GUIDE

Establishment and Designation of National Preventive Mechanisms

Association for the Prevention of Torture

The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva. It was founded by the Swiss banker and lawyer, Jean-Jacques Gautier, in 1977.

The APT envisions a world in which no one is subjected to torture or cruel, inhuman or degrading treatment or punishment, as promised by the Universal Declaration of Human Rights.

The APT specialises in torture prevention, rather than the denunciation of individual cases. This approach enables the APT to collaborate with state authorities, police services, the judiciary, national institutions, academics and NGOs that are committed to institutional reform and changing practices.

To prevent torture, the APT focuses on three integrated objectives:

1. Transparency in institutions
To promote outside scrutiny and accountability of institutions where persons are deprived of their liberty, through independent visiting and other monitoring mechanisms.

2. Effective legal frameworks
To ensure that international, regional and national legal norms for the prevention of torture and other ill-treatment are universally promoted, respected and implemented.

3. Capacity strengthening
To strengthen the capacity of national and international actors concerned with persons deprived of their liberty by increasing their knowledge and commitment to prevention practices.

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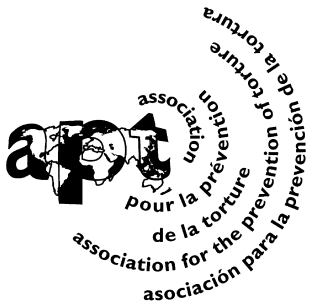

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Foreword

The Association for the Prevention of Torture (APT) is an international non-governmental organisation committed to preventing torture and other ill-treatment worldwide. In particular, the APT promotes the establishment of preventive control mechanisms such as visits to places of detention by independent experts. In pursuit of this goal, the APT played a central role in the realisation of the Optional Protocol to the UN Convention against Torture (OPCAT).

The aim of this Guide is to provide a commentary on the provisions of the Optional Protocol regarding national preventive mechanisms (NPMs), with APT's views and recommendations on the requirements for the effective establishment and functioning of these bodies. This advice is primarily intended to assist national actors, whether from government or civil society, engaged in the process of determining the NPM for their country. The Guide therefore assumes a certain level of familiarity with the OPCAT and is not intended as a general first introduction to the instrument.[1]

APT's earlier, more general, guidance on the establishment of national preventive mechanisms (a November 2003 paper by Debra Long and Sabrina Oberson, subsequently adapted for the 2004 publication *OPCAT: a Manual for Prevention*) was prepared shortly after the adoption of the OPCAT by the UN General Assembly in 2002. Much has happened in the intervening years. At the time of writing the OPCAT has entered into force (in June 2006) and the first States Parties are moving quickly to establish their national preventive mechanisms. Momentum for further ratifications continues to build. The Office of the UN High Commissioner for Human Rights, States Parties, and NGOs are preparing for the elections, first sessions and initial visits of the International Subcommittee.

In this new and dynamic context, the APT frequently receives requests for comprehensive technical assistance and very precise questions about the meaning and practical application of particular provisions of the OPCAT

[1] For a more general introduction to the OPCAT, see the Association for the Prevention of Torture and Inter-American Institute of Human Rights, *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (Geneva/Costa Rica, 2005), available at www.apt.ch.

relating to NPMs. We have therefore prepared this new, more detailed, advice to help national actors find solutions to the many challenges they may face in determining their country's NPM. These are also topics for which the International Subcommittee is expected to develop expertise over the coming years.

National actors are often interested in what other countries are doing to implement the NPM provisions of the OPCAT. To this end, this Guide is complemented by a periodically updated "Country-by-Country NPM Status Report", available at www.apt.ch/npm. While the comparative perspective can be extremely useful in illustrating a range of approaches, inclusion of an already-existing domestic body or a particular State's proposed national preventive mechanism in this publication or in the status report should not be seen as an endorsement by the APT that the body or mechanism necessarily meets all the requirements of OPCAT.

It is worth noting that this Guide focuses on the setting-up of NPMs. The practices that an NPM should follow once it is actually carrying out its mandate are therefore discussed only indirectly. A fuller description and recommendations on methodology can be found in a separate APT publication, *Monitoring Places of Detention: a practical guide* (2004). This and many other practical resources are available online, in a range of languages, at www.apt.ch.

Finally, thank you to my colleagues at APT, as well as others – including Debra Long, Malcolm Evans, Antenor Hallo de Wolf, and Elina Steinerte – who reviewed and provided comments on various drafts.

Matt Pollard
APT Legal Adviser
Geneva, October 2006

Introduction

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Preamble

The States Parties to the present Protocol, (…)

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture (…) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures, (…)

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows: (…)

The Optional Protocol to the UN Convention against Torture (OPCAT)[2] establishes a system of regular visits to places of detention by independent expert bodies, in order to prevent torture and other forms of ill-treatment. The Optional Protocol's innovative two-pillar approach combines a new *international* body (the UN Subcommittee on Prevention of Torture), with an obligation for each State Party to establish or designate its own complementary *national* preventive mechanism.

Customary international law *already* requires every State to prevent torture.[3] The Convention against Torture also expressly includes a general obligation for each State Party to take effective measures to prevent torture and other

[2] *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the UN General Assembly on 18 December 2002, UN Doc. A/RES/57/199, entry into force 22 June 2006.

[3] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija* (10 December 1998), Case No. IT-95-17/I-T, paragraph 148.

cruel, inhuman or degrading treatment or punishment.[4] The Convention against Torture further specifies measures, such as the criminalization and prosecution of torture and the prohibition of the use of information obtained by torture, which States Parties must implement in order to better prevent and punish torture.

The Committee against Torture created under the Convention periodically assesses each State Party's progress. It relies primarily on formal written reports submitted to the Committee's office in Geneva by government authorities and national non-governmental organisations (NGOs). This is followed by a face-to-face discussion between the Committee and State authorities, and separate discussions with national NGOs, all of which also takes place in Geneva. Some States Parties have also authorized the Committee to consider complaints from individuals, to which the Committee responds through written decisions, again issued from Geneva.

Visits by the Committee to the territory of a State Party, possible only with the State's specific consent, are extremely rare. In the 20 years since the Convention entered into force, the Committee has officially undertaken inquiries under article 20 of the Convention, which can involve in-State visits, in respect of only 5 of the 141 States Parties.[5]

Despite the range of measures specifically prescribed by the Convention against Torture, and the work of the Committee against Torture, the scourge of torture and other ill-treatment persists. The Optional Protocol was therefore developed to provide a further practical tool to assist States in meeting the obligations they already have under customary international law and the Convention itself. To this end, the OPCAT introduces a system of regular visits to places of detention by independent national and international experts, to serve as the basis for practical and constructive dialogue between the visiting experts and the authorities at institutional and national levels.

The UN Special Rapporteur on Torture has explained the rationale for the OPCAT as follows:

> The rationale for [the Protocol] is based on the experience that torture and ill-treatment usually take place in isolated places of detention, where those who practise torture feel confident that they are outside the reach

[4] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by resolution 39/46 of the UN General Assembly on 10 December 1984, entry into force 26 June 1987. See especially Articles 2(1) and 16. See also the third paragraph of the Preamble to the OPCAT.

[5] Other inquiries may have been conducted, but if so they have remained confidential.

> of effective monitoring and accountability. Since torture is absolutely prohibited under all legal systems and moral codes of conduct worldwide, it can only function as part of a system where the colleagues and superiors of the torturers order, tolerate, or at least condone such practices, and where the torture chambers are effectively shielded from the outside. The victims of torture are either killed or intimidated to the extent that they do not dare to talk about their experiences. If victims nevertheless complain about torture, they face enormous difficulties in proving what happened to them in isolation and, as suspected criminals, outlaws, or terrorists, their credibility is routinely undermined by the authorities. Accordingly, the only way of breaking this vicious cycle is to expose places of detention to public scrutiny and to make the entire system in which police, security and intelligence officials operate more transparent and accountable to external monitoring.[6]

The first pillar of the OPCAT's approach will be the programme of visits carried out by the UN Subcommittee on Prevention (hereinafter "International Subcommittee" or "Subcommittee").[7] In this the OPCAT follows the precedents of the European Committee for the Prevention of Torture and the International Committee of the Red Cross, which have carried out similar functions for many years.[8]

The Subcommittee is not required to seek a State Party's consent to any specific visit to that State's territory – the State in ratifying the OPCAT has already given blanket consent. Once in the territory, the International Subcommittee has the right, among others, to access any place of detention, to move freely, and to private interviews with detainees.

As the second pillar of the OPCAT's approach, a national preventive mechanism (NPM) in each State Party will carry out similar work with comparable guarantees at the local level. The OPCAT sets out fundamental requirements, but allows some flexibility for each country to structure its NPM according to its own circumstances. The OPCAT thus combines periodic scrutiny by experts from around the world, with the more frequent visits to a larger number of places that can be carried out by national preventive mechanisms.

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[6] Report of the UN Special Rapporteur on Torture, UN Doc. A/61/259 (14 August 2006), paragraph 67.

[7] See Article 2 and Parts II and III of the OPCAT.

[8] For more detail about the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, see http://www.cpt.coe.int. For more detail about the International Committee of the Red Cross, see http://www.icrc.org.

NPMs are also expressly mandated to propose and make observations about existing or draft legislation.

The subsequent chapters of this Guide provide legal and practical advice on a range of issues likely to arise at the national level during the process of establishing or designating a national preventive mechanism. The Guide examines the following issues:

— transparency and inclusiveness in the process itself,
— purpose and mandate,
— independence,
— criteria for membership,
— guarantees and powers in respect of visits,
— recommendations and their implementation,
— the NPM and national civil society,
— NPMs at the international level,
— choice of organisational form.

Process for Deciding on an NPM

2

Article 3

Each State Party shall 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 (hereinafter referred to as the national preventive mechanism).

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level.[9] Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

2.1 Introduction

While the process by which each country determines its NPM may differ, some elements should always be included. First, the process should be transparent and include civil society (particularly NGOs) and other relevant national actors. Second, all participants in the process should have relevant information made available to them, including an "inventory" of existing national visiting bodies, and basic information about places of detention in the country. The following sections explain these common elements in more detail.

2.2 Transparency and Inclusiveness

For the work of the NPM to be effective, government officials and civil society must see it as credible and independent. For this to happen, the process of determining the NPM must itself be inclusive and transparent.

The widest possible range of relevant actors should be included in the discussions. As a starting point, this means:

[9] Under Article 24, States may make a declaration upon ratification to postpone their obligations in respect of either the national preventive mechanism or the International Subcommittee for three years, with a possibility for the Committee against Torture to permit a further extension of two years. A State cannot postpone its obligations in respect of both the national and international preventive mechanisms.

- representatives of the political leadership of the executive government and relevant members of the permanent administration with technical expertise (at all applicable levels: local, provincial and/or national),
- national NGOs and other civil society groups,
- national human rights institutions (human rights commissions or Ombudsman's offices, for instance),
- organisations that already carry out visits to places of detention (including inspectorates, sentencing judges, community-based "lay" visiting schemes),
- members of the legislature representing both government and opposition parties,
- in some cases, regional and international inter-governmental and non-governmental organisations.

The choice of organisations or individuals to represent civil society should be made by or in consultation with civil society itself, not a unilateral decision of the executive government. While it is important that leading human rights NGOs be a part of the discussions, other civil society groups should also be included, such as rehabilitation centres for survivors of torture, associations of relatives of detainees, and charity or faith-based groups working in places of detention. It is important to remember that the OPCAT covers not only prisons and police stations, but other places too, such as psychiatric institutions and immigration detention centres.[10] Organisations working with particularly vulnerable populations should therefore be included in the process as well: for example, those who work with migrants, asylum seekers, refugees, minors, women, ethnic and cultural minorities, and people living with disabilities.

Common issues or challenges in designing or choosing the NPM may arise in several States across a region. In such cases, regional roundtables for sharing ideas and strategies can assist each country in moving ahead with its own NPM determination. Regional and international NGOs and regional and international intergovernmental bodies can also be useful participants in the process.

In order to enhance the credibility of the eventual NPM, the process of deciding upon its form and identity should be transparent. Government should proactively publicize the process, opportunities for participation, and the criteria, methods and reason for the final decision.

[10] The range of places to be open to visits will be discussed below in Chapter 3, section 3.2.

2.3 Information

The process of determining the NPM should start with a factual "inventory" of bodies in the country that already carry out visits to places of detention. This inventory should summarize at least the following aspects for each body:[11]

- scope of jurisdiction (which places does it have the right to visit?);
- structure (number of members and staff, functional independence, office locations);
- powers and immunities (right to visit without prior notice, private interviews, right to information, etc.);
- budget and working methods (number of visits, their duration and frequency, type of reporting, degree of acceptance and implementation of its recommendations, how it confirms implementation, etc.).

All participants should also be provided with estimates of the approximate number, size, and locations of places of detention in the country, and the text of the OPCAT and an explanation of its requirements (such as a copy of this Guide).

The factual information about the existing mechanisms and about places of detention in the country will help participants to identify existing gaps in the coverage of places of detention and necessary characteristics and powers of NPMs, as defined in OPCAT,[12] and to estimate the human and financial resources that the NPM will require. This in turn will assist participants in deciding whether to design new institutions or designate existing ones.

[11] More detailed tools to assist with assessing the key characteristics of existing bodies can be found at www.apt.ch/npm.

[12] The range of places to be open to visits will be discussed below in Chapter 3, section 3.2.

2.4 APT Recommendations

■ **The widest possible range of relevant actors should be included in the discussions, including government officials, civil society, national human rights institutions, existing visiting bodies, parliamentarians, and in some cases regional and international inter-governmental and non-governmental organisations.**

■ **Governments should proactively publicize the process, opportunities for participation, and the criteria, methods and reason for the final decision.**

■ **Participants in the process should have available to them an "inventory" (i.e. survey and assessment) of relevant existing national visiting bodies, estimates of the approximate number, size, and locations of places of detention in the country, and the text of the OPCAT and its explanation.**

3 Purpose and Mandate

3.1 A System of Regular Visits

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 1 sets out the purpose and key elements of the OPCAT. Requirements for the independence, composition, and powers of the visiting bodies are elaborated in later articles and will be addressed in Chapters 4, 5 and 6 of this Guide. However, several concepts appear in Article 1 that are not directly explained elsewhere in the OPCAT text:

- **preventive** visits,
- undertaken on a **regular** basis,
- that form part of **an overall system** of visits.

We begin by examining these three concepts more closely in the immediately following sections. Later sections of this Chapter will analyze the scope of places to be visited, the mandate to be given to the national visiting body, and the frequency of its visits.

3.1.1 Preventive Visits

The visits to be carried out under the OPCAT are to be preventive in nature. This means the visits seek to prevent torture or ill-treatment before it happens, through two mutually-reinforcing means:

- constructive dialogue with officials, based on detailed recommendations derived from an independent and expert analysis of the detention system using first-hand information; and
- deterrence, based on the increased likelihood of detection in the future through first-hand observation, which perpetrators cannot so easily avoid by intimidating detainees not to file formal complaints.

The UN Special Rapporteur on Torture has explained as follows:

> The very fact that national or international experts have the power to inspect every place of detention at any time without prior announce-

ment, have access to prison registers and other documents, are entitled to speak with every detainee in private and to carry out medical investigations of torture victims has a strong deterrent effect. At the same time, such visits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention. ... Many problems stem from inadequate systems which can easily be improved through regular monitoring. By carrying out regular visits to places of detention, the visiting experts usually establish a constructive dialogue with the authorities concerned in order to help them resolve problems observed.[13]

The preventive nature of these visits therefore distinguishes them in purpose and methodology from other types of visits that independent bodies may carry out to places of detention. For instance, a "reactive" visit is triggered only after a specific complaint of a violation is received by a complaints body at its office outside the place of detention. Reactive visits generally seek primarily to solve the specific problem of the complainant, or to investigate and document the case in order to punish perpetrators.[14] Another example would be "humanitarian" visits, providing goods or services directly to detainees to improve their conditions of detention or to rehabilitate survivors of torture.

Preventive visits, on the other hand, are proactive, part of a forward-looking and continuous process of analyzing a detention system in all its aspects. Multidisciplinary teams of independent experts carrying out preventive visits gather first-hand observations and speak confidentially with detainees and staff. They scrutinize the physical facility, rules and procedures, and the adequacy of any safeguards, in order to identify the elements that lead, or might lead in the future, to conditions or treatment amounting to ill-treatment or torture. This information is then assessed against national, regional and international standards and best practices, leading to specific and practical recommendations addressed to the authorities best able to implement them (at the institutional, regional and/or national level). These recommendations constitute the basis for constructive dialogue with the authorities. Follow-

[13] UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 72.

[14] Reactive visits can, as a side-effect, also contribute to prevention, through increasing transparency and accountability in places of detention, but this is different from a programme of visits conducted with the primary objective of prevention.

up discussions and visits allow verification of implementation, and further refinement or elaboration, of the recommendations. The preventive visits and the process of dialogue seek to achieve improvements for all members of a detainee population, for the place of detention as a whole, and for the overall system of places of detention in the State.

3.1.2 Regular Visits

The concept of "regular" visits implies that the mechanism will repeat its visits to a given place of detention over time. Repetition is an essential element of any effective scheme of monitoring places of detention for the prevention of torture and other ill-treatment. Repeated visits to a given place of detention:

- enable the visiting team to establish and maintain a constructive ongoing dialogue with detainees and authorities,
- help to chart progress or deterioration in the conditions of detention and treatment of detainees over time,
- help to protect detainees from abuse, through the general deterrent effect of the continuous possibility of outside scrutiny,
- help to protect detainees and staff from reprisals against individuals who have cooperated with the visiting body on previous visits.

The idea that the visit is not a one-off event leads to the question of how frequently the visits must be carried out to be effective and so meet the requirements of OPCAT. This question of minimum frequency is addressed under section 3.4 below.

3.1.3 A System of Visits

Article 1 of the OPCAT also makes it clear that the visits carried out by international and national mechanisms are intended to constitute "a system". This means that the various mechanisms should function in a harmonious and organized or coordinated way.

This has implications at the global level in terms of rights of direct communication between the International Subcommittee and the national preventive mechanisms. It also potentially has implications at the national level within a State that decides to designate multiple national preventive mechanisms. In order for such a collection of national preventive mechanisms within the State to constitute a system, there must be some means of communication and coordination between the mechanisms to ensure that all places of detention may

be visited, and to generate State-wide analysis and recommendations. We will return to these aspects in more detail in later sections of this Guide.[15]

3.1.4 APT Recommendations

■ **Implementing legislation should include a provision that states the purpose of the legislation and incorporates the language of article 1 of the OPCAT.**

■ **Preventive visits should be recognized as different in purpose and methodology from other types of visits to places of detention.**

■ **The system of visits to be carried out by an NPM must involve returning from time to time to places of detention previously visited.**

■ **The national preventive mechanism in a State and the International Subcommittee, and where there are multiple NPMs in a single State, the NPMs themselves, should be designed to function in a harmonious and organized or coordinated way in order to constitute a true "system".**

[15] The relationship between each NPM and the International Subcommittee is considered in Chapter 9. Strategies for achieving consistency and coordination of multiple mechanisms in a single State are explored in section 10.3.2 of Chapter 10.

3.2 Visits to Where?

Article 4

1. Each State Party shall allow visits (…) to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). (…)

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

3.2.1 Introduction

The definition of "places of detention" in Article 4(1) is worded very broadly in order to provide the widest possible protection for persons deprived of their liberty. Key elements of the definition are that individuals are not able to leave the place of their own free will, and that the detention has some link to public authority.

Because the definition of "places of detention" in Article 4 is of overarching importance, implementing legislation that describes the NPM's mandate and powers should include a definition of the places to which the NPM has right of access that covers any place that constitutes a "place of detention" under Article 4(1).

It was considered inappropriate to define "places of detention" in the OPCAT by a closed and exhaustive list of categories of institution. Such an approach would inevitably have rendered the visiting system too narrow and restrictive in its scope. However, certain categories inherently fall within the scope of the OPCAT definition of "place of detention" and could be stated in a non-exhaustive definition in national law for purposes of clarity, for instance:

- police stations,
- pre-trial centres / remand prisons,
- prisons for sentenced persons,
- juvenile detention centres,
- border police facilities and transit zones at land crossings, international ports and airports,

- immigrant and asylum-seeker detention centres,[16]
- psychiatric institutions,
- security or intelligence services facilities (if they have authority to carry out detentions),
- detention facilities under military jurisdiction,
- places of administrative detention,
- means of transport for the transfer of prisoners (police vans, e.g.).

In addition to these relatively obvious categories, Article 4 requires that the NPM have access to any other place where someone may be kept against their will in connection, even indirectly, with public authority. Two key phrases in Article 4's definition of "place of detention" describe the nature of this connection:

- "under its jurisdiction and control"[17] (which appears to refer to the territory or vessel on which the place is located),
- "by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence" (which refers to the means by which a person is or may be kept there).

The following section looks in more detail at the concept of "jurisdiction and control". The subsequent section explains the purpose of including the concepts of "instigation" "consent" and "acquiescence" and the words "or may be", which is to ensure that unlawful detentions and unofficial places of detention are covered by the NPM's mandate.

3.2.2 Jurisdiction and Control

The concept of "jurisdiction" mentioned in Article 4(1) is also used to describe the scope of State obligations under the main Convention against Torture, and the International Covenant on Civil and Political Rights.[18] The opinions of the Committee against Torture and Human Rights Committee established under

[16] It is sometimes claimed that non-citizens held in a detention centre are nevertheless "free to leave" in that they could theoretically voluntarily agree to go to another country. Nevertheless there is no question that persons held in such a situation are "deprived of liberty" within the meaning of article 4. See, e.g., UK House of Lords, *A and others v. Secretary of State for the Home Department* (16 December 2004), 2004 UKHL 56.

[17] The French version is worded slightly differently, even more strongly emphasizing the broad range of places covered: "placé sous sa jurisdiction ou sous son contrôle"

[18] UN Convention against Torture, Articles 2 and 16. Article 2(1) of the *International Covenant on Civil and Political Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

those treaties may therefore assist in assessing what constitutes "jurisdiction and control" for the purposes of the OPCAT.

The ordinary territory of the State is obviously normally under its jurisdiction and control. A ship or aircraft registered in the State, and perhaps a structure resting on the continental shelf of the relevant State Party, would also generally be considered to be under its jurisdiction for purposes of the main Convention against Torture.[19] Based on the jurisprudence of the Committee against Torture and the Human Rights Committee, "jurisdiction and control" should also cover all areas outside of the ordinary territory of the State Party which are "under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised."[20] This would include, for instance, the State Party's military bases abroad. On the other hand, foreign embassies on the territory of a State Party are probably not covered by the concept of "jurisdiction and control" in Article 4 of the OPCAT.[21]

Whether access must be given to foreign military bases located on a State Party's territory under an existing Status of Forces Agreement (SOFA) treaty is a more difficult question. The answer would seem to depend on the specific provisions of the SOFA that applies to the facility in question. If the SOFA clearly and validly cedes jurisdiction and control of the facility to a foreign power that is not itself party to the OPCAT, it may be that the host State cannot provide the NPM with access to the facility in the short-term. However, after a State has signed or ratified OPCAT, international law would not permit it to intentionally avoid its obligations by "contracting out" to other States the jurisdiction and control of

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[19] See J. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers, 1988), pp. 123–124.

[20] Committee against Torture, "Conclusions and Recommendations on United States of America" (18 May 2006), UN Doc. CAT/C/USA/CO/2, paragraph 15; and "Conclusions and Recommendations on United Kingdom" (10 December 2004), UN Doc. CAT/C/CR/33/3, paragraph 4(b). See also Human Rights Committee, "General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13. It is important to remember that Article 32 of the OPCAT specifically provides that its provisions do not affect obligations under the Geneva Conventions and Protocols or otherwise for access to detainees. The possibility of access by the International Subcommittee or a national preventive mechanism can never be used as an excuse to exclude visits by the ICRC or otherwise under the Geneva Conventions.

[21] Customary international law and widely-ratified treaty law deems such places to be "inviolable" by the host State, and specifies that the "agents of the receiving State may not enter" such places except with the consent of the head of the mission. See Article 22 of the *Vienna Convention on Diplomatic Relations*, done at Vienna on 18 April 1961, entry into force 24 April 1964. See also Brownlie, *Principles of Public International Law*, 5th edition (Oxford: Oxford University Press, 1998) at p. 356.

places where individuals are deprived of liberty on its ordinary territory.[22] Thus, States Parties to OPCAT have an obligation to make best efforts to renegotiate, especially at times of expiry or renewal, any Status of Forces Agreements that interfere with NPM access to places of detention on the State's ordinary territory, to include clauses allowing NPM access. Future SOFAs with new States should also allow for this right of access from the very beginning.

3.2.3 Unofficial Places of Detention

It is not enough that the NPM be given the right to visit places that the government has officially designated as a prison, police station, or other publicly recognized institution where people are ordinarily deprived of liberty under a lawful order. The NPM must also have access to unofficial places of detention, i.e. any place where a person may be being held for reasons connected with public authority, even if no public official actually formally ordered the detention.

That the OPCAT was intended to cover such places is evident from the fact that Article 4(1) expressly contemplates alternatives to a formal "order", such as "instigation", "consent", or "acquiescence", as providing grounds for NPM access. These concepts were a part of the OPCAT from early on in the drafting process, indeed from the original text proposed by Costa Rica in 1991,[23] and appear to be drawn from the definition of torture in Article 1 of the Convention against Torture.

The States that adopted the Convention against Torture recognized that torture is usually an unofficial and semi-secret act from which the responsible government seeks formally to distance itself. "Instigation" "consent" and "acquiescence" were therefore added to the Convention against Torture in order to prevent a government from avoiding responsibility for torture by knowingly leaving otherwise "private" or "non-state" actors to actually carry out the torture in some unofficial place of detention.[24]

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[22] See the Preamble and Article 26 of the *Vienna Convention on the Law of Treaties*, signed at Vienna 23 May 1969, entry into force 27 January 1980, on this point declaratory of customary international law.

[23] See Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, 22 January 1991, UN.Doc. E/CN.4/1991/66: "any place within its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held".

[24] J. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers, 1988), pp. 45–46 and 120. See also C. Ingelse, *The UN Committee against Torture: an Assessment* (The Hague: Kluwer Law International, 2001), pp. 210 and 222–225.

The repetition of these concepts in the OPCAT therefore indicates that the definition of "place of detention" is not restricted to "officially ordered" acts of lawful detention in "official" places of detention, but covers other types of "irregular" detention.[25] This conclusion is further reinforced by the fact that the definition in Article 4 expressly covers places where persons "***may*** be deprived of their liberty".[26]

Thus, the OPCAT requires that the NPM have access to places that may not be a police station, prison or other "official" place of detention, but where the NPM suspects that someone is being held against their will in connection, factually or legally, with public authority.

The Uganda Human Rights Commission, though not designated an NPM under the OPCAT, provides an example of an existing provision in national law that expressly provides for such visits. Article 8(2)(1) of the *Uganda Human Rights Commission Act*, 1997 provides in part as follows:

> 2. (1) The Commission shall have the following functions –
> (…)
> b. to visit jails, prisons, and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and make recommendations;
> **c. to visit any place or building where a person is suspected to be illegally detained**; (…)
> [emphasis added]

Unofficial places of detention within the scope of Article 4 of OPCAT could include privately-owned residences or other privately-owned buildings.[27] It is true that in the limited category where the place in question is a private residence and the suspected deprivation of liberty is sufficiently linked to pub-

[25] See also Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, 2 December 1992, UN.Doc. E/CN.4/1993/28, paragraphs 38–40.

[26] See Reports of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture: UN.Doc.E/CN.4/1993/28, paragraph 40; UN.Doc. E/CN.4/2000/58, paragraph 30; and UN.Doc. E/CN.4/2001/67, paragraphs 43 and 45. The fact that unofficial or secret places of detention are covered by the mandate of visiting mechanisms does not legitimise their existence; rather, the possibility of discovery by the visiting mechanism should be seen as deterring or preventing such detentions in the first place. See also APT, "*Incommunicado, Unacknowledged, and Secret Detention under International Law*" (2 March 2006), http://www.apt.ch/secret_detention/Secret_Detention_APT.pdf.

[27] This is indirectly confirmed by the concerns raised by some states during the adoption process: e.g. the comments of the representative of the United States at the ECOSOC as reported in (12 November 2002) E/2002SR.38, paragraph 87, claiming that the OPCAT conflicted with domestic constitutional restrictions on search and seizure.

lic authority, a tension exists between the rights of the owner or occupant of the place and the rights to be accorded an NPM under the OPCAT. However, national laws usually reconcile similar competing interests in other contexts and solutions should therefore also be possible for the NPM.

The NPM might also wish to visit a facility under construction where persons will be held in the future.[28] Visits to such a place could generate recommendations that lead to design or construction changes with an important preventive effect.

As the scope of places covered by Article 4(1) is already extremely broad, the purpose of Article 4(2) is not clear. In reality, the inclusion of Article 4(2) in the final text of the OPCAT seems to have been the result of a diplomatically expedient "stitching together" of the language originally proposed by Costa Rica (still preserved in Article 4(1)), with a competing last-minute proposal (now in Article 4(2)).[29] It seems likely that the proponents of each subarticle never intended for them to co-exist. In referring to "placement of a person in a public or private custodial setting", Article 4(2) at least confirms that NPMs must have access to institutions operated by private corporations under contract to or otherwise on behalf of the government. Article 4(2) also underscores that the essence of the concept of deprivation of liberty is that the individual is not permitted to leave the place at will.

The last part of Article 4(2) refers to an "order of any judicial, administrative or other authority" without mentioning "instigation" "consent" or acquiescence". Does this mean that notwithstanding Article 4(1), places where a person is held in the absence of a formal order are not covered by the OPCAT?

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[28] See Reports of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture: UN.Doc.E/CN.4/1993/28, paragraph 40; UN.Doc. E/CN.4/2000/58, paragraph 30; and UN.Doc. E/CN.4/2001/67, paragraphs 43 and 45.

[29] As pointed out earlier, the references to "instigation", "consent" and "acquiescence" had been present in the negotiating draft from the beginning in 1991. In the 2001 session, the group of Latin American Countries ("GRULAC") proposed a new draft that preserved that language and for the first time introduced the notion of NPMs. At the same session, the EU also proposed a new draft that would have replaced the draft language in Article 4(1) as it had stood for some 10 years with the text that now appears as Article 4(2) of the final version. The EU proposal seems never to have been formally discussed by the Working Group: see Report of the Working Group E/CN.4/2001/67, paragraph 15. Towards the end of the subsequent and final session of the Working Group (see Report E/CN.4/2002/78) the Chairperson-Rapporteur produced her own proposal which combined elements of the GRULAC and EU drafts. It was at this point that Article 4 in its final form first appeared. The new hybrid Article 4 in the Chairperson's proposal appears never to have been specifically discussed and immediately after that session the proposal was presented to (and eventually adopted by) the Commission on Human Rights, ECOSOC, and General Assembly without further discussion on how Articles 4(1) and (2) could be reconciled.

The answer must be no. Such a reading of Article 4 would render the words "either … or at its instigation or with its consent or acquiescence" in article 4(1) superfluous and of no application, an absurd result. Recourse to the preparatory work at the drafting sessions confirms the strong preference expressed for the scope of application of OPCAT to extend to instances where people were de facto deprived of their liberty, without any formal order but with the acquiescence of an authority.[30] This is also the reading of Article 4 as a whole that best harmonizes its meaning, purpose and scope of application with the similar concepts contained in the Convention against Torture. All these considerations, coupled with differences among the language versions of Article 4(2), recommend against its verbatim incorporation into national law.

3.2.4 APT Recommendations

■ **The NPM's right of access to places of detention should be described in the law of the State, and include a definition of the places to which the NPM has a right of access that covers all the places potentially covered by the definition of "place of detention" in Article 4(1) of OPCAT.**

■ **Such a law can include a non-exhaustive list of institutions or categories of institution to enhance certainty for national actors. However, where such a list is included the law must make it clear that the list is not exhaustive and also provide for the broader definition in Article 4(1).**

■ **The NPM must have the mandate and ability to visit unofficial places of detention. To this end the concepts of "instigation", "consent" and "acquiescence", are important to achieving the full intended scope of visiting powers of the NPM and so should be included in domestic implementing legislation. For greater clarity, the authority to visit unofficial places of detention can be specifically recognized in the legislation.**

■ **Implementing legislation should not adopt verbatim the text of Article 4(2) of the OPCAT because it introduces unnecessary ambiguity. The important concepts that can be drawn from Article 4(2) is that it must be possible for the NPM to visit places that are operated by private entities, and that deprivation of liberty means, in essence, that the individual is not permitted to leave the place at will.**

[30] See Reports of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture: UN.Doc. E/CN.4/1993/28, paragraphs 38–40; E/CN.4/2000/58, paragraphs 30 and 78; E/CN.4/2001/67, paragraph 45. Article 32 of the Vienna Convention on the Law of Treaties states that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion where the meaning would otherwise be "ambiguous or obscure" or would lead to a "manifestly absurd or unreasonable" result.

3.3 Mandate

Article 4

(1) (…) These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of persons deprived of their liberty in places of detention as defined in Article 4, with a view to strengthening, if necessary, their protection from torture, cruel, inhuman or degrading treatment of punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.

3.3.1 A Constructive Dialogue Based on Visits

The visits to be carried out by the NPM are intended to form the basis, taken together with information from other sources, for a constructive dialogue between the NPM and authorities in a position to make improvements.[31] The relevant authorities for a given issue could be at any level of government, from the administration of an individual facility to the most senior national leadership.[32]

The OPCAT specifies that the NPM in undertaking the visits is to adopt a particular perspective and aim: to *strengthen* the protection of persons deprived of liberty against the types of treatments and punishments that are prohibited by international (and national) law, and to *aim to improve* their

[31] Article 22 of OPCAT. See also UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 72.

[32] The process of recommendations, dialogue, and implementation will be considered in greater detail in Chapter 7 of this Guide.

treatment and conditions of detention. For the purposes of this Guide, we might call this a distinctly "human rights" approach.

The visits are the main, though not the only, means by which the NPM is to examine the treatment of persons deprived of liberty. During its visits, the NPM will of course gather information directly about the particular place it is visiting. Through its interviews with detainees, the NPM will often also receive information about the conditions and treatment they received before they arrived at that particular place of detention: perhaps during arrest, during transport, or at a police station.[33] The NPM is also entitled to request and receive information from the government or others about places of detention and the persons held there.[34]

Further, the NPM is to review existing and proposed legislation that concerns places of detention and persons deprived of liberty, for instance to assess its consistency with international norms and to consider whether it adequately promotes improved conditions of detention. To facilitate the NPM's work in this regard, the government should make a practice of proactively sending draft legislation to the NPM, so that it has adequate time to analyse and provide its views. In keeping with Article 19(c), there should also be a means for the NPM itself to initiate proposals for new legislation or amendments to existing legislation.

All of this information is to feed into a continuous dialogue between the NPM and the State about improving conditions in places of detention and about prevention of torture or other ill-treatment more generally. The discussion should be constantly driven forward by the recommendations made by NPM and the measures and replies undertaken by authorities in response. As is recognized by Article 19(b) the NPM may engage with many different authorities within the State from time to time, depending on the location or subject-matter of the recommendation, or whether it is a local issue relating to only one or a few places, or a system-wide or nation-wide issue.

3.3.2 Progress Towards International Standards

As the purpose of the OPCAT is to help States Parties to achieve compliance with *international* human rights norms and standards relevant to deprivation of liberty, domestic implementing legislation must permit the NPM to con-

[33] The right to conduct private interviews is set out in Article 20(d), discussed in section 6.3 below.

[34] Article 20 discussed in section 6.2 below.

sider and apply international norms and standards in accordance with Article 19(b) of OPCAT. Implementing legislation should confirm that the NPM should always apply the standard most protective of the persons deprived of liberty.

3.3.3 Additional Mandates

The cycle of visit, recommendations, and follow-up to recommendations must be a core part of the mandate of any NPM under OPCAT. However, States may endow a new mechanism with a broader mandate, or may designate an existing body that already has a broader mandate. This could mean that the NPM promotes a broader range of rights, or promotes rights of a more general category of individuals, such as a national human rights commission might do. Positive synergies can result from combining the NPM functions with a broader mandate; however, some combinations can introduce additional challenges and risks, while others will always be inappropriate.

For instance, giving an institution a mandate that combines the OPCAT visiting function with responsibility to formally prosecute or adjudicate individual complaints (including those arising out of its visits), may give rise to considerable obstacles to achieving the OPCAT's purposes in practice. It may be difficult to maintain the cooperative relationship between the NPM and government officials, upon which the constructive dialogue approach of the OPCAT depends, if those same officials are subject to prosecution or judgment by the NPM. Individuals, including detainees, government personnel, or others, may also feel less willing to speak openly with the NPM if they fear their identity or the information they provide may be disclosed at some later stage (as part of a prosecution or hearing, for instance). Responsibility for processing and determining individual complaints can also create a pressing workload that may in practice overwhelm the NPM's ability to conduct a properly rigorous programme of preventive visits and monitoring.

On the other hand, having the ability to initiate formal proceedings as the result of individual complaints received during a "preventive" visit can provide additional practical incentives for authorities to take the NPM's recommendations seriously. It can also bolster the confidence of a detainee that some positive result for them personally is likely to result from taking the time to talk to the members of the visiting team.

Middle positions are also possible: for instance, nothing in the OPCAT should prevent a specialized NPM from including among its recommendations "to the relevant authorities", a recommendation that the appropriate

complaints-based institution or prosecutor investigate a given individual case.[35]

If, having carefully considered the possible problems and benefits of having a combined mandate, the State determines that a single institution is to serve both as NPM and as a forum for individual complaints, it will be necessary to create strong internal separation of functions (formally divided administrative structure, physically separate offices, separate personnel and record keeping systems, etc.), in order to ensure that the visiting-dialogue functions under OPCAT are not compromised by the other mandates. Again, the office responsible for visits could still recommend to the office responsible for individual cases that it follow up on an individual complaint with a separate investigation, where the complainant has consented to that referral.

Even more serious difficulties can arise where the government seeks to combine the preventive visiting mandate with mandates that do not have the focus on promoting human rights of persons deprived of liberty. For instance, administrative inspection regimes sometimes are charged with promoting a range of government objectives, including assessing an institution's financial performance against government directives, or promoting stricter security measures to reduce the risk of escape. While the *government* of course must find ways to balance these different, potentially conflicting interests, the NPM should always approach its work from the point of view of advancing human rights of persons deprived of liberty, as is mandated by Articles 4 and 19.

Thus, an NPM must not be given additional mandates that could conflict with the OPCAT mandate: for example, it would be inappropriate for part of an NPM's mandate to require it to push for reduction of expenditures to meet budget targets, where this could have an adverse effect on the conditions of those deprived of liberty. Similarly, it would be wrong if an NPM felt it could not propose a potentially costly but necessary improvement because it simultaneously was charged with assessing whether institutions were meeting existing financial targets.[36]

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[35] As we will see in Chapter 6, in such cases the question of how much information the NPM could share with the investigating authority would depend on the level of consent of the individuals interviewed.

[36] Concerns about the difficulty in reconciling the independent visiting function with other inspection mandates contributed to an October 2006 decision by the United Kingdom to end plans to merge the existing office of Her Majesty's Chief Inspector of Prisons (which will be designated an NPM) with several other criminal justice inspectorates. See UK Parliament, Joint Committee on Human Rights, 20th Report of Session 2005-2006, 22 May 2006, pp. 17–20; UK House of Lords, Hansard for Tuesday 10 Oct 2006, Volume No. 685, Part No. 188, column 167–187.

3.3.4 APT Recommendations

■ **The NPM should be mandated to take a "human rights" approach: to strengthen the protection of persons deprived of liberty from torture or other ill-treatment, and to aim to improve their conditions.**

■ **The government should make a practice of proactively sending draft legislation to the NPM for comment. The NPM should be able to initiate proposals for new legislation or amendments to existing legislation.**

■ **Implementing legislation must allow, and should expressly authorize, the NPM to consider international law and standards in addition to national norms, applying the standard most protective of detainees.**

■ **The institution designated as the NPM may have a broader mandate than that described by the OPCAT.**

■ **If a single institution is to serve both as an NPM and as a forum for individual complaints, strong internal separation of functions is necessary to ensure that the preventive functions under OPCAT are not compromised by the other mandate. This would normally include, for example, a formally divided administrative structure, physically separate offices, separate personnel and record keeping systems, etc.**

■ **The NPM should not combine the preventive visiting mandate with mandates not primarily about promoting the human rights of persons deprived of liberty, such as reducing expenditures or reducing the risk of escape.**

3.4 Frequency of Visits

3.4.1 Introduction

The OPCAT requires that the NPM itself have the power to determine how frequently it visits particular places of detention, based on information from a variety of sources. In general, assuming the visits are properly conducted by a sufficient number of independent experts with the necessary powers, the more frequent the visits, the more effective the visiting programme.

In reality, in most cases the overall number of visits an NPM will be able to conduct will depend on the financial and human resources allocated to it by the State.[37] This will, in turn, generally be based on some assumptions about the frequency and length of visits required for the NPM's programme to meet the requirements of the OPCAT.

For these limited purposes, this section suggests guidelines to assist in developing estimates and assessing proposed financial/human resources allocations.[38] We look first at different types of visits, then at different types of places of detention, including the factors that could lead to more or less frequent visits in respect of an individual place of detention.

3.4.2 Types of Visits

3.4.2.1 A Mixed Programme

An effective programme of preventive visits combines periodic in-depth visits and shorter, ad-hoc visits. The minimum frequency of visits to any particular place of detention will depend on the type of visit, the category of place being visited, the findings of previous visits to the place, and the presence or absence of other reliable non-governmental sources of information about the place. In general, places known to have more serious problems will need to be targeted for more frequent visits.

An example of an existing domestic visiting body (which will be designated an NPM) that carries out a programme of visits that combines in-depth and ad-hoc visits is the Chief Inspector of Prisons for England and Wales.[39] The Chief Inspector and her staff of five inspection teams conduct an announced

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[37] Appropriate processes for allocating funding to NPMs while preserving their financial independence are considered in section 4.6 in Chapter 4 below.

[38] The guidance provided in this section is based on the expertise of Barbara Bernath and Esther Schaufelberger of the APT Visits Programme.

[39] For more detail, see http://inspectorates.homeoffice.gov.uk/hmiprisons/ [visited 18 August 2006]. Note that the mandate of this office does not apply to all places of detention as defined by OPCAT; other places in the UK will be covered by different institutions also to be designated as NPMs.

full inspection visit to each prison at least once every five years. Such a full announced visit takes five working days. In between, the Inspectorate conducts unannounced follow-up visits, varying in length and number based on the gravity of problems identified. High risk places receive 'full unannounced visits', which last five days, the others receive 'short unannounced visits', which last two to four days.

Some existing national bodies undertake continuous monitoring, typically through community-based volunteer programmes that visit places of detention on a very frequent basis. While this type of visiting tends to be the most frequent, it is usually undertaken by bodies that would have difficulty meeting the other OPCAT requirements for NPMs, and so generally serve better as a source of information for the NPM, rather than a formal part of the NPM itself.

The following sections look at each type of visit in turn.

3.4.2.2 In-depth Visits

The objective of an in-depth visit is to produce a detailed analysis of the detention system, aimed at identifying root causes which lead or could lead in the future to torture or cruel, inhuman or degrading treatment (including through substandard conditions of detention) and formulating recommendations on how to address these root causes on the practical and normative levels.

The APT publication *Monitoring Places of Detention: a practical guide* describes what should take place for an effective visit.[40] Every in-depth visit should include interviews with a substantial number of detainees. Such a visit will thus last a minimum of one to three full working days depending on the number of detained persons. For instance, a reasonable estimate for in-depth visits to prisons could follow the following guidelines:

- less than 50 detainees, the visit should last at least one working day.
- 50–99 detainees it should last at least two days.
- 100–299 detainees it should last at least three days.
- more than 300 detainees it should last at least four days.

In-depth visits to police stations generally entail a visit to multiple police stations in a given area and so also require a minimum of several days' duration.

In-depth visits require a multidisciplinary team of experts, which have the required capabilities and professional knowledge to understand the detention

[40] Available at www.apt.ch.

context under consideration (see OPCAT Article 18(2)).[41] The APT recommends that a visiting team for in-depth visits consist of a minimum of three experts.

3.4.2.3 Ad-hoc Visits

Ad-hoc visits take place between in-depth visits, in order to follow-up on recommendations and to ensure that detainees have not suffered reprisals. They should be unpredictable, in order for their possibility to have a deterring effect. It is therefore important that such visits take place at random intervals and that an NPM have the right of access to any place of detention at any time (i.e. without prior notice – see discussion under section 6.1.3 below). Ad-hoc visits could also be undertaken in response to an unanticipated situation (e.g. a death in custody, a riot) or to investigate a particular theme.

Ad-hoc visits are usually shorter than in-depth visits and can be undertaken by smaller visiting teams. The APT recommends that approximately one-third of the overall time spent by an NPM carrying out visits should be allocated to ad-hoc visits.

3.4.2.4 Continuous Monitoring

The objective of continuous visits is to establish a daily (or near-daily) presence of outsiders in a place of detention, to thereby deter authorities and staff from ill-treatment, to contribute to a more humane detention environment, and to increase the likelihood of detainee reintegration to society after release. Sometimes these visitors take on the role of mediators, contributing to solving the problems of individual detainees. In order to be continuously available, bodies carrying out continuous visiting are often made up of non-expert volunteers who already reside in communities near the institution.

Conducting continuous visits alone, without drafting analytical reports and making formal recommendations, does not fulfil the mandate of an NPM (see OPCAT Article 19 (b) and (c)). The scale of continuous visiting programmes also often makes it difficult for the State to provide the resources and legislative framework necessary to meet the OPCAT requirements for expertise, independence, and privileges and immunities.

While continuous visiting schemes generally will not therefore be appropriate for designation as a formal part of the NPM itself, they can still be a very valuable *complement* to the NPM's programme of in-depth and ad-hoc

[41] The composition of the NPM is discussed in greater detail in Chapter 5 below.

visits. They can be particularly important as an external source of information for the NPM, to help it decide which places to visit more frequently, and to focus the questions it asks and the parts of a facility it inspects during its own visits.

Continuous visiting could also be recommended by the NPM as an interim measure until the recommendations following an in-depth visit are implemented. Continuous visits can also contribute to fostering links between communities and detainees and thereby easing tensions in places of detention thereby providing a firmer foundation for the constructive-dialogue-based work of the NPM.

3.4.3 Frequency for Different Places of Detention

Some categories of places of detention by nature carry a higher risk of ill-treatment and so should receive an in-depth visit, on average, at least once per year (with the constant possibility of ad-hoc visits in between), for instance:

- police stations with known problems,
- remand or pre-trial detention centres,
- places with high concentrations of especially vulnerable groups.

Police stations are particularly important places in terms of prevention of torture and other ill-treatment. The pressure on law enforcement officials to obtain information from detainees here is perhaps at its highest. The detainee turnover rate is usually very high. The transient nature of the detainee population may mean there is little sustained or organised pressure for improvement of conditions. Yet, because the total number of police stations is very large in most countries, it may be difficult for an NPM to visit all police stations in the country once a year. The APT therefore recommends that NPMs, as a strict minimum, conduct one in-depth visit per year, with ad-hoc visits in between, to each **police station with known problems**, while at the same time carrying out in-depth and ad-hoc visits to other randomly selected police stations during the course of the year.

Frequent visits to **pre-trial detention centres** and **remand prisons** are important not only for prevention in the place itself, but also because such places can be the most important source of information about the conditions and treatment in the police stations from which the remand prisoners have come. That information is essential to allow the NPM to determine which police stations to visit out of the hundreds or thousands in the country. For this reason, remand prisons and pre-trial detention centres should be visited

no less frequently than once per year, with the continuous possibility of ad-hoc visits in between.

Places of detention with high concentrations of **especially vulnerable** categories of detainee should also receive an in-depth visit at least once a year (again with the possibility of ad-hoc visits in between). Such places would normally include specialized centres or places with a de facto high concentration of migrants, women, juveniles, psychiatric patients, national, ethnic, religious or linguistic minorities, indigenous peoples, or persons with disabilities. The special risks such groups face could be based on overt discrimination, or on the failure to provide the specific measures that members of the group may need to meet their basic needs.[42]

Ideally, **other categories of place of detention** (including prisons for instance) would also receive visits on at least an annual basis. However, as a starting point, these other places of detention in the country should on average receive an in-depth visit no less than once every three years, with the continuous possibility of ad-hoc visits to be carried out in between.

A variety of factors affecting individual places of detention need to be considered by the NPM to determine the actual frequency of visits it will undertake to these other categories of places of detention. The NPM should analyze information gathered from a variety of sources in order to determine the frequency of its visits to these places (previous visits, interviews with detainees who were previously at the place, research, news reports, etc.).

Based on such information, any place known or suspected to have significant problems with torture or other ill-treatment, or known to have poor conditions of detention relative to other institutions in the country, should also receive in-depth visits at least annually, with the continuous possibility of ad-hoc visits between, regardless of the type of institution. Indeed, the UN Special Rapporteur on Torture has stated that NPMs "should carry out visits to larger or more controversial places of detention every few months, and in certain cases at even shorter intervals."[43]

In other places of detention, some factors could be a reasonable basis for less frequent visits, such as:

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[42] See, for example, Human Rights Committee. *Hamilton v. Jamaica*, Communication No. 616/1995, U. N. Doc. CCPR/C/66/D/616/1995 (28 July 1999), paragraph 8.2.

[43] UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 71.

- continuous monitoring by other domestic visiting bodies (not themselves NPMs) that have a proven track-record, and the ability and obligation to provide information to the NPM about particular places of detention; or
- a previous in-depth visit by the NPM to the place identified no serious problems or risk of torture or ill-treatment, good conditions of detention, and received exemplary cooperation from officials.

In such limited circumstances, in respect of a place other than police stations with known problems, remand or pre-trial detention centres, places with high concentrations of especially vulnerable groups, or other places known or suspected to have significant problems, an NPM might decide to extend the interval between in-depth visits to the particular place. In no case should any official place of detention receive an in-depth visit less frequently than once every five years under any circumstances.

Further, the OPCAT does not contemplate that geographic isolation of the place of detention or limitations on the economic, logistical or human resources of the NPM could be used by a State to justify less frequent visits to a place of detention than would otherwise be required. In principle, the protection the NPM conveys upon persons deprived of liberty through its visits should not vary depending on where in the territory they are located. In Chapter 10 we will consider possibilities for decentralization of the NPM's operations as a means of addressing the challenge of geographically dispersed places of detention in a State.

3.4.4 APT Recommendations

Any estimate of the frequency of visits to be undertaken by the NPM should be based on a programme that:

- **combines longer in-depth visits (one to four days, by a multidisciplinary visiting team of at least three experts), with shorter ad-hoc visits (at random intervals, capable of being done by smaller teams);**
- **allocates approximately one-third of the overall visiting time of the NPM to ad-hoc visits;**
- **on average, carries out an in-depth visit to each place within the following categories at least once per year, with the continuous possibility of ad-hoc visits in between:**
  - **— police stations with known problems plus a random sample of other police stations,**
  - **— remand or pre-trial detention centres,**
  - **— places with high concentrations of especially vulnerable groups,**
  - **— any other place known or suspected to have significant problems with torture or other ill-treatment, or known to have poor conditions relative to other institutions in the country;**
- **on average, carries out an in-depth visit to each other place at least once every three years (with ad-hoc visits in between), but preferably more frequently;**
- **never carries out in-depth visits to any official place of detention less frequently than once every five years, and at such an extended interval only on the basis of relevant information about the place in the interim.**

The OPCAT does not recognize geographic isolation of the place of detention or state-imposed limitations on the economic, logistical or human resources of the NPM as a basis for a place of detention to receive fewer visits than would otherwise be required.

Independence

4

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

(…)

4. When establishing national preventive mechanisms, States shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights ["Paris Principles"].

4.1 Introduction

Visits by national preventive mechanisms cannot effectively prevent torture or other ill-treatment unless the NPMs are truly independent. Article 18(1) of the Optional Protocol is the main provision requiring States to take measures to ensure the functional independence of NPMs.

Article 18(4) refers to the United Nations "Principles relating to the status of national institutions for the promotion and protection of human rights" (also known as the "Paris Principles"), which themselves include additional detail about measures to safeguard the independence of such institutions.[44] However, the Paris Principles were originally designed for general purpose human rights institutions with broad mandates (such as national human rights commissions) and so some aspects of the Principles do not translate into the OPCAT environment, while a few others are superseded by more detailed provisions in the OPCAT text itself.

We examine the various aspects of functional independence in the sections that follow.[45]

[44] "Principles relating to the status and functioning of national institutions for protection and promotion of human rights", UN General Assembly resolution A/RES/48/134 (Annex) of 20 December 1993 ("Paris Principles").

[45] See also the International Council on Human Rights Policy and Office of the High Commissioner for Human Rights publication, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva, 2005) [hereinafter "Assessing NHRI"]; and UN Centre for Human Rights Professional Training Series No. 4, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (Geneva, 1995) [hereinafter "NHRI Handbook"].

4.2 Independent Basis

Paris Principles

A2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence

The independence of the NPM will be undermined if the executive government has the legal authority to dissolve or replace it, or to alter its mandate, composition and powers, at will. This is true even if the executive does not intend ever actually to exercise such authority, since it is the vulnerability itself that negates the NPM's independence. For this reason, the NPM must be constituted by a constitutional or legislative text that describes certain key elements, including the appointment process, terms of office, mandate, powers, funding and lines of accountability.[46] The added independence conferred by providing the basis in a constitution rather than ordinary legislation means that a constitutional basis will generally be preferable to an ordinary legislative basis.[47]

This also means that the law creating the NPM should not place the institution or its members under the institutional control of a ministry or minister of government, cabinet or executive council, President or Prime Minister. The only authority with the ability to alter the existence, mandate or powers of the NPM should be the legislature itself.[48] The law should expressly provide that ministers and other public officials may not issue instructions, directly or indirectly, to the NPM.[49]

4.3 Independent Members and Staff

The members of the NPM must be experts that are personally and institutionally independent from the State authorities.

NPMs generally should not include individuals who are presently occupying (or on short-term leave from) active positions in the criminal justice system. While this is particularly true for active prosecutors or defence attorneys,

[46] See Assessing NHRI, ibid., pp. 12–14 and NHRI Handbook, ibid., pp. 10–11.
[47] See Assessing NHRI, ibid., p. 13.
[48] See Assessing NHRI, ibid., pp. 12–14 and NHRI Handbook, op.cit., pp. 10–11.
[49] Assessing NHRI, ibid., p. 12.

it also applies to sentencing supervision judges and other judges.[50] Conflicts of interest, real or perceived, are very likely to arise where a member of the NPM is simultaneously discharging multiple roles in respect of a prisoner/detainee, class of prisoners/detainees, institution, or officials.[51]

Obviously, members of NPMs should also be personally independent from the executive government in the sense that they should have no personal connections with leading political figures in the executive government, or with law enforcement personnel, such as political allegiances, close friendships, or pre-existing professional relationships. Even if the proposed member would in fact act in an impartial manner, if she or he could reasonably be *perceived* as being biased, this could seriously compromise the work of the NPM.

The NPM should have authority to choose and employ its own staff based on requirements and criteria it alone determines.[52] The International Council on Human Rights Policy and the UN Office of the High Commissioner for Human Rights state that the staff of national human rights institutions "should not automatically be seconded or re-deployed from branches of the public service."[53] To ensure operational autonomy, the NPM should also have exclusive authority to develop its own rules of procedure without external modification.[54]

The Paris Principles suggest that, generally, national human rights institutions might include representatives of "Parliament" and "Government departments". However, in the context of the OPCAT, the inclusion of parliamentarians who are members of the governing party, or other government representatives (whether from the political level or departmental level), in the NPM would be inappropriate, even in an advisory capacity. First, the OPCAT requires that the NPM and State authorities enter into a dialogue with one another about possible measures to implement the NPM's recommendations.[55] Clearly, then, it was not contemplated that government authorities would themselves participate in the discussions and deliberations within the NPM that lead to the recommendations. Second, the work of the NPM will inherently involve "confidential information", including sensitive statements from individual detainees, which Article 21(2) of the OPCAT specifies is to

[50] For a more detailed discussion of the situation of judicial inspectorates, see section 10.2.6 in Chapter 10 below.
[51] See Assessing NHRI, ibid., pp. 12-14.
[52] Ibid., p. 13.
[53] Ibid., p. 13.
[54] See NHRI Handbook, op.cit., p. 11, paragraph 71.
[55] OPCAT Article 22.

be privileged from disclosure to the government. These considerations, taken together with the specific functions of the NPM as distinct from other types of more general national human rights institutions, preclude the presence of government representatives in any capacity within the NPM.

4.4 Appointment Procedure

Paris Principles

B3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Legislating appropriate procedures for the appointment of members can play a particularly important role in ensuring independence. The law establishing the NPM should define:

- method of appointment,
- criteria for appointment,
- duration of the appointment,
- immunities and privileges,
- dismissal and appeals procedure.

The decision as to whom to appoint should not be directly decided by the executive branch of government, though this does not preclude formal appointment by the head of state after the substantive decision has been taken by a separate body.[56] The process should mandate consultation with or direct involvement of a broad variety of civil society groups such as non-governmental organisations, social and professional organisations, universities, and other experts. Creation of a special appointment body including representatives from these communities is one possibility. Another is a consultative process led by a Parliamentary Committee (though this is only satisfactory where there is an effective institutional and political separation between the parliament and the executive government).[57] In some circumstances, a consultative process led by an independent judicial appointments commission could also be an option.

[56] Assessing NHRI, op.cit., p. 14.
[57] Ibid.

The International Council on Human Rights Policy and the UN Office of the High Commissioner for Human Rights have suggested that for most national human rights institutions "five years is a reasonable period within which members can be effective but not too influenced by concerns about future job prospects."[58] As another example, draft OPCAT implementation legislation in Argentina specifies four-year renewable terms for each of the ten NPM members.

Staggering the end-date of terms ensures that there is continuity in the membership, as the situation where all of the members' terms might expire at once and the membership is entirely new is avoided. Staggered terms are used for this reason in the membership of the International Subcommittee.

During the fixed term of office, an individual should have strong security of tenure; in other words, members of the NPM should be subject to removal from office, if at all, only by vote of a large majority (perhaps three-quarters) of the membership of the NPM itself (where it has multiple members), or of the parliament (where the NPM has only one or two members), and then only where there is evidence establishing gross misconduct.

4.5 Privileges and Immunities

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. (…)

Article 21

2. Confidential information collected by the national preventive mechanism shall be privileged. (…)

Article 35 of the OPCAT requires that NPMs "be accorded such privileges and immunities as are necessary for the independent exercise of their functions". In this regard, sections 22 and 23 of the *Convention on the Privileges and Immunities of the United Nations*,[59] which apply directly to the International

[58] Ibid. pp. 12.

[59] *Convention on the Privileges and Immunities of the United Nations*, adopted by the General Assembly on 13 February 1946, entry into force 10 February 1949.

Subcommittee,[60] should serve as a model for similar privileges and immunities for the members of each NPM, including:

- During the period of membership of the NPM and in connection with their NPM work:
  - — Immunity from personal arrest or detention, and from seizure of their personal baggage;
  - — Immunity from seizure or surveillance of papers and documents;
  - — No interference with communications.
- During and after the period of membership:
  - — Immunity from legal actions in respect of words spoken or written or acts done in the course of performance of their duties for the NPM.

These privileges and immunities must apply personally to each member of the NPM. However, as they are intended to secure the independence of the NPM and not for the personal benefit of the member, the full NPM membership, on a clear majority vote (for instance, 2/3 or 3/4), could be given the ability to waive the immunity in individual cases under defined circumstances.

The Czech Public Defender of Rights, which has been designated the Czech NPM, provides a relevant national law example:

> Criminal proceedings may not be instigated against the Defender without the approval of the Chamber of Deputies [Parliament]. Should the Chamber of Deputies refuse to give their approval, such action against the Defender shall be impossible for the duration of his/her term of office. [61]

[60] The second sentence of OPCAT Article 35 reads: "Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention."

[61] Czech Law on the Public Defender of Rights (349/1999 Coll.) as amended 381/2005 Coll. in effect 1 January 2006, §7(1), at http://www.ochrance.cz/. See also the Constitution of the Republic of Estonia, §145: "Criminal charges may be brought against the Legal Chancellor [to be designated NPM] only on the proposal of the President of the Republic, and with the consent of the majority of the membership of the Riigikogu [Parliament]". Article 211 of the Polish Constitution provides that the Commissioner for Citizens' Rights (to be Poland's NPM) "shall not be held criminally responsible nor deprived of liberty without prior consent granted by the [Parliament]." It further provides that the Commissioner "shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings", in which case "the Marshal of the [Parliament] shall be notified forthwith (…) and may order an immediate release".

Examples exist also of immunities that continue after the end of the term in office. For instance, in respect to acts and omissions relating to the exercise of their functions (including access to prisoners), members of a delegation of the International Committee of the Red Cross that are citizens of the host State receive immunity, even after they have left the service of the delegation, from any form of legal or administrative process, including personal arrest or detention, and from being called as a witness or being required to give evidence.[62]

As regards the protection of information held by the NPM collectively or its members individually, Article 21 of OPCAT reinforces the general privileges and immunities mentioned in Article 35. Information that is "privileged" under national laws is not subject to compelled disclosure to anyone, including executive or judicial authorities. In other words, Article 21 requires the State to ensure that national law does not permit search or seizure of, or otherwise compel disclosure of, confidential information held by the NPM. An exception to general search and seizure powers under criminal, civil, or administrative law must therefore be enacted, if it does not already exist, for the NPM.

The OPCAT itself does not expressly provide for exceptions to the privilege described in Article 21. The strongest privileges under national laws are usually those accorded to the executive government for "state secrets", which are absolutely immune from disclosure. The next-strongest and most common form of privilege under national law is the lawyer-client privilege. Here only extremely limited exceptions are permitted: for instance, a judge may set aside privilege for a document that the lawyer prepared for the sole purpose of assisting the client to commit a crime, or in rare circumstances where an accused person proves that the information is the only source of information likely to allow him to successfully defend against criminal prosecution.[63]

In principle and based on the OPCAT text, there should be no exceptions to the privilege attaching to confidential information collected by the NPM through the observations it makes and interviews it conducts during its visits. In order for the NPM to function effectively, the persons it interviews must be confident that the information they give the NPM will not be subsequently disclosed. Permitting fishing expeditions by lawyers for government officials into the information collected by the NPM, on the premise it may contain

[62] Article 10(11) of the Standard Proposed ICRC Headquarters Agreement, as described in Gabor Rona, "The ICRC Privilege Not to Testify: Confidentiality in Action" (2002), International Review of the Red Cross No. 845, p. 207–219. See also New Zealand Ombudsmen Act 1975, s. 26 (the Ombudsman is one of several bodies to be designated as NPM for New Zealand).

[63] See, e.g., *R. v. McClure*, [2001] 1 S.C.R. 445 (Supreme Court of Canada).

information about crimes, could quickly and severely undermine the protection of Article 21. As the NPM's main purpose is to gather and use information about alleged ill-treatment, it might be all too easy for government officials to breach the privilege and confidentiality of the NPM on purported grounds of "law enforcement".

A further issue with respect to privilege is the role of the person providing the information. In lawyer-client privilege, it is often said that the privilege belongs to the client, not the lawyer, so that if the client freely consents to disclosure of the information, he or she can waive the privilege notwithstanding the position of the lawyer. Given the function of the NPM and the inherently vulnerable position of persons deprived of liberty, however, it is clear that this aspect of lawyer-client privilege cannot be transposed to the OPCAT context. While in accordance with Article 21(2), personal information cannot be disclosed by the NPM without the consent of the individual involved, it does not follow that an individual can *require* the NPM to disclose information about him or her to third parties. In such cases, both the NPM and the individual would have to consent to disclosure.

Article 7 of the Czech law on the Public Defender of Rights again provides an example of national implementation:

> (4) State administration bodies, including bodies responsible for criminal proceedings, are authorised to consult the files of the Defender or may take away such files only on a legal basis and with the approval of the Defender. Should the Defender refuse to grant approval, the approval of the Chair of the Chamber of Deputies is required.

Finally, the issue of confidentiality and privilege further underscores the problems that could arise if the body designated as an NPM simultaneously prosecutes or adjudicates individual cases on behalf of particular victims or against particular violators.[64] The disclosure normally required for such hearings to be fair to the complainant and the accused violator will generally undermine the cooperative/confidential approach to the NPM's visiting and interviewing function.

We return to Article 21 and protection of confidential information and personal data from another perspective, under section 6.2 of Chapter 6 below.

[64] This issue was discussed in greater detail in section 3.3.3 in Chapter 3 above.

4.6 Financial Independence

Article 18

(…)

3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms. (…)

Paris Principles

B2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

Article 18(3) obliges States Parties to provide the necessary resources for the functioning of the national preventive mechanisms. In line with the Paris Principles, financial autonomy is a fundamental requirement; without it, a national preventive mechanism would not be able to exercise its operational autonomy, nor its independence in decision-making. Therefore, as a further safeguard to preserving the independence of the national preventive mechanisms, the source and nature of their funding should be specified in the implementing law.[65]

The law should also specify the process for the allocation of annual funding to the NPM, and that process should not be under direct executive government control. The International Council on Human Rights Policy (ICHRP) and the UN Office of the High Commissioner for Human Rights (OHCHR) suggest a process for national human rights institutions that could serve NPMs well:[66]

- the NPM would draft its own annual budget;
- the global amount of the funding sought under that budget would then be submitted to a vote in Parliament;
- within the allocation made by the Parliament, the NPM would be entitled to determine its spending on particular items.

[65] NHRI Handbook, op.cit, p. 11, paragraph 74.
[66] Assessing NHRI, op.cit, p. 13 and NHRI Handbook, ibid., p. 11.

The process suggested by the ICHRP and OHCHR underscores that the NPM budget should not be merely an item in a larger ministry budget. Financial accountability should be through regular public financial reporting, and an annual independent audit.

How might the NPM go about determining the amount of its request? How can a government estimate the amounts necessary for the start-up period until the NPM can present its first budget request? The OPCAT requires each State Party to make available the resources necessary for its NPM to function effectively. This means that financial and human resources available to the NPM must make possible visits to all places of detention at intervals consistent with the criteria described in section 3.4 in Chapter 3 above.

Budgeting for an NPM will thus depend on the following country-specific variables:

- number of places of detention,
- types of places of detention,
- density of detainee population (number of detainees in each place),
- distances required to travel to carry out visits.

In developing budgets based on predicted visiting frequency, it is also important to consider that NPMs will generally require staff and in some cases outside experts, and will require additional time before the visit (for preparation) and after the visit (for analysis and drafting of reports).

Countries faced with a large geographic area with places of detention dispersed at long distances can reduce the effect of travel costs on the NPM budget by having geographically-dispersed branch offices or multiple NPMs to complement the central NPM office, and/or by ensuring that the membership of the overall NPM is large and diverse enough to allow for "sub-teams" based in different regions.[67] States still need to budget for periodic meetings of representatives from all NPMs within the country, though again these costs could be reduced through teleconferencing or other means.

[67] Options for organizational structure of NPMs are discussed in more detail in Chapter 10 below.

4.7 APT Recommendations

■ **The NPM must be based in a constitutional or legislative text that describes key elements, including the appointment process and criteria, terms of office, mandate, powers, funding, and immunities and privileges, and dismissal and appeals procedures. A constitutional basis is generally preferable to a basis in ordinary legislation.**

■ **No member or members of the executive government should have the legal authority to dissolve or replace the NPM, or alter its mandate, composition, or powers, at will.**

■ **The law should expressly provide that ministers and other public officials may not issue instructions, directly or indirectly, to the NPM.**

■ **The law should require that each member of the NPM be an expert that is personally and institutionally independent from the State authorities.**

■ **Parliamentarians who are members of the governing party, representatives of the political leadership of the government, and representatives of government departments should not be eligible to be members of the NPM, even in a non-voting capacity.**

■ **The NPM should have authority to choose and employ its own staff based on requirements and criteria it alone determines.**

■ **The NPM should have exclusive authority to develop rules of procedure.**

■ **The appointment procedure should mandate consultation with civil society.**

■ **The law should mandate fixed terms of five years. During the time in office, members should be subject to removal, if at all, only by vote of a large majority of the NPM membership or of a large majority of the parliament.**

■ **A system of staggered terms can be used to help ensure continuity.**

■ **The law should provide immunities and privileges for NPM work, including immunity from personal arrest or detention or seizure or surveillance of baggage, documents, communications, and permanent immunity from legal actions for things done in the course of performance of NPM duties.**

■ **The law should provide for an enforceable privilege against disclosure (to government, the judiciary, or any private citizen or organisation) of information held by the NPM.**

■ **The source and nature of NPM funding should be specified in the implementing law, including the process for allocation of annual funding. Parliament should approve a global annual budget, based on a request directly from the NPM, which the NPM is then able to spend without prior approval from executive government officials.**

Membership

5

5.1 Expertise

Article 18

(…)

2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. (…)

For an NPM to be effective, it is not enough that its members are independent from the government, the judiciary, and the authorities responsible for places of detention. As Article 18 explicitly requires, the members must each have relevant expertise and the NPM overall must bring together the required variety and balance of different fields of professional knowledge. The UN Special Rapporteur on Torture has stated that it is "of the utmost importance that States Parties … ensure membership from different professions" in the NPM.[68] States should therefore consider identifying the appropriate range of expertise, and recognising the need for balance, in the implementing legislation itself.

A mix of the following capabilities and professional backgrounds should be included:

- lawyers (especially with expertise in national or international human rights, criminal law, refugee and asylum law, and in some cases humanitarian law),
- doctors (including but not limited to forensic specialists),
- psychologists and psychiatrists,
- persons with prior professional experience regarding policing, administration of prisons and psychiatric institutions,
- NGO representatives,
- persons with prior experience visiting places of detention,
- persons with prior experience working with particularly vulnerable groups (such as migrants, women, juveniles, persons with physical or mental disabilities, indigenous peoples, and national, ethnic, religious or linguistic minorities),
- anthropologists,
- social workers.

[68] UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 70.

The NPM's own expertise can be supplemented from time-to-time by engaging outside experts. The law should expressly permit the NPM to engage such experts and for those experts (and regular NPM staff) to accompany the NPM members on their visits. However, this cannot reduce the need to have an adequate range of expertise within the voting membership of the NPM itself, as the members will be the ultimate decision-makers.

The OPCAT contemplates that the NPM will work for improvements through a process of recommendations and persuasive dialogue, as opposed to binding order-making powers. Therefore, other capabilities necessary for effective NPM membership are moral authority and respect within society. Members should also have demonstrated a personal commitment to the prevention of torture and ill-treatment and improvement of conditions in places of detention.

5.2 Gender Balance and Ethnic and Minority Representation

Article 18

2. (…) They shall strive for a gender balance and adequate representation of ethnic and minority groups in the country. (…)

The principle articulated in Article 18 is important as an end in itself (promoting equality in public institutions), but it is also extremely important to ensuring the NPM will have the knowledge and the ability to gather the information necessary to make effective recommendations.

Sensitivity to and first-hand knowledge of the cultural, religious, and material needs of different groups within the society helps to ensure that NPM members are able to understand how an institution is succeeding or failing to meet the needs of detainees from those groups. Thus, gender balance and representation of ethnic and minority groups, and persons with disabilities, in the NPM will help it to fulfil its mandate more effectively. Having a diversity of linguistic abilities in the membership of the NPM is also important, as NPM members will generally obtain better information from interviewees if they can communicate directly (linguistic diversity among NPM members can also help reduce the costs and inconvenience of relying on interpreters).

Detainees and prisoners may have varying levels of comfort in talking about what may be extremely intimate issues with persons of another gender.

For instance, a female detainee may be much more open about sexual violence or harassment if she is interviewed by a woman. Members of a given ethnic or minority group may be more comfortable discussing their treatment with someone who is from the same group. They may be inherently suspicious of the motives of a person who is from another group.

For these reasons, the objective stated in Article 18 should be incorporated in the domestic implementing legislation and in the appointment process for NPM membership.

5.3 APT Recommendations

- **The implementing legislation should mandate a mix of relevant expertise for the membership of the NPM, including: lawyers, doctors, psychologists and psychiatrists, persons with prior professional experience regarding policing, administration of prisons and psychiatric institutions, NGO representatives, persons with prior experience visiting places of detention, persons with prior experience working with particularly vulnerable groups, anthropologists, and social workers.**
- **The law should expressly permit the NPM to engage outside experts and for those experts (and regular NPM staff) to accompany the NPM members on their visits.**
- **The law should set the objective of the NPM membership having a gender balance and adequate representation of ethnic and minority groups in the country, including persons with disabilities.**

Guarantees and Powers in Respect of Visits

6

6.1 Access to All Places of Detention

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;

(…)

(c) Access to all places of detention and their installations and facilities;

(…)

(e) The liberty to choose the places they want to visit and the persons they want to interview; (…)

The broad scope of the definition of "places of detention" and the basic requirement that such places be open to visit by NPMs under the OPCAT were explained in Chapter 3 above. Article 20 of the OPCAT supplements the basic right of the NPM to visit these places with additional detail about its guarantees and powers.

6.1.1 Access to All Parts of Any Place of Detention

Article 20(c) requires the State authorities to provide the national preventive mechanism access to all parts of any place of detention. This would include, for example, living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters. By visiting all areas within a place of detention, the national preventive mechanism can obtain a full impression of the conditions of detention and treatment of persons deprived of their liberty.

Walking through the entire facility also allows NPM members to visualise the overall layout of the detention facilities, physical security arrangements, architecture, and other structural elements that play an important part in the daily life of those persons deprived of their liberty. The guarantee of full access also helps prevent authorities from keeping certain detainees away from the NPM by hiding them away from the normal detention spaces.

Where an exception to a right of access was intended, the OPCAT explicitly provides for it (see Article 14(2) vis-à-vis the international Subcommittee, for instance). The OPCAT provides no exception to the right of the NPM to visit any part of the place of detention, including on grounds of security or safety. Domestic legislation should make clear that no part of the place of detention should ever be hidden from scrutiny by the NPM for any reason.

6.1.2 Choice of Places to Visit

Article 20(e) emphasizes that the NPM must have the freedom to choose the places it will visit. This is one of the reasons that the OPCAT requires that the NPM have the right to be provided with accurate and up-to-date information detailing the number of persons deprived of their liberty in each place of detention, as well as the overall number of places and their location in accordance with Article 20(a). The right to access this information should therefore be expressly provided by the implementing legislation. In practice, it is only by analyzing this information, together with information from other sources such as NGOs and newsmedia, that the NPM will be able to design an effective programme of visits

6.1.3 Unannounced Visits

It is also evident that the NPM must have the power to undertake at least some visits without prior notice if the visits are to serve their purpose of effectively preventing torture and other ill-treatment. For the longer in-depth visits, prior notice to the authorities will often contribute to a more productive visit. However, undertaking shorter unannounced visits is the only way the NPM can be sure to see a true picture of day-to-day reality of places of detention. The possibility of unannounced visits is also essential to the deterrent potential of NPM visits.

The UN Special Rapporteur on Torture, who also visits places of detention in the course of country missions, has elaborated as follows:

> Unannounced visits aim to ensure, to the greatest extent possible, that the Special Rapporteur can formulate a distortion-free picture of the conditions in a facility. Were he to announce in advance, in every instance, which facilities he wished to see and whom he wished to meet, there might be a risk that existing circumstances could be concealed or changed, or persons might be moved, threatened, or prevented from meeting with him. This is an unfortunate reality that the Special Rap-

porteur faces. In fact, such incidents have even occurred where he has been delayed in entering a facility by as little as 30 minutes.[69]

Reading Article 20 in the context of the OPCAT as a whole supports the conclusion that the NPM must have authority to undertake unannounced visits. For instance, Article 20 on the visiting powers of NPMs parallels closely Article 14 on the visiting powers of the international Subcommittee, with one significant difference. Article 14(2) exhaustively enumerates the exceptional and limited grounds on which a State may object to a visit by the Subcommittee to a particular place of detention ("urgent and compelling grounds of national defence, public safety, natural disaster, or serious disorder in the place to be visited."). Even in such circumstances, Article 14 expressly provides that any objection can only be temporary. However, Article 14(2) has no parallel in Article 20 vis-à-vis the NPM. The reasonable inference is that no circumstances permit even a temporary objection by the government to any visit by the NPM; it is entitled to access at any time of day or night.

Relevant governmental and expert bodies also have concluded that effective NPMs must have authority to undertake unannounced visits:

- In 2006, the UN Special Rapporteur on Torture, addressing the entry into force of the OPCAT, said that State Parties "agree to accept unannounced visits to all places of detention by … one or more independent national mechanisms for the prevention of torture at the domestic level."[70]
- In 2006 the Joint Committee on Human Rights of the United Kingdom Parliament, citing agreement by the government, affirmed that "the power of unannounced inspection is a vital safeguard" to the work of an NPM under the OPCAT.[71]
- In 2005, the issue of visits to police stations in the framework of the OPCAT arose in the course of the UN Committee against Torture's examination of the first periodic report of Albania under the Convention against Torture. Albania had ratified the OPCAT in 2003. Committee member Dr. Rasmussen, referring expressly to the OPCAT, emphasized that to be truly effective, such visits must be conducted by independ-

[69] UN Special Rapporteur on Torture, 2006 Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/6 (23 December 2005), paragraph 24.

[70] UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 68. See also paragraph 75.

[71] UK Parliament, Joint Committee on Human Rights, 20th Report of Session 2005-2006, 22 May 2006, pp. 17–20.

ent experts, take place regularly, and be unannounced.[72] This point was picked up by the full Committee in its Conclusions and Recommendations, expressing concern about the "absence of visits to police stations by the Office of the Ombudsman on a regular and unannounced basis" and recommended that Albania "allow visits to police stations by the Office of the Ombudsman, as well as by other independent bodies, on a regular and unannounced basis."[73]

- In his December 2005 report, the UN Special Rapporteur on Torture, noting the similarity between the standards applicable to his visits to places of detention and those under the Optional Protocol, stated "it is axiomatic that freedom of inquiry in places of detention implies: unimpeded access, with or without prior notice, to any place where persons may be deprived of their liberty."[74] He emphasized that "while in some cases he may indicate to authorities in advance which facilities he intends to visit, access to all places implies that he will also conduct visits with little or no prior notice."[75]
- In 2006, the Czech Republic ratified the OPCAT after amending the law on the Public Defender of Rights (Ombudsman) to confer authority to undertake a system of preventive visits to places of detention, including the authority to enter all areas of such places "without prior warning".[76]

One of the institutions in the Republic of Korea under consideration as a possible NPM is the National Human Rights Commission. Its constituting legislation provides that Commissioners and/or their expert visiting teams are to be given "immediate" access to a detention or custody facility upon presentation of identification of their authority to carry out the visit.[77]

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[72] UN Committee against Torture, Summary Record of the 649th meeting held 10 May 2005, UN Doc. CAT/C/SR.649 (19 May 2005), paragraph 26.

[73] UN Committee against Torture, Conclusions and Recommendations on the initial report of Albania, UN Doc. CAT/CO/34/ALB (May 2005), paragraphs 7(l) and 8(l). See also Conclusions and Recommendations on the initial report of Bahrain, UN Doc. CAT/C/CR/34/BHR (21 June 2005), paragraphs 6(j), 7(g) and 9. See also Conclusions and Recommendations on the second periodic report of Sri Lanka, UN Doc. CAT/C/LKA/CO/2 (15 December 2005), paragraphs 11 and 18(b).

[74] UN Special Rapporteur on Torture, 2006 Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/6 (23 December 2005), paragraphs 22 and 23.

[75] Ibid. paragraph 24.

[76] See Czech Law on the Public Defender of Rights (349/1999 Coll.) as amended 381/2005 Coll. In effect 1 January 2006, §1(2),(3),(4), §15(1), and §21a, at http://www.ochrance.cz/.

[77] National Human Rights Commission Act of the Republic of Korea, Article 24(3). Note that other parts of this article would appear to be inconsistent with OPCAT requirements, such as the express provision that staff of the facility may be present during interviews with detainees.

6.2 Access to Information

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention; (…)

The information to which the NPM is entitled under Article 20(a), about numbers and locations of detainees and places of detention, is essential for the NPM to be able to plan its visiting programme. The range of information covered by Article 20(b) is extremely broad, including for example: aggregate and individual medical records, dietary provisions, sanitary arrangements, schedules (including records of time spent in cells, exercise, indoor/outdoor, work, etc.), suicide watch arrangements, disciplinary records, and so on.

Article 21

(…)

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Obviously, for the NPM to be able to carry out its functions it must have access to specific, potentially very sensitive, information about individual detainees. Individual medical information would be perhaps the most obvious example. It is also possible that some of the information the NPM receives about other persons at a place of detention, such as employees or NGO members, could also be of a personal rather than a professional nature. In many States all such information is, or should be, generally protected against disclosure pursuant to legislation for the protection of privacy.

Because the OPCAT clearly requires that the NPM itself have access to this information, States must review any existing legislation for the protection of

personal data and if necessary enact exemptions to allow the NPM to access and use the information. In some cases existing exceptions for public agencies may already clearly cover the NPM; in others, new specific provision should be made for the NPM to collect, use and protect such personal data.

Protection by the NPM of personal data in accordance with OPCAT Article 21 is important to ensure that the work of the NPM does not violate the privacy rights of individuals and to ensure that all individuals feel they can be open with the NPM (see section 4.5 above and 6.3 below).

However, the legislation should also be sure to permit the NPM to disclose or publish data about individuals where the individual gives express consent. The government should not be permitted to hide behind rhetoric about "personal privacy rights" in order to block release of data that both the NPM and the person concerned would otherwise make public. This must also be possible in case the individual being interviewed requests the NPM to refer his or her specific complaint to another institution such as a prosecutor or human rights tribunal.[78] The NPM should also have an unrestricted ability to publish aggregate information derived from personal data, and to publish relevant information in any other matter that renders the personal data truly anonymous.

6.3 Access to People

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(…)

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose (…) the persons they want to interview; (…)

Article 20(d) grants the national preventive mechanisms the power to conduct private interviews with persons of its choice. This provision is fundamental to

[78] See section 7.1 below concerning NPM recommendations.

guarantee that the NPM get a more complete view of the situation in a detention facility by hearing from those directly affected.

The possibility of interviewing in private is essential to allow people deprived of their liberty to speak more openly with less fear of reprisals. The UN Special Rapporteur on Torture has stated that "the right to interview detainees in private, i.e. without any prison official being able to see or hear the conversation" is one of the most important aspects of preventive visits.[79] "Otherwise", he states, "detainees cannot develop the trust in the inspection team that is absolutely essential for receiving truthful information."[80]

Thus, implementing legislation should recognize the right of the NPM to interview detainees and others without any eavesdropping or other surveillance by officials, inmates, or anyone else. Such eavesdropping or surveillance should be strictly prohibited. The only exception should be where the visiting team itself makes a specific request to conduct an interview out of hearing but within sight of guards, for safety reasons.[81]

The visiting team should not be required to accept places chosen by the authorities for interviews; it should have the liberty to choose any sufficiently secure place it considers appropriate.[82] Where the staff at the place of detention propose to restrict interviews to protect the personal safety of the NPM team, such advice should be given careful consideration; nevertheless, NPM members should ultimately have the right to proceed with the interview if they consider the risk, if any, to their personal safety to be acceptable.[83]

The UN Special Rapporteur on Torture has also stressed the importance of NPMs having the possibility to carry out thorough and independent medical examinations of detainees with their consent.[84]

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[79] Report of the UN Special Rapporteur on Torture, UN Doc. A/61/259 (14 August 2006), paragraph 73.

[80] Report of the UN Special Rapporteur on Torture, UN Doc. A/61/259 (14 August 2006), paragraph 73.

[81] See APT, *Monitoring Places of Detention: a practical guide* (Geneva, 2004), p. 80.

[82] See APT, *Monitoring Places of Detention: a practical guide*, ibid., p. 80. The choice of location will influence the attitude of the person deprived of liberty. Locations that would be likely to equate the visitor with the staff of the institution in the eyes of the detainee (for instance, administrative offices) are to be avoided. Visitors should be able to choose places likely to be secure from eavesdropping. Living quarters of the detainee, visiting rooms, courtyards, and libraries are among the possible locations.

[83] See APT, *Monitoring Places of Detention: a practical guide*, ibid., p. 81. The reason for this rule is that concerns for the personal safety of the visitors can otherwise easily be used as an excuse to deny access to given detainees.

[84] Report of the UN Special Rapporteur on Torture, UN. Doc. A/61/259 (14 August 2006), at paragraphs 73 and 75.

6.4 Protection for Detainees, Officials, and Others

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way. (…)

Individual detainees, employees at a place of detention, members of civil society, and anyone else must feel comfortable and open in communicating orally or in writing with the NPM.

First, (as was discussed under sections 4.5 and 6.2 above), the person must be confident that every possible measure will be taken to ensure no-one but the NPM knows what they have said. This means that the NPM should not name them as the source of information, or disclose information which clearly could have come only from them, unless the person expressly consents to the disclosure of the information.

The second key element is that the person must know that they are protected against retaliation for their cooperation with the NPM. Thus, they must not suffer any negative consequences, either for the very act of speaking to the NPM, nor for the substance of what they have told the NPM (should it become known through a leak or by disclosure with their consent). The protection described by Article 21 should therefore be incorporated in the implementing legislation for the OPCAT in order to ensure its enforceability.

Of the range of people with whom the NPM will speak, detainees are obviously the most vulnerable to retaliation of all kinds. However, staff could also fear disciplinary or professional repercussions for cooperating with or disclosing information to the NPM that potentially implicates co-workers or superiors. NGOs and other members of civil society that may provide services to detainees or do continuous monitoring of places of detention should also be protected against having their access or status suspended as a result of any cooperation with the NPM.

The protection must cover information that State authorities or others may claim is false, because otherwise the protection intended to be conferred by Article 21 could be circumvented. However, it is clear that Article 21 is not intended to protect the State from responsibility for anything its agents may

do to mislead the NPM so as to interfere with its work. If a prison warden were intentionally to provide the NPM with false information, for instance concealing the death or mistreatment of a detainee, the State would be responsible for a most egregious breach of its international obligations under the OPCAT, notwithstanding any personal protection possibly conferred on the individual prison warden by Article 21. Of course, to the extent the actions of a public official in covering up acts of torture or other ill-treatment would constitute a crime under the provisions of the main UN Convention against Torture, for instance as complicity, this independent criminal responsibility would not be excluded by Article 21 of the Optional Protocol.

6.5 APT Recommendations

■ The powers set out in Article 20 of the OPCAT, and the protections provided by Article 21, should be directly incorporated into implementing legislation, and be enforceable under national law by the NPM and protected persons.

■ The legislation should explicitly recognise the right of the NPM to undertake visits to places of detention without prior notice.

■ States should review existing law for the protection of privacy of personal data to ensure the NPM has access to and the right to use the information referred to in Article 20 of the OPCAT.

■ Personal data held by the NPM should be protected against disclosure without consent of the person involved; however, the law should also permit the NPM an unrestricted ability to publish aggregate information derived from personal data, and other information that otherwise renders personal data truly anonymous.

■ Legislation should recognize the right of the NPM to interview detainees and others without any eavesdropping or other surveillance by officials, inmates, or anyone else. Such eavesdropping or surveillance should be strictly prohibited, with a sole exception where the visiting team itself makes a specific request to conduct an interview out of hearing but within sight of guards for safety reasons.

■ The visiting team should not be required to accept places chosen by the authorities for interviews; it should be able to choose any sufficiently secure place.

■ Where the staff at the place of detention propose to restrict interviews to protect the personal safety of the NPM team, NPM members should ultimately have the right to proceed with the interview if they consider the risk, if any, to their personal safety to be acceptable.

NPM Recommendations and Implementation

7

7.1 Recommendations of NPMs

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(…)

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; (…)

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

The national preventive mechanisms are mandated not only to conduct visits but also to make recommendations to the appropriate authorities outlining the means to undertake improvements. The recommendations are an opportunity for the State to benefit from detailed practical and expert advice and observations to assist it in better meeting the obligations it already has under the UN Convention against Torture and other international treaty and customary law. In practice, then, there should be a strong incentive for government authorities to enter into constructive dialogue and implement the recommendations.

To reinforce this practical incentive, Article 22 expressly creates a duty under international law for State authorities, at the level of the particular place of detention or at the national level, to consider these recommendations and to actively discuss their implementation with the NPM. Good faith fulfilment by the government of this obligation is key to achieving the general objectives of the Optional Protocol, based as it is on cooperation rather than confrontation. For this reason, and to further make clear to local officials the need to take the work of the NPM seriously, the obligation of specific local and national officials to consider the recommendations and enter into dialogue with the NPM to discuss implementation of the recommendations should be expressly provided for in the legislation implementing the OPCAT.

The APT recommends that, to assist this process, the visiting team of the

NPM should inform relevant authorities of the initial results of the visit as soon as possible. This will enable the mechanisms to make immediate recommendations for improvements and to establish a constructive working dialogue with the authorities. In every case, an oral meeting between the NPM delegation and the persons directly in charge of the detention facilities should follow the visit. Formal written feedback should also be provided in the form of a detailed letter or report as soon as possible after the visit. The report should then form the basis for constructive dialogue between the NPM and local, regional and national government officials about implementation. Subsequent visits should systematically assess whether earlier recommendations have been fully implemented, while also identifying any new issues that may have arisen.

The OPCAT leaves to the discretion of the NPM the determination as to which authorities are "relevant" to any particular recommendation. As mentioned earlier, some issues with practical solutions or subject to local decision-making may be best directed at the administration of a particular institution. System-wide issues that require decisions to be taken at the national level or amendments to legislation obviously must be directed to authorities higher in the government structure in order to have a reasonable prospect of implementation. Implementing legislation should therefore allow the NPM to determine which authorities are appropriate to receive particular recommendations. The receiving authority should then have a correlating duty under national law, to respond, or if it is not itself competent to implement the recommendations in question, to identify and refer the recommendation to another competent authority which would have the duty to respond.

In the course of a visit, the NPM may come across individual cases, or in the course of its visit receive individual complaints (about treatment at the place being visited, or some other place), which should be further investigated for adjudication, prosecution, or other action outside of the normal "preventive" mandate of the NPM itself. In such cases, the "relevant authority" could be a prosecutor's office, or a national human rights institution with jurisdiction to consider and process individual complaints, and the recommendation could be that the authority investigate the individual case. In such situations, the restrictions on disclosure of personal data continue to apply, so a referral of this sort could only transmit information about the particular complainant with the complainant's consent.

The legislation empowering the NPM should also allow the NPM to set a defined period within which it expects a response and dialogue with the competent officials. For instance, the Czech Law on the Public Defender of Rights

allows the Defender, having visited a facility and delivered his findings and/or recommendations to the relevant officials, to set a time limit within which the officials must respond.[85] If no response is received or corrective measures are insufficient, the Law authorizes the Defender to inform superiors, the Government itself, and/or the public, including by publicly naming the responsible officials.[86]

It is worth noting that delivering recommendations and reports is neither the endpoint of an NPM's involvement with a particular institution, nor the only use an NPM may make of the information it collects.[87]

First, in between visits, NPMs should monitor implementation of recommendations through other means (which could include correspondence with officials, or communication with NGOs or others present in the place of detention on a more frequent basis). NPMs can also consider delivering training seminars for relevant personnel at places of detention.

Second, in the course of carrying out a visit to an institution, an NPM will often receive information about conditions or treatment that the detainees experienced at another place, before being brought there. For instance, information about conditions and treatment at police stations often comes to light only during visits to remand prisons, where the persons may stay in one place for longer periods of time and may feel less vulnerable than while in police custody. The NPM should use such information to help decide which places to visit in the future, and which issues to focus on while there.

Third, information collected from a visit to an individual place of detention could also be used to develop system-wide thematic reports and/or recommendations. The information could therefore also lead the NPM to submit proposals and observations on existing or new legislation, as contemplated by Article 19(c) of the OPCAT.

Fourth, for the International Subcommittee to be effective in its less-frequent visits to a State Party, it will need good information about particular places of detention in the country *before* it arrives. Some of this will of course be provided by the government; however, NPMs should also provide key information to the International Subcommittee on an ongoing basis to allow it to plan strategically the specific places it will go to during a country visit.

[85] Czech Law on the Public Defender of Rights, section 21a.
[86] Czech Law on the Public Defender of Rights, sections 21a and 20(2).
[87] For more detail about effective recommendations and follow-up activities, see APT, *Monitoring Places of Detention: A Practical Guide* (Geneva, 2004).

7.2 Reports

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

In order to ensure sustained improvement of the treatment of persons deprived of their liberty and conditions of detention, the national preventive mechanisms must be able to report upon and disseminate their findings.[88] The NPM must also have the ability to submit proposals and observations concerning existing or draft legislation, whether in its annual report, in individual visit reports, or in a separate special submission or report.[89] Article 23 ensures that an annual report of the work of national preventive mechanisms is published and disseminated by the State Parties themselves. (This does not, however, preclude national preventive mechanisms from publishing and disseminating their annual reports independently if they so desire.)

Nothing in the OPCAT precludes the NPM from deciding to make other reports, and especially individual visit reports, public. For example, issues that arise across a number of institutions could lead the NPM to publish a thematic report. Such reports cannot contain personal data without the express consent of the person involved, but the NPM could include aggregate or otherwise fully anonymous information derived from personal data.[90]

[88] For more detail about the best-practices in the preparation of reports based on visits to place of detention, see APT, *Monitoring Places of Detention: A Practical Guide* (Geneva, 2004) at pp. 85–89.
[89] See Article 19(c).
[90] See discussion under sections 4.5, 6.2 and 6.4 above.

7.3 APT Recommendations

■ **The obligation of specific local and national officials to consider the recommendations and enter into dialogue with the NPM to discuss implementation of the recommendations should be expressly provided for in law.**

■ **To ensure that it can direct each of its recommendations to the most relevant authority, the NPM should have the liberty to choose authorities at any level of government, from the administration of an individual facility to the most senior national leadership, to receive is recommendations and other communications.**

■ **The receiving authority should have a correlating duty under national law, to respond to the recommendations, or if it is not itself competent to implement the recommendations in question, to identify and refer the recommendations to another competent authority which would have the duty to respond.**

■ **The legislation empowering the NPM should allow the NPM to set a defined period within which it expects a response and dialogue with the competent officials.**

NPMs and National Civil Society

8

As was noted at the outset, NGOs and other members of civil society should be included in the process of determining the NPM, in order that the NPM be credible and therefore effective. As will be discussed in Chapter 10, some NGOs may themselves become part of the NPM. In most cases, however, the primary roles that NGOs will play vis-à-vis NPMs are to be an important source of information for the NPM and to be a source of external scrutiny and accountability for the NPM.

Human rights NGOs are often leaders in defending the interests of persons deprived of liberty, particularly against torture and other ill-treatment. NGOs and other civil society organisations may also already be involved in places of detention on a daily basis, providing services of various kinds to detainees. In some cases, their ongoing involvement in providing the services may make it difficult for them to be an effective external source of overall analysis or criticism of the situation in the place. Their daily presence, however, means they can be an excellent source of information for the NPM, to allow it to plan strategically its programme of in-depth visits and to react quickly to unanticipated situations with ad-hoc visits. Such information can also assist the NPM to focus its visits to particular institutions on the facilities or issues that are of the greatest concern. NGOs may also be an important source of information for the NPM in determining, between visits, the extent to which its recommendations are being implemented. As was described in Chapter 6 above, the NPM has the right to speak confidentially with anyone it chooses, including NGOs, and any individual or organization has the right to communicate confidentially with the NPM without fear of retaliation.

Through their advocacy or support work NGOs may have earned a particularly high degree of trust on the part of detainees. Where such an NGO considers it appropriate, it could greatly enhance the effectiveness of the NPM by promoting awareness among the detainee population of the NPM's existence, any upcoming visits and its mandate and working methods, and by encouraging detainees to cooperate with and provide information to the NPM.

Some NGOs will also be an important source of scrutiny, analysis and feedback on the work of the NPM itself. The necessity to provide the NPM with robust independence from the executive government and judiciary means that these institutions are inappropriate sources of accountability for the NPM. In some countries, the legislative assembly and executive government are not realistically separate from one another in practical or political terms. Thus, civil society and NGOs in particular have a crucial role to play in ensuring

accountability of the NPM, through monitoring of its work and impact, and providing public and/or private critical analysis.

The general force of political pressure that NGOs and civil society can often bring to bear on governments, through raising public awareness in particular, is also an important source of incentive at the national level for the government to fully engage in constructive dialogue with the NPM and to take concrete steps to implement the NPM's recommendations. NGOs may also be well-positioned to monitor implementation of NPM recommendations by officials at particular places of detention, through their frequent presence in the place and their links to the local community. Proactively providing this information to the NPM can greatly enhance its effectiveness.

In many countries, NGOs already carry out their own programmes of visits to places of detention. The OPCAT and the role to be accorded to NPMs under it should not be used to exclude NGOs from simultaneously carrying out their own visits. As was noted earlier, the OPCAT is only one of a range of measures that States should take to fulfil the obligation to prevent torture under the main UN Convention against Torture. NGO visits are another appropriate measure in this regard which should continue after any NPM is created in the country.[91] Especially given that the Preamble to the OPCAT itself recognizes the value of preventive visiting, it is likely that the Committee against Torture would criticize any use of the OPCAT as an excuse to reduce other forms of independent monitoring that had already been taking place in a State Party.

Finally, NPMs should ensure they maintain a comprehensive and current knowledge of NGOs and other civil society organisations providing assistance, support, or services to persons deprived of liberty, in order to be able to refer individuals who ask the NPM for personal assistance in the course of a visit. At the beginning of any interview with a person deprived of liberty, the visiting team of the NPM will of course need to fully explain what its role will be: how it can or cannot help the individual being interviewed. Individuals may be much more likely to share information with the NPM if the NPM is itself equipped to provide them with useful referral to organisations that can actually directly provide services to address his or her individual needs.

[91] For instance, in the periodic review of Argentina in 2004, the Committee against Torture continued to request information about NGO access to places of detention notwithstanding that Argentina had ratified the OPCAT and was in the process of designating an NPM: UN Doc. CAT/C/SR.622 (22 November 2004) at paragraph 49.

NPMs at the International Level

9

Article 20(f)

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them (...) the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

The NPM must interact at the international level if the OPCAT's concept of a global system of visits is to be fully implemented. The OPCAT explicitly recognizes this by requiring States to permit direct and confidential contact between NPMs and the International Subcommittee. The right of direct confidential contact flows in both directions, and it is contemplated that the International Subcommittee will play a proactive role in this regard:

Article 11(b)

The Subcommittee shall (...) in regard to the national prevention mechanisms (…)

(ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;

(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

Article 12(c)

In order to enable the Subcommittee on Prevention to comply with its mandate as laid out in Article 11, the States Parties undertake (...) to encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;

These Articles enable the national and the international bodies to have substantial exchanges on methods and strategies to prevent torture and other forms of ill-treatment. Therefore, the Subcommittee and the national preventive mechanisms can meet and exchange information, if necessary on a confidential basis. The national preventive mechanisms can reciprocate and forward their reports and any other information to the international mechanism.

Another important dimension of this relationship is the possibility for the Subcommittee to provide assistance and advice to States Parties concerning the national preventive mechanisms. Therefore, pursuant to Article 11, the Subcommittee has the mandate to advise States Parties on the establishment of national mechanisms and to make recommendations on the strengthening of their capacity to prevent torture and other forms of ill-treatment.

The Subcommittee will also be able to offer training and technical assistance directly to national preventive mechanisms with a view to enhancing their capacities. The Subcommittee can also advise and assist them to evaluate the needs and means necessary to improve the protection of persons deprived of their liberty.

States should also allow and facilitate interaction between NPMs in different States. At the peer level, best practices can be promoted.

APT Recommendations

- **The NPM must have the right to communicate with the International Subcommittee confidentially and directly.**
- **States should also permit and facilitate peer exchange between NPMs in different countries.**

10 Choice of Organisational Form

Article 17

Each State Party shall maintain, designate or establish … one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

10.1 Introduction

The Optional Protocol does not prescribe a unique organisational form for national preventive mechanisms. Subject to the guarantees of independence, diverse expert composition, and the granting of the necessary powers, each State Party can select a structure appropriate to its political and geographic context.

Specific advantages and disadvantages are associated with the design of a new body versus the designation of an existing body, and with the use of a single unified mechanism for the whole country or several mechanisms for different regions or types of institution. However, none of these approaches is inherently superior to the others. The following sections raise the considerations that arise in the choice of new vs. existing mechanisms, and in the choice of single or multiple NPMs for a single state.

In all cases, it is important to remember that whatever the formal structure of an NPM, it will not be effective unless its individual members are themselves personally independent and effective in carrying out preventive visits.

10.2 New or Existing Body?

10.2.1 Overview

In principle, so long as the NPM that is ultimately produced is the same, it should not matter whether it was a new body created following ratification of the OPCAT, or whether the OPCAT responsibilities are fulfilled by an existing mechanism. In practice, however, one or the other approach may have advantages or disadvantages in a given country.

Factors to consider, in each national context, include the following:

- Establishing a new mechanism allows for definition of its mandate, independence, visiting and advisory powers, and other guarantees, precisely to match OPCAT requirements. Is the same result legally and politically possible with respect to any already-existing mechanism?

- Would establishing a new mechanism duplicate the work of existing mechanisms? On the other hand, if the existing body or bodies do not cover all places of detention as defined in OPCAT, would it be easier to fill the gaps or to create a new body that has access to all places covered by OPCAT?
- Does any existing body have a tradition and reputation for institutional independence that would lead to more immediate credibility than might be possible with a new mechanism? Or is the opposite true?
- What are the working practices of the existing body? How is its role perceived by detainees, public officials, and the general public (effective or ineffective)? Has it previously exercised a different mandate or working methods that could interfere with its work as an OPCAT NPM?
- When the existing mechanism was designed, was civil society (especially NGOs working in the area of torture, ill-treatment, and conditions of detention) included in an open process?
- Does the existing body already have the multidisciplinary range of expertise needed for an NPM? The required diversity? If not, would it be easier to add the missing expertise or diversity or to bring it together in a new body?

Designation of an existing mechanism always requires a careful and exhaustive review of its mandate, jurisdiction, independence, membership, powers and guarantees, to ensure that it fully complies with OPCAT requirements. In almost all cases, some changes, through legislative amendments or increased resources or both, will be necessary.[92]

In this context, it is also important to realize that when a State designates an existing domestic visiting body as an NPM, any subsequent visit by the body to a "place of detention" as defined in OPCAT will be considered a visit subject to OPCAT guarantees. This is true whether or not it is officially labelled an "OPCAT Visit" by the State. Consider a hypothetical example:

> A volunteer community group already visits prisoners to encourage contact with the outside world for more effective reintegration into society after release. The group is designated as an NPM. While delivering books

[92] As will be discussed in section 10.3.1 below, if a State designates multiple NPMs, each NPM must meet the OPCAT requirements, particularly if some places of detention are subject to visits only by that NPM and no other – it is not enough to say, for instance, that one component fulfils the independence requirements, another fulfils the expertise requirements, another the right to information, etc.

to one prisoner, a volunteer passes another who seems ill. The volunteer asks to see the prisoner's medical record but the authorities refuse. Another volunteer is chatting with inmates in a common room when she learns that a disruptive prisoner has been placed in solitary confinement; authorities refuse her request to talk immediately in private with the prisoner.

In such cases, it would not be open to the State to say that the volunteer was not actually conducting an "OPCAT visit" but was rather discharging some other pre-existing mandate at the time and so not subject to OPCAT guarantees.[93] The status and powers contemplated for NPMs by OPCAT Articles 18 to 22 cannot be guaranteed if the State retains the ability to choose when they do or do not apply.

Few countries already have independent specialized mechanisms for carrying out preventive visits to all places of detention as contemplated by the OPCAT. However, existing domestic bodies in some countries do already have a mandate to conduct visits of different kinds to some or all places of detention.

A few categories of existing visiting body inherently lack essential elements of an NPM under the OPCAT. This does not mean they cannot still make an important contribution to improving conditions in their own right and as a *complement* to the NPM, but it would be inappropriate to designate them as part of the NPM itself. Examples include:

- internal administrative inspections units of the ministry or department responsible for the places of detention,[94]
- external prisons inspectorates subject to discretionary administrative removal or direction by the ministry or department responsible for the places of detention,[95]

[93] See OPCAT Article 20(a)(b)(c) and (d).

[94] An internal unit of the ministry or department responsible for places of detention cannot satisfy the independence requirements of OPCAT, articles 1, 17, 18(1), 18(4). See Chapter 4 above. See also Walter Suntinger, "National Visiting Mechanisms: Categories and Assessment" in *Visiting Places of Detention: Lessons Learned and Practices of Selected Domestic Institutions* (Association for the Prevention of Torture: Geneva, 2003) pp. 76–77.

[95] Liability to discretionary removal by the ministry or department responsible for places of detention does not satisfy the independence requirements of OPCAT, Articles 1, 17, 18(1), 18(4). See Chapter 4 above. As Suntinger also notes, such mechanisms may not approach their monitoring role with an exclusively human rights perspective, as other purposes (such as disciplinary or financial controls) may be mixed in their mandates. See Suntinger, ibid. pp. 78–81.

- committees of parliamentarians,[96]
- prosecutor's offices.[97]

On the other hand, some already-existing bodies generally have the potential to be designated as NPMs under the OPCAT, though legislative, human and financial resources, and adaptation of work practices will usually be required. Such bodies include:

- national human rights commissions,
- ombudsman or public defender's offices,
- non-governmental organisations (NGOs),
- independent external prisons inspectorates (not subject to discretionary removal by the ministry responsible for operating places of detention).

Some other types of already-existing bodies will generally not be appropriate for designation as an NPM, but with fundamental changes could in some instances be transformed into an NPM that meets the requirements of OPCAT. Examples include:

- certain judicial offices,
- community-based independent visiting schemes.

Each of these categories of possible NPMs will be considered in the sections that follow.

10.2.2 National Human Rights Commissions[98]

Many national human rights commissions have long-established records of independence from executive government that can serve to build confidence in the first years of operation of the Optional Protocol in their country. However, it is important to note that what may be acceptable for a body that provides general policy advice to government (such as the presence of politicians or

[96] In most cases, the members of such a Committee will be either members of the governing party or an opposition party, therefore it is difficult to see how such a Committee could satisfy the independence requirements of OPCAT. Continuity may also be a problem, since membership might change all at once at election time. See also Suntinger at 85-86, regarding obstacles to such committees in consistently achieving the necessary balance of professional expertise for NPM work. He also notes that such committees are especially vulnerable to politicization and regularity of visits may also be an issue. However, if an individual parliamentarian is truly independent of the executive government, it might be possible for him or her to serve as a member of a more broadly-constituted NPM.

[97] Prosecutor's offices inherently lack the independence and specialized approach necessary for an NPM under OPCAT.

[98] See also Suntinger, op.cit., pp. 82–85.

representatives of government departments) may be insufficient for an NPM, which will handle and discuss highly sensitive information about individual detainees.[99]

A national human rights commission may also have extensive experience and expertise with a "human rights"-centred approach to issues. Some national human rights commissions may even already carry out visits to places of detention. However, here it is important to remember the differences between visits to places of detention to collect or investigate individual complaints, and a programme of preventive visits as contemplated by the OPCAT. Extensive experience of carrying out investigations visits to prisons may provide a useful familiarity with the situation in prisons in the country, but some training and changes to methodology are usually necessary to ensure effective preventive visits. Internal structural changes may also be necessary, and additional financial and human resources will almost always be required, for a general-purpose national human rights commission with a broad mandate to be in a position to undertake a sufficiently focussed and frequent programme of preventive visits to meet OPCAT obligations.

As was noted earlier, serious problems can arise when combining the OPCAT visiting function with the prosecution or adjudication of individual cases arising out of its visits, whether by the NPM itself as a quasi-judicial body or before courts of law.[100] It may be difficult to maintain the cooperative relationship between the NPM and government officials upon which the OPCAT visits depend, if those same officials are subject to prosecution or judgment by the NPM. Also, individuals may feel less willing to speak openly with the NPM if they fear their identity or the information they provide may be disclosed at some later stage (as part of a prosecution or hearing, for instance). The workload and urgency of individual complaints can overwhelm and erode the institution's ability to maintain a vigorous programme of preventive visits.

Some national human rights commissions may already have a mix of relevant professional expertise; however, commissions are often dominated by lawyers and missing important expertise in some areas (medical, law enforcement administration, e.g.).

[99] See discussion under section 4.3 above.
[100] See section 3.3.3 above.

10.2.3 Ombudsman and Public Defender's Offices[101]

As with national human rights commissions, Ombudsman and Public Defender's Offices often already enjoy good guarantees of independence, particularly when their mandate is grounded in the country's constitution or a long constitutional tradition.

The degree to which Ombudsman or Public Defender's Offices may already have experience with systematic preventive visits will vary. Such offices may be more accustomed to reacting to and acting on individual complaints, or focussing on a particular countrywide issue in a given year and then moving on to new issues in subsequent years. As with national human rights commissions, prior experience visiting complainants in prisons to document or investigate individual complaints does not necessarily translate into adequate preparation to undertake ongoing systematic preventive visits.

As with national human rights commissions, the likelihood that an Ombudsman or Public Defender's office designated as an NPM will be forced simultaneously to carry out "constructive dialogue" preventive visits, and to advocate particular cases arising out of such visits, can present problems. These may be less severe than in the case of a national human rights commission that potentially has the authority to actually adjudicate such complaints, but nevertheless may require internal restructuring of the office to ensure separation of functions.

Like national human rights commissions, Ombudsman and Public Defender's offices often have an extremely broad mandate. They will rarely already have sufficient financial and human resources to properly undertake an OPCAT-compliant system of preventive visits. States designating such an office as the sole NPM will generally need to allocate additional resources.

The nature of the office often means that there is ultimately a single official (often a lawyer) who is the decision-maker; it is inherently difficult to achieve the full range of necessary professional qualifications for members of an NPM if there is only one "member". Of course, the Ombudsman or Public Defender may be supported by a relatively large and diverse staff, but again particular areas of necessary expertise are often missing (e.g. medical expertise). In any event, it is always preferable that the *members* of the NPM themselves have a range of relevant expertise, rather than relying on expert staff or periodically hiring outside experts, as this tends to improve the quality and impact of recommendations.

[101] See also Suntinger, op.cit.,pp. 82–85.

The approach mandated to Ombudsman's offices, and the scope of their power to make recommendations, varies from country to country. As was noted earlier, the OPCAT requires that the NPM approach its work with the aim of improving conditions of detention and protecting persons in a practical or "policy" sense rather than an assessment of "legality" or "fairness" per se. While some issues of a "legal" nature will arise, particularly in terms of procedural and legal safeguards, these are only part of a much wider array of aspects to be examined and objectives to be achieved. Many of the issues that will arise in the work of most NPMs will instead be questions of "policy" or questions of a technical nature.

Institutions that traditionally have been charged with a "legalistic" mandate – i.e. determining whether specific administrative action complied with proper administrative procedure or standards of fairness – may thus find it difficult to take on the "policy"/technical approach of OPCAT. This could include commenting on government or parliamentary "policy" choices, and potentially proposing that the legislature pass, amend, or repeal laws.

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. Again, as there is a great deal of variation between States in terms of the history, legal context, and working approach of Ombudsman's offices, these concerns may or may not apply in a given country.

10.2.4 Non-governmental Organisations[102]

The strongest commitment to human rights approaches might be found within the civil society of a particular country, and in NGOs in particular. NGOs often informally engage in preventive visits and monitoring in prisons and other places of detention, long before formal statutory bodies are established to fill these roles. Non-governmental organisations, by definition, generally enjoy great structural independence from executive government. In some national contexts, these factors may weigh in favour of inclusion of an NGO or NGOs as a formal part of the NPM.

However, the degree of independence of an NGO in reality can vary, and generally is not legally guaranteed in the future. NGOs generally do not have a right of full access to places of detention grounded in law. Recommendations of NGOs may be taken less seriously by government officials than

[102] See also Suntinger, op.cit., at pp. 88–90.

recommendations of statutory officers. For these and other reasons, while NGOs may welcome the additional authority and powers (and potentially financial resources) that can be conferred by implementing legislation designating an NGO as an NPM, that very statutory authority, power, structure and finances may bring with it responsibilities and a lack of flexibility that an NGO (and its membership) may find difficult to accept. The cooperative dialogue approach adopted by the OPCAT may also be difficult for some NGOs to reconcile with other public advocacy activities. On the other hand, charities and other organisations that are involved in providing services on an ongoing basis (perhaps with offices located inside the institutions themselves) may find it difficult to switch or play multiple roles in relation to the institution.

In any event, as was noted in Chapter 2, national human rights NGOs should always be included in the process of deciding upon the NPM for a given country. As was discussed in Chapter 8, NGOs have a range of other roles to play vis-à-vis the NPM once it is active. Also, the creation of an NPM can never be an appropriate basis for excluding NGOs from continuing to monitor places of detention, including through visits.

10.2.5 Independent External Prisons Inspectorates

Independent external prisons inspectorates can play an important role vis-à-vis NPMs. If such an office is to serve as the sole NPM, its mandate will have to be carefully reviewed and perhaps expanded to ensure it covers all places of detention as defined under the OPCAT. To be appropriately independent under the OPCAT, a variety of requirements apply (basis of mandate in law, security of tenure in office during good behaviour, etc.) which may or may not already be in place.

Some external inspectorates have a mixed mandate: not only the OPCAT-like mandate to review institutions from a "human rights" perspective (prevention of torture and ill-treatment, humane conditions), but also assessing whether institutions meet government budget and accounting objectives, whether public safety is adequately guaranteed by the criminal justice system, whether sentences served are effective. The inclusion of such functions in the mandate of the NPM is not consistent with the requirements of the OPCAT.[103]

[103] Similar concerns were expressed by the Joint Committee on Human Rights of the Parliament of United Kingdom, in its 20th Report of Session 2005–2006, 22 May 2006, pp. 17–20. See discussion under section 3.3.3 of Chapter 3 above.

10.2.6 Judicial Offices

The final paragraph of the Preamble to the OPCAT emphasizes that the preventive mechanisms are intended to constitute a "non-judicial means" of torture prevention. It is therefore evident that existing judicial authorities were not contemplated as candidates for designation as NPMs at the time of adoption of the OPCAT.

The main innovation of the OPCAT was the idea to open prisons to outside observation and analysis by experts from a range of disciplines: not only legal knowledge but also medical, scientific, and social expertise, with a preventive/policy approach rather than an after-the-fact adjudication approach. The nature of the judiciary as an institution properly brings a primarily legal perspective, and generally involves expertise in judging after the fact rather than putting in place policies and practices for prevention. As such, designation of a judicial office as NPM faces considerable obstacles in satisfying the object of the OPCAT.

The reference in the Preamble to "non-judicial means" also suggests that the "independence" required of NPMs under OPCAT is independence from the judiciary as well as from the executive. The judiciary as an institution obviously inherently has other roles to play in respect of most detainees (convicts in particular) and their imprisonment, some of which could conflict with the specialized perspective and approach mandated for NPMs under the OPCAT. For instance, NPMs inherently have a broader policy aspect, which can include recommendations that steps be taken that exceed the requirements of national law or proposing amendments or new laws to improve conditions for prisoners. This important policy/advocacy role will often not be compatible with the nature of the judiciary as an institution.

Finally, a key aspect of the work of NPMs under the OPCAT is the confidential, independent, and non-adjudicative nature of their work, which is intended to engender an atmosphere of openness on the part of detainees and public officials at the place of detention, such that they will more readily voluntarily disclose the true state of affairs in the place. This is reflected in the Preamble, Article 19(d), and Article 21 of the OPCAT (the stipulation that NPMs have the right to privately interview detainees and others, etc.). Where a judge supervising the execution of sentences (and therefore perhaps responsible for determining early release, disciplinary matters, or other adjudication issues) is ultimately privy to an interview, a prisoner may be less willing to disclose his own misconduct or to complain about conditions. Individual

prison staff may similarly be less willing to admit problems if they are not sure whether a judicial authority will make use of the information as evidence in another setting.

For all these reasons, judicial offices responsible for supervising the execution of sentences and otherwise inspecting prisons on behalf of the courts, or where the judges would continue to discharge other judicial functions while appointed as an NPM, generally will not be appropriate for designation as an NPM.

However, the Judicial Inspectorate of Prisons in South Africa represents a challenging example of a judicial institution whose empowering legislation [the *Correctional Services Act*, 1998] may address some of these concerns. Section 86 of the Act implies that the Inspecting Judge will not continue other judicial duties during his or her time in office as Inspecting Judge. Section 85(1) provides specifically for his or her independence in office as Inspecting Judge (i.e. presumably independence from the rest of the judiciary). The Inspecting Judge's mandate vis-à-vis prisoners is to report on their treatment and the conditions of detention, not to deal with disciplinary or other aspects of their execution of sentence in an adjudicative role [section. 85(2)].

10.2.7 Community-based Independent Visitors

Community-based visiting schemes present another challenging case of an existing, usually somewhat independent, entity that already carries out visits to places of detention and so might seem an appropriate candidate for designation as an NPM.

However, OPCAT Article 18(2) makes clear that the members of the NPM must be "experts" with relevant "professional knowledge". Most community-based visiting schemes are quite intentionally open to non-expert volunteers, who begin their work after a relatively short period of orientation or training. The advantage of accepting such a wide range of volunteers without requiring any particular professional knowledge or expertise is that the visits can cover many places of detention on a very frequent basis. Certain individuals who participate in such programmes over a long period of time may eventually acquire considerable practical expertise. Taken as a whole, though, in their existing form such schemes will almost always lack the "professional knowledge" and "expertise" elements that are key requirements of an NPM under the OPCAT.

A proposal to designate a community-based visiting scheme as an NPM would also have to ensure that the powers and protections that individual visi-

tors exercise include the full range required by the OPCAT, including access to all areas and all persons, the liberty to choose which places of detention to visit, and the power to have access to all information. Community-based visiting schemes are generally not designed to develop overall system-wide analysis and recommendations, and so may not have the power to formally submit legislative proposals or comment on legislation. Individual members may not currently have the privileges and immunities required by the OPCAT.

All of these potential differences between an existing community visiting scheme and the requirements of an NPM under OPCAT can, of course, potentially be addressed through changes to its legislative basis, administrative arrangements, work practices, and resource levels. Introducing such changes, and especially imposing relevant professional qualifications as pre-requisites for participation in a community-based independent visiting scheme, however, would generally drastically reduce the number of individuals who could be involved, essentially defeating the purpose – broad coverage and high frequency – of such a scheme in the first place.

While they generally are therefore not appropriate for designation as part or the whole of the NPM itself, community-based independent visiting schemes are a very valuable complementary, but separate, measure that can work in a mutually-reinforcing relationship with an NPM. Community visitors can be excellent external sources of information and an external network of surveillance that can help the NPM to more strategically and efficiently target its professional knowledge, expertise and legislative powers. The maintenance and establishment of such schemes should be strongly encouraged in every State, but not as an "OPCAT NPM" per se.

10.2.8 APT Recommendations

- **States can choose either to designate an existing mechanism or to create an entirely new mechanism. Neither model is universally inherently better than the other.**
- **Civil society must be included in the process of deciding whether to use an existing or create a new mechanism.**
- **Before designating an existing institution, the government and civil society must carefully and exhaustive review its mandate, jurisdiction, independence, powers and guarantees, to ensure that it fully complies with OPCAT requirements, make any necessary legislative amendments and provide any increase in resources required.**

10.3 Multiple Mechanisms

10.3.1 Geographic or Thematic Basis

The possibility to have several mechanisms was primarily foreseen for federal states, where permitting geographically-defined and decentralised bodies to be designated as national preventive mechanisms could facilitate ratification. However, the text of Article 17 appears to allow states to define multiple mechanisms also by thematic divisions of responsibility.

From the perspective of general international law, internal divisions of responsibility for the implementation of treaties provide no excuse for a failure to implement the treaty, even if the restrictions arise from judicially-enforced divisions of power formally entrenched in a written Constitution.[104] This is reinforced in the case of OPCAT by an express provision that "the provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions."[105]

However, from the perspective of seeking universal ratification and full and effective implementation of international human rights treaties, it must be acknowledged that decentralized States face special challenges in practice. The explicit permission in OPCAT for mechanisms established by decentralized units to serve as NPMs under the OPCAT recognizes and provides a solution to such challenges.[106]

Based on the particular constitutional structure and other political and geographic considerations in a State,[107] a federal State's NPM could be either a unified federal body, or a system with multiple bodies. Possible institutional designs for a unified federal NPM include:

- The NPM is legislated and appointed by the central government only.
- The NPM is legislated and appointed by central and regional governments together, each acting under its own constitutional authority, but creating an administratively shared delegated national mechanism.

Possible institutional designs for multiple bodies to collectively meet the NPM requirement in a federal state include:

[104] See Vienna Convention on the Law of Treaties, Article 27.
[105] OPCAT, Article 29.
[106] OPCAT Article 17.
[107] For more detail about OPCAT ratification and implementation in federal and other decentralized states, see the APT paper *Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Federal and other Decentralized States* (June 2005), available at http://www.apt.ch/npm.

- The central government and each of the regional governments each legislate and appoint a separate NPM for the territory and/or subject-matters over which each has jurisdiction.
- The central government creates an NPM to cover all territories and subject-matters not covered by regional governments' jurisdiction, while the regional governments collectively create a second unified NPM that covers all territories and subject-matters under regional governments' jurisdiction.[108]

A State Party, federal or otherwise, could also decide to have several national preventive mechanisms based on a thematic rather than a geographical division. For example, if a State already has a well-functioning mechanism visiting psychiatric institutions, this could continue its specialized work while one or more additional NPMs could be created for the other types of places of detention.

However, if a State designates multiple NPMs, each with separate or partially overlapping thematic mandates, each of these sub-national NPMs must meet the OPCAT requirements. This is particularly an issue if some places of detention will be subject to visits only by that sub-national NPM and no other. A State cannot say that though one body does not fulfil the independence requirements, another lacks the required expertise, and another does not have the right to visit all areas of the place it visits, that the cumulative effect is that each of the OPCAT requirements is met by one or another of the bodies, and that all of the requirements are therefore met by the bodies taken as a collective. Logically, if a place of detention exists that is not subject to visits by a body that itself meets all the requirements of the OPCAT, one cannot point to the characteristics of bodies visiting *other* places to make up the shortcoming.

State Parties considering multiple mechanisms must also keep in view that every place where an individual may be deprived of liberty must be subject to visitation by one or more NPMs. Therefore, where a State implements multiple NPMs it must be especially careful to ensure that their combined mandates cover all places in the country – and this means that at least one of the NPMs must have authority vis-à-vis places that are not normally used for detention but where someone may in fact be detained with government involvement or acquiescence.[109]

[108] For instance, each regional government might separately legislate the establishment and powers of this second NPM, and each appoint one or more members to the NPM, with the NPM then acting as a single entity in respect of the overall territory and subject-matters collectively under the regional governments' authority.

[109] See sections 3.2.3 and 6.1 above.

The discretion of a State Party to sub-divide the responsibilities of "the NPM" for its territory into multiple separate organizations, whether on a thematic or geographic basis, is not without limits under the OPCAT; some of its provisions are not compatible with a high degree of fragmentation. For instance, Article 20(e) of the OPCAT says that each national preventive mechanism must be granted "the liberty to choose the places it wants to visit". If an NPM is designated in respect of only a single place of detention, then, the State is not giving effect to its obligation under Article 20(e): it has given the NPM no liberty to choose the places it will visit.

In most cases, where a country implements OPCAT by designating a multiplicity of NPMs, some form of coordination will be necessary. The necessity and nature of such a coordinating body is considered in the next section of this Guide.

10.3.2 Consistency and Coordination

10.3.2.1 Challenges

In every case where multiple NPMs are contemplated, it is essential to ensure that all places where an individual is or may be deprived of liberty are covered by at least one of the NPMs, that each visiting mechanism has the expertise and enjoys all the powers and guarantees required by OPCAT, and that the overall scheme will be administratively manageable and obtain effective and consistent results.

It may be difficult for multiple NPMs to maintain consistency in recommendations and findings, particularly when there are several NPMs visiting the same or similar types of places of detention. This poses problems for the individuals that the NPMs are intended to protect, the officials called upon to implement the recommendations, and the NPMs themselves.

As was noted earlier, the OPCAT contemplates that the NPMs will form part of "a system".[110] Some form of State-wide coordination will generally be required in order for a collection of NPMs to truly constitute a system. For instance, one of the roles of the NPM is to provide observations and proposals on legislation (Article 19(c)). This implies that at least those NPMs operating under the jurisdiction of each legislative assembly must have some means of generating system-wide or sector-wide analysis and recommendations. NPMs and the International Subcommittee are to form together a global system of visits. Thus, NPMs will be an important source of ongoing information for

[110] See section 3.1 above.

the International Subcommittee, and the Subcommittee has certain global functions vis-à-vis all NPMs. These roles require coordinated communications between the office of the Subcommittee in Geneva and the NPMs in each country.[111] Further, a State must be able to report aggregate information on OPCAT implementation to the International Subcommittee.[112]

For all these reasons, relying on too loose a patchwork of existing entities can be difficult to reconcile with the requirements of OPCAT; some means of coordination at the national level is required.

10.3.2.2 Options

There are several possible means of addressing these difficulties. One alternative is to have a single unified NPM, but decentralize its operations. An administratively-unified NPM can still have geographically-dispersed offices and membership, reducing the travel and other costs associated with carrying out visits across the national territory.[113] This represents a possible compromise between a highly centralized single NPM model and an unworkably loose collection of isolated separate NPMs. Governments at all levels should seriously consider whether the benefits of a geographically-dispersed but administratively-unified single NPM could outweigh the benefits of a multiple NPM approach.

An example of a domestic visiting body (albeit one that has not been designated an NPM under the OPCAT) that follows this approach is the Austrian Human Rights Advisory Board. The Board is responsible for evaluating police activity with a special emphasis on maintaining human rights standards. Within its membership, six expert visiting committees have been set up on a regional basis following the territorial organisation of the Austrian courts.[114] Similarly, the draft legislation for OPCAT implementation in Argentina contemplates that the 10-member NPM will have decentralized delegations in the provinces.

[111] See OPCAT Articles 11(b), 12(c) and 20(f). See also Chapter 9 above.
[112] OPCAT, Article 12(b).
[113] This approach is recognized within the United Nations "Principles relating to the status and functioning of national institutions for protection and promotion of human rights" (the "Paris Principles"), General Assembly resolution A/RES/48/134 (Annex) of 20 December 1993, which state that every national human rights institutions should have the authority to "establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions." Article 18 of OPCAT requires States Parties to consider the Paris Principles when establishing national preventive mechanisms.
[114] See http://www.menschenrechtsbeirat.at/.

Another option for States implementing multiple-NPM models is to establish a single co-ordinating agency or "central NPM". Such a coordinating body should have a mandate to encourage consistency and promote best practices in visiting methodology and the formulation of recommendations among the various NPMs. It can also help ensure that the International Subcommittee and NPMs can effectively and efficiently communicate with one another, as required by the OPCAT.[115]

Any central coordinating NPM should itself have the guarantees of independence and other safeguards and powers applying to NPMs generally. For instance, the power to obtain information from the government on a country-wide basis (number of persons deprived of liberty, overall number of places of detention and the location of each, etc.)[116]

Where NPMs are otherwise designated in respect of particular places of detention or categories of institution, establishing or designating a central NPM is also a means of addressing the requirement for NPMs to have access to unofficial places of detention. The central NPM is the logical repository of residual authority to visit any place of detention as defined under OPCAT that is not already covered by the designation of one of the other NPMs.

New Zealand's legislation for implementation of OPCAT, which proposes to rely on multiple existing domestic visiting bodies (perhaps complemented by some new bodies), includes the concept of a central national preventive mechanism (which would likely be the national Human Rights Commission). The central NPM would coordinate the work of the NPMs in two directions – in terms of the flow of NPM recommendations to the government, and in terms of advice to NPMs themselves. Thus, the central NPM would be responsible for investigating and developing recommendations concerning systemic issues that fall across all places of detention in New Zealand, coordination of the reports of the individual national preventive mechanisms, and advising the national preventive mechanisms of any systematic issues arising from its analysis of the individual reports.[117]

[115] OPCAT, Articles 12(c) and 20(f).
[116] See Article 20(a) of OPCAT.
[117] Information about OPCAT implementation in New Zealand and the APT's comments on the legislation are available at http://www.apt.ch/un/opcat/new_zealand.shtml.

10.3.3 APT Recommendations

■ **States may choose to have multiple mechanisms, defined along geographic and/or thematic divisions.**

■ **However, every place of detention (including unofficial places) must be subject to visits by one or another of a State's NPMs.**

■ **States faced with a large geographic area and widely-dispersed places of detention should consider a geographically-decentralized (through branch offices for instance) but administratively-unified single NPM as an alternative to a multiplicity of NPMs.**

■ **States which choose to have multiple NPMs should designate a central NPM with a coordination and capacity-building mandate, and residual information-gathering, visiting, and recommendations powers for any place not covered by the other NPMs.**

Conclusion

11

At the time of writing, the Optional Protocol to the Convention against Torture has only recently entered into force. The international Subcommittee on Prevention has not yet begun its work. The first States Parties must have their national preventive mechanisms in place within a matter of months, but few have made a final determination as to their precise structure, authority, and composition. Discussions on national preventive mechanisms are also underway in many other States as part of the process of deciding whether or when to join the Protocol. Around the world, then, there is an unprecedented wave of activity at the national level to open places of detention to outside scrutiny and analysis by independent expert visiting mechanisms.

The establishment or designation of a national preventive mechanism in each State will rightly be grounded in the particular domestic context. The framework for the process and its outcome, on the other hand, is inherently international, located in the text of the Optional Protocol and the practical experience of the International Committee of the Red Cross, the European Committee for the Prevention of Torture, the UN Special Rapporteur on Torture, and other similar bodies. As we have seen, the OPCAT text and secondary sources are a rich source of guidance on the key aspects of NPM design, including:

- the process itself,
- purpose and mandate,
- independence,
- criteria for membership,
- guarantees and powers in respect of visits,
- recommendations and their implementation,
- the relationship between the NPM and other national and international actors, and
- organisational form.

For local actors, the international framework can nevertheless seem a distant, uncertain and opaque entity. Inevitably, actors implementing the Protocol's provisions at the national level will encounter specific questions that the drafters of the Protocol were never forced to consider, the answers to which are not necessarily obvious from the text of the Protocol itself. Ultimately, the international Subcommittee on Prevention should connect national actors with the international framework through its mandate to advise and make recommendations to States in regard to national preventive mechanisms, and

through its direct contacts with the mechanisms themselves. At the same time the Subcommittee will face considerable work in the coming years in developing its working methods and undertaking its own programme of visits.

We began this Guide by examining the goals of the Protocol as set out in its Preamble. From where we stand today, it is clear that developing a system of preventive mechanisms that fully realise these goals is a process, at once global and local, that will take many years to achieve. Effective national preventive mechanisms embedded in a larger international system are essential to achieving the aims of the Protocol. This Guide was intended to be an early step toward bridging potential gaps of understanding or access between local actors and the international framework. The Guide is, however, only the beginning of a conversation that can continue, whether through the additional resources available on our website or by contacting APT staff directly. Constructive and open dialogue is as important in the establishment and designation of NPMs as it is in their actual work, and the APT stands ready to engage with local actors in that dialogue, towards the better prevention of torture and all other forms of cruel, inhuman or degrading treatment or punishment.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

ANNEX

I

Preamble

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

Part I
General principles

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall 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 (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

Part II
Subcommittee on Prevention

Article 5

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.
2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.
3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.
4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.
5. No two members of the Subcommittee on Prevention may be nationals of the same State.
6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

Article 6

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2. (a) The nominees shall have the nationality of a State Party to the present Protocol;
   (b) At least one of the two candidates shall have the nationality of the nominating State Party;

(c) No more than two nationals of a State Party shall be nominated;
(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
   (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
   (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;
   (c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;
   (d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.
2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:
   (a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;
   (b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

Article 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

Article 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:
   (a) Half the members plus one shall constitute a quorum;
   (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
   (c) The Subcommittee on Prevention shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

Part III
Mandate of the Subcommittee on Prevention

Article 11

The Subcommittee on Prevention shall:

(a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(b) In regard to the national preventive mechanisms:

(i) Advise and assist States Parties, when necessary, in their establishment;

(ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;

(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;

(c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

(a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;

(b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
(d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

Article 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:
   (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
   (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
   (c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
   (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator

if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Article 16

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.
2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

Part IV
National preventive mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose the places they want to visit and the persons they want to interview;

(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

Part V
Declaration

Article 24

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

Part VI
Financial provisions

Article 25

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

Article 26

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

Part VII
Final provisions

Article 27

1. The present Protocol is open for signature by any State that has signed the Convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 30

No reservations shall be made to the present Protocol.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under

such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.
3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

Article 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a

conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 36

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State;
(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary- General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

ANNEX

II

Principles relating to the status and functioning of national institutions for protection and promotion of human rights (“Paris Principles”)

[excerpts]

These recommendations were endorsed by the UN General Assembly in its resolution A/RES/48/134 of 20 December 1993.

Competence and responsibilities

(…)

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, *inter alia*, have the following responsibilities:
   (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; (…)
   (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
   (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
   (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
   (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights; (…)

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
(b) Trends in philosophical or religious thought;
(c) Universities and qualified experts;
(d) Parliament;
(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:
(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Establishment and Designation of National Preventive Mechanisms

A permanent system of unannounced visits to all places of detention, carried out by independent experts, is one of the best means to prevent torture and other cruel, inhuman or degrading treatment or punishment. The entry into force of the Optional Protocol to the UN Convention against Torture (OPCAT) in June 2006 established a new international framework for the reinforcement and expansion of visits to places of detention. Key to the new global system of visits is the establishment or designation of a National Preventive Mechanism (NPM) in each State Party.

This Guide aims to assist national actors to choose an NPM for their country. It sets out the relevant articles of the OPCAT, provides legal and technical advice about their meaning and application, illustrates the issues with real-world examples, and makes concrete recommendations on issues including:

- process of determining the NPM,
- purpose and mandate,
- independence,
- criteria for membership,
- guarantees and powers in respect of visits,
- recommendations and their implementation,
- role of national civil society,
- role at the international level,
- choice of organisational form.

The Guide is part of an NPM Implementation Kit made available by the Association for the Prevention of Torture (APT), an international non-governmental organisation working worldwide to prevent torture. Additional components of the Kit are available at www.apt.ch/npm.

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