The Optional Protocol To The UN Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment: To Be Welcomed Or Rejected By The International Community?

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Abstract

The current UN human rights treaty body system is in dire need of reform. The resources, both financially and otherwise have long been drained by the any different and varied Conventions and bodies created by the international community. As the Optional Protocol to the UN Convention Against Torture, And Other Cruel, Inhuman Or Degrading Treatment Or Punishment awaits the necessary twentieth ratification, it is an appropriate time to question whether this Protocol should be welcomed.

In order to do this, both the current international and regional mechanisms will be examined in order to assess how these bodies are combating violations of this fundamental, non derogable right of freedom from torture. The Protocol and its provisions will also be examined to observe whether this instrument will provide new and innovative procedures to the international community.

From the examination, it will be made clear that although the current mechanisms and the Protocol will overlap to a certain extent, it will provide a procedure which could change the future of UN torture prevention and indeed human rights in general. State consent will no longer be needed for an independent committee to enter its territory to inspect places of detention, and it will introduce mandatory national bodies. These two factors, despite a of number of disabling factors, are strong reasons as to why this Protocol should welcomed by the international community, with the proviso that certain issues are clarified.

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Chapter One: Introduction

The right to live without torture or the threat of torture has always been regarded as a fundamental, non-derogable right. This was reflected in the inclusion of the prohibition of torture in the Universal Declaration (1948)[1] and again in the International Covenant of Civil and Political Rights (hereon in referred to as the ICCPR) (1966)[2]. However, while States denounced such atrocious acts, officials were still committing them. Clearly the mere statement of prohibition was not sufficient. The introduction of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereon in referred to as the Convention against Torture) in 1984 was heralded as an important step towards the eradication of torture. States were formally acknowledging the need to actively combat torture rather than passively declaring torture as prohibited. Through the mechanisms included in this Convention, it was hoped that the international community would hold States accountable for the actions of their officials with regard to torture. Even with such hope, there was much discussion both during the Convention negotiations and the years following its introduction, of ways to further eradicate torture. Only one year later, the UN Commission on Human Rights created a Special Rapporteur on Torture. In December 2002, after much negotiation and discussion, the UN General Assembly, after a vote, adopted an Optional Protocol to the Convention against Torture (hereon in referred to as the Protocol).

The Protocol, when ratified by twenty States, will introduce a system of State visits by an independent, expert Sub-Committee to the Committee against Torture (the treaty body to the Convention against Torture, hereinafter referred to as the CAT). They will have the authority to enter and investigate all places "where people are or may be deprived of their liberty, whether by virtue of an order given by a public authority or at its instigation or with its

[1] Article 5
[2] Article 7

consent or acquiescence"[3] without requiring State permission. States parties to the Protocol will also be required to create and maintain national Committees with the same mandate as above. Although no judicial power or sanction is included, due to underlying principles of co-operation and confidentiality, if States fail to fulfil their obligations, the Sub-Committee will publish it's reports. This will be a political sanction, thus increasing political costs for governments which Duner believes is the only way to encourage States will actively combat torture.[4] There is no doubt that the prohibition of torture in international treaties has not eradicated this crime. No matter the number of treaties and mechanisms available at an international level, and indeed at regional levels, torture has yet to be stopped. As the Commission on Human Rights recalled, the World Conference on Human Rights firmly declared that eradication of torture should first and foremost concentrate on prevention.[5] Therefore it is believed that this Protocol will be a significant development in the battle against torture.

However there is serious doubt whether the UN human rights treaty body system can sustain another mechanism following the increasing problems for States and Committees, with regard to fulfilling their obligations under the six main UN human rights treaties.[6] The UN Commission on Human rights appointed Philip Alston as the UN Special Rapporteur on the treaty body system. Alston reported[7] that pressures on States to comply with their obligations would continue and grow, as well as the problems associated with the UN. These include the increasing overlap between the work of the treaty

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[3] Article 4(1) of the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, Commission On Human Rights, *Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, 22nd April 2002, E/CN.4/Res.2002/33.

[4] B. Duner (ed), An End to Torture – Strategies for its Eradication, London, Zed Books ltd, 1998.

[5] E/CN.4/Res.2001/44.

[6] International Covenant on Civil and Political rights (1966); International Covenant on Social, Economic and Cultural Rights (1966); Convention on the Elimination of all Forms of Racial Discrimination (1965); Convention on the Elimination of all Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1990).

[7] In 1989, *Effective Implementation Of International instruments On Human Rights, Including Reporting Obligations Under International Instruments On Human Rights,* Commission On Human Rights, 44th Session, A/44/668, 8th November 1989 and in 1997, Effective Functioning Of Bodies Established Pursuant To United Nations Human Rights Instruments: Final Report On Enhancing The

bodies, an increase in demand and competition for funding and an increasing lack of cooperation by States. One solution proposed by Alston was to question the desirability of additional measures. That is to say, to examine the new procedure not only on individual merit, but also as a part of the whole UN system. Will the new procedure provide extra protection to the system as it stands now, without duplicating the responsibilities of current treaty bodies. This was reiterated by the UN Secretary General in 2002 who called for more co-ordination and standardisation of the activities of bodies.[8]

Zoller presents the current problems succinctly. "Another snag is the proliferation of international mechanisms to combat torture…Turkey comes to mind immediately…it makes a show of 'goodwill' at all these different levels, but seems prepared to use diplomacy to play one procedure off against another and so attempt to escape condemnation…Human rights defenders should therefore urgently reflect upon all these instruments which have similar goals but which, because of the way in which they overlap, give states the chance to evade their obligations."[9] Therefore as the Protocol awaits the twentieth ratification,[10] it is relevant to discuss whether it will provide new mechanisms at the international level without overburdening the UN human rights treaty body system. What will be the benefits of this Protocol and will they override the disadvantages?

In order to assess the added value of the Protocol, an analysis of the current international mechanisms of torture prevention will be discussed in Chapter two. To start with, the Convention against Torture. There are a number of ways in which this Convention has improved the detection and prevention of torture, through State reporting, and the ability to investigate alleged abuses. Yet there have been criticisms regarding the CAT, especially in relation to article 20 of the Convention. The Commission on Human Rights appointed a

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long Term Effectiveness Of The UN Human Rights Treaty System, Commission On Human Rights, 53rd Session, E/CN.4/1997/74, 27th March 1997.

[8] UN Secretary General Report, *Strengthening The UN: An Agenda For Further Change*, 57th Session, 9th September 2002, A/57/387.

[9] A.C. Zoller, *Appendix 1 UN Committee Against Torture*, in "Netherlands Quarterly Of Human Rights", vol.7, no.2, 1989, p 253.

Special Rapporteur on Torture who has the mandate to conduct on-site investigations. The benefits of this mechanism towards prevention of torture will be discussed, as well as the disabling aspects. The Commission on Human Rights also has two procedures which could include on-site investigations – the 1235 and the 1503 procedures. Finally, the role of the ICCPR must also be discussed for its success in preventing torture.

Following on, the regional mechanisms to prevent torture will be discussed in the third Chapter. The Protocol was hailed as the UN version of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) (hereon in referred to as the ECPT). Therefore it is important to look to the Convention to see what have been its successes and failures. Included in this analysis will be the investigative work undertaken by the Committee for the Prevention of Torture (hereon in referred to as the CPT). It is also necessary to look to other continents to see what achievements have been made and what else is needed, thereby discovering whether the Protocol is a necessity. There are two other regional mechanisms that attempt to prevent this heinous crime. The Inter-American Commission on Human Rights (hereon in referred to as the IACHR) allows ad hoc country visits. The African Charter on Human and Peoples' Rights (1981) created the African Commission on Human Rights (hereon in referred to as the African Commission) which has the ability to conduct on site investigations in States and has also created a Rapporteur to improve conditions in places of detention in 1996.

Chapter four will be an in-depth study of the Protocol itself. It will deal with the content of its provisions and what it will contribute to the UN system of torture prevention. Chapter five will deal with the similarities and differences between this and the ECPT. Will the Protocol bring the same qualities that the European system has brought to the protection against torture? In its creation, has the Protocol found answers to the problems with the European system?

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[10] To date three States have ratified the Protocol – Costa Rica and Senegal on 4th February 2003 and Argentina on 30th April 2003.

In order to evaluate whether the Protocol's mandate will overlap with current mechanisms, the following concepts will be used – preventing, monitoring and sanctioning. These have been used to divide the work of the different bodies involved in eradicating torture. It has been stated that the Protocol will introduce a purely preventative mechanism where as other mechanisms, monitor and sanction States' behaviour.[11] Although these are useful indicators, they are not entirely independent from each other. It can be argued that a preventive mechanism within this context also has a monitoring role and possibly a sanctioning role too. While those mechanisms that are classified as monitoring bodies, would also have a preventive role too. Therefore, an analysis as to whether these concepts are the bodies' only function will be undertaken, in order to assess the Protocol's ability to provide useful and different mechanisms.

Alston states "the international human rights system has developed to an extent that was inconceivable by the vast majority of observers in 1945."[12] There is now an extensive and impressive list of human rights treaties and bodies, both at the international level and the regional level. Alston comments that while these mechanisms do overlap, many are unwilling to acknowledge this fact as they believe that tackling the problem may reduce the bodies effectiveness rather than enhance it.[13] Indeed this thesis must not be mistaken as trying to do this. It is understood that human rights instruments are needed to combat violations. But the denial or the avoidance of the current treaty system problems, must not occur. As Alston states "…as a result, a patchwork quilt of considerable complexity serves to confuse or deter many potential 'consumers' of these procedures and to diminish the

[11] See for example the Chairperson to the tenth session of the working group on the Optional Protocol who stated "the mandate of the working group was the establishment of a preventive system of regular visits to places of detention on a universal level and that article 20 [of the Convention against Torture] had a clear monitoring and sanctioning function, not a preventive one". Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment On Its Tenth Session*, 20th February 2002, E/CN.4/2002/78, para 27.
[12] P. Alston, *The UN's Human Rights Record: From San Francisco To Vienna And Beyond*, in "Human Rights Quarterly", vol.16, no.2, 1994, p 377.
[13] P. Alston, (1994) p 381.

pressures to develop procedures that will be truly effective".[14] This thesis will reveal an in-depth look into the mechanisms currently available to prevent torture. It will reveal the positive aspects of the Protocol and what it will be able to achieve, but it will also look critically at whether it will be able to fulfil its goal of preventing torture. If this were not the case, then due to the overburdened UN human rights treaty body system, there would be a viable reason not to encourage ratification of the Protocol.

[14] P. Alston, (1994) p 381.

Chapter Two: The Current Mechanisms Available To Prevent Torture At The International Level

2.1 The UN Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment

2.1.1 Introduction

Although no State admits that torture is being committed on their territory (they openly denounce violations of the basic human right to be free from torture), it is clear that torture is a continuing menace throughout the world.[15] This contradiction led to the General Assembly Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975[16] and to the UN Convention, which was unanimously adopted on 10th December 1984. The UN Convention objective was to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment"[17] through a body with the mandate to investigate allegations of violations. It introduced a new and innovative mechanism in the form of the CAT's ability to initiate an inquiry procedure against States, as well as procedures often associated with UN human rights treaty bodies, such as reporting obligations, inter-State and individual complaints.

The international community consensus was an indication that all States believed a universal mechanism was required in the battle against this heinous crime. It was adopted at a time when the UN had become settled in its role as supervising human rights violations at an international level but also over national bodies too. It also entered into force the same day that the Council of Europe's Committee of Ministers adopted the ECPT. Therefore States were willing to accept intervention at the UN level and at regional

[15] As can be seen from a number of Non-Governmental Organisations' reports, such as *Amnesty International Report 1982*, Preface, London, AI Publications, 1982.
[16] GA-Res.3452(XXX) of 9th December 1975.

levels. However, at the same time the UN was beginning to face serious difficulties with regard to these human rights provisions. Reporting systems under the established treaty bodies were starting to crumble, as was the ability of the UN to support the bodies financially and otherwise. The CAT was designed similar to other human rights bodies in that it would be supported by the same secretariat that had problems in providing sufficient support. Furthermore, the CAT finances would largely be dependent on contributions from States parties. This is an inadequate system as to be dependent on States while at the same time expecting to be critical and independent from them would be a difficult balance for the CAT to play.[18] As well as these structural problems, there was also the issue of duplication of work and the need to keep interpretation of terms consistent among the numerous bodies dealing with torture.

2.1.2 Interpretation

Article 1 contains the most detailed definition of torture of all international instruments. Certain commentators believe that as "the definition was approved by the then Eastern and Western powers, and by the present North and South…[it] is thus universal in the very best meaning of the word – a situation that no member state denies, and which in my opinion is much preferable to a wider definition that would not be universally approved".[19] It is true that this Convention was a compromise so that it could be adopted by consensus. Donnelly points out that the final definition is a great deal narrower than the Declaration in1975 and the Swedish draft which was the text used by the working group,[20] although the inclusions of "for such purpose", indicates that the list in article 1 is not exhaustive. Furthermore the Convention does not allow any exceptions, as stated in article 2(2) which states "No exceptional circumstances whatsoever, whether a state or war or a threat of war, internal political instability or any other public emergency, may

[17] Preamble paragraph 6.
[18] The system in fact changed when it became clear that States were not reliable in submitting their contributions. An amendment was made to The Convention against Torture, whereby the CAT would be financed from the UN budget.
[19] B. Sorensen, *Practices Against Governmental Sanctioned Torture*, in "Quarterly Journal On Rehabilitation Of Torture Victims And Prevention Of Torture", vol.5, no.2, (1995) p 21.

be invoked as a justification of torture", and article 2(3) "An order from a superior officer or a public authority may not be invoked as a justification of torture". It is very clear that the Convention will not allow any excuse for torture, other than "lawful sanctions".

Other commentators take a negative view of the fact that the definition is narrow and a classical approach to torture.[21] Van Krieken believes that the Convention "provides a rather vague definition of torture, and a regrettable exception ('lawful sanctions').[22] Byrnes states[23] that although it is clear that it will concern those people who are in State institutions, be they prisoners or not, it is unclear as to whether it includes other spheres of State control or supervision, such as treatment by teachers in State schools. Although the Convention was intended to prevent torture of a political purpose, there is still the possibility that it could include State hospitals or even behaviour by public officials, due to unclear wording of the Convention. Another area that is contentious, is whether torture can be extended to acts by third parties. From the Convention it is clear that it includes acts committed 'at the instigation of' State officers or 'with the consent or acquiescence' of a State official. It is therefore arguably broader than the 1975 Declaration Against Torture which only includes acts performed by a State official or at the instigation of this person.[24] This brings forth the question as to what extent the State official must be aware of the acts taking place. If a State official purposefully ignores the acts or fails to stop them, then this can come under the Convention meaning. Therefore there is a possibility for the CAT to extend this narrow definition of torture and use the power it has to investigate other areas than prisons of State institutions, thereby increasing the traditional boundaries of torture.

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[20] J. Donnelly, The Emerging International Regime Against Torture, in "Netherlands International Law Review", vol.22, (1986) p 2.
[21] T. Meron, *Human Rights Law Making In The UN* in J, Barrett *The Prohibition Of Torture Under law, Part 2: The Normative Content* in "The International Journal Of Human Rights", vol.5, no.2, p 19.
[22] P.J. Van Krieken, *Torture or Asylum*, in "Israel Yearbook On Human Rights", vol.16, 1986, p 148.
[23] A. Byrnes, *The Committee Against Torture*, in P. Alston, (ed), The United Nations And Human Rights, Oxford, Clarendon, 1992, p 515 – 516.
[24] A. Byrnes, (1992) p 517.

The importance of the differences in terms within the international system is that the normative consistency of the term torture is reduced. The international community, according to Alston as the appointed independent expert, was risking confusion and the possibility of diminishing the credibility of the different treaty bodies. [25] As the HRC itself asked, "Does the interpretation under the prior or later treaty prevail?…is the authority and standing of any one interpreting body to be weighed against the authority and standing of any other interpreting body?"[26] It is beneficial for the international community to be seen to collectively agree on an interpretation in order to make the condemnation of those opposing the right even more legally and politically strong, as opposed to giving mixed signals. For example the Convention against Torture allows ill treatment due to lawful sanctions, whereas the ICCPR does not mention such an exception.

Yet Byrnes reminds us that there is no one standard definition of torture which would be applicable in every context. "What 'torture' means for the work of one body will depend on the text, purpose, and history of its enabling instrument, as well as on its own practice and the relevant practice of States".[27] Byrnes comments can be supported by the fact that article 7 (of the ICCPR) is clearly written following the concerns of the human experimentation taken place during World War Two, with the inclusion of "no one shall be subjected without his free consent to medical or scientific experimentation." The UN Convention on the other hand was written in order to protect political prisoners, thus the definition which is related to State officials.

2.1.3 Procedures Under The Convention

This Convention provides for the reporting by States parties to the CAT on their efforts to conform to the provisions within it.[28] This is the classical mechanism that many other international treaties use. The Convention also

[25] P. Alston, A/44/668, p 128.
[26] P. Alston, A/44/668, p 127.
[27] A. Byrnes, (1992) p 513.
[28] Article 19.

allows complaints from States parties[29] and by individuals[30] and includes a new procedure of inquiry.[31]

State reporting. States are required to submit their first report within one year of the Convention entering into force. Following which there is an obligation to submit a report every four years. The CAT has had similar problems with regard to this mechanism as other human rights treaty bodies. Reports are often submitted late and the quality and content[32] of these are often not what is required.[33] Even when reports are submitted, the CAT has a large backlog of reports waiting to be examined. The CAT now meets for three weeks at a time (rather than two weeks as previously), but there are still delays. There is a country rapporteur and co-rapporteur who will investigate and prepare and NGO's are also used to help gain a wider view of the situation. However the CAT does not always have sufficient information to critically assess and probe the government representative during report examinations. Furthermore, the CAT does not conduct fact-finding missions in order to collect further information and the possible use of fact-finding missions for follow-up procedures in order to verify the implementation of recommendations has, to date been ignored. [34] The Special Rapporteur on Torture is not used which could be a potential source of information.

Complaints procedures. There are two complaints procedures – the first being the individual which has been used a number of times especially in relation to article 3. However, due to the difficulties involved in this

[29] Article 21.
[30] Article 22.
[31] Article 20.
[32] See R. Bank, *Country-Orientated Procedures Under The Convention Against Torture: Towards A New Dynamism*, in P. Alston, J. Crawford (eds), *The Future Of UN Human Rights Treaty Monitoring*, Cambridge, Cambridge Uni. Press, 2000, p 150-154, for an in-depth discussion on the quality of reports.
[33] As at 9th May 1997, 32 first periodic reports, 30 second periodic reports and 21 third periodic reports were overdue. Committee Against Torture, *Report Of The Committee Against Torture*, Sessional/Annual Report Of The Committee, 10th September 1997, UN Doc.A/52/44, para 20.
[34] This can currently only be done through States reporting on their implementation, requested by the CAT since 1998 when the CAT revised their general guidelines and included 'compliance with the Committee's conclusions and recommendations'. Committee For The Prevention Of Torture, *General Guidelines Regarding The Form And Contents Of Periodic Reports To Be Submitted By States Parties Under Article 19, Paragraph 1 Of The Convention*, 18th June 1991, CAT/C/14/Rev.1.

procedure[35] there has been limited use of this provision. The second procedure is that of the inter-State. States are reluctant to use this, due to the political implications of accusations between States. Ingelse believes that "All in all, complaints procedures do not contribute any clear added benefit".[36] This is in evidence from the comparison that as of February 2000, the CAT had received 154 complaints, whereas between 1977 and 1999, the ICCPR had received 878 communications. Even taking into account the different years in operation of the bodies, there is a significant difference in numbers.[37] Furthermore, neither of these procedures allow for State visiting which would greatly enhance the CAT's ability to assess the situation.

2.1.4 Article 20

This article introduces a new and innovative procedure in which the CAT can initiate an inquiry procedure "If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party."[38] Article 20(2) allows the Committee to make a confidential inquiry following information given by States at the request of the CAT and other parties. Article 20(3) then allows "such an inquiry may include a visit to its territory," if the State agrees.

As Rodley describes "This procedure is potentially the most important element in the Committee's powers to implement the major obligation of the Convention."[39] He believes that the reporting system is only for long term improvements while the complaints system is unreliable due to the unwillingness to use it or the fact that it is specific to one person. "Abhorrent as every case of torture is, international awareness of and revulsion against

[35] Such as having to first exhaust domestic remedies which places the complainant in a vulnerable position in relation to the authorities. Furthermore allegations of torture are often among one of many and thus victims prefer to use the HRC's procedure so as to lodge all complaints at one time to one body – see C. Ingelse, *The Committee Against Torture: One Step Forward, One Step Back*, in "Netherlands Quarterly Of Human Rights", vol.18, no.3, 2000, p 316.
[36] C. Ingelse, (2000) p 316.
[37] H. Steiner, P. Alston, *International And Human Rights In Context: Law, Politics, Morals*, Oxford, Oxford Uni. Press, 1996, p 777.
[38] Article 20(1).
[39] N. Rodley, *The Treatment Of Prisoners Under International Law*, Oxford, Clarendon,1999, p 159-160.

torture today has been provoked by its widespread and systematic use, rather than by the occasional isolated incident".[40]

However this procedure has been used infrequently. As of 1998, only four inquiry procedures have been initiated involving Turkey (account published in 1994), Egypt (account published in 1996) (note that there was no State visit as the CAT failed to receive approval by the Egyptian Government[41]) and Peru (account published in 2001). The fourth country has not been named. From these reports it can be seen that this is a very lengthy procedure. For example the Peru inquiry was initiated in April 1995 and the final report was published in 2001.[42] This long delay in activity is obviously a serious concern to those who wish the procedure to help in situations of systematic torture. It would be hoped that response could be immediate in order to help improve the situation. Furthermore, although the CAT did find cases of systematic torture in Peru, the article 20 procedure did not produce any real success. Comments and recommendations were made by the CAT, but no suggestion of further reporting by Peru or the CAT were given, merely the hope by the CAT that the Peruvian Government would "take energetic and effective steps to rapidly end the practice of torture."[43]

There are a number of reasons why article 20 is unsuccessful. Firstly it is subject to reservations under article 28[44] which allows States to declare it inadmissible at ratification. Ingelse comments that States which do not make reservations under article 28(1) are those States who do not systematically apply torture[45], thereby reducing article 20 to irrelevance. The fact that it must be declared inadmissible as opposed to the often used declaring it admissible (as is required for the inter-State and individual complaints procedures under the same Convention) is an important inclusion. Donnelly believes that this

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[40] N. Rodley (1999) p 159-160.
[41] This did not however hinder the investigation as the CAT used information from NGO's and from the Special Rapporteur on Torture.
[42] *Inquiry under article 20: Peru* in *Report Of The Human Rights Committee*, 56th Session, supplement 44, 18th May 2001, A/56/44, paras 144 – 193.
[43] A/56/44, para 150.
[44] (1) Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognise the competence of the Committee provided for in Article 20.
[45] C. Ingelse, (2000) p 315.

opt out proposal was a compromise for the Soviet bloc countries who were against allowing "uninstructed individuals to exercise such powers".[46] However, contrary to those who believed that many States would opt out, as of 31st December 1991 only seven of the sixty-four States parties have done so. The difference between the number of States accepting article 20 and ratifying articles 21 and 22 is great and shows that States are more inhibited to opt out of a procedure.[47] Yet the fact remains that States have the option of opting out of it and this is a great victory for States careful of their sovereignty.

In order to initiate this procedure, well-founded indications of systematic torture taking place must be in evidence, thereby the CAT accuses a State of serious allegations of violations of a basic human right. As Bank notes, it is acutely embarrassing for the State concerned.[48] It is true that this procedure remains confidential until the summary report and the State is consulted at all points of the investigation. Yet still it can be seen as an aggressive act on behalf of the CAT and very different to the main objectives of the Convention which is to help and provide information in the form of co-operation. There is evidence to suggest that such a visiting procedure could work under different conditions. The Special Rapporteur made nineteen visits to States between 1985 and 1997. This also requires the consent of States, but because there is no systematic violations requirement, there is a more co-operative and friendly approach to the procedure. Bank therefore blames the fact that there have only been four article 20 procedures on this strict requirement.[49]

Further evidence of article 20's inability to produce results is the confidential procedure of the UN Commission on Human Rights Resolution 1503. This was set up to investigate any allegation of systematic human rights

[46] J. Donnelly, (1986) p 16.
[47] Byrnes notes that under article 21 only twenty-nine States have accepted this procedure and only twenty-eight States have accepted the article 22 procedure. A. Byrnes, (1992) p 530.
[48] R. Bank, (2000) p 169.
[49] R. Bank, (2000) p 171.

violations.[50] Nowak states that it is different to the UN Convention article 20 in that the 1503 procedure is more complex and no independent expert body is involved.[51] Accordingly, it would be assumed that this procedure would be used less frequently than the article 20 procedure. Yet between 1972 and 1999, seventy-five states have been included in this procedure.[52] Furthermore there were twenty-eight countries considered under this procedure between 1978 and 1984, but only four became public. Therefore it can be assumed, or at least hoped, that in the remaining cases improvements were made through confidential pressure.[53] Even if the article 20 procedure were to be as successful in terms of numbers of States visited, there would be still be the criticisms which are accorded to the 1503 procedure in that it is "a way States can escape from international accountability rather than being held responsible for their failure to fulfil their obligations".[54] Furthermore, according to Donnelly,[55] between 1970 and 1986, there was not a complete end to any one of the 1503 procedures.

Due to the seriousness and implications of this procedure it has become a long and drawn out process. The requirements provide that each of the measure involved must have both the consent of the CAT which, as it meets every six months, means that it can be very time consuming, and the States at all stages.[56] This is of particular relevance to on-site visiting procedures (which is clearly protecting State sovereignty). This requirement can not be abolished without a Protocol yet there is hope that if the CAT used this procedure on a frequent basis, then State permission would become a mere formality. An example of this is seen in the publishing of State reports. It is necessary to have the State's consent before this happens (article 19(4),

[50] It is an established procedure to examine complaints of 'situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission'.
[51] The 1503 procedure uses instructed delegates from the Commission on Human Rights. M. Nowak, *The Promotion And Protection Of Human Rights By The United Nations*, in "Netherlands Quarterly Of Human Rights", vol.6, no.2, 1988, p 14.
[52] H. Steiner, P. Alston, (1996) p 616 .
[53] J. Donnelly, (1986) p 19.
[54] M. Nowak, (1988) p 14.
[55] J. Donnelly, (1986) p 17.

Convention against Torture). However it is now the norm for State's to allow this and if they do not, it is seen as politically condemning. Therefore it could be hoped that this atmosphere could grow with regard to State visits, that is to say that by saying no, there is political condemnation.

Another argument could be put forward using the concept of implied powers. Byrnes uses this concept in relation to what he believes is the CAT's ability to make general comments even without a report by the State concerned.[57] This right of the Committee is not stated in the Convention. However as the mandate of the CAT is to supervise the prevention of torture, general comments are an integral part of this duty, even without a report by a State, ie "a power independent of the submission of a State report".[58] This could be extrapolated over to the use of visiting States without their prior permission. It would be a power implied within the Convention in order to fulfil the mandate of CAT. In practice however, it would not be a sustainable idea as States will maintain their sovereignty and their right to bar entry to their country. Furthermore, the CAT has not used this implied power to make general comments in absence of a report from a State. They maintain the original interpretation of article 19(3) and will only consider States who have submitted their reports.

2.2 The UN Commission On Human Rights

This is a political organ of the UN, whose standards are produced through a political and diplomatic process. Although its standards are not legally binding, they have political status as they come from a 53 member State body. This is important for the following bodies and procedures as it gives them important status and powers.

[56] Article 20(5) "All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential and to all stages of the proceedings the cooperation of the State party shall be sought."
[57] A. Byrnes, (1992) p 530.
[58] R. Bank, (2000) p 148.

2.2.1 The Special Rapporteur on Torture

The Commission on Human Rights appointed the Special Rapporteur on Torture as one of the theme Rapporteurs to the Commission in a resolution in 1985.[59] This resolution states that the Special Rapporteur should "seek and receive credible and reliable information from Governments, as well as specialised agencies, intergovernmental organisations and non-governmental organisations" and that "all Governments to co-operate with and assist the special rapporteur in the performance of his tasks and to furnish all information requested."[60] The Special Rapporteur stated that his creation was an indication that the international community believed all States should be held accountable for lack of torture prevention no matter whether they were parties to treaties specifically prohibiting this crime[61], or not.

The Special Rapporteur on Torture conducts his activities in four ways. He receives allegations of torture and sends these to governments to elicit a response in order to influence governments. The Special Rapporteur also requests information from governments with regard to measures they have implemented to protect their citizens from torture, he makes general recommendations of preventive measures that should be taken and finally he makes visits to States to help improve torture prevention. Rueda-Castanon believes that "the Special Rapporteur seeks to clarify the veracity of allegations and to encourage Governments to provide remedies for the victims,"[62] while the CAT's emphasis is "on the legal and institutional framework of the State concerned."[63]

The Special Rapporteur's visits to States "constitute a very important component of the mandate,"[64] because the procedure can be more effective

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[59] Commission On Human Rights, *Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment: The Commission On Human Rights*, 55th meeting, 13th March 1985, CHR Res.1985/33.
[60] Commission On Human Rights, CHR Res.1985/33, para 3 and para 4.
[61] Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, 2nd December 1992, E/CN.4/1993/28.
[62] C. Rueda-Castanon, *The Special Rapporteur On Torture: Some Issues Relating To Coordination With Human Rights Mechanisms*, in "Human Rights", vol.3, 1998, p 14.
[63] C. Rueda-Castanon, (1998) p 14.
[64] C. Rueda-Castanon, (1998) p 16.

than mere correspondence. The Special Rapporteur must have an invitation from the State concerned to enter the country and to investigate which has led to a delay in the procedure of over several years. Furthermore, some States turns down the Special Rapporteur's request for permission to visit. For example in 2002, 7 requests for visits were turned down for the following year, 2 States were in negotiations with the hope that they would permit the Special Rapporteur and only 2 visits were confirmed.[65] However he has been much more successful in gaining access to countries than the CAT (in his first twelve years the Special Rapporteur on Torture has carried out nineteen visits). Many of these States are also party to the Convention against Torture and have not opted out of the article 20 procedure. The success of the Special Rapporteur on Torture therefore is linked to the fact that there is no requirement of systematic torture before the visit, as is the case for article 20. As stated by the Special Rapporteur this year, he undertakes fact-finding missions "where information suggests that torture may involve more than isolated and sporadic incidents, with a view to gaining more direct knowledge of the situation and practice…and identifying measures to prevent the recurrence of such cases and to improve the situation."[66] This is a much lower threshold than article 20.

There are however disabling aspects of the Special Rapporteur's mandate. During individual allegations of torture, he has no power to make a final judgment on whether torture occurred. He can only work with the Government to encourage it to provide remedies. The CAT on the other hand has a quasi-judicial procedure.[67] Furthermore the Special Rapporteur is one of 21 different thematic rapporteurs appointed by the UN Commission on Human Rights. This fact has lead to criticisms of overlapping mandates, inadequate resources being stretched, dilution of pressure on governments and

[65] T. Van Boven, *Report Of The Special Rapporteur On The Question Of Torture Submitted In Accordance With Commission Resolution 2002/38*, 59th Session of the Commission On Human Rights, 17th December 2002, E/CN.4/2003/68, Para 24 and 25.
[66] T. Van Boven, E/CN.4/2002/68, Para3(d).
[67] C. Rueda-Castanon, (1998) p 15.

insufficient co-ordination.[68] In order to try and resolve these issues, joint missions have been introduced, for example in East Timor.

There is one main overlap between the Special Rapporteur's duties and that of the CAT, this being the Special Rapporteur request for information regarding States' implementing measures.[69] This is ultimately the same as the State reporting procedure under Article 19 of the Convention against Torture. For those States that are parties to the Convention, the Special Rapporteur proposed to be given copies of reports from the CAT.[70] For those States not party to the Convention, it means that they still have the same obligations as they would under the Convention against Torture. This arrangement is also a solution to the overlap of complaints to the two bodies. The advantage that the Special Rapporteur has is that he is not limited by the small number of sessions held by the CAT. Therefore he can respond immediately to any allegations of violations. Furthermore the Special Rapporteur is not held back by the domestic remedies having to be exhausted unlike the CAT.

One important difference between the CAT and the Special Rapporteur is that the CAT has a much stricter interpretation of torture and has the separation between this and cruel, inhuman and degrading treatment or punishment. The Special Rapporteur's mandate is to deal with torture, and thus has developed a wider meaning of this term, by using other international norms to define this term. He has also included in his mandate other treatment, as he believes that preventing torture must start at the beginning, ie that if there are other such acts occurring, there is a chance that torture will follow.[71] So the problem of lacking normative consistency continues.

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[68] H. Steiner, P. Alston, (1996) p 642.
[69] A. Byrnes, (1992) p 542.
[70] Committee Against Torture, *Committee Against Torture 2nd Session,* Summary Record Of The 11th Meeting*,* 25th April 1989, CAT/C/SR.11, (1989), Para 42.
[71] P. Kooijmans, *Report By The Special Rapporteur, Mr P. Kooijmans, Appointed Pursuant To The Commission On Human Rights Resolution 1985/33*, 19th February 1986, E/CN.4/1986/15, paras 122-40.

Byrnes reiterates his belief that "it does not seem likely that there will be wasteful duplication between the work of the Committee [the CAT] and that of the Special Rapporteur."[72] However it would seem that State reporting, the Protocol permitting State visits and the different terms all result in duplication between these two bodies. This means that States could use this to their advantage and play between the two authorities to escape their obligations. Furthermore, as the Special Rapporteur seemingly has a wider mandate in terms of interpretation and speed of reaction, it is unfortunate that there is an agreement between the two sources that if a State falls within the Convention against Torture's mandate, then the Special Rapporteur will not intervene.

2.2.2 The 1503 Procedure

This procedure results from the ECOSOC Resolution 1503[73] which allowed the Commission on Human Rights to examine communications (ie complaints) which were related to 'situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission.'[74] There are two procedures resulting from this resolution. The first is one in which the Sub-Commission will discuss the communication and decide whether talks should be continued. The second is one in which the Commission will appoint an ad-hoc committee to investigate the allegations. Although this allows the Commission to investigate[75] in a confidential, discreet and friendly solution atmosphere, this procedure has yet to be used. The entire 1503 procedure is based on secrecy and only one statement by the Chairperson of the Commission each year announces which States are under the 1503 examination. However, due to press leaks, there have been a number of occasions in which the international community has learnt of the States involved and following from this, the Commission has decided to release the relevant information.[76] As has already been noted, it has been criticised as providing no real results.[77]

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[72] A. Byrnes, (1992) p 545.
[73] (XLVIII) (1970) in H. Steiner, P. Alston, (1996), p 612.
[74] (XLVII) (1970), point 5 in H. Steiner, P. Alston, (1996), p 612.
[75] 'the express consent of the State concerned [is required] and shall be conducted in constant co-operation with that State and under conditions determined by agreement with it'.
[76] For example Uruguay, Argentina and the Philippines.
[77] See above 2.1.4

2.2.3 The 1235 Procedure

This procedure emanates from the ECOSOC Resolution 1235,[78] which allows for public debate of systematic occurrences of gross violations of human rights.[79] The Commission had failed to act on a number of gross violations that occurred before the late 1970's.[80] As a result of political pressure from the international community, the Commission expanded its mandate. Through this procedure, the Commission has been able to examine human rights in South Africa, Israeli-occupied territories and Chile. This procedure developed into two areas of activities. The first, coming from the original mandate, is to discuss country-specific situations in the Commission's annual public debate. This gives the Governments and NGO's the opportunity to participate in such discussions with the Commission. The second procedure is one in which the Commission allows for the study and investigation of situations (ie individual cases) through any mechanisms the Commission believes is appropriate. This allows for the Commission to include on-site visits, so long as the State concerned authorises the Commission's presence. An example of this is when the Commission organised an ad hoc working group on the situation of human rights in Chile in 1975. After three years of discussion with the Chilean Government, the group gained access to the territory, where among other things, torture was investigated.[81] These on site visits are just one of a number of ways in which the Commission has expanded its mandate in this area.[82] The results of this 1235 procedure can be to embarrass the State concerned, to draft a resolution, encourage public and open debate about the situation or for the chairperson of the Commission to make a statement on the issue.

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[78] (XLII) (1967) in H. Steiner, P. Alston, (1996), p 619.

[79] 'Authorises the Commission on Human Rights…to examine information relevant to gross violations of human rights and fundamental freedoms' (XLII) (1967), point 2, in H. Steiner, P. Alston, (1996), p 619.

[80] As Steiner and Alston note, examples of this are the Pol Pot's Democratic Kampuchea and the military regimes in Argentina and Uruguay. H. Steiner, P. Alston, (1996) p 620.

[81] Amnesty International, *Torture In The Eighties*, London, AI Publications, 1984, p 41.

[82] Other examples include :- 1) Ask the government concerned to respond to the allegations
2) Provide the State with advisory services
3) Ask the Secretary-general or the Security-Council to take up the issue in question.

There are however a number of criticisms of this procedure. Some reports have been accused of 'being in the pockets of the government',[83] thereby reducing the independence and objectivity of the Commission. Furthermore governments are not always willing to co-operate which provides problems with regards to producing an accurate report.

2.3 The International Covenant on Civil and Political Rights

The HRC's main way to investigate States' behaviour with regard to human rights and their obligations under the ICCPR is through State reporting. Under this covenant[84] the HRC's power are very vague. Although this is a weakness, the reporting procedure has not failed completely. Buergenthal believes that there were dramatic changes with this Committee during the 1990s[85]. The procedure and working methods changed and specialised agencies and other UN organs were included in meetings, enabling them to give oral information at the beginning of each pre-sessional working group meetings. The Committee has increased its use of studies and resolutions from UN organs and therefore country and thematic Rapporteurs have been more involved in the HRC's work. "The questions of its members have become increasingly more probing and intrusive than in the past…It also exposes, probably more than other existing measures of implementation, the achievements and failures of a states' human rights policies."[86]

The HRC has played a greater role in general comments and complaints procedure. This is partly because it has been in action longer than other mechanisms, but also because of its wide mandate. It can investigate a number of allegations from the same complainant ie torture and other abuses which often occur simultaneously. This is an advantage over the CAT, which can only deal with torture and cruel, inhuman and degrading treatment or punishment. Beuregenthal notes however that the Committee continues to have problems in receiving State reports on time. For example on 21st

[83] H. Steiner, P. Alston, (1996) p 622.
[84] Article 40.
[85] T. Buergenthal, *The Human Rights Committee*, in H. Steiner, P. Alston, (1996) p 711-714.

October 1999, the Committee had 138 initial and periodic reports overdue and well over fifty percent of the ICCPR's States' reports in arrears.[87]

The HRC does allow for fact-finding missions within a State, so long as it is offered an invitation by the State. To date this has only occurred once following an individual complaints procedure when the Committee was invited to the State to see what it had implemented following the views adopted by the Committee.[88] There have been suggestions that a visit should be included following the State reporting procedure under the ICCPR.[89] This has yet to be taken up.

Although the HRC's decisions are not legally binding on States, they are authoritative interpretations. Some commentators believe that the HRC has the least restrictive approach than all the international organs.[90] Furthermore the HRC refers directly to soft law standards such as the UN body of principles for the protection of all persons under any form of detention or imprisonment.[91]

2.4 Concluding Observations Of The International Mechanisms

From the preceding discussion, a number of conclusions can be drawn. Firstly with regard to what commentators believe these bodies roles are – to monitor and sanction. It is true that the CAT (through State reporting and the article 20 procedure), The UN Commission on Human Rights (through the work of the Special Rapporteur in particular, although the 1503 and 1235 procedure also contribute to a certain extent) and the ICCPR (through State reporting and on-site visits) all monitor States actions with regard to torture. It

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[86] T. Buergenthal, (1996) p 713.
[87] Human Rights Committee, *Report Of The Human Rights Committee*, 54th Session, Supplement no.40, 21st October 1999, A/54/40.
[88] Human Rights Committee, A/54/40, para 557.
[89] Human Rights Committee, *Report Of The Human Rights Committee*, 48th Session, Supplement no.40, 7th October 1993, UN Doc.A/48/40.
[90] See for example W. Suntinger, *CPT And Other International Standards For The Prevention Of Torture*, in M.D. Evans, R. Morgan, (eds), *Protecting Prisoners: The Standards Of The European Committee for The Prevention Of Torture In Context*, Oxford, Oxford Uni. Press, 1999, p 137-166.
[91] HRC General Comment 21/44 para 5, in W. Suntinger, (1999) p 147.

is also clear that sanctioning also occurs within the CAT through the complaints procedure, the Commission on Human Rights through the 1503 and 1235 procedures and the ICCPR through the complaints procedure under the HRC. However these are not the only functions of these bodies. They all work in order to prevent torture in some way. It could be argued that the complaints procedures also have a deterrent and thus preventative effect as well as State reporting, which although monitoring States behaviour, also acts as prevention through recommendations provided from the bodies involved.

The two main activities at the international level which will overlap with the work of the Protocol through their preventive work is article 20 under the Convention against Torture and the on-site visits of the Special Rapporteur on Torture. However the main, and very important difference between these and that of the Protocol is that they must ask the States' permission before they can enter the territory. This is a major drawback which the Protocol will not have to contend with. Further more, article 20 also has the high threshold which needs to be overcome before it can be instigated.

Secondly, the above analysis has revealed that there are a great number of problems and difficulties associated with each international mechanism. They all have problems, such as those relating to State reporting,[92] or to the complaints procedure. Furthermore, there is the issue of these current bodies already overlapping in mandate and in the way that they interpret the terms under each Convention. It has already been noted the importance of consistency which is not currently being achieved. Furthermore, all bodies rely on the good will of States in order to fulfil their goals. Be this through finances, through State consent requirement or through no sanctions being available and thus requiring the State itself to sanction or implement recommendations. This is a major disability for all bodies concerned. They are having to monitor and prevent torture and sanction States, yet this all requires the co-operation of States.

[92] As Buergenthal states "reporting systems have on the whole have not been seen by them [States] as involving much of a risk [of threatening their freedom of action]" – T. Buergenthal, (1996) p 711.

Chapter Three: The Current Mechanisms Available At The Regional Level

3.1 European Convention for the Prevention of Torture

3.1.1 Introduction

The ECPT was opened for ratification on 26th December 1987 by the Council of Europe and came into force in February 1989 when 7 member States had ratified it. By the summer of 1999, 40 out of the 41 Council of Europe member States had ratified it. Although it was based on the unsuccessful Costa Rican proposal for a UN preventive system, the European version was politically popular which States have been willing to ratify.

The aim of the ECPT is prevention, as opposed to establishing violations, passing judgments and dealing with remedies for the victims, as a court may do. It is based purely on stopping situations that may in the future become cases of ill treatment.[93] The CPT provides assistance to States to prevent violations occurring. Some believe that it is not a political tool, in that the body's criticism is objective, as opposed to condemning the past actions of State officials.[94] However it could be argued that political tools are used, especially when it comes to publishing reports. As Morgan states "A failure to comply with these recommendations [of the CPT] carries the risk of a form of sanction – a 'public statement'- which is 'political' rather than 'legal' in nature.[95]

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[93] See for example the CPT's First General Report – "The main purpose of the Committee's fact-finding is not the minute and punctilious establishment of whether or not serious abuses have actually occurred that characterises a judicial or quasi-judicial process. Rather, the CPT has a much broader remit: it must ascertain whether, in places where persons are deprived of their liberty by a public authority, there are general or specific conditions or circumstances that are likely to degenerate into torture or inhuman or degrading treatment or punishment, or are at any rate conducive to such inadmissible acts or practices." Committee For The Prevention Of Torture, *First General Report On The CPT's Activities Covering The Period November 1989 To December 1990,* CPT/Inf(91) 3, para 45.

[94] O. Rasmussen, B. Sorensen, *The Council Of Europe's Committee For The Prevention Of Torture (CPT) 1989-99*, in "Quarterly Journal On Rehabilitation Of Torture Victims And Prevention Of Torture", vol.9, no.4, 1999, p 109.

[95] R. Morgan, *The CPT Model: An Examination*, in L. Sicilianos (ed), *The Prevention Of Human Rights Violations*, The Hague, Martinus Nijhoff, 2001, p 5.

3.1.2 Procedure

Article 2 lays down the obligation of States to "permit visits…to any place within its jurisdiction where persons are deprived of their liberty by a public authority". Following such visits, the CPT and State will be involved in a series of confidential discussions. Thus confidential non-binding recommendations are made rather than accusations. It has been likened to the system practised by the International Committee of the Red Cross under the Geneva Conventions, thus providing this preventive mechanism for the first time within the international legal sphere of human rights.[96]As Sorensen states "it is the first time in the history of the world that several states have given permission to foreign, independent inspectors, not representing their own countries, to visit their closed institutions and to talk with everyone in private."[97]

One of the important provisions within this Convention is that the CPT is not reliant on States to report on the situation within their own countries. The CPT itself writes the reports, thereby avoiding problems of lack of relevant information from States or tardiness of State reports submission. This takes the pressure off States and allows the CPT to investigate the areas they wish to focus on, rather than hoping that States will do so. As Morgan notes, the State's "principal task is not to initiate but to facilitate and respond."[98] Due to this more passive role, it is believed that the procedure works more successfully.

The CPT has been given extensive powers to fulfil its obligations. Article 8 states that the country involved must provide the CPT with the following resources so that they can fulfil their task – "access to its territory and the right to travel without restriction"; "full information on the places where persons deprived of their liberty are being held"; "unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction"; other information available to the Party

[96] M. Nowak, *Recent Developments in Combatting Torture*, in "SIM Newsletter", vol.19, p 27.
[97] B. Sorensen, (1995) p 23.
[98] R. Morgan, (2001) p 5.

which is necessary for the Committee to carry out its task".[99] Furthermore the CPT has been given the power to "interview in private persons deprived of their liberty"[100] as well as "communicate freely with any person whom it believes can supply relevant information".[101]

There are two types of visits carried out by the CPT. The first is a periodic visit, the first of which takes place once a State has ratified the ECPT. Due to the increase of States parties, the length of time between periodic visits has increased to four years. At the end of each year the CPT publishes which States to be visited the succeeding year. Two weeks prior to the visit, the CPT will inform the State which CPT members will be involved and meetings with ministers will be organised. Three days before the visit, the CPT will notify which institutions they wish to visit. However, the CPT is not bound by this list and if, during the visit, they require visits elsewhere, this can not be prohibited. At the end of the visit, meetings will be held with members of the government. The CPT may make preliminary observations to the State,[102] often when the CPT believes immediate action must be taken. Six months later, the full report with concerns and recommendations will be sent to the State. The second type of visit is an ad hoc visit.[103] This will be made either for a specific reason (i.e. when there are concerns about a situation in a particular country) or as a follow-up visit following a periodic visit.

Whichever the type of visit, the procedure is generally the same. The CPT will use the visit as a opportunity to speak to as many people as possible – government members, NGO workers, people detained, people working in the institutions or anyone else the CPT thinks may have important information. The visit is also an opportunity to inspect places of detention in order to view how the prisons and other detention systems work, the current laws and regulations governing such institutions and whether there are any situations

[99] Article 8(2)(a) – (d).
[100] Article 8(3).
[101] Article 8(4).
[102] Article 8(5).
[103] This is provided for under article 7(1) "The Committee shall organise visits to places referred to in Article 2. Apart from periodic visits, the Committee may organise such other visits as appear to it to be required in the circumstances."

or conditions which may lead to torture or poor treatment.[104] The CPT will try to gain a genuine insight into the institution by arriving when they will be least expected. An example of this is visiting police stations late at night on a weekend, when police officers are most stressed and in difficult situations, and thus detainees most likely at risk. To date the CPT has focussed largely on police stations and prisons. By 1992, Evans and Morgan note,[105] only two States had their mental hospitals visited[106] and only one State had a refugee camp visited.[107] This can further be seen in the visits that the CPT organised in 2001 when Slovenia only had 17 police establishments, 3 prisons and 2 psychiatric establishments visited.[108] However, the UK visit in February, although visiting police establishments twice, court cells three times and prisons four times, did make two visits to children's detention facilities and one visit to a military detention facility.[109] Therefore although this is a limiting factor of the CPT, it is hoped that the UK visit is an example of other places being investigated more frequently.

The final report made by the CPT is confidential between the CPT and the State concerned,[110] providing one reason why the ECPT is successful. The system is based upon trust and co-operation, without which, the ECPT would be a failure, as States would lose too much by signing the Convention. Although the reports are confidential, the States have the right to waiver this and allow the reports to be published.[111] Due to the fact that many States do allow their reports to be published, there is political stigma attached to those who are not willing to do so, as many see this confirming serious problems

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[104] O. Rasmussen, B. Sorensen, (1999) p 108.
[105] M.D. Evans, R. Morgan*., European Convention For The Prevention Of Torture: 1992-1997*, in "International and Comparative Law Quarterly", vol.46, 1997, p 603.
[106] Malta and Sweden.
[107] Sweden.
[108] Visit from 16th September to 27th September, Committee For The Prevention Of Torture*, Appendix 5 – Places Of Detention Visited By CPT Delegates in 2001*, 12th General Report On The CPT's Activities Covering The Period 1 January to 21 December 2001, CPT/Inf (2002) 15, p 30.
[109] 4th February to 16th February, Committee For The Prevention Of Torture, CPT/Inf (2002) 15, p 32
[110] Article 11(1) "The information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned shall be confidential".
[111] Denmark was the first to do this in 1991 and since then most States have done so. This is allowed under article 11(2) "The Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party."

within the State. By August 1999, the CPT had made 63 periodic visits and 27 ad hoc visits, with a total of 59 reports having been published.[112]

There is however one exception to the confidentiality rule. Under article 10(2) the CPT may make a public statement if a State has refused to co-operate or to improve the situation following recommendations. This procedure has only been used twice – both in relation to Turkey. It must be noted however, that the report is not made public in this situation, only a public statement is made. However, in an explanatory report, the CPT states it has "wide discretion in deciding what information to make public", which may lead to including the report itself.[113]

3.1.3 Positive Aspects Of The System

One of the valuable assets for the CPT is the varied backgrounds which the Committee members come from. Article 4(2) states that "The members of the Committee shall be chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention". This has allowed members from a legal, medical, psychological, prison, police and clerical background to participate in the CPT. Furthermore, the ECPT provides for the use of experts on an ad hoc basis.[114] This thereby allows for the Committee to increase its expertise and understanding of the issues involved, during visits.

Sorensen states that "It has proved a very fruitful procedure. CPT has started a valuable dialogue with the governments. The recommendations have been followed to a large extent, or the governments have given CPT convincing reasons for not doing so."[115] Furthermore, because the recommendations of the CPT are not legally binding, they can produce higher human rights norms than already established. However, the idea that the CPT has no legal

[112] O. Rasmussen, B. Sorensen, (1999) p 109.
[113] M.D. Evans, R. Morgan, (1997) p 609.
[114] Article 7(2) "…The Committee may, if it considers it necessary, be assisted by experts and interpreters."
[115] B. Sorensen, (1995) p 23.

function is not one that can be confirmed. The CPT often comes across evidence of torture or ill-treatment and finds itself unable to ignore the different interpretations and meanings of such terms. Although the CPT does have bodies to look to in order to evaluate such conditions (the European Commission and the European Court of Human rights case law), this has not prevented the CPT developing its own interpretation of terms. As a general report of the CPT states, "In carrying out its functions the CPT has the right to avail itself of legal standards contained not only in the European Convention on Human Rights but also in a number of other relevant human rights instruments…it is not bound by the case-law of judicial bodies…but may use it as a point of departure."[116] Therefore the CPT can and has used different interpretations and developed established meanings. For example the CPT uses 'torture' almost exclusively for those in police custody, while 'inhuman' and 'degrading' is used in connection with conditions of detention.[117] The European Court on Human Rights however uses these terms depending on the gravity of the situation. There is clearly a difference in the use of these terms.

Although some claim that the CPT's only sanction is a disabling aspect of the system, this has been counter-argued. It is important that States believe that the confidentiality requirement will be maintained in order to build a co-operative relationship between body and State. Furthermore, the sheer fact that the only sanction (the publishing of reports when States do not co-operate) is used so infrequently, means that when it is used it has severe connotations.

3.1.4 Negative Aspects Of The System

There is however one restriction to this use of unconditional visitation rights. Article 9(10) allows that States may stop a visit taking place "In exceptional …[and] on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in

[116] General Report 1990 (CPT/Inf(91)3) para 5 in R. Morgan, (2001) p 37.
[117] R. Morgan, (2001) p 8.

progress." This potentially gives governments an enormous amount of power in which to stop CPT access. Not only are these situations often the precise moments when violations occur, but they are wide categories which could incorporate a large number of circumstances. However, to date, States have yet to use this provision.

As already stated[118] the CPT is an independent organ and has therefore provided broad interpretations and pragmatic proposals. While this is commendable in that important recommendations result from the work of the CPT, there are problems in that there are now a number of different bodies at the regional and international level interpreting these terms differently. It would surely be most beneficial to provide normative consistency which must surely be valued.[119] However at the same time the CPT is not always the most expansive in its work. There are areas, as noted by Suntinger,[120] which are often not distinguished or brought to the forefront by the CPT, yet other organs classify as relevant and important. For example 'What avenues of complaint exist?' 'How should the State investigate alleged violations?' These are dealt with by other international organs but not by the CPT.[121]

There have been occasions when the classification of State officials' actions, as recorded by the CPT, has been questioned by commentators. For example, Morgan notes that in a Hungarian report, a victim was beaten with batons while handcuffed behind his back, which was not regarded as torture by the CPT.[122] Yet in a report on Bulgaria[123] the beating on the soles of the feet was defined as torture. It is not clear the difference between these situations, and why they should be categorised differently. The CPT needs to standardise its interpretations and make these clear to all parties concerned in order to prevent such confusion.

[118] See above 3.1.3
[119] As already noted above 2.1.2 and 2.2.1
[120] W. Suntinger, (1999) p 157.
[121] For further discussion in this area see W. Suntinger, (1999) p 157 .
[122] Hungary Visit 1994 (CPT/Inf(96)5), in H. Steiner, P. Alston, (1996), p 21.
[123] Bulgaria Visit 1995, in H. Steiner, P. Alston, (1996), p 21.

Although the procedure designates the CPT report as the start of an on-going dialogue, this in reality does not always happen. Morgan notes that there is very little two-way communication occurring. Often long periods lapse with no such discussion, which the CPT acknowledges as a problem due to lack of secretariat resources.[124] Furthermore the CPT is "far from satisfied with its own record as regards the on-going dialogue.[125] There has, according to Morgan[126] been a lack of monitoring the implementation of recommendations which risks the "credibility and effectiveness"[127] of the ECPT.

There are administrative and procedural difficulties relating to the CPT's working methods. All CPT reports are translated into English and French, however many countries do not use these two languages. If translation into the national language does occur, it can not always be relied upon for accuracy. Also people who are able to read the report may not be aware of the slight subtleties in the language used by the CPT or the importance of the different standards and terms. Therefore the CPT's potential to disseminate information to citizens and to provide publicity about violations, is not being fulfilled. Education and publicity is an important aspect of torture prevention – as stated by Sorensen, creating "awareness of the problems of torture – perhaps the most important condition to abolish this plague of the century."[128]

Furthermore, it must be questioned whether the CPT really can claim to have a full and concrete picture of treatment in places of detention. Even if every prison and detention centre could be visited (which is all but impossible in most States), this would only be for a few hours, and could not gain a complete picture of how the centre is run. As Dr Karfy Bard noted "however highly we regard the activities of the [CPT] we cannot seriously think that their visits every five years can solve the detainees' problems."[129] Therefore these

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[124] R. Morgan, (2001) p 16.
[125] Committee For The Prevention Of Torture, *General Report of The Committee For The Prevention Of Torture*, no.5, CPT/Inf (95), 1994.
[126] R. Morgan, (2001) p 16.
[127] General Report 1994 (CPT/Inf(95)10) para 10 in R. Morgan, (2001) p 16.
[128] B. Sorensen, (1995) p 22.
[129] Scientific Director of the Constitutional and Legislative Policy Institute in Hungary, *Punished Before Sentence – Detention and Police Cells in Hungary*, Budapest 1998 p 12 in L. Wendland, *Study:*

reports, although useful, are not complete. This is a major disability of a regional mechanism which can not constantly monitor the situation.

What must be noted is that the two types of visits (periodic and ad hoc/follow up) have in essence different aims which conflict with each other and the mandate of the CPT. The periodic visit is intended to be a regular visit, not with any purpose in mind, apart from assessing the situation and helping the State to combat and prevent torture. This is within the scope of the mandate of the CPT – a co-operation between State and the CPT. Ad hoc visits or follow up visits however have a different intention. These are used to investigate specific allegations of torture or ill-treatment or verify certain issues that were uncovered during the periodic report. This is more of an accusatorial nature, which is contrary to the mandate of the CPT. It is clear that if an ad hoc visit or a follow up visit is required, then there must be something of importance to investigate. Furthermore, not only is this a contradiction of the aim of the CPT, but it is also straying into the path of the European Court of Human Rights as it too is determining whether a violation has occurred.

3.2 The Inter-American Convention on Human Rights

3.2.1 Introduction

1948 saw the creation of the Organisation of American States (hereon in referred to as the OAS) and the adoption of the American Declaration of the Rights and Duties of Man. The American States were therefore bound by human rights treaties before the Universal Declaration was adopted by the UN and the European Convention by the European states. The Inter-American Commission on Human Rights (hereon in to be referred to as the IACHR) was introduced in 1959 and in 1969 the American Convention on Human Rights was adopted. These initiatives were highly significant in a

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The Impact Of External Visiting Of Police Stations On Prevention Of Torture And Ill Treatment, Geneva, APT, 1999.

continent where authoritarian or military governments were often in power and human rights abuses such as torture were common practices. Article 5 of the American Convention on Human Rights prohibits torture and cruel, inhuman or degrading treatment or punishment.[130] Furthermore, in 1985 the Inter-American Convention to Prevent and Punish Torture was adopted and came into force in 1987. No mechanism to prevent torture was created however, States are replied upon to prohibit and punish, with the IACHR as co-ordinator.

3.2.2 The Role Of The Inter-American Commission

The IACHR was originally designed to address only wide scale violations of human rights and to help States improve their protection of such fundamental freedoms. However it quickly became apparent that individual complaints were a necessary inclusion and thereby such a procedure was included by the IACHR. This was finally formalised in 1965 by Resolution XXII passed by the OAS, although a number of commentators have noted that this procedure lacks judicial powers and the IACHR is dependent on the government to provide information.[131] Therefore the IACHR used the procedure it had created to 'take cognisance' of complaints (this was used before resolution XXII was passed). This was interpreted in a broad sense and allowed the IACHR to identify systematic human rights abuses. It also provided the IACHR with the power to examine a country's situation and to publish its own reports on what had been discovered. Amnesty International believes that this body has "some of the most flexible procedures for dealing with human rights abuses of any of the IGO [Inter-Governmental Organisation] human rights bodies.[132] The IACHR's role includes assisting in the drafting of documents, preparing country reports (usually including an on-site visit), promoting

[130] Article 5(1) "Every person has the right to have his physical, mental, and moral integrity respected."
Article 5(2) "No one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."
[131] C. Medina, *The Inter-American commission on Human Rights and The Inter-American Court of Human Rights: Reflections on a Joint Venture*, in "Human Rights Quarterly", vol.12, (1980), p 441.
[132] Amnesty International, (1984) p 42.

human rights, mediating human rights disputes, dealing with individual complaints, advising States and handling cases before the court.[133]

The IACHR has used its mandate to issue country reports as a way to investigate, assess and negotiate with States with regard to human rights. These reports have either been issued following a review on a situation in its annual report or following an on-site visit to a country. According to Cox,[134] the IACHR interpreted its right to enter a State and complete such investigation from it's right to hold meetings in any of the member States. The IACHR is not restricted by any threshold of seriousness, which is an advantage over other bodies, such as the CAT and article 20. However, it must be noted that the State must give its consent before the IACHR can conduct an on-site investigation. This has caused a number of problems and delays in the process. For example when the IACHR asked the permission from the Guatemalan Government, the reply was "The Guatemalan Government respects and guarantees human rights and, just as it respects sovereignty of other States, it is watchful of its own. Due to the foregoing…Guatemala does not give permission for visit by the Commission."[135] This request occurred in October 1973, and after numerous correspondences between the IACHR and the State (during which a visit was finally agreed upon but no date was set), by 1990, the visit date still had not been agreed.

However these on-site investigations have occurred on numerous occasions and have found instances of torture.[136] They are carried out either because the State has invited the IACHR on its own initiative or because the IACHR believes it necessary, following a specific incident. The IACHR will always obtain the reassurance of the State that they will have full freedom of movement and that they will be able to speak to whomever they wish.

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[133] C. Medina, (1990) p 441.
[134] F. Cox, *Analyzing The Inter-American Commission On Human Rights Under Three Theories Of Compliance*, in "Revista Institutuo Interamsericano De Derechos Humanos", vol.28, 1998, p 32.
[135] T. Buergenthal, R. Norris, D. Shelton, *Protecting Human Rights In The Americas: Selected Problems*, Strasbourg, N.P.Engel, 1990, p 278.
[136] For example the El Salvador on-site investigation in 1978 and the Argentinean on-site investigation in 1980. For further detail see T. Buergenthal, R. Norris, D. Shelton, (1990) p 288 – 301.

According to Harris[137] these visits and reports were the main part of the IACHR's work in the first fifteen years. The IACHR decided to establish and thus bring publicity to the gross violations that were occurring, rather than concentrate on single individual cases. This brought pressure on governments and thus helped to bring an end to such violations. Harris believes that this work has resulted in successful outcomes, such as the Argentinean report in 1980. Due to this report, citizens became aware of the exact nature and extent of the disappeared people in their country. However, States are not always happy with the work of the IACHR. For example the Argentinean government following the IACHR report in 1978, claimed that it did not "satisfy the requisites of fairness and objectivity" and that the IACHR was attempting "to put a government on trial and to discredit it", rather than promoting the respect of human rights.[138]

The 1980's saw pressure for the IACHR to concentrate it's energies on individual cases. As many countries had become democratic regimes cases of gross and systematic violations were lessening. Therefore the IACHR started to move towards a case-orientated programme. Yet it must be noted that country reports are still necessary in the Americas and that this form of prevention should not decrease. It is noticeable that the IACHR has yet to compile thematic reports which could enhance publicity and thus prevent violations.

3.2.3 Police Ombudsmen

A number of countries within the American continent have Ombudsmen which conduct visits to police stations. The Association for the Prevention of Torture (an NGO) conducted research on these visits in which they found that the "potential for these bodies to prevent violations through periodic visits of detention facilities is largely untapped due to resource limitations, lack of

[137] D. Harris, *Regional Protection Of Human Rights: The Inter-American Achievement*, in H. Steiner, P. Alston, (eds*), International And Human Rights In Context: Law, Politics, Morals*, Oxford, Oxford Uni. Press, 1996, p 876.
[138] T. Buergenthal, R. Norris, D. Shelton, (1990) p 320.

independence and competing priorities". [139] This could be an area to be developed by the States, or by the IACHR.

3.3 African Charter on Human and Peoples' Rights

3.3.1 Introduction

Article 5 of the African Charter on Human and People's Rights states "…All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited". This treaty provides for the implementation of its provisions and the monitoring of State obligations through the establishment of the African Commission.[140] The mandate of the African Commission is to promote and ensure the protection of human and peoples' rights, to interpret the provisions of the Charter and to perform other tasks as maybe required.[141] To date, the African Commission has been active with regard to the prevention of torture. February 2002 saw the finalisation of the Robben Island Guidelines which are principles and procedures to prohibit and prevent torture. Furthermore the Commission has conducted an internal study of the Convention Against Torture and produced some recommendations, especially with regard to ratification of this treaty. Following this investigation, 14 new African States have ratified.[142]

The African Commission also has a State reporting procedure, which has come across similar problems as other bodies. For example as of May 2001, 24 States had not submitted any reports, 9 States had submitted 1 report, but owed more, 4 States had submitted 2 reports, but owed more. Only 16 States had submitted all required reports.[143] However, State reporting can enforce prisons standards through questions offered by the African Commission to

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[139] www.apt.ch/americas/americas.htm
[140] Article 30.
[141] As stated in Article 45.
[142] www.apt.ch/africa/africa.htm
[143] African Commission On Human Rights, *Status of Submission Of Periodic Reports To The African Commission On Human Rights*, Annex II, in *14th Annual Activity Report Of The African Commission On Human Rights*, 37th Ordinary Session, 2-12 July 2001, www.achpr.org/14th_Annual_Activity_Report-_AHG.pdf, page 22.

the State. An example of this is the South African Article 62 report at the African Commission's 25th Session.[144]

3.3.2 On-Site Investigations

Within the procedural rules granted to the African Commission, "the Commission may resort to any appropriate method of investigation…"[145] From this provision, the African Commission has been able to carry out fact-finding missions in States concerned and has often investigated the use of torture within African States. This was a major innovative action on behalf of the African Commission, and is used both in accordance with article 58(3)[146] and with article 58(1).[147] Although before the 1990's many States turned down the requests, States have been more willing to allow fact-finding missions on their territory, following the involvement of the OAU Secretary General.[148]

The 1992 on-site investigation in Senegal is an example of when this mechanism has been used in relation to torture. Amnesty International reported that recommendations were given to create better conditions for negotiations and also to encourage the government to free political prisoners and to bring perpetrators of torture to justice. This is clearly a positive move in relation to the prevention of torture. However the Amnesty report in 1992 highlighted a number of recommendations in order to improve the on-site investigations. Amnesty International has reproached the African Commission for having used this procedure as a mediation exercise.[149] It was preferred that the African Commission use its powers to investigate human rights. Amnesty International believes that there are severe restrictions to what the African Commission has so far managed to achieve[150], which if this is to be

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[144] See R. Murray*, Application Of International Standards Of Prisons In Africa: Implementation And Enforcement*, www.penalreform.org/english/frset_art_en.htm.
[145] Article 46.
[146] ie in cases of emergency.
[147] ie in cases of a series of serious or massive violations of human rights.
[148] For example Mauritania, Nigeria and Sudan, see H. Steiner, P. Alston, (1996) p 927.
[149] Amnesty International, *Credibility in Question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, AI INDEX IOR 63/02/98.
[150] Amnesty International accuses the African Commission of lacking "an in-depth analysis and then concludes with recommendations which do not adequately respond to the violations mentioned in the report" with regard to the investigation in Mauritania in 1996. Further more the Amnesty report gives

believed, such investigations are lacking in substance, clarity and independence. Therefore the system would need to be improved in order to feel that the African Commission was succeeding in its goal to prevent human rights abuses.

3.3.3 The Special Rapporteur On Prisons And Conditions Of Detention

In October 1996, at the 20th session of the African Commission, the first and only regional Special Rapporteur on Prisons and Conditions of Detention was appointed, following proposals from Penal Reform International and other NGO's. The Special Rapporteur's mandate was to "examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights."[151] The mandate of the Special rapporteur was spelled out in clear elements and the right to "seek and receive" information was included as the way in which to fulfil the mandate.[152] Furthermore full co-operation and assistance was to be expected from States.[153] The procedure of the on-site investigations is similar to that of the CPT, although permission from States must be given before an investigation can be carried out. Prisons, police cells or other such areas where people are imprisoned are visited and the Special Rapporteur will speak with the authorities, prison staff, NGO's and prisoners. On the spot recommendations will be made for serious problems. Following a visit, a report will be submitted to the State, with recommendations. The Government has a chance to make comments to this following which, the report and State

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recommendations to the African Commission in order to improve the on-site investigations which Amnesty feels is required. These include having "the objective of assessing the human rights situation in the country concerned….include a clause [in the African Charter] which prohibits a Commissioner who is a national of or who resides in the territory of the state in which the fact-finding mission is to be carried out from participating in the mission. Adequate preparation in advance of missions…the African commission should insist on unimpeded access to all parts of the territory and make independent arrangements to travel to and within the country concerned. It should also obtain a clear undertaking that no reprisals will be taken against any persons or entities co-operating with the mission…the African commission should produce public reports of missions for wide distribution which provide a detailed analysis of the human rights situation…conclusions and recommendations.

[151] M. D. Evans, R. Murray, (eds), *The African Charter On Human And peoples' Rights: The System In Practice 1986-2000*, Cambridge, Cambridge Uni. Press, 2002, p 291.

[152] M. D. Evans, R. Murray, (2002) p 291.

[153] M. D. Evans, R. Murray, (2002) p 291.

comments will be published[154] Since the creation of this role, 8 countries have been visited.[155]

Evans and Murray believe that the Special Rapporteur's "appointment has been hailed as a success and there appears to be a certain amount of relief from the Commission."[156] This can be judged from the follow-up visit to Mali which occurred in 1998. The Special Rapporteur noted that although there were still concerns similar to those during his first visit, "the government is serious about prison reform. It is willing to learn from and share ideas on the subject with others. It recognises that much work has to be done in this area…[the government had] implemented some of the recommendations" from his first report."[157] The use of follow-up visits (similar to the CPT) allows the Special Rapporteur to ensure enforcement. Furthermore, the African Commission heard in 2001 that the Special Rapporteur had encouraged the Benin Government to address the health of prisoners and that the Government had allocated funds.[158] Therefore it can be concluded that the Special Rapporteur has managed to make some difference.

3.4 Concluding Observations On The Regional Mechanisms

It is clear that from the above analysis, that the CPT's main function is to prevent torture through the system of visits. This can also be said for the Inter-American Commission, which has expanded its mandate so as to allow on-site investigations along with the work of the Ombudsman. The African Commission also has the potential to prevent torture through its on-site investigations and through the Special Rapporteur. Yet at the same time, these functions which are carried out, could also be included under the

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[154] Although the 1998 Madagascar visit report was not published. Special Rapporteur On Prisons And Conditions Of Detention in Africa, *Special Rapporteur*, www.penalreform.org/english/frset_art_en.htm.

[155] Zimbabwe (1997), Mozambique (1997and 2001), Madagascar (1998), Mali (1997 and 1998), The Gambia (1999), Benin (1999), the Central African Republic (2000) and Malawi (2001). M. D. Evans, R. Murray, (2002) p 293.

[156] M. D. Evans, R. Murray, (2002) p 295.

[157] M. D. Evans, R. Murray, (2002) p 294 – 295.

[158] Dankwa, E., *Report Of Special Rapporteur On Prisons And Conditions Of Detention,* in *14th Annual Activity Report of The African Commission On Human Rights*, 37th Ordinary Session, 2- 12 July 2001, www.achpr.org/14th_Annual_Activity_Report-_AHG.pdf.

heading of monitoring. All three bodies are monitoring the behaviour of States within their region through the on-site investigations. It must also be noted that the ad-hoc and follow up visits conducted by the CPT could also be included in the category of sanctions because it is more of an accusatorial system. The African and Inter-American systems could also be included within this category due to the fact that the very reason that on-site visits take place and that ombudsmen and Special Rapporteurs are involved is because of allegations of torture. Thus the result of these inquiries may lead to some sort of sanction, albeit weak.

There are obvious difficulties related to all three bodies, firstly the CPT which lacks normative consistency, not only within the international community, but also within the Committee itself. Furthermore, the places that it visits lacks variation and the dialogue that the CPT and State is supposed to undertake has been criticised as not sufficient. The Inter-American system has no specific body concentrating on torture which is a major disability This is the same for the African system (along with no specific Convention), which has also been accused by some in not being accusatorial enough and thus producing no results in combating torture. These two latter bodies also have the added obstacle of having to rely on state consent before on-site investigations can take place.

Chapter Four: The Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment

4.1 Introduction

In 1980, the Costa Rican draft Protocol to the draft Convention against Torture was not submitted for fear of controversy leading to the Convention not being ratified. It was later brought back into the international arena by the same Government, although due to advances in the UN human rights system with regard to torture (such as the coming into force of the Convention against Torture and the UN Special Rapporteur on Torture) as well as regionally (the ECPT), it was decided that the Protocol would need to be revised. At the Commission on Human Rights' 45th Session an open ended inter-sessional working group was established.[159] Delegates included State representatives, NGOs and Inter-Governmental organisations. For example in 1993 Amnesty International, the International Association of Democratic Lawyers, the International Commission of Jurists and the International Service for Human Rights were all represented,[160] as well as the International Committee of the Red Cross, the CPT, the CAT and the Special Rapporteur on the question of Torture.[161] During the process of negotiations, the Costa Rican draft was considered as well as the Mexican and Swedish delegations' drafts in February 2001[162] and the United States of America's draft submitted as late as 2002.[163] The final draft presented was submitted by the Chairperson, Ms Odio Benito. She classified this as a compromise between the discussions taken place in the preceding ten years and made it clear that it was not to be open for negotiation.[164] It was this draft which was submitted to the Commission on Human Rights.

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[159] Resolution 1992/43 of 3 March 1992, E/CN.4/Res.1992/43.
[160] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 10.
[161] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 27.
[162] Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment On Its Ninth Session*, 13th March 2001, E/CN.4/2001/67, Annex I and Annex II.
[163] Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 26.
[164] Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 45.

4.2 State Consent

The most important principle underpinning the entire Protocol is that State consent is not required for individual visits, once the Protocol has been ratified.[165] This concept of implied consent at the moment of ratification was introduced from the early stages of the negotiations of the Protocol.[166] Therefore, although this concept was introduced from the very beginning, throughout the ten years of negotiations, this continued to be a contentious issue.[167] It is easy to understand why this – without this, the Protocol would have been another mechanism which, similar to the Special Rapporteur on Torture, would only be able to enter States if they consented to each and every visit. This would clearly have diminished the Sub-Committee's authority as it would allow a right of veto.[168] Although the Protocol would receive more ratifications if this provision were not included,[169] it was believed that ratification signified the consent of States to allow visits to occur[170] and thus the act of ratification is the State relinquishing a part of its sovereignty.[171] Furthermore the South African representative noted in 1996 that the principle of universality which is an important concept to the Protocol, would be

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[165] Both Article 12 and 14 lists the demands placed on the State in relation to the Sub-committee, including the right of the sub-committee to visit. Neither of the articles require State consent before these requirements can be fulfilled.

[166] See Article 1, Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment in Costa Rican Government, *Letter Dated 15 January 1991 from The Permanent Representative Of Costa Rica To The United Nations Office At Geneva Addressed To The Under-Secretary-General For Human Rights*, 22nd January 1991, E/CN.4/1991/66.

[167] For example Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment*, 17th November 1993, E/CN.4/1994/25 para 24 and Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, 12th December 1994, E/CN.4/1995/38 para 25 and E/CN.4/1995/38 para 69 and Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment On Its Eighth Session*, 2nd December 1999,E/CN.4/2000/58 para 37 and 38.

[168] Working Group On The Draft Optional Protocol, E/CN.4/1995/38, para 26.

[169] For example, see the representative of Cuba speaking on behalf of Algeria, China, Egypt, Saudi Arabia, the Sudan and the Syrian Arab Republic, who stated that "it was possible to balance the sovereignty and legitimate concerns of States and the effectiveness of the protocol through the prior consent of the State to a visit." - Working Group On The Draft Optional Protocol, E/CN.4/2000/58, para 63.

[170] For example Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment*, 23rd December 1996, E/CN.4/1997/33, para 29.

[171] Working Group On The Draft Optional Protocol, E/CN.4/1997/33, para 39.

contradictory in allowing State to "reserve its consent to receiving a mission."[172] The fact that this ideal has prevailed will be important in two ways. Firstly it will mean that the Protocol is introducing an innovative mechanism into the UN arena. Secondly, it will mean that fewer States will currently be willing to ratify the Protocol. Many States still deny access to the international community. The fact that this Protocol will allow visits at any moment, will deter certain States.

4.3 The National Mechanisms

An important inclusion that occurred late in the negotiation process, were the national mechanisms.[173] This provision requires States to "set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture…".[174] These national preventive mechanisms have the mandate to visit places of detention, to make recommendations to the State authorities and to submit proposals and observations with regard to legislation.[175] They will have access to all information with regard to those deprived of their liberty, to the treatment and conditions of such persons, to all detention centres, the right to private interviews with any persons the national mechanism believes could provide information, the right to choose which places and people they will visit and the right to contact the Sub-Committee.[176] The national preventive mechanisms therefore have wide-ranging powers and mandate awarded to it.

This mechanism was introduced in the Protocol submitted by Mexico in 2001 because "States have the primary responsibility for the protection of human rights and that the action of the international mechanisms has to be

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[172] Working Group On The Draft Optional Protocol, E/CN.4/1997/33, para 35.
[173] It must however be noted that this is an extension to the Convention against Torture which already required States to take "effective legislative, administrative, judicial or other measures to prevent" torture, which is "the main aim and purpose of the Convention". See Committee Against Torture, *Alan v. Switzerland: no.21 (8th may 1996)*, in *Report Of The CAT*, General Assembly, 51st Session, Supplement no.44, A/51/44, Annex V Para 11.5.
[174] Article 3 of the Draft Optional Protocol, E/CN.4/Res./2002/33.
[175] Article 19 of the Draft Optional Protocol, E/CN.4/Res./2002/33.
[176] Article 20 of the Draft Optional Protocol, E/CN.4/Res./2002/33.

complementary to the action taken by each individual State."[177] The Protocol ensures that the national preventive mechanisms are guaranteed independence from the State[178] and that experts who are well qualified and capable to perform their duties are called upon to work in it.[179] Even with these safeguards, States may still have undue influence in the national preventive mechanisms and members may not be free to state clearly and unequivocally what has been uncovered. The fact that the Protocol does not specify ways in which members shall be appointed is a significant disability to their independence.[180] Some States may designate their supporters as members, or appointment procedures may influence the outcome of reports. It remains to be seen how these national mechanisms will work, and whether they will be objective in their assessment of the national detention centres. This is especially relevant in relation to the Convention against Torture because it is specifying State officials' acts as prohibited. Therefore "the assessment of whether a State has in effect failed in the exercise of its state authority must be left to independent international bodies, which, in contradistinction to States, have no power-political interest in violations."[181] Impartiality is very important, and without a separation between State and supervising body there is serious doubt about the ability to act independently.

The power of the national mechanisms is limited. It is true that they have wide, mandate in order to investigate and gather information.[182] However, they have little power in relation to procedures following a finding of abuse. Their annual reports will be published by the State, but there is very little else available as way of exerting their power. This is of particular importance since the bodies are national mechanisms, and thus will receive minimal publicity, especially at the international level. Therefore the effectiveness and usefulness of these national mechanisms may be called into question.

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[177] Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 19.
[178] Article 18(1) of the Draft Optional Protocol, E/CN.4/Res./2002/33.
[179] Article 18(2) of the Draft Optional Protocol, E/CN.4/Res./2002/33.
[180] For example L. Wendland highlights the importance of setting minimum requirements with regard to training, impartiality of visitors and organisation. (1999) p 82.
[181] C. Ingelse, (2000) p 310.
[182] Articles 19, 20, and 21 of the Draft Optional Protocol, E/CN.4/Res.2002/33.

There were complaints by delegates, that there "was no proper balance between the national and the international levels…[and]the latter seemed to become subsidiary to the former." In their opinion, this was contrary to the spirit of the original draft optional Protocol.[183] For others however, the powers of the national mechanism were to be praised as a new initiative, which would put the focus at the national level which was more important.[184] It must however be noted at this point, that the Mexican draft, which was the first to include the mechanism, did not allow for the Sub-Committee to conduct visits, therefore providing fuel to this criticism.[185] Many delegates, as late as the 2002 working group, still advocated this separation of powers[186] and the importance of entrusting the visiting powers to the national body rather than to the Sub-Committee. However it must be noted that some delegates expressed the concern that not enough power was given to the national mechanism and that too much was given to the Sub-Committee.[187] The final draft provides for visits by the Sub-Committee[188] as "no State would on its own be able to…[prevent] torture without international support."[189] It must also be noted that although a number of NGO's supported the introduction of national mechanisms, they were clear that the international mechanism had to be the main focus to the Protocol and be given strong powers including visitation rights in order to prevent torture.[190]

According to a study commissioned by the Association for the Prevention of Torture (an NGO) on the impact of independent, yet national visiting authorities, inspections of police stations,[191] such mechanisms "have the potential to influence the conditions and treatment of detainees",[192] as well as complementing "the work of supranational bodies like the European

[183] Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 21.
[184] See for example Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 21.
[185] Article 2 (former art.2 amended) Alternative preliminary draft optional protocol to the Convention Against torture submitted by the delegation of Mexico with the support of Grulac Working Group On The Draft Optional Protocol, E/CN.4/2001/67.
[186] See for example the views of China, Cuba, Egypt, the Syria Arab Republic and Japan E/CN.4/2002/78 para 21, Egypt E/CN.4/2002/78 para 22 and the Arab group E/CN.4/2002/78 para 108
[187] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 91.
[188] Article 13 of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[189] Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 24.
[190] Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 18.
[191] L. Wendland, (1999).

Committee for the Prevention of Torture by providing much more frequent and regular oversight."[193]

However, the success of such a mechanism, according to the study, will depend upon factors external to the visit. There are a number of factors listed as important, such as a clear legal framework of standards that police behaviour can be measured against, "clear, efficient and transparent reporting and complaints system",[194] protection of visitors from reprisals and that the community believes that the mechanism is a credible system. It is clear from such conclusions that national mechanisms will only be successful if the climate within the State is ready and capable to support them. Wendland believes that such a mechanism must take "into account the particular political, legal and in some cases also historical context in which they operate."[195] It would therefore seem that the fact that the Protocol has left the details regarding the national mechanisms to the States, is a sign that such factors will be taken into account. It would however seem advisable for the Sub-Committee, through rules of procedure, to set guidelines for the national mechanisms. This would enable them to control to a certain extent the behaviour of the national mechanisms and ensure that such factors are taken into account.

Another contentious issue with regard to the national mechanisms was that they are mandatory for all.[196] Although many delegates did favour this, for example Guatemala, Argentina and Mexico,[197] a number of States strongly objected. For example the Japanese delegate stated "that a flexible approach should be taken and that national mechanisms should be encouraged, but not mandatory."[198]

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[192] L. Wendland, (1999) p 81.
[193] L. Wendland, (1999) p 81.
[194] L. Wendland, (1999) p 81.
[195] L. Wendland, (1999) p 82.
[196] Article 17 of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[197] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 38.
[198] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 81.

It is clear however that the national mechanism is a positive step towards the prevention of torture. As Kastanas states, "International bodies have recognised that prevention of violations cannot be imposed from above, by the international community, but can be achieved from the bottom, through the creation of appropriate conditions at the national level."[199] The Sub-Committee, even though it will visit States parties, will not be able to visit every detention centre. Furthermore, although as of yet unknown, the length of time between visits is likely to be long.[200] This inclusion of prevention at a national level will provide wider and more frequent visits of detention centres. Furthermore it was reported, that the CPT constantly recommends States to create such a mechanism.[201]

4.4 The Separation Between The CAT And The Sub-Committee

A separation was believed to be necessary to provide "a clear separation of the activity of preventive visits from the exercise of control by the Committee Against Torture….adds considerably to the impartiality of the proposed system of visits."[202] Delegates held the belief that the CAT was already over burdened with a heavy workload and therefore would not be able to effectively administer the protocol.[203] The UN Special Rapporteur on Torture (N.Rodley) in 1997 addressed the working group, and stated it could be preferable if the new body were to be created under a distinct instrument, thus separating and distinguishing the Sub-Committee and the CAT.[204] However a certain link was believed necessary in order to "promote coordination and cost-effectiveness".[205] Furthermore the Sub-Committee will possibly be able to gain from the CAT's experience and have interpretations

[199] Kastanas, E., *The Preventive Dimension Of The Activities Of United Nations Treaty Bodies*, in L. Sicilianos, (ed), *The Prevention Of Human Rights Violations*, The Hague, Martinus Nijhoff, 2001, p 57-66.
[200] Although the CPT had the hope of visiting every State every two years (General report para 29), by 1997 their aim was to visit every four years. However, as noted by R. Morgans and M.D. Evans (1999, p 167), even this may not be possible. By the end of 1997, there were 8 long-standing member States who had only received one period visit after 8 years of the CPT being at work.
[201] See Working Group On The Draft Optional Protocol, E/CN.4/2001/67, para 28.
[202] As stated by Costa Rica in its original letter to the UN, E/CN.4/1991/66, para 8(b).
[203] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 5.
[204] Working Group On The Draft Optional Protocol, E/CN.4/1997/33, para 19.
[205] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 31.

already laid down. It was noted by some delegations, as late as 2002, that "any mechanism established under the optional protocol should function as a subcommittee of the Committee Against torture, with different and additional functions in the field of prevention."[206]

The United States of America believe that the Sub-Committee will be independent to the CAT and will simply erode the CAT's authority, taking valuable resources away from it.[207] The United States of America wanted the Sub-Committee to assist the CAT especially with regard to article 20 of the Convention against Torture.[208] The chairperson reminded the working group however that article 20 was to monitor and sanction, in contrast to the preventive system the Protocol was creating.[209] The relationship between the CAT and the Sub-Committee is one that has not been greatly defined, although delegates were aware of the need to clarify the relationship.[210] It is clear that the Sub-Committee reports to the CAT annually[211] and that the CAT will be involved in publishing statements with regard to uncooperative States.[212] A representative of the CAT states that principles should be inserted into the Protocol in order to add definition to the relationship.[213] His advice however was not followed.

It is not clear what happens if the Sub-Committee's interpretation of the terms within the Convention differs to the CAT's definitions. As Alston said in 1989, there is a need for normative consistency, which will not occur if the Protocol produces a different interpretation from the CAT.[214] It is also unclear whether the Sub-Committee will be able to extend its mandate and the definitions it has been provided with, as the CPT has managed to do on a number of

[206] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 30.
[207] S. Solomon, *U.S. Statement At The Working group On An Optional Protocol To The Convention Against Torture,* U.S. Mission, Geneva, press Releases 2002, 22nd January 2002, www.usmission.ch/press2002/0222solomon.htm.
[208] Working Group On The Draft Optional Protocol*,* E/CN.4/2002/78, para 25.
[209] Working Group On The Draft Optional Protocol*,* E/CN.4/2002/78, para 27.
[210] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 53 where it was noted "The Committee had not a policy and a general oversight role to play in respect of the sub-committee. It was agreed that these matters would be addressed under other articles."
[211] Article 16(3) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[212] Article 16(4) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[213] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 115.

occasions. The CPT is independent from any other body and therefore is not constrained. It has provided very distinctive and different interpretations of terms such as torture and inhuman treatment. For example the CPT has stressed the importance of the right of detainees to be informed of their rights without delay. However the CAT does not mention this right.[215] Although this is not a problem for the CPT or the other international organs dealing with torture, because they have their own mandate and they are separate organs, this may be a problem for the Sub-Committee and the CAT. It will mean that possibly the Sub-Committee will interpret terms in a more broad and expansionist form than the CAT, leading to a clash.

However, the fact that the Sub-Committee is linked to the CAT could be of major importance to the work of this Committee. There are examples where the CAT have provided greater assistance in the prevention of torture than the CPT. For example the Convention against Torture ensures that States must provide compensation for victims of torture.[216] The CPT has yet to look into this issue. Therefore it may be that the Sub-Committee will look into wider areas than the CPT due to the fact that it is a body related to the CAT.

Although co-operation between the CAT and the Sub-Committee should be encouraged, one must also be wary. Byrne states that the CAT often lacks information when dealing with State reports and complaints.[217] Therefore information from the Sub-Committee could be of great use. However, this could lead to disastrous results for the Sub-Committee. As stated in the report of the working group in 1992, “Cooperation [between the Sub-Committee and States] would inevitably be difficult to establish and maintain if another body, with jurisdictional responsibilities [the CAT] in relation to the State, had the full details of specific findings by the subcommittee other than in extraordinary cases where cooperation had broken down”.[218] Such an exchange of information could prevent the necessary confidentiality and co-operation

[214] P. Alston, A/44/668, para 126 – 129.
[215] For further analysis of the differences in interpretation and meaning of torture and ill treatment see W. Suntinger, (1999), p137 – 166.
[216] Article 14.
[217] A. Byrnes, (1992) p 527.

between States and Sub-Committee. These two bodies are performing distinct and different roles thus requiring separate entities and clear boundaries. This has not have been achieved within the Protocol.

4.5 The Sub-Committee Members

The working groups made a concerted effort to design the electoral process of the Sub-Committee members in order to provide an independent and impartial body. The original provision[219] was found to have too limited options and that professions such as lawyers, judges and academics needed to be included.[220] Furthermore there were discussions in relation to the method of election. It was thought by some that the CAT should be involved in this process as "a highly knowledgeable and responsible international committee"[221] and would produce "impartiality, independence and objectively" as Governments would only have an indirect participation.[222] Furthermore, it would facilitate cooperation between the CAT and the Sub-Committee.[223] However, the working group decided on a form of direct election, in which States Parties elected the members in order to keep CAT members from possible political undue influence and to help provide a fair geographical distribution. [224]

4.6 Reservations

The inclusion of reservations was debated throughout the years of the negotiations, although from the beginning, they were excluded from the Protocol.[225] The positive aspect of allowing reservations would be that a greater number of States would ratify the Protocol.[226] However, in response, it was felt "that reservations could undermine the whole purpose of the optional

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[218] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 90.
[219] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, Article 4(2).
[220] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 60.
[221] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 63.
[222] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 62.
[223] Working Group On The Draft Optional Protocol, E/CN.4/1994/25, para 41.
[224] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 63.
[225] Article 18(3) of the Draft Optional Protocol, E/CN.4/1991/61.
[226] Working Group On The Draft Optional Protocol, E/CN.4/2000/58para 20.

protocol and the impartial functioning of its monitoring mechanism…[the draft]already contained a 'negotiated reservation'."[227] The final draft allows for no reservations.[228]

4.7 Financial Considerations

This Protocol contains a heavy financial burden on States parties for a number of reasons. Firstly, through ratification, States are setting into motion the transfer of UN funds from existing bodies to the Protocol mechanisms. Article 25(1) of the Protocol states that "the expenditure incurred by the Subcommittee on prevention…shall be borne by the United Nations." Furthermore, the staff and facilities necessary "for the effective performance of the functions of the Subcommittee"[229] will be provided for by the UN Secretary-General. Some delegates believed that the inclusion in the UN budget of the Protocol is a positive step to guaranteeing "the independence and neutrality of the mechanism."[230] Furthermore, it would be financially strong enough to fulfil its mandate. It is true that this Sub-Committee will be linked to the CAT and that some resources will be shared, however there will be significant costs incurred in this procedure. Furthermore, even those States who decline to ratify the Protocol, will be paying for the Protocol, through the UN general budget. This seems inappropriate, especially since this is an optional mechanism.[231] (Although the Netherlands delegation did make it clear that all member States contributed to the UN budget, no matter which treaties they had ratified.[232]) Certain States agreed with the inappropriateness of increasing the financial burden within the UN system. For example1996, saw Nigeria, the United States of America and Japan all encouraging the financing of this Protocol through States, or at least with the assurance that the UN would be able to support this financial burden.[233]

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[227] Working Group On The Draft Optional Protocol, E/CN.4/2000/58para21.
[228] Article 30 of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[229] Article 25(2) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[230] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 33.
[231] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 32.
[232] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 34.
[233] Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment*, 25th January 1996, E/CN.4/1996/28, para 77 and 79.

However, many delegates at this working group believed the UN financial difficulties were temporary and therefore saw no problems in the UN financing the Protocol.[234]

The second financial cost is that of the national mechanisms. Article 18(3) requires States to make funds available to these bodies. This is a huge financial commitment for States parties which some will not be able to undertake. This could lead to putting a price on human rights, thus rich countries only affording the price of participation.[235] Furthermore, there will be States who will not want to ratify, and will use this provision as a excuse. It seems irresponsible for the UN to create such a mechanism where some will not be able to participate, no matter how much good-will is intended, merely for financial reasons.

There is a further financial burden that will be carried by States in article 26 of the Protocol. This creates a special fund to provide money for the implementation of the Sub-Committee's recommendations by States and for education programmes run by national mechanisms. This will require a large financial commitment, bringing pressure on States to provide, especially if other actors do not contribute. As Steve Solomon stated (The head of the US delegation), "We must ask if we spend millions of dollars a year on a new mandatory visiting mechanism, what will be the consequences for other human rights priorities?" [236]

4.8 Lack Of Consensus

It is clear from the ten years of negotiations on this Protocol and the often intensive and difficult meetings that were held within the working groups, that this Protocol is highly controversial. The final working group held in 2002 is an example of the very different opinions and desires of the delegates. Time and time again delegates stated their disagreement either with the final provisions

[234] Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 80.
[235] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 34.
[236] S. Solomon, (2002), www.usmission.ch/press2002/0222solomon.htm.

or with other delegates' statements.[237] Many delegates wished negotiations to continue in order to gain consensus.[238] This was evident from the fact that the Protocol was adopted in a Commission vote with nearly as many negative votes and abstentions as votes in favour of it (29-10-14)[239] and the Protocol was approved by the General Assembly by 127 votes, but there were 4 votes against and 42 abstentions. As Steve Solomon stated "it is better to continue the work of the working group than to have a draft protocol that does not command consensus on the substance considered by the Commission on Human Rights."[240] It must also be remembered, that this is a Protocol to the Convention against Torture. This Convention was passed with consensus, and yet it did not receive universal ratification, in fact it is the least ratified convention of the six main UN human rights treaties.[241] Therefore, it must be questioned whether this Protocol will receive a substantial number of ratifications.

4.9 Lack Of Constitutionality

Both the Sub-Committee and the national mechanisms have been given extensive powers in relation to access to areas and people.[242] They have unrestricted rights to enter places and to speak to whoever will be helpful in their investigation. Although this is a positive aspect of the Protocol, in that they are not bound by the good will of the State and its officials, this has led to criticisms with regard to the rights of the individual. The United States of America has been one of the States demanding restrictions on the bodies'

[237] What is interesting to note is that a number of States who were opposing the final draft in the 2002 working group were States who had not ratified the Convention against Torture, this therefore meant that they were blocking the ratification of a Protocol which they themselves could not ratify. For example Comoros, Iraq, Mauritania, Oman, Sudan, Syrian Arab republic and the United Arab Emirates all were included in a statement, yet none of them are parties to the Convention. See Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 108.
[238] See as an example of one of many such comments the Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 61.
[239] John Davison, Deputy U.S. Representative on the UN Economic and Social Council, Explanation of Vote, New York, July 24th 2002, www.state.gov/p/io/rls/rm/2002/12200.htm.
[240] S. Solomon, (2002), www.usmission.ch/press2002/0222solomon.htm.
[241] As of 31st March 2003, 132 States have ratified it. See Office Of The UN Commissioner For Human Rights, *Status Of Ratifications Of The Principal International Human Rights Treaties,* As of 7th July 2003, www.unhchr.ch/pdf/report.pdf
[242] Article 12 and 14 for the Sub-Committee and articles 19 and 20 for the national preventive mechanisms. (Draft Optional Protocol E/CN.4/Res.2002/33).

rights for constitutional reasons[243] as certain fundamental rights should be restricted by all treaties, no matter the content of the instrument. As noted in the working group report in 1999, "it would create an absolute obligation on any State party to provide access to any place or person [deprived of their liberty]…including any private residence and any strictly private hospital or mental institution if an individual was detained there, possibly with State acquiescence…The delegation…noted that the Constitution of the United States guaranteed that its citizens would be secure in their homes, and that those acting under colour of law could not have access to private homes without a court determination that there was sufficient probably cause for search.[244] Constitutional requirements or national law "could also limit the possibility of the Subcommittee to require testimony from detained persons or to interview prisoners' without witnesses'."[245] Furthermore some delegates believe that no body should have such wide powers without a method of checking their behaviour.[246] Yet as the Netherlands delegate pointed out, the Protocol is optional so "the State would decide whether it wished to become a party after careful consideration."[247] Constitutional problems could then be examined at that point. Furthermore, it was noted by an NGO that States "raise domestic law as a shield against intrusions by international human rights standards [which is] another way of challenging the universality of human rights."[248]

4.10 Problems Of An International Level Mechanism

The Protocol has introduced two bodies, one at the international level and one at the national level. It is however excluding the regional level. From the successes of the ECPT, it can be seen that there are advantages to maintain

[243] See for example the Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 60.
[244] Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment On Its seventh Session*, 26th March 1999, E/CN.4/1999/59, para 109.
[245] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 40.
[246] See Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 64, for the United States of America's opinion and para 69 for the Russian Federation's view.
[247] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 36.
[248] Human Rights Watch, *Human Rights Mechanisms Under Attack,* HR/12/97, in H. Steiner, P. Alston, (1996) p 695.

such a preventative mechanism regionally. The United States of America introduced a draft Protocol which gave greater emphasis to regional level mechanisms. A three tier system in which the national, regional and international levels all played a part in the prevention of torture was suggested. The United States of America particularly paid attention to the ECPT's qualities and the CAT and how its role could be improved through reform.[249] As the United States of America's delegate stated "a regional framework would provide an important political context and local credibility."[250]

There is understandable doubt that this mechanism will be sustainable at the international level. It requires States to acquiesce to an international body investigating its affairs with members who will be from an entirely different continent. It has been clear over the years that there are often clashes between countries as to what is acceptable with regard to violations and abuses. Furthermore, there could potentially be greater mistrust between State and the Sub-Committee when the members are from different backgrounds. In contrast some believe that a regional mechanism could avoid these problems due to the fact that all States involved are from the same continent, thus providing a greater understanding and trust during discussions.[251] An example of this is the inter-State complaints procedure. The Convention against Torture, the Convention for the Eradication of Racial Discrimination and the International Covenant of Civil and Political Rights all have inter-State complaints procedures, all of which have the goal of achieving a friendly solution. Yet these have never been used. The European Convention on Human Rights on the other hand has such a procedure which has been used a number of times.

Forms of behaviour and treatment have been recognised to rely to a certain extent on societal factors. This was underlined in the Greek case in which the European Commission stated that "it appears from the testimony that a

[249] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 17.
[250] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 57.

certain roughness of treatment of both police and military authorities is tolerated by most detainees…This underlines the fact that the point up to which prisoners and the public may accept physical violence…varies between different societies and even between different sections of them."[252] Yet the ambition of the human rights system is that all people, no matter what type of society they belong to, will live without any violations of their fundamental freedoms. The basic treatment of others, without any form of ill treatment must surely be what the international community aspires to. As the HRC stressed "treating all persons…with humanity and with respect for their dignity is a fundamental and universally acceptable rule" whose application "cannot be dependent on the material resources available."[253] The success of the Sub-Committee will depend on which path it chooses to take. If it follows the European Commission under the Greek case jurisprudence, the Sub-Committee will find itself defining acts differently according to which country it is visiting. If the Protocol follows the thinking of the HRC, these differences in societal values will not be of importance to the Sub-Committee's work. Yet this will cause resentment by those accused of ill treatment who may feel unjustly accused. As a result, the Sub-Committee may find its reports receiving hostile responses from States. This will reduce the aim of the Protocol, which is to bring about change through mutual respect and co-operation. Furthermore, there may be a clash between the national body and the international body. If the national body follows the societal values, but the international does not, this could provide differences of opinions and thus political difficulties. If the national bodies follow the Sub-Committee, its work may suffer as commentators have stressed the need of civil society backing of such mechanisms.[254]

[251] For example see press statement of Steve Solomon, (2002), www.usmission.ch/press2002/0222solomon.htm.
[252] Comm Rep. 5th November 1969, "European Court of Human Rights Year Book", vol.12, p 501
[253] General Comment 21/44 para4 in W. Suntinger, (1999) p 145-146.
[254] For example L. Wendland (1999).

4.11 Ratification Problems

The Protocol requires twenty States to have ratified the Protocol, after which it will come into force. This was seen by some delegates, as too large a number. They felt that it was necessary to allow the Sub-Committee to commence work as soon as possible so that positive results would encourage more ratifications.[255] It would seem that twenty is in reality a low figure if attention is paid to the number of States within the ECPT. This is currently 44, therefore it takes less than half of the ECPT States to bring the Protocol into force. It would seem inappropriate for the Protocol to only come into force for States who already have similar obligations under a regional mechanism. This is especially prevalent with regard to the financial burden. It would seem more appropriate to wait until a greater number of non-ECPT States have ratified the Protocol. Thus the resources will not be wasted on a half-hearted gesture. Furthermore, a small number of ratifications would not necessarily "promote universal participation."[256] As the United States of America indicated, a high number of ratifications "would ensure a high degree of participation and would more easily attract financing."

4.12 Duplication Issues

When the original draft was proposed by the Costa Rican Government, there were specific provisions dealing with the need to eradicate duplication of work at the international and regional level. The proposed mechanism to deal with the overlap with the European system, as noted below, was abolished. The Protocol has always included specific instructions with regard to the International Committee of the Red Cross, in order to avoid any specific overlap.[257] It is interesting to note that the working group over the years has paid attention to the new mechanisms that have developed during the

[255] For example see the representative of Cuba's opinion in Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment*, 2nd December 1997, E/CN.4/1998/42, para 103.
[256] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 109.
[257] Article 9 of the Draft Optional Protocol, E/CN.4/1991/66 and Article 32 of the Draft Optional Protocol, E/CN.4/Res/2002/33.

negotiation progress. For example the creation of the UN Special Rapporteur on Torture, therefore the final Protocol has included Article 11(c) indicating a need for co-operation between the Sub-Committee and all other bodies and organisations dealing with torture. However the Protocol does not include more specific instructions in cases of overlap or work. This is surprising, as the working groups have been aware of the problems and criticisms that commentators have been quick to point out with regard to this Protocol and duplication issues.[258]

4.13 Concluding Observations With Regard To The Provisions Within The Protocol

The Protocol has provided the international community with a new and innovative mechanism. There are a number of provisions within the instrument that will provide the bodies with wide ranging powers in which to prevent torture. The fact that mandatory national mechanisms have been created is also a positive inclusion so as to provide preventative systems not only at the international level, but also at the national level. The fact that the Protocol has been annexed to the Convention against Torture is advantageous as resources and expertise can be shared, but at the same time there will be an important distance between the two bodies in order that independence can be maintained and that their different functions can be fulfilled. Furthermore it is important that the no State consent requirement has been included and not fallen victim to the State sovereignty argument.

However there are a number of provisions that bring justified caution to the comment that the Protocol will prevent torture and will not overlap with the current mechanisms. Firstly it is unclear whether this system, will work at an international level. It uses co-operation and dialogue as its main tool against torture, yet this may not be so easy to work when States and Committee members are from such different and varied societies. The proposal to

[258] See for example Alston who suggested States parties to the Protocol should have their obligation with regard to State reporting under the Convention against Torture relinquished. (E/CN.4/1997/74, para 97). This proposal was not taken up by the working group.

include regional mechanisms within this Protocol has not been included which may have helped avoid such difficulties. There is also the question of funding which has yet to be fully answered. It is unclear whether the UN will have sufficient funds and it is unclear whether sufficient funds from private sources for the special fund will be collected on a regular basis. Finally the duplication issue between the Protocol's bodies and the current mechanisms has yet to be cleared up. The Protocol does not provide for procedures when there is an overlap of mandate or how the Sub-Committee and the CAT will interact with each other.

What is important to note is that the international community has hailed this Protocol as a purely preventive mechanism, and thus will not overlap with the current mechanisms available that are monitoring and sanctioning systems. Although it is true that the Protocol does create bodies that are preventing torture, it can be noted that these bodies can also be said to monitor the situation of States that they are investigating. This is because they themselves will be entering the State and regarding the systems and procedures. Furthermore, the Sub-Committee does have the ultimate sanction of publishing their reports with regard to a State if it is not implementing or co-operating. It may seem a rather weak sanction, but it may have some effect on States especially if public and international condemnation follows. Therefore the statement that the Protocol is purely preventive and thus will not overlap current mechanisms, is an over simplification of the system as it stands today.

Chapter Five: A Comparison Between The Optional Protocol To The Convention Against Torture And The European Convention For The Prevention Of Torture

5.1 Introduction

There has been much discussion of the usefulness of the Protocol since the ECPT exists, especially as the CPT has made it clear that it is willing to follow Article 3[259] of the First Protocol to the ECPT.[260] This allows the ECPT to have no regional boundaries so that any State is capable of becoming a State party. Certain delegates to the Protocol working group therefore believed that there was no need to develop a UN Protocol.[261] The European mechanism, although originally regional, could easily become an international mechanism. As the US Mission statement reported in 2002, the CPT's "growth potential is multi-regional and international."[262] Furthermore, there is a question as to whether the States parties to the ECPT, should ratify the Protocol. These two procedures are very similar and would overlap a great deal – thus providing a great deal of pressure on States, and Committees themselves for resources.

To counter argue the proposition that the CPT and the Protocol will overlap and provide duplication of work, the initial years of Protocol negotiations saw the inclusion of a provision which provided for ECPT States excluded from Sub-Committee visits.[263] Instead, a member of the Sub-Committee would be an observer to the CPT's missions and would submit a report to the Sub-Committee. Those States coming within the mandate of the ECPT and the Protocol would also have nationals on the Sub-Committee membership list. This procedure[264] would also be extended to future regional mechanisms that

[259] "The text of Article 18 of the Convention shall become paragraph 1 of that article and shall be supplemented by the following second paragraph: 2. The Committee of Ministers of the Council of Europe may invite any non-member State of the Council of Europe to accede to the Convention."
[260] Note Council of Europe press release "no geographical limits to this power of invitation are foreseen in the protocol" and " a new stage in the expansion of the field of operations of the CPT…can now begin."
[261] Working Group On The Draft Optional Protocol, E/CN.4/2002/78, para 17.
[262] S. Solomon, (2002), www.usmission.ch/press2002/01145solomon-htm
[263] Costa Rican Government, E/CN.4/1991/66, para 14 .
[264] Article 9(1) of the Draft Optional Protocol, E/CN.4/1991/66.

came into force. Such a provision would indeed reduce the overlap that could occur between the CPT and the Sub-Committee.

However such a proposition could be very dangerous in the light of difficulties the Protocol will have in gaining ratifications. Many countries, already sensitive to the Western domination of human rights and their belief that Western States are enforcing their values onto others, may conclude that this is another example of the Western colonialism. Those States parties to the ECPT, would then be able to visit non member States without being visited themselves by the Sub-Committee. As stated in the working group held in December 1992, “It was essential… to avoid giving the impression that the existence of a regional mechanism could operate to exempt states parties to that mechanism from the purview of the international mechanism of the optional protocol".[265] Furthermore the CPT made it clear that it was wary of such a procedure for legal and practical problems as far as the CPT was concerned.[266]

This provision was finally excluded from the Protocol, as the working group wanted to ensure universal application of the Protocol, without excluding any region, no matter what regional mechanism existed.[267] However the Protocol does not provide answers to the duplication of the two mechanisms. It merely encourages consultations and co-operation between bodies.[268] It is interesting to note that the working groups have managed to reduce the original provision of taking great care not to duplicate mechanisms to a vague and imprecise provision with very little clarity on the matter. It will be interesting to see how the Sub-Committee and the CPT interpret this provision and how they find ways to solve what can only be described as a massive overlap in mandate and powers.

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[265] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 97.
[266] For further information, see A. Cassese, *Letter From The President Of The CPT To The United Nations Deputy Secretary General For Human Rights in 3rd General Report On The CPT's Activities Covering The Period 1/1 to 31/12 1992*, CPT/Inf(92) 12, Appendix 5.
[267] See for example the Working Group On The Draft Optional Protocol, *Report Of The Working Group On The Draft Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment*, 17th November 1993, E/CN.4/1994/25, para 69.

5.2 Similarities Between The ECPT And The Protocol

There are a number of similarities between the ECPT and the Protocol, which is why the necessity of the Protocol has been called into question. These two instruments provide for the same mechanism – the establishment of an independent body permitted to visit States (without State consent required) in order to examine places where people are "deprived of their liberty" in order to prevent torture, inhuman or degrading treatment. Furthermore they both rely on the procedure of the body writing reports, thus avoiding the reporting problems of other mechanisms. The use of both instruments of the words "deprived of their liberty" is significant. In the negotiations for the Protocol, many delegates wished to see these words changed to detained. This however was seen as a greater restriction on the Sub-Committee's mandate and finally it was decided to use the same wording as the ECPT.

Neither instrument allow the bodies' reports to be published, unless the State has specifically agreed to it.[269] This could be seen as a restrictive measure on behalf of the drafters of the instruments. However,[270] the CPT has not allowed this to deter them and States nearly always allow reports to be published.[271] This may not automatically occur with the Protocol, as it will be dealing with States throughout the international community. An atmosphere of trust and co-operation may not be so evident as with the CPT. It is therefore not certain that States will automatically allow the Sub-Committee to publish their reports. This is a disabling factor for the Protocol as the publishing of the reports is one way in which the CPT has brought about public discussion and condemnation of such ill treatment. However, it is clear that the aim of the Protocol (and indeed the ECPT) is to create co-operation between the bodies and the States, which can only occur if confidentiality is adhered to. By excluding the right of the Sub-Committee to publish reports without the consent of States, the likelihood of co-operation is increased. It can only be

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[268] Article 31 of the Draft Optional E/CN.4/Res.2002/78.
[269] Article 16(2) of the Draft Optional Protocol, E/CN.4/Res.2002/33 and Art 11(2) of the ECPT
[270] As above, see 3.1.2
[271] If this does not happen, there is political condemnation from the regional community .

hoped that the procedure will follow the example of the CPT, and that reports are frequently published.

Both instruments give States the right to exclude experts during visits.[272] Furthermore neither allow reservations of any kind to be included.[273] Both instruments also include annual reports by the bodies and given either to the Committee Against Torture in the case of the Sub-Committee[274] and to the Committee of Ministers in the case of the ECPT.[275] This therefore means that both bodies are responsible to certain higher organs within the regional and international system.

One similarity that must be looked at is that of the visiting process. Both instruments allow for a periodic visit and then some sort of follow up visit (the ad-hoc visits which have been removed by the Protocol will be discussed later). However, according to Evans and Morgan[276] the periodic visit is being used increasingly infrequently within the CPT as it is regarded as too cumbersome for a number of tasks. Suggestions have been given of ways to change the procedure in order to reduce these problems. One idea is to have a first periodic visit, followed by short visits focussing on certain problems. Another idea is to have CPT members assigned to a country to examine certain issues, without necessarily making a visit. The CPT has also suggested meeting governments on a more regular basis in order to discuss areas of concern.[277] It is therefore unfortunate that the Protocol has followed the ECPT's lead and maintained the formal and traditional method of visiting. It would have been advantageous for the Sub-Committee to have tried to modify the procedure to take into account the new problems within the CPT, or at least to have left some margin of appreciation to the Sub-Committee to change the procedure as or when it feels necessary to change.

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[272] Article 14(3) ECPT and Article 13(3) Draft Optional Protocol, E/CN.4/Res.2002/33.
[273] Article 30 Draft Optional Protocol, E/CN.4/Res.2002/33 and Article 21 ECPT.
[274] Article 16(3) Draft Optional Protocol, E/CN.4/Res.2002/33.
[275] Article 12 ECPT.
[276] In *Preventing Torture: A Study Of The European Convention For The Prevention Of Torture And Inhuman Or Degrading Treatment or Punishment*, Oxford, Oxford Uni. Press, 2000, p 367.
[277] The CPT's General Report No. 7, para 8, CPT/Inf (97) 10, 1996.

5.3 Differences Between The ECPT And The Protocol

From a superficial look, therefore, it would seem these two instruments are following the same procedure and have the same mandate. However, from a deeper examination of the two texts, it can be seen that there are some subtle differences appear which could make a difference between the operation and objectives of the bodies involved.

5.3.1 The Mandate Of The Two Bodies

The first difference is the acts which the bodies are expected to examine. The ECPT is only mandated to look at torture, inhuman or degrading treatment or punishment while the Protocol, linked to the Convention against Torture, also includes the word cruel. This could make a difference to the areas that the Sub-Committee can investigate. However, it should be noted that the CPT to date, has not paid much attention to such wording. That is so say, that they are not interested in deciding whether certain treatment is torture, inhuman or degrading and therefore, the lack of the inclusion of 'cruel' has not prevented the CPT from investigations. It will be of interest to see how the Sub-Committee proceeds in its work. Officially it is not a body interested in the separation of terms. It is a preventive body looking for ways to prevent ill treatment before it occurs. But from the experience of the CPT, it may find itself passing comment on such terms.[278]

What could potentially be significant is the wording under Article 2 of the ECPT and Article 4(1) of the Protocol. The ECPT only mentions "where persons are deprived of their liberty by a public authority". Delegates to the Protocol working group felt that the term 'public authority' was too narrow and that they wished to discuss further possibilities due to "an emerging trend in some countries toward the operation of penal institutions by private commercial entities."[279] Therefore the final draft states "a public authority, or at its instigation or with its consent or acquiescence". This could have far reaching effects, as the Sub-Committee may be able to deal with more

[278] See above 3.1.3
[279] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 39.

situations and thus widen the scope of the visits. However talk of further expanding this particular provision by including “are held or may be held” at the end of this provision was not continued. The underlying reason for this is that it would provide the Sub-Committee with too much discretion, especially the words “may be held”, thus being able to visit places where no-one is currently being held, but could be.[280]

5.3.2 Guiding Principles To The Protocol And The ECPT

An important inclusion in the Protocol in order to see the guiding objectives of the delegates, is article 2(3) -“Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity”. These five principles are also the back bone to the ECPT. However they have only been included in Article 3 of the ECPT as co-operation between the CPT and the State, in Article 11 and Article 12 where confidentiality is mentioned and in Article 4(4) regarding the Committee’s role to be independent and impartial. The Protocol therefore has placed a greater stress on these principles. The ECPT mentioning them throughout the instrument highlights the securities and trust of the States Parties to the ECPT compared to the working group who felt the necessity to place them at the beginning of the Protocol, thereby highlighting them.

5.3.3 The National Mechanism

One of the innovations to the Protocol is that of the national mechanisms. As noted above, this requires States to create national preventive mechanisms, in order to continue the work of the Sub-Committee on a regular basis. The Sub-Committee also has the role of helping and advising the national mechanisms. The CPT does not have such a provision, merely stating that “In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co-operate with each other.”[281] However, as reported in the working group of the Protocol,[282] the CPT

[280] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 40.
[281] Article 3 of the ECPT.
[282] “Some recalled that the establishment or strengthening of such mechanisms had been repeatedly recommended by the European Committee for the Prevention of Torture with respect to many of the countries it had visited.” E/CN.4/2001/67 para 28

recommends the establishment of national mechanisms on a regular basis to States in its reports.[283] Therefore this inclusion in the Protocol is an example of how the working group tried to improve on the ECPT and include suggestions from the CPT. It can be seen from a reading of the working groups over the years, that the views of the CPT have played an important role.[284]

5.3.4 Visitation Rights

There is one specific area in which the ECPT has been given a greater mandate that the Sub-Committee. Article 7(1) of the ECPT allows for the CPT to conduct periodic visits and "such other visits as appear to it to be required in the circumstances". The Protocol however only allows the Sub-Committee to "propose a short follow-up visit after regular visit". The original draft allowed for "other such missions as appear to it to be required in the circumstances",[285] thus allowing the Sub-Committee to conduct ad hoc visits. Yet the working group finally rejected this after long negotiations. For example in November 1993, certain delegates were unwilling to allow for any other type of visit than the periodic, due to the main object of the Protocol.[286] Others were willing to allow visits in specific circumstances such as "well-founded reasons for considering information on non-compliance with the obligations under the Convention by a State concerned".[287] While others wanted the Sub-Committee to have greater freedom and discretion in the use of such visits. Furthermore the Special Rapporteur addressed the working group in October 1996 and stated that an essential element was the right of the Sub-Committee to conduct ad hoc visits.[288]

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[283] See for example CPT (1998) *Report To The Government Of The Former Yugoslavia Republic Of Macedonia On The Visit To The Former Yugoslavia Republic Of Macedonia*, 17th to 27th May 1998, CPT/Inf(2001)20, para 46.
[284] For example, the clarifications from a representative of the CPT were noted in the working group report held in November 1993 with regard to the number of members for the Sub-Committee. Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 33.
[285] Costa Rican Government, E/CN.4/1991/66, Article 8(1).
[286] Working Group On The Draft Optional Protocol, E/CN.4/1994/25, para 64.
[287] Working Group On The Draft Optional Protocol, E/CN.4/1994/25, para 65.
[288] Working Group On The Draft Optional Protocol, E/CN.4/1997/33, para 18.

Ad hoc visits have been used by the CPT in two situations. Firstly when there are specific allegations of ill treatment, and secondly when States request a visit from the CPT. The second situation is very rare, and in fact there has only been one to date – at the request of the Turkish Government, August 1996 in response to a hunger strike in Eskisehir special type prison.[289] By the end of 1997, the CPT had made 21 ad hoc visits.[290] The CPT regards these investigations as fact-finding missions to stop acts occurring, not as judicial inquiries. Therefore, by excluding ad hoc visits, the Protocol has prevented the Sub-Committee from entering a State to prevent ill treatment, when there are situations that have caused alarm to the international community. This is clearly a way that States have found to limit the Sub-Committee's potential in relation to what could be embarrassing and politically harmful reports about situations in their territory. It will be interesting to see whether the Sub-Committee uses a strict interpretation of the provision, or whether it manages to expand the mandate and incorporate the use of ad hoc visits. It may be possible that the Sub-Committee will use ad hoc visits, but classify them as follow-up visits to the previous periodic visit.

5.3.5 State Consent Exception

An provision which restricts the rights of States is the exception to no State consent needed. Both instruments provide for States rejecting a visit to a place of detention.[291] The Protocol allows this on grounds of "national defence, public safety, natural disaster or serious disorder in the place to be visited". The inclusion and wording of this provision was controversial. It was felt by some that it should not be included at all[292], and if it were to be then it should be kept to the minimum and only if necessity dictates.[293] Others felt that it was a necessity and they called for more exceptions to be included for

[289] R. Morgan, M.D. Evans, (1999) p 168.
[290] R. Morgan, M.D. Evans, (1999) p 169.
[291] Article 14(2) of the Draft Optional Protocol E/CN.4/Res.2002/33 and Article 9 of the ECPT.
[292] As such a provision "was contradictory to the purposes of the protocol and allowed for the possibility of misuse by certain States. It was pointed out that torture was most often practised in precisely the circumstances that were listed as exceptional." – Working Group On The Draft Optional Protocol, E/CN.4/1999/59, para 54.
[293] "The observation was made that this article was in the nature of a 'negotiated reservation' to the optional protocol, which must be as limited in nature as possible to avoid abuse." Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 88.

example the ECPT grounds - “the medical condition of a person or than an urgent interrogation relating to a serious crime is in progress”.[294] It was finally agreed however that these are often situations when torture is most likely to occur, and thus were not included in the Protocol.[295] Furthermore, the ECPT allows States to use Article 9(1) in cases relating to not only a visit to a certain place, but also for an entire visit.[296] The Protocol however, only allows this exception in relation to visits to a certain place.[297]

As the Protocol does not clarify who will decide when the grounds have been met, it can only be assumed that it will be for the Sub-Committee to decide whether Article14(2) applies. It is interesting to note that the working group has not included provisions for when States do invoke article 14(2). It simply states that the occurrence should “temporarily prevent” a visit taking place. This assumes that due to the temporary nature of the occurrence, a visit will take place in future. This will be an opportunity to see whether the Sub-Committee will extend its own mandate and restrict these situations, or whether the State will be given a large margin of appreciation. Although this provision has the potential to undermine the work of the Sub-Committee, it must be noted that the ECPT provision has yet to be invoked “as far as we can ascertain”.[298]

5.3.6 Protection Of Individual Rights

The Protocol has included an extra provision with regards to protecting those people that the Sub-Committee will come in contact with. Article 15 states that “No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its members any information whether true or false, and no such person or organization shall be otherwise prejudiced in

[294] Article 9(1).
[295] See Working Group On The Draft Optional Protocol, E/CN.4/2000/58 para 43.
[296] Article(1) “In exceptional circumstances, the competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the committee”. ECPT
[297] Article 14(2) “Objection to a visit to a particular place of detention…” Draft Optional Protocol, E/CN.4/Res.2002/33.
[298] M.D. Evans, R. Morgan, (2000), p 187.

any way". This therefore is an extra safeguard for the citizens of the country being visited, which the ECPT has not allowed for.

5.3.7 Ratifying States

One major obstacle to the Protocol, which does not apply to the ECPT due to the First Protocol (1983), is that only States party to the Convention against Torture may ratify it. This is a limiting and disappointing provision. Negotiations were held over this matter, and a number of delegates believed that it was important to create a body that was unrelated to the Convention against Torture for this precise reason of allowing non-members to ratify the Protocol.[299] There are a number of States who are obligated under different treaties (such as the ICCPR) to prevent torture on their territory. It would therefore be beneficial to those States who had yet to sign up to the Convention against Torture to be a part of the Protocol.[300] It could also encourage such States to ratify the Convention.[301]

5.3.8 The Use Of Experts

The ECPT has allowed for experts to be included in visits when required[302] and from the practice of the CPT it is clear that these additional members are an important component. By the end of 1997, there had been 37 different experts accompanying 120 missions, and between 1994 and 1998, only 1 of the 31 CPT missions was unaccompanied by an ad hoc expert.[303] During the Protocol negotiations, there was lengthy discussion whether the use of such experts should be permitted. Some delegates believed that they were not necessary, since the Sub-Committee members would have the relevant professional qualifications.[304] They were obviously concerned about the inclusion of non Sub-Committee members in this mechanism.[305] However,

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[299] For example Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 32.
[300] A view expressed in the working group of 1996 – Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 103.
[301] See for example the opinion of the observer for Sweden in Working Group On The Draft Optional Protocol, E/CN.4/1998/42, para 97.
[302] Article 7(2).
[303] M.D. Evans, R. Morgan, (2000), p 162.
[304] For example see Working Group On The Draft Optional Protocol, E/CN.4/1995/38, para 39.
[305] Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 77.

other delegations believed (not only from the experience of the CPT[306]) that experts were a necessary requirement, due to the limited number of Sub-Committee members and that not all relevant experience may be covered by these members.[307]

As a compromise, the use of experts was included, but stringent requirements were set with regard to their nomination and proposal, which are not included in the CPT.[308] Furthermore States are allowed to exclude an expert without giving a reason[309] (although it was first drafted that States must include a reason.[310]). As the representative of Mexico stated, "the sovereignty of States could not be limited and the State concerned should be able unconditionally to refuse permission for any expert."[311] Furthermore, unlike the ECPT, interpreters are excluded from this provision in the Protocol,[312] although they are mentioned under Article14(d) of the Protocol in relation to having private interviews with persons deprived of their liberty. Experts are not afforded the immunities and privileges that the Sub-Committee will receive from Article 35, unlike the ECPT.[313] It can therefore be seen that the Sub-Committee has restricted use of interpreters and experts by not afforded them the same rights as the members of this body.[314] This could severely hamper the work of the Sub-Committee – not only the expertise of members included in the visits, but without immunities and

[306] For example see Working Group On The Draft Optional Protocol, E/CN.4/1993/28, para 77.
[307] For example see Working Group On The Draft Optional Protocol, E/CN.4/1994/25, para 79.
[308] Article 13(3) of the Draft Optional Protocol "…These members can be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts." (E/CN.3/Res.2002/33). Compare this to the ECPT Article 7(2) "…The Committee may, if it considers it necessary, be assisted by experts and interpreters", although the CPT does include the following provision in Article14(2) "Experts shall act on the instructions and under the authority of the Committee. They shall have particular knowledge and experience in the areas covered by this Convention…"
[309] Article13(3) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[310] See the Japanese delegate's view in Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 27.
[311] Working Group On The Draft Optional Protocol, E/CN.4/1998/42, para 49.
[312] Although they were included in the Protocol and negotiations for a substantial amount of time – see for example Working Group On The Draft Optional Protocol, E/CN.4/1998/42, para 46.
[313] Annex privileges and immunities (Article 16).
[314] An example of delegates holding this view is that of the Chinese representative in Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 132.

privileges, experts will not be able to play as great a role as perhaps necessary. However it must be noted that the ECPT includes in article 14(2) that the experts "shall be bound by the same duties of independence, impartiality and availability as the members of the Committee." The Protocol does not include such requirements for experts, which is interesting to note considering one would assume that stringent requirements on their behaviour and duties would also be included.

5.3.9 Committees' Reporting Rights

The Protocol has included article 16(2) which gives the Sub-Committee the right to publish the whole report, if the State has made part of the report public. Although this has become part of the CPT procedure, the ECPT does not specifically mention the right of the body to do so.[315] This inclusion allows for the Sub-Committee to automatically act without waiting for its mandate to evolve and extend over time, if in fact this would occur. Furthermore, in relation to the reporting procedure, the Protocol allows for a public statement or to publish the report in whole when "the State party refuses to cooperate with the Subcommittee…or to take steps to improve the situation in the light of the Subcommittee's recommendations".[316] The ECPT only allows for a public statement on the issue involved,[317] thereby giving less of an incentive for the State concerned to cooperate. The CPT however in its explanatory report stated that it has a "wide discretion in deciding what information to be made public",[318] which could include sections of the report or even substantial parts of the actual report. Yet the two times this has happened,[319] the reports were both simply short documents setting out the facts and the failure of the Government to respond to recommendations made by the CPT.

This is an interesting situation as during the negotiation many delegates were worried about the use of sanctions. For example the Cuban delegate stated that "any elements in the draft optional protocol that would incite States to

[315] Article 10 and Article 11 deal with reporting procedure.
[316] Article 16(4) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[317] Article 10(2).
[318] para 75 in R. Morgan, M.D. Evans, (2000), p 201.
[319] Both in relation to Turkey.

abstain from supporting the draft should be avoided…The aim of article 14 [ie state reporting] should be cooperation between the sub-committee and the States Parties and not condemnation. Therefore confidentiality was required in all aspects of the process."[320] States did not want any provisions to be included which could allow international condemnation into the procedure.[321] Some delegates believed in a compromise - States' reports could be published, but only with the consent of the State.[322] This clearly would not provide any sanction of any sort. For example the Swiss observer believed that "it was crucial to keep the only sanction provided for in the optional protocol which had an important persuasive, deterring and preventive effect, albeit only as a measure of last resort."[323] Some delegates felt that what 'a failure of the State to cooperate' was, should be clarified.[324] This was not done and therefore the Sub-Committee has power to regulate when this has occurred. This could possibly give the Sub-Committee the role of arbitrator, which was "incompatible with the nature of the Subcommittee and the optional protocol."[325] The delegate from Ethiopia was worried about States who wanted to implement recommendations but were unable to do so due to funds lacking.[326] This however was finally solved through the inclusion of a provision creating a special fund for such situations.[327]

One of the arguments not to include such a provision giving the Sub-Committee the right to publish reports, was that of aspiring to universal acceptance of the Protocol. With such a provision it was believed that this ideal would not be reached. However the International Commission of Jurists' observer stated in 1996 that "the universality of the instrument was important, but should not be achieved at the cost of losing the very essence of the draft

[320] Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 46.
[321] In 1996, the delegates from Algeria, Brazil, Mexico, the Russian Federation agreed with such principles.
[322] See China's proposal in Working Group On The Draft Optional ProtocolE/CN.4/1996/28, para 4 (6) and Uruguay and Nicaragua's views Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 47and 48.
[323] Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 49. This was supported by the observer for Amnesty International who feared the Protocol would become ineffective without such a provision – E/CN.4/1996/28 para 63.
[324] Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 43.
[325] Working Group On The Draft Optional Protocol, E/CN.4/2000/58, para 48.
[326] Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 44.

optional protocol, which required the spelling out of clear and specific obligations for the states parties." In his opinion "the effective protection of persons deprived of their liberty required a provision allowing the sub-committee to take action if a State Party failed to cooperate." [328]

5.3.10 The Definition Of "Deprivation Of Liberty"

The Protocol has included within its provisions a definition of 'deprivation of liberty', unlike the ECPT. Article 4(2) states that "For the purpose of the present protocol deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will be order of any judicial, administrative or other authority." This would seem to be a broad and extensive range of places that can be applied to this definition. During the Protocol negotiations, it was believed by the observer for Australia, as late as December 1999, that "the term 'deprived of their liberty' was more commonly used in the human rights arena and that the term 'detained' could be too narrow."[329] Yet at the same working group, the representative of Cuba, on behalf of Nigeria, China, Egypt, Saudi Arabia, the Sudan and the Syrian Arab Republic states that "deprived of their liberty" was too wide a term.[330]

5.3.11 The Rights Of The Committees During Visits

The ECPT lays down the obligation on States to allow the CPT "access to its territory and the right to travel without restriction" in Article 8(2)(a). The Protocol however requires the States to "receive the Subcommittee on Prevention in its territory and grant it access to the places of detention…"[331] and to grant the Sub-Committee "unrestricted access to all places of detention and their installations and facilities"[332] and "The liberty to choose the places it wants to visit and the persons it wants to interview".[333] Although this may in practice make no difference, it could have the potential to restrict

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[327] Article 26 of the Draft Optional Protocol, E/CN.4/Res./2002/33.
[328] Working Group On The Draft Optional Protocol, E/CN.4/1996/28, para 60.
[329] Working Group On The Draft Optional Protocol, E/CN.4/2000/58 para 59.
[330] Working Group On The Draft Optional Protocol, E/CN.4/2000/58 para 63.
[331] Article 12(a) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[332] Article 14(1)(c) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[333] Article 14(1)(e) of the Draft Optional Protocol, E/CN.4/Res.2002/33.

the Sub-Committee's role. The ECPT gives the CPT full and unrestricted access to States' territory and implies that the body can move freely within the State as and when it wants. The Protocol however implies that the body will have less opportunity to move freely by itself, that the State will be involved in their movements and travel. It will be interesting to see how these provisions develop during the practice of the Sub-Committee.

5.3.12 Financial Considerations

The Protocol, in contrast to the ECPT, has created "a special fund…to help finance the implementation of the recommendations made by the Subcommittee…as well as education programmes of the national preventive mechanisms."[334] This is an important new provision, especially since the Protocol will be dealing with countries, which may not have the financial resources to act on the recommendations. Furthermore it will enable the national mechanisms to provide much needed educational projects. However, "the Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organisations and other private or public entities."[335] This could result in either insufficient funds being received, and thus providing insecure and irregular finances. Or it could mean that the Protocol will become reliant on certain entities that have a vested interest in the outcome of the reports and projects, thus leading to criticisms of lack of independence and impartiality. However, needless to say, the fund is a step in the right direction, as it will reduce the criticisms that the Protocol will be draining resources from a much-starved UN human rights system.

5.4 Concluding Observations With Regard To A Comparison Between The Protocol and The ECPT

It is clear that the are a number of important similarities between the Protocol and the ECPT, as the former has kept a number of important provisions that were first introduced by the ECPT, such as the no State consent requirement,

[334] Article 25(1) of the Draft Optional Protocol, E/CN.4/Res.2002/33.
[335] Article 26(2) of the Draft Optional Protocol, E/CN.4/Res.2002/33.

the sanction of report publishing and the use of experts. Yet some of the similarities are not all positive, for example dialogue between the Sub-Committee and State being a key feature, which as described in chapter three, has proved difficult to maintain by the CPT. The Protocol does not include provisions with regard to administrative difficulties that the CPT has encountered, nor are there ways to improve the dialogue procedure or to encourage a greater variety of places to be visited.

However, at the same time, when the Protocol was being negotiated, the problems associated with the ECPT were taken into consideration and were altered on a number of occasions. For example the term “public authority” was widened, national mechanisms were included, the exception to no State consent was narrowed, a special fund was created and people who come into contact with the Protocol bodies have been especially provided for. However, at the same time there are a number of differences which could be seen to reduce the power of the bodies under the Protocol or that may reduce the effectiveness of the system. For example, ad hoc visits have not been included in the Protocol, nor have experts been given the same rights as they are under the ECPT. Furthermore interpreters are no longer within the same category as experts and there is possibly a greater restriction on the bodies’ rights to move in comparison to the CPT.

Chapter Six: Concluding Observations

This thesis has attempted to show the current and proposed mechanisms available at an international and regional level in order to prevent torture. A number of concluding remarks can be made in order to assess whether the international community should welcome or reject the Protocol to the Convention against Torture.

It is clear that at the international level there are a number of mechanisms currently available to States in order to prevent torture. All have had certain successes (and failures) to date. For example, the Convention against Torture has a particularly relevant provision within Article 20, which has potential to provide investigation and fact finding within States. The HRC has shown improvements in its investigation techniques in order to discover whether torture has taken place. The most important mechanism at the international level has been the Special Rapporteur on Torture. This has managed to conduct a great number of investigations within States and to continue dialogues between it and the State concerned. Yet it cannot be said that these mechanisms deal only in the monitoring and sanctioning of torture while the Protocol will only prevent this crime. There is a clear overlap between a number of these bodies and the functions that they perform. However all the international procedures currently available lack one important provision. They all lack the ability to enter States without the consent of the government. No matter how many reforms that are made, without this change, these mechanisms will have limited value. Therefore although the Protocol and these bodies will overlap, the Protocol will always have the added value of the inability of States to block visits.

In relation to the regional mechanisms, it is clear that the Protocol and the ECPT overlap in many areas. Apart from the new inclusion of national mechanisms and the Special Fund (if this will in fact be in operation, rather than falling by the way side when States and other institutions do not subscribe to it), it is very difficult to see the usefulness of ECPT States ratifying the Protocol. There are many similarities, both negative and positive

and the differences have included negative provisions for the Protocol. However the national mechanism requirement is a very strong incentive for ECPT States to commit to the Protocol with the proviso that they do not to ratify this Protocol before it has come into force. There is no advantage of having the Protocol come into force purely because a large percentage of those States making the twenty necessary ratifications are States that already have a mechanism similar to that of the Protocol. With regard to the other regional mechanisms, although there are certain aspects which can be commended, they do not offer the same level of protection as the Protocol. Therefore States within the Americas, Africa and needless to say the regions not mentioned in this thesis due to no formal torture prevention mechanism, should be encouraged to ratify the Protocol.

The Protocol, when looking at what it can possibly achieve through the work of the CPT, can be seen to have the potential to bring torture prevention to the attention of the international community, as well as working with States to eradicate this heinous crime. It has included many of the positive aspects of the ECPT as well as improving on some provisions which have proved to be problematic for the CPT. However, one of the potentially crippling aspects of this provision is that it is unclear whether the underlying principle of co-operation will succeed at an international level. It is clear from recent events at the UN level, that there is a great deal of mistrust between State parties. It would therefore be foolish to presume that such co-operation will be automatic. Without this principle, at the forefront, this Protocol will be of little use and it will become what many commentators already attribute to other mechanisms – that it is an easy way for States to be publicly protecting human rights while in reality achieving very little.

It has been proven that not only are there currently high levels of duplication of work and resources between bodies, but also that the Protocol will be involved in such controversies. Therefore it is of vital importance that the Sub-Committee clarifies the relationship it intends to have with all other bodies. This is necessary in order to avoid overlap. Without such a procedure then the fear that this Protocol will simply duplicate the work of current

Committees, will become a reality. It would be preferable if a conference on torture prevention could be called in which all bodies involved in combating torture could meet in order to discuss these problems and to organise the competences of each and every mechanism. It would also be of significant value if the Sub-Committee, whether in rules of procedure or through general comments, clarified its relationship to the CAT, the Special Rapporteur on Torture and the ECPT in particular as these three bodies are most likely to step within each others parameters. It must be noted that the mechanisms currently available will still have a role to play even if the international community welcomes the Protocol. There will be a number of States who will not be willing to submit to the scrutiny of the Sub-Committee. Therefore they must not be allowed to escape torture prevention systems. Co-ordination must take place to ensure that States are not able to slip between the net of the many bodies. There is no doubt that reform of the Committees discussed in this thesis (including the Protocol if the provisions do result in some of the worries discussed in this thesis) is a necessity. It would be a positive addition to the Protocol if its coming into force can encourage such a discussion and begin the long but necessary overhaul of the system.

It is also abundantly obvious that the exclusion of similar regional mechanisms is a limiting factor of the Protocol. As Opsahl states "strengthening regional complaints systems, like the European, American and African ones, offer several advantages in the areas of logistics, local trust and homogeneity."[336] It can only be hoped that through the workings of the Protocol, the Sub-Committee will be able to encourage regions to set up and maintain their own mechanisms in order to provide a three-tier system. The evolution of a regional system would help provide for the difficulties that may be caused at the UN level in the differences of societal and cultural attitudes, as well as mistrust.

As the international community and States attitudes sit today, it is inconceivable to believe that such a mechanism as proposed in the Protocol

[336] T. Opsahl, (1992), p 740.

will become universally accepted, or at least accepted by a large majority of States. However this Protocol could be the beginning of a change of atmosphere and procedure within the international community. Time and time again rights and concerns long thought of as within the sphere of the State, have been opened up to the international arena. Therefore the coming into force of this Protocol could be the beginning of a new way of human rights protection and prevention of violations.

It is for these reasons that this thesis concludes that the international community must welcome the Protocol. It has the possibility of injecting a new and innovative mechanism into the UN combat against torture. Although the Protocol does have certain factors which need to be clarified or improved, it is the best solution to date, to eradicate torture. Therefore no matter the funding problems at the UN, States should be encouraged to give their full support and financial resources to this Protocol in order to see that it succeeds in its task.

It is true that "in the final analysis, prevention depends on the good will and cooperation of states that are, however, themselves accountable and responsible for violations."[337] The introduction of the Protocol will not change this. States must first allow ratification and even then continued co-operation is required in order to bring about change in the State. It remains to be seen whether this new and innovative mechanism which has the potential to prevent torture in a great number of countries, will in fact achieve such results. Although the protection of human rights, as the international order stands today, relies on the State as the final actor, this Protocol has the potential to lessen this to a certain extent. The former Special Rapporteur on Torture, Peter Kooijmans, "considered torture to be the final link in a long chain which begins where human dignity is taken lightly.[338] Prevention involves identifying the links in this chain and breaking it before the end is

[337] E. Kastanas, (2001), p 66.
[338] Report of the Special Rapporteur on Torture UN Doc E/CN.4/1993/26 para 582

reached."[339] It is contended that this Protocol will be the best way in which to do this. It is therefore important to encourage the backing of this mechanism in order to open the international community to a new way of preventing human rights crimes. This may be the beginning of a new era in the fight to eradicate this crime of torture.

[339] M. Nowak,W. Suntinger, *International Mechanisms For The Prevention Of Torture* in Bloed, Leicht, Nowak, Rosas, (Eds), *Monitoring Human Rights In Europe*, Dordrecht, Martinus Nijhoff, p 146.

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