Visits to Less Traditional Places of Detention: Challenges under the OPCAT

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Abstract

The coming into force of the Optional Protocol to the UN Convention against Torture UN and other cruel, inhuman or degrading treatment or punishment (OPCAT), in 2006, has been hailed as major development in the fight against torture. The OPCAT opens up all types of places of detention to a new international body, and also mandatory national visiting bodies, for inspection with the aim of preventing torture and other types of ill treatment therein. The OPCAT not only covers prisons and police cells, but also places of detention that do not regularly fall under the criminal justice system, including psychiatric institutions, care homes for the elderly, and migrant detention centres. The particular nature of these less traditional places of detention means that the OPCAT visiting bodies have to pay extra attention to a number of matters. Issues like expertise, frequency of visits, and relevance of recommendations, although applicable to visits to both traditional and less traditional places of detention, gain an extra dimension with regard to the latter. This article discusses the potential pitfalls that the OPCAT visiting bodies could face while inspecting less traditional places of detention.

1. Introduction

With the entry into force of the Optional Protocol to the UN Convention Against Torture (OPCAT)[1] on 22 June 2006, the fight against torture (and other cruel, inhuman, or degrading treatment) reached an important milestone. Eschewing a reactive approach to dealing with the issue of torture, the OPCAT adopts a proactive perspective in order to forestall torture. The OPCAT establishes 'a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture

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[1] See Optional Protocol to the Convention against Torture and other cruel, Inhuman or degrading treatment or punishment, Resolution 199, UN Doc. A/RES/57/199. The OPCAT was adopted in December 2002, following a protracted drafting process, and came into force on 22 June 2006. At the time of writing, 50 States had ratified the OPCAT and a further 23 were signatories. For a discussion of the drafting process of the OPCAT, which lasted around twenty years, see Malcolm D. Evans and Claudine Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture', (2004) *Human Rights Law Review* 4, pp.19-55.

and other cruel, inhuman or degrading treatment or punishment'[2] at the universal level. Previous efforts to prevent torture through proactive visits to places in which persons are deprived of their liberty were limited to regional initiatives, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its monitoring body, the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT).[3] Inspections to places of detention have also been central to the activities of other international and regional bodies, albeit not with the sole purpose of preventing torture and other forms of ill treatment as such. Arguably, the body with most experience in this regard is the International Committee of the Red Cross and Red Crescent (ICRC).[4] Moreover, a number of countries already maintain bodies that inspect places of detention, in particular prisons and police cells.[5] Under the OPCAT, the mandatory visiting of places of detention by independent bodies, with the aim of preventing torture, has gone global. States Parties to the OPCAT are obliged to allow visits by an international body, the UN Subcommittee on the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT), to any place under their jurisdiction and control where persons are, or may be, deprived of their liberty. States Parties are also under the obligation to establish, designate, or maintain independent national bodies (National Preventive Mechanisms or NPMs) with a similar mandate to visit places of detention. This two-pronged approach is regarded as innovative and groundbreaking,[6] and appears to gain more validation at the international level.[7] Although the OPCAT does not specifically name or list the places of detention that are to be visited by the SPT and the NPMs, it does convey a broad understanding of what a place of detention is.[8] In general, it can be said that

[2] OPCAT, Article 1. See fn.1.

[3] The CPT has, under the aegis of the Council of Europe, conducted visits to places of detention since its inception in 1989. For an overview of the practice of the CPT, see Malcolm Evans and Rod Morgan, *Preventing Torture – A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Oxford University Press, 1998). While the nature of the of the respective mandates of the Special Rapporteur of the Inter-American Commission on Human Rights on the Rights of Persons Deprived of Freedom, and the Special Rapporteur of the African Commission on Human and Peoples' Rights on Prisons and Conditions of Detention in Africa, are not the same as that of the CPT, these two mechanisms have also been carrying out inspections of places of detention on a regular basis, arguably contributing to strengthening the protection of the rights of persons deprived of their liberty in those two regions. See Frans Viljoen, 'The Special Rapporteur on Prisons and Conditions of Detention: Achievements and possibilities', (2005) *Human Rights Quarterly* 27, p.125.

[4] The ICRC carries out visits to prisoners of war and civilian detainees during international armed conflicts, and has secured access to persons deprived of their liberty during conflicts of a non-international nature. For visits during international armed conflicts, see Articles 123 and 126 of the 1949 Third Geneva Convention relating to the treatment of prisoners of war, and Articles 76, 140, and 143 of the 1949 Fourth Geneva Convention relating to the protection of civilian persons in times of war. Although ICRC visits are not legally guaranteed under the Geneva Conventions during non-international armed conflicts, States Parties to the Conventions have recognised the ICRC's capacity to carry out such visits during those types of armed conflicts. See further Alain Aeschlimann, 'Protection of Detainees: ICRC action behind bars,' (2005) 87 *International Review of the Red Cross*, pp.87-88.

[5] See *Monitoring Places of Detention: A practical guide* (Association for the Prevention of Torture (APT): Geneva, 2004), p.37. Countries like Argentina, Uganda, and the United Kingdom have, respectively, established institutions like the Prison Ombudsman, the National Human Rights Commission of Uganda, and Her Majesty's Inspectorate for Prisons that carry out inspections of prisons.

[6] See Evans and Haenni-Dale, 'Preventing Torture?', p.20. See fn.1.

[7] Thus, the Convention of the Rights of Persons with Disabilities, which recently entered into force, has adopted a similar approach to the OPCAT with regard to an international monitoring body, the Committee on the Rights of Persons with Disabilities (CRPD), and a mandatory national body with a mandate not dissimilar to that of NPMs. See Article 33(2), Convention on the Rights of Persons with Disabilities, General Assembly Resolution 106 UN, UN Doc. A/RES/61/106 (2006).

[8] Evans and Haenni-Dale, 'Preventing Torture?', pp.43-44. See fn.1.

the OPCAT system of visits covers what may be regarded as traditional places of detention, such as prisons and police detention centres, as well as other, less traditional places of detention, which fall outside the criminal justice system, including psychiatric institutions and care homes for the elderly and young people.[9]

The fact that the OPCAT mechanisms are expected to carry out periodic visits to a broad range of places of detention raises a number of questions that need to be addressed. Generally speaking, bodies visiting and inspecting places of detention that do not belong to the traditional criminal justice system face similar challenges to those faced when visiting traditional places of detention. These challenges include (i) the difficulties associated with making frequent or regular visits, (ii) the need to ensure that they have sufficient capacity to geographically cover, and secure access to visit, the relevant places in a particular country, (iii) the complexities of applying relevant standards in the analysis of a particular place of detention with the aim of strengthening the rights of those deprived of their liberty therein, (iv) and the difficulties of making sure that the recommendations the body makes are both sufficiently detailed and relevant to the specific context of the place visited. These challenges apply to both the more and less traditional places of detention. However, visiting the less traditional ones may pose particular questions and also require specific expertise, knowledge, and experience that may not always be present in bodies accustomed to dealing with inspections of prisons and police cells and which now, under the OPCAT (i.e. when existing institutions are designated as NPMs), are expected to visit non-traditional places of detention as well. If the SPT and the NPMs are to fulfil their visiting and preventive mandates in an effective fashion, especially with regard to non-traditional places of detention, they must deal with the challenge of first ensuring that they have the capacity, knowledge, and expertise to carry out visits to these places.

This paper discusses these challenges and analyses how, and to what extent, they are being taken into consideration by the SPT and the NPMs that are currently operating. To this end, the paper starts by discussing the OPCAT system and its monitoring bodies. The focus then shifts to the definition of deprivation of liberty and what is understood by 'place of detention' in the OPCAT. The paper then turns to the practice of visiting non-traditional places of detention, using a few examples at the international, regional, and national levels. Subsequently, a number of challenges that face visits to these places are explored. For the purposes of this paper, less traditional places of detention are understood to comprise those places that deprive persons of their liberty as stated in Article 4 of the OPCAT, but which, unlike prisons and police detention and custody centres, do not traditionally belong to the criminal justice system. These may include, but are not limited to, psychiatric institutions, hospitals, care homes for the elderly or children, military detention centres, and detention centres for irregular/illegal migrants.

2. The OPCAT System and Its Bodies

2.1 *The obligation to prevent torture*

With the OPCAT's entry into force in 2006, a new approach to dealing with the problem of torture at the international level was introduced. The OPCAT revolves around the idea that preventing torture is more effective as a method aimed at eradicating it than dealing with the

[9] This list is not exclusive or exhaustive since, as discussed below, the OPCAT definition of places of detention is open to interpretation.

problem after the fact is. According to the Working Group entrusted with drafting the OPCAT, the Protocol's aim was to establish a mechanism to assist States in fulfilling their obligation to prevent torture and other forms of ill-treatment, as laid down in Articles 2(1) and 16(1) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[10] Although the obligation to prevent is not further defined or described in the UNCAT itself,[11] the Committee Against Torture (CAT) has attempted to give further guidance as to the content of the obligation. In its recent second General Comment on the implementation of Article 2 by States Parties, the CAT observed that the measures that States can adopt to prevent torture and other types of ill-treatment include the establishment of 'impartial mechanisms for inspecting and visiting places of detention and confinement'.[12] Nonetheless, it can also be argued that prevention of torture entails more than visits to places of detention, as acknowledged in the Preamble to the OPCAT, which states that 'the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial, and other measures'. Regardless, the OPCAT's main focus, with respect to prevention, is on proactive visits to a broad range of places in which persons are deprived of their liberty.

That proactive visits can have a preventive effect vis-à-vis torture has been widely acknowledged by international bodies and experts. Thus, the various mandate holders of the UN's Special Rapporteur on Torture have observed, on a number of occasions, that allowing independent experts or bodies to visit places of detention or imprisonment is a measure that may have an important preventive effect.[13] The Association for the Prevention of Torture (APT), which was the impetus behind the European Convention for the Prevention of Torture as well as

[10] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Commission on Human Rights, UN Doc. E/CN.4/1993/28 (1992), para. 30. Articles 2(1) and Article 16(1) of the UNCAT state, respectively, that '[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction', and '[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

[11] The UNCAT's *travaux preparatoires* do not reveal any indication as to the actual content of the obligation to prevent, nor do they attempt to define the obligation. A discussion of the nature of the obligations under Article 2 of the UNCAT, but without an analysis of their actual content, can be found in Achene Boulesbaa, 'The Nature of the Obligations Incurred by States Under Article 2 of the UN Convention Against Torture', (1990) *Human Rights Quarterly* 12, pp.53-93.

[12] General Comment No 2, Implementation of article 2 by States Parties, Committee Against Torture, UN Doc. CAT/C/GC/2 (2008), para. 13. For a comment on the General Comment and its arguably limited view on the concept of prevention, see Comments on Draft General Comment No 2: Implementation of Article 2, submitted by the OPCAT Research Team of Bristol University before the UN Committee Against Torture on its Draft General Comment No 2 on Implementation of Article 2 by States Parties. Available at http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/commentsoncatdraftgeneralcomment2.pdf. Last accessed 24 July 2009.

[13] See Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, Mr P. Kooijmans, appointed pursuant to Commission on Human Rights Resolution 1986/50, Commission on Human Rights, UN Doc. E/CN.4/1987/13 (1987), para. 83. See also Note by the Secretary General, Interim report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with para. 30 of General Assembly resolution 55/89, UN Doc. A/56/156 (2001), para. 34 and 39(e). See also Note by the Secretary General, Interim report submitted by Theo van Boven, Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with para. 56/143 of 19 December 2001, General Assembly, UN Doc. A/57/173 (2002), para. 36 and 41.

the OPCAT, has also stressed the importance of visiting places of detention as an effective means for scrutiny and prevention of torture.[14] The OPCAT seeks to capitalise on this approach by, essentially, seeking to strengthen the 'protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment … by non-judicial means of a preventive nature, based on regular visits to places of detention.'[15]

Compared to other international human rights instruments, which tend to be based on a reactive approach, the Protocol does not seek to punish or prosecute. It clearly steers away from a retributive approach, favouring one that emphasises regular visits and continuous dialogue as a means of preventing torture and other types of ill-treatment. Thus, the drafters of the OPCAT noted that its purpose 'is not to condemn States but to have them co-operate in order to improve, if necessary, the situation of persons deprived of their liberty'.[16] The OPCAT also breaks new ground in the way that States are monitored in the implementation of their human rights obligations under international human rights instruments. Indeed, the OPCAT does not require States Parties to report to an international monitoring body on the various measures they have adopted to implement their legal obligations under those instruments. Instead, States Parties have to grant the two monitoring bodies, the SPT and the NPMs, free access to their places of detention. Building on those visits, the monitoring bodies issue recommendations aimed at improving, both in law and practice, the system of safeguards that are necessary to protect people deprived of their liberty.[17]

2.2 The OPCAT visiting bodies

With the establishment of the SPT and the NPMs, the OPCAT introduced an innovative method of monitoring the implementation of the human rights obligations of States Parties. It does not only prescribe mandatory monitoring from the outside, through an international human rights treaty body (the SPT), but it also mandates monitoring from within the State, through the NPMs. In addition to that two-pronged approach, it can be argued that the international component of the monitoring, the SPT, deals with its subject matter in a manner different to existing treaty monitoring mechanisms at the international level. In its first annual report, the SPT observed that the Subcommittee, 'is a new type of United Nations treaty body with a unique mandate'.[18] Unlike other UN treaty bodies, the SPT is a more proactive body, geared towards work in the field, and does not perform judicial or quasi-adjudicatory functions, like the Human Rights Committee or the CAT. In contrast to other monitoring bodies operating in the same area, such as the UN Special Rapporteur on Torture, or the UN Working Group on Arbitrary Detention, the SPT can carry out visits to countries that have ratified the OPCAT without previously requesting permission to do so.

[14] See APT, *Monitoring Places of Detention*, p.15. See fn.5.

[15] See the last paragraph of the preamble to the OPCAT. See also the preamble of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted under the aegis of the Council of Europe in 1987, from which the OPCAT appears to have 'borrowed' the text.

[16] 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, Commission on Human Rights, UN Doc. E/CN.4/1991/66 (1991), para. 8.

[17] See SPT, Second Annual Report, UN Doc. CAT/C/42/2 (2009), para. 13.

[18] SPT, First Annual Report (February 2007-March 2008), UN Doc. CAT/C/40/2 (2008), para. 5.

The SPT is composed of ten international experts[19] and its mandate, which can be found in Article 11 of the OPCAT, has three different, but interrelated, components. First, the SPT's main task consists of carrying out visits to all places of detention in each State Party.[20] Second, the SPT must advise and assist State Parties with regard to the designation or establishment of the national component of the OPCAT: the national preventive mechanisms. The SPT must also maintain direct contact with the NPMs and, where necessary, offer them training and technical assistance.[21] Third, the SPT should cooperate with all relevant UN bodies and other international, regional, and national bodies for the prevention of torture and ill-treatment.[22] In the context of its activities, the SPT is to be guided by the principles of confidentiality, impartiality, non-selectivity, universality, and objectivity, in accordance with Article 2(3) of the OPCAT.

Of particular relevance is the principle of confidentiality. In a similar fashion to its European counterpart, the CPT, any recommendations and observations made by the SPT, following a visit, shall be confidentially communicated to the State Party.[23] The latter can request that the SPT publish the report of the visit, and its recommendations and observations, together with any comments by the State Party concerned.[24] Should a State Party not fully cooperate with the SPT, the latter can request that the CAT adopt a public statement on the matter or publish the report.[25] The confidentiality of the SPT's work is vital in light of the fact that the SPT is a non-judicial body and its activities are not geared toward condemning non-compliant State conduct. Rather, the SPT's activities seek to build a relationship, based on trust and cooperation, between itself and the States Parties it visits in order to improve, if necessary, the situation of persons deprived of their liberty. [26]

The SPT started its activities in January 2007 and, by August 2009, it had carried out six visits to State Parties and various places of detention therein.[27] As discussed below, in its six initial visits, the SPT carried out visits to seven less traditional places of detention. In its first annual report, the SPT discussed the challenges it faced in its first year of operation and offered some guidance with regard to the national component of the OPCAT by issuing its preliminary NPM guidelines, which contain a number of points of consideration that States should take into account when

[19] The number of members of the SPT will increase to 25 once 50 States have ratified the OPCAT under Article 5 § 1. At the time of this writing, 50 States had ratified the OPCAT, although the election of the additional members of the SPT had not yet taken place.

[20] See OPCAT, Article 11(a). See fn.1.

[21] See OPCAT, Article 11(b). See fn.1. The SPT should also, *inter alia*, (i) advise and assist the NPMs in evaluating the necessary means to improve safeguards against ill-treatment, and (ii) make necessary recommendations and observations to States Parties with a view to strengthening the capacity and mandate of the NPMs.

[22] See OPCAT, Article 11(c) and Article 31. See fn.1. On the issue of cooperation and engagement between the SPT and other international and regional bodies, see the policy paper prepared by the OPCAT Research Team at Bristol University, 'The Relationship between the Optional Protocol to the UN Convention Against Torture (OPCAT) and other international and regional visiting mechanisms'. Available at http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/relationshipopcatandothervisitingmechanisms.pdf.

[23] OPCAT, Article 16(1). See fn.1.

[24] OPCAT, Article 16(2). See fn.1.

[25] OPCAT, Article 16(4). See fn.1.

[26] See 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 E/CN.4/1991/66 (1991), para. 8.

[27] The States visited until now are Mauritius, the Maldives, Sweden, Benin, Mexico, and Paraguay. At the time of this writing, only the Maldives and Sweden have requested that the SPT make its reports on the visits public. See http://www2.ohchr.org/english/bodies/cat/opcat/index.htm. Last accessed 1 August 2009.

designating or establishing NPMs.[28] The SPT's second annual report focused on its efforts to engage more actively with NPMs, although it noted that this part of its mandate is seriously hampered by a lack of resources.[29]

By introducing a national component in the form of the NPMs, the OPCAT made an innovative contribution to the fight against torture under international (human rights) law: the notion of a mandatory visiting body to complement the visits carried out by an international body. The OPCAT is quite flexible with regard to the choice of mechanism to fulfil the role of NPM. Under Article 3, States Parties must either 'set up, designate, or maintain at the domestic level one or several visiting bodies for the prevention of torture'.[30] This provides States Parties to the OPCAT with leeway to designate a body, or group of bodies, that fits their particular national context and needs.

As observed by Murray and Steinerte, there are three trends emerging around the globe with regard to the way States Parties are setting up their NPMs.[31] The most common trend, thus far, has been the designation of a single, already existing body to take on the role of the NPM. This has usually, but not exclusively, entailed the designation of an ombudsman or the established National Human Rights Institution, sometimes in collaboration with non-governmental organisations (the so-called 'ombudsman plus civil society' approach).[32] A small group of States have decided to designate various other pre-existing bodies.[33] This option poses a dilemma for States with regard to how the activities of these previously existing bodies will be coordinated in order to avoid duplication and to ensure that they achieve a common and consistent approach to their preventive activities, including the application of standards. This is an issue that can have a significant effect with regard to visits to less traditional places of detention, as discussed below. Some countries have decided to create new institutions to fulfil the role of NPM with a specific mandate to deal with torture prevention.[34]

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[28] SPT, First Annual Report, para. 28. See fn.18.

[29] See SPT, Second Annual Report, para. 74 See fn.17.

[30] OPCAT, Article 3. See fn.1.

[31] See Steinerte and Murray in this volume.

[32] Various countries across Europe (such as Albania, Armenia, Czech Republic, Denmark, Estonia, and Moldova) and have designated their respective national Ombudsman as their official NPM. Slovenia opted to designate its Human Rights Ombudsman together with a group of civil society organisations, which collaborate with the Ombudsman, as the NPM. In Latin America, Costa Rica designated, by decree, the Defensoría de los Habitantes (Ombdusman), while Mexico designated the National Human Rights Commission. In Africa, the Maldives designated its Human Rights Commission as the NPM. See List of Designated National Preventive Mechanisms at the website of the Association for the Prevention of Torture: http://www.apt.ch/content/view/138/152/lang,en/. Last accessed 15 September 2009. See also Steinerte and Murray in this volume for a discussion of the implications of designating existing organisations as NPMs.

[33] For example, New Zealand has chosen to designate five existing bodies to fulfil the role of NPM: the New Zealand National Human Rights Commission, the Ombudsman, the Children's Commissioner, the Police Conduct Authority, and the Inspector of Defence Penal Establishments. Liechtenstein's NPM is the already existing Corrections Commission. In Sweden, the Chancellor of Justice and the Parliamentary Ombudsman have been appointed as the official NPMs for that country. The United Kingdom has opted to designate eighteen existing bodies, which already perform tasks similar to those expected of an NPM: these include Her Majesty's Inspectorate of Prisons (HMIP), the Independent Monitoring Boards (IMB), the Care Quality Commission, the Children's Commissioner for England, the Office for Standards in Education, the Scottish Human Rights Commission, the Mental Welfare Commission for Scotland, the Regulation and Quality Improvement Authority in Northern Ireland, and the Criminal Justice Inspection Northern Ireland.

[34] This is the case in Benin, France, Guatemala, Honduras, Paraguay, and Senegal, which plan to introduce, or have already introduced, new bodies specifically created to fill the NPM role. See APT, National Preventive Mechanisms

The flexibility left to States in deciding which body can operate as an NPM has, however, certain limits. The OPCAT prescribes a number of criteria that must be fulfilled if the NPM is to operate in the manner envisaged by the drafters of the Protocol. First, the NPM must be allowed to visit any place of detention under the State Party's jurisdiction or control where persons are being deprived of their liberty.[35] NPM's must, therefore, be in a position to visit both traditional and less traditional places of detention.

Second, Article 18 of the OPCAT obliges States to guarantee the functional independence of the NPM, as well as the independence of its personnel.[36] With regard to functional independence, the OPCAT requires that the NPM be allowed to operate without restrictions, or government interference, in order to perform its duties and to use the powers that the State should grant it under Articles 19 and 20 of the OPCAT. As a means of strengthening this, the OPCAT requires States to give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights (the 'Paris Principles') when establishing or designating their NPM(s).[37]

The Paris Principles list a set of criteria that have to be taken into account for a national human rights institution to be considered independent.[38] An NPM's functional independence is also related to its financial one. States must make available 'the necessary resources for the functioning of the national preventive mechanisms.'[39] As required by the Paris Principles, it is essential that adequate funding is available to maintain a suitable infrastructure that enables the body to conduct its activities.[40] Independence also relates to the NPM's personnel. States are under an obligation to provide NPMs with the necessary facilities, guarantees, and resources to ensure that personnel are appointed in an appropriate way.[41] The OPCAT also obliges States to guarantee that the NPM's personnel represent the required capabilities, and also sufficient knowledge, to carry out the body's tasks. Thus, States need to ensure that the necessary multidisciplinary expertise and proper gender, ethnic, and minority representation is present in the NPM.[42] Murray has highlighted the factors that allow for effective assessment of the independence of an NPM, as well as its credibility, including the powers granted to the body, the way it and its staff are appointed, and how it develops its relationship with the relevant

– Country by Country Status, 29 June 2009. Available at http://www.apt.ch/component/option,com_docman/task,doc_download/gid,124/Itemid,59/lang,en/. Last accessed 23 September 2009.

[35] OPCAT, Article 4(1). See fn.1.

[36] Rachel Murray, 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One size does not fit all', (2008) *Netherlands Quarterly of Human Rights* 26, p. 495.

[37] OPCAT, Article 18(4). See fn.1.

[38] With regard to the discussion of whether national human rights institutions and/or ombudsmen are suitable bodies to perform the function of an NPM, see Policy Paper on The Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture, prepared by the OPCAT Research Team at the School of Law of the University of Bristol. Available at http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/iccaccreditationandnpms.pdf. See also Steinerte and Murray in this volume.

[39] OPCAT, Article 18(3). See fn.1.

[40] Paris Principles, para. 2. See also Murray, 'National Preventive Mechanisms under the OPCAT', p.496. See fn.36.

[41] Paris Principles, para. 2. See also Murray, 'National Preventive Mechanisms under the OPCAT', pp.496-497. See fn.36.

[42] OPCAT, Article 18(2). See fn.1.

stakeholders (including government, parliament, civil society, and international actors, such as the SPT). [43]

Third, Articles 19 and 20 of the OPCAT highlight a number of powers that NPMs should be granted for them to be able to perform their visiting function. The NPM should be able to examine the treatment of persons deprived of their liberty on a regular basis, and make recommendations to the relevant authorities in order to improve both the treatment of those deprived of their liberty and the conditions of detention. The NPMS should also submit proposals and observations on draft and existing legislation.[44] In addition, access to all places of detention and their facilities, as well as all relevant information, the possibility to interview individuals in private, the freedom to choose which places to visit and which persons to interview, and the possibility of contacting the SPT must be guaranteed for the NPM.[45] These powers, safeguards, and guarantees are essential for an effective performance of the NPM's preventive function. In the context of the present discussion, these powers need to be sufficient to allow the NPM not only to inspect prisons and police cells, but also to enable it to carry out proactive visits to non-traditional places of detention. Thus, the legislation establishing or designating the NPM should make it expressly clear that the NPM has the power to conduct visits and inspections in all the relevant places of detention. As discussed below, some countries have implemented this through the adoption of an explicit, though sometimes non-exhaustive, enumeration of the places of detention that should be visited. Other countries, however, have adopted the open approach of Article 4 of the OPCAT.

3. Places of Detention and Deprivation of Liberty Under the OPCAT

One of the key aspects of the OPCAT is the breadth of the concept of places of detention that have to be visited by its monitoring bodies. Article 4(1) of the OPCAT provides a seemingly ample description of a place of detention: 'any place under [a State Party's] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.'

This description is complemented by the definition of deprivation of liberty found in Article 4(2): 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative, or other authority.' The approach to places of detention adopted by the OPCAT is broad.[46] It does not provide a list of places that should be subject to visits, but refers only to 'any place where persons are or may be deprived of their liberty'. Article 4(2) expands the coverage of the OPCAT to places that persons are not permitted to leave at will, including private places of detention. This entails that not only privatised prisons, but also private hospitals, psychiatric and other institutions, facilities, or establishments in which persons are held against their will on the basis of a public order, or at the instigation or with the acquiescence of a public authority, fall

[43] Murray, 'National Preventive Mechanisms under the OPCAT', p.501. See fn.36.

[44] OPCAT, Article 19. See fn.1.

[45] OPCAT, Article 20. Moreover, any reprisals against persons who have sought contact with or provided information to the NPM should not be tolerated. See OPCAT, Article 21. See fn.1.

[46] Evans and Haenni-Dale, 'Preventing Torture?', pp.43-44. See fn.1.

under the OPCAT's remit.[47] In theory, this guarantees that all relevant places are covered by the OPCAT. It also allows sufficient space for discussion of future developments on the question of what comprises a place of detention.

Given Article 4's approach to deprivation of liberty and places of detention, the key criteria for considering whether or not a particular place can be regarded a place of detention that needs to be visited are (i) whether the place falls under the jurisdiction and control of the State Party, (ii) whether the place deprives persons of their liberty, and (iii) whether the deprivation of liberty is linked to a decision, act, or the conduct of a public authority.

The first key aspect of the concept of places of detention under the OPCAT concerns the jurisdictional and geographical reach of the Protocol. Article 4(1) entails that visits should cover places of detention under 'jurisdiction and control' of the State. It should be observed that the French translation of Article 4(1), which is equally authentic, provides that the visits will take place '*dans tout lieu placé sous sa juridiction ou sous son contrôle*' (to all places under its jurisdiction or under its control).[48] This provides for a broader interpretation of the territorial reach of the OPCAT, which offers more protection to the individual. The use of the term 'jurisdiction' appears to be borrowed from Article 2(1) of the UNCAT, which establishes that a State Party has to adopt the necessary measures to prevent torture in any 'territory under its jurisdiction'.[49] According to Burgers and Danelius, this phrase is intended to include the actual land territory of the State and its territorial sea, as well as ships flying its flag, aircraft registered in the State concerned, and platforms and other installations on its continental shelf.[50] Arguably, the vehicles in which persons deprived of their liberty are transported are also covered. The element of control is relevant and would imply that places of detention in a territory outside a State's normal jurisdiction, but within its control, could be covered by the OPCAT. However, the threshold for deciding whether or not this is the case is relatively high. This is because several bodies, including the European Court of Human Rights and the UN Human Rights Committee, have observed that a State has to exercise a degree of 'effective control over an area'/'overall effective control'[51] over such a territory. With regard to situations in which individuals are being detained abroad, establishing the appropriate degree of control may be difficult. According to

[47] It has been argued that the use of the phrase 'by order of any judicial, administrative or other authority' in Article 4 § 2 is more limited and ambiguous, somewhat undermining the use of 'by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence' found in Article 4(1). See Manfred Nowak, and Elizabeth McArthur, with the contribution of Kerstin Buchinger et al., *The United Nations Convention Against Torture: A commentary* (Oxford: Oxford University Press, 2008), p.932.

[48] See Written Evidence to the Joint Committee for Human Rights, Memorandum from Rachel Murray, Director of the OPCAT project team, and Nicholas Tsagourias, University of Bristol, dated 3 April 2008, 28th Report, UN Convention Against Torture: Discrepancies in evidence given to the committee about the use of prohibited interrogation techniques in Iraq, HL 157/HC 527 (27 July 2008).

[49] See UNCAT, Article 2(1). See fn.11.

[50] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A handbook on the convention against torture and other cruel, inhuman or degrading treatment or punishment* (Leiden: Martinus Nijhoff Publishers, 1988), pp.123-124. See also Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN Doc. E/CN.4/1993/28 (1992), para. 41.

[51] See, for example, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, European Court of Human Rights, Series A310, para. 62-64; *Cyprus v. Turkey*, Judgment of 10 May 2001, European Court of Human Rights, Reports 2001-IV, para. 77; and *Bankovic and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, (Grand Chamber) decision of 12 December 2001, European Court of Human Rights, Reports 2001-XII, para. 71. See also ICCPR General Comment 31 (Eightieth Session, 2004), Article 2: The nature of the general legal obligation imposed on States Parties to the covenant, A/59/40 (2004), para. 10.

Murray and Tsagourias, in situations other than occupation, control over a particular area needs to be established in greater detail.[52]

The second key aspect of the concept of places of detention concerns whether or not a particular place actually deprives an individual of her/his liberty. As observed above, depriving someone of his/her liberty under Article 4(2) of the OPCAT amounts to detaining, imprisoning, or placing that person in a custodial setting (either public or private). Although it may appear obvious what is understood by this, it is worth clarifying what it may actually mean in practice. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[53] for example, defines detention as the situation through which a person is 'deprived of personal liberty except as a result of conviction for an offence', while imprisonment is defined as the condition by which a person is 'deprived of personal liberty as a result of conviction for an offence'. According to the European Court of Human Rights, determining whether a person is deprived of his/her liberty will depend on the 'concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects, and manner of implementation of the measure in question',[54] which has the objective of limiting or restricting the liberty or freedom of movement of a person.[55] An important aspect, in this regard, is the fact that the person involved is not permitted to leave the place at will (Article 4[2]). This is also specifically mentioned in the Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty,[56] which define deprivation of liberty as

> Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative, or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses.[57]

It is worth observing that the Inter-American Commission's Principles also provide a detailed category of persons that may be subjected to deprivation of liberty and a non-exhaustive list of

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[52] Written Evidence to the Joint Committee for Human Rights, Memorandum from Rachel Murray, Director of the OPCAT project team, and Nicholas Tsagourias. See fn.49.

[53] See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly, UN Doc. A/RES/43/173 (1988).

[54] *Case of Guzzardi v. Italy*, Judgment of 6 November 1980, European Court of Human Rights, Series A39, para. 92.

[55] See also *Case of Amuur v. France*, Judgment of 25 June 1996, European Court of Human Rights, Reports 1996-III, para. 42.

[56] The Principles were adopted by the Inter-American Commission of Human Rights' during its 131st regular period of sessions in March 2008. See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OAS Doc. OEA/Ser/L/V/II.131 doc. 26. The Principles aim to expand on the existing normative framework at the regional and international level and, thus, establish precise standards pertaining to the conditions of detention of persons deprived of their liberty, as well as to the standards relating to torture and other cruel, inhuman and degrading treatment. As a means of fulfilling this aim, the Principles advocate, among other things, the use of independent institutions and organisations to carry out visits and inspections to places where persons are deprived of their liberty. For a discussion of the relationship between the OPCAT and the Principles, see policy paper prepared by the OPCAT Research Team at Bristol University, 'The Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the Optional Protocol to the Convention Against Torture'. Available at http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/iacmhrprinciples.pdf.

[57] See Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/C (89) 1, Strasbourg, 26.XI.1987, para. 30.

places that are covered by this definition.[58] By comparison, Article 2 of the European Convention for the Prevention of Torture is quite succinct, limiting itself to a note that the CPT should be allowed to visit 'any place within [a State's] jurisdiction where persons are deprived of their liberty by a public authority.' According to the Explanatory Report to the European Convention for the Prevention of Torture, however,

> [v]isits may be organised in all kinds of places where persons are deprived of their liberty, whatever the reasons may be. The Convention is therefore applicable, for example, to places where persons are held in custody, are imprisoned as a result of conviction for an offence, are held in administrative detention, or are interned for medical reasons or where minors are detained by a public authority. Detention by military authorities is also covered by the Convention.[59]

It is clear that the understanding of whether a particular place deprives someone of his/her liberty encompasses detention in a broad range of places and institutions. This was also recognised by the drafters of the OPCAT, who acknowledged that

> the scope of the protocol should include persons detained in police stations, civil and military prisons, medical or mental health facilities, and secret or irregular places of detention, among other possible places of detention, but that this list was by no means exhaustive.[60]

Clearly, the OPCAT covers both traditional and less traditional places of detention.

The second key aspect of the concept of places of detention concerns whether a particular type of restriction, in a particular place or setting aimed at depriving a person of their liberty, is linked to a decision, act, or the conduct of a public authority. This is highly relevant to the issue of visiting places of detention that are not linked to the justice system. Generally speaking, visiting traditional places of detention does not pose a problem, since the deprivation of liberty in those places is usually based on a judicial order or a conviction. Although detention in migrant detention centres[61] or military barracks can probably be traced to an administrative or disciplinary order issued by a public authority, this is not always the case in other less traditional places of detention, such as hospitals, mental health institutions, or care homes for the elderly. In these settings, persons may be detained on a 'voluntary' basis, or with their family's consent, without any official or public intervention. The OPCAT requires, however, that the detention is based on a public order, or with the State's acquiescence or consent. A link to a public act is,

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[58] The Principles observe that the category of persons covered by the definition of deprivation of liberty 'includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.'

[59] See Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/C (89) 1, Strasbourg, 26.XI.1987, para. 30.

[60] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1993/28 (1992), para. 30.

[61] For a more in-depth discussion of the OPCAT in the context of migrant and refugee detention see Alice Edwards, 'The Optional Protocol to the Convention Against Torture and the Detention of Refugees,' (2008) 57 *International and Comparative Law Quarterly*, pp.789-825.

thus, necessary, possibly to demonstrate the responsibility of the State for the conduct of entities that are not official organs of the State, but which have been empowered by the law of that State to exercise elements of the governmental authority as required by Article 5 of the International Law Commission's Articles on Responsibility of the State.[62]

In sum, these criteria appear to ensure that a broad range of places that are used officially or unofficially to deprive persons of their liberty are covered by the OPCAT's visiting bodies. This broad approach may help to avoid interpretations limiting the scope of places that fall under the OPCAT's reach. This approach, however, was criticised by a number of delegations participating in the negotiations leading to the drafting of the OPCAT. For example, some delegations considered that the phrase 'at its instigation or with its consent or acquiescence', as well as the wording (which implied that any places where persons are or may be deprived of their liberty should come under the OPCAT's remit) was too broad and imprecise.[63] Another delegation noted concerns that, given the enormous task and financial burden that visiting all these places of detention would incur, the visits should 'be limited to places where persons were deprived of liberty as a result of conviction for an offence and should not include institutions where persons stayed for medical reasons.'[64] Nevertheless, most of the delegations argued that in order to prevent torture 'visits to all de facto places of detention should be allowed.'[65] This position was the one that prevailed in the end and, arguably, it provides flexibility to the visiting body in the selection of the places it visits.

4. Challenges of Visiting Less Traditional Places of Detention

4.1 Examples of visits to less traditional places of detention

There is already an existing practice of visits to less traditional places of detention. For example, the CPT has frequently visited less traditional places of detention and has even developed guidelines on the use of restraints at psychiatric hospitals, based on experience gained through visits to these places. Other regional bodies with some experience in visiting less traditional places of detention include the UN's Special Rapporteur on Torture[66] and the UN Working Group on Arbitrary Detention,[67] the Special Rapporteur on Prisons and Conditions of Detention

[62] Articles on the Responsibility of States for international wrongful acts, General Assembly, UN Doc A/RES/56/83 (2001).

[63] 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, Commission on Human Rights, UN Doc. E/CN.4/2000/58 (1999), para. 29-30.

[64] 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, Commission on Human Rights, UN Doc. E/CN.4/2001/67 (2001), para. 44.

[65] Report of the Working Group on the Draft OPCAT, E/CN.4/2000/58 (1999), para. 30. See fn.63.

[66] The Special Rapporteur on Torture visited, for example, a detention centre for rejected asylum seekers during his mission to Denmark, and the psychiatric ward of a hospital in Greenland. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, Mission to Denmark, Human Rights Council, UN Doc. A/HRC/10/44/Add.2 (2009), pp.29 and 33.

[67] During its mission to the Ukraine, the Working Group on Arbitrary Detention visited several less traditional places of detention, including (i) temporary holding facilities for migrants at airports and border detachments, (ii) a centre for the reception and distribution of minors, (iii) and a municipal psychiatric hospital. Report of the Working Group on Arbitrary Detention, Addendum, Mission to the Ukraine, Human Rights Council, UN Doc. A/HRC/10/21/Add.4 (2009), pp.26-27.

of the African Commission on Human and Peoples' Rights, and the Special Rapporteur of the Inter-American Commission on Human Rights on the Rights of Persons Deprived of Liberty.[68] As previously observed, in its first six official missions, the SPT visited seven less traditional places of detention. During its first official visit to Mauritius, in October of 2007, the SPT visited a shelter for children and distressed women.[69] During the SPT's second official visit to the Maldives, three places under the remit of the Ministry of Gender and Family and the Ministry of Education were visited.[70] Finally, during its fifth official visit (i.e. to Mexico), the SPT visited a military prison, a juvenile guardianship council and two psychiatric institutions (one of which was annexed to a prison).[71] Only the official report of the SPT's mission to the Maldives has currently been published at the request of the country's Government; it contains a brief account of the visits of the SPT to the less traditional places of detention mentioned above.[72] In comparison with the report's sections on police cells and prisons, the sections on the less traditional places visited are rather short and describe in largely positive terms the situations encountered.[73]

Of the 23 NPMs that have been designated or established,[74] a number of them are already carrying out visits to less traditional places of detention. For example, in Europe, the Chancellor of Justice, the designated NPM for Estonia, has the mandate to visit child care and educational institutions (such as reform schools for children with special disciplinary or health needs), welfare and health care institutions (including social welfare homes, orphanages, and psychiatric hospitals), as well as military establishments, besides the more traditional places of deprivation of liberty.[75] In its first year of operation as an NPM, the Chancellor of Justice visited a training centre for the infantry[76] and four psychiatric clinics.[77]

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[68] The Special Rapporteur on Prisons and Conditions of Detention, for example, carried out a visit to a mental health hospital and a repatriation centre in South Africa during her visit to that country in 2004. See Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, Mission to the Republic of South Africa, 14- 30 June 2004, available at the website of the African Commission on Human and Peoples' Rights: http://www.achpr.org/english/_info/reports_en.html. Last accessed 15 September 2009. Since the establishment, in 2004, of the Special Rapporteurship of the Inter-American Commission on Human Rights on the Rights of Persons Deprived of Liberty, the only visit to a non-traditional place of detention by the Special Rapporteur was carried out in September 2008 when he visited a psychiatric institution in Paraguay to verify whether precautionary measures adopted by the Inter-American Commission were being respected. For the rest, the Special Rapporteur has mainly focused on visiting prisons and police cells. See the website of the Special Rapporteur at http://www.cidh.oas.org/PRIVADAS/visitas.htm. Last accessed 15 September 2009.

[69] See SPT, First Annual Report, p.24. See fn.18.

[70] The SPT visited a children's home, a detoxification centre for drug addicts, and an education and training centre for children. See SPT, First Annual Report, p.25. See fn.18.

[71] See SPT, Second Annual Report, p.26. See fn.17.

[72] See SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, UN Doc. CAT/OP/MDV/1 (2009).

[73] SPT, Report on the SPT Visit to the Maldives, para. 244-254. See fn.72.

[74] For the official list of designated/established NPMs see http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm. Last accessed 15 September 2009. The APT also maintains a (probably more up-to-date) list of NPMs. See fn.33 above.

[75] See website of the Estonian Chancellor of Justice at http://www.oiguskantsler.ee/?menuID=52. Last accessed 15 September 2009.

[76] See Annual Report 2007 of the Chancellor of Justice, (2008), p. 66. Available at http://www.oiguskantsler.ee/public/resources/editor/File/01_Annual_report_2007.pdf. Last accessed 15 September 2009.

[77] Annual Report 2007 of the Chancellor of Justice, pp.139-140 and 143-144. See fn.76.

In late 2007 in Latin America, a special division of the Mexican National Human Rights Commission, which is the designated NPM for that country, started to carry out visits to places of detention under the aegis of the OPCAT. According to its first annual report over the period 2007-2008, the Mexican Commission's NPM team inspected sixteen psychiatric institutions, ten centres for the assistance of victims of crime, six migrant centres, and six hospitals.[78] The Costa Rican NPM, the Ombudsman, visited mainly male and female penitentiary institutions, but also inspected two psychiatric hospitals in 2008 and carried out six visits to a detention centre for irregular migrants.[79]

In the Asia-Pacific region, the designated NPM institutions in New Zealand, the Ombudsmen (the Children's Commissioner), and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General, are also mandated to visit various less traditional places of detention.[80] Thus, the Office of the Ombudsmen, is entitled to visit places of detention approved or agreed under the New Zealand Immigration Act 1987, and health and disability-focused places of detention.[81] During its first year of operation as an NPM, senior staff of the Ombudsmen, and a specifically appointed Ombudsman Inspector, carried out preliminary visits to one immigration facility and forty-one mental health facilities[82] with a view to (i) providing information about the Ombudsmen's NPM role, (ii) clarifying the inspection and monitoring process, and (iii) familiarising themselves with the facilities and reporting requirements. The Children's Commissioner has a mandate to inspect residences for children and the youth under the remit of the Child, Youth and Family service (itself under the remit of the Ministry of Social Development), and visited five of those facilities in the period 2007 to 2008.[83] Finally, the Inspector of Service Penal Establishments of the Office of the Judge Advocate General is in charge of visiting New Zealand Defence Forces detention facilities. In his initial year of operation, the Inspector undertook two visits to the Services Corrective Establishment, located in

[78] See Informe de Actividades del Mecanismo Nacional de Prevención de la Tortura de México, Comisión Nacional de los Derechos Humanos, México, p.4. Available at http://www.cndh.org.mx/progate/prevTortura/InformeAnual2008.htm. Last accessed 25 September 2009.

[79] See Report of the Costa Rica National Preventive Mechanism addressed to the UN Subcommittee on the Prevention of Torture, 4 November 2008, pp.5-8. Available at http://www.dhr.go.cr/mnp/crnmpreportjanuary09.pdf. Last accessed 25 September 2009.

[80] See Section 16 of the Crimes of Torture Act 1989, Public Act 1989 No 106 as amended by Section 7 Crimes of Torture Amendment Act 2006 (No 68). See also Monitoring places of detention, First annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT) - 1 July 2007 to 30 June 2008, New Zealand Human Rights Commission, p.6. Available at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/13-Feb-2009_17-25-58_OPCAT_2008_Report.pdf. Last accessed 15 September 2009.

[81] First annual report of activities under the OPCAT. See fn.81. For the sake of completeness it must be noted that the Ombudsmen may visit prisons and youth justice residences, while the other component of the New Zealand NPM, the Independent Police Conduct Authority, is entitled to visit police cells. The central NPM body, the New Zealand Human Rights Commission, does not yet conduct any visits, but acts as the central coordinating body of the entire NPM. See First annual report of activities under the OPCAT, p.6. See fn.80.

[82] See Report of the Ombudsmen for the year ending 30 June 2008 (2007/2008), Presented to the House of Representatives pursuant to Section 29 of the Ombudsmen Act 1975, p.34. Available at http://www.ombudsmen.parliament.nz/imagelibrary/100292.pdf. Last accessed 25 September 2009. See also The Role of an Ombudsman as a National Preventive Mechanism for Monitoring Places of Detention Under the Crimes of Torture Act 1989. Available at http://www.ombudsmen.parliament.nz/index.php?CID=100117. Last accessed 25 September 2009.

[83] See Office of the Children's Commissioner Annual Report for the year ending 30 June 2008, Presented to the House of Representatives pursuant to Section 28 of the Children's Commissioner Act 2003 and Section 150(3) of the Crown Entities Act 2004, p.18. Available at http://www.occ.org.nz/publications/reports_documents. Last accessed 25 September 2009.

Burnham Military Camp near Christchurch, and a number of inspection visits to detention cells in three different bases throughout New Zealand.[84]

Few of the reports chronicling the visits carried out by the various bodies described in the previous paragraphs mention any particular challenge encountered in the course of performing their activities as NPMs vis-à-vis less traditional places of detention. Nevertheless, it is worth discussing some of the potential challenges such bodies may face. Although these challenges may also affect bodies visiting traditional places of detention, particular attention will be paid to the manner in which they can impact on the NPMs' activities with regard to less traditional places of detention. These challenges relate to the presence of suitable expertise in the OPCAT visiting bodies for undertaking effective and meaningful visits to less traditional detention places, accessing those places, and making relevant recommendations, as well as coordinating visiting bodies (for instance, in NPMs made up of multiple sub-bodies).

4.2 Challenges pertaining to the expertise of the visiting bodies

One of the main challenges facing the OPCAT's visiting bodies (or, indeed, any other inspection body) while visiting non-traditional places of detention is the need to guarantee that the SPT and NPMs have sufficient expertise to allow them to take into account and assess the specific settings, context, and nuances of less traditional places of detention. For example, a psychiatrist and other relevant (mental) health experts would be in a better position to assess the specific issues that may be encountered while inspecting a psychiatric institution or hospital than a lawyer would be. Experts on children or geriatric care would also have more expertise and prove more valuable in a visiting team inspecting care homes for children and elderly people, respectively. Principle 29 of the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that visits to places of detention be carried out 'regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.'[85] With regard to the SPT, Article 5(2) of the OPCAT details the experience required from prospective SPT members. Members must be

> persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.

Although clear preference seems to be given to persons with experience in the administration of justice, the reference to persons with other relevant experience (i.e. experience relevant to the treatment of persons deprived of their liberty) appears to imply that the SPT must be also composed of experts from other fields, such as (forensic) medicine. At the time of writing, the SPT's composition is biased towards legal experts, with only two experts in the field of medicine among the current members.[86] Given that, as prescribed in Article 5(1), there are currently only

[84] See First annual report of activities under the OPCAT, p.22. See fn.80.

[85] See Written Evidence to the Joint Committee for Human Rights, Memorandum from Rachel Murray, Director of the OPCAT project team, and Nicholas Tsagourias. See fn.49. See also Murry, 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention'. See fn.36.

[86] The list of SPT members and their experience and expertise is available at http://www2.ohchr.org/english/bodies/cat/opcat/membership.htm. Last accessed 30 August 2009. It is worth

ten members, it is not surprising that there are few experts who are not lawyers. This may, however, change in the very near future, now that the 50th ratification of the OPCAT is in place: under Article 5(1), membership will be expanded to twenty-five experts, making it possible for other types of experts to be appointed to the SPT. It is worth mentioning, in this regard, that, following the resignation of two of the original SPT members in mid-2009, Dr Silvia Casale of the UK and Mr Leopoldo Torres Boursault from Spain (both legal experts), the new members (Prof. Malcolm Evans and Mr Emilio Ginés) appointed in their place were both also legal experts.[87] Given the fact that Article 8 of the OPCAT mentions that, in seeking replacements to SPT members, States Parties have to take into consideration the need to have a proper balance among the various fields of competence, it would appear that an opportunity to bolster the non-legal expertise of the SPT was missed.

In order to guarantee a proper multidisciplinary approach to visiting places of detention during SPT missions, Article 13(3) makes it possible for the SPT delegation to be accompanied, whenever necessary, by experts of demonstrated professional experience and knowledge in the fields covered by the OPCAT. These ad hoc experts are to be chosen from a roster of experts, which is to be drafted on the basis of proposals not only by States Parties, but also the Office of the UN High Commissioner of Human Rights and the UN Centre for International Crime Prevention. The use of experts may be necessary to complement the knowledge and expertise of the SPT members carrying out the visit. This is directly related to the types of places of detention that the SPT is entitled to visit. The broad range of places of detention that fall under Article 4 of the OPCAT means that SPT visiting teams must have sufficient expertise to allow them to properly cover traditional and less traditional places of detention.

While the possibility of having ad hoc experts seems to secure the availability of sufficient diversity and expertise for the SPT, and to complement its own expertise (enabling it to conduct proper visits not only to prisons or police cells, but also to less traditional places), in practice there appear to be some problems with this system. Thus, in its first annual report, the SPT noted that only a minority of States had actually provided proposals to the roster of experts.[88] The SPT observed that no ad hoc expert accompanied the SPT delegation during its first visit to Mauritius in October of 2007, that only two experts accompanied the SPT on its subsequent visit to the Maldives, and that only one ad hoc expert went on the visit to Sweden.[89] The second SPT Annual Report reveals that 22 States Parties have now provided names and details of experts, and that the UN has set up a panel to select the experts for the roster.[90] However, at the time of the presentation of the second annual report, the roster had not yet been made available to the SPT. In addition, due to budgetary constraints, the SPT was only able to employ one ad hoc expert on one visit carried out during its second year of operation.[91]

On the NPM side of the equation, the requirement of sufficient expertise is covered by Article 18(2) of the OPCAT. Article 18(2) obliges States Parties to ensure that the experts of their NPM have the required expertise and that NPMs should strive towards gender balance and adequate

observing that some of the current SPT members, including one of the medical experts, are also current or past members of the CPT.

[87] List of SPT members. See fn.86.

[88] SPT, First Annual Report, para. 63. See fn.18.

[89] SPT, First Annual Report. See fn.18.

[90] See SPT, Second Annual Report, para. 30. See fn.17.

[91] See SPT, Second Annual Report, para. 30. See fn.17.

representation of ethnic and minority groups. Ensuring the presence of relevant experience and expertise is an issue that may pose particular problems to smaller, developing States that have ratified the OPCAT. For example, the designated NPM of the Maldives, the Human Rights Commission of the Maldives, has four staff members at its disposal to carry out its NPM functions, none of which have either legal or medical backgrounds.[92] During its visit to the Maldives, the SPT noted that the legislation governing the Commission's mandate only allowed visits to places where 'persons are detained under a judicial pronouncement or lawful order',[93] which appeared to exclude visits to police stations and other less traditional places of detention. The Commission itself acknowledged that it did not visit psychiatric institutions or military establishments.[94] Noting that this situation fell short of what is expected under Article 4 of the OPCAT, the SPT also expressed its concerns with regard to the fact that the Human Rights Commission lacked the 'appropriately qualified people to undertake the variety of jobs related to the NPM work'.[95] This problem was compounded by the fact that the Maldives Human Rights Commission could face the prospect of inadequate financial resources. Given the Maldives' small population, it may be particularly difficult for its NPM to recruit members of staff with specialist expertise due to the lack of educational facilities in certain fields. In such a case, the Maldives may well seek experts from outside the country to complement its own contingent.

The Costa Rican NPM, the Ombudsman, also faces potential problems with regard to suitably diverse expertise: even though a special unit within the Ombudsman has been established to perform the NPM functions, this unit consists of only three staff members,[96] leaving some doubt as to whether sufficiently broad expertise is available in such a small team. In his report to the SPT, however, the Ombudsman is quick to point out that this problem is not insurmountable. The Costa Rican Ombudsman has noted that the selection and appointment of personnel for the NPM was made on the basis of criteria including

> knowledge of or experience in Human Rights, Criminal Law, Refugee and Asylum Law, Penitentiary or Psychiatric Institutions Administration and Process Policies; experience in visits to detention centers and activities involving vulnerable groups (migrants, women, disabled persons, ethnic minorities)[.][97]

A further criterion stated that applications must be 'person[s] of high moral standards'.[98] The Ombudsman nevertheless expressed his hope that a planned expansion in the institution's budget will allow it to increase the NPM's staff to nine persons and, thus, allow it to form a suitably multidisciplinary team.[99] In addition, the Ombudsman did not exclude the possibility of utilising professionals from different fields of expertise already working in the Ombudsman's office to assist the NPM team.[100]

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[92] See 'National Preventive Mechanisms – Country by Country Status', Association for the Prevention of Torture, 8 September 2009. See fn.34.

[93] SPT, Report on the Visit of the SPT to the Maldives, para. 41. See fn.72.

[94] SPT, Report on the Visit of the SPT to the Maldives. See fn.72.

[95] SPT, Report on the Visit of the SPT to the Maldives, para. 69. See fn.72.

[96] See Report of the Costa Rica National Preventive Mechanism addressed to the UN Subcommittee on the Prevention of Torture, p.4. See fn.79.

[97] Report of the Costa Rica National Preventive Mechanism. See fn.96.

[98] Report of the Costa Rica National Preventive Mechanism. See fn.96.

[99] Report of the Costa Rica National Preventive Mechanism, p.9. See fn.96.

[100] Report of the Costa Rica National Preventive Mechanism. See fn.96.

Even in nations that may have greater means at their disposal, the issue of expertise may still present certain challenges. This appears to be the case in a number of Ombudsmen institutions that have also been designated as NPMs. The Swedish Parliamentary Ombudsman, for example, which is one of the two bodies designated as the official NPM in Sweden,[101] is mainly composed of lawyers and it does not use external experts from other relevant fields during its visits.[102] The Parliamentary Ombudsman maintains that it has not received the necessary resources for its task as an NPM, and that the institution's main points of interest are the legal aspects of detention.[103] The Estonian NPM, the Chancellor of Justice, seems to be facing similar challenges when visiting psychiatric institutions, although it would appear that it tries to compensate its own lack of expertise by recruiting external experts to accompany the NPM in its visits.[104]

In general, it would appear that national human rights institutions, such as national human rights commissions and ombudsmen, that have been designated as NPMs often face problems associated with restricted expertise given that their core business relates to human rights monitoring and implementation in a broader national context, as well as dealing with human rights situations in a reactive manner through, for example, the handling of complaints related to human rights abuses. They are not always prepared for the proactive, preventive visits envisaged by the OPCAT and, thus, their staff tend to be legal experts.[105] However, interviewing a psychiatric patient or a child often requires particular skills that legal experts lack. Visiting teams lacking specialised staff may be at a disadvantage and, thus, their effectiveness will be hampered.[106]

It is worth observing that a number of States have given some thought to the issue of institutional expertise within the NPM. Thus, although the draft legislation of the Paraguayan NPM does not

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[101] The other NPM is the Chancellor of Justice. See APT, National Preventive Mechanisms – Country by Country Status, 9 September 2009. See fn.34.

[102] See SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/OP/SWE/1 (2008), para. 31.

[103] It should be noted that the Chancellor of Justice has objected to its designation as NPM, maintaining that its appointment, as such, would be akin to receiving instructions from the government: something that impinges on its independence and goes against the extraordinary character of the institution. Report on the Visit of the SPT to Sweden, para. 30. See fn.102.

[104] See Presentation by Mari Amos, Office of the Chancellor of Justice, Estonia, given during the Regional seminar on the prevention of torture, co-organised by the OSCE Office for Democratic Institutions and Human Rights and the University of Bristol in Prague, Czech Republic, 25-26 November 2008. Available at http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationamospowerpoint.pdf. Last accessed 25 September 2009.

[105] On the question of whether national human rights institutions and ombudsmen are suitable as NPMs, see Steinerte and Murray in this volume, and also policy paper by the OPCAT Research Team at Bristol University, Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture. Available at http://www.bristol.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/opcatdocs/iccaccreditationandnpms.pdf. See also National Human Rights Commissions and Ombudspersons' Offices/ Ombudsmen as NPM, Association for the Prevention of Torture. Available at http://www.apt.ch/content/view/44/84/lang,en/. Last accessed 15 September 2009.

[106] It has been suggested, for example, that, in order to compensate for the lack of medical experts in a visiting team, the team members 'must take care to request general information on the state of health of the persons deprived of their liberty: the most frequent illnesses, detection of transmissible and contagious diseases, deaths. They should also examine the system for gaining access to medical care.' See APT, Monitoring Places of Detention: A practical guide, p.192. See fn.5.

specifically mention that the members of the NPM should possess particular expertise,[107] it does provide for complementing the expertise of the members through the use of so-called '*escabinos*': individuals from civil society who are attached to the NPM to meet particular needs or to perform particular functions.[108] Arguably, the Paraguayan NPM could appoint '*escabinos*' with expertise in a particular field to support their visiting activities to less traditional places if they feel that their own knowledge and experience in the relevant field is insufficient.

Other countries have adopted a more pragmatic approach: designating existing specialised institutions, which in most cases already carry out inspections, as part of the NPM in order to ensure that bodies with relevant experience and knowledge will be in a position to carry out visits (in the context of the OPCAT) to places of detention that fall within their field of competence. This is the path adopted by New Zealand and the United Kingdom, which have designated several specialist institutions as part of their respective NPMs. Thus, in the case of New Zealand, the office of the Children's Commissioner, which dealt with the inspection of child and youth residences prior to its designation as part of the multi-institution NPM in that country, is composed of a multidisciplinary staff that includes social workers with experience in dealing with children's issues.[109] Another example is the Mental Welfare Commission for Scotland, one of the eighteen bodies designated as the NPM in the United Kingdom.[110] The Mental Welfare Commission for Scotland is mandated by the Mental Health (Care & Treatment) (Scotland) Act 2003, and the welfare parts of the Adults with Incapacity Act 2000, to carry out announced or unannounced visits to places in which persons with mental illness or learning disabilities have been detained under the Mental Health Act or placed under a compulsory treatment order. According to the website of the Commission, there are three teams in charge of carrying out visits throughout Scotland.[111] Each team is composed of health and social care professionals, administrative support workers and Commissioners, including health and nursing experts, occupational therapists, clinical psychologists, and social workers.[112]

[107] Article 14 of the draft law states that the members of the NPM have to be experts in the fields necessary to the fulfilment of all the States' obligations, with respect to its NPM, under the OPCAT; these experts must be renowned for their work in the protection of human rights. See the Paraguayan draft law on the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Available at http://www.apt.ch/npm/americas/Paraguay1.pdf.

[108] Paraguayan draft law, Articles 23 and 24. See fn.107.

[109] For example, the current Children's Commissioner, John Angus, is a former social worker with experience in policy work on child support, the care and protection of children, and support for vulnerable families. See website of the Children's Commissioner at http://www.occ.org.nz/aboutus/about_the_commissioner. Last accessed 25 September 2009.

[110] See fn.34. See also the list of bodies to be designated as part of the NPM, prepared by the British Ministry of Justice, 31 March 2009. Available at http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90331-wms0002.htm. Last accessed 25 September 2009.

[111] See Mental Welfare Commission for Scotland, About Us at http://www.mwcscot.org.uk/about_us/about_us.asp. Last accessed 25 September 2009.

[112] See Mental Welfare Commission for Scotland, About Us, Our Commissioners at http://www.mwcscot.org.uk/about_us/our_commissioners.asp. Last accessed 25 September 2009.

4.3 Challenges pertaining to ensuring access, regular visits, and relevance of standards and recommendations

Other challenges, which apply equally to visits to traditional and less traditional places of detention, but which may have a larger impact on the latter, are (i) the necessity of ensuring (unrestricted) access to these places on a regular basis in all the territory/territories and jurisdiction(s) of the State, and (ii) guaranteeing that the recommendations issued by the visiting OPCAT body are relevant to the nature of the place or institution visited and are sufficiently detailed.[113]

With regard to the first aspect (i.e. ensuring physical access to less traditional places of detention), the following issues should be considered. Although the OPCAT's understanding of what comprises a place of detention is broad enough that less traditional places are also covered by the Protocol, it should not be taken for granted that that States will deem this to be obvious. States' attention will mainly be drawn to ensuring that NPMs visit traditional places of detention, as these are usually the principal focus of attention when dealing with issues of torture and cruel or inhuman treatment. This appears to be the case in Costa Rica, where the Ombudsman (Defensoría de los Habitantes) was designated as the NPM. The existing Ombudsman legislation allows the Office of the Ombudsman to carry out (unannounced) inspections to public institutions.[114] The presidential decree that designated the Ombudsman as the NPM explicitly notes that the NPM is entitled to visit centres of detention under the supervision of the Ministry of Justice, and the Ministry of Public Security, Governance, and Police.[115] The Ombudsman himself has observed, in the general annual report for the period 2007 to 2008, that the apparently limited list of places that his Office is entitled to visit in implementing the OPCAT, amounts to non-observance of Costa Rica's legal obligations under the Protocol.[116] In his most recent report as Costa Rican NPM, the Ombudsman noted that, in the exercise of his NPM mandate, he is obliged to interpret the national legislation in the light of the legal obligations that the Protocol imposes on Costa Rica, thus concluding that the body is entitled to visit all places of detention and not just those singled out by the presidential decree.[117]

In order to ensure that all places of detention, including less traditional ones, are covered by the NPM, the legislation designating or establishing an NPM should reflect the broad scope of Article 4, exploring what is understood, in practice, by the concept of places of detention and deprivation of liberty. Some countries have opted to adopt an open approach, similar to that of

[113] It is worth noting, in this regard, that the coming into force of the Convention of the Rights of Persons with Disabilities will require that the recommendations of OPCAT visiting bodies take into consideration the substantive obligations of States under the Disabilities Convention with respect to the treatment of disabled people in detention, in particular, those detained in less traditional places of detention, such as mental health institutions.

[114] See Article 12(2) of the Costa Rican Ombudsman Law (Ley de la Defensoría de los Habitantes, No 7429). Available at http://www.apt.ch/npm/americas/CostaRica2.pdf. Last accessed 15 September 2009.

[115] See Article 3 of the Presidential Decree No 33568-RE-MSP-G-J of 13 December 2006, jointly issued by the President of Costa Rica, the Minister of Foreign Affairs, the Minister of Justice, and the Minister of Public Security, Governance, and Police, available at http://www.apt.ch/npm/americas/CostaRica1.pdf. Last accessed 15 September 2009.

[116] See Defensoría de los Habitantes, Informe Anual de Labores 2007-2008, p.417. Available at http://www.apt.ch/npm/americas/CostaRica3.pdf. Last accessed 15 September 2009.

[117] See Defensoría de los Habitantes, Report of the NPM to the Subcommittee on the Prevention of Torture (Informe del MNP al Sub-Comité de Prevención de la Tortura), 4 November 2008, pp.2-3. Available at http://www.dhr.go.cr/mnp/informe2008.pdf. Last accessed 15 September 2009.

Article 4. For example, the legislation establishing the NPM of Honduras, the National Committee for the Prevention of Torture (Comité Nacional de Prevención Contra la Tortura), contains a provision that resembles Article 4 of the OPCAT.[118] Similarly, the French legislation establishing the Inspector General for Places of Detention states that visits may take place to any place within French territory where persons are deprived of their liberty by virtue of a decision of a public authority,[119] although it hurries to clarify that any health establishment entitled to receive patients who are hospitalised without their consent, as provided for in public health legislation, will also be visited.

Another option is to list, in the NPM legislation, the places of deprivation of liberty that are subject to the NPM's mandate. The draft NPM law of Paraguay has adopted such an approach.[120] The New Zealand Crimes of Torture Act 1989, as amended by the Crimes of Torture Amendment Act of 2006, also includes a list of places of detention. Thus, under this Act, a place of detention

> means any place in New Zealand where persons are or may be deprived of liberty, including, for example, detention or custody in
> (a) a prison:
> (b) a police cell:
> (c) a court cell:
> (d) a hospital:
> (e) a secure facility as defined in section 9(2) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:
> (f) a residence established under section 364 of the Children, Young Persons, and Their Families Act 1989:
> (g) premises approved under the Immigration Act 1987:
> (h) a service penal establishment as defined in section 2 of the Armed Forces Discipline Act 1971[.][121]

Making a list of the places of detention to be visited, however, may prove limiting and make it difficult to assess whether certain institutions, which may deprive persons of their liberty, will be subjected to visits if not listed, in spite of the fact that Article 4 of the OPCAT is deliberately

[118] See Article 6 of the Law on the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment (Ley del Mecanismo Nacional de Prevención Contra la Tortura y Otros Tratos Crueles, Inhumanos o Degradantes), adopted by the Parliament of Honduras on 31 October 2008. Available at http://www.apt.ch/npm/americas/Honduras4.pdf. Last accessed 15 September 2009.

[119] See Article 8 of the Loi no 2007-1545 du 30 octobre 2007 instituant un Controleur général des lieux de privation de liberte, unofficial translation. Available at http://www.apt.ch/npm/eca/France5.pdf. Last accessed 15 September 2009.

[120] See Article 4 of the Draft Law on the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Available at http://www.apt.ch/npm/americas/Paraguay1.pdf. Last accessed 15 September 2009. The places to be visited that are specifically identified in this list are (whether public or private) (i) prisons and similar establishments, (ii) educational centres for adolescents who have breached the law, (iii) police, military, or educational establishments that fulfil a similar function, (iv) establishments for the internment of persons with physical or mental disabilities or with addictions, (v) care homes for children and adolescents, adults, and elderly people, (vi) mobile detention units, (vii) transit places for migrants, and (viii) other closed institutions.

[121] Section 16, Crimes of Torture Act 1989, Public Act 1989 No 106, as amended by the Crimes of Torture Amendment Act 2006, Public Act 2006 No 68. Available at http://www.legislation.govt.nz/. Last accessed 25 September 2009.

open in this respect. This could be avoided by making clear in the legislation that the list is for illustrative purposes only and is not meant to be exhaustive. The New Zealand legislation has done so by including the words 'for example' in its text.

In addition to ensuring physical access to less traditional places of detention, another challenge facing NPMs, and for that matter the SPT as well, relates to the frequency of visits to these places of detention. For preventive visits to be effective, they need to be regular.[122] Related to this is the issue of the actual physical reach of the places of deprivation of liberty. Ideally, the visiting bodies should be able to inspect all the relevant places, institutions and facilities within the State's territory or under its jurisdiction. This may not be an issue in the Maldives, given its small size and small number of places of deprivation of liberty. However, it is conceivable that in a large, federal country, such as Brazil, which has 868 prisons, thousands of police cells, as well as over 50 thousand psychiatric patients in both public and private mental health institutions throughout its territory,[123] the proposed NPM (a Mobile Unit of Prevention of Torture consisting of 20 members) will pay more attention to traditional places of detention and visit them more frequently. The actual physical/ geographical reach and access of the visiting mechanism may also be determined by other factors, such as a country's legal structure. Thus, in Mexico, a federal country, the National Human Rights Commission, in its capacity as NPM, can only visit places of detention that are under the jurisdiction of the Federal Government.[124] In order to extend the coverage of its visits to other States in Mexico, the National Human Rights Commission has signed collaboration deals with the human rights commissions belonging to seven of the 31 Mexican States.[125] Clearly, full geographical coverage of all the places of detention in Mexico, traditional and less traditional alike, has not yet been achieved.

Arguably, the standards to be applied, and the recommendations resulting from an OPCAT body visit to a less traditional place of detention, also need to be relevant to the place at issue. With regard to standards, both the SPT and NPMs should attempt to employ the standards that apply to the less traditional place of detention to be visited. It is worth noting that, in the published report of the mission to the Maldives, the SPT makes several references to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard minimum rules for the treatment of prisoners,[126] apparently using them as sources of international standards pertaining to conditions of detention.[127] However, these references are only made with regard to the SPT's inspection of police cells and prisons. The section dealing with the three less traditional places it visited (an educational training centre for children, a care home, a children's home, and a detoxification centre) does not mention any other international body of principles containing standards that could be applicable to those places. This may be

[122] See APT, *Monitoring Places of Detention*, p.70. See fn.5.

[123] See APT, National Preventive Mechanisms – Country by Country Status. See fn.34. See also 'Brazil and the Optional Protocol to the UN Convention Against Torture', paper presented by Fernando Salla, researcher at the University of São Paulo, during seminar 'O Protocolo Facultativo à Convencão das Nacões Unidas contra a Tortura: Implementacão em Estados federados ou descentralizados (The Optional Protocol to the UN Convention Against Torture: Implementation in federal or decentralized States)', São Paulo, Brazil, 22-24 June 2005. Available at http://www.apt.ch/npm/americas/Brasil1.pdf. Last accessed 15 September 2009.

[124] See APT, National Preventive Mechanisms – Country by Country Status. See fn.34.

[125] See Informe de Actividades del Mecanismo Nacional de Prevención de la Tortura de México, Comisión Nacional de los Derechos Humanos, p.5. See fn.78.

[126] Standard minimum rules for the treatment of prisoners, ECOSOC resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[127] See SPT, Report on the Visit of the SPT to the Maldives, pp.22, 25, 28, 33, 34, 38, 44, 50. See fn.72.

explained by the relatively positive remarks of the SPT with regard to those places visited, although it would, arguably, have been much more elegant of the SPT to make a reference to, for example, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, since they clearly apply to these less traditional places of detention as well. The Mexican NPM's report concerning its visits to various hospitals and mental health institutions in March and April 2008, on the other hand, makes a reference to two national documents containing particular standards to be applied during inspections to these types of institutions.[128] In spite of the presence of such standards, however, this report does not mention whether the NPM carried out interviews with patients at the visited institutions. This apparent oversight may cast some doubt on whether the recommendations issued in the report, with regard to the conditions of detention in the visited hospitals, are sufficiently relevant and whether they have taken into account all the particularities of such places. In its first annual report of activities under the OPCAT, the New Zealand Human Rights Commission has chosen to include a basic monitoring standard framework, consisting of a list of relevant international standards that are referred to during visits, although the report hastens to add that the detailed standards and measures used by the New Zealand NPMs are individually tailored to suit each type of detention facility visited under the OPCAT mandate.[129]

4.4 Challenges relating to financing of and coordination between visiting bodies

As mentioned above, the first two Annual Reports of the SPT discuss the financial challenges and limitations that have impacted on the way the Subcommittee carries out its mandate with regard to visits and engagement with NPMs.[130] No doubt these limitations will affect the likelihood of the SPT being able to visit less traditional places of detention, since the allocation of financial resources often entails a focus on the places where there is a pressing or important need for a visit: usually, this means that prisons and police cells receive visiting priority. With regard to NPMs, Article 18(3) of the OPCAT obliges States Parties to make available the necessary resources for the functioning of the NPM. The lack of sufficient resources to, for example, acquire a multidisciplinary staff with sufficient knowledge and experience in visiting less traditional places, like hospitals or care homes for the elderly, hampers the NPM's ability to conduct effective visits to such places. The Swedish NPMs have already complained about this problem.[131]

Coordination issues can arise in countries with multiple NPMs when no measures have been adopted to ensure that there is no overlap in the places to be visited by the NPMs. A lack of proper coordination can lead to the application of different standards by different bodies and,

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[128] See Informe 4/2008 del Mecanismo Nacional de Prevención de la Tortura sobre los Hospitales Psiquiátricos que dependen del Gobierno Federal, 28 June 2008, available at http://www.cndh.org.mx/progate/prevTortura/informe4-2008.pdf . Last visited on 25 Septemer 2009, pp. 2-3. The report mentions the Official Mexican Standard for the Protection of Health Services in the integrated medical and psychiatric units in hospitals (Norma Oficial Mexicana NOM-025-SSA2-1994 para la Protección de Servicios de Salud en Unidades de Atención Integral Hospitalaria Medico-Psiquiátrica), and a Guide for the Supervision of Psychiatric Hospitals drafted by the National Human Rights Commission that contains a number of analytical procedures to evaluate the conditions of hospitalisation in those institutions, with the aim of determining whether there are situations that may result in cases of torture or inhuman or degrading treatment.

[129] See First annual report of activities under the OPCAT, pp.26-32. See fn.81.

[130] See 'The OPCAT Visiting Bodies' section above.

[131] See SPT, Report on the Visit of the SPT to Sweden, para. 31 and 33. See fn.102.

thus, to inconsistent or contradictory recommendations.[132] This may not be a problem if each NPM is assigned its own particular 'turf'. However, the potential for jurisdictional overlaps should not be underestimated. In New Zealand, both the Ombudsmen and the Children's Commissioner have jurisdiction to inspect youth justice residences.[133] Although it is not stated that this common jurisdiction has led to coordination problems, the first annual report of the New Zealand Human Rights Commission observes that the Office of the Ombudsmen is reviewing how best to exercise its NPM role in respect of these facilities.[134]

5. Concluding remarks

The OPCAT has adopted a broad approach to ensuring that any place in which persons are deprived of their liberty are subject to visits by the SPT and NPMs. This broad approach, however, raises a number of issues and challenges that may have an impact on the way that the OPCAT bodies perform their mandate. Although these challenges affect the capabilities of these bodies to visit both traditional and less traditional places of detention, they often impact more significantly on visits to the latter. In particular, the OPCAT's requirement of multidisciplinarity and expertise (to allow proper visits to be made to places of deprivation of liberty) requires more than just the presence of legal experts in the visiting teams: this can be a major hurdle. Although it is not always necessary to have specialist knowledge and experience in order to detect cases of torture, it is, nonetheless, of great importance to ensure that the required expertise is present in the bodies or, at least, that they are in the position to hire outside experts for the occasion, so as to not run the risk of missing the more subtle signs that indicate that the situation prevailing in a specific institution may give rise to torture and other inhuman or degrading treatment or punishment. Equally, guaranteeing full coverage and access to places of deprivation of liberty is no trivial matter; it is of paramount importance that these difficulties do not lead to OPCAT bodies mainly visiting prisons and police cells because they are more easily accessed. Ensuring that OPCAT bodies have reasonable and sufficient budgets is another key issue. Finally, attention must be paid to the necessity to coordinate activities to ensure proper application of similar and relevant standards between visiting bodies; preparing relevant and workable recommendations to support coordination efforts is one of the major tasks ahead of the OPCAT bodies, the UN, and the States Parties to the OPCAT. More research to assess how problematic these issues are, in what contexts the difficulties they raise are most acute, and how these challenges might best be dealt with and surmounted is necessary.

[132] A discussion of the issues pertaining to cooperation and coordination of activities between the SPT and other international, regional and national visiting bodies can be found in a policy paper prepared by the OPCAT Research Team at Bristol University entitled 'The Relationship between the Optional Protocol to the UN Convention Against Torture (OPCAT) and other international and regional visiting mechanisms'. Available at http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/relationshipopcatandothervisitingmechanisms.pdf. Last accessed on 25 September 2009.

[133] First annual report of activities under the OPCAT, p.17. See fn.81.

[134] First annual report of activities under the OPCAT, p.17. See fn.81.