

Same but Different?

National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention against Torture

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Abstract

This article explores whether the designation of an ombudsman as a national preventative mechanism (NPM) under the Optional Protocol to the UN Convention Against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT) poses different challenges to designation of an human rights commission (HRC) as an NPM.

Traditionally, ombudsman institutions are entities concerned with oversight over the proper administration of justice and not human rights specifically, taking a rather legalistic approach. Thus, if designated as NPMs, ombudsman institutions may need to think carefully about the shift required in terms of their approach so as to embrace the preventive mandate that the OPCAT requires. HRCs are traditionally more concerned with the broader aspects of protection and promotion of human rights and, thus, may find it easier to grasp the pro-active nature of the NPM mandate. On the other hand, an ombudsperson in one state is very different from an ombudsperson in another, and the same is true of HRCs; in some countries, HRCs discharge quasi-judicial functions that position their mandates close to those traditionally carried out by ombudsman institutions in other countries. Therefore, it is often difficult to make effective comparisons and generalisations are also problematic. As a result, it would be wrong to conclude that an ombudsperson is better suited to be an NPM than a HRC (or vice versa) *per se*; it depends on the specific context. In a particular state, often there is only one institution that possesses the expertise required of an NPM; more importantly, often only one institution is regarded as having the requisite level of legitimacy by the relevant stakeholders. What is important, therefore, is an awareness that different bodies, in different contexts and jurisdictions, raise different issues and challenges with respect to their ability to function as an effective NPM.

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1. Introduction

In recent years, the international law arena has witnessed growing recognition of the role that national human rights institutions (NHRIs) play in the process of domestic implementation of international law. This is evidenced by the role accorded to these entities in the Human Rights Council and the Universal Period Review,¹ as well as in the work of some of the United Nations (UN) treaty bodies² and even in the structure of the UN itself.³ Recently, NHRIs have been acquiring higher status through the Optional Protocol to the UN Convention Against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT).⁴ Article 3 requires States Parties to ‘set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment’: these are referred to in the instrument as national preventive mechanisms (NPMs). Similarly, the ‘newest’ UN treaty, the Convention on the Rights of People with Disabilities (Disabilities Convention)⁵ requires States Parties to designate ‘one or more focal points within governments’, and to ‘maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms’⁶ to promote, protect and monitor the implementation of the Convention. Both the OPCAT and the Disabilities Convention require States Parties to take account of ‘the principles relating to the status and functioning of national institutions for protection and promotion of human rights’,⁷ namely the Paris Principles⁸ and, thus, imply a role for NHRIs in the implementation of the instrument.

There is no single, commonly accepted definition of an NHRI.⁹ However, the UN has attempted to provide one: ‘the term “national institution” is taken to refer to a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights’.¹⁰ Moreover, the term NHRIs is generally applied to two rather different kinds of institutions:¹¹ human rights commissions

¹ United Nations General Assembly Resolution 60/251, 3 April 2006, Articles 5(h) and 11; Human Rights Council Resolution 5/1, 18 June 2007, Annex, Article 3(m) and 15(c).

² For example: Committee on the Rights of the Child, ‘The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child’ CRC/GC/2002/2, 15 November 2002; Committee on the Economic, Social and Cultural Rights, ‘The role of national human rights institutions in the protection of economic, social and cultural rights’, E/C.12/1998/25, 14 December 1998; Committee on the Elimination of Racial Discrimination, ‘General Recommendation No17: Establishment of national institutions to facilitate implementation of the Convention’, UN Doc. A/48/18, 25 March 1993.

³ Via the establishment of the NHRIs Unit within the UN, and via the International Coordinating Committee which is charged with, *inter alia*, accreditation of NHRIs around the world. See <http://www.nhri.net/>.

⁴ OPCAT, adopted by the UN General Assembly, Resolution 57/199, UN Doc. A/RES/57/199, 18 December 2002, entered into force 22 June 2006.

⁵ Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106, adopted 13 December 2006, entered into force 3 May 2008, UN Doc. A/RES/61/106.

⁶ Disabilities Convention, Article 33. See fn.5.

⁷ OPCAT, Article 18(4), see fn.4; Disabilities Convention, Article 33 (2). See fn.5.

⁸ ‘Paris Principles relating to the status and functioning of National Institutions for Protection and Promotion of Human Rights’, UN General Assembly, Resolution 134, UN Doc. A/RES/48/134, 20 December 1993.

⁹ Rachel Murray, ‘National Human Rights Institutions: Criteria and factors for assessing their effectiveness’, (2007) *Netherlands Quarterly of Human Rights* 25(2), p.189.

¹⁰ United Nations, *National Human Rights Institutions. A handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights*, Professional Training Series No 4, 1995, para. 39.

¹¹ Gauthier de Beco, ‘National Human Rights Institutions in Europe’, (2007) *Human Rights Law Review* 7(2), p.332.

(HRC) and ombudsman institutions.¹² The term ‘ombudsman’ derives from a Swedish term which connotes a ‘trusted person’ whose role is ‘to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration in order to improve public administration and make the government's actions more open and the government and its servants more accountable to members of the public’.¹³ The term national human rights commission, on the other hand, is more commonly afforded to institutions created with the specific aim of promoting and protecting human rights.

While these are usually the HRCs that are understood by the term NHRIs,¹⁴ the practice in relation to the OPCAT shows, however, that it is not just HRCs that are being considered as NPMs, but also ombudspersons. Current consideration of the role of NPMs under the OPCAT tends to treat all NPMs as the same, presuming that HRCs and ombudspersons face the same challenges and issues.¹⁵ Only relatively recently has some distinction between these entities been sketched.¹⁶ This paper examines the similarities and differences that may be raised by designation of an HRC, as opposed to an ombudsperson, as the NPM. It questions whether they are, in fact, that different. However, in considering the parallels between the two types of institutions, the paper offers another perspective on their role as NPMs. It has been argued elsewhere that NPMs need to be considered on a case-by-case basis.¹⁷ This article unpacks the assumption that treats ombudspersons and HRCs as the same and deals with some of the key issues relating to their diverging mandates.

2. The Nature of OPCAT Obligations

The OPCAT moves away from traditional methods of monitoring state compliance with the obligations undertaken by becoming a party to an international human rights treaty. Such traditional methods of supervision as state reports,¹⁸ and a system of individual¹⁹ or inter-state²⁰ complaints, is absent in the framework set out by the OPCAT. The central obligation is two-fold: first, by becoming a party, the state automatically acknowledges the right of the Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT) to visit places of deprivation of liberty that are under the control and jurisdiction of the State

¹² This article will use the term NHRIs when referring to HRC and ombudsman institutions together.

¹³ International Ombudsman Institute: <http://www.law.ualberta.ca/centres/ioi/index.php>.

¹⁴ De Beco, ‘National Human Rights Institutions in Euro’, p.332. See fn.11.

¹⁵ For example, APT Position Paper, The Role of National Human Rights Institutions in the prevention of torture and cruel, inhuman and degrading treatment or punishment, February 2005.

¹⁶ For example, APT Position Paper, National Human Rights Commissions and Ombudspersons’ Offices / Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture, January 2008.

¹⁷ For example, 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(4), 485-516; Summary and Recommendations, *OPCAT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November 2008. Available at <http://www.bris.ac.uk/law/research/centres-themes/opcat/docs.html#OPCATOSCEseminar>.

¹⁸ For example, Disabilities Convention, Article 35. See fn.5.

¹⁹ For example, Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, UN Doc. A/6316 (1966).

²⁰ For example, the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, UN Doc. A/6316, Articles 41-43.

Party and, second, the state must designate an NPM, the mandate of which almost mirrors that of the SPT on a national level.²¹

The OPCAT does not prescribe the procedure by which the NPM should be designated; arguably, this can be achieved simply by States Parties providing a list of their NPMs to the UN when ratifying or acceding to the instrument.²² This appears to be the practice followed by at least some States Parties.²³ Other States Parties have notified the SPT of their NPM choice through correspondence with the treaty body.²⁴ Irrespective of method, it is clear that the NPMs are the central bodies of the system of prevention that the OPCAT puts in place,²⁵ especially given the fact that the SPT itself has expressed doubts as to whether it will be able to visit every State Party once every 4-5 years, which it considers necessary for effective prevention of ill-treatment.²⁶

Consequently, the way NPMs are established, their independence and credibility, the scope of their mandates and their ability to operate freely become central to the success of this international instrument. Despite this, the OPCAT contains few prescriptions as to how NPMs are to be constituted: Article 17 only obliges States Parties to ‘maintain, designate or establish’ an NPM. This rather flexible approach was adopted in order to accommodate the different situations in States Parties.²⁷ Thus, States Parties that already have established bodies that effectively carry out the work of an NPM need only to ‘maintain’ such bodies in order to comply with the OPCAT, whereas States Parties that do not have any entities of the kind must ‘establish’ one or more of them. States that have bodies with similar powers to those required of an NPM may only need to amend the mandates of these bodies to make them OPCAT-compliant. Alternatively, States Parties may choose to designate a number of bodies that would, together, make up an NPM.

The benefit of visiting places of deprivation of liberty in terms of reducing the number of instances of ill-treatment has been widely reported.²⁸ However, the OPCAT takes the visiting obligation a step further in that the instrument sets out more detailed criteria as to what type of visits are required: by instituting a system of regular, preventive visits.²⁹

²¹ OPCAT, Article 4. See fn.4.

²² Debra Long, ‘Commentary on the Optional Protocol to the UN Convention against Torture’ in *Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A manual for prevention* (Lyon: Inter-American Institute for Human Rights and Association for the Prevention of Torture, 2005), p.74.

²³ Declarations designating NPMs at the time of ratification have been made by Azerbaijan, Slovenia, and the Former Yugoslav Republic of Macedonia. Available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9-b.en.pdf>.

²⁴ For a list of such countries, see <http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm>.

²⁵ Elina Steinerte, ‘Institutions of Ombudspersons as National Preventive Mechanisms: Closing Remarks’, *OPCAT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November 2008.

²⁶ SPT, First Annual Report, UN Doc. CAT/C/40/2, 14 May 2008, para. 15-17.

²⁷ Malcolm 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(1), p.50.

²⁸ For example, Frank Ledwidge, ‘The Optional Protocol to the Convention against Torture: a major step forward in the global prevention of torture’, (2006) *Helsinki Monitor* 1, p.72; Matthew Pringle, ‘The Importance of the Ratification of the Optional Protocol to the United Nations Convention Against Torture for the Worldwide Prevention of Torture’ in Harald C. Scheu and Stanislava Hybnerova (ed.), *International and National Mechanisms against Torture* (Prague: University Karlova Law School Publication, 2004), p.11.

²⁹ OPCAT, Article 1.

3. NPM Requirements

Although not all States Parties to the OPCAT have designated their NPMs, of those that have it is evident that these NPMs are very diverse entities, ranging from creating new institutions³⁰ to selecting among existing bodies (e.g. designating a single ombudsmen office³¹ or a series of HRCs³²) or a combination of the two,³³ with or without civil society involvement³⁴). What is clear is that in most designated NPMs use is being made of an ombudsperson and/or a HRC.

The OPCAT does not provide much detail regarding the institutional characteristics that NPMs must have. Thus, Article 18 calls for functional independence and independence of personnel, for NPMs to have the necessary expertise and gender and minority representation, and for the provision of the necessary resources. Article 18 (4) refers to the Paris Principles, which States Parties must ‘give due consideration to’. However, aside from these scarce provisions, there are no further stipulations about the institutional aspects of the NPMs. The Paris Principles, when discussing the establishment of NHRIs, require that NHRIs be anchored in ‘constitutional or legislative text’³⁵ and that the process of establishment is to be transparent and inclusive of the relevant stake holders,³⁶ including civil society.

Articles 19-22 of the OPCAT set out the scope of the mandate of the NPMs, outlining the functional aspects of the NPMs’ work. The mandate of NPMs must extend, first, to all places of deprivation of liberty³⁷ and, second, ‘to all parts of federal States without any limitations or exceptions’.³⁸ This means that, in instances in which an existing institution is designated as an NPM, its jurisdiction (in terms of access to places of deprivation of liberty) must extend ‘to any place under its [the State’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 [the State’s] instigation or with its [State’s] consent or acquiescence’.³⁹ The OPCAT also contains a definition of ‘deprivation of liberty’: this encompasses ‘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

³⁰ For example, in France the institution of General Inspector of Places of Deprivation of Liberty (Contrôleur général des lieux de privation de liberté) has been created to serve as the country’s NPM, while in Senegal a new institution, the National Observer for Places of Deprivation of Liberty (Observateur National des Lieux de Privation de Liberté), has been set up as the NPM.

³¹ For example, in Armenia it is the Office of Public Defender of Armenia that has been designated as the NPM; in Estonia it is the Office of the Chancellor of Justice, while in Costa Rica the Ombudsman’s Office (La Defensoría de los Habitantes) has been chosen as the country’s NPM.

³² For example, in Mexico it is the Mexican National Human Rights Commission that has been designated as the only institution to carry out the mandate of the NPM, but in Mali the NPM functions are to be carried out by the National Human Rights Commission (Commission Nationale des Droits de l’homme).

³³ For example, in New Zealand five institutions have been designated to carry out the mandate of the NPM: the Human Rights Commission (as a central body), 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.

³⁴ For example, in Slovenia, on the other hand, it is the Ombudsman and, in agreement with him/her, the NGOs which are to carry out the tasks of the NPM.

³⁵ Paris Principles, section A, Principle 2. See fn.8.

³⁶ See Commonwealth Secretariat, *National Human Rights Institutions: Best practice* (London: Commonwealth Secretariat, 2001), p.15.

³⁷ OPCAT, Articles 4 and 19. See fn.4.

³⁸ OPCAT, Article 29. See fn.4.

³⁹ OPCAT, Article 4(1). See fn.4.

to leave at will by order of any judicial, administrative or other authority'.⁴⁰ This means that, should an existing body be charged with the NPM mandate, its powers to visit places of deprivation of liberty must reflect the wide definition provided for in the OPCAT.

4. Ombudspersons and NHRIs

Taking the elements of Article 18 in turn, there is no prescription in the OPCAT as to whether the NPM must be established by any specific type of legal act. The Paris Principles, however, call for a constitutional or legislative text:⁴¹ the SPT has shown a clear preference for this.⁴² In this context, it also means that the legal basis of an existing institution designated to carry out the mandate of the NPM will become the legal basis for the NPM.

In terms of NPM designation, practice so far shows that States Parties have either used the act of ratification for designation of their respective NPM⁴³ or simplistic changes in the existing legislation (i.e. instead of detailed amendments regarding the mandate of an existing institution being made, a mere statement that the institution would become an NPM was inserted into the legislative text).⁴⁴ In some cases, the NPM designation stems from a Presidential decree,⁴⁵ while, in other instances (especially when the creation of an institution coincides with OPCAT ratification), the legislation establishing the institution is drafted with the NPM mandate in mind and the formal designation follows.⁴⁶

There appear to be few differences in designation of ombudspersons as opposed to HRCs. The only differences observed so far relate to the Ombudsman offices. In Sweden, the Government designated two Ombudsmen institutions to carry out the functions of the NPM through the ratification bill that was presented to the Parliament. However, the office of the Parliamentary Ombudsman interpreted this designation as interference with its independence in that the assignment of NPM duties is akin to requiring an institution to follow Government instructions with regard to what the institution ought to be doing.⁴⁷ Consequently it has openly opposed the designation, stating that it does not consider itself to be an NPM.⁴⁸ Similarly, the Ombudsman of

⁴⁰ OPCAT, Article 4(2). See fn.4.

⁴¹ Paris Principles, A-2. See fn.8.

⁴² SPT, First Annual Report of the SPT, para. 28(i). See fn.26.

⁴³ For example, Slovenia, which announced its NPM designation at the time of depositing the instrument of ratification.

<http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9-b.en.pdf>

⁴⁴ In Estonia, for example, the decision to designate the Chancellor of Justice as the NPMN was written into the Ratification Act that was presented to the Parliament.

⁴⁵ This is the case in Mali, where, in March 2006, a Presidential Decree established a National Human Rights Commission: the Decree implies it would also be the NPM. APT, National Preventive Mechanisms: Country-by-country status under the Optional Protocol to the UN Convention Against Torture (OPCAT), 29 June 2009, p.18. Available at <http://www.apt.ch/content/view/44/84/lang,en/>.

⁴⁶ This was the case with the Scottish Human Rights Commission (see especially Article 9 of the Scottish Commission for Human Rights Act 2006; 2006 Act of Scottish Parliament 16), which was established on 1 January 2008. In March 2009, the entity was designated as a part of the UK NPM.

⁴⁷ Interview with Mr Kjell Swanström, head of staff, Riksdagens Ombudsmän (Parliamentary Ombudsman) on 6 November 2007, on file with authors.

⁴⁸ SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, UN Doc. CAT/OP/SWE/1, 10 September 2008, para. 31.

Costa Rica was designated as the NPM through a Presidential Decree; the Ombudsman Office issued a formal note accepting the designation in order to avoid this being viewed as interference with its independence. The institution deemed the act of the Government's designation as analogous to instructing it on what it ought to do and, by formally accepting the designation (i.e. demonstrating its ability to accept or reject the designation, as so make an independent choice), the Ombudsman felt that interference with its independence was avoided.⁴⁹

Thus, in these two countries, being designated as an NPM was viewed by the Ombudsman offices as (potentially) interfering with their independence. However, these two examples show that the choice of method of designation depends on the usual practice of the particular jurisdiction, rather than whether the institution that is being designated as the NPM is a HRC or an ombudsperson.

As to the manner in which the NPM is established or designated, again there is no major difference between the approaches of HRCs as opposed to ombudspersons. Studies have shown that the more transparent, inclusive and open the process of establishing these types of bodies, the more credibility and legitimacy the future institution will have.⁵⁰ However, the approach taken has varied from State to State, with some undertaking little consultation about the choice of the entity⁵¹ with both the proposed NPM and civil society.⁵² In other States, a transparent process has been achieved with little involvement from the State.⁵³

The provision of independence lies at the heart of the OPCAT and is the most important characteristic that an NPM must possess.⁵⁴ Yet, in relation to both aspects of independence required by OPCAT (namely, functional independence and independence of personnel), there is little difference in the challenges that are faced by HRCs as opposed to ombudspersons.

The composition of Ombudsperson offices differs from that of HRCs in that the former are usually headed by one person, such as the Parliamentary Commissioner for Civil and Military Administration in Denmark (Danish Ombudsman);⁵⁵ HRCs are more commonly composed of a

⁴⁹ APT, Country-By-Country Status Report, p.41. See fn.45.

⁵⁰ For example, Stephen Livingstone and Rachel Murray, *Evaluating the Effectiveness of NHRIs: The Northern Ireland Human Rights Commission with comparisons from South Africa* (Bristol: University of Bristol, 2005). This fact has been stressed also by the SPT: Second Annual Report, UN Doc. CAT/C/42/2, (2009), para. 38.

⁵¹ In Denmark, where the Danish Ombudsman has been designated the NPM, the government deemed it unnecessary to hold extensive consultations with civil society prior to its choice of NPM, as the government considered that the Ombudsman was already performing NPM tasks: Interview with Mr Jens Færkel, Minister Councillor, Danish Ministry of Foreign Affairs, Legal Service, Human Rights Unit, 6 November 2007 (on file with authors). Subsequently, the Ombudsman undertook extensive consultations with civil society and entered into agreement with them on the implementation of the OPCAT.

⁵² In Peru, the NGOs have been leading the discussion on the appropriate NPM, suggesting that the Ombudsman's office be designated as an NPM. The Ombudsman's office has been taking active part in such discussions and draft legislation has been submitted. APT, Country-By-Country Status Report, pp.55-56. See fn.45.

⁵³ In Georgia, for example, the process of NPM designation was driven by the civil society; the Office of Public Defender, which appears to be the most likely choice for the NPM, participated actively in the process. The Government, however, did not. Tsira Chanturia, 'The OPCAT in the OSCE Region: How to Make it Work', *OPCAT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November 2008.

⁵⁴ See OPCAT Article 1, 17 and 18.

⁵⁵ Ombudsman Act [Denmark], No 473 of 12 June 1996, Article 1. In some situations, the ombudsperson is supported by deputies, such as in the Ghana Commission on Human Rights and Administrative Justice, which is headed by one commissioner, who is supported by two deputy commissioners, see

team of members.⁵⁶ There is no clear pattern regarding appointments of ombudspersons compared to HRCs. Furthermore, turning to issue of the level of difficulty of the NPM mandate, there is a need for diversity of expertise within the NPM, given the variety of places of deprivation of liberty that the NPM must visit. This has given rise to particular concerns about Ombudsmen offices designated as NPMs: traditionally, since ombudsperson offices are charged with issues of oversight regarding the proper administration of justice, these offices are composed predominantly, if not exclusively, of lawyers. The NPM mandate requires diversity of expertise⁵⁷ that the Ombudsman offices designated as NPMs often do not have. This may lead them to seek expertise from outside the institution. Thus, the Danish Ombudsman is in the process of concluding Memorandums of Understanding with civil society groups to supplement its legal expertise with expertise from the medical field.⁵⁸ In the Czech Republic, where the Public Defender of Rights (the Czech Ombudsman) has been designated as an NPM, provisions have been made for the NPM to contract-in the expertise necessary (e.g. by employing doctors, psychiatrists, etc.)⁵⁹ as the Office is almost exclusively composed of lawyers.

The ability of an institution to function independently necessarily entails two essential components: adequate powers and adequate resources to fulfil its mandate. The General Recommendations adopted by the Sub-Committee on Accreditation of the International Coordinating Committee of National Human Rights Institutions (ICC) specify that the relationship between the government and its NHRIs must be clearly defined, especially concerning the NHRIs' budgets.⁶⁰ The OPCAT, in turn, requires States to guarantee the functional independence of an NPM and make available the necessary resources for the functioning of the NPM.⁶¹ The SPT has further specified that these resources are to be adequate and 'ring-fenced'.⁶² There are similar stipulations in the OPCAT and the Paris Principles.

Provision of funding by the legislature, rather than the executive, assures greater independence.⁶³ The Paris Principles, while not explicitly calling for funding to be provided by the legislature, require that funding provisions enable NPMs to be independent of their government.⁶⁴ This is reflected in the General Recommendation by the ICC. No generalisations can be made regarding the manner in which Ombudspersons versus HRCs receive their funding.

A significant practical problem, however, is the fact that many States Parties have viewed the designation of existing institutions as NPMs as the most effective 'cost-saving' option, arguing that, if existing institutions already carry out NPM functions, there is no requirement for

<http://www.chrajghana.org/index?articleId=1126206678265>. In Lithuania, there are five Ombudsmen in the institution, all elected by the Parliament, according to Republic of Lithuania Law on the Seimas Ombudsman, No VIII-950, 3 December 1998, Article 7.

⁵⁶ For example, Kenya National Commission on Human Rights Act, 2002; No 9 of 2002, Article 4.

⁵⁷ OPCAT, Article 18(2). See fn.4.

⁵⁸ Jens Færkel, 'The added value of joining OPCAT for ECPT Member States', *OPCAT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November 2008.

⁵⁹ Filip Glotzmann and Petra Zdrzilova, 'National Preventive Mechanism: Czech Republic', *OPCAT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November 2008.

⁶⁰ ICC Sub-Committee on Accreditation: General Observations, Section 2.10. Available at <http://www.nhri.net/default.asp?PID=253&DID=0>.

⁶¹ OPCAT, Article 18. See fn.4.

⁶² SPT, First Annual Report, para. 28(vii). See fn.26.

⁶³ Murray, 'National Human Rights Institutions', p.202. See fn.9.

⁶⁴ Paris Principles, B-2. See fn.8.

additional resources.⁶⁵ This approach is apparent in relation to both ombudspersons and HRCs, and poses significant problems for both.⁶⁶ The mandate of NPMs is very demanding in terms of resources as the mandates requires the NPM to set up a system of regular visits to a whole variety of places of deprivation of liberty. Equally, the powers of existing institutions may not be as extensive as required for the NPM. Moreover, a preventive approach to visiting is required; this, in turn, means that visits have to be more comprehensive than visits made in response to allegations of ill-treatment. Finally, NPMs are also required to engage in other preventive activities, like work at the policy level and help to develop legislation, as well as engaging in educational and awareness raising campaigns. All these activities are resource intensive and, thus, it is perhaps unsurprising that several NHRIs have argued that they should only be designated as NPMs if the necessary additional powers and resources are made available for carrying out the NPM mandate.⁶⁷ Indeed, some of the HRCs that have been considered for the role of the NPM have shown considerable reluctance to undertake the role if designation is not matched by extra resources.⁶⁸

As far as the institutional aspects of HRCs and ombudsman offices carrying out the NPM mandate are concerned, it is evident that there are no major differences between HRCs and ombudsman offices. The effectiveness of provisions in the constitutions of these bodies as well as the guarantees of independence (i.e. independence of personnel, representativeness, necessary expertise, and adequate funding) are important considerations that apply to both HRCs and ombudsman institutions.

However, as will become evident, while HRCs and ombudsman institutions may bear significant similarities from an institutional perspective with regard to the prescriptions of the OPCAT in relation to the NPM, the scope and specifics of the NPM mandate pose significant challenges.

5. Differences and Challenges

There has been a tendency to treat both ombudspersons and HRCs as one and the same when it comes to examining their suitability with regard to the NPM mandate. Yet, as the following points make clear, a more detailed comparison of these two types of institution raises a number of key issues that require more detailed discussion, especially when considering the specifics of the NPM operational mandate.

⁶⁵ Interview with Mr Jens Færkel, Minister Councillor, Danish Ministry of Foreign Affairs, Legal Service, Human Rights Unit, on 6 November 2007 (on file with authors). It should, however, be noted that, since the designation of the Danish Ombudsman as an NPM, requests for additional funding have been met by the Danish legislature.

⁶⁶ For example, in relation to the Costa Rican Ombudsman, see examination of the state report by the Committee Against Torture, including List of issues to be considered during the examination of the second periodic report of Costa Rica, UN Doc. CAT/C/CRI/Q/2, 26 February 2008, para. 28; Conclusions and recommendations of the Committee against Torture, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para 26. New Zealand Human Rights Commission, *Monitoring places of detention* (2009). See also *First annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT) - 1 July 2007 to 30 June 2008* (2008), p.24.

⁶⁷ Nairobi Declaration, *Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights*, Nairobi, Kenya, 21-24 October 2008, para. 39.

⁶⁸ Summary and Recommendations, *OPCAT in the African Region: Challenges of implementation*, Cape Town, South Africa, 3-4 April 2008, p.3. Available at <http://www.bris.ac.uk/law/research/centres-themes/opcat/docs.html/>

5.1 Composition

First, Article 18 (3) of the OPCAT requires that the composition of NPMs be representative in terms of gender, and the ethnic and minority groups in the country, as well as representative of the diverse expertise necessary for carrying out the NPM mandate. The Paris Principles also call for diversity in terms of NHRI composition, noting the need to involve NGO representatives as well as representatives of trade unions, relevant social and professional organisations (e.g. associations of lawyers and doctors, representatives of universities, parliamentarians and government department representatives [the latter should only be involved in an advisory capacity]).⁶⁹ As a collective, the members of an NHRI should be reflective of the gender balance, the ethnic diversity of the society, and the range of vulnerable groups in it.⁷⁰ Thus, there is considerable overlap between the requirements of the OPCAT and the Paris Principles in relation to the representativeness of the NPMs and NHRIs.

However, when considerations regarding representativeness are given priority over and above the other qualities of NHRI candidates, there is a risk of being tokenistic and appointing individuals who are not the best choice for the post.⁷¹ The same considerations should also apply in terms of the composition of NPMs: there is a need to strike a balance between the representativeness of its members and their professional abilities. Nevertheless, when examining ombudsman institutions in particular, the issue of representativeness gives rise to a particular concern: these institutions are traditionally led by one individual. The selection of the appropriate individual for such a post therefore becomes immensely difficult as there is a need to ensure that the selected person is perceived as being representative of a variety of different societal groups. In contrast, this may be easier to achieve with HRCs, where a number of different members represent the public face of the institution.

On the other hand, in the case of designated ombudsman institutions, existing Ombudsmen often have outstanding reputations across a broad range of stakeholders; when ombudsmen have acquired impeccable reputations, this enhances the legitimacy of new NPMs.⁷² This is often harder to achieve for HRCs as these are normally composed of a number of commissioners.

Given the OPCAT's focus on prevention, and the requirements (in Articles 19(b) and (c) in particular) to go beyond simply visiting places of detention, an NPM should have human rights expertise, rather than just visiting expertise. Here, again, HRCs are often in a better position as many HRCs were established with a specific mandate to promote and protect human rights; thus, they have an institutional ethos based on this fundamental premise.⁷³ In contrast, ombudsman offices are often more concerned with the proper administration of justice and, while that in itself

⁶⁹ Paris Principles, B-1. See fn.45.

⁷⁰ Commonwealth Secretariat, *National Human Rights Institutions: Best practice*, p.15. See fn.36.

⁷¹ Murray, 'National Human Rights Institutions', p.205. See fn.9.

⁷² Glotzmann and Zdrzilova, 'National Preventive Mechanism'. See fn.59.

⁷³ For example, in Denmark: Act governing the Establishment of the Danish Centre for International Studies and Human Rights, Act No 411, 06/06/2002; in Greece: Constitution of a National Commission for Human Rights and a National Bioethics Commission, Law No 2667 (as amended by Law 2790/2000, Law 3051/2002 and Law 3156/2003); and in the Republic of Ireland: Human Rights Commission Act 2000 (as amended by the Human Rights Commission [Amendment] Act 2001).

does not mean that they do not deal with cases that raise human rights issues,⁷⁴ as the Association for the Prevention of Torture (APT) notes

institutions whose mandate has traditionally focused mainly on the fairness of procedures rather than the appropriateness of substantive outcomes may not be well-equipped for substantive issues and those requiring technical expertise in the NPM's preventive work. ... Detainees and staff in places of detention may also find it confusing to have an institution that has an established approach or role of a more legalistic kind now taking different approaches and assuming different roles under OPCAT[.]⁷⁵

Thus, the office of the Danish Ombudsman has no in-house expertise in international human rights law: a point that has been criticised by Danish civil society with regard to its designation as an NPM.⁷⁶ Indeed, the Danish Ombudsman is considering an agreement with the Danish Institute for Human Rights in order to supplement its in-house expertise on international human rights standards to better execute its function as the NPM.⁷⁷

5.2 Accreditation by the ICC

The reference to the Paris Principles raises issues that may be more relevant and more often seen in relation to HRCs rather than Ombudspersons; this is due to the role played by the ICC and its accreditation of NHRIs as compliant with the Paris Principles. There is now a detailed procedure to follow to request accreditation by the ICC: a label that provides NHRIs with a certain degree of legitimacy and also allows them to be recognised by UN treaty and Charter bodies.⁷⁸

The Paris Principles and the accreditation process have traditionally been applied to HRCs, but not to ombudspersons. In recent years, however, the ICC has considered applications from ombudspersons; in fact, of those NPMs currently existing or being proposed, a number have already been considered by the ICC.⁷⁹ It is no longer true to argue, therefore, that the scrutiny

⁷⁴ For example, Emily O'Reilly, 'Human Rights and the Ombudsman', *Biennial Conference, British and Irish Ombudsman Association*, University of Warwick, Coventry, 27 April 2007, p.2. Available at <http://www.bioa.org.uk/docs/HumanRightsOmbudsmanEmilyOREilly.pdf>. See also Richard Kirkham, 'Human Rights and the Ombudsman', (2008) *Journal of Social Welfare and Family Law* 30(1), pp.75-83.

⁷⁵ APT, *National Human Rights Commissions and Ombudspersons*, pp.5-6. See fn.16.

⁷⁶ Rehabilitation and Research Centre for Torture Victims, *Alternative Report to the list of issues (CAT/C/DNK/Q/5/rev.1)* 19 February 2007 to be considered by the UN Committee against Torture during the examination of the 5th periodic report of Denmark, 38th Session, May 2007, April 2007, Copenhagen, Denmark, p.20.

⁷⁷ Færkel, 'The added value of joining OPCAT'. See fn.58.

⁷⁸ For more details on this aspect see *The Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture*, Policy Paper of the OPCAT Research Team, University of Bristol (2008). Available at: <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html>.

⁷⁹ The following Ombudspersons, which have been designated as NPMs, have been accredited with 'A' status by the ICC: Albania, Costa Rica, Armenia, Poland and Azerbaijan. The Slovenian Ombudsman has 'B' status. The Georgian, Croatian and Peruvian Ombudsman Offices, for example, while not yet officially designated as NPMs, are being considered for the role; all three have been accredited with 'A' Status. National Human Rights Institutions Forum, *Chart of the Status of National Institutions Accredited by the International Coordinating Committee of*

under which those institutions applying for accreditation may come, and the level of information available to the UN on the compliance of a particular institution with the Paris Principles, may be greater for HRCs than ombudspersons.

The persuasiveness of this argument depends on whether the accreditation process is viewed as sufficiently robust. Although there have been many concerns raised in the past regarding the appropriateness of peer review, and the extent to which alternative viewpoints (i.e. ones that would go beyond the comments of the applicant NHRI itself) were heard during the accreditation process, these issues appear to have largely been resolved in recent years. The ICC now receives additional information on an NHRI from civil society organisations, and others, and uses this in its evaluation of the institution's status; in some cases, this has led it to downgrade the status of NHRIs.⁸⁰ It should, nevertheless, be noted that input from other stakeholders in the ICC accreditation process still remains relatively informal in that it has come about more as an incentive from the NGOs, which saw this as an opportunity to provide the ICC with alternative reports in the absence of express ICC rules prohibiting this. The procedure applies equally to HRCs and ombudsman institutions. Interestingly, the accreditation of some ombudsman offices with 'A' status has caused a shift in the ethos of the institutions concerned. Thus, the office of the Croatian People's Ombudsman (the Croatian Ombudsman) has considered taking on 'certain broader functions of a NHRI, beyond complaints handling' as one of the implications of being designated an 'A' status institution by the ICC.⁸¹

5.3 *A preventive mechanism?*

Prevention lies at the core of the OPCAT and the role of both the SPT and the NPMs. This requires not only visits that are preventive in nature, but also that a broader approach is taken to prevention of torture.

5.3.1 *Preventive visits*

The OPCAT requires that visits to places of detention focus on preventing torture, as well as protecting those deprived of their liberty. A preventive visit differs from one that is carried out to, for example, investigate a complaint about violations that have already occurred. In this context, while ombudspersons may have considerable visiting expertise, this is usually focused on investigating complaints, rather than comprising part of a proactive approach. For instance, when examining the practices of the Parliamentary Ombudsman of Finland (Finnish Ombudsman) Pirjola noted that visits carried out to places of deprivation of liberty are 'often

National Institutions for the Promotion and Protection of Human Rights: Accreditation status as of 2 June 2009. Available at: <http://www.nhri.net/default.asp?PID=253&DID=0>.

⁸⁰ For example, more than 38 NGOs from Sri Lanka submitted reports criticising the Sri Lankan Human Rights Commission; the ICC has called on the respective Commission to respond to the criticisms raised. It appears that the NGO reports significantly influenced the decision of the ICC to downgrade the Sri Lankan Human Rights Commission from status 'A' to status 'B'. ANNI, Report on the Performance and Establishment of National Human Rights Institutions in Asia (2008) Bangkok, Thailand, p.176.

⁸¹ Milena Gogic, 'The context and the changing role of the Croatian people's Ombudsman', *ICC 22nd Workshop on NHRIs and Detention*, Geneva, Switzerland, 23 March 2009.

quite brief inspections (for example, one day in one prison) by the Ombudsman’, during which the focus is ‘more on legal issues than policy or funding-related issues’.⁸²

The essence of the NPM visiting programme is to ensure the regular presence of outsiders in places of deprivation of liberty.⁸³ The UN Special Rapporteur on Torture has noted that

In order to maintain a deterrent effect, national visiting bodies should carry out visits to larger or more controversial places of detention every few months, and in certain cases at even shorter intervals[.]⁸⁴

This requirement for regular visiting is more burdensome when the aim of visits is preventive. The recommendation of the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) is to carry out weekly or at least monthly visits: it deemed the visiting practice of the Parliamentary Ombudsman of Iceland of one visit in two years to a psychiatric establishment was insufficient.⁸⁵ The Office of the Chancellor of Justice of Estonia (Estonian Ombudsman) has reported that, since its designation as an NPM, the number of inspections had increased dramatically. The lack of clarity as to what ‘regular visiting’ means, coupled with the requirement for frequent visiting, has been a challenge.⁸⁶

As the APT notes, with respect to Ombudspersons who may not traditionally have undertaken preventive visiting, some changes to the methodology of their approach is needed; the APT recommends some ‘internal structural changes’, including considering whether the same staff should undertake preventive visits and also investigate complaints.⁸⁷ The Croatian Ombudsman, which is currently being considered for the role of the NPM, in respect of their visiting practices and their compliance with requirements, has noted that

Although the work done so far has been highly professional and effective, the bulk of the advisor’s time is still spent on complaints handling rather than visiting, and it is apparent that visits are too short - usually a maximum of one day per institution[.]⁸⁸

For these reasons, it is uncertain whether traditional ombudsperson visits comply with the proactive, preventive visiting required of NPMs.

⁸² Pirjola, p.170.

⁸³ SPT, First Annual Report, para. 15. See fn.26.

⁸⁴ Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General, UN Doc. A/61/259, 2006, para. 71.

⁸⁵ CPT, Report to the Icelandic Government on the visit to Iceland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 10 June 2004, CPT Doc. CPT/Inf (99) 1, (2006) 3, para. 82.

⁸⁶ Replies to the NPM Questionnaire by the Office of the Chancellor of Justice of Estonia, 2008 (on file with authors).

⁸⁷ APT, APT Position Paper, p.5. See fn.16.

⁸⁸ Gogic, ‘The context and the changing role of the Croatian people’s Ombudsman’. See fn.81.

5.3.2 A broader preventive mandate

The *raison de être* of the OPCAT is prevention. Article 1 defines the objective of the Protocol as the establishment of a system of regular visits to places of deprivation of liberty undertaken by both the NPMs and the SPT ‘in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’. However, the Preamble to the OPCAT takes a much broader perspective on the issue of prevention, recognising that ‘effective prevention requires education and a combination of various legislative, administrative, judicial and other measures’.

The ICJ, in its judgement in the case of *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁸⁹ when examining the Genocide Convention, held that the obligation to prevent requires states ‘to employ all means reasonably available to them’⁹⁰ and noted that this obligation ‘is one of conduct and not one of result’.⁹¹ The Committee Against Torture, in its General Comment No 2, noted that prevention requires criminalisation of acts of torture⁹² and the introduction of a definition of torture that reflects the text of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in the domestic legislation of States Parties.⁹³

The Paris Principles do not contain reference to prevention *per se*, but only talk about promotion and protection of human rights. Nevertheless, this mandate allows for significant preventive work to be done should an institution be designated as an NPM. Thus, when examining the role of various HRCs in the promotion and protection of human rights, Gauthier de Beco highlights three specific areas key to effective prevention:⁹⁴ (i) coordination of the efforts of the various human rights actors in the country; (ii) ensuring consistency between human rights policies; and (iii) facilitation of communication between existing human rights actors. However, experience indicates that HRCs that are carrying out the NPM mandate have not achieved much beyond preventive visiting. There are a few States, for instance South Africa, in which the current debate about the possible NPM is tied into a bigger campaign to criminalise torture in South African legislation.⁹⁵ Another example is the National Human Rights Commission of Korea (the body that is leading the OPCAT ratification process in the country) which has noted that

prevention of human rights violations through human rights education and training has greater impact on the improvement of human rights situation [*sic*] in the detention facilities rather than handling human rights violations cases after human rights have been violated[.]⁹⁶

⁸⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, case 91, International Court of Justice, Judgement of 26 February 2007.

⁹⁰ ICJ, Judgement of 26 February 2007, para. 430. See fn.89.

⁹¹ ICJ, Judgement of 26 February 2007. See fn.89.

⁹² Committee against Torture, General Comment No 2. Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para. 8.

⁹³ Committee against Torture, General Comment No 2, para. 9. See fn.92.

⁹⁴ de Beco, ‘National Human Rights Institutions in Europe’, pp.340-341. See fn.11.

⁹⁵ Judith Cohen, ‘The Role of NHRI’s as a national preventive mechanisms and the issue of independence’, *National Human Rights Institutions/Treaty Body Workshop*, 26-28 November 2007, Geneva, Switzerland.

⁹⁶ Byunghoon Oh, ‘National Human Rights Institutions and the Correctional System’, *ICC 22nd Workshop on NHRIs and Detention*, Geneva, Switzerland, 23 March 2009.

These examples demonstrate both a broader human rights ethos and approach, and a broader experience of campaigning and promotional work. However, there is little evidence, so far, that in practice the HRCs that have been designated as NPMs have gone beyond the visiting aspect of the NPM mandate.

The situation is markedly different as far as many of the Ombudsmen institutions are concerned. These entities traditionally do not have the same wide ranging human rights powers as an HRC, as they are more concerned with proper administration of justice. Therefore, adapting to the mandate of the NPM requires a shift in the ethos of the institution.⁹⁷ Thus, as reported by the Estonian Ombudsman's Office

Even if looking literally [at the name of domestic NPM], one of its tasks is preventative work. It can be done through giving lectures, publishing articles, distributing information materials etc. that the NPM has to monitor is the fulfilment of article 10 of the CAT [*sic*]. [It] states that each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. Therefore all curricula of such educational establishments have to be examined [to see] if they include exhaustive information regarding the prohibition against torture.⁹⁸

5.4 Coercive powers?

The visits of the NPM are not an aim in themselves, but rather constitute the starting point of a dialogue with the authorities about the implementation of the recommendations that the NPM issues.⁹⁹ Thus, NPMs must have the requisite powers to issue recommendations and the authorities must have a corresponding obligation to enter into a dialogue about their implementation.¹⁰⁰ This raises two issues.

First, there is the stipulation in Article 19 (b) that the designated NPM must be able to make recommendations 'taking into consideration the relevant norms of the United Nations'. This poses significant challenges for many Ombudsman offices designated as NPMs: as institutions entrusted with the oversight of legality, their point of reference is primarily domestic law and not the norms of international human rights treaties. This has been yet another criticism of the designation of Danish Ombudsman as the country's NPM.¹⁰¹

⁹⁷ Elina Steinerte, 'Institutions of Ombudspersons as National Preventive Mechanisms: Some preliminary observations', *OPCAT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November.

⁹⁸ Replies to the NPM Questionnaire by the Office of the Chancellor of Justice of Estonia (2008), on file with authors.

⁹⁹ Nele Parrest, 'The Operational Modalities of the NPM', *Implementing OPCAT: experiences from South Eastern Europe*, Podgorica, Montenegro, 22-23 April 2009.

¹⁰⁰ OPCAT, Article 19 and 22, respectively. See fn.4.

¹⁰¹ Rehabilitation and Research Centre for Torture Victims, Alternative Report to the list of issues, p.22. See fn.76.

Similarly, as has been discussed in relation to the New Zealand Ombudsmen, a major problem with regard to designating ombudsmen as NPMs is that ombudsmen are not specifically connected to human rights principles or treaties via their constitutions:

The Ombudsmen are creatures of statute, identified as officers of Parliament, who serve to bring to account the actions of the domestic New Zealand executive, that is the public sector, in the name of the individual citizen. In other words, their actions are geared primarily towards the accountability of ‘the system’ rather than towards upholding the rights of a single individual[.]¹⁰²

The particular challenge facing ombudsman offices relates to the fact that these institutions traditionally discharge quasi-judicial functions.¹⁰³ Thus, the Public Defender of Georgia may make suggestions to respective bodies regarding disciplinary or administrative responsibilities against persons whose actions caused a violation of human rights,¹⁰⁴ the Finnish Ombudsman may issue reprimands,¹⁰⁵ the Danish Ombudsman has rather extensive investigatory powers,¹⁰⁶ while the Ombudsman of the Czech Republic may instigate disciplinary action and even criminal prosecutions.¹⁰⁷

The NPM mandate requires that, as NPMs, these institutions engage in dialogue with the authorities about the implementation of their recommendations. Given that the OPCAT calls for a constructive dialogue with the authorities, and not a litigious confrontation, there are significant difficulties associated with the combination of the NPM and quasi-judicial mandates. Although HRCs also often have a complaint mandate,¹⁰⁸ this tends not to be the primary focus of their work. Careful consideration of this aspect of the NPM mandate must be undertaken when adapting primarily complaints-driven institutions, such as ombudsmen institutions, to the proactive mandate of NPMs.¹⁰⁹ Many ombudsmen institutions designated as NPMs have attempted to solve this problem by setting up a designated visiting team,¹¹⁰ or creating an entirely new department within the structure of the institution for the purposes of fulfilling the NPM mandate, as discussed above.¹¹¹

¹⁰² Anand Satyanand, ‘The Ombudsman Concept and Human Rights Protection’, (1999) *Victoria University of Wellington Law Review* 6, p.4.

¹⁰³ This may equally apply to the HRCs, which have quasi-judicial functions.

¹⁰⁴ Organic Law of Georgia on the Public Defender of Georgia, adopted 16 May 1996, Article 21(d).

¹⁰⁵ Parliamentary Ombudsman Act [Finland] (197/2002), Sections 10 and 11.

¹⁰⁶ Ombudsman Act [Denmark], Chapter 6. See fn.5.

¹⁰⁷ Law on the Public Defender of Rights [Czech Republic], 349/1999 Coll., 8 December 1999, para. 19.

¹⁰⁸ It should be also noted that the Paris Principles specifically acknowledge that NHRIs may discharge quasi-judicial functions. Paris Principles D. See fn.8.

¹⁰⁹ Summary and Recommendations *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-26 November 2008, p.6, Section D. Available at <http://www.bris.ac.uk/law/research/centres-themes/opcat/docs.html#OPCATOSCEseminar>.

¹¹⁰ For example, a specific unit within the National Human Rights Commission of the Mexico Commission, the Tercera Visitaduría, has been set up. It is composed of a Director and 13 inter-disciplinary staff, some of whom were formerly involved in prison monitoring within the NHRC.

¹¹¹ For example, the Czech Ombudsman and Slovenian Ombudsman. It should also be noted that the same approach has been adopted by the New Zealand Human Rights Commission: Joris de Bres, ‘The Role of the National Human Rights Institutions as a National Preventive Mechanism and the Issue of Independence: New Zealand’s experience so far’, *National Human Rights Institutions/Treaty Body Workshop*, Geneva, Switzerland, 26-28 November 2007.

Therefore, the designation of ombudsmen offices as NPMs represents a challenge for these bodies as it requires them to transform from bodies of public administration, accustomed to reacting to allegations of human rights violations, into proactive entities, constantly on guard against any potential ill-treatment that may arise.¹¹²

5.5 *NPMs as part of the international framework?*

In respect of the NPMs, it has been argued that

Indeed, in a way, those national mechanisms designated by the State become a part of the international framework of torture prevention, and the boundaries between the national and international suddenly become malleable and permeable[.]¹¹³

HRCs often have experience at the international level in their engagement with UN or regional human rights treaty bodies¹¹⁴ and through the ICC. UN treaty bodies have been engaging with NHRIs since the early 1990s¹¹⁵ through the participation of the NHRIs in the process of reviewing States Parties' reports; sometimes they even make submissions before the treaty bodies, follow up treaty bodies' recommendations, and disseminate the findings of treaty bodies.¹¹⁶ While treaty bodies would (potentially) also welcome submissions from ombudsman offices, in reality, given that the HRCs possess a wider human rights mandate and, therefore, the necessary expertise, they also have more experience in engaging with the UN system compared to the ombudsman offices.

The system of accreditation carried out by the ICC, as argued earlier, is also traditionally more concerned with HRCs as opposed to ombudsman institutions, providing the former with more exposure to the UN system. This has been changing recently as more and more ombudsman institutions engage with the ICC.

The crucial point is that the OPCAT requires cooperation between the SPT and the NPMs and, therefore, prior experience of engagement with the UN system is important. This is yet another aspect where differences between HRCs and ombudsman offices as NPMs prevail.

¹¹² Steinerte. See fn.98.

¹¹³ Evans and Haenni-Dale, 'Preventing Torture?', p.54. See fn.27.

¹¹⁴ de Beco, 'National Human Rights Institutions in Europe', p.356. See fn.11.

¹¹⁵ In 1993, prior to the endorsement of the Paris Principles by the General Assembly, the Committee on Racial Discrimination was the first treaty body to recommend that States Parties establish national institutions and that existent national institutions 'be associated with the preparation of reports and possibly included in government delegations in order to intensify the dialogue between the Committee and the State Party concerned'. Committee on the Elimination of Racial Discrimination, 'General Recommendation No 17: Establishment of national institutions to facilitate implementation of the Convention', 25 March 1993.

¹¹⁶ Conclusions, *International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies*, 2006, UN Doc. HRI/MC/2007/3, Berlin, 7 February 2007.

6. Conclusion

On balance, does the designation of an ombudsman as an NPM pose any different challenges than if an HRC is designated? It is possible to generalise with respect to how these types of institutions normally function; there is a clear need to recognise the different approaches these institutions adopt. Traditionally, ombudsman institutions are entities concerned with oversight over the proper administration of justice and not human rights specifically, taking a rather legalistic approach and predominantly using domestic legislation as their point of reference. Thus, if designated as NPMs, ombudsman institutions may need to think carefully about the shift required in terms of their approach so as to embrace the preventive mandate that the OPCAT requires. Thus, HRCs, as entities traditionally more concerned with the broader aspects of protection and promotion of human rights, may find it easier to grasp the pro-active nature of the NPM mandate.

On the other hand, however, it is clear that an ombudsperson in one state is very different from an ombudsperson in another, and the same is true of HRCs; in some countries, HRCs discharge quasi-judicial functions that position their mandates close to those traditionally carried out by ombudsman institutions in other countries. Therefore, it is often difficult to make effective comparisons and generalisations are also problematic. As a result, it would be wrong to conclude that an ombudsperson is better suited to be an NPM than a HRC (or vice versa) *per se*; it depends on the specific context of the particular jurisdiction.

The role played by the ICC, especially with regard to accreditation of NHRIs, also must not be over-rated. Despite the calls made for those NHRIs that have achieved ‘A’ status to be designated as NPMs,¹¹⁷ practice has shown that this is not necessarily the driving factor in designating an NPM. This is particularly evident in the Americas: Honduras has created a new entity as the NPM, despite having an ‘A’ status ombudsman institution in the country; Bolivia and Paraguay are in the process of creating new institutions, also in spite of having ‘A’ status ombudsman institutions. However, Europe also has similar examples: in Denmark, it is the Ombudsman who has been designated as an NPM, despite the fact that the Danish Institute for Human Rights achieved ‘A’ status, while, in the UK, the Equality and Human Rights Commission, also an ‘A’ status NHRI, is not part of the UK’s NPM at all.

The reality is that, in most States, there are few existing institutions that already have visiting experience to choose from and there will often not be both a suitable ombudsperson and HRC to choose between. In some regions, ombudspersons are the more prevalent choice, while, in others, it is HRCs. In a particular state, often there is only one institution – either an ombudsman office or an HRC – that possesses the expertise required of an NPM. More importantly, often only one institution is regarded as having the requisite level of legitimacy by the relevant stakeholders.

What is important, therefore, is an awareness that different bodies, in different contexts and jurisdictions, raise different issues and challenges with respect to their ability to function as an effective NPM. The real deciding factor, in designating an NPM, should be each State Party’s geo-political, legal, social and cultural specifics. Those exercising quasi-judicial functions may

¹¹⁷ Kyung-wha Kang, Opening statement, *Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights*, Nairobi, Kenya, 21-24 October 2008.

face particular difficulties when it comes to developing a preventive, pro-active mandate, if that is not already part of their remit. There must be a recognition that the change in the approach of an existing institution, when it becomes an NPM, needs to be relayed to those the institution serves, whether that be detainees, relevant authorities, or the public as a whole. This can be difficult to achieve.