

## Reflections on Working for the Prevention of Torture

Nigel S. Rodley\*

When asked, by the editors of this special issue of the Essex Human Rights Review, to reflect on my own work for the prevention of torture, I soon found myself as much reflecting on the word ‘prevention’ as on the work itself. Why, after all, would a visit to a place of detention by the UN Special Rapporteur on torture (of which I did a good number) not be considered preventive, when similar visits, using similar methods, by the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) or the UN Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT) were so understood? I shall return to this after discussing a little of the history. While international preventive machinery will be the main focus of this reflection, advocating prevention at the national level has been, perhaps, the major part of the work, so let me start there.

It is a commonplace for those involved in working against torture to find that the phenomenon could, indeed, be prevented by eliminating what we, at Amnesty International (AI), called ‘the preconditions of torture’. From the earliest days of the AI’s first international campaign against torture (which began in 1973, the year I became the organisation’s first legal officer), we were aware that torture happened to people when they were held at the sole mercy of their captors and interrogators (incommunicado detention). The longer they were denied access to and from the outside world (i.e. to family, lawyers, doctors, courts) the more they were vulnerable to abuse by those wishing to obtain information or confessions from them.

This wisdom was reflected in the outcome of AI’s 1973 Paris Conference on the Abolition of Torture.<sup>1</sup> It was a short step from there to the UN General Assembly in 1975, which, on the heels of the adoption of the Declaration against Torture,<sup>2</sup> set in motion the drafting of principles against arbitrary arrest and detention that would precisely limit the pre-conditions of torture. It is no accident that the eventual product took thirteen years to emerge. The Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment<sup>3</sup> touched on areas of great sensitivity for states. It was one thing for states to make an international commitment not to engage in a practice – torture – that was illegal anyway under their own national laws; it was

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\* Sir Nigel Rodley is Professor of Law and Chair of the Human Rights Centre at the University of Essex, a Member of the UN Human Rights Committee, and Commissioner of the International Commission of Jurists. He is a former UN Commission on Human Rights Special Rapporteur on the question of torture (1993-2001) and a former Legal Adviser/Head of Legal Office of Amnesty International’s International Secretariat (1973-1990).

<sup>1</sup> *Conference for the Abolition of Torture – Final Report* (Amnesty International: London, 1973). See *Conference for the Abolition of Torture*, Paris, 10-11 December 1973.

<sup>2</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Resolution 3452 (XXX), 9 December 1975.

<sup>3</sup> Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by the UN General Assembly, Resolution 43/173, 9 December 1988.

another to deny their often under-trained and under-resourced law enforcement and security agencies the opportunities they felt they needed to do the job expected of them, whether of repressing opposition or of (at least appearing to be) responding to popular demands for ‘effective’ public safety measures.

It may be that AI’s renewed Campaign against Torture (1984-85) played a role in moving things forward. A centrepiece of that campaign was AI’s 12-Point Programme against Torture.<sup>4</sup> Many of the 12 points called for safeguards against torture that were reflected in the draft Body of Principles, especially those aimed at restricting any incommunicado detention to the briefest of periods. I was involved in drafting this programme; as head of what by then had become AI’s Legal Office, I was involved in trying to get the best possible Body of Principles out of the UN. This entailed mobilising the organisation’s national sections to seek to persuade their governments to support stringent safeguards and engaging in direct meetings with government representatives.

I continued this work in 1993 (having left AI in 1990), when I became Special Rapporteur on Torture. I found myself reconfiguring the language of the Programme, though the message was the same: torture is a crime and, like many other crimes, is a crime of opportunity. If only by virtue of their powers of detention, law enforcement officers have more opportunity than most to criminally abuse those in their charge: these opportunities needed to be restricted or removed. In the end, I argued, the traditional paradigm of opacity in places of detention needed replacing by a paradigm of transparency. These notions were reflected in the compilation of the already exacting recommendations that I inherited from my predecessor as Special Rapporteur, Pieter Kooijmans, the first mandate-holder (1985-1992). Technological advances made it possible to begin advocating the use of audio-visual recording of interrogations, a practice that had been introduced into the UK by the 1984 Police and Criminal Evidence Act<sup>5</sup> and was generally acknowledged to have contributed to a substantial reduction in reports of police abuse. Most of the recommendations in the 12-Point Programme were aimed at preventing prolonged incommunicado detention. The UN Commission on Human Rights endorsed the elimination of this practice.<sup>6</sup>

So far, I have focused on exploring the development of international and inter-governmental support for international standards to be followed at the national level. Much of the country-specific work involved trying to persuade governments that they should adopt, or implement effectively, these standards. Typically, I would find myself arguing that they owed it to their law enforcement officials to give them the means to dispel false accusations of torture or similar abuse.

My involvement in the evolution of ‘preventive’ international machinery goes back to the meeting of experts convened by the late, retired Swiss banker Jean-Jacques Gautier. Inspired by the work of the International Committee of the Red Cross (ICRC) in visiting prisoners of war and, later, political detainees, he promoted the idea of an obligatory system of regular visits to places of detention by an international body. (The ICRC had the right to visit prisoners of war, but was only allowed to visit political prisoners if the government in question agreed and did not

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<sup>4</sup> *Torture in the Eighties* (Amnesty International: London, 1984), p.249.

<sup>5</sup> Available at <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/>.

<sup>6</sup> See UN Human Rights Commission, 61<sup>st</sup> Session, Item 11(Oral Statement by the OMCT), 30 March 2005. Available at <http://www.omct.org/index.php?id=&lang=eng&articleSet=Events&articleId=5352>.

change its mind.) At the meeting, convened by the Swiss Committee against Torture (SCAT), founded by Gautier, to which I was invited by virtue of my function at AI, we agreed on a draft UN convention that would reflect the idea of an international system of visits to places of detention. Like the ICRC, the body to be set up by this convention would be required to keep the reports of its visits confidential. However, we agreed that it should be able to make these reports public if the country in question failed to deal with the problems discovered. While it would not be in a position to follow the ICRC practice of conducting random or follow-up visits to ensure those interviewed were not subjected to reprisals, we made provision for *ad hoc* visits, if the international body deemed this to be necessary (for example, on the basis of information from NGOs).

In the event, the time was not right for including this type of system in the ‘implementation’ provisions of the UN Convention, on which drafting began the following year. It was felt that it would be necessary to follow the pattern of other treaty bodies’ functions (review of periodic reports by states and, possibly, on an optional basis, consideration of individual and interstate complaints) with perhaps ‘a bit more’. In the end, the ‘bit more’ was the 1984 UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) Article 20 provision permitting the Committee Against Torture, created under the UNCAT, to initiate an inquiry into an apparent systematic practice of torture.<sup>7</sup> As part of the inquiry, the Convention could request, but not require, the State Party in question to permit an on-the-spot visit. The SCAT text was formally introduced by Costa Rica as a draft protocol to the proposed UNCAT, but it was not taken forward until after UNCAT had been adopted.

SCAT, in cooperation with the International Commission of Jurists (ICJ), decided to try the idea out at the regional level. In the Council of Europe (then a grouping of Western European States, divided from the east of the continent by the Cold War), the project prospered. The text was worked on by the Council’s Consultative Committee on Human Rights, on which the ICJ and AI had observer status. Less transparent than the UN, it met in closed session. I recall our having to mobilise two of AI’s national sections to address the fact that their governments were trying to carve out a right to exclude access in emergency conditions, as that could have rendered the system nugatory. In the end, a satisfactory compromise was achieved whereby a government could make representations, urging that the visiting team avoid a particular institution temporarily, but the team would be able to have access to relevant individuals elsewhere; moreover, the decision on whether the institution in question would be visited was not left to the sole discretion of the State. I do not believe this sensible outcome would have been possible without the actions of the relevant national AI sections, whose governments, while publicly maintaining their strong support for the project, were insisting on the exception. Since the sections did not act at the public level, AI maintained the confidentiality of the process.

After the CPT got under way<sup>8</sup> and went on to achieve the success it is generally acknowledged to have attained, my main contact was of an informal nature. For example, to the extent consistent with respect for confidentiality, in my capacity as Special Rapporteur, I was able to elicit from the CPT some orientation in respect of countries that I was concerned about, notably in the context of my own visits. Later, as an academic, I was invited to discuss issues relating to

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<sup>7</sup> UNCAT, adopted by the UN General Assembly, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987.

<sup>8</sup> Following the adoption of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (ETS no 126) on 26 November 1987, which established the CPT.

arguments being raised post-11 September 2001 that sought to justify torture, despite its absolute legal prohibition.

Eventually, in the late 1980s, the SCAT, which became the Association for the Prevention of Torture, sought to revive the Costa Rica draft protocol to UNCAT. I confess that, when they approached AI, I was lukewarm to the idea, not because I doubted the intrinsic merits of the idea, but because I was sceptical that, even if the UN adopted it in unadulterated form, the UN would be able to assure the necessary independence of membership or provide the appropriate resources. The whole UN human rights budget was a fraction of that of the ICRC. Worse, there was a real risk that any system that would emerge could end up giving governments an excuse to exclude the ICRC by virtue of their participation in the new UN system. Already, I was aware of two European governments that, confronted by sustained terrorist operations, were resisting suggestions for ICRC access to their prisoners on the grounds that their acceptance of the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment (ECPT) system made ICRC access unnecessary.

After I left the organisation, AI decided to support the re-launch of the Costa Rica protocol and that gave it the necessary political momentum. During most of the drafting period, I was Special Rapporteur. My predecessor had already expressed support for the protocol and it would have been inappropriate for me to contradict him. In any event, as a matter of principle, the protocol remained a good idea.

Accordingly, in my communications with the Commission on Human Rights working group, which was drafting what became the 2002 Optional Protocol to UNCAT (OPCAT), I adopted a position of support for the idea, while insisting that there should be no back-tracking on the ECPT system, especially in relation to the right of unannounced and *ad hoc* visits, and also stressing the need to devise means of ensuring that the eventual sub-committee (SPT) would have the independence, and access to expertise and resources, that it would need to do the job properly.

There ended my involvement. The removal from the text of provision for *ad hoc* visits, and the exiguous resource problems that the SPT now faces,<sup>9</sup> indicates the limits of my influence! On the other hand, I cordially acknowledge the inspired innovation in the final text of a key obligation on States Parties to create national preventive mechanisms (NPMs) that will be able to have cooperation from the SPT. This makes for a substantially different project, the prospects for which conduce to at least cautious optimism.

I turn now to the question of the meaning of ‘prevention’ in the context of these issues. Evidently, establishing the kind of safeguards against incommunicado detention discussed earlier is preventive in a pure sense. Removing the opportunity to torture, of necessity prevents it. Why this should be the case for a particular technique of visiting prisoners and places of detention is less clear.

Part of the answer may be sought in the (also elusive) meaning of other words we commonly and loosely use to describe activities aimed at advancing human rights. We often use, essentially in contradistinction to each other, the words ‘promotion’ and ‘protection’. Promotion covers a range of generalised, basically non-intrusive activities, such as advocacy for and development of

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<sup>9</sup> See Casale in this volume.

(new) international standards, and provision of human rights education as part of formal education and training, particularly for those involved in law enforcement or the administration of justice more generally. ‘Protection’ on the other hand, tends to connote activity aimed at attacking specific human rights violations. It is used especially to describe activities that would be considered application of the law: investigation, reporting, making formal assessment of responsibility in individual cases, and so on.<sup>10</sup> In sum, the focus is assignment of responsibility and establishment of accountability, if not of individuals, certainly of the state. Accordingly, the activities of courts and treaty bodies, or UN Special Rapporteurs, when examining cases or country situations – often described as ‘monitoring’ or ‘supervision’ or, most strongly, as ‘implementation’ – are seen as falling under the idea of ‘protection’.<sup>11</sup>

Why, then, is work such as that of the ICRC, which inspired the ECPT and the OPCAT, considered prevention, rather than promotion or protection? The question is accentuated by the fact that most aspects of promotion and protection can be seen as broadly preventive. For, just as national criminal law is justified to a significant extent by its supposed deterrent effect (i.e. prevention of future criminality), so exposure and denunciation may be hoped, if not expected, to have a similar result on preventing, by deterring torture. Yet we do distinguish between crime prevention (using locks on doors) and protection (finding and prosecuting burglars).

The answer seems to lie in a few specific aspects of the work of the ICRC and the entities inspired by it. Briefly, and at the risk of caricaturing, the basic approach consists of being in a country and making unannounced visits to places of detention, conducting unsupervised interviews with prisoners, and making confidential reports to governments. The approach also involves making unannounced return visits to the same places. How does that differ from a visit by the Special Rapporteur – or, for that matter, by the Committee against Torture carrying out an UNCAT Article 20 inquiry? The Special Rapporteur (like the Committee against Torture) has to be allowed into the country for a specific visit, but can and does make unannounced visits to places of detention and can also hold unsupervised interviews with prisoners. His (or her, though, to date, all the Special Rapporteurs on torture have been male) report is public. He cannot make unannounced return visits after leaving the country and can only usually rely on the support, where available, of civil society to seek to establish contacts with interviewees (e.g. through prisoner welfare organisations or local ombudsman-type officials). Follow-up support can not, however, be counted on.

Thus, what is perceived as being essentially preventive about the ICRC’s work is its ability to do sustained visiting over time and its non-impugning of the public level of the government in respect of any torture or other abuses identified. The government, according to (unverifiable, but, by the same token, unrefutable) expectations, will move to address the problem once apprised of it. Of course, this does not always happen, but there is a strong belief that external access by the ICRC tends to ensure the safety of those it has met.

As for the Special Rapporteur, and risking some oversimplification, it is clear that there is nothing sustained about his visits. The key element is the public report, with its factual

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<sup>10</sup> Karel Vasak, ‘The Distinguishing Criteria of Institutions’, in Karel Vasak and Philip Alston (ed.), *The International Dimensions of Human Rights, Vol. I* (Westport, Connecticut and Paris; Greenwood Press and UNESCO, 1982), pp.215-218.

<sup>11</sup> Louis B. Sohn, ‘Human Rights: Their Implementation and Supervision by the United Nations’, in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Oxford University Press, 1984), p.369.

conclusions (not on individual cases, but on the situation) and specific recommendations. Thus, this role encompasses the investigation and exposure dimension of protection, as understood above. Yet, in many ways the Special Rapporteur's visits cannot be as directly protective of the individuals who have been met as are those of the ICRC, if only because of the effective impossibility of undertaking follow-up visits.

The work of the CPT falls somewhere between the paradigms. Its visits are like those of the ICRC, except that there is no in-country presence and the occasional *ad hoc* visit cannot effectively make up for this. Its reports are confidential (albeit most are eventually published with the agreement of the governments concerned). It is perhaps this dimension that, at bottom, is invoked to support any preventive aspect of the work. As ICJ Secretary General Niall MacDermot put it:

The sponsors of this proposal consider its great advantage is that it does not involve any public attack or accusation being made against the government concerned. Consequently, the government is not thrown upon the defensive and has no incentive to impose delays, but rather has an incentive to cooperate under a confidential procedure in remedying any abuses which may exist.<sup>12</sup>

Gautier himself summarised the essential aspects of this issue, arguing that 'instead of a state being found guilty of a violation, stress will be laid on prevention.'<sup>13</sup>

So here we have it: prevention means we save the state's face, in return for which we hope to get more effective action than would be achieved by exposure. The subtext is that confidentiality is the price of sustained or regular access.

If prevention differs from the work of the UN mechanisms operating at the *public* level, it does so in the manner in which it delivers, or aims to deliver, protection. Tellingly, the title of the text first submitted to the Council of Europe, which eventually became the ECPT, was 'Draft European convention on the *protection* of detainees from cruel, inhuman or degrading treatment or punishment' (emphasis added). Similarly, the explicit purpose of the original Costa Rica draft optional protocol to the draft UNCAT, according to its one preambular paragraph, was to achieve the 'implementation' of the future UNCAT.

As to the OPCAT, there are still too many unanswered questions to know how to characterise the work to be done under it. The visiting practices of the SPT, even if properly resourced, do not explicitly include *ad hoc* visits, so may hardly be any different from Special Rapporteur or Committee against Torture visits, but without the public reporting. Here, prevention can be little more than a euphemism for non-exposure. The powers and functions of NPMs remain even more ill-defined at this stage. On average, NMPs may be little different, apart from working in a specific field, than other National Human Rights Institutions (NHRIs): that is, ombudspersons, national human rights commissions, *personeros*, *médiateurs*, and so on. Indeed, in some countries, it will be the NHRI that will also be the NPM. Their work is auxiliary to that of the usual organs of justice. The reader may decide whether any of the words we have been discussing as applicable at the international level, provide a useful description of the national

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<sup>12</sup> *Torture: How to Make the International Convention Effective* (2<sup>nd</sup> Edition) (Geneva and Lausanne: ICJ and SCAT, 1980), p.24.

<sup>13</sup> *Torture: How to Make the International Convention Effective*, p.35. See fn.12.

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If, after decades of using the word myself, I now seem to be questioning the use of the word 'prevention', it is not to seek to change it. It has served the function of making palatable to states what might otherwise have been less palatable. There should be no doubt, however, that, in the case of torture prevention is not better than cure. Prevention is protection by another name. It is remedial, rather than prophylactic.