

# Torture prevention in practice

*Association for the Prevention of Torture*<sup>1</sup>

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## 1. Introduction

### 1.1 Overview

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”: so states article 5 of the 1948 Universal Declaration of Human Rights.<sup>2</sup>

The absolute prohibition proclaimed in article 5 has rarely been questioned. On the contrary, the prohibition of torture and ill-treatment has been enhanced by a unique normative and institutional proliferation. States have adopted an impressive framework of legal and political instruments, and international courts have generated jurisprudence, elaborating a substantive *legal framework* for the prevention of torture. At the same time, a network of institutions for the prevention, investigation, and redress of torture and other ill-treatment has gradually emerged. To determine whether this legal framework and these institutions have a real

impact on the incidence of torture and other ill-treatment, however, it is necessary to consider the *practical* measures available for the prevention of torture.

This paper first describes the context in which torture prevention measures operate, setting out the international legal framework and introducing relevant international institutions. In its second section, the paper reviews a range of existing practical measures for the prevention of torture, including implementation of basic procedural safeguards in connection with arrest and trial, the material conditions of detention, training and empowerment, oversight and monitoring, and a variety of domestic legal measures flowing from international and regional treaties, including criminalization of torture. In its third section, the paper considers strategies for improving the prevention of torture in practice, including reinforcing existing

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2) Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

mechanisms, better implementing international and regional norms, emphasizing the role of national actors such as non-governmental organizations (NGOs), national institutions, and judges and prosecutors, and promoting the monitoring of places where there is deprivation of liberty. Finally, the paper will extract general characteristics and trends from the examples provided in the preceding sections.

### 1.2 International legal framework

Every general human rights treaty has

included the prohibition of torture and ill-treatment.<sup>3</sup> States have also adopted international instruments that focus specifically on torture and ill-treatment.<sup>4</sup> States and international organizations have promulgated more detailed prescriptions, in the form of “basic principles,” “minimum rules,” and “codes of conduct,” that elaborate and give further effect to the prohibition of torture and ill-treatment.<sup>5</sup>

An extensive jurisprudence regarding the prohibition of torture and ill-treatment has emerged through decisions taken in in-

3) [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, article 3; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, article 7; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), article 5; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, article 5.

4) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (hereafter “UNCAT”); Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 83 (1992); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, entered into force Feb. 1, 1989.

5) Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977); Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979); 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, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988); Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990); European Prison Rules, Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe (12 February 1987); Recommendations on Prison Education, Recommendation No. R (89) 12 of the Committee of Ministers of the Council of Europe (13 October 1999); Recommendations on prison overcrowding and prison population inflation, Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe (30 September 1999).

dividual cases by international human rights courts and commissions. These include the legally-binding decisions of the European and Inter-American Courts of Human Rights, and the politically important decisions of the Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights. The recently established African Court of Human and Peoples' Rights will soon provide another source of case law.<sup>6</sup> As the prohibition against torture and ill-treatment also forms part of international criminal law and the international law of armed conflict, its elaboration has been further accelerated by the judgments of international ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia,<sup>7</sup> and by criminal prosecutions undertaken by individual states in their domestic courts acting under international universal jurisdiction.<sup>8</sup>

### 1.3 International institutions

States, at the urging of human rights organizations and other members of civil society, have also created international mechanisms designed to give force to the legal framework described above. The purpose of such organs is to prevent torture and to identify and condemn violations of the international prohibition.

The 1984 Convention against Torture and

Other Cruel, Inhuman and Degrading Treatment (UNCAT)<sup>9</sup> established the Committee against Torture. The Committee against Torture is a group of experts empowered to examine periodic mandatory country reports that outline what states are doing to prevent and punish torture and other ill-treatment. The Committee also receives and investigates individual and inter-state complaints about violations of the UNCAT, and can conduct confidential inquiries, including carrying out visits to places of detention, in states where torture is allegedly systematic.<sup>10</sup>

In 1985 the UN Commission on Human Rights created the position of Special Rapporteur on Torture. This is an independent expert who issues public reports on both the general situation and specific issues in relation to torture, sends urgent appeals to governments requesting that they take concrete steps to protect individuals at risk of torture or ill-treatment, and carries out visits to places of detention in any country, with the government's consent. Examples of the issues on which the Special Rapporteur has issued Reports and urged state action in recent years include anti-terrorism measures,<sup>11</sup> and the trade in and production of equipment which is specifically designed to inflict torture.<sup>12</sup>

The prohibition of torture and ill treatment also benefits, at the regional level, from a prevention mechanism that is uniquely

6) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), in force 25 January 2004.

7) Furundzija, IT-95-17/1, judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, 10 December 1998, paragraphs 134 et seq.

8) See Amnesty International, Universal Jurisdiction: The duty of states to enact and implement

legislation, AI Index IOR 53/013/2001 (London, September 2001), Chapter Ten "Torture: State practice at the national level".

9) Note 4 above.

10) Convention against Torture, note 4 above, Part II.

11) Reports of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/69; UN Doc. A/58/120.

12) Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/69, 13 January 2003.

practical: the European Committee for the Prevention of Torture (CPT). The CPT is an independent body of experts empowered to make regular visits to places of deprivations of liberty within each state of the Council of Europe, and in fact carries out some 170 to 180 days of inspections per year. A similar independent preventive mechanism at the global level will soon be added to the array of actors in the prohibition against torture and ill-treatment, when the Optional Protocol to the UN Convention against Torture (OPCAT) comes into effect, establishing a Subcommittee on Prevention.<sup>13</sup> Like the CPT, the UN Subcommittee on Prevention will be empowered to carry out visits, whenever and wherever it chooses, in states that become parties to the OPCAT.

## 2. Practical measures for the prevention of torture

### 2.1 Introduction

While readers are invited to consult more comprehensive and detailed sources where necessary,<sup>14</sup> the following paragraphs provide specific examples and an overall flavour of existing practical measures for the prevention of torture.

### 2.2 Basic procedural safeguards for those deprived of liberty

From the moment a person is deprived of their liberty, he or she should be guaranteed by law and provided in practice with certain

procedural safeguards. For instance, notification of the detention should be given to a relative or other appropriate third person. An independent medical examination should be conducted to establish whether the person requires medical attention, to establish a baseline for determining whether subsequently-identified injuries occurred during detention, and to monitor for signs of abuse. Individuals should be provided immediate access to a lawyer, and notified of their rights in a language the person understands.

There are a variety of steps that states must take, and NGOs should monitor, to implement safeguards during arrest and other pre-trial processes. For instance, states should prohibit and punish the use of secret, unauthorised or unofficial places of detention, as well as the use of incommunicado detention. States should also ensure that all persons deprived of their liberty have access to legal and medical services and have the right to be visited by and correspond with family members. In particular, states should provide detainees with the right to have a lawyer or another third person present during interrogation, and the right to access a lawyer throughout the investigation, pre-trial, and trial process. These measures help prevent torture because, as the former UN Special Rapporteur on Torture, Sir Nigel Rodley, has pointed out, torture is usually perpetrated while the victim is isolated from the outside world.<sup>15</sup> NGOs can play a role

13) Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in 42 I.L.M. 26 (2003)].

14) For instance, see Association for the Prevention of Torture, *Monitoring Places of Detention: A Practical Guide* (Geneva: Association for the Prevention of Torture, 2004), <http://www.ap.torture>.

[ch/pub/library/Monitoring%20Guide%20EN.pdf](http://www.essex.ac.uk/pub/library/Monitoring%20Guide%20EN.pdf). Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Colchester: University of Essex Human Rights Centre, 2003), <http://www.essex.ac.uk/combatingtorturehandbook/>.

15) Nigel Rodley, *The Treatment of Prisoners Under International Law* (2nd ed.) (Oxford: Oxford University Press, 2002) at 11.

by drawing public attention to places or facilities in which it is suspected that persons are being held unofficially or in secret. For instance, reports by Human Rights First, Human Rights Watch, and Amnesty International published in 2004 drew attention to allegations that suspects and prisoners in the “war on terror” were being held in secret and/or at secret facilities.<sup>16</sup>

Judicial oversight provides a second important safeguard during pre-trial processes. Thus, states must immediately inform every detained person of the reasons for the detention, promptly inform every person arrested of any charges, and immediately bring every person deprived of his or her liberty before a judicial authority. In addition, all persons deprived of their liberty have the right to challenge the lawfulness of their detention; thus, procedures such as *habeas corpus* or *amparo* should be expressly provided for in national law. Individuals should have the right to defend themselves or to be assisted by legal counsel of their own choice, publicly-funded where necessary.

Record-keeping constitutes a further practical measure that can help prevent torture. First, mandatory record-keeping creates a paper-trail for accountability purposes. Second, where legal or administrative rules require records to be kept, but no or insufficient records are kept in a particular case, judicial and other fact-finding authorities can justifiably shift the burden of proof to the state, requiring the state to prove that the individual was *not* tortured or otherwise

mistreated. This can help rectify the situation where an individual would otherwise be unable to substantiate a valid claim of torture because by the very nature of such ill-treatment, the torturers exercise complete control over any evidence.

Therefore, states must keep, at each place of detention, comprehensive written records concerning all those deprived of their liberty – detailing at minimum the date, time, place and reason for the detention – and provide the detainee, legal counsel, and independent inspectors with access to such records. More specifically, states should make and retain comprehensive written records of all interrogations, which include the identity of all persons present during the interrogation and video tape and/or audio tape record interrogations where feasible. For instance, in India, in response to directions from the National Human Rights Commission and government officials, cameras have been installed in police stations to monitor and deter police brutality.<sup>17</sup>

To reduce the usefulness of information obtained through torture,<sup>18</sup> and thus to eliminate a key incentive for state officials to commit torture, states must prohibit the admission into evidence, in any proceedings, of any statement obtained through the use of torture, or other cruel, inhuman or degrading treatment or punishment (except against persons accused of torture as evidence that the statement was made). Also, where it is alleged by a defendant that a statement was obtained through torture, or other cruel, inhuman or

16) Human Rights First, Ending Secret Detentions, June 2004, [http://www.humanrightsfirst.org/us\\_law/PDF/EndingSecretDetentions\\_web.pdf](http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf); Human Rights Watch, The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees”, 12 October 2004, <http://hrw.org/backgrounder/usa/us1004/index.htm>; Amnesty International, Human dignity denied: Torture and

accountability in the ‘war on terror’, AI Index: AMR 51/145/2004, 27 October 2004.

17) R. Lakshmi, “In India, Torture by the Police is Frequent and Often Deadly”, Washington Post 5 August 2004, Page A11.

18) Rodley, n. 15 above, at 10-11.

degrading treatment or punishment, the burden of proof should shift to the state, such that the evidence is automatically excluded unless the state proves that the interrogation was free of any torture or other ill-treatment.

### *2.3 Improving conditions of detention*

As seen above, international law prohibits not only torture per se, but *all* forms of cruel, inhuman or degrading treatment or punishment, of which “torture” is only the most severe category. Improving the general conditions of detention can also help to prevent torture. To these ends, states should ensure that the treatment of all persons deprived of their liberty is in conformity with international standards, the UN Standard Minimum Rules for the Treatment of Prisoners being of key importance.<sup>19</sup>

In particular, states should improve conditions in places of detention, specifically in respect of food, outdoor exercise, hygiene and health care, family visitation, religious facilities, condition of buildings and housing, conditions of and voluntariness of prisoners’ work, and complaint mechanisms regarding disciplinary sanctions and ill-treatment. This requires that states provide adequate resources (budget, staff, and facilities) to the proper administration of prisons, and that those resources be appropriate: e.g. states should develop, implement, and follow-up training programmes for prison staff, which includes specific training on human rights. States should hold pre-trial detainees separately from convicted persons, and only hold juveniles, women, and other vulnerable groups in appropriate and separate detention facilities. Finally, states should reduce overcrowding in places of detention by, among

other things, limiting the length of periods in remand, promoting alternatives to pre-trial custody, and encouraging the use of non-custodial sentences for minor crimes.

### *2.4 Developing training and empowerment*

States should also establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups. States should furthermore devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel. NGOs, national human rights institutions, community-based organizations and (where relevant) traditional leaders, regional and international bodies, and other human rights experts should be given an opportunity to meaningfully participate in the development of such programmes, materials and codes. NGOs should participate in the development and delivery of training materials, monitor compliance with codes of conduct and ethics, and assist in drawing the attention of disciplinary authorities to breaches of such codes.

States should establish, encourage, and provide financial and other support to public education initiatives and awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons. States should also support (and certainly must not interfere with) the work of NGOs and the media in public education, dissemination of information, and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment. NGOs should also conduct research and studies on the situation of torture and other forms of ill-treatment in their country and/or region, provide training for relevant

<sup>19</sup> UN Standard Minimum Rules for the Treatment of Prisoners, n. 5 above.

groups in the community, and provide counselling services to victims of torture.

### *2.5 Establishing mechanisms of oversight and monitoring*

All law enforcement officials must be accountable to independent judicial and disciplinary authorities. This must be coupled with a combination of independent and internal oversight and complaint mechanisms that undertake regular visits to places of detention. The very possibility of a visit can have a deterrent effect on torture, particularly where the visiting body itself determines where to visit and is empowered to carry out visits without prior notice. Recommendations arising from visits can also ground constructive dialogue with prison officials.

A key step states can take towards ensuring adequate oversight and monitoring of treatment of persons deprived of liberty is to ratify the OPCAT, so as to empower international and national visiting mechanisms with the mandate to visit all places where people are deprived of their liberty. States should also undertake diplomatic efforts to promote ratification of the Optional Protocol by other states.

With or without ratification of OPCAT, states can further implement torture prevention through the creation of an independent national institution with a mandate and will to prevent torture. National institutions should be empowered to carry out independent investigations and visits to prisons, police stations and other places of detention, to make recommendations to relevant authorities to prosecute and/or discipline officials who torture or mistreat persons deprived of liberty, and to make pro-active recommendations to prevent recurrence.<sup>20</sup> States should promptly cooperate with and comply with all recommendations of such national institutions, and

ensure the effective and active functioning of the institution.

### *2.6 Measures relating to the prohibition of torture*

States should ratify, and NGOs should promote ratification of, regional and international instruments, including:

- the UNCAT and the OPCAT;
- the International Covenant on Civil and Political Rights and the First Optional Protocol thereto;
- the Rome Statute establishing the International Criminal Court;
- applicable regional instruments such as the Inter-American Convention to Prevent and Punish Torture, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Protocol to the African Charter of Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights.

Ratifications should be made without "reservations" that seek to avoid application of certain provisions, and states should also make any declarations necessary to accept the jurisdiction of associated treaty bodies. For instance, states should make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 of UNCAT and recognizing the compe-

20) For additional detailed guidance see: UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights, UN A/Res/48/134, 20 Dec. 1993; and Inter-American Institute of Human Rights and Association for the Prevention of Torture, Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention (San José/Geneva: IHR/APT, 2004).

tency of the Committee to conduct inquiries pursuant to Article 20 of UNCAT.

A variety of measures can help states to co-operate with international mechanisms. States should issue standing invitations to UN and regional human rights bodies, allowing them to conduct country visits at any time.<sup>21</sup> They should submit periodic reports on time to treaty bodies and should designate a particular department with responsibility for drafting periodical reports. States should move quickly to implement the conclusions and recommendations of treaty bodies and regional or international special mechanisms such as the Special Rapporteurs. States should consult with national, international and regional human rights institutions and organisations when preparing periodic reports.

For their part, NGOs can facilitate co-operation with international mechanisms by submitting information, alternative reports and individual cases to treaty bodies and other relevant mechanisms, by following up on conclusions and recommendations by treaty bodies and other relevant mechanisms, and by making sure all relevant government, NGO and International Organisation documents are publicly available and widely disseminated. The Robben Island and European Guidelines processes described in greater detail below are practical examples of NGO work in this regard.

“Non-refoulement” is the technical term for the obligation on states not to extradite or otherwise transfer a person to a state where he or she faces a risk of torture. States can implement this obligation in part by ensuring that extradition treaties and

procedures prevent return in such circumstances, and by ensuring an effective appeals process against the decision to return, expel or extradite.

Impunity allows perpetrators of torture to escape personal or criminal liability and responsibility under national or international law. The Convention against Torture specifically requires each State Party “to ensure that all acts of torture are offences under its criminal law.”<sup>22</sup> A similar requirement was also included in the UN Declaration against Torture.<sup>23</sup> The requirement to create such offences ensures that the prohibition of torture is expressly and directly enforceable against individuals under domestic laws. The next section of this paper considers the requirement of criminalization in greater detail.

To combat impunity, states should also ensure that national legislation and regulations allow full access to justice for victims of torture, including financial and other forms of compensation, establish effective complaints and investigations procedures, and designate specific government authorities as responsible for such investigations.

### *2.7 Criminalization of torture*

In addition to the Convention against Torture and the UN Declaration against Torture, a number of international instruments require states to ensure that torture is a criminal offence under domestic law.<sup>24</sup> Although some or all conduct amounting to torture may already be covered by other existing criminal offences (such as assault), it is strongly preferable, perhaps mandatory, that each state creates a separately defined

21) As of 14 October 2004, 51 countries had extended a standing invitation to the UN thematic procedures: <http://www.ohchr.org/english/bodies/chr/special/invitations.htm>.

22) UNCAT, n. 4 above, article 4(1).

23) *Ibid.*, article 7.

offence specifically named “torture.”<sup>25</sup> The offence must also cover acts constituting complicity or participation in torture, not solely the individual who directly causes pain or suffering.<sup>26</sup> The seriousness of the offence also requires that a sufficiently severe penalty be applied in all cases of torture.<sup>27</sup>

A number of defences that may normally be applicable in respect of regular criminal offences must be specifically disallowed in respect of torture. “Exceptional circumstances”, also known as “necessity”, can sometimes be invoked in regular criminal proceedings where the impugned act took place in the context of war, protection of the public, or self-defence; however, such situations can provide no defence to a charge of torture,<sup>28</sup> nor can a plea that one was only following the orders of a superior, even under military command.<sup>29</sup>

Under an international legal doctrine known as “universal jurisdiction,” states also have the right to arrest, charge, and prosecute an individual who is accused of torture, even if the act of torture occurred

outside the territorial jurisdiction of the state and even if neither the perpetrator nor his victims are nationals of the state.<sup>30</sup> For instance, in 2004, pursuant to its domestic criminal law implementing UNCAT, the UK prosecuted an Afghani national, Faryadi Sarwar Zardad, for torture he is alleged to have inflicted in Afghanistan on other Afghani nationals.<sup>31</sup> While the jury in the first trial was dismissed after it failed to reach a verdict, a retrial is being sought.<sup>32</sup> The ability to hold torturers criminally responsible throughout the world is intended to establish that there is no “safe haven” to which torturers can flee so as to escape responsibility for their acts.<sup>33</sup>

The creation of a worldwide net of criminal responsibility is an important practical measure for the prevention of torture. Individuals will be less likely to commit acts of torture the greater the certainty that they will ultimately be publicly and severely held responsible for acts of torture. Even if they are acting under authorization or orders by a regime that currently permits torture, a rigorous international and domestic crim-

24) 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, arts. 129 and 130; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, arts. 146-147; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, n. 4 above art. 7; Inter-American Convention to Prevent and Punish Torture, n. 4 above, art. 6.

25) The UN Committee against Torture, for its part, now views this as a requirement, at least for States that are party to the Convention against Torture. See Chris Ingelse, *The UN Committee against Torture: An Assessment* (The Hague, 2001), 222 and 340. In the several years following publication of Ingelse’s book, the Committee has continued to consistently direct states to adopt a separate offence of torture.

26) UNCAT, n. 4 above, article 4(1).

27) *Ibid.*, article 4(2); Ingelse, n. 25 above, 341-342.

28) UNCAT, article 2(2).

29) *Ibid.*, article 2(3).

30) J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, 1988), 131-138.

31) BBC, 18 November 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/4023349.stm](http://news.bbc.co.uk/2/hi/uk_news/4023349.stm).

32) Guardian Online, 26 November 2004, “Retrial for Afghan Warlord” <http://www.guardian.co.uk/afghanistan/story/0,1284,1360178,00.html>.

33) Burgers and Danelius, n. 30 above, 131.

inalization of torture establishes a deterrent through the constant possibility of criminal prosecution by a subsequent regime, or in the course of travelling to another state.

### 3. Improving the prevention of torture in practice

#### 3.1. Introduction

Torture and ill-treatment are still practiced worldwide despite the institutional and normative proliferation of the prohibition against torture, the identification of relevant preventive measures and a strong mobilization of civil society. The following sections of this paper consider strategies for improving the prevention of torture in practice, examining in turn how states and civil society can work together in order to:

- reinforce existing mechanisms;
- better implement international and regional norms;
- emphasize the role of national actors such as NGOs, national institutions and judges and prosecutors; and
- promote the monitoring of places of deprivation of liberty by international, regional and domestic mechanisms.

#### 3.2 Reinforcing existing mechanisms

When, some twenty years ago the Special Rapporteur on torture, the Committee against Torture and the CPT started their activities, the cooperation of governments was not always forthcoming. Thus, the visit to Turkey undertaken in 1992 by the Com-

mittee against Torture faced difficulties in several respects.<sup>34</sup> It had been difficult at the outset to get the agreement of the Turkish government to allow the visit.<sup>35</sup> Once in the country, members of the Committee encountered a number of difficulties, including denial of access to certain places of detention.<sup>36</sup> In the same manner, on several occasions in the early years of its activities, the CPT had been confronted with the problem of police or penitentiary officers refusing to grant access to places of detention under their control.

Today it is rare to see a government refusing outright to cooperate with these mechanisms. For instance, states almost always provide their consent to the publication of CPT visit reports, which would otherwise remain confidential, though the European Convention does not require that such consent be given.<sup>37</sup> While the shift in attitudes is to be welcomed and constitutes a positive step towards the prevention of torture and ill-treatment, the practical effect of international and regional mechanisms cannot be assessed solely on the basis of whether a spirit of goodwill prevails during presentation of a report or hosting of a visit. Such goodwill and openness have little actual impact if they are not linked with effective and efficient implementation at the national level of the recommendations of international mechanisms.

Consequently, international institutions are beginning to establish follow-up with states after recommendations have been

34) Activities of the Committee against Torture pursuant to article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Turkey (15 November 1993), A/48/44/Add.1

35) Ibid. paragraphs 6 to 12.

36) Ibid. paragraph 15.

37) However, regarding especially the CPT, governments decide when they want that publication to be made available to the general public.

made. Thus, the Human Rights Committee has created a working group on follow-up that is empowered to ask governments about measures they have taken to implement their recommendations. In a similar manner, the Committee against Torture may ask a government to send it information related to the implementation of the Committee's recommendations, six or twelve months after the recommendations were made. The Special Rapporteur on Torture also established a process to monitor implementation of recommendations following his visits.<sup>38</sup>

It is important that such measures not remain restricted to an exchange of information between the relevant body and the government. The appropriate focus should be at the national level and include information from the civil society within the state. A good example of this was achieved by NGOs in 2003, reporting on the follow up to the visit to Brazil made by the Special Rapporteur on Torture in 2001.

National, regional and international NGOs met to discuss and adopt a report that provided information on what Brazil had done in response to the Special Rapporteur's recommendations. The NGO report was submitted on a confidential basis to the Special Rapporteur. The Special Rapporteur then invited a response from Brazil. This process in turn led to the publication

by the Special Rapporteur of a specific "follow-up" addendum to his next Report. The addendum described the information supplied by the government and NGOs describing the specific steps Brazil had taken, or had failed to take, to implement each of the Special Rapporteur's recommendations.<sup>39</sup> For instance, Brazil had promulgated a National Plan to Fight Torture, which included a National Campaign against Torture.<sup>40</sup> The Campaign involved the creation of a national hotline to denounce incidents of torture and a national network for collecting and following cases, training of the national network staff, and dissemination of information about the Campaign to raise awareness among the general public. Brazil had reportedly also established a mobile visiting organization to visit places of detention where torture had been alleged, though it did not appear that it had actually carried out any visits.<sup>41</sup> A variety of other recommended measures did not appear to have been fully implemented.<sup>42</sup>

The Geneva-based Association for the Prevention of Torture (APT), together with the national NGOs, ultimately published the NGO follow-up report, releasing it simultaneously in Brazil and at the session of the UN Commission on Human Rights in Geneva.<sup>43</sup> The Brazilian Minister for Human Rights attended the Commission

38) "Guidelines for the Submission of Information on the Follow-up to the Country Visits of the Special Rapporteur on Torture (08/07/04)", <http://www.ohchr.org/english/issues/torture/rappporteur/docs/guideline.doc>.

39) Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum: Follow-up to the recommendations made by the Special Rapporteur, Visits to Azerbaijan, Brazil, Chile, Mexico, Romania, Turkey and Uzbekistan, UN Doc. E/CN.4/2004/56/Add.3 (13 February 2004).

40) Ibid at paragraph 23.

41) Ibid. at paragraph 25.

42) Report, n. 39 above.

43) Association for the Prevention of Torture (APT), Centro pela Justiça e o Direito Internacional (CEJIL), Grupo Tortura Nunca Mais do Rio de Janeiro (GTNN-RJ), Tortura no Brasil: Implementação das Recomendações do Relator da ONU (Rio de Janeiro: CEJIL, 2004).

and declared his intention to pursue a dialogue with the Rapporteur towards further implementation of the 2001 Recommendations. The opportunity for NGOs and the Special Rapporteur to follow-up with the state in this fashion creates additional pressure on the state to take concrete and effective measures towards the prevention of torture.

Another example is the work of NGOs in Moldova to promote implementation of recommendations of the European Committee for the Prevention of Torture (CPT). In May 2003, the APT organized a workshop meeting in Moldova to identify concrete measures that could be taken by the authorities to address the recommendations made by the CPT during its three visits to Moldova in the period from 1998 to 2001. Before the meeting the NGOs prepared a detailed analysis of the conditions of detention in the country. The meeting was attended by international human rights academics and practitioners and supported by key domestic actors including civil society, the Ministry of Justice and the Department of Penitentiary Institutions.

The workshop discussion resulted in a written "Plan of Action to Improve Prison Conditions in Moldova" which was agreed upon with all of the actors, including both state authorities and NGOs. The Plan of Action was sent to a range of domestic and international actors, including the Moldovan authorities, civil society, foreign embassies, international donors, international human rights institutes and intergovernmental bodies such as the Council of Europe and the European Union. In Government Decision No. 1624 of 31 December 2003, the Moldovan authorities officially adopted the Plan of Action, formally committing the government to specific steps to reduce overcrowding, enhance the status of prison

staff, tackle inter-prisoner violence, and to improve the nutrition and healthcare of detainees.

Throughout 2004 the APT continued to work with the Moldovan authorities and civil society to identify various means to facilitate the implementation of the Plan of Action. An important aspect of the work was to match the needs of the Moldovan penal system with external sources of funding and other technical assistance. During follow-up visits by the APT, meetings were arranged with various potential international donors in order to introduce them to the Plan of Action and the various initiatives being undertaken on the ground in Moldova to implement it. International representatives took part in visits to facilities where they saw first-hand the poor conditions of detention. The APT continued to work closely with the Department of Penitentiary Institutions on various aspects of the government's overall long-term penal reform process, the ten-year "Plan of Measures for the Reform of the Penitentiary System 2004-2013."

The APT delegation also held in-depth discussions with representatives of civil society active in the fields of torture prevention and penal reform. In particular, the APT cooperated with the Coalition for the Support of Penitentiary Reform (CORSIP), four non-governmental organizations with proven track records in torture prevention and penal reform. Each NGO drafted funding proposals for one or more aspects of the Plan of Action for presentation to international donors, and will assist in implementing those aspects of the Plan. Examples include:

- development of enhanced training materials for prison managers and rank-and-file prison personnel, and the implementation of such training programmes;

- provision of activities for prisoners in the areas of education, sport and leisure;
- promotion of alternatives to detention and the prevention of recidivism through the improved social reintegration of former prisoners; and
- implementation of various harm reduction activities aimed at combating HIV/AIDS in detention facilities.

The Brazil and Moldova processes are good examples of how existing mechanisms, such as the CPT, can be made more effective through concrete follow-up procedures involving cooperation between state and non-state, international and local actors. Further, such follow-up actions should be systematized both by NGOs and by UN country teams, as part of the “Plan of Action” for Action 2 of the UN Reform programme on mainstreaming human rights.<sup>44</sup>

### 3.3 Towards a better implementation of existing norms

Recent years have seen a shift in strategy and techniques for the prevention of torture. An earlier phase focussed primarily on establishing the universal, non-derogable and fundamental nature of the prohibition against torture, under both treaty-based and customary international law, and identifying and legislating international standards to that end. While that project is by no means complete, there has been general recognition that action must also be taken now to advance the implementation of the international stand-

ards. This section describes several processes through which implementation measures were developed in regional contexts, and then identifies certain common characteristics of the techniques. The two processes selected for examination here are:

- the African Commission’s Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment in Africa (Robben Island Guidelines);<sup>45</sup>
- the European Union’s Guidelines on Torture.<sup>46</sup>

#### 3.3.1 Robben Island Guidelines

The Robben Island Guidelines were formulated at the initiative of the Association for the Prevention of Torture during a workshop organized jointly by the APT and the African Commission on Human and Peoples’ Rights (ACHPR) on Robben Island, South Africa, in February 2002. The Guidelines were subsequently adopted by the ACHPR during its 32nd session in October 2002. In its resolution adopting the Guidelines, the ACHPR called for the establishment of a Follow Up Committee including the ACHPR, the APT and such prominent African Experts as the African Commission may determine, with the mandate to promote the adoption and implementation of the Guidelines.

In the African Commission’s 2003–2004 Activity Report, which included a report on its 2002 fact-finding mission to Zimbabwe, the ACHPR specifically referred to an

44) UN Secretary General, “Strengthening human rights-related United Nations action at country level: National human rights promotion and protection systems, Plan of Action” at <http://www.un.org/events/action2/action2plan.pdf> <accessed 12 December 2005>.

45) Guidelines and Measures for the Prohibition

and Prevention of Torture and Cruel, Inhuman or Degrading Treatment in Africa, adopted by the ACHPR during its 32nd session in October 2002.

46) Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, Adopted by General Affairs Council - Luxembourg 09/04/01.

on-going practice of torture and ill-treatment in Zimbabwe and recommended that Zimbabwe consider and implement the Robben Island Guidelines.<sup>47</sup> The fact that the ACHPR has taken “ownership” of the Guidelines in their development and application helps to reinforce their acceptance by African States as an “African solution” implementation instrument. Indeed, the consideration of the ACHPR reports by the African Union (AU) Council of Ministers in July 2004 attracted worldwide media interest. While Zimbabwe subsequently succeeded in delaying substantive consideration or publication of the critical ACHPR report on human rights in Zimbabwe, they could not dismiss the report as European propaganda and imperialist interference in African affairs.<sup>48</sup> The consideration and adoption of the ACHPR reports by the Council of Ministers, comprised of foreign ministers of the 63 member States of the African Union, illustrates the wide acceptance by AU member States of the legitimacy of ACHPR’s concerns and that the Robben Island Guidelines are an appropriate African implementation mechanism for regional and international standards for the prevention of torture.

### 3.3.2 European Union Guidelines on Torture

The APT is making use of similar techniques in relation to implementation of the EU Guidelines on Torture.<sup>49</sup> The EU Guidelines were adopted by the EU on 9 April 2001, and are intended “to provide

the EU with an operational tool to be used in contacts with third countries at all levels as well as in multilateral human rights fora in order to support and strengthen on-going efforts to prevent and eradicate torture and ill-treatment in all parts of the world.” The Council’s Political and Security Committee adopted a working paper in December 2002 proposing the introduction of systematic reporting by EU Heads of Mission on possible patterns of torture in third countries. This reporting would, it was contemplated, help the EU to determine appropriate action to combat torture in a particular country on the basis of the guidelines.

The EU Guidelines make general provision for a three-tiered process of periodic monitoring, analysis and reporting by EU Heads of Mission, assessment by the Council Working Group on Human Rights (CO-HOM), and consequent EU “actions” in its relations with third countries. The forms of action contemplated include political dialogue, demarches and public statements urging relevant third countries to undertake effective measures against torture and ill-treatment and requests for information, as well as bilateral and multilateral co-operation (though no specific forms of co-operation are enumerated or provided for illustration).

The Guidelines state that the EU will urge third countries to take steps to, among other things, prohibit and condemn torture and ill-treatment (including criminalization), prohibit production and trade of torture

47) 17th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Doc. EX.CL/109 (V) as described in “Executive Summary of the Report of the Fact-finding Mission to Zimbabwe” (Posted on the web on 12th July 2004), <http://www.zimbabwedemocracytrust.org/outcomes/details?contentId=1941>.

48) Decisions of the Assembly of the African Union, Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Third Ordinary Session, 6–8 July 2004, Addis Ababa, Ethiopia, Assembly/AU/Dec.49(III).

49) Guidelines, n. 46 above.

equipment, adhere to international norms and procedures, adopt and implement safeguards and procedures relating to places of detention, combat impunity, establish domestic complaints and reports processes, provide reparation and rehabilitation for victims, allow visits by qualified representatives of civil society, establish national institutions, provide effective training, support the work and independence of medical professionals, and consistently conduct autopsies.

In a submission to the EU Forum on Human Rights in late December 2002,<sup>50</sup> the APT noted that the Guidelines were not being implemented by most EU diplomats in the field, partly due to a lack of awareness, but also due to uncertainty as to how to incorporate the Guidelines into their method of work with national authorities. The APT thus offered suggestions as to how the Guidelines could be used in practice.

The APT proposed that effective implementation of the Guidelines be part of a process composed of several stages: an initial report providing an overview of the situation in the particular country with respect to torture and ill-treatment, followed by a setting of priorities in the application of the Guidelines to the particular country, identification of actions to be taken by the Heads of Mission, and finally follow-up at the EU level. Further, as the Guidelines cover a wide range of measures but at a fairly general level, the APT suggested a series of more specific questions and actions for EU diplomats to consider in implement-

ing the Guidelines. As with the Robben Island Guidelines, the APT provided a series of detailed questions EU diplomats could ask themselves with respect to the particular state involved, so as to evaluate the existing situation before deciding what actions to take. The APT is currently providing further suggestions as to actions EU actors might take that would be particularly appropriate in relation to each aspect of implementation of the EU Guidelines.

#### *3.4 Emphasizing the prevention of torture at the national level*

At the national level a variety of national actors are already involved in the prevention of torture and ill-treatment in practice. Their efforts should be strengthened.

##### 3.4.1 NGOs

In some countries non-governmental organizations (NGOs) have extensive experience in monitoring places of detention. For instance, in Morocco the Observatoire Marocain des Prisons (OMP – Moroccan Prison Monitor), an independent NGO, visits prisons with the mandate of monitoring compliance with both national and international standards.<sup>51</sup> The OMP inspects facilities and interviews officials, prisoners and prisoners' families, then addresses its concerns to both local officials and the government.<sup>52</sup>

In Nepal, prison visits are carried out by the independent Center for the Victims of Torture Nepal (CVICT).<sup>53</sup> Their visits led directly to the transfer of severely men-

50) Association for the Prevention of Torture "Implementation of the EU Guidelines on Torture", Submission to the EU Forum on Human Rights, Copenhagen, 20-21 December 2002, <http://www.apr.ch/europe/euforum.pdf>.

51) Amnesty International, "Preventing Torture at Home – A Guide to the Establishment of Na-

tional Preventive Mechanisms", AI Index: IOR 51/004/2004 (1 May 2004).

52) Ibid.

53) See B. Sharma, M. Van Ommeren, "Preventing Torture and Rehabilitating Survivors in Nepal", *Transcultural Psychiatry* (March, 1998).

tally ill prisoners from a prison where they received no care to another facility where a psychiatrist visits monthly to provide and monitor medication.<sup>54</sup> Based on a number of years of experience the CVICT decided in 2004 to expand its visit programme to cover a wider range of detention facilities.<sup>55</sup> Examples of similar work include the Georgia Young Lawyers Association,<sup>56</sup> the Peace and Justice Service (SERPAJ) of Uruguay,<sup>57</sup> the Bulgarian Helsinki Committee,<sup>58</sup> and the Independent Medico Legal Unit (IMLU) in Kenya.<sup>59</sup>

The difficulties experienced by local NGOs in carrying out visits and practical solutions to those problems are illustrated in context in a Report published by the Association for the Prevention of Torture as a follow-up to a regional seminar in the Caucasus.<sup>60</sup> In the Report, the experience of an Azerbaijan NGO, the Centre of Programmes for Development "EL", in monitoring prisoners right to health is presented as a case study. Among the issues considered are the methodology for selection of sites to visit, qualifications and preparation of the visiting team members, the specific methods for carrying out visits (visits with individuals as well as general inspections, receipt of written complaints, contacts with prison staff, etc.), design and use of questionnaires for prisoners

and prison personnel, video and audio interviews with prisoners and staff, comparison of collected information with official statistics, and the forms of reporting and follow-up.

Further, NGOs can promote best practices and methodology on visiting places of detention. For instance, the Association for the Prevention of Torture has published *Monitoring Places of Detention: A Practical Guide*<sup>61</sup> and, together with the Inter-American Institute of Human Rights, the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention.<sup>62</sup>

NGOs can lobby for necessary changes to legislation, monitor implementation, and establish or assist with a system of monitoring places of detention. NGOs are also able to raise awareness among the public in general, and legal and medical professionals in particular, of the rights of persons deprived of their liberty. NGOs may also assist in translating the rights of persons deprived of liberty into relevant languages.

For instance, the Human Rights Centre at the University of Essex, funded by the United Kingdom Foreign and Commonwealth Office, has produced several human rights education handbooks to provide practical resources for judges, lawyers and

54) *Ibid.*

55) [www.cvict.org.np/legal.html](http://www.cvict.org.np/legal.html).

56) [www.gyla.ge](http://www.gyla.ge).

57) <http://www.serpaj.org.uy/>.

58) [http://www.bghelsinki.org/index\\_en.html](http://www.bghelsinki.org/index_en.html).

59) <http://www.imlu.org/>.

60) Association for the Prevention of Torture, *Prevention of Torture in the Caucasus: Role and*

*Experience of National NGOs* (Geneva: Association for the Prevention of torture, 2003), available at <http://www.apt.ch/pub/library/Caucasus.pdf>.

61) *Monitoring Places of Detention: A Practical Guide* (Geneva: Association for the Prevention of Torture, 2004).

62) *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (San José/Geneva: IIHR/APT, 2004).

human rights activists to prevent torture.<sup>63</sup> One of the handbooks has been translated into more than 20 languages and has been extensively distributed and used by NGOs and other actors worldwide. The Human Rights Centre is also developing a handbook aimed specifically at health care professionals, a project being carried out in close collaboration with the Medical Foundation for the Care of Victims of Torture.<sup>64</sup> Another example is Amnesty International's publication *Combating Torture: a manual for action*.<sup>65</sup>

NGOs can also lobby for the ratification of OPCAT and for its full implementation. The persistent targeted efforts of the Association for the Prevention of Torture in promoting, advocating, and lobbying individual states to ratify OPCAT, provides a practical illustration. The APT actively lobbied almost all of the States that went on to become the first States Parties and signatories to the OPCAT.

In addition to lobbying for and raising awareness of the above measures, NGOs can themselves facilitate access by persons deprived of liberty to legal advice and practical assistance. For instance, the Georgia Young Lawyers Association<sup>66</sup> provides free legal assistance to persons deprived of their liberty.

NGOs and other members of Civil Society can contribute to the establishment and maintenance of prison conditions that comply with international norms in a variety of ways.

A key measure is to establish programmes to carry out visits to detainees and prisoners and, where necessary, to supply their needs. For instance, during prison visits the independent Center for the Victims of Torture Nepal provides free mobile medical services to prisoners.<sup>67</sup> NGOs can also raise awareness among the general population about the situation and needs of prison populations and lobby relevant authorities (prison officials, government officials, parliamentarians) for improvement of prison conditions.

#### 3.4.2 National institutions

The National Human Rights Commission in India has statutory authority to visit and inspect places of detention, although it must give advance notice. The Commission directed that cameras be installed in police stations to monitor and deter police brutality.<sup>68</sup> At least in some urban areas, such cameras have been installed, though their long-term effect in preventing torture remains to be seen.<sup>69</sup> The Commission has also required, since 1993, that it be informed within 24 hours of the death of any person while in police, judicial or prison custody, and that it receive post-mortem reports, magisterial inquest reports and videography reports of the post-mortem within two months in every case.<sup>70</sup> In given cases the Commission also directs the government to take action against police officers that perpetrate torture.

63) Camille Giffard, *The Torture Reporting Handbook* (Colchester: University of Essex Human Rights Centre, 2000) and at <http://www.essex.ac.uk/torturehandbook/>; Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Colchester: University of Essex Human Rights Centre, 2003), <http://www.essex.ac.uk/combatingtorturehandbook/>.

64) [http://www2.essex.ac.uk/human\\_rights\\_centre/research/projects/med.shtm](http://www2.essex.ac.uk/human_rights_centre/research/projects/med.shtm).

65) *Combating Torture: a manual for action* (London: Amnesty International, 2003).

66) [www.gyla.ge](http://www.gyla.ge).

67) [www.cvict.org.np](http://www.cvict.org.np).

68) R. Lakshmi, n. 17 above.

69) *Ibid.*

The Constitution of the Republic of Uganda establishes a Human Rights Commission and specifically provides for visits to jails, prisons, and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and making recommendations.<sup>71</sup> The Commission carries out visits without prior notice to the government or prison officials, and interviews prisoners in private; it seeks to determine, among other things, whether torture is occurring.<sup>72</sup> By addressing its concerns to authorities and monitoring implementation after the visit, the Commission has improved the conditions of detention.<sup>73</sup> South Africa<sup>74</sup> and Fiji<sup>75</sup> also provide their national Human Rights Commissions with similar powers to visit and monitor places of detention. In South Africa the Commission has not focussed on torture as a specific issue, although it has raised concerns about assaults on prisoners as a general matter.<sup>76</sup>

In Argentina, the Procurador Penitenciario (Ombudsman of prisons) carries out weekly visits and interviews with prisoners in private, without prior notice, in order to fulfil his mandate of protecting prisoners' rights including the right to be free from mistreatment.<sup>77</sup> A similar role is played by the Om-

budsman in Poland<sup>78</sup> and the Chancellor of Justice in Estonia.<sup>79</sup> In other countries a specialized ombudsman for prisons may have the right to visit places of detention and interview prisoners, but only after providing advance notice to authorities.<sup>80</sup>

### 3.4.3 Judges and lawyers

Judges, prosecutors and defence lawyers can also play an active and practical role in the prevention of torture. Though judges and prosecutors may not traditionally have been considered as playing a proactive role in the prevention of torture, they are uniquely positioned to play a preventive role if sensitised and educated with respect to international standards and practical indicators of torture and ill-treatment.

The judge may be the only supervising authority in a position to ascertain whether a detainee's rights have been protected. Thus, when detainees are brought before them, judges can do much more than simply ascertain whether the detention is *prima facie* lawful under national laws. Prosecutors, on the other hand, are often actively involved in the process of collection of evidence, and may be present at interrogations of detainees. Both the prosecutor and judge will be

70) See <http://nhrc.nic.in/sec-1.pdf> and letter addressed to the Home Secretaries of all States/ Union Territories, all Directors General of Prisons and all Directors General of Police by Shri N. Gopalaswami, Secretary General of the Commission, on 5 January 2001, <http://nhrc.nic.in/dispar-chive.asp?fno=157>.

71) The Constitution Of The Republic Of Uganda 1995, article 52(1)(b).

72) Amnesty International, "Preventing Torture at Home", n. 51 above.

73) Ibid.

74) [www.sahrc.org.za](http://www.sahrc.org.za).

75) [www.humanrights.org.fj](http://www.humanrights.org.fj).

76) See Report of The National Prisons Project of the South African Human Rights Commission (1998). [http://www.sahrc.org.za/prisons\\_report.pdf](http://www.sahrc.org.za/prisons_report.pdf).

77) See Procuracion Penitenciaria, Ley 25.875 (20 January 2004), Articles 15-21, <http://infoleg.mecon.gov.ar/txtnorma/92063.htm>.

78) Act of 15 July 1987 on the Commissioner for Civil Rights Protection, Article 13, <http://www.brpo.gov.pl/index.php?e=1&poz=360>.

79) <http://www.oiguskantsler.ee/>.

80) E.g., United Kingdom, <http://www.ppo.gov.uk/>.

concerned with the admissibility of evidence and, thus, both should actively satisfy themselves that all evidence has been collected without torture or other ill-treatment. Judges and prosecutors must both be sensitive to signs that witnesses have been mistreated and be prepared proactively to initiate investigations of any suspicions.

Information about the duties and roles of judges and prosecutors in relation to torture prevention, and detailed practice advice, is provided in a recent publication of the University of Essex Human Rights Centre, *Combating Torture: A Manual for Judges and Prosecutors*.<sup>81</sup>

#### 3.4.4 Police training

The Association for the Prevention of Torture has focussed its work in Africa, and to some extent in Europe, on developing codes of conduct for the police as potential tools to prevent torture and ill-treatment. The APT is co-operating with the SARPCCO (Southern African Regional Police Chiefs Co-operation Organisation) on the promotion and implementation of its regional Code of Conduct for Police Officials.<sup>82</sup> The Code was drafted during a workshop jointly organised by the APT and SARPCCO in Harare, Zimbabwe, in July 2001. The SARPCCO Police Chiefs then adopted the Code, becoming the first regional police organisation to apply a uniform Code of Conduct for its member states. The programme has attracted international attention: Interpol has expressed

interest in duplicating this model in other regions.

The APT also offers assistance to national police services to train and inform their officers and thus commence the process of using and applying the Code. To this end, from 17 to 25 November 2003, the APT and the Botswana Police Service, jointly organised three workshops on the implementation of the Code. The workshops were intended to:

- better integrate human rights into police practice;
- improve the capacity of Botswana Police Officers in human rights and policing by ensuring they know and use the SARPCCO Code of Conduct;
- study, test and consider the Code and to come up with strategies for its implementation in the day-to-day duties of the police;
- make the officers aware that in protecting human rights, the police are actually facilitating effective and fair enforcement of the law, not impeding law enforcement;
- promote the concept that in protecting human rights, the police will gain respect, efficiency, professionalism and effectiveness; and
- emphasise the importance of working with the community and not against it, thereby enhancing the social role of the police.

The APT provided technical and financial support for the three workshops. It provided two experienced police trainers (from South Africa and the U.K.) who conducted the workshops. The APT also sponsored the publication of a pocket-size booklet containing the SARPCCO Code of Conduct and the Botswana Police Mission of Statement and Values, which was distributed to the

<sup>81</sup> *Combating Torture: A Manual for Judges and Prosecutors*, n. 63 above.

<sup>82</sup> Harare Resolution on the SARPCCO Code of Conduct for Police Officials, Southern African Regional Police Chiefs Co-operation Organization 6th Annual General Meeting, 27-31 August 2001, Mauritius.

attendees of the three workshops. The practical booklet will also be disseminated to each Botswana police officer. The Mauritius Police have now invited the APT to assist them to conduct a similar training exercise in 2005.

Similarly, the International Rehabilitation Council for Torture Victims undertook a project in collaboration with Ukraine from 2001 to 2003, training Ukrainian law-enforcement personnel, Ombudsman, and NGOs on standards and practices for the prevention of torture.

### *3.5 International monitoring of places of detention*

#### 3.5.1 History of the monitoring concept

The 1949 Geneva Conventions give the ICRC the right to visit places where prisoners of war are detained pursuant to an international armed conflict.<sup>83</sup> The ICRC also has experience in carrying out such visits in situations of internal armed conflict or other civil disruption. These visits have demonstrated their ability to prevent torture and ill-treatment of prisoners of war in international armed conflicts, and other detainees in non-international conflicts.

It was explicitly on the basis of this experience that Jean-Jacques Gautier, a Swiss banker and founder of the Association for the Prevention of Torture, decided to promote the idea of visits to places of detention as a tool to prevent torture and ill-treatment for all detained persons. Considering the efficiency of such preventive approach and the conventional limits of the ICRC, Jean-Jacques Gautier proposed in the late 1970's to establish an international visiting mechanism that would be empowered to prevent torture and ill-treatment in situations not covered by international humanitarian law. A subsequent campaign in support of his idea resulted in the successful adoption of

the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment in 1987, and the adoption by the UN General Assembly of the Optional Protocol to the UN Convention against Torture on 18th December 2002.

#### 3.5.2 CPT

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is established by article 1 of the European Convention with a mandate to "by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Established in 1989, the CPT is now competent to undertake regular, follow-up and ad hoc visits within the 45 States Parties to the Council of Europe. In 2004 the CPT undertook 169 days of visits, representing a direct force for preventing torture and ill-treatment in the institutions it has visited. The CPT has also played a major role through its annual reports, in which it compiles its findings so as to aid the development of general standards related to the deprivation of liberty.<sup>84</sup>

The CPT primarily makes visits to States Parties. Each country visit lasts on average 2 weeks and allows the Committee to visit several places of detention. States are visited on a periodic basis, on average once every five years, though the frequency may vary with the size of the state. The Committee can also revisit places visited on a previous occasion,

83) See also Article 5-2-d of the Statutes of the International Committee of the Red Cross, International Review of the Red Cross no. 324, p. 537-543.

84) <http://www.cpt.coe.int/en/docsstandards.htm>.

in order to verify that its recommendations have been implemented. At the end of the year the Committee establishes a list of states that will be visited in the coming year. For example, on November 30, 2004, the CPT announced that it would visit Albania, Belgium, Germany, Greece, Hungary, Norway, Russian Federation, San Marino, Slovakia and Ukraine during 2005.

However, the CPT can also decide at any time to visit states not on the list. The Committee may receive information that the situation in a particular prison is urgently poor, that a specific person is detained and that people are concerned about his or her situation, or that the general situation in a region requires its visit. For instance the CPT made several unscheduled visits in Turkey during a period of hunger strikes and riots in some specific prisons. On another occasion, on learning that Spanish authorities had taken a separatist into custody, the CPT immediately carried out an unscheduled visit to ensure that he was treated with respect for his human dignity. Exceptionally among international human rights mechanisms, the Committee has also been able to visit Chechnya in recent years to assess detentions arising from the conflict between local paramilitaries and federal Russian forces.

A few days before each periodic visit, the CPT provides the state with a list indicating the specific places of detention that it intends to visit. However, this list is only an indication; the Committee can and does visit other places of detention that do not appear on the list. When the Committee arrives in the country it meets with relevant government authorities, such as the Ministry of Justice or Ministry of the Interior. It also meets with NGOs and representatives of civil society in order to gather an overview of the situation in the country in general

and of people deprived of their liberty in particular. After these initial consultations, the delegation of the Committee often divides itself into sub-groups in order to visit a greater number of places of detention. Members usually go in pairs, accompanied by interpreters, members of the secretariat of the Committee and external experts who are retained to provide the delegation with specific expertise.

According to the European Convention, each State party must guarantee the delegation unlimited access to all places of detention, and fully cooperate in a variety of other ways:

A Party shall provide the Committee with the following facilities to carry out its tasks:

- a) access to its territory and the right to travel without restriction;
- b) full information on the places where persons deprived of their liberty are being held;
- c) unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;
- d) other information available to the Party that is necessary for the Committee to carry out its task.<sup>85</sup>

The Convention also provides that within each place of detention the Committee has the right to “interview in private persons deprived of their liberty” and “may communicate freely with any person whom it believes can supply relevant information.”<sup>86</sup>

85) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment n. 4 above, article 8.2.

86) Ibid. article 8.3.

At the end of the visit the Committee usually meets with the authorities again in order to present its general views on the situation of persons deprived of liberty in the country. It can also, if need be, draw the attention of the authorities to the situation of a particular place of detention about which the Committee is very concerned, and invite the authorities to take immediate measures.

The Committee then drafts a report on its visit. A copy of the report is sent to the state, normally six months after the visit. The state authorities usually draft a “response” in which they describe how they intend to implement the recommendations included in the Committee’s report. The state response may also identify areas of disagreement with the Committee’s assessment of the situation.

It is on the basis of this exchange – visit, report, response – that co-operation is established with a view to improving the situation. In some cases, however, the co-operative process cannot be established, or breaks down, due to an unwillingness on the part of the state to give serious attention to the Committee’s views and recommendations; in such cases the Committee can decide to make a public statement.

The tools that the Convention provides the Committee to deal with uncooperative states are generally persuasive rather than coercive. Within the framework of the Convention, public statements are a form of sanction through which the Committee can seek to harness public pressure by publicly condemning any lack of co-operation on the part of the authorities. A public statement may be triggered by non-cooperation during or after a visit.

First, the Committee may encounter obstacles during a visit: difficulties in obtaining information, or limitations on access to places or people. A government may not provide enough cars for the delegation, so

that the delegation logistically cannot get to a specific place of detention. A government official might formally refuse to provide access to a place of detention. In such situations the delegation, during the visit, first privately complains to the authorities; if the situation does not improve it may decide to make a public statement.

Second, a lack of co-operation can occur after the visit because the government does not answer properly to the Committee’s report, or does not take measures to implement its recommendations. Again the Committee can decide to make a public statement in an effort to encourage positive action. To date the Committee has issued 4 public statements: 2 regarding Turkey<sup>87</sup> and 2 regarding the Russian Federation, specifically concerning the situation in Chechnya.<sup>88</sup>

In the course of its visiting activities the CPT has also developed general standards regarding the deprivation of liberty. Initially the objective of these standards was primarily internal: delegations to different countries were composed of different combinations of Committee members, so it was necessary to find a way to avoid inconsistencies in the findings and recommendations generated by each group. However these standards are now known and used throughout the Council of Europe, including by the European Court on Human Rights and other actors involved in the prevention of torture and ill-treatment.<sup>89</sup> The standards represent a very useful reference tool on a

87) CPT/Inf (96) 34 (6 December 1996); and CPT/Inf (93) 1 (15 December 1992).

88) CPT/Inf (2003) 33 (10 July 2003); and CPT/Inf (2001) 15 (10 July 2001).

89) See for instance *Kalashnikov v. Russia*, (47095/99) [2002] ECHR 591 (15 July 2002).

wide range of issues: police custody, imprisonment, training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens legislation, involuntary placement in psychiatric establishments, juveniles deprived of their liberty, women deprived of their liberty, training of law enforcement officials and combating impunity.<sup>90</sup>

The work of the CPT has contributed to reforms and concrete improvements in a number of states. Turkey, for example, has been visited by the CPT on numerous occasions since 1990. In an 18 June 2004 Report, the CPT noted that the Turkish Government had recently “engaged in a vast programme of legislative reform” and that this reform “included numerous positive changes in areas related to the CPT’s mandate.”<sup>91</sup> These reforms implemented a number of CPT recommendations and included:

- reductions to the maximum period of police custody in respect of certain offences;
- additional requirements that a judge hear from the detainee before deciding whether to extend police custody;
- extending the right of the detainee to have the government notify a relative or other designated person of the fact of detention;
- a formal right of immediate access to a lawyer for all detained persons regardless of what their suspected offence were;

- the ability for prosecutors to instigate proceedings under the torture and ill-treatment offence provisions of the Criminal Code without having to seek authorisation from an administrative authority. Procedural amendments have been adopted to ensure the speedy investigation and prosecution of such offences, and sentences imposed under those Articles can no longer be converted into a fine or suspended.<sup>92</sup>

The CPT found that, with some important exceptions, these reforms were generally being respected in practice by 2004,<sup>93</sup> and was able to conclude that:

the legislative and regulatory framework necessary to combat effectively torture and other forms of ill-treatment by law enforcement officials has been put in place; the challenge now is to make sure that all of the provisions concerned are given full effect in practice.<sup>94</sup>

Further, as regards the factual situation prevailing in Turkey by 2003, the CPT stated that “the Government’s message of ‘zero tolerance’ of torture and ill-treatment has clearly been received, and efforts to comply with that message were evident, including a recognized ‘sharp reduction’ in the incidence of ‘heavy torture.’”<sup>95</sup> As regards conditions of detention, the CPT stated in 2003 that

90) CPT/Inf/E (2002) 1 - Rev. 2004.

91) CPT, Report to the Turkish Government on the Visit to Turkey from 7 to 15 September 2003 (18 June 2004), CPT/Inf (2004) 16 (“2004 Turkey Report”), paragraph 6.

92) Ibid. and CPT, Report to the Turkish Government on the Visit to Turkey from 21 to 27 March and 1 to 6 September 2002 (25 June 2003), CPT/Inf (2003) 28 (“2003 Turkey Report”), paragraph 28.

93) 2004 Turkey Report, n. 91 above, paragraphs 14 to 27.

94) Ibid., paragraph 7.

95) Ibid., paragraph 8.

96) Ibid., paragraph 35.

“progress continues to be made towards improving conditions of detention in law enforcement establishments” and that “in practically all of the establishments visited, material conditions of detention were on the whole adequate for the periods of custody involved.”<sup>96</sup> However, the CPT also identified, in respect to virtually all areas of its mandate, areas where considerable improvement on the part of Turkey is still required.

### 3.5.3. OPCAT

On the basis of the experience of the European CPT, in 1991 the UN Commission on Human Rights created a Working Group to establish an Optional Protocol to the Convention against Torture that would incorporate a visiting mechanism similar to the CPT but operating at the universal global level. After a decade of negotiations, on 18 December 2002 the UN General Assembly adopted the OPCAT by 127 votes in favour, 42 abstentions and four against. The protocol will actually enter into force after twenty states have ratified. The provisions of the Protocol will only apply to states that are already party to the Convention against Torture, and choose additionally to ratify or accede to the Protocol. One innovative feature of the OPCAT is that it not only requires states to allow an international visiting mechanism (the Subcommittee on Prevention) unrestricted access to places of detention, it also requires states to establish independent visiting mechanisms at the *national* level with similarly unrestricted powers (National Preventive Mechanisms).<sup>97</sup>

#### 3.5.3.1 National preventive mechanisms

Article 3 of the OPCAT requires each State Party to “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.” These national institutions are known as National Preventive Mechanisms (NPMs). A state may have one or several NPMs designated under OPCAT, but every place of detention in the state must be subject to the jurisdiction of one or more NPMs. For instance, in a federal state, the NPM requirement may be met by designating a combination of regional and federal mechanisms (such as where the state constitution internally divides jurisdiction over places of detention),<sup>98</sup> but the failure of even one region or institution to be subject to visiting by some designated mechanism would constitute a violation of OPCAT.

The State Party must guarantee the independence of its NPM(s) and ensure that NPM members have appropriate expertise. At a minimum, the state must empower its NPM(s) to regularly examine the treatment of persons deprived of liberty, in order to strengthen protections against torture and other ill-treatment, to make recommendations to the relevant authorities, and to provide advice on existing or proposed legislation.<sup>99</sup> The state must also ensure that the NPM has the powers necessary to effectively carry out its mandate. In particular, in order to enable the national preventive mechanisms to fulfil their mandate, states must give the NPMs:

- unrestricted access to information concerning the persons deprived of their liberty, and the places where they are held;
- access to all places of detention and their installations and facilities;

97) OPCAT, n. 13 above, article 1.

98) Ibid., article 17.

99) Ibid., article 19..

- the right to interview detainees, or any other person, confidentially and without witnesses;
- freedom to choose the places they want to visit and the persons they want to interview;
- the right to exchange information and to meet with the international Subcommittee on Prevention.<sup>100</sup>

As we will see below, if the state fails to fulfil these obligations the international Subcommittee on Prevention is empowered to address the issue to the relevant authorities.

NPMs will also have an advisory role. This is apparent from the text of the Protocol; the OPCAT recognizes that the NPM will naturally play a consultative role where the government is developing new legislation.<sup>101</sup> However, the NPM will also fulfil advisory functions in other areas not expressly identified in the Protocol itself; for instance, the NPM may help to develop training activities for law enforcement officials.

### 3.5.3.2 Subcommittee on revention

The Subcommittee on Prevention is the key international component of the prevention system established under OPCAT. The Subcommittee will be composed of 10 independent experts elected by States Parties to OPCAT, though this number would increase with the number of ratifications. Though it is formally constituted as a “subcommittee” of the Committee against Torture established under UNCAT, it is clear from the text of OPCAT that the Subcommittee on Prevention will in fact function as an independent body, not subject to general direction or control by the Committee against Torture.

The Subcommittee is to be independent and have a relevant professional knowledge

in the field of deprivation of liberty.<sup>102</sup> Thus, one would expect Subcommittee membership to include lawyers, doctors, psychiatrists, former law enforcement officials, and specialists in human rights or humanitarian law.

The Subcommittee is given a broad authority to carry out in-country inspections. Under articles 4, 11 and 12, each State Party must allow the visiting mechanisms access 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.” The Subcommittee is to establish a programme of regular visits, drawn up at first by random. If appropriate, the Subcommittee can propose a short follow-up visit in addition to the regular periodic visit.

The OPCAT requires states to provide the Subcommittee with the same unrestricted access to individuals, places of detention, and information that was described above in relation to NPMs.<sup>103</sup> A state can object to a visit by the Subcommittee only in respect of a *particular* place of detention, only temporarily, and only in the following limited circumstances:

- the grounds for delaying any visit must be “urgent and compelling”;
- the only permissible grounds are national defence, public safety, natural disaster or serious disorder;

101) *Ibid.*, article 19.

102) *Ibid.*, article 5.

103) *Ibid.*, article 14(1).

104) *Ibid.*, article 14(2).

- the grounds must exist “in the place to be visited,”
- the general existence of a declared state of emergency as such cannot be invoked by a State Party as a reason to object to a visit.<sup>104</sup>

Following its visit, the Subcommittee will send a report to the authorities on a confidential basis. The Subcommittee will also submit an annual report to the Committee against Torture. Where there has been a lack of co-operation on the part of a State Party, the Subcommittee can refer the matter to the Committee against Torture, which can then decide to issue public statements to condemn the State Party’s non-compliance and create pressure for renewed co-operation.

The Subcommittee will also be able to provide assistance to National Preventive Mechanisms. Assistance can be provided directly, through exchange of information or through a training session for the NPM members. Assistance may also be provided indirectly in that the Subcommittee can report to the government that the national preventive mechanism is not functioning as intended by the OPCAT (for instance because members are not independent or its visiting powers are restricted) and can make corrective recommendations which, if not implemented, can lead to a public statement by the Committee against Torture. Once the national mechanisms are in existence, the Subcommittee is to maintain contact with them and offer training, technical assistance, and other advice or recommendations. Further, Article 11 also provides for the Subcommittee to co-operate generally with relevant UN bodies, as well as with other international, regional and national institutions or organisations working to prevent torture.

#### 4. Conclusion

Certain general characteristics and trends can be extracted from the preceding examples of recent efforts to ensure effective implementation of international standards for the prevention of torture.

First, the techniques demonstrate the importance of pursuing full implementation of international standards and monitoring by regional and national actors. Such processes demand that NGOs and other international actors view their work as only partially completed once international standards are established and ratified; actual prevention of torture requires an ongoing process of cooperative dialogue between states, human rights mechanisms, and civil society. The African Commission’s Robben Island Guidelines implementation process, the European Guidelines implementation process and follow-up to the Special Rapporteur’s Brazil visit provide examples of the opening up of such a crucial dialogue.

Second, such processes are not focussed on setting further or more detailed standards. Rather, their aim is to identify, solve, clarify and make concrete recommendations to states and other actors as to the practical measures, such as monitoring, that can be taken to help prevent torture (and so better to comply with the already-established international standards). The work of the European CPT is a good example of this.

Third, the processes outlined above underline the necessity for states and local actors to begin with an assessment of the situation as it currently exists, in order to identify practical measures that are likely to work within the particularities of a given national or regional setting.

Fourth, the processes selected for examination demonstrate the leading role that NGOs and other civil society actors can take in guiding implementation strategies and

maintaining pressure on state and regional actors to put measures into effect, thus giving international standards concrete reality on the ground.

Fifth, the processes generally involve confidential processes, whereby the state is given an opportunity to develop and implement its response, combined with transparency at the end of the process.

To return to the admonition in article 5 of the Universal Declaration of Human Rights with which we began this paper – “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” – states, international organizations, and all members of local, regional and international civil society, must continue to work together to find and implement practical measures for the prevention of torture, if the promise enshrined in the Declaration is truly to be fulfilled.