

OPCAT Challenges and the Way Forwards: The ratification and implementation of the Optional Protocol to the UN Convention against Torture

Audrey Olivier and Marina Narvaez*

Abstract

The novel approach to the prevention of torture, and other forms of ill-treatment, proposed by the Optional Protocol to the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT) presents specific challenges for states considering its ratification and implementation. Three years after its entry into force, the focus has shifted from ratification of this international instrument to implementation at the national level. Implementation requires that States Parties establish National Preventive Mechanisms (NPMs): independent bodies that carry out regular visits to places of detention. Using examples from different States Parties and Signatories to the OPCAT, this article discusses the challenges relating to ratification and implementation of the OPCAT, and suggests ways forward.

1. Introduction

Torture has been widely condemned by the international community as ‘one of the most atrocious violations against human rights dignity’.¹ However, despite public condemnation and its absolute prohibition under international law, torture and other cruel, inhuman and degrading treatment or punishment² persists around the world.

Inspired by the work of the International Committee of the Red Cross, in the 1970s the Swiss philanthropist Jean-Jacques Gautier sought to promote a system of regular and unannounced visits to all places of detention as an effective tool to prevent torture and other forms of ill-treatment.³ The rationale behind this system was based on the evidence that torture usually occurs behind closed doors and out of the public view: hence, there is a pressing need to promote transparency in all places of deprivation of liberty.

* OPCAT Coordinator and UN & Legal Programme Officer at the Association for the Prevention of Torture (APT).

¹ Vienna Declaration and Programme of Action, adopted by the United Nations General Assembly, UN Doc. A/CONF.157/23, 25 June 1993, para. 55.

² Unless otherwise specified, in this article ‘torture’ will be used to refer to torture and also cruel, inhuman or degrading treatment or punishment.

³ For more details, see *Jean-Jacques Gautier et la prévention de la torture: de l'idée à l'action: Recueil des textes* (APT and the European Institute of Geneva University: Geneva, 2003).

Thirty years later, Jean-Jacques Gautier's idea finally took shape at the universal level in the form of an Optional Protocol to the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT), which was adopted by the United Nations General Assembly on 18 December 2002⁴ and entered into force on 22 June 2006, after the 20th ratification.⁵

The OPCAT provides a practical means to assist States in meeting their obligations to prevent and combat torture, and other forms of ill-treatment, by establishing a global system of regular visits to all places where persons are, or may be, deprived of their liberty by the State.⁶ These visits are undertaken, with the aim of enhancing the protection of persons deprived of their liberty, by independent international and national bodies on the premise of constructive dialogue and cooperation with relevant State authorities.

To date, 50 States⁷ have become legally bound by this innovative international instrument and a number of other States are gradually moving towards ratification. Most current States Parties come from Eastern and Western Europe (28 States) and the Americas (12 States), while there are only three States Parties in the Asia-Pacific region (Cambodia, Maldives and New Zealand), six in Africa (Benin, Liberia, Mali, Mauritius, Nigeria and Senegal), and one in the Middle East and North Africa (Lebanon). One of the main challenges for the ratification campaign in the coming years is the promotion of an improved regional balance among States Parties and Signatories.⁸

As the momentum for ratification continues to build, different challenges arise. These challenges, which are primarily related to the implementation of the treaty, are derived from the novel preventive approach of the OPCAT and the obligations contained therein. Using practical examples from both States Parties and Signatories to the OPCAT, this article explores the main challenges in ratification and implementation of the OPCAT, and proposes ways forward.

2. A New Generation of International Human Rights Treaties

The OPCAT paves the way for a new generation of international human rights treaties as it differs from other international human rights treaties in several ways.

The OPCAT establishes, for the first time in international human rights law, a system of prevention of torture (and other forms of ill-treatment) based on complementary international and national preventive bodies. On the one hand, the OPCAT establishes an international preventive body within the United Nations called the Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT). It is currently composed of ten independent and multi-disciplinary experts; its membership will increase to 25 at the end of 2010 as there are now 50 States Parties to the OPCAT. On the other hand, the OPCAT also

⁴ UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002.

⁵ OPCAT, adopted by the UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002, entered into force 22 June 2006, Article 28(1).

⁶ OPCAT, Article. 1. See fn.5. For more details, see *The Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (APT and the Inter-American Institute for Human Rights: Geneva, 2004); and *The Guide on the Establishment and Designation of National Preventive Mechanisms* (APT: Geneva, 2006).

⁷ Information correct as of 28 November 2009.

⁸ For the sake of brevity, the general term 'ratification' will be used to refer to ratification, accession or succession.

requires States to ‘maintain, designate or establish one or several’ preventive bodies at the domestic level: namely, National Preventive Mechanisms (NPMs).⁹ A State Party to the OPCAT has the obligation to allow visits by the SPT and NPM ‘to any place under its jurisdiction or control where persons are or may be deprived of their liberty’.¹⁰

The OPCAT is primarily an action-oriented treaty. Very few treaty monitoring bodies, including the United Nations Committee against Torture, can undertake visits to States Parties as they can only do so in response to allegations of violations and with the prior consent of the State Party. In contrast, in-country visits are at the heart of the SPT’s mandate. Upon ratification or accession, States Parties agree to allow visits by the SPT.

Moreover, unlike existing international human rights treaties, such as the UN Convention against Torture, the OPCAT text does not provide for a system of periodic reports on the preventive measures undertaken by States Parties to implement the OPCAT. The OPCAT is conceptualised as a practical tool to assist States Parties to further comply with their obligation, contracted under the Article 2 of the UN Convention against Torture, to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.

The OPCAT is not a standard-setting instrument that establishes new rights for persons deprived of their liberty. Instead, it focuses on a set of obligations that States acquire upon the ratification of, or accession to, the treaty. The establishment of independent and effective NPMs is one of the most important obligations acquired by States Parties to the OPCAT. The SPT and NPMs share (i) a similar methodology; (ii) powers and guarantees to regularly monitor all places of detention, including access, at any time, to all places of deprivation of liberty; (iii) access to all persons deprived of their liberty; (iv) access to all necessary information relevant to their mandate; and (v) the right to have private interviews with persons, chosen by the SPT/NPM, who have been deprived of their liberty; and immunities and protection against reprisals.

In addition to the operational side of their preventive mandate, the OPCAT grants the SPT and NPMs an ‘orientation function’. The SPT and NPMs are expected to give advice and make recommendations on preventive measures and safeguards, as well as observations on both draft and current legislation, and also draft and current rules and regulations relevant to their preventive work. The orientation function of the SPT is, however, slightly different from that of NPMs; the SPT is also required to provide guidance on the interpretation of the OPCAT and to provide assistance to the NPMs.

Another innovative aspect of the OPCAT is that it establishes a novel, triangular relationship between States Parties, and international and national preventive bodies. This is a pioneering approach in an international human rights instrument because it recognises NPMs as actors in the implementation of the treaty.¹¹ In addition, the OPCAT establishes a direct relationship, characterised by constructive dialogue, between the national and international preventive bodies, whereby the State Party has an obligation to facilitate contact between the SPT and NPMs.¹²

⁹ OPCAT, Article 17. See fn.5.

¹⁰ OPCAT, Article. 4. See fn.5.

¹¹ The use of national independent bodies as part of the implementation of a human rights treaty has now been introduced in other instruments, such as the United Nations Convention on the Rights of Persons with Disabilities.

¹² OPCAT, Article 20(f). See fn.5.

3. A Change of Mindset

The prevention of torture and other forms of ill-treatment requires the adoption of a new holistic and systemic approach to identify and analyse the factors that can increase or decrease the risks of torture in specific contexts and in the society as a whole.¹³ To date, few detention monitoring bodies at the international and national levels have adopted this approach in a systematic way. Therefore, the adoption of this approach is a challenge in itself. Indeed, the newness of this approach impacts on all stages of the process of designation of the NPM. In first place, the NPMs need to make a clear distinction between ‘preventive’ and ‘reactive’ monitoring. In the second place, preventive monitoring requires an analysis of each State Party’s entire system of detention to address the recommendations to the corresponding level and locus of responsibility.

3.1 *Preventive and reactive monitoring*

The preventive approach of the OPCAT is based on the premise of constructive dialogue and cooperation between the preventive bodies and the relevant State authorities, rather than the denunciation of post-facto individual cases of torture. Often, existing national human rights institutions have some experience in carrying out visits to places of detention to document and investigate individual complaints. However, these institutions do not usually have accumulated expertise on systematic preventive visits to all places of detention.¹⁴

3.2 *Analysing the deprivation of liberty system*

The core mandate of NPMs (and, to a lesser extent, the SPT) is to carry out frequent and regular preventive visits to all places where persons are, or may be, deprived of their liberty. On the basis of these visits, the preventive bodies are able to address potential risks of torture and to identify gaps in the protection of human rights of persons deprived of their liberty. Therefore, the OPCAT preventive bodies monitor places of detention, and propose solutions to prevent the re-occurrence of abuses. Thus, it has been recommended that the OPCAT bodies apply a framework of analysis that addresses the five different levels of the system of deprivation of liberty: namely, the

- legal framework relevant to the deprivation of liberty;
- public policies which may have an impact on the deprivation of liberty;
- relevant institutions and actors in the system;
- administration and management of places of deprivation of liberty; and
- functioning of specific detention centres.¹⁵

¹³ Association for the Prevention of Torture (APT), *The Five Levels of Analysis: a Framework for the Prevention of Torture and Other Ill-Treatment; the Example of the Police*, June 2009, on file with the authors.

¹⁴ APT, *National Human Rights Commission and Ombudsperson’s Office/ Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture*, January 2008. Available at http://www.apr.ch/component?option=com_docman/task,doc.../gid.../lang,en/. Last accessed 2 December 2009.

¹⁵ APT, *The Five Levels of Analysis*. See fn.13.

3.3 *Addressing recommendations to the relevant level of responsibilities*

The visits to all places of detention carried out by both the SPT and the NPM usually address the last level of analysis: that is, the functioning of the place of detention. At that level, risks of torture may be identified, but solutions may remain at the policy or legal framework level. To improve the prevention of torture at the national level, the recommendations of the OPCAT bodies should identify, for each preventive measure, the corresponding levels of responsibility.

This new approach to the prevention of torture implies an important change of mindset, not only for monitoring bodies, but also for States considering ratifying and implementing the OPCAT. While considering the ratification of the OPCAT, States should not only be committed to working effectively to prevent torture, but to implementing legal, as well as policy and institutional, reforms, with a view to improving the protection of persons deprived of their liberty.

4. Bringing Together All Relevant Actors in Relation to OPCAT Ratification and Implementation

The preventive approach proposed by the OPCAT requires bringing together all actors working on issues related to torture prevention in order to discuss the implications of ratification and implementation. In many countries, a participative and inclusive consultation on the OPCAT at the national level has proven to be very useful in ensuring broad support for the ratification among all interested actors. In January 2006, following a roundtable on the OPCAT, a national coalition for the ratification and implementation of the OPCAT was set up in Senegal. The efforts of the national coalition and its international counterparts resulted in the ratification of the OPCAT on 18 October 2006. In addition, the national coalition continued the dialogue with the relevant authorities and promoted the designation of an effective Senegalese NPM. In February 2009, legislation creating a National Observer for Places of Deprivation of Liberty as Senegal's NPM was passed at the Parliament.¹⁶

National discussions should not focus only on ratification, but should also encompass the organisational form of the NPM and its establishment. However, bringing together a wide range of stakeholders to discuss the OPCAT may represent a challenge in cases when these actors are not used to working together on human rights issues. For instance, the national seminar on the OPCAT held in Paraguay in November 2006 represented an opportunity to gather representatives from the relevant Ministries (including Foreign Affairs and Justice), detaining authorities, parliamentarians, the Ombudsperson's Office, monitoring bodies and civil society organisations, for the first time, to discuss the implications of the OPCAT ratification.¹⁷

Furthermore, reaching consensus among all relevant stakeholders on the most appropriate NPM option may not always be straightforward. Following the national seminar on the designation of the most appropriate NPM option in Togo in June 2009, two options emerged from the discussions: designating the existing national human rights institution as the NPM; or creating a

¹⁶ APT, OPCAT Country Status: ratification and implementation. Available at <http://www.apr.ch>. Last accessed 26 October 2009.

¹⁷ APT, OPCAT Country Status. See fn.16.

new body to assume the NPM mandate. The Follow-up Committee established after the seminar will examine, among others, these possible NPM options for Togo.¹⁸

It is recommended that States Parties give due consideration to the designation and establishment of NPMs as soon as they begin to consider becoming party to the OPCAT. National consultations on the OPCAT should take place at the earliest stages of the ratification process. These consultations may be considered the first step of the constructive dialogue between State authorities and relevant actors. In this respect, the SPT recommends that

The national preventive mechanism should be established by a public, inclusive and transparent process, including civil society and other actors involved in the prevention of torture; where an existing body is considered for designation as the national preventive mechanism, the matter should be open for debate, involving civil society.¹⁹

Places of detention falling under the OPCAT are not limited to prisons and police stations, but encompass all places where persons are, or may be, deprived of their liberty. Therefore, discussions on OPCAT ratification, and NPM designation and establishment, should include all the actors who work on issues related to the human rights of persons deprived of their liberty and all those who are interested in the issue of torture prevention in general. Ideally, the following actors should be included in the consultations: relevant government officials (e.g. Ministries of Foreign Affairs, Justice, Interior, Defence and Health); parliamentarians; National Human Rights Institutions (NHRIs); organisations with experience in monitoring places of detention; relevant civil society organisations; professional associations; former law enforcement officials and former staff of places of detention; victims of torture and other forms of ill-treatment; and groups representing current and former detainees. The process of bringing these actors together raises awareness of a number of important issues, such as the preventive mandate of the OPCAT bodies, the powers and guarantees of the NPM, the overall scope of places of deprivation of liberty, and other matters of concern.

National seminars, workshops and conferences on the OPCAT have proven to be extremely useful for bringing together the above-mentioned actors to discuss the implications of OPCAT ratification and the most appropriate NPM for the national context. For instance, fora for discussions on the OPCAT took place in all five continents.²⁰ However, consultations need to be sustainable over time. They should be promoted by one or several national leading actors, such as specific ministries, NHRIs or civil society organisations that have the capacity to bring together all relevant stakeholders and to follow-up on the discussions. In some cases, these consultations have led to the creation of a specific OPCAT working group responsible for the drafting of NPM proposals. For instance, this has happened in Paraguay, where a multidisciplinary working group was established in November 2006, after the national consultation on the OPCAT. The working group drafted an NPM proposal to create a new National Commission of Prevention of Torture as the NPM. The proposal was presented to Congress in June 2007 and is still under consideration at the time of writing.

The process of involving a wide range of actors in the designation process of the NPM will not only enhance the legitimacy and credibility of the future NPM, but it will also represent a unique

¹⁸ APT, OPCAT Country Status. See fn.16.

¹⁹ SPT, First Annual Report, UN Doc. CAT/C/40/2, 14 May 2008, para. 28.

²⁰ APT, OPCAT Country Status. Last accessed 28 November 2009. See fn.16.

opportunity for them to contribute to the design and composition of the NPM. The contributions of these actors could take the form of the broad technical knowledge and expertise required by the OPCAT. Often, relevant experts who participate in national seminars on the OPCAT are selected as members of follow-up OPCAT committees. These experts therefore contribute to the in-depth discussions on the design of the NPM; this occurred, for instance, in Benin, Ghana, Paraguay, Togo and Uruguay.

5. Designating and Establishing Independent and Effective NPMs

According to Article 17 of the OPCAT, States Parties shall ‘maintain, designate or establish’ one or several independent NPMs no later than one year after the entry into force of the OPCAT (for the initial States Parties) or after the State’s ratification or accession (for subsequent States Parties).²¹

Notwithstanding the one-year deadline to designate an NPM, few of the initial States Parties had started the process of implementation at the time of the entry into force of the OPCAT. This may have happened for a number of reasons. First, States may have been willing to ratify the OPCAT rapidly in order to present a candidate to the first SPT. Second, States and other relevant actors may have assumed that the treaty would not enter into force so swiftly and, hence, that there would be plenty of time to give due consideration to the possible NPM options. Third, States and other relevant actors may have underestimated the length of the process of consultation required to set up an NPM compliant with the criteria foreseen by the OPCAT. Consequently, most of the first States Parties have taken longer than a year to designate and establish their NPM, while others are still in the process of doing so.

To date, out of the 50 States Parties to the OPCAT, only 29 have designated their NPM.²² Indeed, the national implementation of the OPCAT through the designation and establishment of an independent and effective NPM represents one of the main challenges faced by States Parties. One important consideration is the organisational form of the NPM. The OPCAT text prescribes specific requirements for NPMs relating to their independence, composition, powers and guarantees.²³ However, it does not prescribe any organisational form for national OPCAT bodies. It is, therefore, up to each State Party to decide on the most appropriate NPM according to its national context. This decision requires thorough analysis, preferably as soon as a State begins considering the ratification of the OPCAT.

A State Party may decide to designate and establish an NPM prior to, during, or after the ratification of the OPCAT, provided that it complies with the deadlines established by the international treaty.

Some States have decided to designate and establish their NPM before ratifying the OPCAT. For instance, France decided to conduct consultations on the OPCAT implementation before ratifying the OPCAT. Several institutions, including the *Médiateur de la République*, were

²¹ States may also postpone their obligations to designate an NPM for a period of three to five years under Article 24 of the OPCAT. The United Nations Committee against Torture may extend that period for an additional two years after due representations have been made by the State Party and after consultation with the SPT.

²² Information available at <http://www.apt.ch/content/view/138/152/lang,en/>. Last accessed 29 November 2009.

²³ OPCAT, Articles 18-23. See fn.5.

initially considered as potential NPMs. The government finally decided to establish by law²⁴ a new body to act as the French NPM: namely, the General Inspector for Places of Deprivation of Liberty. The mandate-holder was nominated in June 2008 and France ratified the OPCAT six months later, on 11 November 2008. Therefore, at the time of ratification, the General Inspector was already operational and had started visiting places of detention.

In other cases, States have enacted a comprehensive OPCAT law, encompassing both ratification and implementation. For example, a law on the OPCAT was adopted by the Swiss Parliament on 20 March 2009²⁵ that encompasses both the ratification and the establishment of a new preventive body called the Commission for the Prevention of Torture. Switzerland has a rather strict policy on ratification of human rights treaties and generally opts for securing the implementation of its obligations under the new treaty before proceeding to ratification.²⁶

Some States have also considered the possibility of designating their NPM through a declaration, under Article 17 of the OPCAT, upon ratification. For instance, Slovenia, while acceding to the OPCAT on 23 January 2007, made the following declaration:

In accordance with Article 17 of the Protocol, the Republic of Slovenia declares herewith that the competencies and duties of the national preventive mechanism will be performed by the Human Rights Ombudsperson and in agreement with him/her also by non-governmental organisations registered in the Republic of Slovenia and by organisations, which acquired the status of humanitarian organisations in the Republic of Slovenia.²⁷

Finally, a few States have opted to postpone their national obligation to designate their NPMs for a period of three years. This decision is generally taken in response to a particularly complex national situation or a specific state structure, such as federalism or decentralisation. However, at the time of writing, only three States have made use of this provision so far: namely Germany, Montenegro and Romania.

It must be noted that federal and decentralised states face specific legal and political challenges to designate and establish an NPM in all places of detention (i.e. under any of the jurisdictions of the State Party). Addressing and overcoming these complex challenges requires careful consideration over time, particularly when the State Party considers designating several bodies at the federal and local levels to assume the NPM mandate. Therefore, consultations on the implications of OPCAT ratification at the federal and local level should take place to achieve consensus from all the constituent entities. Such consultations aim to avoid possible duplications and overlaps in the monitoring of places of detention, and to ensure that there are coherent standards and a shared understanding of the concept of prevention of torture.²⁸

²⁴ Law 2007-1545 of 30 October 2007, establishing the French General Inspector for Places of Deprivation of Liberty. Available at <http://www.apr.ch/npm/eca/France4.pdf>. Last accessed 30 July 2009.

²⁵ *Arrêté fédéral portant approbation et mise en œuvre du Protocole facultatif se rapportant à la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, 20 March 2009. Available at <http://www.admin.ch/ch/f/ff/2009/1821.pdf>. Last accessed 30 July 2009.

²⁶ Available at http://www.humanrights.ch/home/fr/Connaissances/Suisse/idart_844-content.html. Last accessed 26 October 2009.

²⁷ Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en. Last accessed 5 December 2009.

²⁸ Final Conclusions and Recommendations of the International Seminar, 'The Optional Protocol to the United Nations Convention: Challenges and Possible Solutions', organised by the APT, the Ministries of Justice and

Taking into consideration the challenges relating to its federal structure, Germany ratified the OPCAT with a declaration under Article 24 to postpone the designation of its NPM. It opted for establishing two new institutions as NPM: a federal NPM (the Federal Agency for the Prevention of Torture) and a regional NPM (the Joint Commission of the Länder). Despite the establishment of the federal NPM in May 2009, the establishment of the regional NPM depends on an agreement between the 16 Länder.²⁹ Similarly, Argentina and Brazil envisage designating several bodies at the federal and local levels as the NPM. Consultations are lasting several years in both countries and the NPM proposals are still under consideration.³⁰

On the other hand, a federal inter-departmental Working Group, led by the Federal Office of Justice, was established in Switzerland as an ad hoc mechanism for consultation and implementation of the OPCAT. One representative for the group of twenty-six constituent entities or Cantons was part of this process and regularly consulted with the individual Cantons. Almost all of the twenty-six Cantons agreed that Switzerland should ratify the OPCAT. At the outset, all but three Cantons preferred a single, federal NPM, rather than a multiplicity of cantonal authorities. Faced with the prospect of having to pay for cantonal NPMs themselves, the three Cantons ultimately decided that recognising federal jurisdiction would be preferable and consensus was achieved.³¹

6. Designating and Establishing the Most Appropriate NPM

As mentioned above, due consideration should be given to the designation and establishment of NPMs at the earliest stages of the ratification process. Several NPM options exist and each State has to balance the challenges and advantages of each option according to, *inter alia*, its national context, resources and existing monitoring bodies.

6.1 *Making an assessment of existing monitoring bodies*

Experience has demonstrated that starting the process of ratification with an assessment of existing monitoring bodies, in light of the OPCAT requirements, will later facilitate decision-making about the most appropriate NPM. As a minimum, the assessment should take into account the following elements of the existing monitoring bodies: resources (human, financial and logistical); relations with the authorities and other actors; scope of jurisdiction; independence (real and perceived); powers and immunities; and working methods (e.g. number, duration and frequency of visits).³²

Foreign Affairs of the Republic of Argentina and the Center for Justice and International Law, Buenos Aires, Argentina, 23-26 September 2008.

²⁹ APT, OPCAT Country Status. Last accessed 28 October 2009. See fn.16.

³⁰ APT, OPCAT Country Status. Last accessed 28 October 2009. See fn.16.

³¹ Report from the International Seminar ‘The Optional Protocol to the United Nations Convention: Challenges and Possible Solutions’, organised by the APT, the Ministries of Justice and Foreign Affairs of the Republic of Argentina and the Center for Justice and International Law, Buenos Aires, Argentina, 23-26 September 2008. On file with the authors.

³² See the *NPM Assessment Tool* developed by the APT, on file with the authors.

Such an assessment will shed light on whether there is a need to establish an entirely new institution, or whether it is necessary to make changes to existing institutions so that they can be appropriately designated. Whatever the organisational form of the NPM, no option is inherently superior to another, provided that the NPM complies with the requirements mentioned in the OPCAT and that it works effectively to prevent torture and other forms of ill-treatment.

6.2 *NHRIs as NPMs*

A number of States have chosen to designate their NHRI as the NPM. This option has several advantages: a number of NHRIs have accumulated experience in detention monitoring and have established a visible public profile.³³ Some States have decided that this option is less expensive and more politically expedient, and that it is a way to avoid the danger of duplicating institutions and mandates. The OPCAT text also encourages States to give due consideration to the United Nations Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (i.e. the ‘Paris Principles’) while designating their NPM.³⁴ However, this provision should not be interpreted as a reason to automatically grant the NPM mandate to a NHRI: rather, it should serve as guidance for the designation and establishment of NPMs.

Nevertheless, designating an NHRI as the NPM raises several challenges. Experience has proven that legal and institutional changes are always required to make an existing NHRI compliant with the OPCAT criteria. Many NHRIs possess a wide mandate, but many have limited human, financial and logistical resources. Therefore, the process of assuming the NPM mandate generally requires that the NHRI be given additional resources (including multidisciplinary staff) to be able to carry out regular and frequent monitoring visits to all places of detention. In general, NHRIs commonly react to complaints as opposed to pro-actively visiting places of detention. Upon assuming the NPM function, NHRIs should adopt a different approach to effectively prevent torture.

To face this particular challenge, a number of NHRIs designated as NPMs have decided to create a specific preventive unit to carry out the NPM work so as to avoid any confusion between the preventive and reactive mandates of the NHRIs.³⁵ For instance, in January 2009, the National Human Rights Commission (NHRC) of the Maldives, which was designated as the NPM, established a specific unit, comprising four staff members who are fully engaged in preventive monitoring. Many issues have arisen since the designation of the NHRC of the Maldives as the NPM, particularly with regard to the difference between the investigatory visits and preventive visits of the NHRC. Previous to becoming the NPM, the NHRC had carried out only investigatory visits to places of detention to document and investigate individual complaints from persons deprived of their liberty. The NPM staff had, therefore, to develop new working methods and detention monitoring methodology to carry out preventive visits. The information

³³ APT, National Human Rights Commission. See fn.14. For ease of reading, we will use the general term National Human Rights Institution (NHRI) to refer to both Ombudsperson’s Offices and Human Rights Commissions. See also Steinerte and Murray in this volume.

³⁴ OPCAT, Article 18(4). See fn.5.

³⁵ As of 21 July 2009, Albania, Armenia, Azerbaijan, Costa Rica, Czech Republic, Denmark, Estonia, the Former Yugoslav Republic of Macedonia, Maldives, Mali, Mauritius, Mexico, Moldova, Poland, Sweden and Uruguay had designated or established an NHRI as the NPM or part thereof. Information available at <http://www.ap.t.ch/content/view/138/152/lang,en/>. Last accessed 21 July 2009.

gathered by the complaints unit during their visits to places of detention may be of interest to the NPM unit and provide them with useful insights on the current situation in places of deprivation of liberty. In addition, the NPM unit may not be able to follow-up on individual cases it may identify. Fostering synergies between the NPM and complaints units was therefore necessary to avoid possible duplications or lacunas and ensure better protection of persons deprived of their liberty. Procedures of confidentiality and information sharing (e.g. to encourage follow-up to individual complaints) are being developed between the NPM and the complaints units in order to ensure a better distribution of tasks and responsibilities.

All of these challenges must be taken into account when establishing a new NHRI that will also assume the NPM mandate.

6.3 *Ombudsperson plus civil society as NPM*

Taking into consideration the possible lack of expertise or resources of existing NHRIs in some areas, especially those related to detention monitoring, some States may decide to formally involve civil society organisations in some of the NPM tasks. This option is better known as an ‘Ombudsperson plus civil society’ NPM and has the main advantage that it makes use of all available resources and expertise at the domestic level.³⁶ However, a clear division and definition of roles and responsibilities is required between the ‘host institution’, namely the NHRI and the civil society organisations which contribute to the NPM work. Special procedures regarding confidentiality and information sharing should be also established, as discussed above. In addition, due consideration should be given to the risk of dilution of mandates for those civil society organisations participating in the NPM, and to the risk of loss of independence and credibility for both bodies. The process of selection of civil society organisations should be inclusive and transparent, and should be based on specific criteria for participation in order to address the issues described above. In addition, depending on the NPM tasks they will be given, guarantees of immunities and protection, as well as necessary powers, should be provided to civil society organisations so that they may carry out their work effectively.

As mentioned above, Slovenia decided to implement the ‘Ombudsperson plus civil society’ option and made its intention to do so clear on ratification. The main responsibility of the NPM lies with the Human Rights Ombudsperson of Slovenia, which carries out its tasks in cooperation with civil society organisations. The Human Rights Ombudsperson organised a public tender and invited organisations with experience in the field of human rights, particularly in torture prevention, to participate in the NPM. In the first year of activity, two organisations applied and were selected by the NHRI.³⁷ A one-year formal agreement was concluded thereafter with the NHRI and the invitation to participate in the NPM was repeated a year later, which enabled other organisations to apply and participate in the NPM work. From the three organisations selected in the second year of activity of the Human Rights Ombudsperson, two are new partners.

³⁶ APT, *Civil Society and NPMs under the OPCAT*, June 2008.

³⁷ The Peace Institute (*Mirovni inštitut*) and Legal Information Centre for NGOs (*Pravno-Informacijski Center Nevladnih Organizacij-Pic*) were selected as the NGOs participating in the NPM.

6.4 *A new body as NPM*

Some States have concluded that the best way to implement the OPCAT at the national level would be to designate a new body specialising in torture prevention, especially if no effective detention monitoring bodies already existed and if it felt that the work and recommendations of the new body would have more impact than an existing institution with a broader mandate. In addition, the legislation establishing a new body as the NPM can be written specifically to be compliant with the OPCAT requirements, whereas the legislation establishing existing bodies may have to be adapted. However, this option is not without challenges. The new body, especially at the beginning of its existence, may face difficulties in securing access to all places of detention; it may also struggle to be perceived as independent. Awareness-raising about its powers and guarantees will be crucial during the NPM's first few years of work. Hence, the selection of the first mandate-holders and staff will be key for the establishment of an independent and effective new NPM. The new body should be established with a long-term perspective and, therefore, should be granted sufficient and sustained human, logistical and financial resources. It should also establish and maintain constructive dialogue with the relevant authorities, existing institutions with a similar mandate, and civil society organisations.

Although few examples of functioning new NPMs exist, there are several NPM proposals currently under consideration that adopt this approach. An example of such a functioning NPM is France's General Inspector of Places of Deprivation of Liberty. The law establishing the French NPM was adopted in October 2007. It was only in June 2008 that the mandate-holder was appointed, after long internal discussions and debates at the governmental level to decide on the most appropriate first Inspector. Since his appointment, the mandate-holder has acted independently from the government and is said to be perceived to be doing so by civil society organisations. He produced a comprehensive annual report after his first six months in office and published recommendations illustrating the general situation in all places of deprivation of liberty in France.

6.5 *Several bodies as NPM*

Finally, States also have the possibility to draw on the experience and expertise of existing institutions and to designate several relevant institutions as the NPM, either on a thematic or geographically-defined basis.³⁸ This option is usually, although not exclusively, considered by States with a federal and decentralised structure. Bringing together existing institutions (including NHRIs) to assume the NPM mandate has the advantage of building on specific expertise accumulated over years and of guaranteeing a better thematic and regional coverage of all places of detention. However, this option generally requires some degree of coordination among existing institutions to avoid gaps and duplications, and to ensure sufficient coherence of standards and information.

For example, New Zealand designated a multiple NPM body coordinated by the Human Rights Commission and comprising the Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner, and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces. The organisations making up the NPM dedicated their first year of activity to assessing the scope of

³⁸ APT, *Establishment and Designation of National Preventative Mechanisms* (Geneva: PCL Lausanne, 2006), p.89.

their roles and developing a preventive monitoring programme, processes, and activities based on international human rights standards.³⁹ Similarly, the United Kingdom recently designated 18 bodies as part of the NPM; these are coordinated by Her Majesty's Chief Inspectorate of Prisons.

7. Promoting Synergies Between Anti-Torture Bodies

Some States may be reluctant to ratify and implement the OPCAT considering that international and regional torture-related bodies already exist. Some States may argue that the OPCAT bodies will duplicate the work of existing institutions, such as the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT). Although the designation and establishment of effective and independent NPMs may pose a significant challenge, these bodies provide an important added value, while, at the same time, working in cooperation with other torture-related bodies. Several arguments illustrate the importance of national preventive bodies. First, the presence of NPMs at the domestic level facilitates the regular monitoring of places of detention and allows for a better coverage of all these places.

Second, the NPMs have a permanent presence in the country and may have a better understanding of the national context (e.g. in relation to the language, institutional and legal framework) than an international or regional body. Additionally, their location and exclusive national focus enable permanent contacts with the detaining authorities and, thus, facilitate constructive dialogue and cooperation. Hence, the NPMs may be in a better position than international and regional bodies to propose targeted recommendations and observations to relevant authorities in order to improve the prevention of torture, and other forms of ill-treatment, at the national level.

In addition, the fact that existing bodies are already carrying out effective detention monitoring should not deter States from considering OPCAT ratification. As discussed previously above, existing monitoring bodies rarely meet all the criteria required by the OPCAT. In addition, if such bodies were designated as NPMs, they could benefit from the strengthening of their mandate. For instance, the Commission of Human Rights and Administrative Justice (CHRAJ) in Ghana currently carries out monitoring visits to places of detention with prior announcement. Therefore, if the Commission were to be designated as the NPM, the OPCAT would enable this institution to carry out regular and unannounced visits.

The designation and establishment of effective and independent NPMs requires a certain degree of coordination and cooperation with existing international, regional and national bodies working on issues related to torture prevention. The OPCAT text specifically addresses this issue.⁴⁰

At the European level, the CPT has expressed its interest in cooperating with the OPCAT bodies, engaging, for instance, with the NPMs on the occasion of an in-country visit.⁴¹ This contact has

³⁹ 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, Human Rights Commission, New Zealand, 2008. 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 3 August 2009.

⁴⁰ OPCAT, Article 11(c). See fn.5.

⁴¹ See Bristol OPCAT Project, 'OPCAT in the OSCE region: what it means and how to make it work?', Summary and recommendations from the Conference, 25-26 November 2008, Prague, Czech Republic, p.4. Available at

already been made in some of the countries visited by the CPT, such as Albania.⁴² The CPT and SPT have understood the need to foster synergies and to include NPMs in their fields of activity. A first regional conference gathering CPT and SPT members, the United Nations Special Rapporteur on Torture, all the designated NPMs from the Council of Europe's region and other relevant stakeholders (relevant treaty bodies, representatives of States Parties and civil society organisations), took place in Strasbourg in November 2009. This conference represented an ideal opportunity to explore opportunities for collaboration between the preventive bodies; this helped to identify ways forward, particularly regarding the coherence of standards, the sharing of information and the implementation of the recommendations of the various preventive bodies. This experience could be repeated in other regions to encourage a regional debate on ways to improve synergies between preventive bodies.

The spirit of the OPCAT also implies specific cooperation between the NPM and national torture-related bodies. The designation and establishment of the NPM in a specific country should never be used as an opportunity to close places of detention to other external scrutiny. NPMs should engage and maintain dialogue with relevant bodies working on torture prevention in order to complement their preventive mandate. In this connection, the SPT recognises that the

oversight of all places of deprivation of liberty exercised by independent bodies, judicial and prosecutorial oversight of custody, the possibility to lodge a complaint to an independent body charged with examining allegations of ill-treatment, coupled with access to a lawyer *de jure* and *de facto* are key safeguards against torture and ill-treatment.⁴³

8. Conclusion

The ratification of the OPCAT implies, *inter alia*, (i) a strong political commitment to, and interest in, preventing torture and other forms of ill-treatment, (ii) a change of mindset towards the prevention of torture, (iii) a willingness to establish and maintain a cooperative dialogue between the detaining authorities and the OPCAT bodies, (iv) and a commitment to ensuring the transparency of all its places of detention on the part of individual States Parties.

The designation and establishment of effective and independent NPMs is one of the main challenges for States Parties and Signatories to the OPCAT. A number of States have found practical solutions and taken important steps towards implementing the OPCAT. Hence, States that consider becoming party to the OPCAT might wish to examine other national experiences and the respective lessons learned, particularly in the different phases that lead to the designation and establishment of NPMs. These international experiences, tailored to the national context, may prove helpful in adopting a system for the prevention of torture.

<http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf>. Last accessed 30 July 2009.

⁴² CPT, Report to the Albanian Government on the Visit to Albania Carried Out by the European Committee for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment (CPT), from 16 to 20 June 2008, CPT Doc. CPT/Inf (2009) 6. Available at <http://www.cpt.coe.int/documents/alb/2009-06-inf-eng.htm>. Last accessed 30 July 2009.

⁴³ SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, 26 February 2009, UN Doc. CAT/OP/MDV/1, para. 63.

The upcoming SPT elections, which are due to take place by the end of 2010, will represent a unique opportunity to improve the regional balance, gender representation and multidisciplinary composition of this international body. The SPT would then be in a better position to assist States in the designation and establishment of independent NPMs, in accordance with its orientation mandate, and to assist the NPMs themselves in the implementation of their preventive mandate.⁴⁴ Moreover, whatever the NPM structure, the development of NPMs should be viewed as an on-going obligation for States Parties: their methodology and working methods should be reinforced and improved incrementally.⁴⁵ Hence, the NPM should always be subject to a process of continuous strengthening and its recommendations duly implemented by the State Party to advance efforts to prevent torture, and other forms of ill-treatment, at the national level, as provided for in the OPCAT.

⁴⁴ OPCAT, Article 11. See fn.5.

⁴⁵ SPT, First Annual Report, UN Doc. CAT/C/40/2, 14 May 2008, para. 28.