and the OPCAT campaign, through the production and strategic distribution of appropriate and timely media oriented material. For example, a special supplement about the Optional Protocol could be included in the local newspaper on a symbolic date such as 26 June, the International Day in Support of Victims of Torture or 10 December, International Human Rights Day.

b) regional and international actors

i) regional and international NGOs

A number of international human rights NGOs, which were active in the negotiation and adoption phase of the OPCAT, are also already actively promoting the ratification and implementation campaign. Actions thus far have focused on developing a global strategy, producing and disseminating materials about the OPCAT (such as this Manual), mobilising local partners and lobbying

relevant UN bodies, as well as some national governments.³ Those organisations comprising the Coalition of International Non-Governmental Organisations against Torture (CINAT)⁴ have committed to making the Optional Protocol a top priority on their agenda, including a coordinated worldwide action in favour of the OPCAT annually on 26 June.

International organisations should form strategic alliances with regional NGOs, which are well situated to promote the Optional Protocol within their own regional context. The partnership between the APT and the IIHR is an example of such an alliance for the American continent. Furthermore, most international NGOs work with local partners and a number of organisations, such as Amnesty International, the International Commission of Jurists and the World Organisation against Torture - to name only a few - also have national sections or affiliates. A truly global campaign will involve the mobilisation and coordination of all these national, regional and international actors, creating a powerful dynamic promoting the ratification and implementation of the Protocol.

ii) regional and international intergovernmental bodies

Intergovernmental bodies, both regional and international, also have a role to play in the campaign, as they are either comprised of or have official standing before the States that will ratify and implement the OPCAT. At a universal level, UN bodies with human rights mandates, particularly those involved in combating torture, such as the Committee against Torture and the Special Rapporteur, should make their presence felt in the campaign. The same is true of the UN Commission on Crime Prevention and Criminal Justice and other bodies such as the ICRC, and the Inter-Parliamentary Union. As in the case of international NGOs, some of these institutions have regional and/or local branches, which can also be involved in the campaign in all corners of the globe.

The Optional Protocol can also be promoted through the various regional political arrangements such as the Organisation of American States, the African Union and the three main regional bodies in Europe, namely the Council of Europe, the Organisation for Security and Cooperation in Europe and the European Union. In respect of the European Union in particular, organisations promoting the ratification of the Optional Protocol should establish a close working relationship with the country that is acting as the president of the EU at

³ See the APT website for some information on the campaign and useful materials: www.apr.ch

⁴ Amnesty International, the Association for the Prevention of Torture, the International Commission of Jurists, the International Federation of Action by Christians for the Abolition of Torture, the World Organisation against Torture, the International Rehabilitation Council for Torture Victims and Redress.

any given time. These bodies have established human rights mechanisms, such as the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the European Committee for the Prevention of Torture, which can serve as catalysts within a region by backing the OPCAT campaign. When working with intergovernmental bodies, it is wise to target countries that act or will act as *pro tempore* secretariats, as well as attending summits that provide important opportunities for lobbying with States.

2. Suggested actions for the campaign

The actors mentioned above, as well as any others who may take an active interest in the prevention of torture can conduct a multitude of different and associated actions in favour of the Optional Protocol. As explained in the introduction, these can roughly be divided into actions towards the ratification and the implementation of the OPCAT. It is important to stress that these actions can take place simultaneously and, in this sense, it may be more useful to think of them as tracks rather than consecutive phases. Additionally, some initiatives may be considered groundwork for the campaign and may seek both the objective of ratification and implementation at once. It should be stressed again that the actions suggested below are by no means exhaustive and that the applicability of each must of course be evaluated strategically in any given context.

a) The groundwork

i) producing and disseminating materials

Since the implications of the Optional Protocol are still largely unknown to many national and even international actors, the campaign must necessarily start off by making information available. Appropriate campaign materials must therefore be produced. These should be designed keeping in mind the target audience, as well as the particular objective. Materials should obviously be made available in the local language and adjusted to the local context as necessary. For example, a "best practice" manual for Africa should include at least some examples from this continent. Below are some examples, by no means exhaustive, of the types of materials that may be required:

- General introductory information about the Optional Protocol for the general public which could take the form of brochures, posters or flyers;⁵

⁵ For example see APT, *The Optional Protocol to the UN Convention against Torture: Frequently Asked Questions on the Optional Protocol*, APT Publication 2003, www.apr.ch.

- More detailed information, possibly in the form of a manual, about the background, importance and reach of the OPCAT, targeted primarily at key stake-holders in the campaign;
- More technical documents about the legal and methodological implications of the Optional Protocol, particularly the national preventive mechanism for those directly involved in ratification and implementation;⁶
- Press releases and media kits, including photographs, charts and other illustrations, providing news and story ideas in clear and engaging ways in order to help journalists and editors transmit these in turn to the general public;
- Audiovisual and printed “social marketing” materials, such as radio or TV spots, newspaper advertisements and video documentaries, which could be disseminated by the media as public service announcements and used during conferences, round tables, etc.

Given the diversity of actors involved in the campaign, this list can hardly be considered comprehensive. Lectures, round tables, conferences, exhibitions and press conferences will surely also call for specific background and other materials. The creativity and adaptability of the various actors will come into play for designing appropriate materials. It is important to stress that materials need not necessarily be costly, as resourcefulness will also be important for finding economical ways for producing clear and motivating materials.

Regarding the channels for dissemination of information, mention has already been made of the importance of the media. The advantages of making use of telecommunication technology can also not be overstated. Information about the Optional Protocol is already available on the web sites of the international and regional NGOs involved in the campaign and others should be encouraged to use this tool. Electronic mail is also an effective, prompt and inexpensive means for disseminating information to a very wide audience. In addition, the use of telecommunications technology is an effective and essential means for coordinating the global campaign and making the best use of often limited resources of national actors. The exchange of information, ideas and updates about the progress of the campaign in different places around the world can be greatly facilitated through the use of electronic lists, discussion groups, internet sites and electronic mail.

6 For example see APT, *Implementation of the Optional Protocol to the UN Convention against Torture: National Preventive Mechanisms*, APT Publication 2003, www.apr.ch.

It is strategically important to tap into existing dissemination channels of those actors interested in the campaign. In addition to those channels traditionally used by NGOs, regional and national fora and networks can be approached to assist in distribution and dissemination of information about the OPCAT. The Commonwealth, the International Francophone Organisation and regional and sub-regional forums of National Human Rights Institutions provide only a glimpse of the possibilities. In the Americas, for example, a network called Ombudsnet has been established to disseminate relevant information amongst human rights institutions of the region.⁷

ii) Encouraging a national debate

Following directly from the production of materials is the need to encourage a national debate amongst the national actors, outlined above, regarding the Optional Protocol and how it can help governmental and non-governmental efforts to develop and implement policies for preventing torture and improving conditions of detention. The debate should not be limited only to the more technical aspects of the Optional Protocol, but should ideally serve as a platform for a much broader public debate on the problem of torture and ill-treatment generally. Given that the scope of the OPCAT is not purely penitentiary, as is commonly perceived, the issue of other persons deprived of their liberty should also be considered.

Encouraging such a national debate should serve a dual purpose. Firstly, as an exercise in raising awareness and ensuring that such a fundamental human rights instrument does not stay merely in certain closed circles but is relevant to society as a whole. Secondly, the national debate can serve as a consultation process for developing a campaign strategy, which is appropriate to the specificities of each local context and which responds to the needs and concerns of the various actors. A specific programme of action can be devised for the ratification and implementation phases of the campaign based on the concrete national circumstances to emerge from this ongoing process. This is important not only to ensure that all strategies and actions respond to real opportunities but also to promote a sense of ownership and participation by the various actors through all stages of the campaign. For this reason, it is important for the debate to be as broad and inclusive as possible. International and regional NGOs may also be ideally suited to promote a debate about torture prevention and the Protocol, particularly in countries where State authorities might be reluctant to debate the issue publicly with national actors.

⁷ See the Web site of this Network established by the IIHR at: <http://www.iidh.ed.cr/comunidades/Ombudsnet/>

National human rights NGOs first need to become familiar with the instrument, particularly since action on the Optional Protocol during the negotiation and adoption phase was mainly limited to a few international organisations. Then they can act as a motor behind the campaign. Working through national NGO networks and various public fora, seminars, and training modules during courses, etc. can be a beneficial way of spreading the word. As mentioned previously, other civil society actors should also be proactively brought into the process, including universities, trade unions, church groups, women's groups, grass-roots organisations and others. Involving the potential beneficiaries of the Optional Protocol, such as: prisoners, their relatives; migrants; women; minors and others in the debate should be given special attention.

Political society, such as parliamentarians and political parties, should also be encouraged to take an active part given their broad influence. Likewise, public authorities should be brought into the debate to learn about how the Optional Protocol can assist them in their work and to voice their particular perspective. Those with direct involvement with the target population, such as prison authorities, police officials, migration officials, administration of justice personnel should especially be reached. Other governmental actors of particular importance are those with a direct role in the ratification process, such as the ministries of foreign affairs, as well as the implementation process, such as ministries of justice and the interior.

National human rights institutions should also actively participate in the national debate, particularly in view of their mandate to promote the ratification of international instruments, and the fact that many already work on torture prevention and conditions of detention and their potential part in the implementation of the Optional Protocol. Special training on the Optional Protocol could be provided for the staff of these bodies, which could also include the participation of representatives of other governmental institutions. Ideally, as national actors become acquainted with the Protocol, they could themselves act as trainers. In some cases, national human rights institutions are also ideally situated to facilitate relations between public authorities and civil society, encouraging such a national debate.

Once the groundwork of producing adequate materials and engaging in a national debate is under way, simultaneous steps towards the ratification and implementation of the Optional Protocol can also be set in motion.

b) towards the ratification of the Optional Protocol

Actions geared towards the ratification of the Optional Protocol basically seek to directly influence and generate support for the instrument within the various spheres of power. The debate, described above, should have the effect of not only familiarizing, but also in convincing key decision-makers about the merits of the instrument and recruiting their support to ratify the Optional Protocol. Furthermore, the consultation process should have helped to reveal the different perceptions about torture prevention amongst various stakeholders, to identify opportunities for pushing the ratification process and to devise a lobbying strategy accordingly. A diversity of separate but coordinated lobbying actions can take place both directly with national authorities and through regional and international forums.

i) lobbying national authorities

Based on the analysis to emerge from the national debate, in some countries a good deal of lobbying may need to be targeted at the legislative branch. Possible lobbying actions could include working meetings and information sessions, for example, with influential members of certain political parties and members of relevant committees such as human rights, foreign affairs, penitentiary, and migration policy. The executive branch will also need to be targeted for lobbying once those individuals who directly influence the ratification process have been identified. Bilateral meetings with certain actors may be beneficial in order to discuss, confidentially, the plans and implications of the Optional Protocol, while more open sessions could also serve to clarify concerns and generate political momentum amongst various stakeholders.

ii) lobbying through regional fora

Regional fora provide an excellent platform not only for lobbying national authorities represented there, but also for gaining a broader range of political backing for the Optional Protocol. By fora we refer to periodic summits or meetings between States or certain government bodies, such as national human rights institutions, for example, which usually take place at a continental or regional level. During these meetings not only can delegates be approached regarding the ratification by their own countries, but they can also be encouraged to include a positive reference to the Optional Protocol in the final declarations or statements to emerge from these meetings. For this to occur it is necessary first to identify which country will host the event and, if different, which country is in charge of the *pro tempore* secretariat of these particular fora and then to lobby the relevant authorities of these countries concerned in advance in order to support these efforts.

Given the growing importance of regional integration and the fact that nearby States may sometimes exert a positive influence on more reticent neighbours, these opportunities should not be overlooked in the general campaign strategy. Below we list some of these regional fora, although the list is by no means exhaustive:

General regional fora: In the Americas: the Annual Ibero-American Summit of Presidents and Heads of States;⁸ Summit of the Americas; Plenary Session of the Latin-American Parliament; In Europe: EU Summit; meetings of the Council of Europe and the OSCE ; In Africa: the Conference of Heads of States of the African Union; and the Ministerial Conference of the African Union on Human Rights.

Specialized regional fora: In the Americas: Meeting of the Ministers of Justice or Attorney Generals of OAS Members States; Ibero-American Federation Congress;⁹ In Europe: Meeting of European National Human Rights Institutions; Meetings of the Office of Democratic Institutions and Human Rights; In Africa: the Conference of African National Human Rights Institutions; the African NGO forum prior to the African Commission on Human and Peoples' Rights; In Asia and the Pacific: annual meeting of the Asia-Pacific Forum of National Human Rights Institutions.¹⁰

Sub-regional general fora: In the Americas: Rio Group meetings; sessions of the Andean and Central American Parliaments; Summit of Central America; Belize and the Dominican Republic Heads of State; meeting of Mercosur Heads of State; In Africa: Economic Community of West African States; South African Development Community.

Sub-regional specialised fora: In the Americas: meetings of the Central American Council of Human Rights Procuradores; the Andean Council of Ombudsmen; the Caribbean Association of Ombudsmen; as well as regular meetings of Ministers of Justice (of Central America, or from the Southern Cone etc...); In Europe: Conference of Mediterranean National Human Rights Institutions; In Asia: the South East Asia Forum for Human Rights.

⁸ The next one for instance will be held in San José, Costa Rica, in November 2004.

⁹ Visit <http://www.portalfio.org>. It is to be noted that during its last Annual Meeting, the FIO included a reference to the importance of ratifying the OPCAT. See Panama Declaration of FIO, 18-21 November 2003, operative paragraph 14

¹⁰ Visit: <http://www.asiapacificforum.net>

Unquestionably, other Summits or Annual Conference of organisations not based on geographical or regional link but rather on linguistic and politic relations (such as the International Organisation of Francophone Countries or the Commonwealth itself) are also areas that could be explored for the purpose of the promotion of the OPCAT.

iii) lobbying through target States

When thinking in terms of the ratification campaign worldwide, it is strategically prudent to target a number of key States. These States would ideally not only promptly ratify the OPCAT themselves, but would also set an example amongst other States both within and beyond their region. The criteria for identifying these States would include the degree of political will, its measure of influence within a given region, its own human rights commitment and the existence of bodies that conduct visits to places of detention, which could serve as model national preventive mechanisms for other States.

Once identified, lobbying activities in these States should be intensified in order to convince the national authorities to ratify the Optional Protocol and to encourage other States to do the same. Actors within these States could actively participate in the campaign at a regional and international level, through diplomatic channels and by hosting official meetings in favour of the Optional Protocol. Such promotional activities at a regional level could include, for example, members of international affairs committees in the legislature, legal advisors of foreign and justice ministries, staff in charge of international treaties in the national human rights institutions and members of professional organisations such as bar associations and medical colleges.

Hopefully, the example set and the endorsement provided by influential States supportive of the Protocol should have the same type of snowball effect on the ratification process as it did during the previous adoption phase of the instrument by the UN bodies. In some instances, regional action exerted both through regional fora or through influential States can have as much, if not more, influence on the national ratification process than any type of national pressure.

c) towards the implementation of the Optional Protocol

While the actions that follow focus on implementation rather than ratification of the Optional Protocol, this does not mean that they should be carried out only after the instrument has been ratified by the State. These actions can

complement the ratification campaign and pave the way for implementation, which encompasses the establishment and functioning of the visiting bodies and then the ongoing process of monitoring to ensure that they work effectively in practice. From a national perspective, the most challenging aspect of implementation will surely be the appointment of the national preventive mechanism foreseen in the Optional Protocol. It is therefore particularly important to be thinking ahead, so that the specific way in which the Optional Protocol is ratified does not hinder the effectiveness of the mechanism, but rather enhances it.

Many of these actions involve technical assistance by international trainers and experts who can provide governmental and non-governmental bodies with access to specialized knowledge and experiences that they would otherwise find difficult to gain with their often limited resources. Actions aimed at effective implementation should address the State and civil society both jointly and separately.

i) The State and civil society together

- **A national focal point**

In each country, professionals of various disciplines (lawyers, doctors, professors, judges, government officials, NGO representatives and others) with solid experience in human rights and torture prevention should be identified and encouraged to work together as a national focal point to advise the State regarding the legal and operational aspects of implementing the Optional Protocol. The existence of a broad-based focal point to coordinate the various efforts aimed at the effective implementation of the Optional Protocol should significantly strengthen the impact of the campaign by reinforcing efforts and assuming actions carried out by international and regional actors.

- **Exchange of experiences and identification of “best practices”**

It would be advantageous to ensure the exchange of experiences and the identification of “best practices” among bodies already conducting visits to places of detention, which could serve as models for the national preventive mechanisms. When faced with a new international instrument, nations, NGOs and others within their territory often lack the resources to engage in such an exchange and gain information about best practices in the field in order to adapt them to domestic circumstances. In order for national actors to draw inspiration from other contexts, technical assistance should be arranged within a country or, alternately, national actors should participate as observers in missions to places where these best practices have been observed.

It would also be useful to make use of existing international recommendations and handbooks that can guide the actions of States and NGOs regarding the establishment and functioning of national preventive mechanisms. The Paris Principles are specifically mentioned in the Optional Protocol and therefore can act as a basic reference point.¹¹ Regarding the actual functioning of the national preventive mechanisms, guidelines relating to how to conduct visits to places of detention and the documentation of torture are particularly relevant. Materials such as: the APT Manual on Monitoring Places of Detention,¹² the Manual Making Standards Work: an international handbook on good prison practice¹³ and the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, better known as the “Istanbul Protocol”,¹⁴ will all serve as practical and authoritative guides.

- **Professional Training**

Concerning professional training for those individuals and organisations with the mandate to conduct visits to places of detention, such as government officials and members of NGOs and professional associations (lawyers, judges, doctors), this training should bring together a broad range of experts and include suitably qualified NGOs. It is obvious that the effectiveness of the visiting mechanism, whether it is international or national, depends on the professionalism of those in charge of the visits. Yet, in many countries there is very little experience in the area of visits to places of detention, legal investigation, documentation of torture, and how to interview people deprived of liberty.

The aforementioned Istanbul Protocol, places an emphasis upon the difficulties of conducting effective visits. This states that:

“Visits to prisoners are not to be considered lightly. They can in some cases be notoriously difficult to carry out in an objective and professional way, particularly in countries where torture is still being practised. One-off visits, without follow-up to ensure the safety of the interviewees after the visit, may be dangerous. In some cases, one visit without a repeat visit may be worse than no visit at all. Well-meaning investigators may fall into the trap of visiting a prison or police station, without knowing exactly

11 Paris Principles, Op.cit See: <http://www.ohchr.org/english/law/parisprinciples.htm>

12 APT, Monitoring Places of Detention: a practical guide, Geneva, APT, 2004. www.apr.ch.

13 Adopted by Penal Reform International in 2001 (second edition). Visit www.penalreform.org.

14 Adopted in 1999 with the participation of 37 NGOs under the coordination of Physicians for Human Rights (PHR), the Human Rights Foundation of Turkey and Action for Torture Survivors.

Available on: <http://www.ohchr.org/english/about/publications/training.htm>

what they are doing. They may obtain an incomplete or false picture of reality. They may inadvertently place prisoners that they may never visit again in danger. They may give an alibi to the perpetrators of torture, who may use the fact that outsiders visited their prison and saw nothing.”¹⁵

Therefore a commitment to providing appropriate professional training and to build capacity domestically through training, such as “train the trainers” initiatives, is a necessary part of the implementation campaign of the Optional Protocol.

ii) with the State

- **Implementation of the national preventive mechanism**

When it comes to the international preventive mechanism, most States Parties will have a fair idea of the exact nature of their contractual obligations, but this may not be the case for the national mechanisms. Although the Protocol outlines the measures a State must take to ensure the independence and impartiality of these mechanisms, it does not elaborate how this can be achieved.

States should be provided with technical cooperation concerning the various aspects of the national mechanisms. The mechanisms established or designated to carry out these visits by the State must, moreover, receive technical advice on issues such as human and material resource management, or the operational rules and working methods to be adopted in carrying out visits to places of detention.⁽¹⁶⁾ The goal must be to empower such bodies to act effectively, in part by adapting the best practices identified in other countries and heeding the recommendations issued by the UN, international and regional bodies, and NGOs on visiting places of detention.

- **Technical assistance for federal states**

Special reference must be made to countries with a federal structure.⁽¹⁷⁾ Does a national mechanism in these circumstances mean a highly centralized body, a loose aggregation of state/provincial bodies, or a hybrid of the two? In this respect, it would be beneficial to gather information, not so much on best practices, but on “best structures” identifiable in other nations with a similar federated system.

¹⁵ *ibid.* §126.

¹⁶ See the APT publication: Implementation of the Optional Protocol to the UN Convention against Torture: Establishment and Designation of National Preventive Mechanisms”, www.apr.ch.

¹⁷ A list of these States will be found in Annex 7.

iii) with civil society

- **Monitoring the national mechanism**

Civil society will play a key role in the campaign for the ratification of the Optional Protocol, although its task will hardly end there. It is essential for civil society groups and other national actors to oversee the way in which the national mechanisms are implemented and to monitor them operating in practice, blowing the whistle on any failings. However, there is also an international component to be considered.

Assistance must be provided to civil society organisations in their oversight role of mechanisms, because many of them may be unfamiliar with this role, which maybe only indirectly related to their previous experiences. They must be trained to identify the problems that may arise in the implementation of the Optional Protocol, such as government proposals that may affect the independence or efficacy of the mechanism, and to sound the alarm in ways that can neutralize such stratagems. As noted previously, NGOs working directly with vulnerable persons or groups must be brought in to share their specific expertise.

- **Monitoring appointment of candidates**

States are called upon by the Optional Protocol to put forward candidates to make up the Subcommittee. It is essential for all relevant international, regional and national actors, in particular civil society organisations to watch the nomination process closely in order to ensure that nominees are selected *“from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration or in the various fields relevant to the treatment of persons deprived of their liberty”*, as stipulated in Article 5 of the Protocol. It is also imperative that candidates have a demonstrable commitment to human rights.

It may not always be possible to find professionals who meet all the criteria listed in the Optional Protocol, but it is desirable for the nominees to be chosen as a result of consultations between the State and NGOs working in the field of torture prevention, particularly given the risk that governments may nominate former ministers, diplomats, bureaucrats, judges or even heads of police agencies or places of detention. This kind of appointment of persons with perhaps a solid practical experience but who may not have a particular interest in human rights, could seriously affect the work of the future mechanisms, and in some cases jeopardise the independence of the national preventive mechanisms.

As previously discussed, in order to assist the Subcommittee members in carrying out visits, a roster of experts shall also be prepared. This list will be comprised of experts nominated by States Parties, the UN Office of the High Commissioner for Human Rights and the UN Centre for International Crime Prevention. It is just as important for the same amount of attention to be given to appoint appropriate experts to this roster as for the Subcommittee.

Conclusion

The actions outlined above do not cover all aspects of a ratification and implementation campaign, although there are those that merit special attention. Some will interest certain institutions; others will appeal to bodies with a different function. What matters is that the overall effort is coordinated by the various organisations involved in the ratification and implementation campaign, in order to increase the impact of actions taken at the global, regional and national level.

A coordinated approach and optimising the use of available resources will call for strategic alliances spanning across sectors and regions. Governments are the ones officially called upon to sign, ratify and implement the Optional Protocol to the Convention against Torture. Yet, the experience of previous ratification campaigns of international human rights instruments has demonstrated that it is most effective for States to proceed in consultation with NGOs, rather than alone. To ensure that the ratification of the Optional Protocol is not simply an empty formality, it must therefore, arise from a commitment not only by the State but also by national actors, the human rights movement and civil society as a whole.

A greater collaboration between NGOs involved in torture prevention and the overall human rights movement, therefore, seems particularly desirable. In some countries, it will only be through the combined and carefully coordinated pressure by national and international NGOs that the balance will be tilted in favour of ratification and implementation.

An integral strategy such as the one outlined above, should not only accelerate the ratification and implementation process, but also provide new inputs for improving the implementation of the international and national mechanisms. This should ensure that all actors involved in upholding human rights, particularly the rights of persons deprived of liberty, view them as useful tools that they helped to forge.

ANNEXES

- Annex 1:** Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Annex 2:** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Annex 3:** States Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Annex 4:** Voting Record on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Annex 5:** Useful Addresses
- Annex 6:** Further Reading on the Optional Protocol to the Convention against Torture

ANNEX 1

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Preamble

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

PART I

General principles

ARTICLE 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

ARTICLE 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

ARTICLE 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

ARTICLE 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

PART II**Subcommittee on Prevention****ARTICLE 5**

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.
2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.
3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.

4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.
5. No two members of the Subcommittee on Prevention may be nationals of the same State.
6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

ARTICLE 6

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2. (a) The nominees shall have the nationality of a State Party to the present Protocol;
(b) At least one of the two candidates shall have the nationality of the nominating State Party;
(c) No more than two nationals of a State Party shall be nominated;
(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

ARTICLE 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
 - (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
 - (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;

- (c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;
 - (d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.
2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:
- (a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;
 - (b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;
 - (c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

ARTICLE 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

ARTICLE 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

ARTICLE 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, *inter alia*, that:
 - (a) Half the members plus one shall constitute a quorum;
 - (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
 - (c) The Subcommittee on Prevention shall meet *in camera*.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

PART III**Mandate of the Subcommittee on Prevention****ARTICLE 11**

- The Subcommittee on Prevention shall:
- (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

- (b) In regard to the national preventive mechanisms:
 - (i) Advise and assist States Parties, when necessary, in their establishment;
 - (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;
 - (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
 - (iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;
- (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

ARTICLE 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

- (a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
- (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

ARTICLE 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

ARTICLE 14

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:
 - (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
 - (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
 - (c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
 - (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

- (e) The liberty to choose the places it wants to visit and the persons it wants to interview.
- 2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

ARTICLE 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

ARTICLE 16

- 1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.
- 2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
- 3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
- 4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

PART IV

National preventive mechanisms

ARTICLE 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

ARTICLE 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

ARTICLE 19

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

- (c) To submit proposals and observations concerning existing or draft legislation.

ARTICLE 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

- (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
- (c) Access to all places of detention and their installations and facilities;
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- (e) The liberty to choose the places they want to visit and the persons they want to interview;
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

ARTICLE 21

- 1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
- 2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

ARTICLE 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

ARTICLE 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

PART V

Declaration

ARTICLE 24

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

PART VI

Financial provisions

ARTICLE 25

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

ARTICLE 26

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

PART VII**Final provisions****ARTICLE 27**

1. The present Protocol is open for signature by any State that has signed the Convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

ARTICLE 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

ARTICLE 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

ARTICLE 30

No reservations shall be made to the present Protocol.

ARTICLE 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

ARTICLE 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

ARTICLE 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.
3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

ARTICLE 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed

amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

ARTICLE 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

ARTICLE 36

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

- (a) Respect the laws and regulations of the visited State;
- (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

ARTICLE 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

ANNEX 2

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

ARTICLE 1

1. For the purposes of this Convention, 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

ARTICLE 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

ARTICLE 3

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

ARTICLE 4

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.

ARTICLE 5

1. Each 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:
 1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

2. When the alleged offender is a national of that State;
 3. When the victim was a national of that State if that State considers it appropriate.
2. 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 to any of the States mentioned in Paragraph 1 of this article.
 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

ARTICLE 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

ARTICLE 7

1. The State Party in 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.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

ARTICLE 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offenses. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested state.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

ARTICLE 9

1. States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

ARTICLE 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

ARTICLE 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

ARTICLE 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

ARTICLE 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

ARTICLE 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

ARTICLE 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

ARTICLE 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

PART II

ARTICLE 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

ARTICLE 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that
 1. Six members shall constitute a quorum;
 2. Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The State Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement of the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 above.

ARTICLE 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States

Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.

2. The Secretary-General shall transmit the reports to all States Parties.
3. [Each report shall be considered by the Committee which may make such comments or suggestions on the report as it considers appropriate, and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1.]

ARTICLE 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

ARTICLE 21

1. A State Party to this Convention may at any time declare under this article 3 that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
 1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, references to domestic procedures and remedies taken, pending, or available in the matter.
 2. If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee by notice given to the Committee and to the other State.
 3. The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

4. The Committee shall hold closed meetings when examining communications under this article.
5. Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the present Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission.
6. In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.
7. The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.
8. The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report.
 1. If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.
 2. If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

ARTICLE 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communication submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communication from an individual under this article unless it has ascertained that:
 1. The same matter has not been, and is not being examined under another procedure of international investigation or settlement;
 2. The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit parties thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter

which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

ARTICLE 23

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on missions for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

ARTICLE 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

ARTICLE 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

ARTICLE 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

ARTICLE 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the State Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

ARTICLE 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

ARTICLE 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective. Nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

ARTICLE 32

The Secretary-General of the United Nations shall inform all members of the United Nations and all States which have signed this Convention or acceded to it, or the following particulars:

1. Signatures, ratifications and accessions under articles 25 and 26;
2. The date of entry into force of this Convention under article 27, and the date of the entry into force of any amendments under article 29;
3. Denunciations under article 31.

ARTICLE 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

ANNEX 3

States Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984)*

*Current as of 31 January 2006.

State	Signature	Ratification, Accession (a), Succession (d)	Reser- vation on Art. 20 ⁽¹⁾	Recog- nition of Art. 21 ⁽²⁾	Recog- nition of Art. 22 ⁽³⁾
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AFRICA					
Algeria	26 Nov 1985	12 Sep 1989		•	•
Benin		12 Mar 1992 a			
Botswana	8 Sep 2000	8 Sep 2000			
Burkina Faso		4 Jan 1999 a			
Burundi		18 Feb 1993 a			•
Cameroon		19 Dec 1986 a		•*	•
Cape Verde		4 Jun 1992 a			
Chad		9 Jun 1995 a			
Congo		30 Jul 2003 a			
Côte d'Ivoire		18 Dec 1995 a			
Comoros	22 Sep 2000				
Democratic Republic of the Congo		18 Mar 1996 a			
Djibouti		5 Nov 2002 a			
Egypt		25 Jun 1986 a			
Equatorial Guinea		8 Oct 2002 a	•		
Ethiopia		14 Mar 1994 a			
Gabon	21 Jan 1986	8 Sep 2000			
Gambia	23 Oct 1985				
Ghana	7 Sep 2000	7 Sep 2000		•	•
Guinea	30 May 1986	10 Oct 1989			

* The communication is only accepted if it comes from a State Party which has made a similar declaration under article 21.

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- (1) Regarding the competence of the CAT to make confidential inquiries, including a visit to a State Party, based on well-founded indications of a systematic practice of torture in the State Party.
 - (2) Regarding the competence of the CAT to receive and consider communications from a State Party regarding alleged breaches to obligations under the UNCAT by another State Party (a State Party must make a declaration to recognize this competence).
 - (3) Regarding the competence of the CAT to receive and consider individual communications from or on behalf of alleged victims of violations to the UNCAT by a State Party (a State Party must make a declaration to recognize this competence).

State	Signature	Ratification, Accession (a), Succession (d)	Reser- vation on Art. 20 ⁽¹⁾	Recog- nition of Art. 21 ⁽²⁾	Recog- nition of Art. 22 ⁽³⁾
Guinea-Bissau	12 Sep 2000				
Kenya		21 Feb 1997 a			
Lesotho		12 Nov 2001 a			
Liberia		22 Sep 2004 a			
Libyan Arab Jamahiriya		16 May 1989 a			
Madagascar	1 Oct 2001	13 Dec 2005			
Malawi		11 Jun 1996 a			
Mali		26 Feb 1999 a			
Mauritania		17 Nov 2004 a			
Mauritius		9 Dec 1992 a			
Morocco	8 Jan 1986	21 Jun 1993	•		
Mozambique		14 Sep 1999 a			
Namibia		28 Nov 1994 a			
Niger		5 Oct 1998 a			
Nigeria	28 Jul 1988	28 Jun 2001			
Sao Tome and Principe	6 Sep 2000				
Senegal	4 Feb 1985	21 Aug 1986		•	•
Seychelles		5 May 1992 a			•
Sierra Leone	18 Mar 1985	25 Apr 2001			
Somalia		24 Jan 1990 a			
South Africa	29 Jan 1993	10 Dec 1998		•	•
Sudan	4 Jun 1986				
Swaziland		26 Mar 2004 a			
Togo	25 Mar 1987	18 Nov 1987		•	•
Tunisia	26 Aug 1987	23 Sep 1988		•	•
Uganda		3 Nov 1986 a		•*	
Zambia		7 Oct 1998 a			

* The communication is only accepted if it comes from a State Party which has made a similar declaration under article 21.

State	Signature	Ratification, Accession (a), Succession (d)	Reser- vation on Art. 20 ⁽¹⁾	Recog- nition of Art. 21 ⁽²⁾	Recog- nition of Art. 22 ⁽³⁾
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ASIA and THE PACIFIC					
Australia	10 Dec 1985	8 Aug 1989		•	•
Bangladesh		5 Oct 1998 a			
Cambodia		15 Oct 1992 a			
China	12 Dec 1986	4 Oct 1988	•		
East Timor		16 Apr 2003 a			
India	14 Oct 1997				
Indonesia	23 Oct 1985	28 Oct 1998			
Japan		29 Jun 1999 a		•	
Republic of Korea		9 Jan 1995 a			
Mongolia		24 Jan 2002 a			
Nauru	12 Nov 2001				
Nepal		14 May 1991 a			
New Zealand	14 Jan 1986	10 Dec 1989		•	•
Philippines		18 Jun 1986 a			
Sri Lanka		3 Jan 1994 a			
The MIDDLE EAST					
Afghanistan	4 Feb 1985	1 Apr 1987	•		
Bahrain		6 Mar 1998 a			
Israel	22 Oct 1986	3 Oct 1991	•		
Jordan		13 Nov 1991 a			
Kuwait		8 Mar 1996 a	•		
Lebanon		5 Oct 2000 a			
Qatar		11 Jan 2000 a			
Saudi Arabia		23 Sep 1997 a	•		
Syrian Arab Republic		19 Aug 2004 a			
Yemen		5 Nov 1991 a			

* The communication is only accepted if it comes from a State Party which has made a similar declaration under article 21.

State	Signature	Ratification, Accession (a), Succession (d)	Reser- vation on Art. 20 ⁽¹⁾	Recog- nition of Art. 21 ⁽²⁾	Recog- nition of Art. 22 ⁽³⁾
The AMERICAS					
Antigua and Barbuda		19 Jul 1993 a			
Argentina	4 Feb 1985	24 Sep 1986		•	•
Belize		17 Mar 1986 a			
Bolivia	4 Feb 1985	12 Apr 1999			
Brazil	23 Sep 1985	28 Sep 1989			
Canada	23 Aug 1985	24 Jun 1987		•	•
Chile	23 Sep 1987	30 Sep 1988			
Colombia	10 Apr 1985	8 Dec 1987			
Costa Rica	4 Feb 1985	11 Nov 1993		•	•
Cuba	27 Jan 1986	17 May 1995			
Dominican Republic	4 Feb 1985				
Ecuador	4 Feb 1985	30 Mar 1988		•	•
El Salvador		17 Jun 1996 a			
Guatemala		5 Jan 1990 a			
Guyana	25 Jan 1988	19 May 1988			
Honduras		5 Dec 1996 a			
Mexico	18 Mar 1985	23 Jan 1986			•
Nicaragua	15 Apr 1985	15 Jul 2005			
Panama	22 Feb 1985	24 Aug 1987			
Paraguay	23 Oct 1989	12 Mar 1990		•	•
Peru	29 May 1985	7 Jul 1988		•	•
Saint Vincent and the Grenadines		1 Aug 2001 a			
United States of America	18 Apr 1988	21 Oct 1994		•*	
Uruguay	4 Feb 1985	24 Oct 1986		•	•
Venezuela	15 Feb 1985	29 Jul 1991		•	•

* The communication is only accepted if it comes from a State Party which has made a similar declaration under article 21.

State	Signature	Ratification, Accession (a), Succession (d)	Reser- vation on Art. 20 ⁽¹⁾	Recog- nition of Art. 21 ⁽²⁾	Recog- nition of Art. 22 ⁽³⁾
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EUROPE					
Albania		11 May 1994 a			
Andorra	5 Aug 2002				
Armenia		13 Sep 1993 a			
Austria	14 Mar 1985	29 Jul 1987		•	•
Azerbaijan		16 Aug 1996 a			•
Belarus	19 Dec 1985	13 Mar 1987			
Belgium	4 Feb 1985	25 Jun 1999		•	•
Bosnia and Herzegovina		1 Sep 1993 d		•	•
Bulgaria	10 Jun 1986	16 Dec 1986		•	•
Croatia		12 Oct 1992 d		•	•
Cyprus	9 Oct 1985	18 Jul 1991		•	•
Czech Republic		22 Feb 1993 d		•	•
Denmark	4 Feb 1985	27 May 1987		•	•
Estonia		21 Oct 1991 a			
Finland	4 Feb 1985	30 Aug 1989		•	•
France	4 Feb 1985	18 Feb 1986		•	•
Georgia		26 Oct 1994 a			
Germany	13 Oct 1986	1 Oct 1990			
Greece	4 Feb 1985	6 Oct 1988		•	•
Holy See		26 Jun 2002 a			
Hungary	28 Nov 1986	15 Apr 1987		•	•
Iceland	4 Feb 1985	23 Oct 1996		•	•
Ireland	28 Sep 1992	11 Apr 2002		•	•
Italy	4 Feb 1985	12 Jan 1989		•	•
Kazakhstan		26 Aug 1998 a			
Kyrgyzstan		5 Sep 1997 a			
Latvia		14 Apr 1992 a			

* The communication is only accepted if it comes from a State Party which has made a similar declaration under article 21.

State	Signature	Ratification, Accession (a), Succession (d)	Reser- vation on Art. 20 ⁽¹⁾	Recog- nition of Art. 21 ⁽²⁾	Recog- nition of Art. 22 ⁽³⁾
Liechtenstein	27 Jun 1985	2 Nov 1990		•	•
Lithuania		1 Feb 1996 a			
Luxembourg	22 Feb 1985	29 Sep 1987		•	•
Macedonia		12 Dec 1994 d			
Malta		13 Sep 1990 a		•	•
Monaco		6 Dec 1991 a		•	•
Netherlands	4 Feb 1985	21 Dec 1988		•	•
Norway	4 Feb 1985	9 Jul 1986		•	•
Poland	13 Jan 1986	26 Jul 1989	•	•	•
Portugal	4 Feb 1985	9 Feb 1989		•	•
Republic of Moldova		28 Nov 1995 a			
Romania		18 Dec 1990 a			
Russian Federation	10 Dec 1985	3 Mar 1987		•	•
San Marino	18 Sep 2002				
Serbia and Montenegro		12 Mar 2001 d		•	•
Slovakia		28 May 1993 d		•	•
Slovenia		16 Jul 1993 a		•	•
Spain	4 Feb 1985	21 Oct 1987		•*	•
Sweden	4 Feb 1985	8 Jan 1986		•	•
Switzerland	4 Feb 1985	2 Dec 1986		•	•
Tajikistan		11 Jan 1995 a			
Turkey	25 Jan 1988	2 Aug 1988		•	•
Turkmenistan		25 Jun 1999 a			
Ukraine	27 Feb 1986	24 Feb 1987		•	•
United Kingdom of Great Britain and Northern Ireland	15 Mar 1985	8 Dec 1988		•*	
Uzbekistan		28 Sep 1995 a			

* The communication is only accepted if it comes from a State Party which has made a similar declaration under article 21.

ANNEX 4

Voting Record on the Optional Protocol to the UN Convention against Torture

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

AFRICA							
Algeria	Y	A	A			A	A
Angola	N			N	Y	Y	Y
Benin	Y			N	Y	Y	Y
Botswana	Y						Y
Burkina Faso	Y			N	Y	Y	Y
Burundi	Y	N	Y	N	Y	Y	Y
Cameroon	Y	A	A	No vote	A	A	A
Cape Verde	Y					Y	Y
Central African Republic	N						
Chad	Y						
Comoros	s						
Congo	Y					Y	Y
Cote D'Ivoire	Y						Y
D.R. Congo	Y	A	Y			Y	Y

* Current as of 31 January 2006.

S = Signature

Note: In addition to voting Yes or No, a Member State may choose to register an abstention. This is often used when a State would prefer to vote against, but due to diplomatic pressure is unable to do so, or when a decision has not been taken at the Capital level of that particular State as to how to vote on an issue. If a State delegate does not register any vote at all, then it is recorded that the State did not vote. This may occur if the representative is out of the room, or it can be the best solution for some States who are under extreme diplomatic pressure from both sides to vote in a certain way.

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

Djibouti	Y						A
Egypt	Y			Y	N	A	A
Equatorial Guinea	Y						Y
Eritrea	N					Y	Y
Ethiopia	Y			Y	A	A	A
Gabon	Y						Y
Gambia	s					Y	Y
Ghana	Y			N	Y	Y	Y
Guinea	Y						Y
Guinea Bissau	s						
Kenya	Y	A	A			A	A
Lesotho	Y					Y	Y
Liberia	Y						
Libya	Y	Y	N	Y	N	A	A
Madagascar	Y					Y	Y
Malawi	Y					Y	Y
Mali	Y					Y	Y
Mauritania	Y					A	A
Mauritius	Y					Y	Y
Morocco	Y					Y	Y
Mozambique	Y					Y	Y
Namibia	Y					Y	Y
Niger	Y						

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

Nigeria	Y	Y	N	Y	N	N	N
Rwanda	N						
Sao Tome and Principe	s						Y
Senegal	Y	N	Y			Y	Y
Seychelles	Y						Y
Sierra Leone	Y	N	A				Y
Somalia	Y						A
South Africa	Y	N	Y	N	Y	Y	Y
Sudan	s	Y	N	Y	N	A	A
Swaziland	Y	Y	A			Y	Y
Tanzania	N					A	A
Togo	Y	Y	A			A	A
Tunisia	Y					A	A
Uganda	Y	Y	A	Y	Y	Y	Y
Zambia	Y	Y	A			Y	Y
Zimbabwe	N			No Vote	A	Y	Y
Total		15	15	14	14	53	53
Yes	42	7	4	6	7	24	32
No		4	3	6	4	1	1
Abs		4	8		3	11	13
Not voted				2		17	7

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

ASIA AND THE PACIFIC							
Australia	Y			Y	N	A	A
Bangladesh	Y					A	A
Bhutan	N			A	A	A	A
Brunei Darussalam	N					A	A
Cambodia	Y						Y
China	Y	Y	N	Y	N	N	A
D.R. Korea	N						
East Timor	Y						Y
Fiji	N			N	Y	Y	Y
India	s	Y	A	Y	A	A	A
Indonesia	Y	Y	A			Y	Y
Japan	Y	Y	N	Y	N	N	A
Kiribati	N					Y	Y
Laos	N						
Maldives	Y						
Malaysia	N	Y	N			A	A
Marshall Islands	N						N
Micronesia	N						Y
Mongolia	Y					Y	Y
Myanmar	N					A	A
Nauru	s					Y	Y
Nepal	Y			A	A	A	A

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

New Zealand	Y					Y	Y
Pakistan	N	Y	A	Y	A	A	A
Palau	N						N
Papua New Guinea	N					Y	Y
Philippines	Y					A	A
R. Korea	Y	Y	N	A	Y	Y	Y
Samoa	N					Y	Y
Singapore	N					A	A
Solomon Islands	N						Y
Sri Lanka	Y					Y	Y
Thailand	N	Y	A			A	A
Tonga	N						
Tuvalu	N						Y
Vanuatu	N					Y	Y
Vietnam	N	Y	A			N	A
Total		9	9	9	9	37	37
Yes	14	9		5	2	11	16
No			4	1	3	3	2
Abs			5	3	4	12	15
Not voted						11	4

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

THE MIDDLE EAST							
Afghanistan	Y					Y	
Bahrain	Y	Y	Y	A	Y	A	Y
Iran	N			Y	No Vote		
Iraq	N						
Israel	Y					N	Y
Jordan	Y					Y	Y
Kuwait	Y					A	A
Lebanon	Y						Y
Oman	N					A	A
Qatar	Y			A	A	A	A
Saudi Arabia	Y	Y	N			A	A
Syria	Y	Y	N			N	A
United Arab Emirates	N						
Yemen	Y						Y
Total		3	3	3	3	14	14
Yes	10	3	1	1	1	2	5
No			2			2	
Abs				2	1	5	5
Not voted					1	5	4

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

THE AMERICAS							
Antigua and Barbuda	Y					Y	Y
Argentina	Y	N	Y	N	Y	Y	Y
Bahamas	N					A	A
Barbados	N					A	Y
Belize	Y					A	A
Bolivia	Y					Y	Y
Brazil	Y	N	Y	N	Y	Y	Y
Canada	Y	N	Y			Y	Y
Chile	Y	N	Y	N	Y	Y	Y
Colombia	Y					Y	Y
Costa Rica	Y	N	Y	N	Y	Y	Y
Cuba	Y	Y	N	Y	N	N	A
Dominica	N						Y
Dominican Republic	s					Y	Y
Ecuador	Y	N	Y			Y	Y
El Salvador	Y			N	Y	Y	Y
Grenada	N						A
Guatemala	Y	N	Y	N	Y	Y	Y
Guyana	Y					A	A
Haiti	N						Y
Honduras	Y						Y
Jamaica	N					A	A

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

Mexico	Y	N	Y	N	Y	Y	Y
Nicaragua	Y					Y	Y
Panama	Y					Y	Y
Paraguay	Y					Y	Y
Peru	Y	N	Y	N	Y	Y	Y
Saint Kitts and Nevis	N					Y	
Saint Lucia	N						A
Saint Vincent and the Grenadines	Y						Y
Suriname	N			N	Y	Y	Y
Trinidad and Tobago	N					Y	
USA	Y			Y	A	N	N
Uruguay	Y	N	Y			Y	Y
Venezuela	Y	N	Y			Y	Y
Total		12	12	11	11	35	35
Yes	24	1	11	2	9	22	25
No		11	1	9	1	2	1
Abs					1	5	7
Not voted						6	2

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

EUROPE							
Albania	Y					Y	Y
Andorra	s			N	Y	Y	Y
Armenia	Y	N	Y			Y	Y
Austria	Y	N	Y	N	Y	Y	Y
Azerbaijan	Y					Y	Y
Belarus	Y						Y
Belgium	Y	N	Y			Y	Y
Bosnia Herzegovina	Y					Y	Y
Bulgaria	Y					Y	Y
Croatia	Y	N	Y	N	Y	Y	Y
Cyprus	Y					Y	Y
Czech Republic	Y	N	Y			Y	Y
Denmark	Y					Y	Y
Estonia	Y					Y	Y
Finland	Y			N	Y	Y	Y
France	Y	N	Y	N	Y	Y	Y
Georgia	Y			A	Y	A	Y
Germany	Y	N	Y	N	Y	Y	Y
Greece	Y					Y	Y
Hungary	Y			N	Y	Y	Y
Iceland	Y					Y	Y
Ireland	Y					Y	Y

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

Italy	Y	N	Y	N	Y	Y	Y
Kazakhstan	Y					A	Y
Kyrgyzstan	Y					Y	Y
Latvia	Y					Y	Y
Liechtenstein	Y					Y	Y
Lithuania	Y					Y	Y
Luxembourg	Y					Y	Y
Malta	Y			N	Y	Y	Y
Monaco	Y					Y	Y
Netherlands	Y			N	Y	Y	Y
Norway	Y					Y	Y
Poland	Y	N	Y			Y	Y
Portugal	Y	N	Y			Y	Y
Republic of Moldova	Y					Y	Y
Romania	Y			A	Y	Y	Y
Russia	Y	Y	A	Y	A	A	A
San Marino	s					Y	Y
Slovakia	Y					Y	Y
Slovenia	Y					Y	Y
Spain	Y	N	Y	N	Y	Y	Y
Sweden	Y	N	Y	N	Y	Y	Y
Switzerland	Y					Y	Y
Macedonia	Y					Y	Y
Tajikistan	Y						Y

Region	Ratified CAT*	Vote at CHR		Vote at ECOSOC		Vote at the GA	
		Cuba's No Action Motion (22/04/02)	Resolution E/CN.4/2002/L. 5 (22/04/02)	USA Amendment E/2002/L.23 (24/07/02)	Resolution E/2002/23 (24/07/02)	Third Committee A/C.3/57/L.30 (07/11/02)	Plenary Session A/RES/57/199 (18/12/02)

Turkey	Y					Y	Y
Turkmenistan	Y						
Ukraine	Y			A	Y	Y	Y
UK	Y	N	Y	N	Y	Y	Y
Uzbekistan	Y					A	A
Serbia and Montenegro	Y					Y	Y
Total		14	14	17	17	52	52
Yes	51	1	13	1	16	45	49
No		13		13			
Abs			1	3	1	4	2
Not voted						3	1
TOTAL		53	53	54	54	191	191
Yes	141	21	29	15	35	104	127
No		28	10	29	8	8	4
Abs		4	14	8	10	37	42
Not voted				2	1	42	18

ANNEX 5

Useful addresses

INTERNATIONAL ORGANISATIONS

International Committee of the Red Cross

19 Avenue de la Paix
1202 Geneva, Switzerland
Telephone: +41 22 734 60 01
Fax: +41 22 733 20 57
Website: www.icrc.org

Inter-Parliamentary Union (IPU)

5, chemin du Pommier,
Case Postale 330,
CH-1218 Le Grand-Saconnex,
Geneva, Switzerland
Telephone: +41 22 919 41 50
Fax: +41 22 919 41 60
Website: www.ipu.org

United Nations Office of the High Commissioner for Human Rights

Palais Wilson
Rue des Pâquis 52
1201 Geneva, Switzerland
Telephone: +41 22 917 90 00
Fax : +41 22 917 90 12
Website: www.ohchr.org

REGIONAL ORGANISATIONS

African Commission on Human and Peoples' Rights

90 Kairaba Avenue,
P.O. Box 673, Banjul,
The Gambia
Telephone: +220 392 962
Fax: +220 390 764
E-mail: achpr@achpr.org
Website: www.achpr.org

Council of Europe

Avenue de l'Europe,
F-67075 Stasbourg, Cedex, France
Telephone: +33 3 88 41 20 00 / 33
Fax: +33 3 88 41 27 30 / 45
Website: www.coe.int

**European Committee for the Prevention of Torture
and Inhuman or Degrading Treatment or Punishment (CPT)**

CPT Secretariat - Council of Europe

F-67075 Strasbourg Cedex, France

Telephone: +33 03 88 41 39 39

Fax: +33 3 88 41 27 72

E-mail: cpt.doc@coe.int

Website: www.cpt.coe.int

**Inter-American Commission on Human Rights
Organization of American States (OAS)**

1889 F Street, N.W., Washington D.C: 2006, USA

Telephone: +1 202 458-6002

Fax: +1 202 458-3992

Website www.cidh.org

Inter-American Court on Human Rights

Avenida 10, Calles 45 y 47 Los Yoses, San Pedro

Apartado 6906-1000, San José - Costa Rica

Telephone: + 506 234 0581

Fax: + 506 234 0584

E-mail: corteidh@corteidh.or.cr

Website : www.corteidh.or.cr

**Organization for Security and Co-operation in Europe (OSCE)
Office for Democratic Institutions and Human Rights (ODIHR)**

Aleje Ujazdowskie 19

00-557 Warsaw - Poland

Telephone: +48 22 520 06 00

Fax: +48 22 520 06 05

E-mail: office@odihr.pl

Website: www.osce.org/odihr

NON-GOVERNMENTAL ORGANISATIONS (NGOs)

INTERNATIONAL NGOs

Amnesty International (International Secretariat)

1 Easton Street, London WC1X 0DW, United Kingdom

Telephone: + 44 20 74135500

Fax: +44 20 79561157

E-mail: amnestyis@amnesty.org

Website: www.amnesty.org

(Please consult also addresses of AI sections across the world)

Association for the Prevention of Torture (APT)

10 Route de Ferney,
P.O. Box 2267,
1211 Geneva 2, Switzerland
Telephone: +41 22 919 21 70
Fax: +41 22 919 21 80
E-mail: apt@apt.ch
Website: www.apt.ch

Human Rights Watch (HRW)

350 Fifth Avenue, 34th Floor,
New York, NY 10118-3299, USA
Telephone: +1 212 290 47 00
Fax: +1 212 736 13 00
E-mail: hrwny@hrw.org
Website: www.hrw.org
(Please consult also addresses of other HRW sections)

International Commission of Jurists (ICJ)

33, rue des Bains,
P.O. Box 91
1211 Geneva 8, Switzerland
Telephone: +41 22 9793800
Fax: +41 22 9793801
Email: info@icj.org
Website: www.icj.org
*(Please consult also addresses of national sections
and affiliated organisations across the world)*

**International Federation of Action by Christians
for the Abolition of Torture (FIACAT)**

27 Rue de Maubeuge,
75009 Paris, France
Telephone: +33 1 42 80 01 60
Fax: +33 1 42 80 20 89
E-mail: fiacat@fiacat.org
Website: www.fiacat.org
*(Please consult also addresses of ACAT organisations across
the world)*

International Federation of the League of Human Rights (FIDH)

17 Passage de la Main d'Or,
75011 Paris, France
Telephone: +33 1 43 55 25 18
Fax: +33 1 43 55 18 80
E-mail: fidh@fidh.org
Website: www.fidh.org

International Rehabilitation Council for Torture Victims (IRCT)

Borgergade 13,
P.O. Box 9049,
DK-1022 Copenhagen K, Denmark
Telephone: +45 33 76 06 00
Fax: +45 33 76 05 00
E-mail: irct@irct.org
Website: www.irct.org

International Service for Human Rights (ISHR)

1 rue de Varembe,
P.O. Box 16,
1211 Geneva 20, Switzerland
Telephone: +41 22 733 51 23
Fax: +41 22 733 08 26
Website: www.ishr.ch

Penal Reform International

Unit 450, The Bon Marché Centre,
241-251 Ferndale Road,
London SW9 8BJ, United Kingdom
Telephone: +44 20 7924 95 75
Fax: +44 20 7924 96 97
Website: www.penalreform.org

(Please consult also addresses of regional and national PRI offices)

The Redress Trust

3rd Floor, 87 Vauxhall Walk,
London SE11 5HJ, United Kingdom
Telephone: +44 20 7793 1777
Fax: +44 20 7793 1719
E-mail: info@redress.org
Website: www.redress.org

World Organisation against Torture (OMCT - SOS Torture)

8, rue du Vieux-Billard,
P.O. Box 21,
1211 Geneva 8 - Switzerland
Telephone: +41 22 809 49 39
Fax: +41 22 809 49 29
E-mail : omct@omct.org
Website: www.omct.org
(Please consult also addresses of regional sections)

REGIONAL NGOs

African Centre for Democracy and Human Rights Studies

Zoe Tembo Building, Kerr Sereign,
P. O. Box 2728,
Serrekunda - The Gambia
Telephone: +220 446 2340/42
Fax: +220 446 2338/39
E-mail: info@acdhrs.org
Website: www.acdhrs.org

Asia-Pacific Human Rights Network

B-6/6, Safdarjung Enclave Extension,
New Delhi-110 029 - India
Telephone/Fax: +91 11 2619 1120 / 2619 2717 / 2619 2706
E-Mail: hrcd_online@hotmail.com
Website www.hrcd.net/sahrhc

Inter-American Center for Justice and International Law (CEJIL)

1630 Connecticut Ave., NW - Suite 401,
Washington D.C. 20009-1053 - USA
Telephone: +1 202 319 3000
Fax: +1 202 319 3019
E-mail: washington@cejil.org
Website: www.cejil.org

Inter-American Institute of Human Rights (IHR)

P.O. Box 10081-1000,
San José - Costa Rica
Telephone: +506 234 04 04
Fax: +506 234 09 55
E-mail: instituto@iidh.ed.cr
Website: www.iidh.ed.cr

International Helsinki Federation for Human Rights

Wickenburggasse 14/7,

A-1080 Vienna - Austria

Telephone: +43 1 408 88 22

Fax: +43 1 408 88 22 50

E-mail: office@ihf-hr.org

Website: www.ihf-hr.org

(Please consult also addresses of committees members across the world)

ANNEX 6

Further reading on the Optional Protocol to the UN Convention against Torture

Books and articles

AMNESTY INTERNATIONAL, *Combating Torture: A Manual for Action*, Amnesty International Publications, London, 2003, pp. 141-142.

BOLIN PENNEGARD, Anne-Marie, *An Optional Protocol, based on prevention and cooperation*, in DUNER Bertil (Editor), *An End to Torture. Strategies for its Eradication*, Zed Books, London/ New York, 1998, pp.40-60.

BURGERS, J.H. DANELIUS, H., *The UN Convention against Torture : a Handbook on the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, 1988, pp. 27-29.

DE VARGAS, François, *Bref historique du CSCT-APT*, in APT, *20 ans consacrés à la réalisation d'une idée, Recueil d'études en l'honneur de Jean-Jacques Gautier*, APT, Geneva, 1997, pp. 27-46.

DEPLAÇE, Edouard, *La prohibition internationale de la torture et des peines ou traitements cruels, inhumains ou dégradants*, Thèse de Doctorat en Droit, Université de Nanterre- Paris X, December 2002, pp. 90-96.

EVANS, Malcolm D., MORGAN, Rod, *Preventing Torture, A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Clarendon Press, Oxford, 1998, pp. 106-112.

EVANS, Malcolm D., MORGAN, Rod, *Protecting Prisoners, The Standards of the European Committee for the Prevention of Torture in Context*, Oxford University Press, 1999, pp. 3-31.

GAUTIER, Jean-Jacques, MACDERMOT, Niall, MARTIN, Eric, DE VARGAS, François, *Torture : how to make the International Convention effective : a draft optional protocol*, International Commission of Jurists and Swiss Committee Against Torture, 1980 (out of print).

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The Association for the Prevention of Torture (APT) founded in 1977 by Jean-Jacques Gautier and based in Geneva, Switzerland, is an independent international non-governmental organisation committed to prevent torture and other forms of ill-treatment worldwide. In particular the APT supports and promotes the national implementation of standards that prohibit and prevent these abuses and develops training and other activities for professionals in contact with persons deprived of their liberty. Its specificity lies in the promotion of preventive control mechanisms, such as visits to places of detention.

