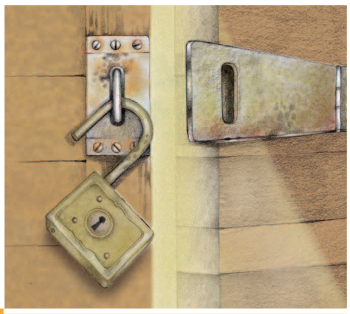

# Optional Protocol to the UN Convention against Torture

## Implementation Manual

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association for the prevention of torture
association pour la prévention de la torture
asociación para la prevención de la tortura

IIDH
Instituto Interamericano de Derechos Humanos

Revised Edition

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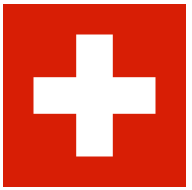


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**Optional Protocol to the UN Convention against Torture**
**Implementation Manual (revised edition)**

Jointly published in 2010 by the Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR).

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# Contents

# Foreword



This manual is about one of the seminal developments in human rights protection in recent times: the process by which the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) has come into existence and is being implemented. The first decade of the 21st century heralded a new era in the prevention of torture: the OPCAT was adopted by the General Assembly in December 2002 and it entered into force in June 2006. Since then, two new actors have emerged in the field of torture prevention: the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the SPT), the treaty body established by the OPCAT, and the national preventive mechanisms (NPMs), which each State Party to the OPCAT is obliged to maintain, designate or establish to carry out preventive work at the national level. A third element, not yet operational, is provided for in the OPCAT, is the Special Fund, still remains to be formally created to help finance implementation of the SPT's recommendations and education and training for NPMs.

The SPT, the first in a new generation of UN treaty bodies with a focus on operations in the field, began work in February 2007 with ten members. In late 2010, the SPT's membership will increase to 25, making it the largest human rights treaty body of the UN. Since its inception, the SPT has developed a programme of preventive visits and extended its relations with other actors, particularly with the NPMs.

NPMs, arguably the most innovative feature of the OPCAT, are being created in a variety of ways across the fifty-seven current States Parties. To date, more than a half have established or maintained bodies designated as NPMs. Some States have identified existing bodies to take on the preventive NPM mandate; however, in some cases there has been little or no organisational adaptation and little change in approach, a policy which is questioned in the manual. Other States have created new bodies to take on this new role. NPMs have emerged at a different pace across the States Parties. Some NPMs have been operational for more than two years, while others have not yet started work. Other States Parties are still in the process of setting up an NPM (or NPMs).

Not surprisingly, there are as many NPM models as there are States Parties: each NPM reflects the traditions - cultural, historical, legal, social, political and economic - of its country. It is hoped that this diversity will ensure that each 'home-grown' body flourishes in its own setting, whilst holding true to the core principles enshrined in the OPCAT.

NPMs do not spring into being, ready to take on their role with full capabilities. Few NPMs begin work as a multi-disciplinary team with the range of expertise, skills and diversity of background required by the OPCAT; few have the resources and strong legal mandate required by the OPCAT. Each NPM will face continual challenges as it strives to fulfil the complex preventive mandate, including (i) visiting all places of deprivation of liberty in its country, (ii) relating to other preventive bodies within the international framework of the OPCAT, (iii) commenting on draft or existing domestic legislation, (iv) and making recommendations to domestic authorities about the ways in which systems need to change in order to ensure the full protection of persons deprived of liberty. The development of NPMs must be viewed as an on-going process.

When an existing national human rights body takes on an additional role as an NPM, it will need to adapt to embrace a truly preventive approach. Such bodies may face more complex challenges than those starting with a blank slate. Although some NPMs enjoy the confidence of the public because they derive from, or are part of, existing human rights institutions whose credibility and independence have already stood the test of time, others will need to rise above the scepticism with which civil society regards parent institutions not previously known for their critical distance from the government. Each NPM will need to establish its own identity as a preventive body within the national context and as part of the international OPCAT framework.

Currently many actors are engaged in, or with, preventive work: the SPT, NPMs, other international actors at the universal or regional level, State Parties, and other actors at the national or local level, including civil society. All can benefit from this timely update of the OPCAT manual, which explains in a straightforward and accessible manner the many elements of the OPCAT and explores options for the gradual implementation of its provisions.





As the first two chairpersons of the SPT, we warmly welcome this renewed initiative of the APT, offering, as it does, valuable support to all who want to see the vision of the OPCAT fulfilled: a world in which a system of preventive mechanisms ensures the protection of all who are deprived of liberty against torture and other cruel, inhuman or degrading treatment or punishment.

Victor Rodriguez Rescia
Chairperson of the SPT

Silvia Casale
First Chairperson of the SPT

October 2010

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This publication is based on an earlier version, which was published in 2004 by the Association for the Prevention of Torture (APT) and the Inter-American Institute of Human Rights (IIHR). The original version was drafted by Debra Long and Nicolas Boeglin Naumovic.

The APT and the IIHR would like to thank:

- the contributors to the second version of this manual: namely Barbara Bernath (Chief of Operations, APT), Debra Long (Consultant, APT), Audrey Olivier (OPCAT Coordinator, APT) and Olivia Streater (Consultant, APT);
- the Editing Committee, which comprised Barbara Bernath, Audrey Olivier and Mark Thomson (Secretary General, APT); and
- the members of staff of both the APT and IIHR who reviewed and provided comments on various drafts.

The APT and the IIHR would also like to extend their gratitude to the editor of this manual, Dr Emma-Alexia Casale-Katzman, as well as to Anja Härtwig (Publications Officer, APT), who was in charge of the layout of the manual. Finally, the APT and the IIHR are grateful to the members of staff who coordinated the drafting and publication of this manual: Audrey Olivier, Maylin Cordero (Editorial Production, IIHR) and Marialyna Villafranca (Editorial Production, IIHR).







# Introduction for users

The Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR) agreed that a new version was required of their 2004 manual, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: a Manual for Prevention*.

The first version of the manual was an essential advocacy tool for securing the OPCAT's prompt entry into force, on 22 June 2006. The first version of the manual was published in seven languages and disseminated worldwide. It was complemented by the APT's 2006 publication *Guide to the Establishment and Designation of NPMs*, also known as the *NPM Guide*. Six years later, 57 States are Parties to the OPCAT and, 33 of them have designated their National Preventive Mechanism (NPM). An additional 21 States are Signatories to the OPCAT and have initiated dialogue on how to implement the treaty at the domestic level.

In addition to taking into account the latest developments in all regions of the world, this revised version of the manual emphasises the process and challenges of implementing the OPCAT; this emphasis is reflected in the fact that the new manual is entitled *The Optional Protocol to the UN Convention against Torture: Implementation Manual*.

The new manual aims to support and strengthen the work of international, regional and national actors involved in OPCAT ratification and implementation. It provides concrete examples of good practice drawn from around the world. Both NPMs and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) are at an early stage in their development. In order to shed light on the implementation of the preventive mandates of both the SPT and NPMs, this manual proposes a number of practical ways forward.

The manual is divided into five chapters, each of which can be read separately. The first chapter provides a general introduction to the OPCAT. It replaces the reflection on the OPCAT's history that opened the original version of the manual (interested readers can find the original introduction on the APT and IIHR's websites). As in the first version of the manual,

the second chapter provides a legal analysis of the OPCAT on an article by article basis. The third chapter is new: it provides a detailed analysis of the SPT's first years of operation. The fourth chapter is also new: it provides guidance on the process of OPCAT ratification and implementation, with a particular focus on NPM designation and establishment. The fifth chapter is based on APT's accumulated experience of working with NPMs: it examines the practical challenges and operational issues associated with the functioning of NPMs.

We would like to take this opportunity to recognise the important role that Ms Elizabeth Odio Benito played in the conception of the OPCAT, as the Chairperson of the Open Working Group of the UN Commission on Human Rights, in charge of drafting the Optional Protocol. The draft text of the OPCAT that she believed was the best compromise to create a new effective system of prevention was the text approved by the appropriate UN bodies in 2002.

The APT and the IIHR hope that this new manual will provide useful and practical guidance to all interested actors, and that it will prove an effective tool for strengthening efforts to prevent torture and ill-treatment worldwide.

Mark C.A Thomson
Secretary General, APT

Roberto Cuéllar M.
Executive Director, IIHR

October 2010



# Abbreviations

| | |
|---|---|
| APT | Association for the Prevention of Torture |
| CAT | UN Committee against Torture |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CPT | (European) Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| CPTA | Committee for the Prevention of Torture in Africa |
| CRC | Committee on the Rights of the Child |
| ECPT | European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| HRC | Human Rights Committee |
| IACHR | Inter-American Commission of Human Rights |
| ICCPR | International Covenant for Civil and Political Rights |
| ICJ | International Commission of Jurists |
| ICRC | International Committee of the Red Cross |
| IGO | Inter-Governmental Organisation |
| MERCOSUR | *Mercado Común del Sur* (Southern Common Market) |
| NGO | Non-Governmental Organisation |
| NHRC | National Human Rights Commission |
| NHRI | National Human Rights Institution |
| NPM | National Preventive Mechanism |
| OHCHR | Office of the UN High Commissioner for Human Rights |
| OPCAT | Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| OSCE | Organisation for Security and Cooperation in Europe |
| RIG | Robben Island Guidelines |
| SCT | Swiss Committee against Torture |
| SPT | UN Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| UN | United Nations |
| UDHR | Universal Declaration of Human Rights |
| UNCAT | UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |

# Chapter I

# Fundamental Aspects of the Optional Protocol to the UN Convention against Torture

Contents

## 1. Introduction

The international community has publicly and officially recognised torture and other cruel, inhuman or degrading treatment as among the most brutal and unacceptable assaults on human dignity.[1] In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in response to the atrocities that occurred during the Second World War. Article 5 of the UDHR states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[2] Since the adoption of the UDHR, this prohibition has been repeatedly reaffirmed in numerous national, regional and international instruments.[3] In accordance with these instruments, the prohibition of torture and other ill-treatment is absolute: no exceptions to this prohibition, including armed conflict, public emergency, or threats to national security are permitted under international law. Furthermore, the absolute prohibition of torture and other ill-treatment is regarded as part of international customary law: in other words, it is binding on all states, regardless of whether they have ratified any human rights instruments.

Regrettably, despite the longstanding absolute prohibition of torture and other ill-treatment, no region in the world has managed to free itself

1 For ease of reading, we will refer to cruel, inhuman or degrading treatment or punishment as 'other ill-treatment' in this manual.

2 Universal Declaration of Human Rights, UN Doc. GA Res. 217A(III), UN Doc. A/810, at 71, 10 December 1948.

3 See the International Covenant on Civil and Political Rights, Article 7, 16 December 1966; the Geneva Conventions of 1949 on the protection of victims of armed conflicts, Articles 3(1)(a) and 3(1)(c), which are common to all of the 1949 Geneva Conventions, Article 147 of the Convention on Civilians, Articles 49-51 of the Convention on the Wounded in the Field, and Articles 51-53 of the Convention on the Wounded at Sea, 12 August 1949; the UN Convention against Torture, 10 December 1984; the UN Convention on the Rights of the Child, Articles 37 and 39, 20 November 1989; the American Convention on Human Rights, Article 5, 22 November 1969; the Inter-American Convention to Prevent and Punish Torture, 9 December 1985; the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, 4 November 1950; the Final Act of Helsinki of 1975, Principle VII, 1 August 1975; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, along with Protocols I and II, 4 November 1993; and the African Charter on Human and Peoples' Rights, Article 5, 26 June 1981.

from these appalling abuses. During the 1970s, while the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[4] was being negotiated, several international organisations combined forces in order to find additional, more pragmatic ways to help prevent such abuses. Inspired by the results of visits to prisons during times of war that had been conducted by the International Committee of the Red Cross (ICRC), the Swiss philanthropist Mr Jean-Jacques Gautier sought to create a system of regular visits to all places of detention throughout the world. Following a lengthy and arduous negotiation process, a preventive system was finally realised on 18 December 2002 when the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the UN General Assembly.[5] This chapter examines the fundamental aspects of the OPCAT that make it an innovative treaty within the United Nations human rights system.

## 2. What is the Optional Protocol to the UN Convention against Torture?

The OPCAT aims to prevent torture and other ill-treatment by establishing a system in which regular visits to all places of detention within the jurisdiction and control of States Parties are undertaken and, on the basis of these visits, recommendations from international and national experts on improving domestic prevention measures are submitted to the authorities of the States Parties. The OPCAT stands in addition to the UNCAT, its parent treaty, rather than replacing it.

Unlike other optional protocols to human rights treaties, the OPCAT is viewed as an operational treaty rather than a standard-setting instrument. The OPCAT does not establish a system for individual complaints to be submitted since this is already provided for under Article 22 of the UNCAT; neither does it require States Parties to submit periodic reports to a treaty body. Instead, the OPCAT introduces a practical and

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, 10 December 1984.

5 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/57/199, 18 December 2002.







complementary element to the preventive framework set out under the UNCAT. The UNCAT provides a solid legal framework to combat and prevent torture and other ill-treatment; it includes a general obligation for each State Party to take effective measures to prevent torture and other forms of ill-treatment, and to make specific provisions to meet this goal.[6] Any State that has ratified the UNCAT can and should ratify the OPCAT.[7]

The OPCAT breaks new ground within the UN human rights system for four main reasons.

### 2.1 It emphasises prevention

Rather than reacting once violations have occurred, the OPCAT sets up an innovative, proactive system of visits to prevent violations from happening in the first place. Most existing human rights mechanisms concerned with preventing torture and other forms of ill-treatment, including the UN Committee against Torture (CAT), the treaty body that reviews States Parties' compliance with the provisions of the UNCAT, monitor the situation in a State Party's places of deprivation of liberty only when examining reports or after receiving allegations of abuse. For example, while the CAT can conduct visits to States Parties, it may only do so if there are well-founded allegations that torture is being systematically practised. Moreover, before it can conduct a visit, the CAT requires the prior consent of the State. In contrast, when a State ratifies the OPCAT it is giving its express consent to allow regular, unannounced visits by international and national experts to all types of places where people are deprived of their liberty. Thus, under the OPCAT, there is no need for further permission to be given for a visit or for a complaint (i.e. that torture or other ill-treatment has occurred) to be submitted.

Preventive visits enable OPCAT bodies to identify risks factors, analyse both systemic faults and patterns of failures, and propose recommendations to

6 UNCAT, Articles 2, 10, 11 and 16; and CAT, General Comment No 2, Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008.

7 If a State has signed the UNCAT, it can also sign the OPCAT, but it cannot ratify the OPCAT until it has ratified the UNCAT. For the latest information on the status of ratification of the UNCAT and OPCAT, see the website of the Office of High Commissioner for Human Rights: http://www2.ohchr.org/english/bodies/ratification/9.htm.

address the root causes of torture and other ill-treatment. The long-term objective of the OPCAT is to mitigate the risks of ill-treatment and, thus, build an environment where torture is unlikely to occur.

### 2.2 It combines complementary international and national efforts

The OPCAT is pioneering in that it establishes a system for complementary international and national efforts. The OPCAT establishes an international expert body within the UN[8], the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the SPT). It also requires States Parties to establish or designate National Preventive Mechanisms (NPMs) based on a set of criteria elaborated within the provisions of the OPCAT.[9] Both the SPT and NPMs are expected to:

- conduct regular visits to places of detention in order to improve the treatment and conditions of persons deprived of their liberty and the administration of places of detention in order to prevent torture and ill-treatment,
- propose recommendations to adopt preventive measures and to improve the system of deprivation of liberty, and
- work constructively with States Parties in relation to implementing these recommendations.[10]

By prescribing a complementary relationship between preventive efforts at the international and national levels, the OPCAT breaks important new ground in human rights protection by aiming to ensure the effective implementation of international standards at the national level.

### 2.3 It emphasises cooperation, not condemnation

Rather than focusing on public condemnation of violations that have already been committed, the mandate of the OPCAT bodies is based on the premise of cooperation with States Parties in order to improve

8 See Article 2 in Chapter II of this manual.

9 The mandate and functioning of the SPT and NPMs are explained in detail in Chapters III, IV and V of this manual. See discussion of Article 3 in Chapter II of this manual.

10 See commentary on Articles 11 and 19 in Chapter II of this manual.





conditions of detention and also procedures aimed at preventing violations. While other human rights mechanisms, including the UNCAT, also seek to establish constructive dialogue with States Parties, they are based on the public examination of States' compliance with their obligations through a reporting procedure and/or an individual complaints system. The system established by the OPCAT is based on a process of long-term, sustained cooperation and dialogue in order to assist States Parties to implement any changes necessary to prevent torture and other ill-treatment in the long-term.[11]

### 2.4 It establishes a triangular relationship between the OPCAT bodies and States Parties

In order to provide the greatest level of protection to all persons deprived of their liberty, the OPCAT establishes a triangular relationship between States Parties, the SPT, and NPMs. This triangular relationship is expressed in the various provisions of the OPCAT that establish obligations, corresponding duties, and points of contact between the States Parties, the SPT and NPMs. The OPCAT is the first international human rights instrument to establish such a triangular relationship.

This triangular relationship is created through the following series of interconnected powers and obligations:

- the SPT and NPMs have the power to conduct visits to places of detention.
- States Parties are obligated to allow visits by the SPT and NPMs.
- the SPT and NPMs have the power to propose recommendations for change.
- States Parties are obligated to consider their recommendations.
- the SPT and NPMs must be able to maintain contact.
- States Parties are obligated to facilitate direct contact (on a confidential basis, if required) between the SPT and NPMs.

11 See commentary on Preamble and Article 2(4) in Chapter II of this manual.

## 3. Why is there a need for the OPCAT?

Although the obligation to prohibit torture and other ill-treatment is expressly contained within a wealth of human rights instruments, and is also recognised as part of customary law, some states continue to ignore their existing obligations to prevent, prohibit, and punish acts of torture and other ill-treatment. Effective and sustainable measures to prevent such abuses have not been systematically implemented at a national level. Consequently, torture and other ill-treatment continue to persist in all regions of the world. Therefore, the entirely new approach that the OPCAT represents is sorely needed.

This new approach is driven by the fact that persons deprived of their liberty are most at risk of being subjected to torture and other ill-treatment. Since places of detention are, by definition, closed to the outside world, persons deprived of their liberty are vulnerable to, and thus at risk of, torture, other forms of ill-treatment, and other human rights violations. Respect for detainees' rights depends exclusively upon the authorities in charge of places of detention. Indeed, detainees are dependent upon others for the satisfaction of their most basic needs. Abuses can arise for a variety of reasons: for example, from a policy of state repression, negligence, lack of resources, poor or inappropriate staff training, and inadequate systems of oversight. Without independent, external monitoring these abuses can occur unchallenged. Consequently, the premise of the OPCAT is that the more open and transparent places of detention are, the less abuse will take place.

## 4. How did the concept of the Optional Protocol develop?[12]

In the 1970s, because of growing concern about the continued, widespread practice of torture and other ill-treatment, it was decided that there was a need for a treaty against torture and other ill-treatment to codify norms to prohibit and prevent these abuses, and to create mechanisms

12 The term 'detainee' is used in different ways in different countries and different international documents. For ease of reading, in this manual the term 'detainee' is used in its broadest sense to refer any person deprived of liberty as a result of arrest, administrative detention, pre-trial detention or conviction who is held in a place of detention as defined in Article 4(1) of the OPCAT.







to hold states accountable for violations. UN negotiations on a draft UN Convention against Torture commenced in 1978.

As discussed above, the notion of establishing an international visiting mechanism was the idea of Swiss banker and philanthropist Jean-Jacques Gautier. Following extensive research into existing methods to combat torture and other ill-treatment throughout the world, Jean-Jacques Gautier concluded that the ICRC's visits to prisoners of war and political prisoners were extremely effective for preventing abuses. He therefore set out to build support for a similar system of regular visits to all places of detention. In 1977, Jean-Jacques Gautier established the Swiss Committee against Torture (SCT, today called the Association for the Prevention of Torture [APT]) as a platform for his campaign.[13] The idea attracted the interest of several international non-governmental organisations (NGOs), particularly Amnesty International and the International Commission of Jurists (ICJ), who with the SCT built alliances with a number of states, namely **Switzerland**, **Sweden** and **Costa Rica**.

Initially, the idea was to include a provision for an international visiting mechanism within the text of the draft UNCAT. However, as it was known that there would be strong resistance from many States to allowing unrestricted inspections of their detention facilities, the proponents of the UNCAT decided not to push for the visiting mechanism to be included within the text of the draft treaty. Instead, Niall McDermot, Secretary General of the ICJ, persuaded Jean-Jacques Gautier that it would be wiser to advocate for a specific Optional Protocol to the UNCAT, once the UNCAT was adopted, to establish an international visiting mechanism.[14] In March 1980, **Costa Rica** took the initiative and formally submitted a draft Optional Protocol to the UNCAT to the UN.[15] However, the draft was presented with a proposal that its examination be postponed until after the adoption of the UNCAT in order to avoid delaying UN approval of the other treaty.

13 For information on the global work of the Association for the Prevention of Torture, see www.apt.ch.

14 Niall McDermot, How to enforce the Torture Convention: How to make the International Convention Effective, Swiss Committee against Torture and the International Commission of Jurists, Geneva, 1980, pp.18-26; and APT, Letting in the light, 30 years of Torture Prevention, APT, Geneva, 2007.

15 Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, UN Doc. E/CN.4/1409, 8 March 1980.

While the idea of establishing an international visiting mechanism within the UN was postponed, the notion gathered momentum in Europe. In 1983, the Council of Europe's Parliamentary Assembly adopted a draft text, prepared by the SCT and the ICJ, to create a visiting system within the framework of the Council of Europe. Following negotiations, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)[16] was adopted by the Council of Europe on 26 June 1987. This Convention established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which is mandated to visit places of detention in Council of Europe member states that have ratified the ECPT.[17]

An attempt was made to establish a similar system within the Americas; however, whilst an Inter-American Convention to Prevent and Punish Torture was adopted in 1985,[18] a system for regular preventive visits was not included within the treaty.

In 1987, the UNCAT entered into force and efforts began to revive the idea of establishing an international visiting mechanism within the UN. In 1992, the UN Commission on Human Rights adopted a resolution[19] to establish an open-ended Working Group to draft an Optional Protocol to the UNCAT. This Working Group was open to all member States of the UN, as well as relevant NGOs and other experts. As expected, negotiations within the Working Group were arduous and time consuming: for eight years these negotiations focused on obtaining consensus on establishing an effective international visiting body. Despite the best efforts of a number of States and NGOs, negotiations reached a stalemate due to resistance from other States.

However, in 2001, the Mexican delegation, with the backing of other Latin

16 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Doc. Inf/C (2002) Strasbourg, 26.XI.1987, amended according to Protocols No 1 (European Treaty Series No 151) and No 2 (European Treaty Series No 152).

17 For more information on the CPT, see www.cpt.coe.int.

18 Inter-American Convention to Prevent and Punish Torture, A-51, Organization of American States, Treaty Series No 67, entered into force February 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83, 1992.

19 Commission on Human Rights, Resolution 1992/43, 3 March 1992.









American States, submitted a draft that introduced an innovative element that reinvigorated the debate. This draft proposed a system of regular visits based on preventive visits by an international visiting mechanism and also an obligation for States to establish national visiting bodies. This proposal was met with a mixed response from participants of the Working Group. In an attempt to draw the drafting process to a close, in 2002 the Chair of the Working Group presented a compromise text that combined the international and national elements of the original and Mexican drafts. Whilst consensus on this text was not achieved within the Working Group, the Chair's draft was regarded by many States and NGOs as the best hope of securing a system of regular preventive visits. As a result, in March 2002 the Chair's text was presented to the UN Commission on Human Rights along with a resolution tabled by Costa Rica, calling for the text to be presented to the UN General Assembly for final adoption. Following a round of strongly contested debates and votes within the UN Human Rights Commission and the UN Economic and Social Council, the UN General Assembly adopted the OPCAT on 18 December 2002 with a majority vote.[20] On 22 June 2006, the OPCAT entered into force following the 20th ratification.[21]

## 5. How is the OPCAT helping to prevent torture and other ill-treatment?

The UNCAT contains a broad range of provisions designed to prevent torture and other ill-treatment. The requirement for States Parties to the UNCAT to include visits to places of detention as only part of a comprehensive preventive framework has been emphasised by the CAT in its interpretation of Articles 2 and 11.[22]

The OPCAT is designed as a practical tool to assist States Parties to the

20 127 States voted in favour of the OPCAT, 42 abstained and only 4 States voted against the OPCAT, namely Marshall Island, Nigeria, the United States of America, and Palau Island. For records of voting in connection with the OPCAT within the UN, see the first version of this manual, which is available at www.apt.ch. See Annex 3 of this manual for details of the final vote at the UN General Assembly.

21 At the time of the writing, there are 57 States Parties to the OPCAT. For details of the status of ratification, see http://www2.ohchr.org/english/bodies/ratification/9.htm.

22 See CAT, General Comment No 2; and APT, *Torture in International Law: A guide to Jurisprudence* ('*Jurisprudence Guide*'), APT, Geneva, 2008, pp.25-26.

UNCAT to put their existing obligations into effect in order to prevent torture and other forms of ill-treatment.

### 5.1 The effectiveness of visits to places of detention as a preventive tool

The extensive experience of organisations such as the ICRC and the CPT has demonstrated that regular visits to places of detention can be extremely effective for preventing torture and other ill-treatment. The possibility of being subjected to unannounced external scrutiny can have an important deterrent effect. Moreover, visits enable independent experts to examine firsthand, rather than via intermediaries, the treatment of persons deprived of their liberty and the conditions in which they are detained. Based on the concrete situation observed and private interviews with persons deprived of liberty, experts can make realistic, practical recommendations and enter into dialogue with the authorities in order to improve the situation. Furthermore, visits from the outside world can be an important source of moral support for persons deprived of their liberty.

The OPCAT is not intended to target or to point a finger of blame at individual States for violations, but rather to work constructively with States Parties to implement sustained improvements. In order to build trust and a positive collaborative relationship, the SPT is mandated to work confidentially with a State Party if the State wishes. States Parties not only have an obligation to cooperate with the SPT and NPMs, but it is also in their best interests to do so. By assisting these mechanisms in identifying the specific changes needed to improve their systems of deprivation of liberty, in the long-term States can demonstrate their commitment to preventing torture and other ill-treatment.

### 5.2 An integrated approach to prevention

Visits to places of detention should be a central part of any preventive system. However, visits themselves are not enough to prevent torture and other ill-treatment. As recognised in Article 2 of the UNCAT, the prevention of torture and other ill-treatment requires a range of legislative, administrative, judicial and other measures. Prevention aims to address the root causes of torture and other ill-treatment; to be successful, it must involve









a holistic approach that is directed at society as a whole. The objective of prevention is to reduce the risks of torture and other ill-treatment and, thus, to create an environment where torture is not likely to occur.

The development of a comprehensive strategy for the prevention of torture and other ill-treatment requires an integrated approach composed of three broad, interrelated elements:

- a legal framework, public policies and shared conceptions of best practice for prohibiting and preventing torture and other ill-treatment that
- is implemented by actors (e.g. judges and the police) relevant to efforts to prevent torture
- via mechanisms to monitor the relevant laws and their implementation.

#### 5.2.1 A legal and policy framework that respects the prohibition

Establishing a legal framework that prohibits and prevents torture and other ill-treatment forms the foundation of any preventive strategy. Torture and other ill-treatment are absolutely prohibited under international law and states should reflect this international prohibition in their constitutions and/or legislation. In accordance with the provisions of the UNCAT, torture should be made a crime under domestic criminal law and offences should be punished by appropriate penalties. Moreover, evidence gathered via torture or other ill-treatment should be inadmissible in legal proceedings since this would negate one of the main reasons that such abuses are committed.

General public policies, such as human rights action plans, and specific public policies that affect deprivation of liberty are of particular relevance in terms of establishing legal provisions to prevent torture and other ill-treatment. For instance, public policies on crime (e.g. zero tolerance policies), drug users, juvenile justice, and immigration, as well as mental health and public health policies (e.g. in relation to HIV), may have an important direct or indirect impact on torture prevention.

#### 5.2.2. Implementation of the prohibition

Different measures are needed to combat impunity and to ensure that legal prohibitions are implemented in practice. A range of procedural

safeguards should be established for persons deprived of their liberty. For example, from the very outset of deprivation of liberty people should be afforded the means and opportunity to notify a third person, and to have access to lawyers[23] and physicians. In addition, procedures and rules should be regularly reviewed, and reformed if necessary. Proper implementation also implies that all officials involved in deprivation of liberty should receive appropriate training regarding both the prohibition of torture and other ill-treatment, and their professional responsibilities in preventing such abuses. Finally, implementing legal prohibition(s) implies that any breach will not be tolerated and will be appropriately sanctioned. When this is not the case, a culture of impunity develops: this undermines both the force of the relevant laws and their implementation.

#### 5.2.3 Control mechanisms: the obligation to protect persons from torture and other ill-treatment

However, having a legal framework that is implemented is not enough to ensure that torture and other ill-treatment does not occur. Constant vigilance is needed as the risk of abuse always exists. Even in a favorable environment, there is a need for control mechanisms to detect warning signs and, when these are detected, to propose remedial action. Torture and other ill-treatment usually happen in secret and it is therefore crucial to promote transparency. A range of complementary measures are required to promote effective transparency, including, for example, the establishment of independent monitoring of places of deprivation of liberty; accessible and effective complaints mechanisms; media reporting; and civil society campaigns and activities.[24]

Preventing torture and other ill-treatment is a complex process, encompassing different, but interlinked, measures and strategies. Unlike other treaties and treaty bodies, which often make demands on States Parties without offering guidance on implementation, the OPCAT offers the means to implement change at the domestic level. Thus, the OPCAT

23 For more information, see APT Legal Briefing, *Legal Safeguards to Prevent Torture: The Rights of Access to Lawyers for Persons Deprived of Liberty*, Legal Briefing Series, APT, Geneva, March 2010: available at www.apt.ch.

24 For further information on the nature of States' obligations to prohibit and prevent torture and other ill-treatment under international law, see APT, *Jurisprudence Guide*.









bodies are mandated not only to conduct visits to places of detention, but also to offer States Parties advisory and other assistance, such as training, to tackle the root causes of torture and other ill-treatment, irrespective of whether a visit has been conducted recently (or, indeed, at all).[25]

The SPT has recognised the importance of an integrated approach to prevention and has expressly stated that it regards its own mandate as not restricted to commenting on the situation in places of detention observed during its visits. The SPT has stated that, as well as commenting on current practice, including conditions of detention, its mandate extends to looking at "legal and system features" within States Parties in order to identify where the gaps in protection exist and which safeguards require strengthening.[26] It is important that this broad approach is replicated by the NPMs; indeed, the OPCAT contains specific requirements for NPMs to address issues observed through visiting, and to comment on any relevant domestic legislation, as a fundamental part of their preventive mandate.[27]

Furthermore, as an additional aid for States Parties looking to implement domestic preventive measures, a Special Fund is being established to support the education and training programmes of the NPMs, and to give practical assistance to States Parties in fully implementing the recommendations of the SPT.[28]

## 6. What are States Parties' obligations under the OPCAT?

When a State becomes a party to the OPCAT it does not gain any additional reporting requirements: States Parties do not have to submit periodic reports to the SPT. Instead, the OPCAT establishes a set of obligations of a practical nature. The obligations of States Parties under the OPCAT can be classified into seven broad categories: these categories relate to each State Party's obligations:

25 See commentary on Articles 11 and 20 in Chapter II of this manual.

26 SPT, First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2007 to March 2008, UN Doc. CAT/C/40/2, 14 May 2008, §12.

27 See commentary on Article 19(c) in Chapter II of this manual.

28 See commentary on Article 26 in Chapter II of this manual.

1. to establish, designate or maintain an NPM (or NPMs);
2. to open up all places of detention under its jurisdiction and control to external scrutiny by its NPM(s) and the SPT;
3. to facilitate contact between its NPM(s) and the SPT;
4. to provide information to its NPM(s) and the SPT on domestic detention procedures and preventive measures;
5. to consider the recommendations of its NPM(s) and the SPT;
6. to cooperate with its NPM(s) and the SPT; and
7. to publish the annual reports of its NPM(s).

These obligations are operational in nature: they facilitate the preventive mandates of the SPT and NPMs. Furthermore, these obligations are based on the overarching aim of establishing cooperation and a triangular relationship between States Parties, the SPT, and NPMs. The rationale for this cooperative approach is based on the understanding that effective prevention requires communication and coordination in order to establish a system that will provide the greatest possible protection to the broadest category of persons deprived of their liberty.[29]

## 7. How do the OPCAT bodies work?

### 7.1 The SPT[30]

The SPT was established on 18 December 2006 when the first 10 experts to serve as members were elected by States Parties. Following the 50th ratification of the OPCAT, the SPT will comprise 25 members.[31]

The SPT's broad preventive mandate centres on two inter-related functions: an advisory function (i.e. to provide advice on issues relating to NPMs and on domestic preventive measures generally) and an operational function

29 For a more detailed discussion of this cooperative relationship, see Sections 2.2-2.4 of this chapter; and also Chapter III, especially Sections 3.3.2, 4.5.1 and 4.7.2. See also the commentary on Articles 1, 3, 11(b)(ii), 12(c), 16(1) and 20(f) in Chapter II of this manual.

30 See Chapter III of this manual, especially Section 2.1, for details of the SPT's preventive mandate.

31 In accordance with Article 5.1 of the OPCAT, following the 50th ratification, in 2011 the number of SPT members will to rise to 25. For a list of current SPT members, see http://www2.ohchr.org/english/bodies/cat/opcat/index.htm#membership.





(i.e. to carry out in-country missions and monitor places of detention).

While the SPT is mandated to provide recommendations and observations to improve the protection of persons deprived of their liberty, it also has an important advisory role to play in the establishment, designation and functioning of NPMs. The role of the SPT in respect of NPMs has four key dimensions:

- advising States Parties on the establishment or designation of NPMs;
- advising States Parties on the functioning of NPMs;
- advising NPMs directly on their mandate and effective functioning;
- advising on measures to protect persons deprived of their liberty; and
- providing training for NPMs.[32]

As a first step in carrying out this demanding aspect of its mandate, the SPT produced a set of preliminary guidelines on the establishment of NPMs to assist States Parties and others involved with the NPM decision-making process.[33]

As discussed above, the SPT is mandated to carry out in-country missions to States Parties in order to monitor the situation of deprivation of liberty (including visits to places of detention) and provide advice on OPCAT implementation (including engaging with NPMs). Following an in-country visit, the SPT writes a report concerning its findings and then submits this to the relevant authorities. The report will remain confidential unless the State Party concerned gives its consent to publication or fails to cooperate with the SPT.[34] The SPT can also undertake short follow-up visits between its regular, periodic in-country missions.[35]

32 See commentary on Article 11 in Chapter II of this manual.

33 See Chapter III of this manual, especially Section 3.3, for further details of the work of the SPT, and Annex 2 of this manual for the SPT's Preliminary guidelines on the on-going development of NPMs.

34 See Sections 9.1.2 and 10 of this chapter for further details of the principle of confidentiality as applied in the work of the SPT. See also the commentary on Article 16(1) in Chapter II of this manual, and the explanation of the work of the SPT in Chapter III, especially sections 3.2 and 4.7.2-3, with regard to confidentiality.

35 See Article 13(4), including commentary, in Chapter II of this manual.

### 7.2 NPMs

The national element of the OPCAT's preventive approach revolves around the obligation for States Parties to establish, designate, or maintain NPMs with a similar mandate to the SPT. In accordance with Article 17 of the OPCAT, a State Party is expected to have an NPM (or NPMs) in place one year after ratification or accession.[36] In order to guarantee the effective and independent functioning of NPMs, a key aspect of which is ensuring that they will be free from any undue interference, the OPCAT sets out, for the first time in an international instrument, specific guarantees and safeguards in respect of national visiting bodies that must be respected by States Parties.[37] The OPCAT does not dictate the form that these mechanisms must take, thereby providing the flexibility for States Parties to designate one or several bodies of their choosing, including new specialised bodies, existing human rights commissions, ombudsperson's offices, parliamentary commissions. However, each national mechanism, irrespective of the form it takes, must comply with the minimum guarantees and powers set out in the OPCAT.[38]

As noted above, the requirement for States Parties to put some form of NPM in place is a novel aspect that greatly strengthens the OPCAT as a preventive tool.[39] The inclusion of NPMs within the OPCAT preventive framework overcame a real practical obstacle in the original OPCAT concept, which envisaged visits being conducted only by the SPT. The original concept failed to address the fact that an international body would not be able to visit places of detention with sufficient frequency to be effective on its own.[40] However, NPMs, by their nature, are situated within States Parties so they can conduct more frequent visits, maintain

36 The first 20 States Parties to the OPCAT had until 22 June 2007 to establish or designate their NPMs. In practice, few met this deadline. For a list of designated NPMs, see http://www.apt.ch/content/view/138/152/lang,en/.

37 See Articles 18-23, especially Article 18.

38 For more information on how the SPT and NPMs function, see Chapters III and IV of this manual. For a detailed analysis of the establishment and designation of NPMs, see APT, *NPM Guide*.

39 Nowak and McArthur, *The UNCAT*, p.923.

40 Nowak and McArthur, *The UNCAT*, p.923.





a more regular and sustained dialogue with those responsible for the care and custody of persons deprived of their liberty, propose concrete preventive measures adapted to the national context and follow-up on the implementation of recommendations, including those of the SPT.[41]

### 7.3 Cooperation between the SPT and NPMs

At the heart of the OPCAT lies the principle of cooperation and constructive dialogue. The key practical consequence of this principle is that the SPT and NPMs are expected to work in a complementary manner. To facilitate collaboration, the SPT and NPMs are required to have direct contact and exchange information, if necessary on a confidential basis.[42] An important dimension of this cooperation is the SPT's unique mandate to provide both assistance and advice directly to States Parties concerning the establishment and effective functioning of NPMs, and to offer training and technical assistance directly to NPMs, with a view to enhancing their capacities.[43]

## 8. How are 'torture' and 'other ill-treatment' defined?

The aim of the OPCAT is to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment. Article 1 of the UNCAT defines torture as a crime under international law thus:

> the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of

41 Nowak and McArthur, *The UNCAT*, p.923. See also commentary on Article 3 in Chapter II of this manual and chapter IV of this manual.

42 See commentary on Article 11 in Chapter II of this manual.

43 For further details, see Sections 9.1-11 of this chapter; and also Section 3.3 of Chapter III.

> or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[44]

This Article identifies three fundamental elements in its definition of torture as a crime:

- there must be severe physical or psychological pain or suffering;
- the pain or suffering must be inflicted either for a purpose or for a reason based on any kind of discrimination; and
- the pain or suffering must be inflicted by/at the instigation of, or with the consent/acquiescence of, a public official or a person acting in an official capacity.

Various instruments at the international and regional levels contain alternative definitions of torture. However, the three features outlined above are common to all these definitions. The accepted approach under international law has been to avoid drawing up an exhaustive list of acts that could be considered to amount to torture because of concerns that such a list may prove too limited in its scope and, thus, may fail to adequately respond to developments in technology and values within societies.[45]

Unlike torture, other forms of cruel, inhuman or degrading treatment or punishment are not expressly defined by the UNCAT. The UNCAT simply refers to them as acts that cannot be considered to fall within the definition of torture as outlined in Article 1.[46] There is a persuasive body of opinion among international experts that these acts can be distinguished from torture if they have not been inflicted for any specific purpose.[47]

44 UNCAT, Article 1(1). It is important to note that an act cannot be justified as a lawful sanction merely because it is approved by national law; it must also conform to international standards.

45 For further information on the definition of torture, see APT, The Definition of Torture: Proceedings of an Expert Seminar, APT, Geneva, 2003; and Nigel Rodley, The Treatment of Prisoners under International Law, Oxford University Press, Oxford, 1999, pp.75-107. See also APT, *Jurisprudence Guide*, pp.7-13.

46 UNCAT, Article 16.

47 APT, *The Definition of Torture: Proceedings of an Expert Seminar*, p.18 and pp.58-59.





The lack of a definition of "other forms of ill-treatment" is useful as it ensures that other types of abuse that may fail to meet the strict UNCAT definition of torture as a crime, but that nevertheless cause suffering to individuals, are also absolutely prohibited. This affords the broadest possible protection against various assaults on persons' human dignity. Over the years, a broad range of forms of treatment and punishment has been recognised as cruel, inhuman or degrading; the jurisprudence of international and regional human rights bodies and experts has been particularly helpful in identifying forms of treatment and punishment that may amount to cruel, inhuman, or degrading treatment or punishment. For example, poor conditions of detention (such as over-crowding), lack of adequate sanitary provision, lack of light, lack of exercise; the use of certain forms of mechanical restraints; denigration of religious symbols and publications; and excessive use of force during riot control have, in specific circumstances, been considered by human rights bodies to amount to cruel, inhuman or degrading treatment or punishment.[48]

However, it is vital to bear in mind that when working within a preventive framework it is generally not necessary to distinguish between acts of torture and other forms of ill-treatment because both are absolutely prohibited under international law at all times. Furthermore, labelling an act as torture or cruel, inhuman or degrading treatment or punishment may hinder the establishment of a constructive dialogue with the authorities, and/or staff within places of detention, by focusing discussions on definitions rather than on solutions to problems.

The SPT has confirmed that its preventive mandate will not be constrained by the application of strict definitions. It has stated that "the scope of preventive work is large, encompassing any form of abuse of people deprived of their liberty which, if unchecked, could grow into torture or other cruel, inhuman or degrading treatment or punishment."[49] The SPT recommends that this broad approach is also reflected in the work of NPMs.

48 For further information on the definition of torture and other forms of ill-treatment, see APT, *Jurisprudence Guide*, pp.7-13; and Nowak and McArthur, *The UNCAT*, pp.28-29.

49 SPT, First annual report, §12.

## 9. What are the visiting powers of the OPCAT bodies?

### 9.1 Which types of places of detention may be visited under the OPCAT?

The term 'place of detention' is very broadly defined by the OPCAT[50] in order to ensure the protection of all persons deprived of their liberty (i.e. detainees) under any circumstances. This means that visits by the SPT and NPMs are not limited to prisons and police stations, but also include places such as pre-trial detention facilities, centres for juveniles, places of administrative detention, security force stations, detention centres for migrants and asylum-seekers, transit zones in airports, checkpoints in border zones, mental health institutions, and social care homes. The scope of the mandate of the SPT and NPMs also extends to unofficial and secret places of detention, where people are particularly vulnerable to many types of abuse. Institutions where persons are, or may be, deprived of liberty and placed under public or private control are subject to visits by the OPCAT bodies.[51]

### 9.2 Visiting powers

When a State ratifies the OPCAT, it gives its consent to both types of bodies entering any place of detention within its jurisdiction and control without additional prior consent being required.[52] Their respective mandates empower visiting experts from both the SPT and NPM(s) to conduct interviews, in private and without witnesses, with any persons of their choosing, including any person deprived of his or her liberty, staff within places of detention, medical personnel, lawyers, family members of detainees, and former detainees.[53] Visiting experts must be given unrestricted access to the full records of all detainees and other relevant

50 For a more detailed analysis of these issues, see discussion of Article 4 in Chapter II of this manual.

51 For further information, see analysis of Article 4(2) in Chapter II of this manual.

52 See commentary on Articles 1 and 4 in Chapter II of this manual.

53 See commentary on Articles 14 and 20 in Chapter II of this manual.





documents.[54] The visiting team must be permitted to inspect the entirety of detention facilities and their premises.[55]

Whilst the SPT and NPMs are granted the same visiting rights and duties under the OPCAT, there are important differences in the mandates of the SPT and NPMs that result, respectively, from the international versus the national scope of their work.





### 9.3 Regularity and programme of visits

The SPT, as an international body, is mandated to conduct in-country missions to all States Parties to the OPCAT in order to visit places of detention, to advise on the establishment and functioning of NPMs, and to review prevention practices at first hand.[56] The SPT is, of course, unable to visit places of detention within States Parties as regularly as NPMs do. For example, after a few years of operation, when there were 50 States Parties to the OPCAT, the SPT stated that it planned to conduct 10 in-country mission in every 12-month period, in order to be able to visit each State Party every four or five years, provided that the UN General Assembly approved the relevant budgets.[57] In contrast, because of their national focus, NPMs are expected to conduct more frequent visits to the places of detention within the jurisdiction of their respective States Parties.

Therefore, unlike NPMs, the SPT is mandated (by Article 13) to establish a "programme of visits" to determine when individual States Parties will be the focus of an in-country mission. The SPT was obligated by Article 13(1) to choose the first States Parties to receive in-country missions by lot in order to avoid any suggestion of bias.[58] The SPT has since agreed, in its rules and procedures, that subsequent in-country missions will be decided on a reasoned basis, taking into account the following factors:

54 See commentary on Articles 14 and 20 in Chapter II of this manual.

55 See commentary on Articles 14 and 20 in Chapter II of this manual.

56 See commentary on Article 11 in Chapter II of this manual.

57 SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, UN Doc. CAT/C/44/2, 25 March 2010, §21.

58 The first countries visited by the SPT were Mauritius, the Maldives, Benin, and Sweden. For further details, see http://www2.ohchr.org/english/bodies/cat/opcat/index.htm.

date of ratification; establishment of the State Party's NPM(s); geographic distribution of places of detention within the State Party's jurisdiction and control; size and complexity of the State; regional preventive monitoring; and whether any urgent issues have been reported to relevant human rights bodies or organisations.[59] Once the SPT has drawn up its programme of in-country missions, this is made public and notification is sent to the relevant States Parties so that they can make the necessary practical arrangements for the missions.[60]

### 9.4 What happens after visits?

At the end of a visit conducted by the SPT or NPM, the relevant body issues a report on its findings, including recommendations for change.[61] The visit report is an extremely useful tool for establishing and maintaining dialogue with the relevant authorities and for evaluating improvements in a State Party's system of deprivation of liberty. The objective is to establish a lasting collaborative relationship with the relevant authorities (such as ministries of justice, the interior and/or security, as well as penitentiary authorities) in order to work towards the implementation of recommendations from OPCAT bodies. Since the OPCAT primarily seeks to assist State Parties in developing practical and realistic measures to prevent torture and other ill-treatment, the effectiveness of the OPCAT as a preventive tool is based on the premise of on-going, constructive collaboration. The instrument therefore establishes a specific obligation for States Parties to enter into dialogue with their NPMs and the SPT on proposed recommendations and possible implementation measures.[62]

In order to foster a climate of mutual respect and collaboration, the in-country mission reports of the SPT are submitted to the relevant authorities on a confidential basis. This confidentiality gives States Parties the opportunity to correct problems and implement changes out of the limelight of international public condemnation, resulting in many States

59 SPT, Third annual report, §20.

60 SPT, First annual report, §14. See also OPCAT, Article 1; and Section 4.4 of Chapter III of this manual.

61 See discussion of Article 16 in Chapter II of this manual.

62 See commentary on Articles 12 and 22 in Chapter II of this manual.









being more willing to enter into dialogue with the SPT and their respective NPM(s). However, States Parties may choose to authorise the publication of their SPT visit reports.[63] For example, **Sweden**, one of the first States Parties to receive an SPT in-country mission, gave permission for its report to be made public.[64] The SPT may also publish a report in the event that a State Party makes part of the report public. Furthermore, if a State fails to cooperate with the SPT, either during a visit or afterwards (i.e. by failing to improve the situation of deprivation of liberty according to the SPT's recommendations), the SPT may request that the CAT make a public statement and/ or publish the visit report after consultations with the State Party concerned.[65]

Conversely, the reports of NPMs are not subject to the principle of confidentiality. NPMs can thus decide to publish all, or some, of their visit reports: an NPM's strategy in relation to publication versus confidentiality of reports is often a critical aspect of its working methods. However, States Parties have an obligation to publish and disseminate the annual reports of their respective NPM(s).[66] This provision does not interfere with the independence of NPMs, as NPMs are at liberty to publish their annual reports themselves; this obligation simply provides a guarantee that the annual reports of all NPMs will be published and distributed. This enables NPMs to have transparent working practices. In the long-term, the dissemination of annual reports is also expected to improve the domestic impact of the work of NPMs.

## 10. Addressing the root causes of torture and other ill-treatment

In addition to allowing visits to places of detention, when a State becomes a party to the OPCAT it also commits itself to receiving and considering recommendations and observations from the SPT and NPM on any

63 See discussion of Article 16 in Chapter II of this manual.

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

65 OPCAT, Article 16(4).

66 See commentary on Article 23 in Chapter II of this manual.

changes or actions that are required in order to prevent torture and other ill-treatment. This provision must be read in the very broadest terms as encompassing advice on a range of legislative, judicial, administrative, and other measures that, as noted in Section 5.2, are all required in order to establish an integrated preventive system.

While both the SPT and NPMs are mandated to provide advice on preventive measures generally, the SPT has an additional unique function: it is also mandated to advise on matters concerning NPMs.[67] This additional aspect of the SPT's mandate reinforces the triangular relationship, established by the OPCAT, between States Parties, the SPT, and NPMs. This part of the SPT's role is vital to fully realising the OPCAT's goal of establishing a system of complementary international and national efforts to prevent torture and other ill-treatment.

67 For further information, see Sections 6.1 and 6.2 of this chapter. See also discussion of Article 11 in Chapter II of this manual.

# Chapter II

# Commentary on the Articles of the OPCAT

Contents

## 1. Introduction

This chapter outlines each article of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[1] in turn, providing a detailed, line-by-line commentary. The Chapter can be used either as a stand-alone guide to the treaty or to complement other reading. While other chapters in this manual deal with, for instance, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and national preventive mechanisms (NPMs), this chapter focuses on the provisions of the OPCAT, rather than on their practical application.

## 2. OPCAT Preamble

### 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 these articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common

1 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/57/199, 18 December 2002. The OPCAT entered into force on 22 June 2006.

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 (...)

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The Preamble sets out the basic principles underlying the OPCAT and describes the rationale behind its unique preventive focus. The idea of intervening before a violation takes place is a relatively recent concept within the field of human rights protection: usually, interventions occur once a violation has already taken place (*ex post facto*). Thus, the OPCAT represents a new approach that seeks to address the root causes of torture and ill-treatment, and to foster cooperative relationships in order to reduce the likelihood that violations will occur.

The Preamble acknowledges that torture and other cruel, inhuman or degrading treatment or punishment[2] are already prohibited under international law and confirms that states bear primary responsibility for preventing such abuses. The nature of states' obligations to prevent torture and other ill-treatment under international law flow both from express provisions within human rights treaties and from customary international law;[3] thus, every state must act to prevent torture and other ill-treatment, regardless of treaty ratification status.

2 For the sake of brevity, this chapter uses the term 'other ill-treatment' to refer to 'other cruel, inhuman or degrading treatment or punishment'.

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







The Preamble places the OPCAT within the context of its parent treaty: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UNCAT).[4] The UNCAT contains general obligations, under Articles 2 and 16, to prevent torture and other ill-treatment; it also contains other, more specific measures (such as the criminalisation of torture, the systematic review of interrogation techniques, and the investigation of complaints), which States Parties must include in their preventive framework at the national level.[5] The OPCAT aims to supplement these preventive provisions. Article 2(1) of the UNCAT outlines the efforts that States Parties must make to prevent acts of torture: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

Article 16(1) of the UNCAT affirms that, as well as preventing torture, States Parties must also prevent acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture as defined under Article 1:[6]

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.[7]

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, 10 December 1984. The UNCAT entered into force on 26 June 1987.

5 For further information see APT, *Torture in International law, A Guide to Jurisprudence*, APT, Geneva, 2008, pp.13-29.

6 For further information on the definition of torture, see APT, *Definition of Torture: Proceedings of an expert seminar*, APT, Geneva, 2003; and APT, *Jurisprudence Guide*, pp.7-13, pp.56-63, pp.94-101 and pp.126-129.

7 The references to Articles 10, 11, 12 and 13 of the UNCAT relate to the following obligations:

The UN Committee against Torture (CAT), which monitors States Parties' compliance with their obligations under the UNCAT, has interpreted Articles 2 and 16 as giving equal importance to obligations to prevent torture and obligations to prevent other forms of ill-treatment. The CAT's General Comment No 2 states that:

> The obligation to prevent in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes "in particular" the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.[8]

Article 10: "1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person."

Article 11: "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."

Article 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Article 13: "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."









As the CAT makes clear, States Parties to the UNCAT already have an obligation to take a range of measures to prevent torture and other forms of ill-treatment at the national level. However, the UNCAT does not set out the exact nature of the preventive "legislative, administrative, judicial and other" measures that States Parties must implement under Article 2.

The OPCAT was developed to help States Parties to meet their existing preventive obligations under the UNCAT. It complements the UNCAT, notably by setting out in detail a particularly effective non-judicial means by which to strengthen the protection afforded to detainees: regular visits to all places of detention. The obligation to conduct visits can be said to derive from Article 2 of the UNCAT.[9] The rationale for the OPCAT's focus on visits is that torture and other ill-treatment often occur in places of detention as they are, by definition, closed to public scrutiny: thus, the best means of prevention involves opening up places of detention to independent scrutiny.[10]

The Preamble also highlights the need for complementary international and national efforts to prevent torture and other ill-treatment. This provides the basis for the OPCAT's innovative approach, which involves establishing a system of prevention of torture and other ill-treatment that includes both international and national bodies.

8 CAT, General Comment No 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, §3.

9 Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford Commentaries on International Law, Oxford University Press, Oxford, p.890; and CAT, General Comment No 2, §13.

10 Nowak and McArthur, *The UNCAT*, p.890.

## 3. OPCAT Part I: General principles

Part I contains four articles that set out the general principles that form the conceptual framework of the OPCAT. It details the key objectives of the OPCAT and how they are to be implemented via international and national mechanisms. It also sets out States Parties' general obligations under the OPCAT. Parts II to IV of the OPCAT elaborate on the modus operandi of the OPCAT bodies.

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**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.

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Article 1 sets out the two defining and novel characteristics of the OPCAT: its preventive objective and its approach to prevention. The OPCAT's preventive approach establishes a system comprising international and national preventive bodies. No other international treaty provides for such detailed, practical and complementary international and national efforts to prevent torture and other ill-treatment from occurring within places of detention worldwide. The OPCAT does not set out new legal norms; instead, it focuses on establishing a system to prevent torture and other ill-treatment that is framed around the implementation of exis-ting international norms. Article 1 mentions several concepts, explored in detail below, that are not directly explained elsewhere in the OPCAT:

- the need for preventive visits
- that are undertaken regularly
- by independent national and international bodies that form part of a system.







### Article 1: Preventive visits

The objective of the system of visits established by the OPCAT is to prevent torture and other cruel, inhuman or degrading treatment or punishment. Visits to places of detention are preventive in two-ways:

- they have a deterrent effect, and
- they contribute to the mitigation of risks of torture and other ill-treatment.

The mere fact that independent external experts are able to enter places of detention has an important deterrent effect. The drafters of the OPCAT conceptualised the treaty as providing OPCAT bodies with the powers and guarantees necessary to conduct unannounced visits to any place of detention within the jurisdiction and control of all States Parties.[11] It is essential that OPCAT bodies are able to carry out unannounced visits if these are to have a significant deterrent effect. Although the text of the OPCAT does not expressly use the term 'unannounced visits', this power is implied in Articles 12(a), 14(c) and 20(c).

Preventive visits also enable OPCAT bodies to identify risks factors, analyse both systemic faults and patterns of failures, and propose recommendations to address the root causes of torture and other ill-treatment. The long-term objective is to mitigate the risks of ill-treatment and, thus, build an environment where torture is unlikely to occur. Preventive visits under the OPCAT differ in their objectives and methodology from other types of visits to places of detention and also those that may be conducted by other bodies. Under the OPCAT, preventive visits form part of a proactive, forward-looking, continuous process of analysis of the system of deprivation of liberty and all its structural aspects. Preventive visits do not merely analyse the situation in individual places of detention but, instead, look holistically at the risks factors in institutional, legal and policy frameworks.[12] Moreover, as preventive visits are based on a collaborative approach, the objective is not to denounce the situation in individual places of detention, or to investigate individual complaints, but rather to enter into dialogue on

11 Nowak and McArthur, *The UNCAT*, p.906 and p.1011.

12 See Section 3 of Chapter V of this manual for more information.

ways to improve the treatment and conditions of persons deprived of their liberty.

The UN Special Rapporteur on Torture, who also visits places of detention in the course of country visits, has elaborated on the importance of "unannounced visits" as a preventive measure:

> 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.[13]

### Article 1: Regular visits

Repetition is an essential element of any effective preventive system. Repeat visits to a given place of detention:

- enable the visiting team to establish and maintain a constructive on-going dialogue with detainees and authorities;
- chart progress or deterioration in the conditions of detention and the treatment of detainees over time;
- protect detainees from abuse through the general deterrent effect of the continuous possibility of outside scrutiny; and
- protect detainees and staff from reprisals against individuals who have cooperated with the visiting body on previous visits.[14]
- Therefore, visits must be carried out with some degree of frequency in order to be truly preventive. The actual frequency of visits is determined by the OPCAT bodies.[15]

13 UN Special Rapporteur on Torture, *2006 Report to the Commission on Human Rights*, UN Doc. E/CN.4/2006/6, 23 December 2005, §24.

14 APT, *Guide to the Establishment and Designation of NPMs*, APT, Geneva, 2006, p.16.

15 Some categories of places of detention may, by their nature, place detainees at an inherently greater risk of torture or other ill-treatment; these include police stations, remand or pre-trial detention centres, and other places with high concentrations of particularly vulnerable categories of detainees. OPCAT bodies may decide to visit these types of institutions more frequently. See also the analysis of Article 4 in this chapter. For further information, see APT, *NPM Guide*, pp.30-35.





### Article 1: System of visits by independent bodies

Article 1 of the OPCAT makes it clear that the visits carried out by OPCAT bodies aim to constitute "a system": the various mechanisms should be independent and should function in a harmonious, organised and coordinated manner. Effective communication, information-sharing and coordination between OPCAT bodies is vital to ensure the greatest possible protection for persons deprived of their liberty.[16] For this reason, the principle of cooperation is an overarching theme of the OPCAT; thus, various provisions of the OPCAT foresee a triangular relationship between the State Party, the SPT and NPMs.[17]

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**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.

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Article 2 provides for the creation of a new international body: the SPT. This forms the international component of the system of prevention of torture foreseen by the OPCAT. Article 2 mirrors the Preamble by highlighting that the OPCAT is adopted within the framework of the UNCAT. Subsequent articles elaborate on the relationship between the

16 APT, *NPM Guide*, pp.16-17.

17 See also OPCAT, Articles 11, 12, 13, 14, 16, 19, 20, 22 and 23.

SPT and the CAT (the international body established by the UNCAT).[18] Although the OPCAT text qualifies the SPT as a subcommittee of the CAT, in practice the SPT is not a subordinate body: its work is independent from, but complementary to, that of the CAT.[19]

### Article 2(2): Scope of the SPT mandate

Article 2(2) provides a general framework of reference for the SPT by mentioning the purpose and principles of the Charter of the United Nations. The Charter reflects the desirability of cooperation in the promotion of respect for human rights and of fundamental freedoms.[20] The reference to the Charter underscores the importance of the cooperative nature of the relationship between States Parties and the OPCAT bodies.

Article 2(2) also enables the SPT to consider, and to make reference to, all relevant international norms in the conduct of its activities, including in its recommendations to States Parties. This allows the SPT to go beyond the specific provisions of the UNCAT to take into account other human rights treaties and international human rights standards. Thus, the SPT can adopt a comprehensive approach to prevention that encompasses the wide range of issues, such as judicial and legal safeguards and other legal provisions, that impact on the prevention of torture and other ill-treatment.[21]

### Article 2(3): Guiding principles

Article 2(3) establishes that the SPT shall be guided by the principles of confidentiality, impartiality, non-selectivity, objectivity and universality. These principles are designed to provide a general framework for the working methods and ethics of the SPT.

The concept of impartiality entails that members of the SPT should adopt a non-partisan approach to their mandate, party politics and related

18 OPCAT, Articles 10(3), 11(c), 16 and 24.

19 Nowak and McArthur, *The UNCAT*, p.914. See also the discussion of Articles 16 and 24 in this chapter for more information on the relationship between the SPT and the CAT; and Chapter III of this manual, especially Sections 4.7.3 and 5.1.

20 Charter of the United Nations, Articles 1 and 2.

21 See the website of the OHCHR for relevant UN standards on detention and on the administration of justice: http://www2.ohchr.org/english/law/.





issues. They should not be guided or influenced by personal, economic, political, religious, media or other interests.

Objectivity is closely related to impartiality in that SPT members should carry out their mandate in a professional, fact-oriented, unbiased manner. Accordingly, they should resist any pressure exerted by governments, civil society, the media or any other interest groups.[22]

The principles of universality and non-selectivity aim to ensure that the SPT deals with all States Parties fairly and without bias.[23] This is picked up again in Article 13(1), which specifies that the first countries to be visited by the SPT are to be selected by lot.





### Article 2(4): Cooperation

In Article 2(4), the OPCAT places specific emphasis on the principle of cooperation, though this principle is not listed with the other guiding principles of the SPT: this separation highlights the fact that cooperation, and dialogue between actors working to prevent torture and ill-treatment, are core elements of the OPCAT as a whole. The SPT aims to engage with States Parties via constructive collaboration rather than condemnation. Cooperation is a mutual undertaking binding not only States Parties, but also the SPT and the NPMs.[24] Cooperation should be considered a guiding principle at all stages of implementation of the SPT mandate. This cooperation is facilitated by the confidential nature of both SPT reports and communications with States Parties and NPMs.

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**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).

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22 Nowak and McArthur, *The UNCAT*, p.918.

23 Nowak and McArthur, *The UNCAT*, p.918.

24 See Article 16(4) (including the discussion on the article in this chapter), which provides sanctions against States Parties that fail to cooperate fully with the SPT.

Article 3 introduces the national element of the OPCAT's system of prevention. This article requires States Parties to put NPMs in place to carry out preventive monitoring of places of detention. The inclusion of NPMs in the preventive framework established by the OPCAT is an innovative and practical measure designed to support the effective and sustained implementation of international standards at the domestic level.[25]

### Article 3: The added value of NPMs

When the OPCAT was first conceived, only a new international visiting body was envisaged: the inclusion of national bodies in the system of prevention was a major breakthrough in the negotiations leading to the adoption of the OPCAT.[26] The NPM concept overcame a significant practical obstacle in the original conceptualisation of the OPCAT: the drafters assumed that, by its very nature, an international body on its own would not be able to visit all places of detention with sufficient frequency to be truly effective.[27] However, NPMs, being permanently situated within States Parties, can conduct more frequent visits and can maintain on-going dialogue with those responsible for the care and custody of persons deprived of their liberty.

However, the possibility that States Parties might use their NPMs to hide, rather than reveal, the true national situation with regard to human rights was raised during negotiations. Therefore, the SPT was granted an advisory role in respect of NPMs; various provisions of the OPCAT support this role by establishing the importance of direct contact, and areas of cooperation, between the SPT and NPMs.

25 For detailed advice on the establishment and designation of NPMs, see APT, *NPM Guide*; and Chapter IV of this manual, especially Sections 6 and 7.

26 For further information on the drafting and development of the OPCAT, see Chapter I of this manual, especially Sections 1 and 3.

27 Nowak and McArthur, *The UNCAT*, p.923.





### Article 3: Consultations on the most appropriate NPM option

To assist decision-makers within States Parties with the complex task of deciding on the most appropriate form(s) for the country's NPM(s) to take, the SPT drafted some preliminary guidelines on the designation of NPMs. These highlight certain key features of NPMs and elaborate on how these mechanisms should comply with the requirements set out under Part IV of the OPCAT.[28] The processes by which States Parties determine their NPM may differ. However, the SPT recommends that all States Parties employ a transparent, inclusive and participative process for selecting NPMs; all relevant stakeholders should be included in discussions on the most appropriate NPM option for the country.[29]

### Article 3: NPM organisational form

Article 3 permits States Parties some flexibility in relation to complying with the obligation to put in place a system of regular and preventive visits at the national level. The OPCAT does not specify a particular organisational form that NPMs must take. Depending on the national context, the presence of existing independent national monitoring bodies, the country's geography, and the complexity of the country's administrative and financial structure[30], States Parties may choose to create one or several new specialised bodies, designate one or several existing bodies, or select bodies of both types to assume the NPM mandate.[31]

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## 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

28 See Chapter IV of this manual, especially Section 7; and also Annex 2 of this manual.

29 See Chapter IV of this manual, especially Section 6, for further information.

30 SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, UN Doc. CAT/C/44/2, 25 March 2010, §49.

31 See analysis of Article 17 in this chapter; and also Section 7 of Chapter IV of this manual. For a list of designated NPMs, see www.apt.ch.

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.

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Article 4 is a cornerstone provision of the OPCAT as it establishes the obligation for States Parties to allow visits by the SPT and NPMs to all places where people are, or may be, deprived of their liberty. As well as setting out the overall obligation for States Parties to allow unannounced visits by OPCAT bodies, Article 4 defines the terms "place of detention" and "deprivation of liberty". As such, it sets out the scope of application of the mandates of both the SPT and NPMs.

### Article 4(1): Obligation to allow visits

According to Article 4, States Parties shall allow the SPT and NPMs to visit all places of detention under their jurisdiction and control. This provision means that, unlike for other UN mechanisms, no prior consent is required for the SPT to conduct an in-country visit. In other words, the SPT has an open invitation to enter a State Party's territory to carry out in-country visits.

### Article 4: Definition of places of detention

The OPCAT's definition of "places of detention" was designed to be very broad in order to provide the widest possible protection for persons deprived of their liberty. The key elements of this definition concern the fact that an individual deprived of his/her liberty is not able to leave the place of detention of his/her own free will, and that the detention must have some link, direct or indirect, to public authorities.[32] The definition also contains two key descriptors of the nature of the connection to the State that must be established in order for a place of detention to fall within the scope of the OPCAT:

32 APT, *NPM Guide*, p.18.





the place must be under a State Party's jurisdiction and control; and
the place must contain, or may be used to contain, persons held by virtue of an order given by a public authority, or at its instigation, or with its consent or acquiescence.[33]

### Categorisation of places of detention

The OPCAT drafters considered it inappropriate to set out an exhaustive list of places of detention; this allowed them to avoid an overly narrow and restrictive categorisation of places of detention that would place undue limitations on those persons able to benefit from the treaty's protection. The broad definition adopted also has the advantage of addressing the national context of deprivation of liberty in different States Parties, as the form and nature of places of detention may vary considerably from one country or region to another. However, certain categories of places of detention necessarily fall within the scope of application of Article 4, such as:

- 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;
- closed mental health institutions;
- social care homes;
- security or intelligence service facilities;
- detention facilities under military jurisdiction;
- places of administrative detention;
- means of transport for the transfer of detainees;
- closed drug treatment centres; and
- children's homes.

33 APT, *NPM Guide*, p.19.

### Jurisdiction and control

Places of detention must be under a State Party's "jurisdiction and control"[34] to be covered by the mandate of the OPCAT bodies. The scope of application of the UNCAT, and of the International Covenant for Civil and Political Rights (ICCPR), is described in similar terms. Under the UNCAT, a territory under a State Party's jurisdiction has been interpreted as including not only the ordinary territory of the State Party but also ships or aircrafts registered in the State Party concerned, and structures resting on the continental shelf of the relevant State Party.[35] Like the UNCAT, the OPCAT's notion of jurisdiction and control extends to all areas, including those located outside the sovereign territory of a State Party, that are "under the de facto effective control of the State Party, by whichever military or civil authorities such control is exercised."[36] This includes, for example, a State Party's military bases abroad. The essential element that must be established by OPCAT bodies is a link between places of detention and the authority of States Parties.

34 For further information on the scope of application of the OPCAT, see APT, *Application of OPCAT to a State Party's places of military detention located overseas*, APT Legal Briefing Series, APT, Geneva, 2009. Available at www.apt.ch.

35 UNCAT, Article 2. By way of explanation, see J. Burgess and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht, Martinus Nijhoff Publishers, 1988, pp.123-124; and Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN Doc. E/CN.4/1993/28, 2 December 1992, §41.

36 CAT, Concluding Observations of the Committee against Torture on United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, §15; Concluding Observations of the Committee against Torture on United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, §4(b); and Human Rights Committee, General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004. 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 under other international instruments, with regard to access to detainees; thus, the possibility of access by the SPT or NPMs cannot be used as an excuse to exclude visits by the ICRC (or other bodies) under the Geneva Conventions.







### Unofficial and private places of detention: instigation, consent and acquiescence

Torture and other ill-treatment are often unofficial or secret acts that governments seek to deny responsibility for and/or distance themselves from. Consequently, Article 4(1) mirrors the language of the UNCAT by requiring that OPCAT bodies have access to any place 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". The wording of article 1 UNCAT ensures that governments cannot avoid responsibility for torture and other ill-treatment by knowingly leaving otherwise private or non-State actors to actually carry out abuses in unofficial places of detention.[37] OPCAT bodies must, therefore, have access to any place where an individual may be kept against his/her will in connection, even indirectly, with a public authority.

The term "instigation" has been interpreted in relation to the UNCAT as meaning incitement, inducement or solicitation requiring "the direct or indirect involvement and participation of a public official".[38]

The terms "consent" and "acquiescence" allow for the inclusion of a broad range of settings. The scope of article 4(1) extends to places of detention operated by persons acting in an official capacity, including on behalf of the State. It also encompasses privately-run residences, such as private hospitals, nursing or children's homes, which hold persons against their will with the mere knowledge and consent of a public authority.[39]

These terms would also cover other types of setting, such as places where individuals are detained by private groups when the State is aware of it and fails to exercise due diligence to prevent such detention.[40] One may refer in this regard to the wording of article 1 UNCAT, which includes the similar terms of "consent" and "acquiescence".

These terms would also cover other types of setting, such as places where individuals are detained by private groups when the State is aware of it

37 APT, *NPM Guide*, p.21

38 Nowak and McArthur, *The UNCAT*, p.78.

39 Nowak and McArthur, *The UNCAT*, p.931. See also APT, *NPM Guide*, p.23.

40 Nowak and McArthur, *The UNCAT,* p.931.

and fails to exercise due diligence to prevent such detention.[41] One may refer in this regard to the wording of article 1 UNCAT, which includes the similar terms of "consent" and "acquiescence".

Under the UNCAT, these terms have been interpreted broadly as covering the concept of due diligence in relation to preventing acts of torture and other ill-treatment. Accordingly, a State Party will be responsible for acts committed by private or non-State individuals or groups when it fails to adequately prevent abuses, and/or it fails to investigate alleged abuses and, if necessary, punish those responsible.[42] Thus, States Parties have a duty not to inflict torture or other ill-treatment on individuals through their own officials or other persons acting in an official capacity, and they also have a positive duty to protect persons from acts committed by private individuals/groups and non-State actors.[43] The CAT has summed up the extent of States Parties' responsibilities for acts of torture or other ill-treatment committed by private or non-State individuals or groups as follows:

> 18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.[44]

This concept of due diligence relating to acts of torture and other ill-treatment was developed in relation to Article 2 of the UNCAT, in conjunction with Article 1 of the UNCAT. Transposed to the interpretation of the meaning of "consent" and "acquiescence" of the deprivation of liberty under article 4(1) OPCAT, it leads to the possibility for the SPT and NPM to visit purely private places of deprivation of liberty when the State knows or has reasonable ground to believe that such an occurrence of deprivation of liberty exists and it fails to exercise due diligence to prevent or otherwise address it.

### Article 4(1) vs 4(2): Definition of deprivation of liberty

Article 4(2) defines deprivation of liberty. However, the purpose of providing this definition is not readily apparent in light of the detailed definition of places of detention provided in Article 4(1). Moreover, the wording of Article 4(2) conflicts with that of Article 4(1) in one important respect. Article 4(2) states that a person who is deprived of his/her liberty is someone who is "not permitted to leave at will by order of any judicial, administrative or other authority". This wording would seem to require some form of order emanating directly from a public authority in order for the person to fall within the scope of the OPCAT bodies: here, in direct contrast to Article 4(1), mere consent or acquiescence on the part of the public authority appears insufficient.[45]

The Vienna Convention on the Law of Treaties assists treaty interpretation in light of conflicting or ambiguous wording. It states that the terms of a treaty should be given their ordinary meaning in consideration of their context and in the light of the treaty's object and purpose.[46] If a meaning is ambiguous, recourse can also be made to the preparatory work of the

41 Nowak and McArthur, *The UNCAT*, p.931.

42 For more information on the nature of States Parties' obligations, see APT, *Jurisprudence Guide*, pp.13-29.

43 APT, *Jurisprudence Guide*, p.13.

44 CAT, General Comment No 2, §18.

45 Nowak and McArthur, *The UNCAT*, p.932; and APT, *NPM Guide*, p.23.

46 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, 1969, Article 31.

treaty.[47] Reading Article 4 as a whole, and in light of the discussions of the working group established to draft the OPCAT, it appears incongruous that Article 4(2) provides such a narrow definition of deprivation of liberty, not least in light of the fact that, as explained above, Article 4(1) mirrors the language of the UNCAT.[48] The inclusion of this wording in Article 4(2) was the result of political expediency during lengthy OPCAT negotiations. During the drafting process, there was a strong preference for the OPCAT's scope of application to extend to instances where people were, de facto, deprived of their liberty without any formal order but with the acquiescence of an authority.[49] When the object and purpose of Article 4 and the OPCAT as a whole are taken into consideration, it is immaterial whether the deprivation of liberty results from an express order or not. The key fact to establish is that an individual is unable to leave at will.

## 4. OPCAT Part II: The Subcommittee on Prevention of Torture

Part II comprises six articles that set out in detail the procedures for the establishment of the SPT and the election of its members.

### Article 5

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification 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 the equitable geographic distribution and to the

47 Vienna Convention on the Law of Treaties, Article 32.

48 APT, *NPM Guide*, pp.23-24.

49 Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, UN Doc. E/CN.4/1993/28, 2 December 1992, §39; Report of the UN Working Group, UN Doc. E/CN.4/2000/58, 2 December 1999, §30 and §78; and Report of the UN Working Group, UN Doc. E/CN.4/2001/67, 13 March 2001, §45.





representation of different forms of civilisation and legal systems of the States Parties.

4. In this composition consideration shall also be given to the 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 5 is a key provision that establishes the size, expertise, composition and independence of the SPT.

### Article 5(1): Size of membership

In accordance with Article 5(1), the SPT initially comprised 10 members, with the number rising to 25 after the 50th ratification[50] to take into account the increased workload resulting from the increase in the number of States Parties. With 25 members, the SPT is currently the largest UN treaty body. The novel advisory and operational mandate of the SPT requires the maintenance of a constructive dialogue with States Parties and NPMs, as well as a system of regular visits to all States Parties: therefore, a significant amount of work on the part of the SPT is needed in relation to each State Party. The increase in the number of members reflects a similar provision in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[51] However, the OPCAT does not provide for a further increase (i.e. beyond 25 members). This may have implications for the work and resources of the SPT in the future.[52]

50 The number of States Parties rose to 50 following Switzerland's ratification on 24 September 2009. The number of SPT members will rise to 25 in February 2011. For a list of serving SPT members, see http://www2.ohchr.org/english/bodies/cat/opcat/index.htm.

51 Convention on the Elimination of all Forms of Discrimination against Women, Article 17; and Nowak and McArthur, *The UNCAT*, p.946. The majority of existing UN human rights treaty bodies have 18 members each. The CAT and the Committee on Migrant Workers, which have 10 members each, and the CEDAW, which has 23 members, are the key exceptions to this norm.

52 Nowak and McArthur, *The UNCAT*, pp.946-947.

### Article 5(2): Expertise of members

Article 5(2) outlines the requirement for SPT members to have the necessary capabilities and professional knowledge to execute the SPT's preventive mandate effectively. However, further details about which particular skills and expertise are required are not explicitly provided in the OPCAT.

The requirement for SPT members to have "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" suggests that States Parties should consider several criteria when nominating and/or electing individuals to serve as members of the SPT. Members should have:

- demonstrated a commitment to human rights;
- a wide range of professional skills (e.g. relevant medical expertise, relevant legal expertise, or expertise in policing and administration of places of deprivation of liberty as well as in human rights);
- expertise related to detention monitoring at the domestic level;
- drafting and analytical skills for research, report writing and editing;
- experience of working with a wide range of stakeholders;
- proficiency in UN languages; and
- other personal skills (such as negotiation skills, the ability to be a team player, cultural sensitivity, the capacity for empathy, and the capacity to cope in stressful situations and environments).[53]

In addition, States Parties should give careful consideration to the nomination of SPT members who are in a position to represent groups of persons who may be particularly at risk in places of detention (e.g. persons with disabilities, elderly people, survivors of torture, and persons from religious and/or ethnic minority groups).

The advisory and visiting functions of the OPCAT mean that SPT membership is a demanding role. SPT members should:

53 For further information, see Section 2.2 (especially 2.2.2) of Chapter III of this manual.









- be available upon request to conduct several missions each year and to participate in three SPT meetings in Geneva each year;[54]
- be financially autonomous;[55] and
- be independent and impartial.

### Article 5(3): Composition

Articles 5(3) and 5(4) are further reminders that the SPT must carry out its mandate impartially, and be seen as doing so. This is crucial in order to facilitate the development of constructive dialogue with States Parties, NPMs and other torture prevention actors. Articles 5(3) and 5(4) outline the requirement for the SPT to give equal representation to different geographical regions, "different forms of civilization" and different legal systems, and to try to achieve "balanced gender representation". These provisions are linked to the principles of the UN Charter and the guiding principles in Article 2(2) and (3) of the OPCAT. Each State Party must give these factors serious consideration when nominating and, more particularly, electing persons to serve on the SPT.

The reference to geographical balance is a standard provision within treaties that establish a treaty body. The measure is designed to strengthen the impartiality of treaty bodies by ensuring that they are not dominated by one particular region or by a country-specific approach to their respective mandates.[56] In line with other treaties that establish treaty bodies, Article 5(5) limits the number of nationals from each State Party that can serve on the SPT at any given time to one. This ensures that no single State Party dominates the SPT; it also helps to avoid the creation or perception of bias or country dominance. The requirement to strive for gender balance is a novel feature of the OPCAT and is, perhaps, indicative of recent developments within the UN human rights protection framework aimed at mainstreaming gender issues in the work of human rights mechanisms.[57]

54 See Section 2.2.2 of Chapter III in this manual for further details.

55 SPT members do not receive a fee for their participation in SPT sessions and in-country missions. However, they receive plane tickets and a UN daily subsistence allowance for their participation in the specific activities detailed above.

56 The first SPT comprised three members from Western Europe, three from Eastern Europe, and four from Latin America.

57 The first SPT comprised two women and eight men.

### Article 5(6): Independence

Notwithstanding their appointment by States Parties, Article 5(6) requires SPT members to carry out their functions in an independent manner. The requirement of independence is set out in several articles, evidencing the critical importance of this principle for the effective functioning of OPCAT bodies. Without independence, SPT members cannot work authoritatively and constructively with state authorities, NPMs, persons deprived of their liberty, staff within places of detention, and other stakeholders. SPT members must conduct their work free from any interference from States Parties. Accordingly, States Parties have a duty to ensure that they nominate and/or elect persons who are independent of the government. States Parties must also refrain from trying to influence members of the SPT in the execution of their duties.[58] Members also have a personal responsibility to ensure that they approach their mandate impartially.

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### Article 6

1. Each State Party may nominate, in accordance with paragraph 2, 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.

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58 OPCAT, Articles 2, 14, 15 and 35.







Article 6 sets out the procedure for the nomination of members to the SPT. The procedure is similar to that of other treaty bodies, including the Human Rights Committee. SPT members can only be nominated by States Parties to the OPCAT. Non-States Parties are not represented during SPT elections. Article 6, building on the provisions of Article 5(5), is designed to ensure that no single State Party dominates the SPT membership.[59] It also provides a deadline for nominations to be submitted.

A standard *curriculum vitae* form has been developed for treaty bodies nominees to use; this ensures that each candidate provides information of certain key types. Nominees' forms are then translated into the UN official languages and posted on the website of the UN Office of the High Commissioner for Human Rights (OHCHR). This is a positive step and States Parties should ensure that detailed information on the qualifications of nominees is provided to the UN and that this information is made publicly available. To enable translations of *curriculum vitae* to be made and then publicised, States Parties should present their candidates in the appropriate period of time, respecting the deadline for nominations. However, the election of the first SPT members set a precedent: States Parties have the option to put SPT candidates forward for nomination until the day of the election, though there is no guarantee that the details of candidates presented after the nomination deadline will be translated into other languages or that they will be publicised.

The OPCAT does not specify any particular procedure that States Parties should follow to decide who to nominate. However, the national selection process is crucial in ensuring that only candidates with the skills outlined in Article 5 are considered in elections. Ideally, States Parties should launch a public call to select the most appropriate SPT candidates. This public call should address the following issues:

- the announcement of the public call for nominations should clearly lay down the criteria outlined above;
- States Parties should encourage the promotion of female candidates, those from minority groups and those from diverse professional backgrounds;

59 The OPCAT allows States Parties to nominate up to two candidates, mirroring Article 29 of the ICCPR.

- States Parties should encourage civil society organisations to propose candidates; and
- the process of selection at the national level should guarantee equal conditions and treatment of candidates.

Addressing these four key issues should guarantee reasonable scrutiny from relevant stakeholders and, thus, should help to ensure that the most suitable candidates are identified. After these consultations, States Parties may decide to establish a selection committee, gathering representatives from the relevant ministries in charge of the process of selection[60] as well as representatives from civil society organisations with relevant expertise. The decision of the selection committee should then be made public. The candidate should be submitted by the ministry of foreign affairs to the United Nations Secretary General, with a request that the candidate's details, and those of candidates from other OPCAT States Parties, be made public prior to the meeting at which the election will take place.[61] The process of nominating candidates should contribute to strengthening the mandate, credibility and legitimacy of individual SPT members and, hence, the SPT as a whole.

## 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 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 selected 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 nationals 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 national 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 national shall be the member.

Article 7 outlines the election process for SPT members. This is similar to that for other UN treaty bodies, including the CAT. The reference to fulfilment of Article 5 criteria reinforces the responsibility States Parties have to elect members with appropriate experience and skills to carry out the demanding preventive work of the SPT. It also acts as a reminder that, in election periods, States Parties should give due consideration to the composition of the SPT, to gender and geographic balance, as well as diversity of professional expertise. The UN General Assembly recently reiterated the need for consideration to be given to the overall composition of all treaty bodies.[62]

In accordance with Article 7(1)(b), the first States Parties' meeting was held on 18 December 2006, at which time the first 10 members of the

60 The ministries in charge of selecting SPT candidates are usually the ministry of foreign affairs and/or ministry of justice.

61 APT, *The Subcommittee on Prevention of Torture: Guidance on the selection of candidates and the elections of members*, OPCAT Briefing, APT, Geneva, February 2010. Available at www.apt.ch.

62 UN General Assembly, Resolution on Equitable geographical distribution in the membership of the human rights treaty bodies, UN Doc. A/RES/63/167, 19 February 2009.

SPT were elected.[63] Subsequent elections took place during the biennial meetings of States Parties. Voting takes place by secret ballot to safeguard the impartiality of the election process.

Article 7 allows States Parties to nominate more than one candidate, although this is unlikely to occur in practice. Those candidates who obtain both the largest number of votes and an absolute majority of the votes of the States Parties present and voting at the meeting will be elected. Each State Party may vote for as many candidates as there are places to be filled. For example, if there are five places, then each State Party may vote for five candidates.[64] In light of this complicated election procedure, it is unlikely that the exact number of candidates required will receive an absolute majority during the first round of voting. A number of rounds of voting are likely to be necessary to elect the requisite number of members.

### 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 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 8 follows the common procedure for election of a new UN treaty body member when a serving member dies or resigns. The reasons that a State Party might object to a replacement member are not elaborated upon, but could include lack of the requisite competence provided for under Article 5. If a replacement member is rejected, the nominating State Party can propose another candidate, according to the procedure outlined above.

63 For details of current SPT members, see http://www2.ohchr.org/english/bodies/cat/opcat/index.htm.

64 Nowak and McArthur, *The UNCAT*, p.965.







### 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 these members shall be chosen by lot, by the Chairman of the meeting referred to in article 7 paragraph 1d.

Article 9 provides that members of the SPT will be elected for a term of four years and that they can be re-elected once. Half of the first SPT's members were chosen by lot to serve an initial term of two years, after which further elections were held, in accordance with this article. Those members who only served a two-year term were eligible to be re-nominated for a further term of four years. This is standard practice for UN treaty bodies and is designed to avoid a situation in which the entire membership is due for re-election at the same time. It is interesting to note that there is no similar provision for staggering terms of office after the 50th ratification of the OPCAT.

With the ratification of **Switzerland** on 24 September 2009, the number of States Parties rose to 50; therefore, the number of SPT members will rise to 25 following elections in October 2010.[65] Thereafter, 20 membership places will be open for nominations, or re-election of current members, at the same time. In October 2010, States Parties will first elect 5 members to fill the vacancies left by the members whose terms of office will have expired. Second, they will elect a further 15 SPT members to bring the total number of members to 25,[66] though half of the 15 newly elected SPT members will, according to lot, receive two-year initial terms of office.

65 The only other treaty body to provide for the election of additional members after a certain number of ratifications is the CEDAW.

66 *Note verbale* from the Secretary General of the United Nations, UN Doc CAT/OP/SP/10/1, 12 May 2010.

**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.

Article 10, which mirrors Article 18 of the UNCAT, ensures that the SPT has control over its own rules of procedure and working methods. Article 10(2) sets out provisions regarding the number of members who must be present for a meeting to be quorate, and the requirement for majority decision-making, that must be included in the rules. Nevertheless, most procedural matters are left to the SPT members to agree.[67] For instance, the first members of the SPT established the procedure of electing one "officer" (i.e. SPT member) to act as chairperson and two to act as vice-chairpersons. This is similar to the practices established by other treaty bodies and is designed to facilitate decision-making, organisation and committee management.

Article 10(2)(c) states that the SPT must meet *in camera* (i.e. in private). This practice differs from that of the CAT, whose meetings are open to the public unless its members decide otherwise. These differing approaches highlight the differences between the bodies' specific mandates. Article 10(2)(c) must be read in light of Article 2, which requires the SPT to be

67 See the website of the SPT for details of its working practices: http://www2.ohchr.org/english/bodies/cat/opcat/index.htm.





guided by the principle of confidentiality due to its preventive approach and the sensitive nature of in-country visits.[68]

The CAT's current practice is to meet twice a year for three weeks in Geneva, while the SPT currently meets three times a year, each time for one week. Article 10(3) ensures that at least one annual meeting of SPT members overlaps with a session of the CAT; this usually occurs in November. This overlap allows for face-to-face dialogue to facilitate SPT and CAT cooperation. The members of the SPT and CAT have also created a contact group comprising two members from each treaty body to facilitate cooperation.[69]

## 5. OPCAT Part III: Mandate of the Subcommittee on Prevention of Torture

Part III comprises six articles that together define the key elements of the mandate and working methods of the SPT. It also sets out the corresponding obligations of States Parties that enable the SPT to carry out its mandate effectively.

**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, if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;

68 Nowak and McArthur, *The UNCAT*, p.981.

69 SPT, *First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. CAT/C/40/2, 25 April 2008, §33. For further information on cooperation between the CAT and the SPT, see Sections 4.7.3 and 5.1 of Chapter III of this manual.

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 from 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 toward the strengthening of the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment.

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Article 11 sets out the SPT's core preventive mandate. It has two main functions: an 'advisory function' (i.e. to advise on the establishment, designation and functioning of NPMs; to provide authoritative interpretations of the OPCAT; and to review domestic legislative, administrative, judicial and other preventive measures) and an 'operational function' involving monitoring places of detention in order to make observations and recommendations on improving systems of deprivation of liberty. Article 11 also requires the SPT to cooperate with other actors working to prevent torture and other ill-treatment.

Article 11 establishes the key duties of the SPT:

- to visit places of detention and to make observations and recommendations to relevant authorities on preventive measures to be taken;
- to provide advice on the protection of persons deprived of their liberty;
- to provide advice directly to States Parties on the establishment of NPMs;
- to make recommendations and observations to States Parties in respect of NPMs;
- to have direct contact with NPMs and to advise them on their work; and
- to offer NPMs training and other technical assistance.







### Article 11(a): Visits to places of detention

Article 11(a) establishes the duty of the SPT to visit places of detention as defined in Article 4. A corresponding duty for States Parties to allow such visits, and to consider SPT recommendations, is also contained in Articles 4 and 12. Article 11(a) also creates a duty for the SPT to make recommendations to States Parties to strengthen the protection of detainees. Preventive visits have an important impact in themselves, but they also have a second vital function: to begin a sustained process of engagement with national actors aimed at strengthening protection measures.[70]

### Article 11(a): Recommendations to strengthen the protection of persons deprived of their liberty

Article 11(a) sets out the SPT's duty to make recommendations to States Parties concerning the protection of persons deprived of their liberty from torture and other ill-treatment. The corresponding duty on States Parties to consider these recommendations is contained in Article 12(d). The Article 11(a) phrase "concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment" is extremely significant. It empowers the SPT to comment not just on the conditions of detention and the treatment of detainees observed during in-country visits, but also on systemic weaknesses that impact on the protection of persons deprived of their liberty. This means that the SPT can issue recommendations relating to States Parties that have not (yet) received an in-country visit.

Article 11(a) must also be read in conjunction with Article 2(2), which enables the SPT to consider, and to refer to, all relevant international norms in the conduct of its activities, including in its recommendations to States Parties. This allows the SPT to look beyond the very specific preventive provisions of the UNCAT in making recommendations. Thus, the SPT can take into account other human rights treaties, as well as the numerous other international standards that elaborate on the administration of justice and the protection of persons deprived of their liberty.[71]

70 APT, *Monitoring Places of Detention: A Practical Guide*, APT, Geneva, 4 February 2004, p.86.

71 See the website of the OHCHR for details of relevant UN standards: http://www2.ohchr.org/english/law.

Taken together, these articles enable the SPT to take a broad approach to prevention. Therefore, SPT recommendations may cover a wide range of issues and provisions, such as judicial and legal safeguards, and other legal provisions, relevant to the prevention of torture and other ill-treatment.

In practice, the SPT has taken a broad approach to its mandate to strengthen the protection of persons deprived of their liberty. Its third annual report further elaborated on the scope of its preventive work, confirming that recommendations will extend to the identification of systemic weaknesses. The SPT stated that:

> The process of prevention of torture and other cruel, inhuman or degrading treatment or punishment ranges from the analysis of international instruments on protection to the examination of the material conditions of detention, taking in along the way public policy, budgets, regulations, written guidelines and theoretical concepts explaining the acts and omissions that impede the application of universal standards to local conditions.[72]

In addition, the SPT noted that:

> The scope of the SPT's preventive mandate is large, encompassing many factors related to obtaining information on the situation in a country as regards the treatment or punishment of people deprived of their liberty. Such factors include: any relevant aspect of, or gaps in, primary or secondary legislation and rules or regulations in force; any relevant elements of, or gaps in, the institutional framework or official systems in place; and any relevant practices or behaviours which constitute or which, if left unchecked, could degenerate into, torture or other cruel, inhuman or degrading treatment or punishment. (…) The SPT's preventive approach is forward looking. In examining examples of both good and bad practice, the SPT seeks to build upon existing protections, to close the gap between theory and practice and to eliminate, or reduce to a minimum, the possibilities for torture and other cruel, inhuman or degrading treatment or punishment.[73]

72 SPT, Third annual report, §16.

73 SPT, Second annual report of the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2008 to March 2009, UN Doc CAT/C/42/2, 7 April 2009, §13.









## Article 11(b): Advisory role in respect of NPMs

Article 11(b) establishes one of the most crucial elements of the SPT's mandate: the relationship between the SPT and NPMs. In accordance with Article 11(b)(i), the SPT should advise States Parties on the establishment of NPMs. The SPT considers this aspect of its mandate "a key element in the work of the SPT" that "will form an important part of each visit."[74] While it is likely that the SPT will provide advice to States Parties on NPMs during the course of, and/or following, in-country visits, the provision of advice does not have to be linked to a visit.

Article 11(b)(ii) ensures that the SPT and NPMs have direct contact with each other, independent of the State Party. Direct contact between OPCAT bodies is an essential element of the OPCAT's system of prevention of torture. This provision also supports the independence of OPCAT bodies.[75] In light of the sensitive nature of preventive visits, this contact can, where necessary, be confidential. The obligation on States Parties to ensure that the SPT and NPMs have contact with each other highlights the need for each State Party to give serious consideration to the issue of coordination and cooperation when deciding upon its NPM or system of NPMs; the issue will be most acute for States Parties with multiple NPMs.[76]

As well as maintaining contact with NPMs, the SPT is mandated to offer them training and technical assistance. In accordance with Article 11(b)(iii), the SPT can advise on and assist with NPMs' efforts to evaluate measures to improve conditions of detention and to prevent torture and other forms of ill-treatment. The training and technical assistance to be provided under Article 11(b)(iii) is addressed to NPMs and not to States Parties, further demonstrating the triangular relationship established by the OPCAT. However, the SPT is also mandated, under Article 11(b)(iv), to make "recommendations and observations to the State Party

74 SPT, First annual report, Annex VI.

75 Nowak and McArthur, *The UNCAT*, p.997.

76 For more details of the particular challenges posed by having multiple NPMs, see the commentary on Articles 3 and 17 in this chapter; Section 7.4 of Chapter IV of this manual; and APT, *NPM Guide*.

concerned" in order to strengthen the effective functioning of NPMs.

In practice, the SPT has tended to include references to the effective functioning and/or establishment of NPMs in the recommendations and observations in its visit reports (although, as noted above, the provision of such advice is not limited to States Parties that have received an in-country visit).[77] This is a significant development because funds for implementation may be made available through the Article 26 Special Fund.

### Article 11(c): Cooperation

Article 11(c) requires the SPT to cooperate with relevant UN mechanisms, as well as with other international, regional, and national institutions and organisations working to protect persons deprived of their liberty.[78] This is a catchall provision that encourages cooperative efforts between a range of actors in the field of prevention; this, in turn, encourages integrated and consistent preventive strategies to be employed. Specific articles on cooperation (i.e. Articles 31 and 32) complement this provision.

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**Article 12**

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

(a) To receive the Subcommittee on Prevention in its 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.

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77 See, for example, the first SPT in-country mission report for Sweden (UN Doc. CAT/OP/SWE/1, 10 September 2008); and the first SPT in-country mission report for the Maldives (UN Doc. CAT/OP/MDV/1, 26 February 2009).

78 For further information, see section 5 of chapter III of this manual.







Article 12 sets out the duties of each State Party that correspond directly to the powers granted to the SPT by Article 11. Both articles underscore the fact that the principle of cooperation is a fundamental aspect of the OPCAT's preventive approach.[79]

Article 12(a) reaffirms that the SPT does not require additional prior consent to conduct an in-country visit to a State Party. This aspect of the SPT's mandate is unique. Ordinarily, some form of prior consent or invitation is required before a UN mechanism, such as the CAT or UN Special Rapporteur on Torture, can enter the territory of a State Party.[80] However, States can make a declaration extending a standing invitation to all UN Special Procedures that enables mandate holders to conduct visits without additional consent being required. The fact that the SPT can carry out an in-country visit without any prior consent does not mean that the SPT will arrive without notification. In accordance with Article 13, the SPT notifies States Parties of its programme of in-country visits in order to make the necessary logistical and practical arrangements with the relevant authorities.[81] The SPT only provides general information about its visit, its working methods and its preventive mandate. However, the SPT does not communicate to the national authorities its programme of visits to specific places of detention.

Article 12(b) requires State Parties to ensure that the SPT has access to all information relevant to the execution of its mandate: the SPT can only be effective if it has the appropriate country-specific knowledge to assess the specific measures required for a State Party to strengthen the protection of persons deprived of their liberty.[82]

Article 12(c) complements Article 11(b), which grants the SPT the power to have direct and independent contact with NPMs, by creating

79 Nowak and McArthur, *The UNCAT*, p.1000.

80 Under Article 20 of the UNCAT, the CAT may conduct a visit to a State Party as part of its inquiry procedure but it requires the prior consent of the State Party concerned. Similarly, the UN Special Rapporteur on Torture and other UN Special Procedures need to have invitations from the countries that they propose to visit before they can undertake fact-finding missions.

81 See commentary on Article 13(2) in this chapter; and Section 4.2 of Chapter III of this manual.

82 As per Article 14 of the OPCAT.

a corresponding obligation for States Parties to encourage and assist direct contact between the SPT and NPMs. Moreover, in accordance with Article 11(b)(ii), States Parties must facilitate this contact without interfering with confidential meetings between OPCAT bodies.

In accordance with Article 12(d) States Parties also have an express obligation "to examine the recommendations of the SPT and enter into dialogue with it on possible implementation measures." Therefore, States Parties must consider SPT recommendations seriously. To do otherwise would be to undermine both the preventive objective of the OPCAT as a whole and the principle of cooperation set out in Article 2(4). Consequently, any State Party that refuses to cooperate with the SPT, and/or refuses to take appropriate steps to strengthen the protection of persons deprived of their liberty, may face sanctions, such as the publication of the SPT's in-country report in accordance with Article 16(4) of the OPCAT.



**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 can be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the 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 can propose a short follow-up visit to a regular visit.





### Article 13(1): Programme of visits

Article 13 elaborates on how the SPT is to establish its programme of in-country visits and how the visiting delegation is to be selected.

In accordance with Article 13(1), the first programme of visits was decided by lot.[83] This was deemed consistent with the principles of universality, non-selectivity and impartiality, set out in Article 2(3), that guide the SPT's work, including its approach to States Parties. The SPT has since decided, in its own rules and procedures, that subsequent visits will be decided on a reasoned basis, taking into account the following factors: date of ratification and establishment of NPM(s); size and complexity of the State; regional preventive monitoring; and urgent issues reported. The geographic distribution of the States Parties to be visited each year should also be considered.[84]

Once the SPT has drawn up its programme of visits for the year, it makes the list of countries to be visited public, without specifying the dates of any visits, and notifies the relevant States Parties in accordance with Article 13(2).[85] Prior notification is required for practical and logistical reasons. However, this should not to be confused with a requirement to seek consent from States Parties.

### Article 13(3) Composition of visiting delegations

Article 13(3) establishes the requirements regarding the composition of visiting delegations. It states that a visit must be conducted by at least two members of the SPT. In practice, SPT delegations are composed of two to four members. Additional experts may accompany the SPT members. This ensures that visiting teams represent a range of professional expertise, as required by Article 5. Including additional experts in visiting delegations is also an effective way to address the requirement in Article 5 to strive for gender and geographic balance within the SPT.

83 The first countries that received SPT in-country visits were Mauritius, the Maldives and Sweden. For further details, see http://www2.ohchr.org/english/bodies/cat/opcat/index.htm.

84 SPT, Third annual report, §20.

85 SPT, First annual report, §14.

Nominees for the roster of additional experts are proposed not only by States Parties but also by the OHCHR and the UN Centre for International Crime Prevention. No limit is placed on the number of additional experts that can be placed on the roster, although each State Party can propose a maximum of five nationals as experts. This provision is similar to the Rules of Procedure of the CAT[86] and to Article 7(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[87] However, the SPT selects which experts will accompany a specific delegation on an in-country visit.

Experts are required to have the same professional expertise and personal skills as SPT members. As they have the same rights and duties as SPT members, they are entitled to the facilities, privileges and immunities of experts on missions for the UN, as laid down in the relevant sections of the UN Convention on Privileges and Immunities of the United Nations. They are also required to perform their functions honestly, faithfully, independently and impartially, and to respect the principle of confidentiality. In order to ensure consistency of visiting methods, experts should receive information and training regarding the SPT's mandate and visiting methodology.

### Article 13(4): Follow-up visits

Article 13(4) enables the SPT to propose a short follow-up visit, in addition to a regular in-country visit, to check on the implementation of its recommendation and to assess progress in the situation of deprivation of liberty in the country. In future, the SPT may also consider conducting short thematic visits to focus on specific issues, such as the designation, establishment or functioning of NPMs.

86 CAT, Rules of procedure, UN Doc. CAT/C/3/Rev.4, Rule 82-1.

87 Article 7(2) of the ECPT states that "As a general rule, the visits shall be carried out by at least two members of the Committee. The Committee may, if it considers it necessary, be assisted by experts and interpreters".





**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 these persons as well as their conditions of detention;

(c) Subject to paragraph 2, 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 whom the Sub-committee 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 can only be made 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 declaration of a state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Article 14 should be read in conjunction with Article 12 as it elaborates on States Parties' obligations in relation to the SPT. These obligations mirror the established practice of other visiting bodies, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),[88] the International Committee of the Red Cross (ICRC), and the Inter-American Commission on Human Rights (IACHR). Together, the two articles enable the SPT to make accurate assessments and relevant recommendations.

88 The CPT is established by the ECPT.

### Article 14(1): Access to information

Articles 14(1)(a) and 14(1)(b) elaborate on States Parties' general duty, contained in Article 12(b), to provide the SPT with relevant information; the articles also specify the types of information to which the SPT should have access. Unrestricted access to all relevant information is crucial if the SPT is to carry out its preventive mandate effectively. Information on the number and location of places of detention is essential when preparing for an in-country visit, including in terms of drawing up an effective visiting agenda; for instance, the SPT needs to be able to make accurate assessments about a range of factors, including overcrowding and the adequacy of staff-to-detainee ratios, in order to determine which places of detention to visit. Access to information relating to the treatment of detainees and conditions of detention (e.g. individual files, registers of disciplinary measures, medical records, dietary provisions, sanitary arrangements, and suicide watch arrangements) is also important as visiting delegations may seek to cross-check this information during visits.

### Article 14(c): Access to places of detention

Article 14(c) is closely linked to Articles 1, 4 and 12(1), which stipulate the obligation for States Parties to allow the SPT to visit all places of detention under their jurisdiction and control.[89] Article 14(c) expands on this to ensure that SPT members are allowed access not only to all places of detention, but to all premises or facilities within these places, such as living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters. Not only must the visiting team be free to choose which rooms, facilities and other places to visit within a place of detention, but they must be also able to do so without any interference from staff. It is only by having this unrestricted right of access within places of detention that the SPT can verify that it has access to all detainees and, thus, ensure that it is in a position to gain an accurate picture of the place of detention. This provision also enables the SPT to observe the layout of detention facilities, their physical security arrangements, architecture,

89 See commentary on Article 4(1) in this chapter for more details on what is meant by "jurisdiction and control".





and other features, all of which play an important part in the daily life of persons deprived of their liberty there and in the working environment of the staff.[90]

Whilst Article 14 does not expressly refer to "unannounced visits",[91] this is the only interpretation of the OPCAT that is consistent with the treaty's object and purpose. Therefore, the term "unrestricted access" should be interpreted as encompassing the power of carrying out unannounced visits.

### Articles 14(d) and 14(e): Private interviews

Article 14(d) requires States Parties to ensure that the SPT can conduct private interviews with persons deprived of their liberty. This is an extremely important preventive tool as it enables visiting delegations to obtain testimony and build up an accurate picture of both the risks of torture and other ill-treatment in individual places of detention, and the effectiveness of measures aimed at preventing such abuses. The requirement for interviews to be private means that interviews should be conducted out of hearing, and possibly out of sight, of public officials, other state agents, and other detainees. The choice of interview location is therefore crucial. Any location that is specifically chosen by the authorities should be carefully considered. The SPT has the liberty to choose the location and to select an alternative if necessary.

Article 14(e) specifies that the SPT has the right to chose persons to interview. This is crucial to ensure that a comprehensive analysis of the situation, conditions and treatment of detainees in a particular place of detention can be carried out. Although the SPT may interview detainees recommended by the authorities, and detainees who request an interview, visiting delegations have adopted the practice of also randomly selecting a representative number of detainees to interview. The SPT should be able to interview not only detainees and members of staff within places of detention, but also members of detainees' families, relevant civil society organisations, alleged victims of torture or other ill-treatment, and former detainees.

90 Nowak and McArthur, *The UNCAT*, p.1042.

91 See the discussion of Articles 4 and 12 in this chapter.

Article 14 must also be read in conjunction:

- with Article 15, which prohibits reprisals against persons or organisations who may have communicated with the SPT, and
- with Article 16(2), which states that no personal data shall be published without the express consent of the person concerned.

Additional experts and/or interpreters will also be bound by these provisions.

### Article 14(2): Temporary postponement of a visit

Article 14(2) sets out the exceptional circumstances in which a visit to a particular place of detention may be temporarily postponed. It must be stressed that an objection can only be made to a visit to a particular place of detention and not to the entire programme of an in-country visit. This provision aims to prevent States Parties from trying to dictate when and where the SPT conducts visits. As such, it should be read in light of Articles 1, 4 and 12, which all establish the obligation of States Parties to allow the SPT to conduct visits to all places of detention. Although Article 14(2) is based on Article 9(1) of the ECPT, the restrictions in the OPCAT are more narrowly defined and the OPCAT thus provides greater safeguards against State interference in preventive visits than the ECPT does.[92]

Article 14 does not use the term "exceptional circumstances". However, it is clear from the phrase "urgent and compelling grounds" that such circumstances should be exceptional in nature. The reference to not invoking a state of emergency has been interpreted as prohibiting a State Party from invoking an already declared state of emergency in order to avoid a visit.[93] Indeed, preventive visits can be particularly relevant during

92 Article 9(1) of the ECPT states that "In exceptional circumstances, the competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee. Such representations may only be made on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress."

93 Nowak and McArthur, *The UNCAT*, p.1045.





times of emergency when safeguards against unlawful detention, torture, other ill-treatment, and the violation of the right to life may come under threat from state or other interference.

During a period of postponement, it is crucial that the SPT delegation and the authorities liaise closely in order to find a solution to the problem and to ensure that a visit takes place at the earliest opportunity.

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### Article 15

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

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This provision is an essential safeguard against sanctions, and other forms of reprisal, against an individual or organisation that might occur as a result of communication with the SPT. The SPT has interpreted this article as providing "a positive obligation upon the State to take action to ensure that there is no reprisal as a consequence of a visit by the SPT". In addition, the SPT "expects the authorities of each State visited to ascertain whether reprisals for cooperating with the Subcommittee have occurred and to take urgent action to protect all concerned. In this regard, the existence of national preventive mechanisms is of prime importance".[94]

The OPCAT's use of the term "sanction" covers all types of reprisal, punishment and intimidation (e.g. beatings, disciplinary measures, withdrawal of privileges, or transfers) against any organisation or person, including persons deprived of their liberty. It also encompasses civil liability, criminal sanctions and warnings aimed at discouraging communication with the SPT delegation. Fear of being threatened, harassed or otherwise intimidated may prevent individuals and organisations from providing information, opinions or testimony to the SPT; thus, prohibiting sanctions is necessary to ensure that persons are not deterred in any way from communicating with the SPT and/or individual visiting delegations.

94 SPT, Third annual report, §35-36.

Article 15 mirrors the terms of reference for fact-finding visits carried out by the UN Special Procedures, which state that:

> no persons, official or private individuals who have been in contact with the special Rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings[.][95]

It also reflects the current practice of the ICRC, the CPT and the IACHR.

Persons deprived of their liberty are particularly vulnerable to the risk of reprisals; therefore enquiries about the welfare of the persons the visiting delegation interviewed are an essential element of any follow-up to an SPT in-country visit.

With regard to the fact that this provision covers both true and false information, it should be underlined that in assessing the facts, in transmitting its recommendations to the State Party, and in making its reports public in accordance with the requirements of the OPCAT, the SPT also has a responsibility to individuals who may be falsely accused of torture or other ill-treatment. The guiding principle laid out in Article 2 shall be given due consideration in this regard.[96]

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**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.

95 Report of the meeting of Special Rapporteurs/Representatives, experts and chairpersons of working groups of the Special Procedures of the Commission on Human Rights and of the advisory service programme, UN Doc. E/CN.4/1998/45, 20 November 1997, Appendix V(c).

96 Nowak and McArthur, *The UNCAT*, pp.1050-1051.







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 Subcommittee on Prevention's recommendations, 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 Subcommittee on Prevention's report.

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Article 16 encapsulates the OPCAT's overarching principle of cooperation. Read as a whole, it balances the presumption of confidentiality as an aid to cooperation with the use of sanctions in the event of non-cooperation by a State Party.

### Article 16(1): Communication of recommendations and observations

In line with Article 16(1), the SPT must initially submit its recommendations and observations to a State Party on a confidential basis. In the context of an SPT in-country mission, the SPT delivers its preliminary observations to the relevant authorities at the end of the mission. These observations are the basis for a more detailed visit report and further confidential dialogue. Responses communicated by the State Party's authorities are considered in the drafting of the final in-country visit report. The final report is then sent to the authorities, which are requested to respond in writing to the SPT's recommendations. Note that (as observed above), under Article 11(b)(iii), the SPT may also communicate recommendations and observations on issues regarding NPMs and/or measures to strengthen the protection of persons deprived of their liberty outside the context of an in-country visit.

Article 16(1) should be read in conjunction with Article 12, which contains a corresponding duty on States Parties to examine the recommendations of the SPT and enter into dialogue with it on ways to implement these. Article 16(1) also reinforces the principle of cooperation between the SPT and NPMs by ensuring that the SPT can decide, "if relevant", to

communicate its recommendations and observations directly to NPMs on a confidential basis. Although the OPCAT does not specify the meaning of the word "relevant" as used in Article 16(1), it is generally accepted that the article empowers the SPT to decide to submit its recommendations and observations to an NPM without consulting the State Party concerned.[97] This is intended to enable NPMs to follow up on SPT recommendations independently and, thus, contribute to the effectiveness of in-country visits.[98]

### Article 16(2): Publication of SPT reports

Article 16(2) mandates the SPT to draft a report (including recommendations, observations and other relevant information) following an in-country visit and to submit the report to the relevant State Party for consideration. Once the SPT members adopt a country-specific report, it is sent to the State Party with a request that the State Party respond to the SPT's recommendations, and to any requests for further information, within a specific timeframe.[99] As discussed above, although communications between the SPT and States Parties are usually confidential, Article 16(2) provides for SPT reports, together with responses or any other comments from the relevant States Parties, to be made public on the request of the States Parties in question. This provision, which is similar to Article 11(2) of the ECPT, guarantees respect for the principle of confidentiality while simultaneously allowing States Parties to adopt more transparent processes if they so choose. The SPT encourages States Parties to request the publication of SPT visit reports and any response from the authorities.[100]

SPT reports, as envisaged by Article 16(2), do not exclusively follow SPT in-country missions. The SPT can also draft reports relating to other aspects of its mandate; for instance, the SPT can draft reports on the functioning of NPMs or on issues relating to strengthening the protection of persons deprived of their liberty.

97 Nowak and McArthur, *The UNCAT*, p.1061.

98 For further information, see Sections 4.7 and 8 of Chapter III of this manual.

99 SPT, First annual report, Annex V.

100 SPT, Third annual report, §30.









### Article 16(2) and Article 16(4): Sanctions as a result of non-cooperation

While the reports of the SPT are transmitted to States Parties on a confidential basis, there are two circumstances in which publication may occur without the express consent of the State Party concerned.

The first instance is outlined in Article 16(2), which provides that if the State Party makes part of the report public the SPT can decide to publish the report in its entirety or in part. This is a safeguard against States Parties hiding behind the SPT's principle of confidentiality to provide false representations of its findings. By publicising part of the report, the State Party is deemed to have waived the requirement of confidentiality for the remainder of the report.

Under Article 16(4), the CAT can make a public statement and/or make an SPT report made public if a State Party fails to cooperate with the SPT as a whole or with a specific SPT visiting delegation. These are regarded as the only sanctions available in the event that a State Party fails to meet its obligations under the OPCAT. In order to prompt this sanction, a failure to cooperate - (i) in respect of the State's obligations under Article 12 and 14, or (ii) in the implementation of the SPT's recommendations - must be of a serious degree.

It is important to note that the power to authorise the publication of a report and to make a statement under Article 16(4) does not rest with the SPT but rather with the CAT. If a State Party fails to cooperate, the SPT can inform the CAT. The CAT will then allow the State Party concerned the opportunity to present its views, after which a majority of the CAT's members can decide to publish the relevant SPT report and/or make a public statement on the matter. This is a necessary safeguard as a State Party that is no longer willing to comply with its obligations to cooperate should not benefit from the principle of confidentiality, the sole objective of which is to provide a framework for cooperation and constructive dialogue. It is also advantageous for the SPT, in such circumstances, to be able to demonstrate that its inability to work effectively is due to the non-cooperation of the State Party concerned and not the result of its own shortcomings.[101]

101 For further explanation of this provision, see Ann-Marie Bolin Pennegard,

In any case, if a report is made public, either with the express consent of the State Party concerned, or because part of the report has been made public (i.e. under Article 16(2), or as a sanction against non-cooperation (i.e. under Article 16(4)), the SPT and/or CAT must still ensure that, as per Article 16(2), personal data is not published without the express consent of the person(s) concerned. Thus, the principle of express consent mentioned in Article 16(2) also applies to cases covered by Article 16(4).

### Article 16(3): Annual reports

In accordance with Article 16(3), the SPT must present a public annual report, setting out its activities for the previous year (e.g. in relation to its engagement with NPMs, the countries visited, and other events attended), to the CAT. In practice, the SPT has also included information on other relevant issues, such as developments in its interpretation of its mandate and working methods. Any information contained within the annual report must comply with the principle of confidentiality elaborated in other provisions of the OPCAT, including Articles 2(3), 16(1) and 16(2), in respect of personal data.

To reinforce the cooperative relationship between the SPT and the CAT, Article 16(3) provides that the SPT's annual report shall be presented to the CAT. In addition, it is progressively becoming a standard practice for the SPT Chairperson to present the SPT annual report to the Third Committee of the General Assembly of the UN in October, when the CAT presents its own annual report.

## 6. OPCAT Part IV: National Preventive Mechanisms

Part IV comprises seven articles that set out States Parties' obligations in respect of NPMs. This section details the national element of the system of prevention of torture and other forms of ill-treatment set out by the OPCAT. The treaty combines, and gives equal importance to, both international and national efforts to prevent torture and other ill-treatment.[102]

'*An Optional Protocol, Based on Prevention and Cooperation*', in Bertil Duner (ed.), *An End to Torture: Strategies for its Eradication*, Zed Books, London, 1998, p.48.

102 See commentary on Article 3 in this chapter; and also Chapters IV and V of this manual. For more detailed information on the establishment of NPMs, see also APT, *NPM Guide*, available at www.apt.ch.





**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 17: Deadline for maintaining, designating or establishing NPMs

Article 17 reaffirms the obligation, set out under Article 3, for States Parties to put in place one or several NPMs; it also sets a time limit for States Parties to comply with this obligation. In accordance with this article, the first 20 States to ratify or accede to the OPCAT had one year from the OPCAT entry into force, to establish or designate their NPM(s).[103] States that have become party to the OPCAT since its entry into force have one year from their date of ratification or accession to put their NPM(s) in place.[104]

The idea of staggering the time when States Parties must have NPMs in place was intended to encourage prompt ratification while addressing the fact that NPM designation and establishment take time.[105] It must be remembered that during this one-year period States Parties and the SPT should have contact, in accordance with Article 11(b)(i), so that the SPT can provide advice and assistance on NPM establishment and designation. This underscores the need for States Parties to begin the process of deciding on the form of their NPM(s) at the earliest opportunity in order to be ready to comply with their obligations within one year of becoming a party to the OPCAT.

The OPCAT does not elaborate on the difference between the terms "maintain", "designate" and "establish" in relation to the creation of

103 For details of the current status of the designation of NPMs, see www.apt.ch.

104 Subject to any declaration that may be made under Article 24 of the OPCAT.

105 Nowak and McArthur, *The UNCAT*, p.1069.

NPMs. The inclusion of the term "maintain" may have been intended to cover States Parties with existing monitoring bodies that already carry out functions equivalent to those of NPMs and, thus, may be regarded as NPMs in all but name. Designation, on the other hand, was intended to cover instances in which the State Party wishes an existing body to take on the mandate of the NPM despite the fact that the body does not currently carry out functions similar to those of an NPM and/or does not meet the requirements of the OPCAT. Establishment refers to instances in which a State Party intends to create an entirely new body to undertake NPM functions. In practice, the distinction between maintaining and designating a body as an NPM is probably academic; in most, if not all, circumstances, some form of change to the mandate, resources and/or functioning of an existing body will be required in order for it to be fully compliant with the OPCAT.

### Article 17: Flexibility

As noted in respect of Article 3, the OPCAT does not prescribe a particular form that NPMs must take. Therefore, States Parties have the flexibility to select the type of NPM that is most appropriate to their particular country context. States Parties may establish a new body or bodies, or designate an existing body or bodies, to carry out the NPM mandate. There is no ideal solution. However, it is vital that States Parties employ a transparent, inclusive and comprehensive decision-making process to determine the most appropriate form for the NPM or NPM system to take, bearing in mind country-specific factors.

The OPCAT allows States Parties to have several NPMs. This provision was primarily envisaged as important for federal States but, in practice, other States Parties have designated multiple NPMs. Multiple NPMs may be based on thematic, geographic and/or jurisdictional divisions to ensure full coverage of the range of places of detention within the State Party's jurisdiction and control, as required by Article 4(1). States Parties considering multiple mechanisms should also bear in mind that every place where an individual may be deprived of liberty must be subject to monitoring by at least one NPM. When a State Party implements its obligations via multiple NPMs, it must be careful to ensure that their combined mandates cover all







places of detention under the State Party's jurisdiction and control. Under Article 4(1), at least one NPM must have authority vis-à-vis places that are not normally used for detention but where persons may, in fact, be detained with government involvement or acquiescence.[106]

If a State Party decides to implement its obligations via multiple NPMs, each with separate or partially overlapping thematic mandates, each of these bodies must meet the OPCAT's requirements. For example, a State Party cannot say that although one body does not fulfil requirements for functional independence, another lacks the required expertise, and another does not have the right to carry out interviews in private, the cumulative effect is that all the OPCAT requirements are met. Relying on too loose a patchwork of existing entities may be difficult to reconcile with the requirements of the OPCAT. Some means of coordination at the national level will usually be required[107] (particularly as the OPCAT contemplates that NPMs will form part of "a system"[108]). For instance, one role of an NPM is to provide observations and proposals on legislation (Article 19(c)). This implies that NPMs must have some means of generating system- or sector-wide analysis and recommendations (at least with regard to the monitoring bodies operating within the same jurisdiction or thematic area). The reference to decentralised units under Article 17 is particularly relevant for federal States in which decentralised bodies may be designated as NPMs if they meet the criteria set out under Part IV of the OPCAT. This provision should be read in conjunction with Article 29, which ensures that the OPCAT is applied without exception to all parts of a federal or otherwise decentralised State.[109]

NPMs and the SPT are envisaged as together forming a global system of monitoring. Thus, NPMs are an important on-going source of information for the SPT, and the SPT has certain global functions *vis-à-vis* all NPMs. These roles require coordinated communication between the SPT and NPMs in each country.

106 APT, *NPM Guide*, p.90.

107 See Section 7.4 of Chapter IV of this manual; APT, *NPM Guide*; and also SPT, Third annual report, §53.

108 See OPCAT, Preamble and also Article 1.

109 See also the analysis of Article 29 in this chapter.

**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 mechanisms 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.



While Article 17 allows States Parties a degree of choice regarding the structure of their NPM(s), Article 18 lays down the specific guarantees that all NPMs must be granted, no matter what form they take. NPMs cannot effectively prevent torture and other ill-treatment if they are not truly independent. Accordingly, the Article 18 provisions are designed to ensure that NPMs can operate free from any State interference. The Article 18 provisions are not mutually exclusive; they are inter-linked and must be read together in order to ensure the full independence of NPMs. Moreover, Article 18 contains a specific reference to the Principles relating to the status of national institutions for the promotion and protection of human rights (the 'Paris Principles'):[110] the requirements for NPMs, as laid down in Article 18, should be interpreted with the Paris Principles in mind.

### Article 18(1): Functional independence

Article 18(1) of the OPCAT is the primary provision that demands that States Parties guarantee NPMs' functional independence. This essential safeguard determines the overall effectiveness of these bodies. In practice, functional independence means that NPMs must be capable

110 Paris Principles, UN Doc. GA Res 48/134, 20 December 1993.





of acting independently and without interference from State authorities; the authorities responsible for prisons, police stations and other places of detention; the government; civil administration; and party politics. It is also crucial that NPMs be *perceived* as being independent from State authorities. Therefore, NPM members should be appointed following a public procedure, in consultation with relevant stakeholders.[111]

The SPT recommends that an NPM be established by a constitutional or legislative text that describes its key elements, including the body's mandate and powers, its appointment process for staff and members, its terms of office, its funding and its lines of accountability.[112] Furthermore, the law creating the NPM should not place the institution or its members under the institutional control of a government ministry/minister, cabinet, executive council, president or prime minister. The only authority with the power to alter the NPM's existence, mandate, or powers should be the legislature itself. Only the NPM should have power to appoint its staff.[113] The independence of individual members is also crucial to ensure overall effectiveness. Each member or member of staff should be personally and institutionally independent from State authorities. Generally, NPMs should not include individuals who are presently occupying active positions in the government, the criminal justice system or law enforcement.

### Article 18(2): Independent experts

Article 18(2) elaborates on the need for NPM members to be appropriately qualified, independent experts. NPM members should have professional knowledge in relevant fields, such as human rights, healthcare or the administration of justice. The Paris Principles advocate a pluralistic composition for national human rights institutions (NHRIs).[114] This is also

111 APT, *NPM Guide*, p 41. See also discussion of the process of nominating SPT candidates in the commentary on Article 6 in this chapter.

112 SPT, First annual report, §28(a).

113 APT, *NPM Guide*, pp.39-40.

114 Paris Principles, (Composition and guarantees of independence and pluralism Section): "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 protection and promotion of

appropriate for NPMs.[115] Furthermore, the OPCAT recognises that NPM members should be representative of the wider society in terms of gender balance and representation of minority ethnic or religious groups. As with the SPT,[116] the participation of experts from groups that are at particular risk in places of detention (e.g. persons with disabilities or survivors of torture) should be encouraged. In practice, NPMs, like the SPT, may need to rely on external experts to assist with visits. External experts must meet the same requirements of independence, and be afforded the same privileges and guarantees against reprisals, as NPM members.[117]



### Article 18(3): Financial independence

Article 18(3) contains a positive obligation for States Parties to provide both the necessary resources and adequate funding for the effective functioning of NPMs. This provision is crucial as adequate financial resources, as well as human and logistical resources, are key for the effective implementation of NPMs' preventive mandates. In line with the Paris Principles, financial autonomy is a fundamental requirement of independence: without it NPMs cannot exercise operational autonomy or independence in decision-making.[118] To be financially autonomous, NPMs must be able to draft their own annual budgets. They must also be

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)."

115 See commentary on Article 13 in this chapter; and also Section 8 of Chapter IV of this manual.

116 See commentary on Article 5(2) in this chapter.

117 As per Articles 21 and 35 of the OPCAT.

118 Paris Principles, Composition and guarantees of independence and pluralism: "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."





able to decide how to use all of their resources on an independent basis: one free from both governmental control and the need for governmental authorisation or approval. As a further safeguard to preserving the independence of NPMs, the source and nature of their funding should be specified in their founding instruments. This should enable NPMs to be financially and independently capable of performing their basic functions, including paying their own independent staff.

### Article 18(4): The Paris Principles

In accordance with Article 18(4), the OPCAT requires States Parties to give due consideration to the Paris Principles. However, the Paris Principles were designed to provide guidance for general purpose human rights institutions with broad mandates (e.g. NHRIs). Consequently, some aspects of the Paris Principles cannot be applied to the OPCAT's preventive framework, while others are superseded by more detailed provisions within the OPCAT.[119] It must be remembered that an NHRI's compliance with the Paris Principles does not automatically guarantee that it will comply with the provisions of the OPCAT. In this context, the SPT considers that the accreditation of NHRIs is "a supplementary mechanism but should not be used as a procedure for accreditation of national mechanisms in general, since it is for the Subcommittee to make such assessments in specific cases".[120] This provision should not be interpreted as a reason to automatically grant the NPM mandate to an NHRI.



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**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, 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

119 APT, *NPM Guide*, p.38.

120 SPT, Third annual report, §61.

of their liberty and to prevent torture, 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.

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Article 19 sets out in detail the NPM mandate to conduct regular visits to places of detention and to make recommendations in order to prevent torture and other ill-treatment. Article 19(3)(c) also grants NPMs the power to comment on existing or draft legislation, allowing them to become involved in preventive legislative efforts.



### Article 19(a): Regular visits

The idea of introducing a system of national preventive monitoring to places of detention was partly designed to guarantee that places of detention were visited regularly. Generally speaking, the more frequent and regular the visits, the more effective the monitoring programme will be as a preventive tool.

Article 19(a) does not specify what frequency of visits the term "regularly examine" implies. This suggests that NPMs have the power to determine this for themselves. Thus, NPMs are able to tailor their programme of preventive monitoring to meet the challenges of the national context. Considering the scope of the NPM mandate, most NPMs will find it difficult to make frequent regular visits to all places where persons are deprived of their liberty. Thus, most NPMs will need to select which places to visit each year; they should also define a certain minimum frequency for visiting each place of detention. For example, given the often rapid turnover of detainees in pre-trial detention facilities and police lock-ups, these should probably be visited more frequently than penal establishments.[121]

### Articles 19(b) and 19(c): Scope of recommendations

Article 19(b) mandates NPMs to make recommendations to the authorities aimed at "improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture, cruel, inhuman or degrading

121 See Sections 4.1.1-2 of Chapter V of this manual.





treatment or punishment, taking into consideration the relevant norms of the United Nations." This must be understood as encompassing not only the identification of failings within places of detention but also the identification of any systemic weaknesses or legislative gaps in the protection of persons deprived of their liberty.[122] Thus, the provision to make recommendations is not limited to observations following a visit to a place of detention. As is the case with the SPT, NPMs are empowered to make recommendations on a wide range of issues relevant to the prevention of torture and other ill-treatment. It is also important to underline that, according to Article 19(b), NPMs can base their analysis on a wide range of standards, including all the relevant UN norms enshrined in treaties and other instruments.[123]

Article 19(c) further strengthens this broad preventive approach by empowering NPMs to review existing and proposed legislation concerning places of detention and persons deprived of their liberty. For example, an NPM may review the consistency of legislation in relation to international standards in order to determine whether it adequately promotes the protection of persons deprived of their liberty.[124] To facilitate this aspect of the NPMs' mandate, the governments of OPCAT States Parties should make a practice of proactively sending draft legislation to their respective NPM(s). NPMs should also be able to initiate proposals for new legislation and/or amendments to existing legislation.[125]

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### 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 these persons as well as their conditions of detention;

122 OPCAT, Article 1. For further discussion of this issue, see APT, *NPM Guide*, p.26; and Section 3 of Chapter V of this manual.

123 See also analysis of Article 2(2) in this chapter.

124 APT, *NPM Guide*, p.26.

125 APT, *NPM Guide*, p.26.

(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 whom the national preventive mechanism believes may supply relevant information;

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

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



Article 20 further demonstrates that the OPCAT accords equal importance to international and national efforts to prevent torture in that it establishes similar duties for international and national OPCAT bodies, along with corresponding obligations for States Parties.[126] Article 20 mirrors Article 14, which addresses the SPT mandate, by setting out similar obligations for States Parties to ensure that NPMs:

- have access to information and places of detention;
- have the opportunity to select which places to visit and who to interview; and
- can conduct private interviews.

The guarantees provided by Article 20 are fundamental to the effective functioning of NPMs. They enable NPMs both to conduct rigorous and comprehensive examinations of domestic preventive frameworks without hindrance from State authorities, and to build up an accurate picture of the level of protection afforded to persons deprived of their liberty.

### Articles 20(a) and 20(b): Access to information

The information that an NPM is entitled to obtain under Article 20(a), about both the number and location of detainees and places of detention in the country, is essential for the NPM to be able to plan an effective monitoring programme. The range of information on the treatment of

126 OPCAT, Articles 12(c) and 14.





detainees and conditions of detention covered by Article 20(b) is extremely broad; it encompasses a wide range of documents, records, registers and files. These may include internal rules, staff regulations, aggregate and individual medical records, schedules (including records of time spent in cells, time spent exercising, time spent indoors versus outdoors, and time spent working), suicide watch arrangements, and disciplinary records.[127] Some of the information that an NPM will have access to will be confidential in nature, such as medical reports. The State Party's obligation to provide information must, therefore, be read in conjunction with the corresponding obligation on the part of the NPM to respect the confidential nature of the information, including by not publishing any personal data without the express consent of the person(s) concerned.[128]

Since the OPCAT requires that NPMs have access to confidential information, States Parties should review existing legislation for the protection of personal data and, if necessary, enact exemptions to allow NPMs access to, and use of, relevant information in accordance with the OPCAT. This may already be covered by existing exceptions for public agencies; in other cases, new provisions will be required to permit NPMs to collect, use and protect personal data.[129]

### Article 20(c): Access to places of detention

Article 20(c) reaffirms the obligation, established by Article 1, for States Parties to allow NPMs access to all places of detention as defined in Article 4. Article 20(c) does not directly mirror the language of Article 14(c), which allows the SPT "unrestricted access". However, as discussed above in relation to Article 4, when Article 20 is read in the context of the OPCAT as a whole, it is clear that NPMs must be given the same powers as the SPT to conduct visits without interference by State authorities. This includes conducting unannounced visits.[130] This is the only conclusion that is consistent with the OPCAT's purpose and objectives and, thus, is the interpretation that is required by the Vienna Convention on the Laws of Treaties.[131]

127 APT, *NPM Guide*, p.58.

128 OPCAT, Article 21(2).

129 APT, *NPM Guide*, p.58.

130 APT, *NPM Guide*, p.57. See also Nowak and McArthur, *The UNCAT*, pp.1090-1091.

131 Under Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See also

In relation to the SPT, Article 14(2) sets out exceptional and limited grounds upon which a State Party may temporarily postpone a visit to a particular place of detention. No parallel language exists in Article 20. The reasonable inference is that no circumstances permit even a temporary objection by the government to any visit by the country's NPM(s).[132]

### Article 20(d): Conducting private interviews

Article 20(d) guarantees that NPMs have the same right to conduct private interviews as the SPT does under Article 14(d). The possibility of interviewing persons in private is essential to allow individuals to speak openly and without fear of reprisals. Implementing legislation should guarantee the right of NPMs to interview detainees, and others, without eavesdropping or other surveillance by officials, inmates or others. The only exception should be when a visiting team itself makes a specific request to conduct an interview out of hearing but within sight of guards for safety reasons.[133]

As is the case for the SPT, an NPM monitoring team should not be required to accept places chosen by the authorities for interviews.[134] NPM members should have the liberty to choose any sufficiently secure place that they consider appropriate. When staff in a place of detention propose to restrict interviews to protect the personal safety of an NPM team, such advice should be given careful consideration. Nevertheless, NPM members should ultimately have the right to proceed if they consider the risk to their personal safety, if any, to be acceptable.[135]

### Article 20(e): Choice of interviewees

Article 20(e) specifies that NPMs have the right and liberty to choose the persons they want to interview.[136] This is an important power as it enables NPMs to select persons deprived of liberty to interview based on either

discussion of Articles 1 and 4 of the OPCAT in this chapter.

132 APT, *NPM Guide*, p.57.

133 APT, *NPM Guide*, p.60.

134 See commentary on Article 14(d) in this chapter.

135 APT, *NPM Guide*, p.60.

136 See commentary on Article 14(e) in this chapter.





specific criteria or random selection/representative sampling procedures in order to gain a representative and accurate picture of the situation within the place of detention.[137]

### Article 20(f): Contact with the SPT

Article 20(f) mirrors Article 12(c) in requiring States Parties to ensure that NPMs are able to communicate with, and send information to, the SPT. Direct contact between NPMs and the SPT is an innovative feature of the OPCAT. Moreover, it is critical to the establishment of the "system" of prevention envisaged by the treaty.[138] Direct contact is essential to ensure that OPCAT bodies cooperate and complement each other. Accordingly, the right of direct confidential contact flows in both directions. Article 11(b)(ii) indicates that the SPT should play a proactive role in this regard, as it is given the responsibility to "maintain direct, and if necessary confidential, contact with the NPMs". In the context of multiple NPMs, the SPT recommends that States Parties ensure that "contacts between the Subcommittee and all units of the mechanisms (…) be guaranteed".[139] In addition, Article 16(1) states that the SPT "shall communicate its recommendations and observations confidentially to the State Party, and if relevant, to the national preventive mechanism." Applied together, Articles 20(f), 12(c), 16(1) and 11(b)(ii) enable NPMs and the SPT to have substantive exchanges on strategies to prevent torture and other forms of ill-treatment; the SPT and NPMs can meet and exchange information, if necessary on a confidential basis, and NPMs can forward their reports and any other information to the SPT.

The SPT is also, in accordance with Articles 11(b)(ii) and 11(b)(iii), able to offer training and technical assistance directly to NPMs, with a view to strengthening their capacities and their functioning.

137 APT, Detention Monitoring Briefing No 2, *The Selection of Persons to Interview in the Context of Preventive Detention Monitoring*, APT, Geneva, April 2009. Available at www.apt.ch.

138 See OPCAT, Preamble and also Article 1.

139 SPT, Third annual report, §53.

**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 21(1) mirrors Article 15 and applies the same prohibition against any reprisals against an individual or organisation for communicating with an NPM. This is essential to ensure individuals' personal safety, and to ensure that individuals and organisations feel safe to approach and communicate with NPMs. However, in order for Article 21(1) to be effective, individuals must be aware that they are protected against retaliation for their cooperation. Therefore, the provisions of Article 21 should be incorporated into national legislation to implement the OPCAT.[140] NPMs may also wish to remind the relevant authorities of these provisions at the start of visits, and to make individuals aware of the provisions when conducting interviews. An NPM's permanent in-country presence enables it to more easily verify and follow-up on concerns about possible reprisals (e.g. through follow-up visits and follow-up interviews with the detainees that the NPM had been in contact with).

The protection described by Article 21 must cover information that State authorities or others may claim is false, because otherwise the protection intended to be covered by this Article could be circumvented.[141] However, it is clear that Article 21 is not intended to protect the State from responsibility for anything its agents might do to deliberately mislead the NPM and interfere with its work. For example, if a prison warden were intentionally to provide the NPM with false information (e.g. in order to conceal the death or mistreatment of a detainee), the State would be responsible for breaching its international obligations under the

140 APT, *NPM Guide*, pp.61-62.

141 See also commentary on Article 15 in this chapter.





OPCAT, notwithstanding any personal protection possibly conferred on the individual prison warden by Article 21. Of course, to the extent that 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 UNCAT (e.g. in terms of complicity), independent criminal responsibility would not be excluded by Article 21 of the OPCAT.[142]

Article 21(2) states that confidential information collected by the NPM must be privileged. No corresponding article exists for the SPT because this is unnecessary in light of Article 2(3), which mandates the SPT to abide by the guiding principle of confidentiality.[143] As a consequence of having a right of access to information in accordance with Article 20, in the course of its work an NPM will inevitably have access to sensitive information about places of detention and individuals (e.g. medical information). In addition, some information that an NPM receives about other persons at a place of detention, such as employees, could be of a personal, rather than professional, nature. In many States, this type of information would already be protected against disclosure pursuant to legislation relating to the protection of privacy.[144]

However, implementing legislation should also permit an NPM to disclose or publish data about individuals when they give their express consent. States Parties should not be permitted to hide behind legislation (or rhetoric) about personal privacy in order to block the release of data that both the NPM and the person(s) concerned would otherwise disclose or make public. Disclosure must also be possible when the interviewee explicitly requests that the NPM refer his/her complaint to another institution, such as a prosecutor, ombudsman, professional association, or human rights tribunal. An NPM should also have the unrestricted right to publish statistical or other information collated from personal data, and to publish relevant information on any other matter that renders personal data truly anonymous.[145]

142 APT, *NPM Guide*, pp.61-62.

143 See also OPCAT, Article 16(1).

144 APT, *NPM Guide*, p.58.

145 APT, *NPM Guide*, p.59.

**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 22 mirrors Article 12(d) in respect of the SPT, underscoring the fact that the OPCAT accords equal importance to international and national preventive efforts. Like Article 12(d), Article 22 stresses the importance of the principle of cooperation by obliging States Parties both to examine the recommendations of NPMs and to discuss implementation measures with them. Unlike with SPT visit reports and recommendations, the OPCAT does not contain any provisions regarding confidentiality of NPM visit reports and recommendations. Depending on an individual NPM's strategy, and the degree to which it cooperates with State authorities, it may, therefore, decide to publish its visit reports, though only in compliance with Article 21(2): confidential information obtained by the NPM should be privileged and personal data should only be published with the express consent of the person concerned.

Article 22 provisions may be of particular interest to existing national monitoring mechanisms that lack comparable provisions requiring the State to consider their recommendations: being designated as NPMs would afford such mechanisms particular advantages.

### Article 22: Competent authorities

The "competent authorities" mentioned in Article 22 are the authorities in charge of places of detention, including the managers of places of detention and the ministers under whose authority these places fall. However, the OPCAT leaves the determination of which authorities are relevant to any particular recommendation to the discretion of the NPM.[146] Accordingly, recommendations for some issues with practical solutions, and those subject to local decision-making, may be best directed to the administration of a particular institution. System-wide issues that require legislation to be amended, and/or decisions to be taken at the national level, will naturally

146 APT, *NPM Guide*, p.65.







be better directed to higher authorities in the government or legislative structure in order to have a reasonable prospect of implementation.[147]

In order to implement Article 22, the national legislation implementing the OPCAT should expressly allow NPMs to determine which authorities should receive particular recommendations. The receiving authority should then have a correlating duty under national law to respond or, if it deems itself to lack the requisite competence to implement the recommendation(s) in question, to identify a competent authority to refer the recommendation to this authority would then assume the duty to respond.[148] Legislation should also allow the NPM to define an appropriate period within which the competent authorities are expected to respond and/or engage in dialogue with the NPM on specific matters.

In the course of a visit, an NPM may come across individual allegations that require further investigation, adjudication and/or prosecution; therefore, it may recommend that an appropriate authority investigate. In such circumstances, the "competent authority" could be a prosecutor's office, an ombudsperson's office, or an NHRI with jurisdiction to consider individual complaints. However, the restrictions on disclosure of personal data contained in Article 21(2) would apply. Consequently, a referral could only transmit information about the particular complainant with his/her express consent.[149]

### Article 22: Consideration of recommendations

In order to assist in the consideration of recommendations and observations, it is recommended that NPMs follow the example of the SPT and hold a meeting with the relevant authorities at the end of a visit, or as soon as possible thereafter, to inform them of initial recommendations and observations.[150] Formal written feedback should subsequently be provided as soon as possible. The report should form the basis for constructive dialogue between the NPM and relevant authorities on implementation of

147 APT, *NPM Guide*, p.65.

148 APT, *NPM Guide*, p.65.

149 APT, *NPM Guide*, p.65. See also commentary on Article 21 in this chapter.

150 SPT, First annual report, Annex V.

recommendations. National legislation implementing the OPCAT should contain an express obligation for the State Party concerned to consider the recommendations of, and enter into dialogue with, NPMs.[151]

NPMs may monitor implementation of recommendations on a more frequent basis than the SPT through various means, including follow-up visits, correspondence with officials, and communication with non-governmental organisations (NGOs) or others present in the place of detention, such as faith-based organisations or community-based visitors. Subsequent visits, in particular, will enable the NPM to assess implementation of earlier recommendations and identify any new issues.[152] If there are any problems with implementation, these can then be raised promptly with the relevant authorities.



**Article 23**

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

Article 23 refers to the publication and dissemination of NPM annual reports. The OPCAT does not prescribe the content of annual reports. However, if the designated NPM is an existing institution, the NPM annual report should be published as a separate report or, at the very least, it should be afforded a separate chapter in the institution's general annual report[153] to clarify which activities were carried out under the institution's NPM mandate. As there is no provision regarding the confidentiality of NPM reports,[154] annual reports may, subject to Article 21(2), include samples of visit reports, observations and recommendations. The report may also represent an opportunity for NPMs to submit proposals and observations concerning existing or draft legislation.[155]

Article 23 contains no specific requirements regarding publication

151 APT, *NPM Guide*, p.64.

152 APT, *NPM Guide*, p.65.

153 See Section 4.3 of Chapter V of this manual.

154 See Articles 2 and 16.

155 For further information, see Section 4.4 of Chapter V of this manual.





and dissemination. NPMs are at liberty to publish their annual reports themselves. However, Article 23 provides a guarantee that they will be published and distributed by States Parties. Widespread national dissemination of NPM reports contributes to the transparency of places of detention, as well as the accountability of NPMs. Publication is, thus, intended to enable NPMs to employ transparent working practices, and to improve the long-term domestic impact of their work. NPMs and States Parties should ensure that annual reports are also sent to the relevant international and regional bodies, such as the SPT, CAT, CPT, Committee for the Prevention of Torture in Africa (CPTA) and IACHR.

A variety of options are available to help NPMs to disseminate information. Article 23 does not preclude an NPM from deciding to make other reports, including its visit reports, public. Issues arising across a number of institutions could lead an NPM to publish a thematic report.



## 7. OPCAT Part V: Declaration

Part V contains only one article: Article 24 seeks to provide States Parties with some time for reflection in order to consider how best to implement their obligations under the OPCAT.

**Article 24**

1. Upon ratification, States Parties can make a declaration postponing the implementation of their obligations either under part III or under 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 year period.

Article 24 seeks to afford States that wish to become a party to the OPCAT additional time within which to consider how best to implement the obligations set out under the treaty. In accordance with Article 24, States Parties may make a declaration to temporarily postpone their obligations in respect of either the SPT (i.e. under Part III of the OPCAT)

or NPMs (i.e. under Part IV of the OPCAT). The postponement may be for an initial period of up to three years with the possibility, subject to approval by the CAT, of an extension for an additional two years. The initial postponement of obligations has been interpreted as allowing States Parties an initial four-year postponement period in relation to NPMs. This is because States Parties already have one year from the date of ratification to put an NPM in place pursuant to Article 17.[156]

### Article 24(1): Timing of declaration

The interpretation of Article 24(1) of the OPCAT has proved contentious as it was not clear whether a declaration to postpone can only be made at the moment of ratification or whether it can be made at any time afterwards. Disagreement hinged on the conflicting translations and interpretations of the phrase "upon ratification" in the treaty's equally authentic Arabic, Chinese, English, French, Russian and Spanish[157] versions.[158] In accordance with Article 33 of the Vienna Convention on the Law of Treaties, the terms of the treaty are presumed to have the same meaning in each authentic text. In addition, Article 37(1) of the OPCAT does not expressly provide for any one particular version of the text to prevail, notwithstanding the fact that the English version was the primary basis for negotiations.

The English and French versions of Article 24(1) make it clear that a declaration of postponement can only be made at the time of ratification, not afterwards. On the other hand, the initial Russian version suggested that the declaration should be made after ratification. The initial Spanish version seemed to suggest that the possibility of postponement continued after the moment of ratification.[159]

156 Nowak and McArthur, *The UNCAT*, p.1108.

157 That is the UN official languages.

158 See OPCAT, 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". For further information, see the commentary on Article 37(1) in this chapter.

159 APT, '*Linguistic Issues in OPCAT Article 24*', APT, Geneva, 27 March 2007, p.2.





Following a precedent set by Kazakhstan,[160] the linguistic issues raised by Article 24 of the OPCAT were referred to the United Nations Office of Legal Affairs, which "initiated a correction procedure to bring the Russian and Spanish versions of Article 24 into line with the other authentic texts": the correction procedure centred on ensuring that these versions mirrored the meaning of the phrase "at the time of the ratification".[161] The amendments to the original OPCAT text entered into force on 29 April 2010. Article 24 should now be interpreted as follows: postponements under Article 24 can only be made upon ratification.

### Article 24: Effect of postponement for the SPT

When a State Party makes a declaration to postpone implementation of Part III of the OPCAT at the time of the ratification, the SPT will not implement its operational mandate in respect of the State Party concerned during the period of the postponement. In practice, this means that the SPT will temporarily be prevented from conducting in-country visits to the State Party, and will be unable to provide advice and assistance on the establishment of NPMs.[162]

Direct contact with NPMs is, however, crucial during a postponement. While the SPT would be unable to initiate contact with the relevant NPM(s) because its mandate to do so under Article 11(b)(ii) would be postponed, the NPM(s) could take such initiative and enter into dialogue with the SPT by virtue of Article 20(f).

160 Kazakhstan ratified the OPCAT on 28 October 2008, invoking the Russian version to make a declaration under Article 24 postponing the establishment of its NPM. This declaration was made on 8 February 2010 and, in the absence of any objection on the part of States Parties to the OPCAT, the Secretary General of the United Nations received the declaration in question within a period of three months from the date of the notification. C.N.57.2010.TREATIES-2 (Depositary Notification of 22 February 2010).

161 For further information, see SPT, Third annual report, §48; and Corrections to the original text of the Optional Protocol (authentic Russian and Spanish texts) and to the certified true copies, C.N.244.2010.TREATIES-3 (Depositary Notification, 22 February 2010), available at http://treaties.un.org/doc/Publication/CN/2010/CN.244.2010-Eng.pdf.

162 Nowak and McArthur, *The UNCAT*, p.1108.

### Article 24: Effect of postponement for NPMs

In practice, Article 24 could be used by States that may have to create a new body as the NPM, or make substantial modifications to existing national legislation, in order to comply fully with their obligations under Part IV of the OPCAT. By making a declaration to postpone obligations under Part IV of the OPCAT, a State Party can ratify the OPCAT in order to take advantage of the advice offered by the SPT while working to put in place an effective system of national monitoring.

When States Parties exercise the option to postpone their NPM-related obligations, it is essential for the SPT and national actors to remain in contact with each other in order for the SPT to be able to provide advice regarding the designation process, and the establishment and effective functioning of NPMs. By maintaining contact with the SPT on this issue, States Parties can make effective preparations to implement the OPCAT fully at the end of the opt-out period. In such cases, by virtue of Article 11(b)(ii) (in Part III), which expressly allows the SPT to make direct contact with NPMs, the SPT would be able to have contact with any mechanism being considered for designation as an NPM.

## 8. Part VI: Financial Provisions

Part VI contains two articles that describe how the SPT's activities will be funded and how States Parties may receive special funding to implement SPT recommendations.

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**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 under the present Protocol.

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Article 25 ensures that the SPT will be funded from the regular budget of the UN and not just from contributions made by States Parties. The







regular budget comprises contributions from all UN Member States. The amount required from each Member State is based on the principle of capacity to pay: thus, the wealthiest States make the largest contributions. Therefore, funding the SPT through the regular budget is consistent with current UN practice for treaty bodies.

The inclusion of this provision was strenuously opposed by a handful of Member States during the OPCAT negotiations and the adoption process.[163] A few Member States argued that it was not fair for States that are not Parties to the OPCAT to have to fund the SPT's activities. They claimed that funding the SPT would divert funds from existing bodies and that they doubted that the OPCAT would have a significant impact on the prevention of torture and other ill-treatment. However, ensuring that the SPT receives funds from the regular UN budget is vital to guarantee that it functions effectively. Previous experience with other UN treaty bodies demonstrates the inadequacy of State Party funding; in the past, this has led to inconsistency in the quality of protection afforded to individuals in respect of their human rights.[164] For this reason, the UN Member States adopted a General Assembly Resolution in 1992 to guarantee that all treaty bodies would receive funding from the regular budget.[165]

Funding from the regular budget is particularly important for the OPCAT as States Parties already bear the cost of NPMs. Article 25 assists States Parties that would be unable to afford to ratify the OPCAT if simultaneously required to make a substantial contribution to SPT running costs.

In practice, the resources provided to the SPT, in line with those provided to other UN treaty bodies, are met through the budget of the OHCHR.[166] The cost of the initial 'set up' activities of the SPT were met through

163 Report of the UN Working Group to Draft an Optional Protocol to the Convention against Torture, UN Doc. E/CN.4/2002/78, §32-36; and APT, 'USA Putting a Price on the Prevention of Torture' (press release), 2 November 2002, available at www.apt.ch. See also the first version of this manual at www.apt.ch.

164 States Parties originally funded the CAT and the Committee on the Elimination of Racial Discrimination, but this led to resourcing problems.

165 Resolution on effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights, UN Doc. UN GA Res. 47/111, 16 December 1992.

166 Nowak and McArthur, *The UNCAT*, p.1121.

additional funding provided by the OHCHR, rather than monies from the OHCHR's general budget. As a result, the SPT faced a challenging situation when it first became operational because it only had funding to cover its in-country visits; therefore, its functions in respect of NPMs had to be restricted. Following the 50th ratification of the OPCAT, and the expansion in the number of SPT members from 10 to 25, the UN General Assembly recognised the need to grant the SPT adequate resources to enable it to fulfil its unique preventive mandate effectively.[167]

**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 to a State Party after a visit to a State Party, as well as education programmes of the national preventive mechanisms.

2. This Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

Article 26 provides for a Special Fund to be set up to help finance both educational programmes run by NPMs and the implementation of recommendations made by the SPT. The OPCAT Special Fund was not designed to supplement the SPT's general budget in respect of its functioning. Making express provision for funds to be made available to assist States Parties in meeting their obligations is another novel aspect of the OPCAT and reflects its specific preventive approach. This article reinforces the importance of cooperative dialogue in assisting States Parties to implement their existing obligations (including under the UNCAT) to take measures to prevent torture and other ill-treatment.

The addition of this article was a key element in ensuring the adoption of the OPCAT by Member States of the UN. Many were concerned about the financial implications of the obligations to establish, designate

167 UN General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/64/153, 18 December 2009, §36.







or maintain NPMs and to implement recommendations from the SPT and NPMs. Consequently, it was deemed necessary to provide additional funds to assist with these processes.

### Article 26(1): Implementation of SPT recommendations after a visit

Article 26(1) of the OPCAT provides funds to support the implementation of SPT recommendations after an in-country mission. Some SPT recommendations aim to improve domestic systems of deprivation of liberty, including through preventive measures. Projects to be financed may, for instance, aim to improve conditions of detention, the protection of detainees against ill-treatment and/or measures to prevent torture and ill-treatment during detention. This includes all programmes relating to the reform of a State Party's criminal justice and/or prison system, such as:

- "legislative reforms;
- training of judges, prosecutors, law enforcement officials and prison guards;
- review of interrogation methods;
- forensic examination of detainees;
- anti-torture complaints and investigations mechanisms;
- anti-corruption programmes in the context of the administration of criminal justice;
- all other measures aiming at preventing torture in accordance with the respective provisions of the [UN]CAT and other relevant UN and regional instruments[.]"[168]

In addition, under Article 11(b)(iv) the SPT is mandated to make recommendations "with the view to strengthening the capacity and the mandate of the national preventive mechanism". However, the OPCAT Special Fund does not aim to contribute to the regular budget of NPMs: it may only be used to finance educational programmes run by NPMs or

168 Nowak and McArthur, *The UNCAT*, p.1129. See also Human Rights Council, Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, UN Doc. A/HRC/RES/13/19, §13, 26 March 2010.

the implementation of SPT recommendations that aim to strengthen the capacities and mandate of NPMs.[169]

Not all SPT recommendations necessarily have significant financial implications. Indeed, States Parties should be encouraged to take measures that do not have major financial implications, such as guaranteeing procedural safeguards. Thus, the OPCAT Special Fund is expected to prioritise projects that help to implement recommendations with significant financial implications.

The confidentiality of SPT reports may result in the OPCAT Special Fund prioritising the implementation of recommendations detailed in SPT reports that have been made public; this reinforces the importance of encouraging States Parties to authorise the publication of SPT in-country mission reports. Moreover, the SPT has suggested that the more visits reports are made public, the more states will contribute to the OPCAT Special Fund.[170]

### Article 26 (1): Educational programmes

Article 26 of the OPCAT also envisages that the Special Fund will support NPM educational programmes, including capacity-strengthening activities proposed by NPMs (and/or carried out by NPMs), capacity-strengthening activities for NPMs (e.g. training sessions), and activities aimed at raising awareness of the NPM mandate and/or torture prevention measures (e.g. recommendations for reforms). The Special Fund is not intended to meet the regular costs of running NPMs; States Parties bear the primary responsibility for implementing domestic preventive measures and ensuring that their NPMs have adequate funding.[171]

### Article 26(2): Contributions to the OPCAT Special Fund

Contributions to the OPCAT Special Fund must be directed to the OHCHR, which manages the Fund. Governments, as well as a variety of other actors (including civil society organisations, academic institutions,

169 Nowak and McArthur, *The UNCAT*, p.1129.

170 SPT, Third annual report, §59.

171 Under Article 18(3) of the OPCAT.







individuals, companies, private foundations, and other private or public entities), can make contributions.[172] The OPCAT Special Fund has already received contributions from some states.[173] However, more contributions are needed for the OPCAT Special Fund to carry out its mandate effectively.

Article 26 is silent on the subject of the decision-making process for using funds. It is unclear whether a State Party must request funds or whether an NPM can make such a request or, indeed, whether the SPT can or should take the initiative. In addition, the reference to the Special Fund being "administered in accordance with the financial regulations and rules of the United Nations" requires administration by an independent Board of Trustees. In accordance with these rules, the members of the Board of Trustees can be appointed by the General Assembly or States Parties to the relevant treaty.[174] The OPCAT does not elaborate on the procedure for appointment. The Board of Trustees of the UN Voluntary Funds for Victims of Torture was envisaged as eventually acting as the Board for the OPCAT Special Fund.[175]

## 9. Part VII: Final Provisions

Part VII, which comprises 11 articles, contains provisions regarding:

- the entry into force of the OPCAT;
- the process to be followed by States Parties that wish to withdraw from, or amend, the instrument;
- a prohibition on reservations to the treaty; and
- provisions concerning the need for cooperation with other relevant bodies.

172 OPCAT, Article 26(2).

173 According to the third annual report of the SPT, the Czech Republic, the Maldives and Spain contributed to the OPCAT Special Fund. UN Doc. CAT/C/44/2, 25 March 2010, §59.

174 Nowak and McArthur, *The UNCAT*, p.1128.

175 SPT, Second annual report, §46.

**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 which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 27 establishes that only States that have signed, ratified or acceded to the UNCAT can, respectively, sign, ratify or accede to the OPCAT. Without Article 27, the OPCAT would not be an optional protocol to UNCAT but a 'free standing' treaty in its own right.[176] Article 27 expressly places the OPCAT within the context of the UNCAT, evidencing the OPCAT's historical origins; it should be noted that the proposal for an international monitoring mechanism was first made during UNCAT negotiations.[177] Article 27 emphasises the OPCAT's role in assisting States Parties to the UNCAT to better implement their existing obligations to prevent torture and other ill-treatment under the UNCAT.

In accordance with this article, States can sign the OPCAT and the UNCAT simultaneously. Binding obligations occur only with ratification or accession, not signature. Signature is, however, a means to express willingness to become formally bound by the provisions of the OPCAT. Furthermore, in accordance with Article 18 of the Vienna Convention on the Law of Treaties, signature creates an obligation upon the signatory state to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.[178] However, States are only expressly bound by

176 Nowak and McArthur, *The UNCAT*, p.1137.

177 See Section 4 of Chapter I of this manual; and the first version of this manual.

178 Vienna Convention on the Law of Treaties, Article 18. For further information, see the UN Treaty Reference Guide: www.untreaty.un.org.





the obligations of the OPCAT when they ratify or accede to the instrument. Whilst the processes for ratifying/acceding to the UNCAT and the OPCAT treaty are different, there is no difference between the results as each process binds States equally.

Ratification is the most common process. Before ratifying an international treaty, a state expressly seeks approval at the domestic level to be bound by the provisions of the treaty.[179] The legal process required for ratification varies from state to state. When approval has been received at the domestic level for ratification of the OPCAT, an instrument of ratification will be lodged with the Secretary General of the UN. Accession, on the other hand, is the process by which a State agrees to be bound by the provisions of a particular treaty without having signed the treaty. It is a process that is used less often than ratification and must be expressly provided for by the relevant treaty. However, it has the same legal effect as ratification.

In addition, although the OPCAT does not expressly say so, a State can also sign, ratify, or accede to the OPCAT by means of succession.[180]

**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 the deposit of its own instrument of ratification or accession.

179 Vienna Convention on the Law of Treaties, Articles 2(1)(b), 14(1) and 16.

180 The principle of "succession of states" relates to the process via which a newly-created state replaces another state with regard to the responsibility for the international relations of a territory. For example, Serbia and Montenegro signed the OPCAT on 25 September 2003. Montenegro declared independence on 3 June 2006. Serbia ratified the OPCAT on 26 September 2006 and Montenegro became a signatory State by means of succession on 23 October 2006. Montenegro became a State Party to the OPCAT on 6 March 2009.

Article 28 sets out the procedure for the entry into force of the OPCAT (i.e. the date on which its provisions become legally and expressly binding). Article 28 states that the OPCAT shall enter into force on the day after 20 ratifications are attained. Other optional protocols to human rights treaties generally require only 10 States Parties to ratify or accede before the treaty's entry into force.[181] The relatively high number of ratifications required under Article 28 reflects the difficulties and resistance encountered during the OPCAT negotiation process. However, in the end, the number of States Parties required did not significantly delay the OPCAT's entry into force. The OPCAT entered into force on 22 June 2006, only three and half years after its adoption by the UN General Assembly on 18 December 2002. The OPCAT's entry into force triggered the process that created the SPT. The initial States Parties' meeting for the election of the members of the SPT was held on 18 December 2006.[182]

Article 28 also stipulates that each State that ratifies or accedes to the OPCAT after its entry into force will become legally bound by the treaty's provisions on the 30th day after the day of the deposit of their instrument of ratification or accession.

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**Article 29**

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

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Article 29 aims to ensure that federal States Parties apply their obligations equally within all states to ensure consistent domestic implementation of the OPCAT.[183] This reflects the principle that holds that States Parties must not use federal structures to excuse failures to implement their obligations

181 See the first Optional Protocol to the ICCPR, Article 9; Optional Protocol to the CEDAW, Article 16; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 13; and Nowak and McArthur, *The UNCAT*, p.1143.

182 OPCAT, Article 7(1)(b).

183 For detailed information on the implementation of the OPCAT in federal States, see APT, *Implementation of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Federal and Decentralised States*, APT, Geneva, 2005. Available at www.apt.ch.





fully. This provision mirrors Article 50 of the International Covenant for Civil and Political Rights and is consistent with Article 29 of the Vienna Convention on the Law of Treaties, which provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[184] In practice, implementing the OPCAT within a federal state, or another form of decentralised state, poses a number of particular challenges.

### Article 29: Scope of the Article

The reference to "federal States" in Article 29 should be interpreted as applying to all forms of decentralised states. 'Federal' division of authority between a centralised federal government and regional or provincial governments is the most common form of decentralisation. However, decentralisation can take other forms, including much more limited delegation of specific responsibilities to municipal or local governments.[185] Typically, decentralisation divides authority based on defined geographic areas and/or categories of subject matter.

### Article 29: Responsibility for implementing the OPCAT in federal states

In federal states, treaty-making is often the exclusive responsibility of the federal government. However, in some states, the federal government alone cannot implement a ratified treaty. When all or part of the subject matter of the treaty falls within the competence of regional governments, the latter may be required to pass legislation enabling the treaty to take effect. However, if a federal government does not have overriding, exclusive authority to legislate for the implementation of international treaties, it may still have sufficient constitutional authority to implement a treaty on the basis that the treaty falls within its regular areas of competence. The federal government may have broad responsibility for such areas (e.g. for human rights) or it may be responsible for a wide range of specific issues (e.g. prisons, policing, and health).[186]

184 Vienna Convention on the Law of Treaties, Article 29.

185 APT, *Implementation of OPCAT in Federal States*, p.4.

186 APT, *Implementation of OPCAT in Federal States*, p.9.

In any situation in which the federal government cannot implement a human rights treaty alone, some method of obtaining agreement and action from regional governments will be necessary. International human rights treaty bodies, including the Human Rights Committee, have indicated that federal states have a duty to establish federal-regional cooperation, and implementation-monitoring mechanisms, in order to meet their international human rights obligations.[187] Accordingly, federal governments should consider whether they have the constitutional authority to pass the legislation required to implement the OPCAT.[188] Legislative changes to ensure that the SPT and NPMs have the powers and authority stipulated by the OPCAT may also have to be identified and implemented before the OPCAT can be fully implemented.[189]

### Article 29: Establishment or designation of NPMs within federal states

Federal governments, like all governments that are (or intend to become) States Parties to the OPCAT, should undertake a review of existing detention monitoring mechanisms to consider whether any of these could be designated as NPMs or whether it would be better to create a new body (or new bodies). Particular attention should be paid to determining the frequency and duration of visits that will be required in the context of the State's geography and institutions.[190]

In federal states, NPMs may be:

- geographically-based: some States may designate multiple bodies, according to geographic divisions, to assume the NPM mandate;

187 Human Rights Committee, Concluding observations of the Human Rights Committee on Germany, UN Doc. CCPR/CO/80/DEU, 4 May 2004, §12, quoted in APT, Implementation of OPCAT in Federal States, p.9: "The State Party is reminded of its responsibilities in relation to article 50 [federal States clause] of the Covenant; it should establish proper mechanisms between the federal and *Länder* levels to further ensure the full applicability of the Covenant".

188 Nowak and McArthur, *The UNCAT*, p.1147.

189 Nowak and McArthur, *The UNCAT*, p.1147.

190 See also commentary on Article 3 in this chapter; APT, *Implementation of OPCAT in Federal States*, pp.7-13; and Walter Suntinger, 'National Visiting Mechanisms: Categories and Assessment', in *Visiting Places of Detention: Lessons Learned and Practices of Selected Domestic Institutions* (Report on an expert seminar), APT, Geneva, July 2003.









- jurisdiction-based: States may decide to designate multiple bodies, in relation to different types of institutions or subject matter, that fall under specific jurisdictions (federal or other);
- thematically-based: some States may decide to designate several bodies, each with specific expertise (e.g. concerning juveniles, migrants, or the police) to carry out NPM tasks. Each institution will be responsible for monitoring the places of detention falling within its thematic area of expertise (e.g. police detention units, places of detention for juveniles, or homes for elderly people); or
- a combination of these options may be used.[191]

The final decision as to what form of NPM will best suit a given State will, of course, depend on a number of factors, including the size of the country, the existence of monitoring bodies, and the nature of the State's national constitutional authority.[192] In every case, it is essential to ensure:

- that all places where an individual may be deprived of his/her liberty are covered;
- that each visiting mechanism has the expertise, and all the powers and guarantees, required by the OPCAT; and
- that the overall scheme is administratively manageable and that positive and consistent results are obtained.

In this regard, as mentioned earlier in relation to Article 17, relying on too loose a patchwork of existing entities can be difficult to reconcile with the requirements of the OPCAT.[193]

### Article 30

No reservations shall be made to the present Protocol.

Article 30 precludes any reservations being made to the OPCAT. This provision is particularly significant as most international instruments provide

191 For further information, see Section 7 (especially 7.4) of Chapter IV of this manual.

192 APT, *Implementation of OPCAT in Federal States*, p.12.

193 See commentary on Article 17 in this chapter. See also Section 7.4 of Chapter IV and Section 6.1 of Chapter V of this manual.

that reservations may be made, though only if they are not incompatible with the object and purpose of the treaty. In the case of the OPCAT, the drafters considered it essential to exclude the possibility of reservations because the OPCAT does not create new substantive norms; instead, its provisions create new mechanisms that assist with the implementation of existing obligations under the UNCAT.[194] Therefore, any reservation would inevitably restrict the mandate and/or working methods of the OPCAT bodies, thereby interfering with the object and purpose of the treaty.[195] This would be contrary to Article 19(c) of the Vienna Convention on the Law of Treaties.[196] Moreover, Article 24, which allows States Parties to temporarily opt-out of their obligations in respect of either the SPT or NPMs, already grants States Parties sufficient leeway to prepare to implement their obligations fully.

### 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.

194 The issue of allowing reservations was a particularly controversial aspect of OPCAT negotiations. Some States argued that it should be possible for a State to issue reservations, as is the case in relation to some other optional protocols, such as the two optional protocols to the UN Convention on the Rights of the Child. The majority, however, noted that recent practice in the field of human rights (e.g. in the 1998 Rome Statute of the International Criminal Court, and the 1999 Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women) has been to disallow any reservations.

195 Reports of the UN Working Group to Draft an Optional Protocol to UNCAT, UN Doc. E/CN.4/1993/28, 2 December 1992, §111-112, and UN Doc. E/CN.4/2000/58, 2 December 1999, §20-22.

196 Article 19(c) of the Vienna Convention on the Law of Treaties states that "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."









Article 31 illustrates the principle of cooperation that lies at the heart of the OPCAT's preventive approach. The article acknowledges the existence of regional bodies that conduct visits to places of detention, and addresses concerns that the SPT may duplicate the work of such mechanisms and that these bodies may duplicate the work of the SPT. Cooperation is essential to ensure that the various bodies apply coherent standards and recommendations, particularly with regard to the designation, establishment and functioning of NPMs.[197] The cooperation between the SPT and other regional mechanisms envisaged under Article 31 could take various forms, including exchanges of information and best practice guidelines, coordinated programmes of visits to specific countries, and bilateral meetings to discuss issues of common interest.

Although Article 31 does not expressly mention NPMs, it is useful for NPMs to consider how to consult with relevant regional bodies and how these bodies might consult with them. This would be of mutual benefit, as each body could then act upon the information gathered and the recommendations made as a result of visits by any of the bodies.

### 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 their Additional Protocols of 8 June 1977, or 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 32 is further evidence of the importance of the OPCAT's overarching principle of cooperation.[198] It provides that the OPCAT shall not limit, or otherwise interfere with, the obligations stemming from the four Geneva Conventions and their additional Protocols. Collectively these texts constitute the basis for international humanitarian law;[199] thus,

197 Nowak and McArthur, *The UNCAT*, p.1159. See also Section 5 of Chapter III of this manual for further information about the cooperation envisaged between the SPT and other preventive bodies.

198 See OPCAT, Article 11(c).

199 International humanitarian law involves the protection of persons during times of

Article 32 places States Parties under obligations that are complementary to those that arise as a result of international humanitarian law. Article 32 envisages the work of the OPCAT bodies complementing that of the ICRC.[200] It follows from the text of the OPCAT that the right of access to places of detention that is afforded to the SPT and relevant NPM(s) must not be used as justification to exclude visits by the ICRC or vice versa. In accordance with the Geneva Conventions, the ICRC is authorised to visit all places of detention where prisoners of war, detained civilians and other "protected persons" are, or may be, held during an international armed conflict.[201] During a non-international armed conflict or in times of peace, a State may authorise the ICRC to visit places of detention on an ad hoc basis.[202]

Therefore, there is significant potential for overlap between the work of the ICRC and OPCAT bodies, notwithstanding the broader definition of places of detention that govern the mandate and scope of application of the OPCAT bodies. To avoid duplication of efforts, the OPCAT bodies should set up a system whereby they can cooperate and communicate effectively with the ICRC. Effective cooperation would require a procedure for sharing information, particularly regarding the choice of places to be visited, during preparations for SPT in-country missions. Further exploration of the possibilities for cooperation between NPMs and the ICRC is needed. However, cooperation may represent a particularly complex challenge for States Parties with multiple NPMs; this is another reason that such States should consider establishing or identifying a coordinating body.[203]

armed conflict. For instance, it enables the ICRC to conduct visits to places of detention to visit prisoners of war.

200 Nowak and McArthur, *The UNCAT*, p.1165.

201 For more information on the activities of the ICRC, seew ww.icrc.org.

202 Nowak and McArthur, *The UNCAT*, p.1161. For a definition of 'armed conflict', see www.icrc.org

203 APT, *NPM Guide*, p.91.







## 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 adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Subcommittee on Prevention prior to the date at 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 33 mirrors Article 31 of the UNCAT; it sets out the common UN language and procedure to be followed when a State Party wishes to withdraw from a treaty. It contains safeguards designed to prevent States Parties from denouncing the OPCAT in order to selectively adhere to their obligations under the treaty. The act of withdrawing from the treaty is a serious step.

The obligations of a State Party do not stop the moment that it submits its denunciation; denunciation takes effect one year after receipt of notification. During the year following receipt of a notice of denunciation, a State Party's obligations, including those in respect of the SPT, continue: during the post-denunciation year, the SPT is still able to carry out regular and follow-up in-country visits, to maintain contacts with NPMs, and to provide NPMs with training, advice and technical assistance.[204] However, once notification of denunciation is submitted, the SPT cannot commence consideration of new matters and the State Party is effectively released from new obligations after this date. On the other hand, a State Party's obligations continue with regard to acts that occurred, or situations that

204 Nowak and MacArthur, *The UNCAT*, pp.1170-1171.

arose, before the date on which the denunciation became effective. The SPT may continue to act in respect of such matters; therefore, a notice of denunciation cannot be used to prevent the SPT from continuing to look into a matter that is already under consideration. The term "situation" covers a broad range of circumstances and issues (e.g. issues previously raised with the State Party by the SPT and projects to implement SPT recommendations financed via the Special Fund).[205]

Furthermore, this provision does not have any legal effect on the domestic work of NPMs. In order to discontinue the functioning of its NPM(s), a State Party would have to take the necessary legislative or other actions (e.g. repealing the NPM's founding legislation) as specified in the constitutional or legislative text that established the NPM.[206]



### 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 which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

205 Nowak and MacArthur, *The UNCAT*, p.1170.

206 Nowak and MacArthur, *The UNCAT*, p.1171.





Article 34, which mirrors Article 29 of the UNCAT, sets out the common UN language and procedure to amend provisions of a treaty.

### 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 Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.



## Article 35: Privileges and immunities for SPT members

Article 35 is an additional safeguard against government (or other) interference with the work of the SPT and NPMs. It ensures that SPT members are granted the same privileges and immunities as other UN personnel/ representatives in accordance with Article VI, Section 22 of the UN Convention on Privileges and Immunities:

Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written or acts done by them in the course of the performance of their missions, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.[207]

Section 22 provides that these privileges and immunities are to be afforded to experts "during the period of their missions". If this were to be applied strictly to SPT members, the privileges and immunities would only apply during an in-country visit. However, Section 22 is commonly applied to experts who have been appointed for a specific fact-finding or other visit. Whilst the majority of these privileges and immunities will be most relevant during an in-country visit, in order to be compatible with the wording of Article 35 of the OPCAT, Section 22 should also be interpreted as applying to the entire period for which an expert serves as a member of the SPT.[208]

Although Article 35 of the OPCAT does not refer to the privileges and immunities to be afforded to additional experts forming part of an SPT visiting delegation under Article 13(3), additional experts should be considered experts on missions for the duration of the in-country visit and should, thus, be entitled to the privileges and immunities set out in Section 22.[209]

Article 35 of the OPCAT also makes specific reference to Section 23 of the UN Convention on Privileges and Immunities in order to provide an important safeguard against misuse of privileges and immunities. Section 23 qualifies Section 22 by stipulating that the privileges and immunities afforded to an individual under Section 22 must not be exploited for the personal benefit of the individual and that they can be waived without prejudice to the interests of the UN. The UN Secretary-General can also waive these privileges and immunities if he/she believes that they would impede the course of justice. For example, if a member of the SPT were to

207 Convention on the privileges and the immunities of the United Nations, UN Treaty Series No 15, 13 February 1946, Article VI, Section 22.

208 Nowak and McArthur, *The UNCAT*, p.1182.

209 Nowak and McArthur, *The UNCAT*, p.1182.







be charged, during the exercise of his or her duties, with a crime that was not related to the SPT mandate, the UN Secretary General could decide that the individual circumstances warranted a waiver of immunity from prosecution.[210]

### Article 35: Privileges and immunities for NPM members

Article 35 also grants NPM members privileges and immunities, as these are essential for the exercise of their preventive mandate. Although the OPCAT text does not specify the nature of these privileges and immunities, those that are afforded to SPT members under Article 35 should serve as a model. However, the exact nature and extent of privileges and immunities for NPM members should be specified in the domestic legislative text establishing the NPM (or system of NPMs).[211] These provisions should cover immunity from personal arrest, detention and seizure of personal baggage; and immunity from seizure or surveillance of papers and documents. NPM members should also be immune from legal actions in respect of words spoken or written, or acts performed, in the course of their NPM duties.[212] Provisions regarding privileges and immunities should also guarantee that there is no interference with communications relating to the exercise of NPM members' functions.

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### 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; and

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

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This provision is directly linked to the privileges and immunities afforded to members of the SPT pursuant to Article 35. Article 36 sets out the corresponding duties of a visiting delegation of the SPT when

210 Nowak and McArthur, *The UNCAT*, p.1182.

211 Nowak and McArthur, *The UNCAT*, p.1183.

212 For further information, see APT, *NPM Guide*, pp.42-45.

undertaking an in-country visit. Article 36 ensures that SPT members do not exploit their position in order to avoid compliance with the ordinary national laws and regulations of a State Party. Article 36 is also linked to Article 2, which states that the SPT is to be guided by the UN Charter and by the principles of impartiality and objectivity. Note that Article 36 applies solely during in-country visits, whereas Article 35 applies for the entire time an individual serves on the SPT.

This article could be interpreted as meaning that members of the SPT must not only respect domestic criminal law, and religious or traditional customs, but also all "prison rules, codes of criminal procedure and similar laws to the same extent as the public in general".[213] However, such a strict interpretation could, in practice, adversely affect the SPT's ability to carry out truly effective preventive visits by imposing undue restrictions on its work; this would be contrary to specific provisions of the OPCAT, such as Article 14 (which relates to the powers to be granted to the SPT during the course of an in-country mission). Accordingly, States Parties should not use Article 36 to obstruct the SPT's execution of its mandate. Nor should SPT members abuse the rights, privileges and immunities afforded to them under the OPCAT for their own personal benefit.[214]

Article 36 does not expressly mention additional experts who might participate in an SPT in-country mission. However, this provision should be interpreted as also extending to them; as part of a visiting team, they should enjoy the same powers and guarantees as SPT members in relation to the execution 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.

213 For a critical interpretation of Article 36, see Nowak and McArthur, *The UNCAT*, pp.1188-1189.

214 Nowak and McArthur, *The UNCAT*, p.1189.







Article 37 contains standard language found in all UN treaties providing for the OPCAT to be translated into all official UN languages and ensuring that translations will not alter treaty provisions and obligations in any way. However, as discussed above, the different language versions of Article 24 have raised some issues in terms of coherence and interpretation of the OPCAT; the interpretation of Article 24 has now been officially clarified and amendments to the original texts have been adopted.[215]

Article 37(2) mirrors Article 33 of the UNCAT such that, in conformity with Article 102(1) of the UN Charter and Article 80 of the Vienna Convention on the Law of Treaties, the UN Secretary-General is designated as the depository of the OPCAT.[216]

215 See commentary on Article 24 in this chapter.

216 Nowak and McArthur, *The UNCAT*, p.1192.

# Chapter III

# The Subcommittee on Prevention of Torture

Contents

## 1. Introduction

The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is a new kind of treaty body in the UN human rights framework. It has a purely preventive mandate focused on a sustained, proactive approach to the prevention of torture and other ill-treatment.[1] It aims to complement and build upon the more reactive approach of the UN Committee against Torture (CAT) specifically, and other treaty bodies and experts in general.[2] The SPT's work is guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity, as provided for by Article 2(3) of the OPCAT. It has two inter-related functions: an advisory function involving advice on OPCAT implementation and policy development, and an operational function involving monitoring of places of detention. The SPT is required to operate in cooperation with States Parties, NPMs, and other international, regional and national actors active in the field of prevention of torture, in order to strengthen the protection of persons deprived of their liberty.[3]

The SPT became operational in February 2007, following the OPCAT's entry into force in June 2006. Therefore, it is in the early stages of developing both its own policies and working methods, and its general guidelines on both the implementation of the OPCAT and the prevention of torture and other ill-treatment.

This chapter aims to provide national stakeholders in OPCAT States Parties and Signatories, and other interested actors, detailed information on the SPT. Therefore, the chapter explores the SPT's mandate, its working methods, and its cooperative relationships with States Parties, NPMs, the CAT, other bodies and experts, and civil society organisations. Public sources of information regarding the SPT's functioning are limited because the SPT's work is generally bound by the principle of confidentiality. This chapter was drafted using the information that was

1 See Section 7.1 of Chapter I of this manual.

2 See commentary on Articles 5-16 in Chapter II of this manual; and Section 2.1 of Chapter 1.

3 See OPCAT, Articles 2(4), 11(c), 12(c), 20(f) and 31.

publicly available at the time of writing, including SPT annual reports, press releases, and published SPT in-country visits reports. This chapter also proposes some ways forward with regard to areas of the SPT's work that are currently being developed and refined.

## 2. Overview of the SPT

### 2.1 Preventive mandate

The SPT has declared its fundamental purpose to be the "identification of risk of torture".[4] Rather than reacting once violations have occurred, the SPT forms part of an innovative, proactive system of monitoring of all places of detention that aims to prevent violations from happening in the first place. The SPT's preventive approach is based on the premise of cooperative dialogue with States Parties and NPMs, much of which is conducted on a confidential basis, as allowed for by the OPCAT.[5]

Article 11 of the OPCAT sets out the SPT's core preventive mandate and outlines its two complementary functions.[6] First, the SPT is required to provide advice on the protection of persons deprived of their liberty via observations and recommendations to States Parties and NPMs. In this regard, the SPT may comment on legislative, administrative, judicial, and other preventive measures. It also provides authoritative interpretations of the OPCAT, advice on OPCAT implementation, and general observations on wider torture-related issues. Finally, it provides States Parties and NPMs with advice on NPM designation, establishment and functioning. In relation to the functioning of NPMs, it may also provide training and technical assistance. The SPT has a duty to remain in direct contact with NPMs: developing constructive relationships with NPMs is as important as the SPT's other functions.[7] Second, the SPT is required to conduct

4 Statement upon presentation of the second annual SPT report to the Committee against Torture. See 'Committee against Torture meets with Subcommittee on Prevention of Torture' (press release), 12 May 2009: available at www.unog.ch.

5 OPCAT, Articles 2 and 11(b)(ii).

6 Subsequent OPCAT Articles set out in more detail the rights and duties of the SPT and the correlative duties of States Parties: see Chapter II of this manual.

7 See Article 11(b)(ii) of the OPCAT. For a detailed analysis of this article, see Chapter II of this manual.







visits to all States Parties to the OPCAT to monitor their places of detention in order to be able to provide recommendations and observations on how to improve systems of deprivation of liberty. Thus, the advisory and operational functions of the SPT are inter-related.

However, due to several constraints, the SPT has given more attention to the implementation of its operational mandate than to its advisory function. The SPT is currently exploring creative solutions to ensure the comprehensive implementation of its mandate.

### 2.2 Membership of the SPT

Article 6 of the OPCAT sets out the procedure for nomination of members to the SPT;[8] it also specifies that only States Parties to the OPCAT can present candidates and nominate SPT members. The OPCAT does not specify any particular procedures that States Parties should follow at the national level to make decisions about who to put forward as the national SPT candidate. However, as explained below, the national selection process must ensure that candidates have the essential skills, capabilities, expertise and independence outlined in Article 5 of the OPCAT.[9] It is crucial that States Parties implement a participative and transparent selection process.[10] Article 5 also elaborates on a number of important factors relating to the composition of the SPT as a whole that should be taken into account when electing SPT members.

The SPT initially comprised 10 members, though the OPCAT provides for the number of members to rise 25 following the 50th State ratification or accession.[11] The increase in SPT membership is designed to maintain

8 See commentary in Chapter II of this manual.

9 See commentary in Chapter II of this manual.

10 APT, *The Subcommittee on Prevention of Torture: Guidance on the selection of candidates and the election of members*, OPCAT Briefing, APT, Geneva, June 2010: available at www.apt.ch. See also commentary on Article 6 of the OPCAT in Chapter II of this manual.

11 OPCAT, Article 5(1). Following Switzerland's ratification on 24 September 2009, the number of States Parties rose to 50; therefore, the number of SPT members will rise to 25 in February 2011. For a list of serving SPT members, see http://www2.ohchr.org/english/bodies/cat/opcat/index.htm.

capacity so that regular visits to States Parties, and constructive dialogue with States Parties and NPMs, can continue as the number of States Parties grows.[12]

### 2.2.1 Independence

The importance of OPCAT bodies being – and perceived as being – independent is emphasised in the treaty. Notwithstanding their appointment by States Parties, Article 5(6) requires SPT members to carry out their functions in an independent and impartial manner, free from interference from States Parties. This is necessary for the SPT to work effectively and authoritatively with all relevant actors, including NPMs, the authorities of individual States Parties, persons deprived of their liberty, staff within places of detention, and civil society organisations. Accordingly, States Parties have a duty to nominate and elect SPT members who are independent from their authorities. Moreover, they are not permitted to influence members of the SPT in the discharge of their functions.[13] SPT members also have a personal responsibility to demonstrate independence in their execution of the SPT's mandate.

### 2.2.2 Skills, expertise and availability

The OPCAT does not break down the core skills and competencies required of SPT members. However, the treaty acknowledges that preventive work encompasses a huge range of issues related to the administration of justice. Article 5(2) states that SPT members must 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.

Experts from fields relevant to deprivation of liberty and prevention of torture may include:

12 See commentary on Article 5(1) of the OPCAT in Chapter II of this manual; and Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford Commentaries on International Law, Oxford University Press, 2008, p.946.

13 OPCAT, Articles 2, 14, 18, 21 and 35.







- those with relevant medical expertise;
- those with relevant legal expertise;
- those with experience in policing and/or administration of places of deprivation of liberty; and
- those from related professions, including social workers, anthropologists, education and training specialists, and so forth.[14]

SPT members should demonstrate a holistic understanding of, and commitment to, prevention of torture and other forms of ill-treatment. They should be willing to help develop a vision of the SPT mandate, and contribute to both the on-going development of the SPT and the implementation of the OPCAT.

Along with a commitment to the OPCAT's preventive approach, it is recommended that SPT members have:

- experience in monitoring places of detention at the national level;
- drafting and analytical skills for research, report writing and editing; and
- experience of working with a wide range of stakeholders, including high-level government officials, detaining authorities, persons deprived of their liberty, and vulnerable or marginalised groups.[15]

It is recommended that SPT members also have the following additional skills, capacities and expertise:

- personal skills, empathy with persons deprived of their liberty, cultural sensitivity, team spirit, and the ability to cope in stressful situations and environments (e.g. in-country visits);
- communication skills, including proficiency in UN languages; and
- negotiation skills.

In addition, the SPT's first years in operation demonstrated the need for SPT members to be:

14 See commentary on Article 5(2) of the OPCAT in Chapter II of this manual.

15 APT, *Guidance on selection of SPT candidates and election of SPT members*, OPCAT Briefing, APT, Geneva, June 2010.

- available to conduct, on request, several visits per year;
- available to participate in the three SPT sessions in Geneva;[16] and
- financially autonomous.[17]

### 2.2.3 Composition

Articles 5(3) and 5(4) outline the requirements for the SPT to represent different geographical regions, "civilizations", and legal systems equally, as well as to ensure balanced gender representation. These requirements reflect the framework of the UN Charter that, under Article 2 of the OPCAT, guides the SPT. Achieving this balance is a strategic challenge for States Parties that should be borne in mind when electing SPT members.

The SPT has the potential to operate in all regions of the world, mainly through in-country visits to States Parties to the OPCAT. The SPT's approach to its mandate, and to the prevention of torture in general, should not be dominated by one particular region or country. Therefore, geographic distribution of SPT's members is necessary to strengthen the body's analytical capacities, impartiality and effectiveness, as provided for in Article 5 of the OPCAT. For this reason, under Article 5(5) "No two members ... may be nationals of the same State". This ensures that the SPT is not dominated by one State Party (or a small sub-set of States Parties), which may create (or be perceived to create) bias. Indeed, the General Assembly of the UN has stressed the need to ensure equitable geographical distribution in the membership of human rights treaty bodies.[18] The first SPT comprised three members from Western Europe,

16 SPT members are formally required to be available for three sessions per year, each lasting one week, and at least one in-country visit, lasting approximately two weeks, including preparation and follow-up. SPT members may also receive ad hoc invitations to participate in seminars, conferences and training related to the OPCAT. Therefore, SPT members should be available for approximately six to eight weeks per year.

17 SPT members do not receive any fee for their participation in SPT sessions or in-country missions. However, they do receive travel expenses and a UN daily subsistence allowance for their participation in these specific activities.

18 For instance, see UN General Assembly, Resolution on equitable geographical distribution in the membership of the human rights treaty bodies, UN Doc. A/RES/63/167, 19 February 2009.





three from Eastern Europe and four from Latin America.[19] Similarly, the SPT has recognised that "equitable geographic distribution in its membership" affords "the Subcommittee greater legitimacy and acceptance, in addition to enriching its work".[20]

In addition, experience has shown that gender balance, which is an important element for any human rights treaty body, is essential for effective detention monitoring. The OPCAT strongly encourages States Parties to give due consideration to the gender balance of the SPT as a whole, while bearing in mind the principles of equality and non-discrimination.[21] However, the first SPT comprised only two women (one of whom became the Chairperson). The Chairperson resigned in 2007, leaving only one female member in the initial SPT: therefore, in its third annual report, the SPT stressed the importance of balanced gender representation.[22]

Finally, States Parties should give careful consideration to the importance of selecting SPT nominees with a wide range of expertise. For instance, the majority of the first SPT's members were legal professionals, though two were health professionals. Indeed, in its third annual report, the SPT highlighted the importance of specific areas of expertise, including health.[23]

Furthermore, the nomination of SPT members from groups that are at particular risk in places of detention (e.g. persons with disabilities, elderly people, or ethnic minorities) should be encouraged. Similarly, consideration should be given to nominating former detainees and/or survivors of torture as such persons are well-placed to offer critical insights into both specific detention issues and systems of deprivation of liberty and, thus, promote a holistic understanding of the issues at stake.

19 According to the geographical divisions used by the UN, including the General Assembly.

20 SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, CAT/C/44/2, 25 March 2010, §21.

21 Nowak and McArthur, *The UNCAT*, p.986.

22 SPT, Third annual report, §6.

23 SPT, Third annual report, §6.

### 2.2.4 Compatibility with other functions

The OPCAT is silent on the issue of compatibility of SPT membership with other functions: Article 5(6) only states that SPT members shall "serve in their individual capacity … [and] be available to serve the Subcommittee on Prevention efficiently". Potential incompatibilities regarding dual NPM and SPT membership, and between dual membership of regional monitoring bodies (e.g. the European Committee for the Prevention of Torture[24]) and the SPT, should be explored as the SPT moves forward. On one hand, members' experience of working in NPMs and/or regional monitoring bodies may help to strengthen SPT cooperation with these bodies, facilitate exchanges of best practice in monitoring places of detention, and reinforce these bodies' understanding of the SPT's functioning and mandate. On the other hand, States should give careful consideration to selecting current members of NPMs and/or regional monitoring bodies as SPT candidates. Out of the first ten SPT members (2007-2008), two were current and two were former CPT members. This experience revealed that the approach of members serving on regional monitoring bodies is usually tailored to specific institutional cultures and working methods. Therefore, combining two mandates, although preventive, at the regional and global levels may be challenging as members will be operating in different contexts in their different capacities, with different means and resources, and with different (and sometimes conflicting) perspectives. Moreover, SPT members must be available to serve on the SPT via participating in in-country visits, SPT sessions and other OPCAT-related activities. Although none of the first ten SPT members had also assumed NPM responsibilities, it is not unlikely that in the near future persons who are NPM members may also be nominated as SPT members; this deserves consideration. As NPM membership is very time-consuming, NPM members are unlikely to be suitable candidates for the SPT as the combination of workloads may challenge the effectiveness of both bodies. However, former members of NPMs or regional monitoring bodies could bring useful experience to the SPT without facing the challenges of holding two mandates.

24 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).







## 2.3 The SPT's organisational and administrative functions

### 2.3.1 SPT rules of procedure

The SPT, like a number of other UN treaty bodies (such as the CAT and the Human Rights Committee),[25] has the power to define its own working methods. To that end, it has drafted and adopted a series of rules of procedure according to Article 10(2) of the OPCAT.[26] Rules of procedure are an essential tool that enable a treaty body to interpret and expand on the details of its mandate, spell out its working methods, and clarify internal procedures, particularly decision-making processes. For instance, the rules of procedures of the CAT include information on its sessions, agenda, public and private meetings, reporting procedures, and dissemination of reports and other documents. Article 10(2) of the OPCAT obliges the SPT to include information regarding the number of members that must be present for a session to constitute a quorum, and the requirement for majority decision-making, in its rules of procedure.

Publicising the SPT's rules of procedure would represent a useful way to inform interested actors about the SPT's working methods and functioning. However, contrary to the practice of other UN treaty bodies, and despite the importance of this document, the SPT rules of procedure have not yet been made public.

### 2.3.2 SPT Sessions

The OPCAT specifies that the SPT should meet at such times as shall be provided for in its rules of procedure.[27] In practice, the SPT meets three times a year (usually in February, June and November) in Geneva, Switzerland. Each session lasts one week and one of these sessions is timed to coincide with one of the CAT sessions.[28] The dates of the SPT sessions are announced on its website, together with its programme of work in the field (including in-country visits) for the following year.

25 See UNCAT, Article 18; and International Covenant on Civil and Political Rights, Article 39(2).

26 See commentary on in Chapter II of this manual.

27 OPCAT, Article 10(3).

28 For further information, see Sections 5.1.2 and 5.1.3 of this chapter.

Article 10(2)(c) of the OPCAT states that the SPT should meet *in camera* (i.e. in private). This provision must be read in light of Article 2, which requires that the SPT be guided by the principle of confidentiality because of its preventive approach and the sensitive nature of the in-country missions that it undertakes.[29] Contrary to the practice of other UN treaty bodies, including the CAT, the agendas of SPT sessions are not made public. In its first year of activity, most SPT sessions were devoted to organisational work, including strategic planning; elaborating criteria for selecting countries to visit; developing fieldwork methodologies and a framework for compiling visit notes; producing promotional materials; and drafting, discussing and adopting visit reports.[30] In the following years, the focus of SPT sessions shifted to the preparation and follow-up of in-country visits (e.g. planning of visits, and discussion and adoption of in-country visit reports), strategic planning, and discussion of information relating to OPCAT States Parties and NPMs.[31] The SPT's programme of work, which identifies the countries to be visited during the following year, is usually defined in November.

The SPT also uses sessions to implement its cooperative mandate and meet with a wide range of actors, including:[32]

- representatives of States Parties' permanent missions to the UN (in order to prepare for upcoming SPT in-country missions),[33]
- NPMs,[34]
- UN bodies and mechanisms (e.g. the CAT, the UN Special Rapporteur on Torture, and the United Nations High Commissioner for Refugees),[35]

29 Nowak and McArthur, *The UNCAT*, p.981.

30 SPT, First annual report, §58.

31 SPT, Second annual report of the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2008 to March 2009, UN Doc. CAT/C/42/2, 7 April 2009, §77; and SPT, Third annual report, §78.

32 For further information on the cooperation of the SPT with other actors, see Section 5 of this chapter.

33 SPT, Second annual report, §77; and SPT, Third annual report, §78.

34 For instance, during its November 2007 session the SPT met with the Mexican NPM (the National Human Rights Commission) at its request: see SPT, First annual report, §26. In addition, during its 5th session (in June 2008) the SPT met with the Estonian NPM (the Chancellor of Justice); see SPT, Second annual report, §37.

35 During its sessions the SPT regularly holds meetings with the UN Special Rapporteur on Torture: see SPT, Second annual report, §48. During its 9th session (in November 2009), the SPT also met with the United Nations High Commissioner for Refugees: see SPT, Third annual report, §63.





- regional mechanisms (e.g. the CPT, and the Special Rapporteurs of the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights),[36]
- international and regional organisations (e.g. the International Committee of the Red Cross, the Council of Europe, and the Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights),[37] and
- civil society organisations, such as the OPCAT Contact Group organisations.[38]

### 2.3.3 Internal organisation[39]

Article 10(1) states that the SPT shall elect its officers for a renewable term of two years. The SPT decided to elect one chairperson and two vice-chairpersons. However, this may change with the increase in the number of SPT members to 25. The SPT's work is supported by a secretariat based in Geneva at the United Nations Office of the High Commissioner for Human Rights (OHCHR).

The SPT's members are provided with a secure web facility to ensure that confidential and sensitive information and data, arising out of the SPT's work, are protected.[40]

36 See SPT, Third annual report, §67.

37 For instance, during its 8th session (in June 2009) the SPT met with the ICRC: see SPT, Third annual report, §64.

38 The OPCAT Contact Group brings together individual organisations and academic institutions that support the ratification and implementation of the OPCAT: namely, Amnesty International, the Association for the Prevention of Torture, the Human Rights Implementation Centre of Bristol University, the International Federation of Actions by Christians for the Abolition of Torture, the Mental Disability Advocacy Centre, the World Organisation against Torture, Penal Reform International, and the Rehabilitation and Research Centre for Torture Victims. For further information on the OPCAT Contact Group organisations, see Section 5.5.1 of this Chapter.

39 See Section 6 of Chapter IV of this manual.

40 SPT, First annual report, §65.

## 3. Advisory functions: OPCAT implementation and policy development

As discussed above,[41] the SPT's mandate encompasses two interrelated functions. One essential dimension of the SPT's preventive mandate is its advisory function; this relates primarily to interpreting and monitoring the implementation of the OPCAT in individual States Parties. Although the SPT regularly implements its advisory function in the context of in-country missions, it does not have to conduct such a mission before it can provide advice. The SPT's advisory role involves different but interlinked activities, including advising and co-operating with States Parties and NPMs, and co-operating with the CAT and other international and regional bodies. The SPT is currently developing this area of its mandate by exploring creative ways to implement its advisory function; the provision of guidance and advice is the domain in which the SPT could, in future, have a greater impact on the prevention of torture and other forms of ill-treatment.

### 3.2 Advice on the OPCAT and general observations on torture and other forms of ill-treatment

The SPT's mandate to provide authoritative interpretations of the OPCAT, and guidance and observations on torture-related issues, is central to its advisory role. According to Article 16(3), the SPT shall present a public annual report on its "activities" to the CAT. The annual report is one of the few documents published by the SPT on its preventive work.[42] Therefore, the SPT has seized the opportunities that its annual reports represent to go beyond describing its activities; instead, it has used its annual reports as tools for disseminating its interpretations of the OPCAT, information on its own mandate and working methods, and advice on OPCAT implementation. For instance, in its first annual report, the SPT included information on the interpretation and scope of the SPT's preventive mandate, as well as preliminary guidelines on the on-going development

41 See Section 2.1 of this chapter.

42 At the time of the writing, the SPT had published three annual reports. These are available at www.ohchr.org.







of NPMs. The second annual report[43] included (in the annex) a detailed analysis of the Istanbul Protocol as a tool for prevention.[44] In its third annual report, the SPT summarised the recommendations issued in its first in-country visit reports regarding NPMs, legal and institutional frameworks for prevention of torture, and also a number of recurring issues relating to places of deprivation of liberty.[45] As indicated in its third annual report, the SPT plans to extend its comments and observations in future annual reports.[46]

No details of the findings of in-country visits are included in the SPT annual reports, in accordance with the principle of confidentiality established by Article 16(1) of the OPCAT. However, in accordance with Article 11(b)(iii), the SPT may use its annual reports to communicate general recommendations and observations on issues relating to NPMs and/or the strengthening of the protection of persons deprived of their liberty.

As reflected by the SPT in-country visit reports that have been made public by the relevant States Parties, the SPT has adopted three levels of thematic analysis of torture prevention in its visit reports; these levels explore:

1. the State Party's legal framework, rules and regulations,
2. the State Party's institutional frameworks, and
3. other practices or behaviours that could lead to torture and other forms of ill-treatment.[47]

43 SPT, Second annual report, Annex VII.

44 Office of the High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment, Professional training series n°8/Rev.1, United Nations, New York and Geneva, 9 August 1999.

45 SPT, Third annual report, §31.

46 SPT, Third annual report, §32.

47 SPT, Second annual report, §12. See also SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, UN Doc. CAT/OP/MDV/1, 26 February 2009, §17-64; SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Paraguay, UN Doc. CAT/OP/PRY/1, 7 June 2010, §21-55; SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading

### 3.3 Advice regarding NPM development

The SPT's role in respect of NPMs is a critical element of its advisory function. This aspect of its preventive mandate goes to the heart of the OPCAT's central purpose: strengthening national protective measures against torture and other ill-treatment. The SPT has also acknowledged that this "will form an important part of each visit".[48] The SPT's role in respect of NPMs has four key dimensions:

- advising States Parties on NPM establishment or designation (under Article 11(b)(i));
- advising States Parties on the capacities and mandates of NPMs (under Article 11(b)(iv));
- advising NPMs directly (and confidentially, if necessary) on their own capacity-building and functioning, and providing them with technical assistance and training (under Article 11(b)(ii)); and
- advising NPMs on strengthening the protection of detainees (under Article 11(b)(iii)).

#### 3.3.1 Advice to States Parties on NPM designation and establishment

The SPT is able to provide advice on NPM designation and establishment directly to States Parties during or following in-country missions and/or follow-up visits. Thus far, SPT in-country visits have focused primarily on monitoring places of detention. However, the SPT usually takes the opportunity afforded by being physically present in a country to meet with actors involved in the NPM designation and establishment process, and to discuss these issues with high-level authorities. A number of the SPT in-country visit reports that have been made public have discussed

Treatment or Punishment to Honduras, UN Doc. CAT/OP/HND/1, 10 February 2010, §75-138; and SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico, UN Doc. CAT/OP/MEX/1, 31 May 2010, §34-82. Other key analytical tools include the APT's holistic torture prevention approach, which identifies public policies, and administration and management of places of detention, as additional key elements: see Section 3.3 of Chapter V of this manual.

48 SPT, First annual report, Annex V.





issues relating to NPM designation.[49]

However, the provision of advice does not have to be linked to an in-country mission. This has important practical significance as the SPT's ability to conduct in-country missions is restricted by resource limitations. Restricting the provision of advice to the context of visits would defeat the purpose of the preventive system established by the OPCAT, under which international and national components are intended to strengthen each other.

The SPT has also started to use its annual reports to disseminate guidance on NPM designation and establishment. In its first annual report, the SPT developed preliminary guidelines on NPM establishment and on-going development.[50] These guidelines highlight the features necessary to ensure that NPMs meet the requirements set out under Part IV of OPCAT: they are designed to assist:

- national actors in the process of designating NPMs,
- States Parties in creating independent and effective NPMs, and
- NPMs during the establishment phase.

For instance, the SPT recommendation to establish NPMs via "a public and transparent process, including civil society and other actors involved in the prevention of torture" has been implemented in several States Signatories and Parties to the OPCAT.[51]

In the context of the cooperative dialogue envisaged by the OPCAT, States Parties are encouraged to inform the SPT about the designation or establishment of NPMs[52], and to facilitate the contacts with their NPM(s).[53]

49 Discussion of such issues in a visit report is largely dependent on the level of NPM development in the State Party. For instance, the SPT welcomed the adoption of legislation establishing a new body (the National Committee for the Prevention of Torture) as the NPM in Honduras. See SPT, Report on the visit to Honduras, §262-265. See also SPT, Report on the visit to Paraguay, §56-58.

50 SPT, Preliminary guidelines for the on-going development of NPMs, First annual report, §28; see also Annex 2 of this manual.

51 See APT, OPCAT Country Status, available at www.apt.ch; and Section 6 of Chapter IV of this manual, which provides further information and practical examples.

52 Article 17 of the OPCAT.

53 OPCAT, Article 20(f). For See commentary in Chapter II of this manual.

Few States Parties met their obligations under Article 17 within the SPT's first year of operation. Consequently, the SPT has adopted the practice of regularly sending each States Parties a reminder letter upon expiration of its NPM designation deadline.[54] As a result of these communications, the SPT publicises a list of designated NPMs, as well as non-confidential communications from States' authorities that provide information on NPM designation and establishment processes.[55] For instance, following an SPT communication requesting information, **Cambodia** informed the SPT by letter about its progress towards establishing an NPM via a sub-decree.[56]

SPT members have also taken part in national consultations on NPM options and regional activities; in its third annual report, the SPT reported having participated in 14 activities of this kind.[57]

The SPT can also provide comments and observations on draft NPM legislation. Such comments can influence national processes at a critical stage of NPM development; therefore, they represent a useful tool for helping the SPT to implement its advisory mandate. Comments and observations generally focus on the compliance of the proposed NPM with OPCAT requirements, rather than on the suitability of the specific NPM option chosen by the national stakeholders.[58]

### 3.3.2 Advice on functioning of NPMs

The SPT considers that NPM development is an on-going process; it monitors this as an integral part of its preventive mandate.[59] This advisory aspect of the SPT's mandate should be understood in a broad sense.[60] The two main beneficiaries of the SPT advice on NPM functioning are

54 SPT, Second annual report, §34.

55 For further information, see http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm.

56 See Cambodia, Official Communication to the SPT, January 2009. Available at www.ohchr.org.

57 For example, in October 2009, the APT invited a SPT expert to join its mission to Benin to promote the designation and establishment of an effective NPM. SPT, Third annual report, §41 and Annex V.

58 For further information, see Section 6.2 of Chapter IV of this manual.

59 SPT, First annual report, §39.

60 Nowak and McArthur, *The UNCAT*, p.995.





States Parties and NPMs themselves. As with NPM establishment and designation, the provision of advice on the functioning of NPMs is not limited to those States Parties that have received an in-country visit.

- **Relevant information on NPM functioning**

In order to provide tailored and concrete recommendations on NPM functioning, the SPT needs to gather relevant information. In accordance with Articles 12(b), 14(1)(a) and 14(1)(b) of the OPCAT, the SPT has developed the practice of requesting specific information from States Parties and NPMs concerning the functioning of NPMs. Sending NPM annual reports to the SPT is becoming a fruitful way of providing concrete information on their functioning.[61]

Other sources of information include existing monitoring mechanisms, national human rights institutions (NHRIs), civil society organisations, and international and regional mechanisms. Reports from these stakeholders often represent invaluable sources of information.

The SPT may wish to gather information on NPMs':[62]

- founding legislation;
- mandates;
- appointment procedures;
- composition;
- expertise;
- internal organisation;
- resources;
- working methods;
- activities; and
- relationships with external actors.

The SPT may, however, face challenges in gathering specific and practical information on elements of NPMs' functioning, especially working methods, if it only relies on external and written sources of information. Direct contact with NPMs is essential if the SPT is to provide tailored advice on their functioning.

61 NPM annual reports are made available on the SPT's website: www.ohchr.org.

62 SPT, Third annual report, §39. See also Section 5.2 of Chapter IV of this manual.

- **Advice to States Parties**

States Parties acquire specific obligations regarding NPMs upon ratification of the OPCAT, including in relation to:

- providing NPMs with the necessary powers and guarantees, and with sufficient resources (human, financial and logistical),[63]
- examining their recommendations,[64]
- establishing a cooperative dialogue with their NPM(s),[65] and
- publishing their NPM's annual report.[66]

Failure to implement even one of these obligations may have a direct impact on NPM functioning, for which States may be considered responsible.

The SPT is expected to enter into direct dialogue with States Parties in order to provide assistance, observations, and comments on NPM functioning in the most appropriate way given the national context of individual States Parties. Key methods of engagement include the following:

- Bilateral meetings with the authorities of States Parties

During its sessions in Geneva, the SPT engages with States Parties that will receive a visit in the following twelve months. It also engages with States Parties during in-country visits and when participating in OPCAT-related activities (e.g. national seminars or workshops) at which State's authorities are present.

- Recommendations and observations, including reports on in-country missions

When the country concerned has a designated NPM, SPT in-country visit reports contain tailored recommendations and observations on the NPM's functioning.[67] Some of these recommendations are directly

63 OPCAT, Articles 18-21. See commentary in Chapter II of this manual.

64 OPCAT, Article 22. See commentary in Chapter II of this manual.

65 OPCAT, Article 22.

66 OPCAT, Article 23. See commentary in Chapter II of this manual; and Section 4.3 of Chapter V.

67 This was the case in the Maldives. See, SPT, Report on the visit to the Maldives, §65-72. For further information, see also SPT, Report on the visit to Mexico,







addressed to the State Party concerned, while others are addressed to the NPM(s).

The SPT also uses its annual reports to provide guidance on specific issues relating to NPM functioning that are of interest to all OPCAT States Parties and Signatories. For instance, in its third annual report, the SPT devoted a section to "Issues in relation to the establishment of NPMs" in which it recommended that when an existing NHRI is designated as an NPM, a separate NPM unit or department should be constituted, with its own budget and staff, to take on the NPM mandate.[68]

- **Advice to NPMs[69]**

The SPT is also mandated to advise NPMs directly on their operational capacities, and to assist them in identifying measures to strengthen the protection of detainees, as provided for by Articles 11(b)(ii) and 11(b)(iii). This requires the SPT and NPMs to be in direct contact, which is also essential to secure the independence of both NPMs and the SPT.[70]

Direct contacts between NPMs and the SPT are often established during SPT in-country visits, essentially through bilateral meetings.[71] Thus far, no specific budget has been allocated for other types of engagement with NPMs, although several options exist:

- meetings during SPT sessions in Geneva;
- participation in in-country activities at the national level;
- participation in regional gatherings of NPMs, especially those focused on exchanging information on best practice regarding detention monitoring methodologies;[72] and

§24-32; and SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, UN Doc. CAT/OP/SWE/1, 10 September 2008, §19-42.

68 SPT, Third annual report, §51.

69 See Section 7.5 of Chapter IV of this manual.

70 Nowak and McArthur, *The UNCAT*, p.997.

71 See SPT, Report on the visit to Mexico; SPT, Report on the visit to Sweden; and SPT, Report on the visit to the Maldives.

72 For instance, the European NPM Project of the Council of Europe (2010-2011) aims to strengthen the capacity of designated European NPMs to function

- written communications.

In addition, the SPT can provide advice to NPMs without being in direct contact, through:

- reviewing reports (i.e. NPM annual reports and samples of NPM visit reports); and
- providing general guidance, as well as specific recommendations, on NPM functioning through its in-country visit reports and annual reports.

## 4. Operational functions: monitoring places of detention

The other essential dimension of the SPT's preventive mandate is its operational function, which centres on preventive monitoring of places of detention in States Parties to the OPCAT. Article 2 of the OPCAT guarantees the SPT access to all places of detention within the jurisdiction and control of States Parties. Article 11(a) sets out the duties of the SPT to visit places of detention (as defined in Article 4) and to make recommendations to States Parties regarding the protection of persons deprived of their liberty against torture and other ill-treatment. Articles 4(1), 12(a) and 12(b) set out corresponding undertakings for States Parties to receive the SPT, grant access to all places of detention, and provide all relevant information requested by the SPT to enable it to execute its mandate effectively. As discussed above, in its first years of existence the SPT concentrated on its operational functions in order to develop its working methods and visiting methodologies.[73]

### 4.1 Choice of countries to receive SPT missions

The SPT selected the first States Parties to visit (**Mauritius**, the **Maldives**, and **Sweden**) by lot, as provided for by Article 13(1) of the OPCAT.

effectively by providing thematic workshops and on-site training on detention monitoring methodologies for different types of places of detention. SPT members are involved in the project as experts. The APT is the implementing partner. For further information, see: www.apt.ch.

73 See Section 2.1 in this chapter.







The SPT has since agreed criteria for the selection of countries to be visited that take into account the following factors: date of ratification; establishment of an NPM (or NPMs); geographic distribution; size and complexity of the State; regional preventive monitoring; and urgent issues reported.[74] Each year, the SPT establishes a programme of in-country visits for the following year. This programme is made public during the last session of the year (i.e. in November). The SPT usually posts the names of the countries that will receive an in-country mission in a given year on the website of the OHCHR, although the precise dates of each mission remain confidential.[75]

In its first years of operation, the SPT faced budgetary constraints that limited the number of in-country missions it was able to carry out.[76] In its first four years of activity, the SPT conducted a total of eleven visits encompassing the following countries: **Benin**, **Bolivia**, **Cambodia**, **Honduras**, **Lebanon**, **Liberia**, the **Maldives**, **Mauritius**, **Mexico**, **Paraguay**, and **Sweden**.[77] This raises concerns regarding the body's ability to comply with the OPCAT Article 1 requirement to establish a system of "regular visits". The SPT has stated that less frequent visits may jeopardise both the support given to NPMs and the protection afforded to persons deprived of their liberty.[78] It is hoped that the increase in the number of SPT members (from 10 to 25) in 2011 will be accompanied by a proportionate increase in the SPT's budget; these developments are expected to have a positive impact on the body's capacity and, thus, on its strategic planning of visits and the implementation of its advisory function.[79]

74 SPT, Third annual report, §20.

75 See the OHCHR's website for more information: http://www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm.

76 SPT, Second annual report, §62-76.

77 See the OHCHR's website for more information: http://www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm.

78 SPT, First annual report, §17.

79 SPT, Third annual report, §21.

### 4.2 Access: consent and notification

A State Party is deemed to give its general consent to SPT in-country missions upon ratification: this is a key principle of the OPCAT. Articles 4 and 12 establish that the SPT does not require an individual invitation or other form of consent from a State Party before conducting an in-country visit.[80] This aspect of the SPT's mandate is unique. All other UN bodies and mechanisms, including the CAT and UN Special Rapporteur on Torture, require either an invitation or prior consent before entry to a State's territory is afforded.

The right to conduct an in-country visit without consent does not preclude the duty to notify. Once the SPT has established its programme of in-country missions for a particular year, under Article 13(2) it must notify the States Parties concerned "without delay".[81] In practice, the SPT meets in Geneva with the Permanent Missions of the States Parties concerned in order to prepare for in-country visits. It then notifies the relevant State Party of the dates of an upcoming in-country mission at least three months before the visit, but it does not identify the places of detention that will be visited. The SPT also provides information in writing to States Parties on the composition of the SPT delegation, including the names of the SPT members, the OHCHR staff who will support the delegation, and the external experts who will be involved.[82] The notification process enables the SPT to stress the confidential nature of its work and to provide information to all relevant authorities on the SPT's mandate, powers, and duties. In addition, notification of an up-coming visit allows the State Party concerned to make the necessary practical arrangements, such as issuing visas and credentials to SPT members, gathering information for the SPT (as detailed below), and designating focal points for the mission.[83]

80 For further analysis of these articles, see commentary in Chapter II of this manual, especially the commentary on Articles 4(1) and 12(a).

81 See commentary in Chapter II of this manual.

82 SPT, First annual report, Annex V.

83 See Sections 4.2 and 4.4 of this chapter for further information on the arrangements that should be made prior to an in-country visit. For a detailed discussion of Article 13, see Chapter II of this manual; and also Nowak and McArthur, *The UNCAT*, p.933.





### 4.3 SPT visiting delegations

#### 4.3.1 Composition of SPT visiting delegations

In accordance with Article 13(3),[84] an in-country mission shall be conducted by at least two members of the SPT accompanied, if necessary, by additional experts selected by the SPT from a roster. The SPT has recommended that each visiting delegation should include more than two SPT members, at least two additional experts, and two members of the SPT's Secretariat.[85] Thus far, depending on the complexity of the situation in the State Party to be visited, delegations have comprised between two and six SPT members, and between two and four members of the OHCHR. Due to budgetary restrictions, additional experts have not been included in SPT in-country visits since the SPT's visit to Sweden in 2007.[86]

#### 4.3.2 Roster of experts

Under Article 13(3) of the OPCAT, SPT members "may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the field" (i.e. in the field of torture prevention or in a related field). Experts have participated in three SPT in-country visits: namely, the visits to **Benin**, the **Maldives** and **Sweden**.[87] In its third annual report, the SPT stated that "it was not possible for delegations to the countries visited [post-2007] to be accompanied by independent experts owing to budgetary constraints".[88]

Effective in-depth visits to the broad range of places of detention covered by the SPT's mandate require a multidisciplinary visiting delegation comprising experts with different professional skills and experiences.[89]

84 See commentary in Chapter II of this manual.

85 SPT, First annual report, §51.

86 APT interview with the SPT Chairperson, Victor Rodriguez Rescia, 21 June 2010.

87 See SPT, First annual report, §63; and United Nations, 'UN press release following SPT visit to Benin', 26 May 2008, available at http://www.unhchr.ch/huricane/huricane.nsf/0/222ECFC5807C7E55C1257456002F9863?opendocument.

88 SPT, Third annual report, §34.

89 See commentary on Articles 4 and 13(3) in Chapter II of this manual.

Experts are also a means to satisfy the duty of the SPT, under Article 5, to strive for gender and geographic balance within SPT delegations.[90] In addition to having professional expertise, experts need the same generic skills and expertise as SPT members.[91] They must perform their functions independently and impartially, respecting the principle of confidentiality.[92]

For the sake of consistency, it is also advisable that experts receive the same training as SPT members. As experts form part of the visiting delegation, they have the same rights and duties as SPT members. Under Article 35 of the OPCAT,[93] they are entitled to the facilities, privileges and immunities of experts on visits for the UN, as laid down in the relevant sections of the UN Convention on Privileges and Immunities of the United Nations.[94]

The OPCAT provides specific procedures for the nomination of experts.[95] States Parties, the OHCHR, and the UN Centre for International Crime Prevention can propose nominees to be included in the SPT's roster of experts. Similar provisions on experts are contained in the Rules of Procedure of the CAT[96] and Article 7(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[97] No limit is placed on the number of experts who can be placed on the roster, although, under Article 13(3), States Parties

90 See Section 2.2.3 in this chapter.

91 See Section 2.2.2 in this chapter.

92 See European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Doc. Inf/C (2002) Strasbourg, 26.XI.1987, amended according to Protocols No 1 (European Treaty Series No 151) and No 2 (European Treaty Series No 152), Article 14(2); and CAT, Rules of Procedure, UN Doc. CAT/C/3/Rev.4, 9 August 2002, Rule 82-2.

93 See commentary in Chapter II of this manual.

94 UN Convention on the privileges and the immunities of the United Nations, UN Treaty Series No 15, 13 February 1946.

95 See OPCAT, Article 13(3).

96 CAT, Rules of procedure, Rule 82-1.

97 Article 7(2) of the ECPT states that "As a general rule, the visits shall be carried out by at least two members of the Committee. The Committee may, if it considers it necessary, be assisted by experts and interpreters".





can propose a maximum of five national experts each. In its third annual report, the SPT reported that 30 States Parties had put forward experts for the roster. A panel to select which nominees would be placed on the roster was set-up by the United Nations in 2008.[98]

However, there is no public information available regarding either the procedures and criteria for selecting individual experts to participate in specific SPT in-country visits, or the financial compensation for experts' participation in visits.

## 4.4 Visit preparation

### 4.4.1 Information gathering

Access to information is vital for SPT in-country missions. The SPT's Secretariat relies on a variety of sources to gather concrete and up-to-date information prior to an in-country mission in order to construct an accurate picture of the situation of deprivation of liberty in the relevant country. Experience has also demonstrated that information from other national, regional and international actors is very useful in helping the SPT to prepare for in-country missions.[99]

Deprivation of liberty is also of interest to other UN treaty bodies, such as the CAT, the Human Rights Committee, and the Committee on the Rights of the Child. The recommendations and reports of these and other interested international mechanisms, including UN Special Procedures (e.g. the UN Special Rapporteur on Torture, and the UN Working Group on Arbitrary Detention)[100] and regional mechanisms (e.g. the CPT, and the Rapporteurs of the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights) are often used in SPT in-country visit reports,[101] and during preparation and follow-up to in-country missions. For instance, the UN Special Rapporteur on Torture visited **Paraguay** in November 2006; he later published a report

98 See SPT, Third annual report, §33; and SPT, Second annual report, §30.

99 See Section 6 of this chapter for further information.

100 For further information, see Section 5.2 of this chapter.

101 SPT, Second annual report, §50.

on his findings.[102] The SPT visited **Paraguay** three years later; the visiting delegation took the opportunity to follow-up on the Special Rapporteur's recommendations.[103]

The OPCAT drafters took this need for information into consideration. The Articles 12(b), 14(1)(a) and 14(1)(b) further elaborate on this general duty by specifying that States Parties must provide unrestricted access to all necessary and relevant information.[104]

Prior to the first in-country mission to a State Party, it is vital that the SPT establish contact with the relevant NPM(s), in accordance with Articles 11(b)(ii), 12(c) and 20(f). These articles enable the SPT and NPMs to have direct and, if necessary, confidential contact without interference from States Parties; this is an essential element of the OPCAT's overarching principle of cooperation.

In some circumstances, the SPT may also undertake or participate in specific activities shortly before a planned in-country mission. Thus far, preliminary activities before SPT in-country visits were supported and facilitated by civil society actors in **Lebanon**, **Mexico** and **Paraguay**.[105] Such activities enable the SPT to initiate the process of engaging in dialogue with the authorities and the NPM(s) (if already designated). They also provide opportunities for the SPT to inform relevant actors of its mandate and the purpose of the planned mission, and to identify the country's key challenges in relation to torture prevention. Established contacts and dialogue prior to a planned in-country visit (especially the SPT's first visit to the State Party) are essential to gathering first-hand information to help the SPT determine the focus of its programme of visits within the State Party concerned.

102 Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to Paraguay, UN Doc A/HRC/7/3/Add.3, 1 October 2007. Available at www.ohchr.org.

103 SPT, Report on the visit to Paraguay, §3.

104 See commentary on Articles 12(b) and 14 in Chapter II in this manual.

105 SPT, Second annual report, §21; SPT, Third annual report, Annex V. See also Section 6 of this chapter.







#### 4.4.2 Country briefs

Relevant information is compiled and analysed in country briefs, which draw on materials and information collected by the SPT's Secretariat.[106] Country briefs assist the SPT delegation to prepare for an in-country mission; to prioritise places to visit and persons to interview; and to develop an understanding of the State Party's political, legal and administrative structures, and its socio-economic status.

### 4.5 Conducting an in-country mission

#### 4.5.1 Meetings with relevant stakeholders

Establishing constructive dialogue with States Parties is key to implementing the SPT's preventive mandate. The SPT delegation often holds an initial meeting with representatives from the various high-level authorities in charge of places of detention at the beginning of a visit to explain its methodology and to raise initial issues: key actors include the ministries responsible for law enforcement, custody of persons held in pre-trial detention, prisons, military detention centres, immigration detention centres, and psychiatric and social care institutions. Meetings are facilitated by the liaison officer(s) who are appointed by the government to assist the SPT during the in-country mission.[107]

The SPT also meets with representatives from NPMs (or actors involved in NPM designation in countries that have yet to designate or establish an NPM) and other monitoring bodies in order to gather up-to-date information on the conditions of detention and the treatment of detainees in the State Party. This information helps the SPT delegation:

- to assess the general risk of torture and other ill-treatment in the country,
- to identify particular places to visit, and
- to provide advice and assistance to the country's NPM(s).

In addition, the SPT meets with NHRIs, non-governmental organisations (NGOs) and others interested actors who may have relevant information

106 SPT, Third annual report, §23.

107 SPT, First annual report, Annex E.

(e.g. representatives from the judiciary and supreme court; families of detainees; doctors; lawyers; witnesses to, and alleged victims of, torture or other ill-treatment; and former detainees).[108]

At the end of a visit, the SPT has a final meeting with senior officials to discuss the visit in confidence; the SPT usually takes this opportunity to present its preliminary observations and recommendations. Issues or situations requiring immediate action are brought to the attention of the relevant officials, as are laws, systems and/or practices that require modification in order to strengthen the protection of detainees. In accordance with the principle of cooperation, this dialogue is two-way: authorities may also provide immediate feedback to the SPT delegation.

### 4.5.2 Access to places of detention

Article 14(1)(c) of the OPCAT states that the SPT must be granted "unrestricted access to all places of detention and their installations and facilities". Implicit in the term "unrestricted access" is the understanding that visits by the SPT to places of detention, as defined by Article 4, can be conducted unannounced and at any time. Articles 4, 12 and 20, as well as the overall preventive objective of OPCAT as defined in Article 1, support this interpretation, which was clearly specified during the drafting process.[109] Any other interpretation of the OPCAT would seriously undermine its preventive goals.[110] This right is vital to prevent attempts to conceal aspects of detention, and to allow monitoring of the daily functioning of places of detention.[111]

Under Article 4, the SPT and NPMs must be able to visit any place where people are deprived of their liberty that is under the jurisdiction and control of States Parties. Article 4 defines the terms "jurisdiction and control" and "deprivation of liberty" extremely broadly, with the result that the

108 SPT, First annual report, Annex V.

109 Nowak and McArthur, *The UNCAT*, p.906 and p.1011.

110 For further information on these Articles, see Chapter II of this manual; APT, Guide to the Establishment and Designation of NPMs ('NPM Guide'), APT, Geneva, 2006, pp.55-57; and APT, Application of OPCAT to a State Party's places of detention located overseas, Legal Briefing Series, APT, Geneva, October 2009: available at www.apt.ch.

111 Nowak and McArthur, *The UNCAT*, p.1042.





SPT has access to an enormous range of places of detention.[112] Under Article 4, the SPT must also have access to any place where an individual may be kept against his or her will in connection, even indirectly, with public authority, including secret or unofficial places of detention and custodial or other settings owned or run by private institutions.

In accordance with Article 14(c), visiting delegations also have a right of unrestricted access to all premises and facilities within places of detention.[113]

Thus far, the SPT has focused its visits on prisons (both pre-trial institutions and institutions for sentenced prisoners) and police detention centres. Most visiting delegations have visited between two and four prisons, and between six and ten police detention centres. However, the SPT has also visited the following types of places of detention during in-country visits: military prisons and detention centres; administrative retention centres; detention centres in courts of justice; juvenile centres; psychiatric facilities; drug rehabilitation centres; and social welfare centres.[114]

### 4.5.3 Private interviews

Conducting private interviews lies at the heart of the preventive monitoring process. Private interviews are essential to collect information, including from the point of view of persons deprived of their liberty, regarding the treatment of detainees, the conditions of detention, and the administration and management of the place of detention. Such interviews enable the monitoring team to build up an accurate picture of the risks of torture and other ill-treatment in the place of detention concerned.[115] Article 14(d) of the OPCAT obliges States Parties to allow the SPT to conduct "private interviews" with persons of its choice, and in the presence of a translator or other person, if deemed necessary. Interviews held in private should be conducted out of hearing, and possibly

112 See SPT, First annual report, Annex VII; and commentary on Article 4 in Chapter II of this manual.

113 See commentary on Article 14(c) in Chapter II of this manual.

114 See SPT, First annual report, Annex III; SPT, Second annual report, Annex III; SPT, Third annual report, Annex III; and United Nations, 'Subcommittee on Prevention of Torture concludes mission to Lebanon' (press release), 2 June 2010: available at www.ohchr.org.

115 SPT, Third annual report, §26.

out of sight, of both the staff of the place of detention and other persons deprived of liberty.[116]

Any location specifically chosen by the authorities for interviews should be considered carefully. The SPT delegation should have the liberty to choose the location and be able to select alternatives, if necessary. In practice, it may be difficult for interviews to be held completely out of sight of officials in certain places of detention. The SPT delegation should use its judgment, when selecting the location of interviews, to minimise the risk of eavesdropping.[117]

Interviews should be carried out with the consent of the interviewee. Moreover, the delegation should be sensitive to the concerns of the interviewee before, during and after the interview.[118] No pressure should be placed upon a person, either by the visiting delegation or by the authorities, to participate in an interview with the SPT. Moreover, Article 14 of the OPCAT should be read in conjunction with:

- Article 15, which aims to prohibit reprisals or other punitive or prejudicial measures against persons or organisations who may have communicated with the SPT, and
- Article 16(2), which prohibits publication of personal data in the absence of express consent.

In its third annual report, the SPT expressed its concern regarding the risks of reprisals after its visits:

> Persons deprived of their liberty with whom the Subcommittee delegation has spoken may be threatened if they do not reveal the content of these interviews, or punished for having spoken with the delegation. In addition, the Subcommittee has been made aware that some persons deprived of their liberty may have been warned in advance not to say anything to the Subcommittee delegation.[119]

116 See commentary on Article 14 in Chapter II of this manual.

117 APT, *Monitoring Places of Detention: a practical guide*, APT, Geneva, April 2004, p.80.

118 APT, *Monitoring Places of Detention*, p.81; and Nowak and McArthur, *The UNCAT*, p.1043.

119 SPT, Third annual report, §35.







It recommended that States Parties take action to ensure that there are no reprisals as a consequence of SPT visits, as per Article 15 of the OPCAT. In addition, the SPT expects the authorities of a State that has received an SPT visit to communicate any cases of reprisals and any action taken to protect the persons concerned. It also recognises the important role that NPMs play in relation to these issues.[120] Thanks to their in-country location, NPMs are well-placed to follow-up on concerns about possible reprisals and to liaise directly with the SPT.

### 4.6 Temporary postponement of a visit to a place of detention

A State Party cannot refuse an in-country mission by the SPT, but it may temporarily postpone a visit to a particular place of detention under one or more of the limited grounds provided for under Article 14(2).[121] No similar provision exists in relation to NPMs.

The fact that an objection can only be made in relation to a particular place of detention, not to an entire programme of visits, is highly significant and reflects the underlying duty of States Parties to grant unrestricted access to all places of detention under their jurisdiction and control upon which the efficacy of the OPCAT as a preventive tool rests. Article 14(2) prevents a State Party from trying to hinder access or dictating when and where the SPT conducts a visit.

The Article 14(2) phrase "urgent and compelling grounds" emphasises the fact that each situation must be considered on a case-by-case basis and that it must be exceptional in nature to warrant the postponement of a visit. The existence of a declared state of emergency is not sufficient grounds to postpone or object to a visit.[122] In such instances, the delegation

120 SPT, Third annual report, §36.

121 According to Article 14(2) of the OPCAT, "objections 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". See commentary on Article 14(2) in Chapter II of this manual.

122 Nowak and McArthur, *The UNCAT*, p.1045. See also commentary on Article 14(2) in Chapter II of this manual.

and the authorities should liaise closely in order to find a solution and to ensure that the suspended visit goes ahead at the earliest possible opportunity. Indeed, preventive visits are particularly important during times of emergency, since fundamental, non-derogable rights, including the right to life and to freedom from torture, are often threatened and other rights and safeguards temporarily suspended at such times. If a State Party refuses to cooperate with the SPT with regard to the rescheduling of a temporarily postponed visit, the SPT can request that the CAT agree, via a majority vote, to make a public statement under Article 16(4).[123]

The SPT has reported that, to date, it has rarely encountered problems in accessing places of detention.[124] When problems arose, they were mainly due to communication issues and were resolved with the cooperation of governmental liaison officers.[125]





### 4.7 After an in-country visit[126]

What happens after an in-country visit is as important as the in-country visit itself, if not more so. Visits help to initiate the process of establishing a constructive dialogue with State authorities, as well as NPMs, in order:

- to strengthen the protection of detainees,
- to identify measures to improve the domestic system of deprivation of liberty, and
- to provide guidance on the designation, establishment, and functioning of NPMs.

#### 4.7.1 Factual press releases

At the end of a visit, the SPT usually issues a brief written press release focusing on factual information relating to the visit. The press release usually indicates that the visit has taken place, identifies the composition

123 See commentary on Article 16 in Chapter II of this manual.

124 See SPT, Report on the visit to the Maldives, §257; SPT, Report on the visit to Sweden, §12; SPT, Report on the visit to Paraguay, §17; and SPT, Report on the visit to Honduras, §23.

125 SPT, Report on the visit to Mexico, §20.

126 See Section 11 of Chapter I of this manual.





of the delegation, and lists the places of detention that were visited. In addition, the press release usually outlines the meetings that the SPT held during its visit, including those with senior officials, NPMs, NHRIs, NGOs, and other relevant actors.[127] However, press releases do not provide any information on the situation of deprivation of liberty in the country concerned.

#### 4.7.2 Visit report drafting

The next step is the drafting of the confidential visit report; this sets out the SPT's analysis of its findings and its recommendations. Reports should be broad in scope in order to cover the wide range of issues that impact on torture prevention.[128] Under Article 2(2), in visit reports, as well as in other reports and activities, the SPT is required to consider, refer to, and apply relevant international norms.[129]

Visit reports are an essential tool for establishing and maintaining dialogue with national authorities and relevant actors on measures to be taken to improve the situation of prevention of torture and other ill-treatment in a given country. Under Article 12(d), States Parties have an obligation "to examine the recommendations of the SPT and enter into dialogue with it on possible implementation measures". Therefore, once the SPT has drafted a visit report, it is sent to the State Party, initially on a confidential basis; when submitting the report, the SPT requests that the State Party respond to its recommendations and that it sends information on developments since the visit. The deadline for a State Party's response to a visit report is currently kept confidential.[130] Responses from States Parties are taken into consideration in the final version of reports, and may even be included. For instance, the responses from the authorities of **Honduras** were included in the final visit report: both the feedback from the authorities and the SPT's final recommendation were included

127 The SPT's press releases are available on its website: http://www2.ohchr.org/english/bodies/cat/opcat/index.htm. See also SPT, First annual report, Annex V.

128 See the website of the OHCHR for relevant UN standards on the administration of justice: http://www2.ohchr.org/english/law

129 See commentary on Article 2(2) in Chapter II of this manual.

130 SPT, First annual report, Annex V.

under each recommendation.[131] Once finalised, visit reports are discussed and adopted during SPT sessions. They are then sent to State authorities on a confidential basis in order to encourage continued dialogue and cooperation on the implementation of the measures and recommendations explored in the reports.

The SPT provides updated information on the status of visit reports (i.e. whether they have been sent to the relevant State Party and whether they are currently confidential or public) on its website.[132]

Article 16(1) of the OPCAT provides for the SPT to communicate its recommendations and observations confidentially to NPMs "if relevant". NPMs' permanent in-country location enables them to establish an ongoing dialogue with relevant authorities; thus, they are in an ideal position to follow-up on SPT recommendations, and to keep the SPT abreast of both new developments and the impact of the in-country mission. The relationships between the SPT and NPMs should be based on mutual trust and confidence. Communicating an SPT mission report in whole or in part may extend the impact of an SPT visit and strengthen the NPM. For instance, following the SPT's visit to **Mexico**, the Mexican National Human Rights Commission (the NPM) requested a copy of the visit report: the SPT granted the request.[133]





### 4.7.3 Publishing in-country visit reports

Although the SPT is required to communicate its observations and recommendations confidentially to the State Party concerned and, if relevant, to the NPM, the OPCAT provides for three possibilities regarding the publication of SPT reports.

First, the State Party may authorise the publication of the SPT report. The SPT itself actively encourages States Parties to request the publication of SPT visit reports and any response(s) from the authorities.[134] So far, five in-country visit reports have been made public: the reports on

131 SPT, Report on the visit to Honduras.

132 See www.ohchr.org.

133 APT interview with the SPT Chairperson, Victor Rodriguez Rescia, 21 June 2010.

134 SPT, Third annual report, §30.





**Honduras**, the **Maldives**, **Mexico**, **Paraguay**, and **Sweden**.[135] Hopefully, publication will become standard practice. Although confidentiality is a key principle of the OPCAT, publication of reports can be a potent torture prevention tool. Publication sends a message that a State Party is committed to transparency and willing to cooperate with the SPT and NPMs, and thus to upholding its international human rights obligations. Publication also encourages national awareness and debate on the treatment of detainees, and on the prevention of torture and other forms of ill-treatment. Finally, it is an effective tool for facilitating monitoring of the implementation of recommendations by national, regional and international actors, including NPMs.

Second, a visit report may be published without the consent of the relevant State Party when the State Party has published the report in part. Under Article 16(2) of the OPCAT, a State Party is deemed, through partial publication, to have waived the requirement of confidentiality regarding the remainder of the report. The SPT can then publish the report in whole or in part. This procedure has not yet been used.

Third, publication is also possible as a sanction for lack of cooperation on the part of the relevant State Party. Under Article 16(4), a visit report can be published when a State Party fails to cooperate with the SPT in respect of its obligations, especially as set out in Articles 12 and 14, or when it fails to implement the SPT's recommendations. The power to authorise publication in such cases rests not with the SPT but with the CAT, which, at the request of the SPT, decides to allow or prohibit publication on the basis of a majority vote. Alternatively, the CAT may choose to make a public statement concerning non-cooperation on the part of an OPCAT State Party. Before the CAT makes its decision, the State Party concerned should be given the opportunity to present its views. The possibility of publication of visit reports as a sanction highlights the importance of the principle of cooperation: however, it is clear that States Parties should not misuse this principle to avoid the implementation of their obligations under the OPCAT. Again, this procedure has not yet been used.

135 SPT, Report on the visit to Sweden; SPT, Report on the visit to the Maldives; SPT, Report on the visit to Honduras; SPT, Report on the visit to Mexico; and SPT, Report on the visit to Paraguay.

### 4.7.4 Following-up on SPT reports

The SPT has developed a practice of requesting responses from States Parties following the communication and/or publication of the final SPT visit report, although the OPCAT text is silent on this point. Responses form part of the constructive dialogue between the SPT and States Parties. They also enable the SPT to assess the impact of its visits and any improvements in the systems of deprivation of liberty in the States Parties visited. States Parties' responses can be made public upon request. For instance, in the SPT's first few years of operation, three States Parties provided responses to the SPT following the communication of final visit reports: two of these (i.e. the responses from **Paraguay** and **Sweden**) were made public.[136]

In addition to requesting formal responses, the SPT may also request information on the implementation of its recommendation. Letters sent to States Parties requesting information on the development of NPMs also represent an ideal opportunity to follow-up on NPM issues identified in SPT visit reports.[137]

## 4.8 Conducting a follow-up visit

Article 13(4) of the OPCAT enables the SPT to conduct short follow-up visits. Regional monitoring bodies, such as the CPT, have already adopted the practice of conducting follow-up visits and these have proven extremely useful. Although the SPT has yet to carry out any follow-up visits, these would enable SPT visiting delegations:

- to focus on specific issues of concern (e.g. NPM functioning),
- to assess the level of implementation of SPT recommendations, and
- to react to specific situations.

The SPT mentions follow-up visits in its third annual report, in which it specifies that a follow-up visit to Paraguay is planned.[138]

136 Mauritius, Sweden and Paraguay provided responses to the SPT following the communication of their respective final SPT in-country visit reports. These responses are available at http://www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm.

137 For further information, see Sections 3.3.1 and 3.3.2 of this chapter.

138 See SPT, Third annual report, §24; and United Nations, 'Committee against Torture meets with Subcommittee on the Prevention of Torture to discuss synergies in their work' (press release), 11 May 2010: available at www.unog.ch.







# 5. Cooperation with external actors

For the purpose of prevention of torture in general, Article 11(c) of the OPCAT obligates the SPT to cooperate with the:

> relevant UN 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[.]

As discussed above,[139] cooperation is one of the core principles of the OPCAT and the SPT has a specific duty to establish and maintain dialogue and cooperative relationships with like-minded organisations in order to strengthen the system of prevention of torture and other forms of ill-treatment.

## 5.1 Cooperation with the Committee against Torture

As reflected in the OPCAT's Preamble, the treaty aims to assist States Parties to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[140] in the implementation of their existing obligations to adopt effective measures to prevent torture and other forms of ill-treatment. As the CAT is one of the most important bodies with which the SPT is expected to establish a dynamic and co-operative relationship, the OPCAT establishes a specific relationship between the two bodies, without either being subordinated: it grants the CAT specific powers with regard to the OPCAT and regulates the sharing of information between the two bodies (e.g. the presentation of the SPT's annual reports to the CAT). The CAT represents an important resource for the SPT, not only on torture-related issues, but also on issues concerning the development of NPMs. In 2003, the CAT adopted a statement on the OPCAT and practical guidelines for cooperation and coordination between the CAT and the SPT.[141] In practice, despite being

139 See Section 1 of this chapter.

140 UNCAT, UN Doc. A/RES/39/46, 10 December 1984.

141 CAT, Annual report, UN Doc. A/58/44, 1 September 2003, §14-17.

called a "Sub-Committee", the SPT complements the CAT: indeed, the CAT acknowledges that the SPT is an autonomous body.[142] However, the CAT can publicly scrutinise implementation of States Parties' obligations under the OPCAT.[143]

The CAT considers that dual membership (i.e. of both the CAT and SPT) would be positive for coordination and cooperation, despite some practical difficulties.[144] However, experience has demonstrated that SPT members should not also be CAT members; separation avoids the potential for confusion in light of the bodies' differing preventive and quasi-judicial approaches, particularly in relation to the CAT's public scrutiny of State Party compliance with the UNCAT and its consideration of individual complaints. None of the first 10 members of the SPT were also CAT members.





#### 5.1.1 CAT powers with regard to the OPCAT

The CAT has two important powers with regard to the OPCAT.

- **The power to make public statements and publish the SPT's in-country visit reports under Article 16(4).**

As discussed above,[145] the OPCAT provides for SPT visit reports to be made public if a State fails to cooperate with the SPT in respect of its obligations and grants the CAT specific powers in that regard. The SPT may face challenges in the implementation of its mandate when a State Party fails to cooperate in respect of its obligations (especially under Articles 12 and 14) or to implement SPT recommendations. If a failure of either type occurs, the SPT may decide to inform the CAT. The CAT will then give the State Party the opportunity to discuss its point of view. Following this, a majority of the CAT's members may authorise the publication of relevant SPT reports and/or a public statement by the SPT. This provision reinforces the relationship between the SPT and the CAT without subordinating the SPT to the CAT.

142 CAT, Annual report 2003, §14(A)(3).

143 Nowak and McArthur, *The UNCAT*, p.914. See also commentary on Articles 16 and 24 in Chapter II of this manual.

144 CAT, Annual report 2003, §14(B).

145 See Section 4.7.3 of this chapter.





This procedure is a necessary safeguard as a State Party that is no longer willing to fulfil its obligations to cooperate should not benefit from the principle of confidentiality, the sole objective of which is to provide a framework for cooperation and constructive dialogue with States Parties. It is also advantageous for the SPT to be able to demonstrate that its inability to work effectively is due to the non-cooperation of the State Party concerned and not a result of its own shortcomings.[146] This procedure has not been used thus far.

- **The power to extend temporary postponement of a State Party's obligations in respect of either the SPT (i.e. under Part III of the OPCAT) or NPMs (i.e. under Part IV of the OPCAT) under Article 24(2).[147]**

The OPCAT seeks to afford States that wish to become parties to the treaty additional time within which to consider how best to implement the obligations set out under the treaty. In accordance with Article 24, States Parties may make a declaration at the time of ratification to temporarily postpone their obligations in respect of either the SPT (i.e. their obligations under Part III) or NPMs (i.e. their obligations under Part IV).[148] Thus far, four States Parties (Germany, Kazakhstan, Montenegro and Romania) have made declarations under Article 24 to postpone their obligations in respect of the designation of their NPMs, though no State Party has used this procedure in respect of the SPT.

Requests to extend postponement are subject to the CAT's approval. The CAT should make its decision on the basis of State Party communications after consulting the SPT. The fact that consultations and discussions are required before a decision can be made on such extensions serves to reinforce the relationship between the SPT and the CAT. To date, no requests for extension of postponements have been presented as the States Parties mentioned above are still in the three year initial postponement period allowed under Article 24.

146 For further explanation of this provision, see Ann-Marie Bolin Pennegard, *An Optional Protocol, Based on Prevention and Cooperation*, in Bertil Duner (ed.), *An End to Torture: Strategies for its Eradication*, Zed Books, London, 1998, p.48.

147 See also Section 3 of Chapter IV of this manual; and the commentary on Article 24(2) in Chapter II.

148 See commentary in Chapter II of this manual.

### 5.1.2 SPT Annual reports

In addition to the specific powers granted to the CAT with regard to the OPCAT, the treaty establishes a specific procedure regarding SPT annual reports: Article 16(3) requires the SPT to present its annual reports to the CAT. The presentation of the SPT's annual report usually occurs during the CAT's May session, which is public and represents an ideal opportunity for CAT and SPT members to exchange views on issues of common concern.[149]

Article 10(3) of the OPCAT provides for the SPT and the CAT to hold simultaneous sessions at least once a year; this usually occurs in November. They offer opportunities for issues of common interest, such as NPMs, in-country visits and their time-tabling, sharing of information between the two bodies,[150] and specific issues (e.g. the rights of persons with disabilities and their implications for the CAT and the SPT), to be discussed.[151]

In addition, it is becoming standard practice for the SPT Chairperson to present the SPT annual report to the Third Committee of the General Assembly of the UN in October, at the same time as the CAT and the UN Special Rapporteur on Torture present their annual reports.

### 5.1.3 Exchange of information

In 2003, the CAT recognised that cooperation and coordination between the two bodies is both "desirable and required" by the OPCAT.[152] In the guidelines that it adopted in 2003, the CAT proposed concrete measures to facilitate cooperation and exchanges of information. First, the CAT proposed the participation of one or several of its members as observers at SPT sessions devoted to the drafting and adoption of the SPT's rules of procedure; the CAT suggested that these discussions should be followed by a joint meeting to finalise the rules of procedure.[153] This recommendation was not implemented by the SPT.[154] In 2003, the

149 SPT, Second annual report, §43.

150 SPT, Second annual report, §43.

151 SPT, Third annual report, §54.

152 CAT, Annual report 2003, §14(A)(3).

153 CAT, Annual report 2003, §14(A)(3).

154 APT interview with the SPT Chairperson, Victor Rodriguez Rescia, 21 June 2010.







CAT also recommended the establishment of a "standing committee on cooperation" that would involve both CAT and SPT members.[155] As a result, the SPT and CAT have created a contact group of two members from each treaty body to facilitate the exchange of information.[156]

The CAT has proved to be a very useful resource for the SPT (and vice versa) not only on torture-related issues but also in relation to OPCAT and NPM development. For instance, the CAT has adopted the policy of systematically recommending ratification of the OPCAT when examining the reports that States are required to submit under the UNCAT.[157] In addition, the CAT has adopted the policy of requesting information on the designation, establishment, and functioning of NPMs from States Parties to the OPCAT. The CAT has also published recommendations on these issues.[158] Thus, the SPT regularly cites the CAT in its visit reports.[159] Moreover, OPCAT States Parties' reports to the CAT, and the CAT's recommendations to States Parties, are useful sources of information for the SPT, especially in relation to preparing for in-country visits.[160] Likewise, SPT in-country mission reports (when made public) and the SPT's confidential country briefs[161] are of value to the CAT in relation to its own activities.

155 CAT, Annual report 2003, §14(A)(3).

156 SPT, First annual report, §33.

157 CAT, Annual report 2003, §2. In 2009, the CAT recommended the ratification of the OPCAT to all non-States Parties to the OPCAT (including Chad, Israel, the Philippines, Colombia, El Salvador, Slovakia and Yemen). For further information, see www.ohchr.org.

158 CAT, Annual report 2003, §2. For instance, the CAT provided Moldova with detailed recommendations on the functioning of its NPM. See CAT, Concluding observations of the Committee against Torture on Moldova, UN Doc. CAT/C/MDA/CO/2, 19 November 2009, §13.

159 SPT, Third annual report, §62.

160 For further information, see Section 4.4.1 of this chapter.

161 The SPT has adopted the practice of sending its confidential country briefs to the CAT on a confidential basis. APT interview with the SPT Chairperson, Victor Rodriguez Rescia, 21 June 2010. For more information, see Section 4.4.2 of this chapter.

### 5.2 Cooperation with other UN bodies and mechanisms

A range of other UN treaty bodies, experts and other bodies have mandates that encompass torture prevention issues. Over time, the SPT is likely to develop cooperative relationships with many, if not all, of these bodies.

#### 5.2.1 UN treaty bodies

As discussed above,[162] the SPT regularly cites the observations and recommendations of relevant treaty bodies in its visit reports.[163] Key sources of information for the SPT include jurisprudence from treaty bodies that receive individual complaints, and also periodic State Party reports to treaty bodies and the resulting treaty body recommendations and observations. Various UN treaty bodies examine issues related to the prevention of torture and other forms of ill-treatment in the context of their own mandates. These bodies include:

- the UN Human Rights Committee,
- the UN Committee on the Elimination of All Forms of Discrimination against Women,
- the UN Committee on the Rights of Persons with Disabilities, and
- the UN Committee on the Rights of the Child.

To facilitate contact and enhance the effectiveness of the treaty body system as a whole, the SPT also participates in an annual meeting of all the UN treaty body chairpersons and in regular inter-committee meetings, which are attended by the chairperson and one member of each treaty body.

#### 5.2.2 UN Special Procedures of the Human Rights Council

Some Special Procedures established by the UN Human Rights Council hold mandates that are closely linked to issues of concern to the SPT. As part of their activities, most Special Procedures receive information on specific allegations of human rights violations and transmit communications to governments, including urgent appeals relating to individuals reported to be at risk and allegations about violations relating to their mandates. Mandate holders also carry out in-country visits to investigate

162 See Section 5.1.3 of this chapter.

163 SPT, First annual report, §50.







the situation in respect of various human rights at the national level, though they require an invitation from the State concerned to do so.[164]

The Special Procedure most relevant to the SPT's work is the UN Special Rapporteur on Torture. However, other Special Procedures may also be of interest, including:

- the UN Special Rapporteur on extrajudicial, summary or arbitrary executions,
- the UN Special Rapporteur on the independence of judges and lawyers,
- the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism,
- the UN Working Group on Arbitrary Detention,[165] and
- the UN Working Group on Enforced or Involuntary Disappearances.

In recent years, these UN Special Procedures have dealt with OPCAT issues as part of their agendas.

Upon the OPCAT's entry into force, the UN Special Rapporteur on Torture, Manfred Nowak, stated that he considered "this new instrument to be the most effective and innovative method for the prevention of torture and ill-treatment worldwide".[166] Consequently, he reported that out of the countries he had visited during his term seven had ratified the OPCAT and four had an NPM in place.[167] He also made public

164 For more information, see the Special Procedures' webpage: http://www2.ohchr.org/english/bodies/chr/special/index.htm.

165 In its preliminary observations, the UN Working Group on Arbitrary Detention made recommendations on the functioning of the NPM following its 2009 visit to Malta. See Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, Mission to Malta (19 to 23 January 2009), UN Doc. A/HRC/13/30/Add.2, 18 January 2010, §69-70.

166 Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/61/259, 14 August 2006, §66.

167 Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Doc. A/HRC/13/39/Add.5, 5

recommendations on the functioning of NPMs in the countries he had visited and "regularly emphasized that a lack of independence and restrictions to the NPM[s] seriously impede [their] function".[168] The SPT has maintained particularly close contact with the UN Special Rapporteur on Torture to discuss common challenges and working methods; meetings regularly occur during SPT sessions in Geneva.[169]

### 5.2.3 Cooperation with other UN bodies

The OPCAT establishes a specific obligation for the SPT to cooperate with the relevant United Nations bodies and mechanisms.[170] In recent years, this cooperation has been increasing, particularly in relation to efforts to support the designation and establishment of NPMs. For instance, the interaction and cooperation between the SPT and the International Coordinating Committee (ICC) of NHRIs has been steadily increasing as a result of bilateral meetings and exchanges of information.[171] The SPT also has plans to strengthen direct contact and interaction with the Sub-Committee on Accreditation of NHRIs via joint sessions and confidential exchanges of information about NHRIs designated as NPMs that are going through the accreditation or review process.

This is important because the OPCAT recommends that States Parties give due consideration to the Paris Principles[172] while setting-up their NPM(s),[173] although this recommendation should not be interpreted as a reason to automatically grant the NPM mandate to NHRIs established according to the Paris Principles.[174] The fact that some NHRIs have also assumed the NPM mandate has raised the issue of NHRI and NPM accreditation. The ICC Sub-committee on Accreditation assesses the compliance of NHRIs

February 2010, §158.

168 Report of the Special Rapporteur on Torture, Study on the phenomena of torture, §162.

169 SPT, First annual report, §35.

170 OPCAT, Article 11(c).

171 SPT, Third annual report, §61.

172 Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (the 'Paris Principles'), UN Doc. GA Res 48/134, 20 December 1993.

173 OPCAT, Article 18(4).

174 For further information, see Section 7.2 of Chapter IV of this manual.







with the Paris Principles. In that regard, the 'Statement of Compliance with the Paris Principles' (a template for assessing compliance in order to grant accreditation)[175] was updated in June 2009 to include information relating to NPM designation and establishment, in line with the SPT's Preliminary guidelines for the on-going development of NPMs. However, the SPT has stated that the accreditation procedure for NHRIs is a supplementary mechanism that should not be used to accredit NPMs.[176]

In the same spirit of cooperation, the SPT has established a dialogue with the UN High Commissioner for Refugees to exchange information in order to make SPT visits "to persons being held in places of asylum more effective".[177]

## 5.3 Cooperation with regional bodies[178]

Article 31 of the OPCAT encourages the SPT to consult and cooperate with regional bodies that conduct visits to places of detention. This provision aims to avoid duplication of effort, and to further the prevention torture and other ill-treatment. The obligations of States Parties under regional conventions, especially in respect of regional visiting mechanisms, are unaffected by OPCAT signature, accession or ratification. A number of regional bodies have visiting mandates that are particularly relevant to the work of the SPT.

- **Africa**

The Committee for the Prevention of Torture in Africa (CPTA, formerly known as the Follow-up Committee to the Robben Island Guidelines) enjoys a broader mandate than the SPT in terms of prevention of torture and is a key partner for the SPT in Africa.[179] The SPT and the former RIG

175 For further information, see http://nhri.net.

176 SPT, Third annual report, §61. See also OPCAT Research team: University of Bristol, Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture, University of Bristol, Bristol, November 2008.

177 SPT, Third annual report, §63.

178 See Section 7.6 of Chapter V of this manual.

179 For further information, see the website of the CPTA: http://www.achpr.org/english/_info/index_RIG_Under_en.htm. See also APT, *Africa torture prevention Conference*

Committee set up the basis for cooperation in 2009 when the Chairperson of the RIG Committee visited the SPT, during one of its plenary sessions, to discuss issues of common interest and to share best practice.[180] This cooperation was strengthened through a joint promotional visit to Benin in 2009 that focused on torture prevention issues; members of the RIG Committee were accompanied by one SPT member, who acted as a resource person.[181] Joint activities of this kind help to reinforce the dialogue and cooperation between the two bodies.

Another African mechanism has been established to visit places of detention: the Special Rapporteur on Prisons and Conditions of Detention in Africa of the African Commission on Human and Peoples' Rights.[182] The fact that the current CPTA Chairperson is also the Special Rapporteur on Prisons and Conditions of Detention in Africa may facilitate synergies and cooperation with the SPT.





- **The Americas**

The Inter-American Commission on Human Rights (IACHR) has established thematic and country rapporteurships that are mandated to conduct visits to all States in the Americas. The Rapporteur on the Rights of Persons Deprived of their Liberty has a specific mandate to carry out observational visits to places of detention.[183] Cooperation and dialogue is facilitated by regular contacts between the secretariats of the IACHR and SPT, and by the participation of the IACHR in SPT sessions and vice versa. For instance, in 2009 the Secretary of the IACHR participated in a working meeting with SPT members in Geneva, while SPT members attended a public hearing and a plenary session of the IACHR

(Discussion Document), 27-28 April 2010, Dakar: available at www.apt.ch.

180 SPT, Third annual report, §67.

181 See the website of the CPTA: http://www.achpr.org/english/_info/index_RIG_Under_en.htm.

182 For further information, see the website of the Special Rapporteur on Prisons: http://www.achpr.org/english/_info/index_prison_en.html.

183 Other Rapporteurships may be of interest to the SPT, including the Rapporteur on the Rights of Women, the Rapporteur on the Rights of the Child, and the Rapporteur on the Rights of Migrant Workers and Their Families. For further information, see the website of the IACHR: www.cidh.oas.org.





in Washington. These contacts facilitated exchanges of information, particularly regarding NPMs and the planning of in-country missions.[184]

- **Europe**

The CPT, established by the ECPT, conducts regular preventive visits to all places of detention in the 47 Council of Europe Member States. To date, 27 Member States of the Council of Europe have also ratified the OPCAT:[185] places of deprivation of liberty in these countries will be visited by both the CPT and the SPT. A number of challenges arise from the existence of several bodies with a preventive mandate in the European region, especially in relation to cooperation, exchange of information, implementation of recommendations, overlap and duplication of work, and coherence of standards.[186]

The CPT considers that European States that are party to both the OPCAT and ECPT should immediately forward CPT visit reports to the SPT, on a confidential basis, together with the responses (if any) of the relevant States.[187] This would help to ensure that consultations between the SPT and the CPT are held "in the light of all the relevant facts";[188] it would also help to maintain consistent standards. Although the CPT has stressed that the implementation of this proposal would not require an amendment of the ECPT by States Parties, there is no public information available regarding the implementation of this procedure.[189]

The SPT has established a close relationship with the CPT, through regular contact between the secretariats, in order to exchange information on best practice and to coordinate the planning of in-country missions. In the initial years of the SPT's activities, contact was facilitated by the fact that a number of the SPT's current and former members were also

184 See SPT, Third annual report, §66; and SPT, Second annual report, §53.

185 More information is available via the APT's website: www.apt.ch.

186 For further information, see 'Background paper', APT-CPT Conference: New Partnerships in Torture Prevention in Europe region, 6 November 2009, p.6. Available at www.apt.ch.

187 CPT, 16th General Report on the CPT's activities, covering the period 1 August 2005 to 31 July 2006, CPT/Inf (2006) 35, 16 October 2006, Preface.

188 Nowak and McArthur, *The UNCAT*, p.1159.

189 Nowak and McArthur, *The UNCAT*, p.1159.

current or former members of the CPT. As the relationship between the two bodies is now being formalised and institutionalised, States Parties to both the OPCAT and the ECPT are encouraged to give due consideration to the potential challenges raised by double concurrent membership.[190]

Other bodies working at a regional level should also cooperate with the SPT. For example, the SPT has sought to cooperate with the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE), which has been active on OPCAT-related issues throughout its area of operation thanks to its presence in the field. The OSCE is the largest regional security organisation in the world, with 56 participating States from Europe, Central Asia, and North America.[191]

### 5.4 Cooperation with the International Committee of the Red Cross

In consideration of the fact that the International Committee of the Red Cross (ICRC) inspired the OPCAT, the treaty explicitly states that States Parties' legal obligations under international humanitarian law shall be unaffected by signature or ratification of, or accession to, the OPCAT. The Geneva Conventions and their additional Protocols,[192] which form the basis of international humanitarian law, provide protection for persons during armed conflict and enable the ICRC to conduct visits to places

190 See Section 2.2.3 of this chapter.

191 For further information, see the OSCE's website: www.osce.org.

192 Diplomatic Conference of Geneva of 1949, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 197;7 and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.







of detention. In accordance with the Geneva Conventions, in times of international armed conflict the ICRC is authorised to visit all places of detention where prisoners of war, detained civilians and other "protected persons" are, or may be, held.[193] During civil armed conflict, or in peacetime, a State may authorise the ICRC to visit places of detention.

Therefore, there is the potential for significant overlap between the work of OPCAT bodies and the ICRC, notwithstanding the broader mandate of OPCAT bodies in respect of places of detention. Article 32 of the OPCAT aims to ensure that OPCAT bodies complement the work of the ICRC and avoid duplicating or undermining its activities. The SPT and NPMs' rights of access to places of detention must not be used by States Parties as an excuse to exclude visits by the ICRC or vice versa. However, the SPT, States Parties, and NPMs should consider how the ICRC and OPCAT bodies (especially NPMs) will cooperate in order to avoid duplication of efforts.[194] The SPT has already developed a cooperative relationship with the ICRC. For instance, SPT members have received detention monitoring training from the ICRC.[195] When an ICRC delegation is present in an OPCAT State Party, direct interaction and strategic planning with the ICRC prior to an SPT in-country visit are essential.

## 6. Civil society engagement with the SPT

In accordance with Article 11(c) of the OPCAT, the SPT is obligated to cooperate with "organizations working towards the strengthening of the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment". International and national civil society organisations played an instrumental role in the creation of the OPCAT. Thus, the SPT recognises the importance of cooperating with civil society organisations at the international and national levels.[196]

193 For more information on the activities of the ICRC, see http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_protection?OpenDocument.

194 For more information, see commentary on Article 32 in Chapter II of this manual; and also APT, *NPM Guide*, p.91.

195 SPT, First annual report, §40.

196 SPT, First annual report, §60; and APT, *NPM Guide*, p.91.

### 6.1 Cooperation in the context of SPT in-country visits

In recent years, the SPT and international and national actors have interacted and established cooperative relationships before, during and after SPT in-country visits.

- **Preparations for SPT in-country visits**

In order to maximise the effectiveness of SPT in-country visits, once the SPT makes its visiting programme public (usually in November of the year before the programme starts), relevant national and international civil society actors are encouraged to proactively establish direct contact with the SPT's Secretariat. Precise, accurate and independent information from national civil society organisations on the domestic situation of deprivation of liberty, and the prevention of torture and other forms of ill-treatment, is a useful complement to the information presented by the relevant State Party. Thus, prior to an in-country visit, the SPT's Secretariat should also contact relevant civil society actors.

Where possible, it is helpful if national civil society actors coordinate their contributions in order to avoid sending the SPT duplicated or contradictory information. Information should be provided on:

- possible causes and risks of torture and other forms of ill-treatment,
- views on OPCAT implementation,
- suggestions regarding actors for the SPT to consider meeting, and
- places of detention (and/or regions within the State) for the SPT to consider visiting.[197]

Civil society organisations can request that the information sent to the SPT is kept confidential.[198] The information received is compiled into confidential country briefs by the SPT's Secretariat.[199]

International civil society organisations are also encouraged interact with

197 For further information, see APT, Role of civil society in preparation of SPT visits, APT Briefing Note 2, APT, Geneva, May 2008. Available at www.apt.ch.

198 APT, *Role of Civil Society*, p.2.

199 For further information, see Section 4.4.2 of this Chapter.







the SPT and send it country-specific information. Some international NGOs have provided vital support during the preparations for SPT in-country visits, including through arranging activities in the States to be visited prior to visits.[200]

- **Cooperation during SPT in-country visits**

National civil society organisations often play a pivotal role in SPT in-country missions: thanks to the breadth and depth of their in-country experience they are often able to provide crucial information on the prevention of torture and other forms of ill-treatment in a State Party. This information helps the SPT to identify places to visit and key issues to examine (including in relation to the functioning of NPMs).[201] Consequently, the SPT usually meets with national civil society organisations during in-country missions. For instance, during its in-country visit to the **Maldives**, the SPT reported that it held "meetings with members of civil society to gain an overview of the legal framework regarding the administration of criminal justice and places of deprivation of liberty and of how the system was functioning in practice".[202]

- **Follow-ups to SPT in-country visits**

Interactions between the SPT and civil society actors may be of a more indirect nature in the period following an SPT in-country visit. However, civil society actors play an important role in following-up SPT visits. For instance, both international and national civil society actors may campaign for the publication of the SPT visit report by the relevant State Party.[203] They may also encourage the drafting and publication of responses to SPT reports. If both documents are made public (i.e. the SPT in-country visit report and the State Party's response), civil society actors may choose to comment on them, providing updated information in areas relevant to their own work. In addition, they may play a 'watchdog' role, monitoring the implementation of SPT recommendations regarding both the

200 SPT, Second annual report, §21; and SPT, Third annual report, Annex V. See also Section 4.4 of this chapter.

201 See Sections 4.4.1-3 of this chapter.

202 SPT, Report on the visit to the Maldives, §11.

203 SPT, Third annual report, §30.

situation of deprivation of liberty and the development of NPMs.[204] In this context, they are often well-placed to provide regular updates to the SPT's Secretariat, including through written communications.

In addition, it is worth noting that, through the Special Fund established by Article 26 of the OPCAT, funds may be made available to support the implementation of SPT recommendations resulting from an in-country visit. [205] Civil society actors may either consider contributing financially to the OPCAT Special Fund[206] or they may wish to benefit from the Fund.

### 6.2 Cooperation in the context of SPT advisory functions

In its third annual report, the SPT stressed the vital role that civil society actors play with regard to the implementation of the SPT's advisory role, particularly as the SPT has been operating with a restricted budget.[207] At the international level, NGOs and academic institutions working actively on OPCAT ratification and implementation issues came together under the umbrella of the OPCAT Contact Group.[208] The SPT regularly holds in camera sessions with the OPCAT Contact Group to exchange information, to discuss the interpretation of the OPCAT (including in relation to the concept of prevention of torture), and to develop expertise concerning NPMs. The SPT has recognised that regular contact with the OPCAT Contact Group organisations have helped it to develop methods for engaging with NPMs and also a deeper understanding of its own preventive mandate.

- **Advice on NPM development**

As mentioned above, in order to be able to fully implement its advisory mandate in relation to NPM development, the SPT must gather specific

204 See Sections 7.3 and 7.5.3 of Chapter V of this manual.

205 See commentary in Chapter II of this manual; and also Nowak and McArthur, The UNCAT, p.998.

206 OPCAT, Article 26(2).

207 SPT, Third annual report, §61.

208 See Section 2.3.2 of this chapter for a list of the OPCAT Contact Group organisations.







information on NPMs' designation, establishment and functioning.[209] National civil society organisations may establish direct contact with the SPT in order to provide information on such issues.[210] Up-to-date information enables the SPT to analyse the national context and challenges effectively so that it is able to provide accurate, tailored recommendations and observations to both States Parties and NPMs.

Furthermore, national civil society actors are encouraged to send draft NPM legislation to the SPT for comments regarding compliance with the OPCAT.[211]

Finally, civil society actors can involve SPT members in international, regional and national OPCAT-related activities to facilitate direct contacts between SPT members and NPMs. This is a creative way of supporting the SPT's advisory functions and has helped it:

- to develop its understanding of its preventive mandate,
- to start developing constructive dialogue with national actors,
- to engage with NPMs, and
- to establish systems for exchange of information.

For instance, the SPT reported having participated in 14 activities of this kind thanks to the support of several institutions, including the OPCAT Contact Group organisations.[212]

### 6.3 Additional issues: SPT composition[213]

The role of national and international civil society actors in relation to the SPT's composition should not be underestimated. SPT elections take place every two years and civil society advocacy often lends significant momentum of efforts to ensure the nomination/selection and, thus,

209 See Sections 3.3.1 and 3.3.2 of this chapter.

210 The role of civil society organisations in OPCAT ratification and implementation is discussed in detail in Sections 4, 6.1 and 7.3 of Chapter IV of this manual.

211 For further information, see Section 3.3.1 of this chapter; and Section 6.2 of Chapter IV of this manual.

212 SPT, Third annual report, §41 and §71.

213 See Sections 6.1 and 6.2 of Chapter IV of this manual.

election of independent, impartial and competent experts as SPT members.

As mentioned above,[214] the OPCAT sets out specific criteria for the composition of the SPT, but does not specify a specific process for nominating candidates at the national level. States Parties are therefore encouraged to engage in a participative, public and transparent national process to select SPT candidates at the domestic level. This process should ideally include a public call for candidates:[215] proposals from civil society organisations should be encouraged. National civil society organisations are often in an ideal position to identify persons with relevant expertise, skills and experience.[216]

In addition, good practice suggests the establishment of a selecting committee, gathering representatives from the relevant ministries in charge of the process of selection, as well as representatives from civil society organisations with relevant expertise.[217] National civil society organisations should encourage public selection procedures at the domestic level.

The APT's guidance on the selection of SPT candidates and the election of SPT members is a useful advocacy tool.[218] The public selection procedure proposed aims to strengthen the independence, credibility, and legitimacy of the SPT's individual members and, hence, of the SPT as a whole.





214 See Section 2.2 of this chapter.

215 For a more detailed discussion, see commentary on Article 6 in Chapter II of this manual.

216 See Section 6.1 of Chapter IV in this manual.

217 APT, *The Subcommittee on Prevention of Torture: Guidance on the selection of candidates and elections of members*, OPCAT Briefing, APT, Geneva, June 2010. Available at www.apt.ch.

218 APT, *Guidance on the selection of candidates and elections of SPT members*.

# Chapter IV

# OPCAT Ratification and NPM Designation: Domestic Challenges

Contents

## 1. Introduction

OPCAT ratification is a political decision demonstrating the willingness and sincere commitment of the State to preventing torture and ill-treatment. Momentum for worldwide adoption of the OPCAT is building. An increasing number of States are considering how best to approach treaty ratification and implementation. Decisions about the timing of ratification and implementation are influenced by the political climate, legal system and institutional structures of each country, as well as by the requirements of the OPCAT itself.

The OPCAT provides for the establishment of national bodies - National Preventive Mechanisms (NPMs) - with a specific preventive mandate.[1] As the OPCAT does not prescribe the organisational form of NPMs, each State Party is at liberty to choose the structure most appropriate to its specific national context. No single type of body is inherently preferable. What matters is that all NPMs work effectively to prevent torture and ill-treatment. However, the OPCAT does outline a number of fundamental requirements for NPMs, whatever their specific form: functional independence, diverse expert composition, and specific powers and guarantees.

This chapter provides guidance on the timing and process of both OPCAT ratification and implementation, with a particular focus on NPM establishment and designation. It provides a detailed analysis of the possible NPM options, highlighting both the key challenges and some useful examples of good practice. It should be noted that inclusion of a particular State's proposed or existing NPM in this chapter should not be seen as either an endorsement or criticism of that particular option. The chapter is geared towards the needs of prospective and existing OPCAT States Parties, and other national actors, that are considering and/or engaged in the process of NPM designation. The APT *Guide to the Establishment and Designation of NPMs*[2] (the '*NPM Guide*') provides more detailed information on the process of NPM designation, as well as further analysis of the requirements for NPMs.

1 See Section 3.1 of Chapter V of this manual.

2 APT, *NPM Guide*, APT, Geneva, 2006. Available at www.apt.ch.

## 2. Why ratify the OPCAT?

The UN Convention against Torture (UNCAT)[3] contains specific provisions obliging States Parties to take legislative, administrative, judicial and other measures to prevent torture and other forms of ill-treatment.[4] Ratification of the OPCAT, and designation of effective and independent NPMs, helps States Parties to comply with their obligations under the UNCAT.[5]

The OPCAT represents the first of a new generation of human rights treaties for several reasons.

First, in contrast to other international standard-setting human rights treaties, the OPCAT is viewed as an operational treaty. For this reason, States Parties to the OPCAT do not acquire reporting obligations upon ratification. Their main obligations under the OPCAT are to designate one or several NPMs in compliance with the OPCAT requirements, to establish a cooperative dialogue with the OPCAT bodies, to examine the recommendations of these bodies, and to publish an annual NPM report.

Second, the OPCAT is premised on preventing torture and ill-treatment via the deterrent effect of regular visits to all places of detention.[6] The OPCAT establishes both an international preventive body (the SPT)[7] and NPMs; together, these bodies form part of the system of prevention, based on the principles of cooperation and constructive dialogue (rather than on condemnation of violations), foreseen by the OPCAT.[8] While the

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, 10 December 1984.

4 UNCAT, Articles 2, 10, 11 and 16. See also Committee against Torture (CAT), General Comment No 2, Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008.

5 See Section 2.1 of Chapter I of this manual.

6 See Sections 2.2-3, 5.1 and 7.2 of Chapter I of this manual; and the commentary on the OPCAT Preamble and Articles 1 and 19 in Chapter II.

7 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

8 For further information, see Chapter I of this manual, especially Sections 2.2-4 and 6.3; and the commentary on Articles 2 of the OPCAT in Chapter II.









SPT usually operates on a confidential basis,[9] NPMs are not bound by this principle. However, both bodies are required to protect confidential data obtained in the execution of their preventive mandates.[10]

Third, the NPMs distinguish the OPCAT from other international human rights treaties:[11] the OPCAT is the first international human rights treaty to establish national bodies with specific powers and guarantees to prevent torture and ill-treatment. Collectively, independent and effective NPMs represent an ideal complement to the SPT and existing international, regional and national monitoring bodies. Thanks to their presence in the field, NPMs are able to perform their monitoring activities on a regular and frequent basis. Their permanent in-country location enables them to establish on-going dialogue with relevant authorities; this, in turn, facilitates trust-building. In addition, NPMs have a strong understanding of their national context, including public policies, and can therefore propose and suggest concrete preventive measures to the relevant authorities that are tailored to the situation and challenges prevailing in the country. They also have the capacity to follow-up on the implementation of recommendations, including those from the SPT and other monitoring bodies.[12] Finally, NPMs are in a good position to identify early warnings signs and, thus, to prevent abuses in places of detention.[13]

Fourth, the OPCAT has also proved to be an important tool for steering criminal justice system reform and transitional processes aimed at enhancing the rule of law. The OPCAT may also assist authorities to re-establish public trust after crises related to violations of detainees' human rights or after a change of regime. Ratification and effective implementation of the OPCAT enables a government to demonstrate its

9 Under OPCAT, Articles 2(3) and 16.

10 Under Articles 16(2) and 21(2) of the OPCAT, OPCAT bodies can only publish personal data with the express consent of the person(s) involved.

11 See Section 2.2 of Chapter I of this manual; and Wilder Tayler, 'What is the added value of Prevention?', *Preventing Torture in the 21st Century*: Essex Human Rights Review 6.1 (Special Issue 2009), p.26: available at www.ehrr.org.

12 See Section 6 of Chapter II of this manual for further exploration of the issues summarised in this paragraph.

13 Tayler, 'What is the added value of Prevention?', p.26.

commitment to protecting all members of society, including some of the most vulnerable groups of persons (i.e. those deprived of their liberty).

Poorly functioning places of detention, and ineffective systems of deprivation of liberty, generate high costs, including in relation to detainees' health, national security, public safety, and the stress that such problems may place on the criminal justice system. These costs are almost always underestimated. Interventions to identify how and why systems of deprivation of liberty are likely to malfunction, and then to design concrete solutions to mitigate these risks, often prove extremely effective and mean that expenditure (e.g. on rehabilitation and redress)[14] is reduced or avoided entirely.

The core of the NPM mandate concerns identifying risk factors and using this knowledge to design measures to prevent human rights violations. Although establishing an independent and effective NPM is not cost-neutral, OPCAT ratification and NPM designation should be seen as a long-term investment that is likely to deliver a good return on initial expenditure: for instance, examples of best practice demonstrate that prevention of torture can contribute to a State Party's moral authority. Thus, ratifying the OPCAT, and establishing an independent and effective NPM (or NPMs), are critical steps that States can and should take to prevent torture and ill-treatment.

14 See, for instance, CPT, Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Doc. CPT/Inf (95) 14, 23 June 1994, §19. Following a visit to Ireland in 1993, the CPT reported that "in November 1992, a person who alleged that he had been ill-treated by police officers from Finglas Garda Station received an out-of-court settlement of £375,000 (plus costs). The person in question had sustained brain damage, allegedly as a result of having been kicked and struck repeatedly with a baton". In addition, on 5 January 2010 the European Court of Human Rights ruled that Moldova had violated Article 3 of the European Convention on Human Rights. It found that in the case of *Paduret v. Moldova* the authorities had failed to institute an effective criminal investigation into the man's allegations of abuse while in police custody in Bozieni in 2000. The complainant alleged that he was kicked, punched, suspended on a metal bar with his feet and hands tied together behind his back ('Palestinian hanging'), and had a glass bottle repeatedly inserted into his anus. The Court awarded him costs and €20,000 in damages.









## 3. Timing of OPCAT ratification and implementation

In order to implement the treaty effectively, States need to start thinking about the best NPM options for their national context as soon as they start to consider ratification. NPM designation and establishment is often a time-consuming process that requires thorough analysis. Depending on the national context, NPM designation can take place either before of after ratification. Best practice has demonstrated that OPCAT ratification and implementation require the adoption of a human rights approach focused on prevention via constructive dialogue to ensure the implementation of preventive measures at the national level. Therefore, it is essential to ensure that there is broad support for ratification amongst all interested actors; these actors should then be brought together to discuss how to implement the OPCAT at the national level. This is especially important in federal or decentralised States, and States with a large number of pre-existing monitoring mechanisms, due to the political, legal, geographical, institutional and cultural complexities of ratifying the OPCAT in such States.[15]

Article 17 of the OPCAT provides for a fairly strict timescale for implementation, requiring States Parties to establish their NPM(s) no later than one year after ratification or accession.[16] However, the OPCAT drafters took into consideration the possibility that some States Parties may need additional time to designate their NPM(s). Therefore, Article 24 allows for NPM designation to be postponed for an additional five years. States Parties can make a declaration postponing their obligations under Parts III and IV of the OPCAT for up to three years. The UN Committee against Torture (CAT) may then extend this postponement for a further two years, following consultations with the SPT and a request from the

15 See Section 7.4 of this chapter for further information.

16 Article 17 states that "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."

State Party.[17] In complex situations (for instance, in States Parties with federal systems), it is not surprising that six years (one year under Article 17 and an additional five years under Article 24) are needed to take the necessary steps to designate and establish an effective NPM (or NPMs).

Before designating or establishing an NPM, best practice has demonstrated the importance of identifying all places of detention[18] and of undertaking a thorough review of existing national monitoring mechanisms (including in relation to their founding legislation, mandates, jurisdiction, independence, powers and guarantees, and effectiveness).[19] Although a review of this nature may facilitate decision-making concerning the most appropriate form for the NPM to take, it requires time. It is often necessary for NPM designation to be seen as a long-term process that may require legislative action to be undertaken at the national level, such as amending existing legislation or drafting and adopting new legislation. Regardless of the operational form of the NPM, experience has shown that time is needed for institutions to assume a preventive mandate.[20]

The SPT has recognised that "The development of NPMs should be considered an on-going obligation, with reinforcement of formal aspects and working methods refined and improved incrementally."[21] Implementation of the OPCAT, and prevention of torture and other forms of ill-treatment, requires dedication and the adoption of a long-term perspective. There must be adequate information-sharing and coordination with all relevant national actors. Inclusive, transparent and well-publicised

17 Article 24 states that "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." For further discussion of Articles 17 and 24, see Chapter II of this manual.

18 See Section 5 of this chapter for further discussion.

19 APT, *NPM Guide*, Chapter 10.

20 For further information, see Sections 2, 3.1, 5.1 and 6.3 of Chapter V of this manual.

21 SPT, First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2007 to March 2008, UN Doc. CAT/C/40/2, 14 May 2008, §28.









decision-making, with advice sought from the SPT and other relevant expert bodies, is crucial.

It is worth noting that national debates about the designation or establishment of a country's NPM may revitalise wider discussions about prevention of torture. For example, a legislative review may highlight a failure to criminalise torture or other gaps in the implementation of international legal duties under the UNCAT or other international human rights treaties. Some States may decide to take advantage of this political momentum to develop the multi-faceted approach to addressing torture that both the OPCAT[22] and the UNCAT propose; others may choose to focus resources and time exclusively on NPM establishment.

## 4. Putting the OPCAT on the political agenda

OPCAT ratification and effective implementation are more likely to occur in countries where favourable political conditions combine with a pronounced interest in the prevention of torture on the part of relevant authorities and civil society organisations. Commitment to ensuring both transparency of places of detention, and openness to international and national external scrutiny, are key to creating a favourable environment for OPCAT ratification and implementation.

However, the key actors in OPCAT ratification vary from country to country. On one hand, a government may decide to promote OPCAT ratification as part of its human rights policies. For example, the Human Rights Secretariat of the Presidency of **Brazil** is leading on-going consultations on a draft law to establish a system of prevention of torture. On the other hand, advocacy to encourage States to ratify and implement the OPCAT has proven a useful first step in some countries; for instance, some national human rights institutions (NHRIs) have led advocacy campaigns for OPCAT ratification and implementation as part of a mandate to promote the adoption and implementation of international human rights treaties. This is the situation in **Ghana**, where discussions on the designation of an NPM are being led by the Commission on

22 OPCAT, Preamble.

Human Rights and Administrative Justice.[23] Civil society organisations may also carry out campaigns to promote the OPCAT. For instance, the impetus for OPCAT accession in **Armenia** came from a series of roundtables organised by civil society organisations and attended by the relevant ministries and decision-makers. To enhance the understanding of the OPCAT among decision-makers, one of the key non-governmental organisations (NGOs) involved in this process provided several of the ministries with Armenian translations of documents and publications relating to the OPCAT.

Usually, one particular actor (or several actors working together) launches and then leads the process of OPCAT ratification and implementation. These 'leading actors' vary from one context to another: common leading actors include ministries, NHRIs, NGOs, and coalitions. Their role is to make sure that all relevant stakeholders share a common understanding of the key aspects of the OPCAT, especially in relation to the importance of independence, access, confidentiality, co-operation and protection against reprisals. Leading actors also facilitate exchanges of information on OPCAT developments and work to secure the interest of all relevant stakeholders. Finally, they build support for, and maintain momentum towards, OPCAT ratification and implementation. Without leading actors to carry out these functions, OPCAT ratification and implementation may not be identified as institutional or political priorities by key national actors.

Best practice suggests establishing civil society coalitions to promote OPCAT ratification and implementation. Such coalitions can maintain the momentum for ratification and implementation through public campaigns, seminars and other promotional activities. Coalitions often represent ideal interlocutors for governments during discussions about the designation and establishment of NPMs. Finally, coalitions may have a more significant impact on OPCAT ratification and implementation than individual organisations as they represent an effective way to maximise human and financial resources, expertise and media coverage. In **Spain**, an NGO coalition was created to support OPCAT ratification and implementation. Public discussions about

23 APT, *OPCAT Country Status Report*. Available at www.apt.ch. This source is also useful in relation to the OPCAT status of the countries referred to in this chapter as it provides detailed information on States' progress towards ratification, designation of NPMs, and establishment of functional NPMs.









the OPCAT were initiated as early as 2004, when 37 NGOs came together under the umbrella of the Network for the Prevention of Torture to promote ratification and implementation of the instrument, among other things.[24]

When the leading actors are not government bodies, it is essential that one government department or ministry ensures that a system is in place:

- to divide responsibilities appropriately between the relevant ministries/ departments, more particularly regarding implementation, and
- to facilitate effective internal communication on OPCAT issues between the relevant ministries/ departments.

The ministry of justice usually performs this role as it commonly assumes the state's legal responsibilities for implementing international human rights treaties and soft law standards, particularly those relating to the criminal justice system. Other ministries are likely to be responsible for detention centres and these will be directly affected by the OPCAT: these ministries may include those concerned with health, defence, immigration, education, children, and home affairs. Intergovernmental coordination is vital to ensure that a proper understanding of the implications of OPCAT ratification is shared between relevant departments.

## 5. Prerequisites for NPM selection

Once OPCAT ratification is under consideration, the next step is to begin national discussions to select the most appropriate NPM or NPMs. To facilitate dialogue on the most appropriate NPM option, good practice recommends undertaking

- an assessment of existing monitoring bodies in light of the OPCAT's requirements, and
- an exercise to identify all places of detention.

It is also essential to gain a comprehensive understanding of the functioning of the bodies already carrying out visits to places of detention in the country: this is necessary to enable interested actors to assess

24 APT, *Civil society organisations and National Preventive Mechanisms*, APT, Geneva, June 2008, p.4. Available at www.apt.ch.

the potential of existing organisations to execute the NPM mandate in compliance with the OPCAT. Assessments of these types may also assist national actors to identify gaps in detention monitoring as this may provide an indication of whether it would be better to designate a new body or an existing mechanism as the NPM.

### 5.1 OPCAT requirements for NPMs

NPMs, regardless of their form, must comply with the following OPCAT minimum requirements.

- **Independence**

Independence underpins the effectiveness and credibility of NPMs. Under the OPCAT, States Parties are required to guarantee NPMs' functional, financial and personal independence[25] in light of the Principles relating to the status of national institutions for the promotion and protection of human rights.[26] Functional independence means that NPMs should be able to carry out their mandates without interference from any power; therefore, they should operate outside traditional administrative structures.[27] A strong legal basis (i.e. in a constitutional or legislative text)[28] contributes to ensuring independence.[29] Financial independence requires autonomy in drafting the NPM budget, in submitting it for approval outside the control of executive government, and in making decisions about how resources are used.[30] Finally, the OPCAT requires States Parties to guarantee the independence of NPMs' members and staff: they should be personally and institutionally independent from the State authorities.[31] It

25 OPCAT, Articles 18(1), 18(3) and 18(4). For further analysis, see commentary in Chapter II of this manual; Section 5 of Chapter V; and APT, NPM Guide, pp.38-40.

26 Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (the 'Paris Principles'), UN Doc. GA Res 48/134, 20 December 1993.

27 APT, *NPM Guide*, p.38.

28 Paris Principles, Competence and responsibilities, §2.

29 See Section 8 of this chapter for further discussion.

30 APT, *NPM Guide*, p.39; and Paris Principles, Composition and guarantees of independence and pluralism, §2.

31 OPCAT, Article 18(1); and APT, *NPM Guide*, pp.39-42.









is essential that the NPM implementing legislation clearly define the key elements guarantying the independence of the NPM.[32]

- **Composition[33]**

States Parties have a specific obligation to ensure that NPM members and staff have the required capacities and professional knowledge.[34] Furthermore, like the SPT,[35] NPMs should be multidisciplinary and include independent experts drawn from fields relevant to deprivation of liberty (such as human rights, healthcare and the administration of justice); at least some members should have prior experience in monitoring places of detention.[36] In practice, few NPMs achieve this pluralistic composition; therefore, they rely on external experts to complement their members and staff.[37]

The OPCAT also requires each State Party to strive for gender balance, and an adequate representation of ethnic and minority groups in the country, in its NPM(s).[38] The participation of experts from groups that are particularly at risk in places of detention (e.g. persons with disabilities and survivors of torture) should be encouraged as they can bring an experienced perspective to bear on specific detention issues and/or specific places of deprivation of liberty.[39]

32 See section 8 of this chapter for further discussion.

33 See Section 5.2 of Chapter V of this manual.

34 OPCAT, Article 18(2). For further analysis, see commentary in Chapter II of this manual; and APT, NPM Guide, p.50.

35 OPCAT, Article 5(2). For further analysis, see commentary in Chapter II of this manual; and Section 2.2 of Chapter III.

36 APT, *NPM Guide*, pp.50-51.

37 The Public Defender of Rights of the Czech Republic was designated as the NPM. A specific department has been set up to undertake OPCAT-related work; this department comprises twelve lawyers, though it can hire external experts with specific expertise (e.g. medical doctors and psychologists) on a part-time basis to compensate for this lack of diversity. Experts are obliged to respect all the rules and the regulations of the Public Defender of Rights' Office, including in relation to confidentiality. For further information see APT, *OPCAT Country Status*.

38 OPCAT, Article 18(3). For further analysis, see commentary in Chapter II of this manual; and APT, *NPM Guide*, pp.51-52.

39 For instance, in the United Kingdom Her Majesty's Inspectorate for Prisons, which

- **Access to all places of deprivation of liberty**

In accordance with Article 4(1) of the OPCAT, NPMs, like the SPT, should have access to all places where persons are, or may be, deprived of their liberty; this access should include all the installations and facilities within places of deprivation of liberty.[40] Under the OPCAT, places of deprivation of liberty include police stations, pre-trial centres, juveniles detention centres, immigrant and asylum-seeker detention centres, social care homes, mental health institutions, immigrant and asylum-seeker detention centres, and unofficial places of detention.[41] NPMs should have the power to conduct unannounced, regular and frequent visits to all these places of detention.[42]

- **Access to information**

NPMs should have access to all information relating to places of detention, their administration, and the treatment and conditions of persons deprived of their liberty: therefore, NPMs should have access to files, registers, medical records, dietary provisions and other data.[43] This power is key to ensure comprehensive analysis of both the situation and the risk factors within places of detention.

- **Access to persons**

Like the SPT,[44] the NPMs should be granted the power to conduct private interviews with persons they have selected in a location of their choosing.[45]

acts as the UK NPM Coordinator, includes former detainees in some of its visits to places of detention. See also Section 2.2.3 of Chapter III of this manual.

40 OPCAT, Article 20(c). For further analysis, see commentary in Chapter II of this manual.

41 For further analysis of Article 4, see commentary in Chapter II of this manual; Section 9 of Chapter I; and APT, NPM Guide, pp.21-23.

42 OPCAT, Article 19(a); and APT, NPM Guide, pp.55-57. For further information, see also Section 3.2 of Chapter IV of this manual; and commentary on Article 19(a) in Chapter II of this manual.

43 OPCAT, Articles 20(a) and 20(b). For further analysis, see commentary in Chapter II of this manual.

44 OPCAT, Articles 14(d) and 14(e). For further analysis, see commentary in Chapter II of this manual.

45 OPCAT, Articles 20(d) and 20(e). For further analysis, see commentary in Chapter II of this manual; Section 4.5.3 of Chapter III; and APT, *NPM Guide*, pp.59-60.









Private interviews are key to effective preventive detention monitoring; thus, they are an essential element in the working methods of all NPMs.[46] In addition to conducting private interviews with persons deprived of their liberty, NPMs should also be able to interview staff in places of deprivation of liberty and any other person relevant to their mandate.

- **Reports and recommendations[47]**

Conducting regular visits to places of detention is only one aspect of NPMs' preventive mandate. These visits should form the basis of reports and recommendations proposing measures to improve systems of deprivation of liberty. The power to make recommendations to the relevant authorities is essential to change problematic practices and, thus, work to prevent to torture.[48] The OPCAT requires the relevant authorities to examine recommendations and then engage in constructive dialogue with the country's NPM(s) on possible implementation measures.[49]

NPMs should also have the power to draft an annual report on their activities and on the situation of prevention of torture and other forms of ill-treatment. The OPCAT requires States Parties to publish and disseminate their NPM's (or NPMs') annual reports.[50]

- **Observations on legislation[51]**

NPMs should have the power to submit proposals and observations concerning existing and draft legislation relevant to torture prevention.[52] This is one of the core elements of the advisory aspect of the NPM mandate as it contributes to the improvement of safeguards and other measures designed to protect persons deprived of their liberty.

46 See Section 3.2 of Chapter IV of this manual.

47 See also Section 4.2 and 4.3 of Chapter V of this manual.

48 OPCAT, Article 19(b). For further information, see commentary in Chapter II of this manual; Section 4.2 of Chapter V; and APT, *NPM Guide*, pp.64-67.

49 OPCAT, Article 22. For further analysis, see commentary in Chapter II of this manual.

50 OPCAT, Article 23. For further analysis, see commentary in Chapter II of this manual; and Section 4.3 of Chapter V.

51 See Section 4.4 of Chapter V of this manual.

52 OPCAT, Article 19(c). For further analysis, see commentary in Chapter II of this manual; Section 4.2 of Chapter V; and APT, NPM Guide, pp.64-67.

- **Privileges, immunities and protection from reprisals**

The OPCAT contains specific provisions regarding the privileges and immunities that NPM members and staff need if they are to exercise their preventive mandates effectively. Immunities from personal arrest or detention, from seizure of personal baggage, and from interference with communications are key.[53] The OPCAT also reinforces the general privileges accorded to NPM members and staff in relation to the protection of information received by NPMs.[54] Confidential information held by NPMs cannot be disclosed unless the person(s) concerned expressly consents to the disclosure. Protection against disclosure to government, the judiciary, or any other organisation or person should be contained in NPMs' founding legislation.

Finally, any person or organisation who communicates with NPM members and/or staff shall benefit from protection against reprisals and shall not suffer any act of retaliation. This is essential to the effectiveness of preventive monitoring, as it guarantees a relationship of trust between NPMs and their interlocutors. This provision should also be included in NPMs' founding legislation.[55]

- **Direct contact with the SPT**

States Parties to the OPCAT are required to facilitate direct and, if necessary, confidential contact between the SPT and their respective NPMs; these contacts may take the form of meetings, exchanges of information, and/or training sessions. Direct contact lies at the heart of the triangular relationship between States Parties, NPMs, and the SPT.[56]

53 OPCAT, Article 35. For further analysis, see commentary in Chapter II of this manual; and APT, *NPM Guide*, pp.42-43.

54 OPCAT, Article 21. For further information, see commentary in Chapter II of this manual; and APT, *NPM Guide*, pp.43-45.

55 OPCAT, Article 21. For further information, see commentary in Chapter II of this manual; and APT, *NPM Guide*, pp.61-62.

56 OPCAT, Article 20(f). For further information, see commentary in Chapter II of this manual; Section 3.3.2 of Chapter III; and Section 7.5 of Chapter V.









## 5.2 Assessment of existing monitoring bodies and inventory of places of deprivation of liberty

At a minimum, the assessment of existing monitoring bodies should consider each body's:

- founding legislation or other basis of establishment;
- mandate;
- jurisdiction;
- powers;
- immunities;
- resources (human, financial and logistical);
- independence (real and perceived);
- relations with the authorities and other relevant actors; and
- working methods (e.g. objectives, types and frequency of visits, and monitoring methodology).[57]

In addition, the effectiveness of existing monitoring bodies should be taken into account. Assessments should highlight legal, structural and other characteristics that may conflict with the OPCAT requirement for NPMs to have functional independence. For example, a body may possess powers or duties that directly conflict with the OPCAT, such as the power to review or adjudicate upon detention or a duty to disclose confidential information. On the other hand, bodies may lack powers that are important for the execution of the NPM mandate; for example, the power to access all relevant information. Structural, administrative or budgetary dependence on the executive or other branches of government should also be analysed. Assessments should also note when a body has functions other than torture prevention or when a body's existing mandate blurs the distinction between torture prevention and investigation, such as when individual complaints of torture are received, assessed and adjudicated upon in-house. Furthermore, good practice suggests that the assessment exercise should draw conclusions and propose NPM options to facilitate the decision-making process.

57 *NPM Assessment Tool*, developed by the Association for the Prevention of Torture, on file with the authors.

Assessments of this kind have been conducted in a number of countries. In **South Africa** the Centre for the Study of Violence and Reconciliation, a national NGO, carried out a comprehensive inventory of existing monitoring mechanisms, analysing them in the light of the OPCAT's requirements. This assessment identified gaps in the monitoring of specific types of places of detention: namely, places where immigrants and refugees are detained. The assessment proposed some options for the South African NPM as a starting point for national consultations on the OPCAT.[58] In **Australia**, a recent assessment, which included a proposal for the NPM, was endorsed by experts contracted by the Australian Human Rights Commission. Similar inventories have been conducted by various actors (NHRIs, NGOs, experts, etc.) in other countries (including **Brazil**, **Mexico** and **Senegal**); it is generally accepted that these assessments have proven very useful in facilitating the decision-making process on the most appropriate NPM option.[59]

To determine the scope of the work of the future NPM, it is recommended that assessments take into account all known places of detention within the jurisdiction and control of the relevant State Party. It is worth mentioning here that the scope of places of detention, as defined by Article 4 of the OPCAT, is broader than prisons and police stations. The assessment should, therefore, take into account non-traditional places of detention as this has implications for the scope of the work of the future NPM and the expertise it will require. This assessment should also facilitate the evaluation of the resources (human, financial and logistical) needed to conduct an effective programme of preventive monitoring.[60]

An assessment of places of detention should provide four key types of information:

- classification of known places of detention by type (police stations, prisons, remand centres, psychiatric hospitals, drug treatment facilities, children's homes, etc.).

58 Olivia Streater, *Review of Existing Mechanisms for the Prevention and Investigation of Torture and Cruel, Inhuman and Degrading Treatment or Punishment in South Africa*, Centre for the Study of Violence and Reconciliation, 2008. Available at www.csvr.org.za.

59 APT, *NPM Guide*, p.10.

60 For further information on NPM resources, see Chapter V of this manual, especially Section 5.









- identification of which authority's jurisdiction each place of detention falls into: this is particularly important in federal states.
- location, size and capacity of each place of detention.
- basic profile of the detainee population (where known) of each place of detention: number of detainees, sex, age, and other relevant information (e.g. nationality, and ethnicity).

Before ratifying the OPCAT, **France** explored a number of NPM options. The *Médiateur de la République* (Ombudsperson's Office) conducted a preliminary mapping of places of detention; this exercise identified the types of places of detention in France and their number (5778 in total).[61]

It is necessary to keep in mind that an NPM may have a right of access to an institution that is not on this list. This is because, in accordance with the definition of "places of detention" under Article 4 of the OPCAT, an NPM is required to have access to any place where it suspects that someone is being held against his or her will in connection, factually or legally, with a public authority, including in so-called secret detention.[62]

While an assessment may be initiated by the leading actors campaigning for OPCAT ratification and implementation, it still requires the support and input of government agencies, representatives of staff in places of detention, human rights institutions, and members of civil society. An assessment of existing monitoring bodies and places of detention represents an excellent basis for further discussion about the most appropriate NPM.

## 6. Promoting continuous dialogue

Serious thought should be given to the possible NPM options at the earliest stages of the ratification process. In its Preliminary guidelines for the on-going development of NPMs, the SPT recommended that:

> The NPM should be developed by a public, inclusive and transparent process of establishment, including civil society and other actors involved in the prevention of torture; where an existing body is considered for

61 *Médiateur de la République Française*, *Lieux privatifs de liberté, garantir la dignité. Vers un mécanisme d'évaluation*, April 2007, pp.22-23. Available at www.apt.ch.

62 See commentary on Article 4 of the OPCAT in Chapter II of this manual.

designation as the NPM, the matter should be open for debate, involving civil society[.][63]

### 6.1 Torture prevention actors

The implications of OPCAT ratification and the possible NPM options should be discussed as part of a framework of broad dialogue on the OPCAT at the domestic level. Discussions should involve a wide range of actors.

- **Government authorities**

Representatives from all relevant ministries (local, provincial and/or national) with responsibility for places where persons are or may be deprived of their liberty, as defined by OPCAT, should be included in national OPCAT consultations; it should be remembered that places of detention are not limited to prisons and police stations under the OPCAT. Members of the permanent administration of the relevant ministries who have technical expertise should also be included, as should administrators and staff of places of detention. The involvement of the latter is key as the staff of places of detention are responsible for the care and custody of persons deprived of their liberty and, thus, will be deeply involved in OPCAT implementation at the institutional level.[64] Staff knowledge of and respect for the OPCAT and involvement in ratification and implementation, especially if this starts at the very beginning of the process, greatly enhances the effectiveness of NPMs' work.

- **Parliamentarians**

As members of the legislature, parliamentarians play a key role in drafting and adopting legislation to implement the OPCAT at the domestic level. They should be included in discussions from an early stage (i.e. before parliamentary debate takes place). Members of relevant specialist

63 SPT, First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2007 to March 2008, UN Doc. CAT/C/40/2, IV.B, 14 May 2008.

64 The working conditions of staff of places of detention have a direct impact on the conditions and treatment of detainees. There is a risk of abuse if the staff of places of detention are working in very bad conditions (e.g. if there is a high rate of staff turnover, poor training, and/or poor pay).









committees (e.g. committees on human rights, children, migrants, justice, and social affairs) may also be included in discussions.

- **National human rights institutions and ombudspersons**

NHRIs and ombudsperson[65] offices should also be included, particularly those that are under consideration as potential NPMs.[66] These institutions often have direct experience of issues affecting persons deprived of their liberty. Many have a mandate to promote the adoption and implementation of international human rights treaties, and to monitor respect of international obligations contracted by the State. Depending on the national context, NHRIs and ombudspersons may have the capacity to reach a wide audience and, thus, they are often useful partners in the campaign for ratification and effective implementation.

- **Organisations that monitor places of detention or provide services to detainees**

In many states, specific organisations or institutions carry out visits to places of detention, either to provide services (religious, health, legal, etc.) or to assess conditions of detention and the treatment of detainees. Such institutions include inspectorates, sentencing judges, community-based 'lay' visiting schemes, charity-based organisations and other non-governmental organisations. Their expertise is important as they often have particularly valuable insights to offer concerning the persons that would make appropriate NPM members or experts, and the bodies that should be considered as potential NPMs. Moreover, as the OPCAT may impact on their daily work, mandate and functioning, it is wise to get them involved from the start.[67]

65 Many existing institutions use the title 'ombudsman' as an anglicised version of the original Swedish term. Since this can imply an assumption about the gender of the office-holder, in this manual the term 'ombudsperson' is used. The term 'ombudsperson' includes public defenders and/or similar institutions, whatever their formal name.

66 For further details, see APT, *National Human Rights Commissions and Ombudspersons' Offices as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture*, APT, Geneva, January 2008.

67 See Section 7.3 of Chapter V of this manual.

- **Civil society organisations**

It is essential that the choice of organisations and/or individuals to represent civil society should be made by, or in consultation with, civil society organisations themselves; the choice should not be the result of a unilateral decision of the executive government.[68] Quite apart from the collaborative principles underpinning the OPCAT, unilateral decision-making may result in the exclusion of entities that interact relatively infrequently with the State but which nevertheless undertake significant work to prevent torture. OPCAT discussions should bring all relevant civil society organisations together.

#### Non-governmental organisations

Civil society organisations will naturally include leading human rights NGOs. However, in light of the broad definition of places of detention in Article 4(1), "civil society" should be interpreted in its broadest sense. The involvement of rehabilitation centres for torture survivors, and associations for detainees and/or their relatives, is vital since an inclusive decision-making process should provide a voice for individuals who have been detained and/or subjected to torture. These organisations are able to offer unique, first-hand observations about gaps (and appropriate remedies for these) in protections for persons deprived of their liberty. Other relevant organisations may include committees of detainees; faith-based groups; academic institutions; and associations or groups representing refugees, asylum-seekers, migrants, women, children, people living with disabilities, and ethnic or cultural minorities.[69]

#### Other professional associations

The range of relevant professional associations encompasses trade unions and/or similar professional associations representing lawyers, doctors and nurses, mental health practitioners, social workers, and existing and former staff of places of detention. On a practical note, these associations may also be brought in to help conduct an inventory of existing detention centres and monitoring bodies;[70] they may also play a critical role in identifying gaps in existing or draft legislation.

68 APT, *NPM Guide*, p.9.

69 APT, *NPM Guide*, p.9.

70 See Section 5 of this chapter.









- **SPT and other international or regional organisations[71]**

Regional and international NGOs and intergovernmental organisations can also be useful participants. The SPT has emphasised its desire to fulfil its advisory role under Article 11(1)(b)(iv), including via offering recommendations and observations to States Parties to strengthen the mandate and capacity of NPMs. It is important to note that the SPT can provide States Parties with advice irrespective of whether the countries concerned have received an SPT in-country visit.

### 6.2 Consultations on the most appropriate NPM option

The OPCAT requires a particular approach to human rights: one that prioritises constructive dialogue as a tool to implement preventive measures. Therefore, it is essential to ensure broad support for ratification amongst all interested actors, and to promote exchanges of information on, and a common understanding of, the OPCAT. Gathering relevant stakeholders together to discuss the OPCAT and its implications can contribute to building support for ratification and can also help to identify potential areas of resistance.

Government officials, civil society, detainees, and all other relevant national actors must view the country's NPM as credible and independent for it to be effective. This can only happen if the process of selecting the NPM is genuinely inclusive and transparent. The process should help to build the support the NPM needs to effectively discharge its duty to prevent torture and ill-treatment.

As discussed at the start of this section, the SPT recommends that States Parties engage in a transparent, inclusive and participative process for selecting NPMs. Good practice suggests that NPM options should be discussed in broad consultations as soon as a state begins to consider ratifying the OPCAT. Moreover, the stakeholders that will participate in national dialogue should be identified by an initial consultation process rather than by a unilateral decision. All consultations should be well-publicised and have sufficient scope to allow examination of all relevant issues. Similarly, governments should publicise their NPM selection

71 See Sections 7.5 and 7.6 of Chapter V of this manual.

processes and announce opportunities for participation. They should be open about decision-making criteria. Last but not least, they should proclaim the outcome of consultations, including the final decision regarding the designated NPM(s).

Consultations may take the form of national roundtables, conferences, seminars, written submissions, or regional meetings.[72]

- **National seminars and OPCAT working groups**

In **Benin**, for example, two NGOs organised a national seminar following ratification that led to the establishment of a multidisciplinary working group that, in turn, drafted an NPM proposal.

- **Written submissions**

In **Australia**, consultations took the form of written submissions. In May 2008, the Attorney General's Office invited submissions from interested national actors. The Australian Human Rights Commission and the Law Council of Australia, among others, responded. This consultation was followed by seminars in a number of States and Territories to discuss Australia's NPM options.

- **Regional and international events**

Many States Parties find it highly instructive to study other countries' NPM selections. Similar issues and concerns in designing or choosing an NPM frequently arise in States in the same region. Thus, regional events may facilitate the exchange of information on best practice regarding OPCAT implementation and NPM options. In addition, the 'peer pressure' such events may create between States may mobilise national processes; however, these events may be more productive if held once national processes are already underway. The first regional seminar on OPCAT implementation took place in 2007 in **Paraguay**. Representatives from Southern Market Common (MERCOSUR/Mercado Común del Sur) States shared information about OPCAT implementation in their respective countries. The SPT and members of civil society also participated. In 2008, the APT co-organised an international seminar in **Argentina** on the challenges

72 APT, *Civil society and National Preventive Mechanisms*, APT, Geneva, June 2008, pp.3-5. Available at www.apt.ch.









of OPCAT implementation in federal and decentralised States; it was attended by representatives from 10 states from the Americas, Europe and Australasia.

Inviting regional experts (usually government representatives, representatives from the NGOs that are leading OPCAT advocacy in particular countries, or members/ staff from established NPMs) to national events may enhance the effectiveness of discussions. **Kazakhstan**, for instance, sent a delegation to another State Party – the United Kingdom – to meet with key OPCAT national actors and existing monitoring bodies. In **Romania**, the Ministry of Foreign Affairs instructed its worldwide embassies to collate information on OPCAT implementation from host countries.

- **Engagement with the SPT[73]**

Finally, existing or prospective States Parties should consider inviting the SPT to national or regional meetings in order to receive more in-depth technical advice. The SPT views its direct work with NPMs as essential for effective torture prevention. It has emphasised that it "must have the capacity to work with NPMs … [during] the crucial early phase of … development".[74] Therefore, national actors may invite SPT members to participate in national consultations on NPM options. They may also provide the SPT with draft NPM legislation for comments and observations on OPCAT compliance. In **Paraguay**, consultations were undertaken with international and regional organisations, including the SPT, on draft legislation to designate a new national commission to prevent torture as the NPM. The legislation was presented to Congress on 26 June 2007.[75]

73 See also Section 3.3.1 of Chapter III of this manual.

74 SPT, First annual report, §54.

75 For more information on Paraguay, see APT, *OPCAT Country Status*. At the time of the writing, the draft law was under consideration by Parliament.

## 7. NPM options

Once these steps have been taken, NPM options should emerge. The next question to consider is whether to designate a new or existing body as NPM – or, indeed, whether several bodies (new or existing or a mixture of both types) should be designated. Reviewing places of detention, and assessing existing monitoring bodies in the light of the OPCAT's criteria, may assist national actors in evaluating NPM options. The SPT recommends that the decision on the most appropriate NPM should take into account the following additional factors: complexity of the country, its administrative and financial structure, and its geography.[76]

The SPT has emphasised that NPMs should "complement existing systems of protection against torture and ill-treatment. They should not replace or duplicate the monitoring, control and inspection functions of governmental and non-governmental bodies".[77]

No one option is inherently superior to the others. Whatever its formal structure, an NPM will not be effective if it does not enjoy the key requirements described above (independence, diverse composition, and the powers and guarantees required to monitor places of detention effectively).[78] However, experience has demonstrated that particular challenges may arise in the relation to designating new versus existing mechanisms, and in designating a single body versus multiple bodies.[79]

### 7.1 New specialised bodies

States Parties may decide to establish a new body specifically to carry out the NPM mandate. Such bodies will have a clear and focused preventive mandate and, thus, will be able to give priority to torture prevention issues; therefore, they may have more impact than existing institutions with broader mandates. States Parties may also find it easier

76 SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, 25 March 2010, §49.

77 SPT, Third annual report, §50.

78 For further information, see Section 5.1 of this chapter.

79 For a more detailed consideration of these issues, see APT, *NPM Guide*, Chapter 10.









to adopt new legislation to establish a new mechanism than to amend the legislation establishing existing, operational bodies. Moreover, new bodies, established by new legislation, may be more OPCAT-compliant in terms of their mandates, independence, powers, and diversity of staff than existing bodies.

However, this option is not without challenges. A new and, thus, unknown body may face difficulties in building public confidence regarding its work, as well as in establishing its legitimacy and credibility, and in being perceived as independent. Securing access to all places of detention may also be challenging for a new NPM. Awareness-raising activities aimed at informing the authorities and civil society about the NPM's mandate, role, powers and guarantees will be crucial in surmounting these challenges. A long-term perspective is needed when establishing a new, specialised body; it must be granted sufficient and sustained human, logistical and financial resources. In addition to awareness-raising work, the body itself should establish and maintain constructive dialogue with the relevant authorities, existing institutions with a similar mandate, and civil society organisations.

In **Senegal**, as a result of consultations with a variety of national actors (including civil society organisations), and preliminary assessments of existing monitoring bodies, the Government decided to create a new body to carry out the NPM mandate: the General Observer of Places of Deprivation of Liberty (*Observateur général des lieux de privation de liberté*).

### 7.2 National human rights institutions

States may decide to give the NPM mandate to a national human rights institution (NHRI). The term NHRI commonly refers to a "body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights."[80] NHRIs are usually grouped into two broad categories: national human rights commissions and ombudspersons' offices.

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

The OPCAT requires States Parties to give due consideration to the United Nations Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (the 'Paris Principles'[81]).[82] However, this provision should not be interpreted as a reason to automatically grant the NPM mandate to an NHRI. It should rather serve as a guide to the key issues and challenges of designating and establishing NPMs.

### 7.2.1 Existing NHRIs

Designating an existing NHRI as the NPM[83] should not be viewed by States Parties as an inexpensive way of implementing their obligations under the OPCAT. Granting an additional mandate to existing NHRIs will always require additional resources, both human and financial. The SPT has, for instance, stated that it is important to distinguish between the general human rights mandate of NHRIs and the specific preventive mandate of NPMs.[84] Nevertheless, designating an existing NHRI has several advantages. An NHRI may already enjoy significant public confidence and have a high profile as a key national human rights actor.[85] Furthermore, some NHRIs have accumulated experience in detention monitoring. Thus, some States Parties consider this option to be a politically expedient and relatively inexpensive way to avoid duplicating the work of existing institutions.

Independence is key for NPMs and, in this regard, the situation of NHRIs varies. Some NHRIs have a record of independence from the

81 Paris Principles, UN Doc. GA Res 48/134, 20 December 1993.

82 OPCAT, Article 18(4).

83 Albania, Armenia, Azerbaijan, Chile, Costa Rica, Cyprus, the Czech Republic, Denmark, Estonia, Georgia, the Former Yugoslav Republic of Macedonia, the Maldives, Mali, Mauritius, Mexico, Moldova, New Zealand, Poland, Spain, Sweden and Uruguay have all designated or established an NHRI as their NPM or part thereof. For further information see www.apt.ch.

84 SPT, Second annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2008 to March 2009, UN Doc. CAT/C/42/2, 7 April 2009, §49.

85 APT, *National Human Rights Commission and Ombudsperson's Offices/ Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture*, APT, Geneva, January 2008. Available at www.apt.ch.









executive arm of their country's government, particularly when their mandate is enshrined in a national constitution[86] and is compliant with the Paris Principles. As with new specialised bodies, it is essential that NPMs are perceived as independent, legitimate and credible. However, some existing NHRIs do not comply with all OPCAT requirements; for instance, some NHRIs are mandated to provide general policy advice to governments on human rights issues and, thus, their members may include governmental representatives. This type of NHRI would fall short of the OPCAT requirements for NPMs.[87]

Designating an existing, independent NHRI as an NPM involves challenges in relation to the institution's mandate and methodology, as well as its composition and resources.

First, some NHRIs adopt a legalistic approach focused on determining whether specific administrative actions comply with proper administrative procedures and/or standards of fairness. They may find it difficult to adopt the policy approach required by the OPCAT as this involves commenting on draft and existing legislation relevant to the NPM mandate.[88]

Second, an NHRI's mandate is usually broad, in some cases ranging from human rights promotion to quasi-judicial powers. Many NHRIs are granted powers to receive and investigate individual complaints about violations. The OPCAT distinguishes between regular visits to all places of detention to prevent on-going and future ill-treatment of any detainee in the place, and visits to particular individuals in order to investigate ill-treatment that has already taken place. While there may be considerable overlap between these two functions in practice, undertaking visits only after the fact, in order to investigate individual cases, usually fails to achieve the broad preventive effect that is the object of the OPCAT. The OPCAT also distinguishes between visits with the primary purpose of protecting detainees from abuse, which may require advocacy on behalf of detainees (i.e. a human rights approach), and visits that are mainly intended for other purposes (e.g. general inspections, reviews of fiscal performance, or criminal or impartial fact-finding missions that are part

86 APT, *NPM Guide*, p.83.

87 APT, *NPM Guide*, p.82.

88 APT, *NPM Guide*, p.82.

of an adjudicative process).[89] Combining these two mandates may be challenging for existing NHRIs.

Third, many NHRIs already undertake visits to places of detention. However, while some institutions react to, and act on, individual complaints, others carry out visits to places of detention to analyse thematic issues. Thus, prior experience in monitoring places of detention may not be sufficient to ensure that an NHRI is in a position to carry out systematic preventive visits to all places of detention in compliance with OPCAT requirements.[90]

Fourth, the nature of NHRIs (and especially ombudspersons' offices) often means that their members and staff are predominantly lawyers. However, the NPM preventive mandate requires the expertise of members from diverse professional backgrounds, including medical fields.[91]

Fifth, the nature of NPMs' preventive work means that they require access to confidential information, which should be strictly privileged.[92] Maintaining the confidentiality of this information may represent a challenge for an existing institution, particularly when the NPM role is carried out by multiple departments within the institution.

Finally, experience has demonstrated that assuming a new, specific mandate may represent a challenge for an existing NHRI in terms of decision-making processes and the division of tasks and responsibilities within the institution. Thus, these operational issues should be taken into consideration at the time of designation.[93]

Therefore, amendments to legislation, methodological and structural changes, and the provision of additional human, logistical and financial resources will almost always be needed if an existing NHRI is to assume the NPM role.

One common practical solution is to create a separate NPM unit within

89 APT, *NHRIs and Ombudspersons as NPMs*, p.4.

90 APT, *NPM Guide*, p.83.

91 APT, *NPM Guide*, p.83.

92 OPCAT, Article 21. For more information, see commentary in Chapter II of this manual.

93 For further information on this issue, see Section 6.3 of Chapter V of this manual.









the NHRI to avoid any confusion between the institution's existing mandate and the specific preventive NPM mandate.[94] The NPM mandate should, however, be perceived as an institutional priority for the NHRI as a whole and must be sustainable over time.

In the **Maldives**, the National Human Rights Commission, established a specific unit, composed of five staff members with different professional backgrounds, when it was designated as the NPM. Procedures are being developed to coordinate the efforts of the NPM and complaints units in order to ensure an efficient division of tasks and responsibilities, and to avoid possible duplications or lacunas.

The Public Defender of Rights (an ombudsperson's office) is the **Czech Republic**'s NPM. To fulfil the need for a multidisciplinary team, it employs specialists, including psychologists and medical doctors, on a part-time basis as part of the visiting team. These experts are required to respect the Public Defender of Rights' rules and regulations, including those concerned with confidentiality of information.[95]

### 7.2.2 New NHRIs

There are several situations in which the absence of an NHRI has a significant impact on national discussions about the designation of the NPM. National actors may decide to seize the opportunities that national dialogue on the OPCAT and on NPM designation offer to establish an NHRI to assume the NPM mandate. Conversely, an on-going national debate on the establishment of an NHRI may offer an opportunity to discuss NPM designation. This is the situation for instance in **Chile**, **Japan** and **Uruguay**.

Despite lacking NHRIs, some States Parties (e.g. **Switzerland**, which established the Commission for the Prevention of Torture in 2009) have decided to give priority to the designation and establishment of NPMs. Although new NHRIs may face similar challenges to existing NHRIs in assuming the NPM mandate, the establishment of a new NHRI should

94 The SPT recommends that when existing institution is designated as NPM the NPM should be constituted as a separate unit or department, with its own staff and budget. See SPT, Third annual report, §51; and Section 6.1 of Chapter V of this manual.

95 APT, *OPCAT Country Status*.

be seen as an opportunity to create a fully OPCAT-compliant institution. Establishing a new NHRI also allows for the specificity of the NPM preventive mandate and approach to be taken into consideration from the outset.

Independence and the need for multidisciplinary composition are key among the issues that should be taken into account when policy-makers are deciding on the type of NHRI (e.g. ombudsperson's office, national human rights commission or human rights consultative body) that will be designated as the NPM. Such elements will impact on the structure and mandate of the NHRI, as well as on the process of selecting members and staff. When a new body is created, all of these issues can be taken into consideration in the body's mandate and establishing legislation, as can additional OPCAT requirements for NPMs, such as access to all places of detention; access to all relevant information and persons; immunities for NPM members; protections against reprisals for individual (and organisations) who have cooperated with an NPM (or NPMs); and the capacity to give advice on legislation and policies.

Finally, structural and methodological procedures must be established to avoid confusion between the wider mandate of the NHRI and the specific preventive mandate of the NPM; for instance, it may be necessary to establish an NPM unit or to ring-fence funding for the NHRI's NPM work. As with existing NHRIs, it is essential that the NPM mandate is perceived as a sustainable institutional priority for the new NHRI as a whole.

### 7.3 NHRIs plus civil society organisations[96]

Some States may decide to designate an existing institution as the NPM while also formally involving civil society organisations in the NPM mandate, particularly in relation to preventive monitoring tasks; this may represent an effective way to address the fact that many existing institutions face limited resources and/or expertise regarding detention monitoring. The process of selecting civil society organisations to be involved in fulfilling the NPM role should be inclusive and transparent, regardless of whether whole organisations are expected to participate or whether individual experts are appointed.

96 See Section 6.2 of Chapter IV of this manual.









Involving civil society organisations may also help to legitimise both an NPM's mandate and its credibility as an institution, not least because civil society organisations are often structurally independent of the government. Their participation may ensure better coverage of places of detention at the national level. In the NHRI plus civil society organisations option, the latter usually participate in the programme of visits to places of detention and in report drafting. Clear procedures should be adopted and implemented to define the powers and duties of civil society organisations in relation to the NPM tasks. Moreover, civil society organisations should be afforded guarantees, immunities and powers when participating in NPM tasks. Finally, procedures regarding confidentiality and information-sharing should also be established.

However, the inclusion of civil society organisations may represent a challenge, especially when an organisation with a solid track-record of monitoring places of detention has (or has had) an antagonistic relationship with the government. Moreover, certain civil society actors may experience difficulties in reconciling a critical attitude to authority with the cooperative dialogue required by the OPCAT. Furthermore, becoming a formal part of an NPM also means assuming the statutory authority, powers, structure, finances, and responsibilities of the NPM: the requirement to act independently of their own organisational interests may be difficult for some civil society entities to accept, especially when they lack operational flexibility.[97] Therefore, clear procedures need to be put in place, either via legislation or formal agreements, to ensure a clear division of roles and responsibilities between the main NPM institution and the civil society organisations with which it shares the NPM mandate.

At the time of ratification, **Slovenia** specified that "the competences and duties of the NPM will be performed by the Human Rights Ombudsperson and in agreement with him/her also by Non governmental organisations".[98] The Human Rights Ombudsman selects the NGOs on the basis of a public tender open to all NGOs registered in Slovenia. Formal agreements are concluded between the Human Rights

97 APT, *Civil society and National Preventive Mechanisms*, p.13.

98 Notification made by Slovenia under Article 17 of the OPCAT upon ratification. Available at http://treaties.un.org.

Ombudsperson and the selected civil society organisations on an annual basis;[99] procedures were then established to ensure that the selected organisations act in accordance with the regulations and instructions of the Human Rights Ombudsperson.[100] Visits to places of detention are carried out by a mixed team including members of the Human Rights Ombudsperson's Office and experts from the three selected civil society organisations.

### 7.4 Multiple bodies

States Parties may choose to designate several institutions to share the NPM mandate. This option, which is permitted under Article 17, is usually adopted by States with a large territory or a complex structure (e.g. a federal or decentralised structure). States may select existing institutions, create one or more institutions, or designate a combination of both types of institution. There are at least four key types of multiple NPMs.

- **Geographically-based NPMs**

Some States designate multiple bodies to assume the NPM mandate according to geographic divisions. This option is likely to be employed in large or decentralised states.

- **Jurisdiction-based NPMs**

In federal states, the responsibility for places of deprivation of liberty usually falls under several jurisdictions (i.e. federal versus local). Therefore, States may decide to designate multiple bodies, each of which covers the NPM role in a particular jurisdiction. In **Germany**, two bodies were designated: the Federal Agency for the Prevention of Torture (*Bundesstelle zur Verhütung von Folter*) has monitoring responsibility for all detention facilities under federal jurisdiction, while the Joint-Commission of the Länder (*Kommission zur Verhütung von Folter*) is responsible for detention facilities falling under the Länders' jurisdiction.[101]

99 The institutions selected are the Slovenian Red Cross, the Primus Institute, and the Legal Information Centre for NGOs (*Pravno-Informacijiski Center Nevladnih Oganizacij-Pic*). See APT, *OPCAT Country Status*.

100 For further information, see Section 6.3 of Chapter V of this manual.

101 APT, *OPCAT Country Status*.









- **Thematically-based NPMs**

Some States decide to designate several bodies, each with specific expertise (i.e. concerning juveniles, migrants, police, etc.) to carry out NPM tasks. Each institution is responsible for monitoring the places of detention that fall within its thematic area of expertise (e.g. police detention units, places of detention for juveniles, or homes for elderly people). **New Zealand** opted for this option and designated four existing institutions[102] as the NPM; these are coordinated by the New Zealand Human Rights Commission, which acts as the central NPM. The Office of the Children's Commissioner monitors children and youth residences; the Inspector of Service Penal Establishments monitors the facilities of the Defence Force; the Independent Police Conduct Authority monitors police stations; and the Office of the Ombudsmen is in charge of other places of deprivation of liberty, including prisons, immigration detention facilities, medical and psychiatric places of detention, and youth justice residences.

- **A combination of the other three options**

A combination of geographically-based, thematically-based and/or jurisdiction-based bodies may also be chosen. For instance, the **United Kingdom** designated 18 existing bodies, coordinated by Her Majesty's Inspectorate of Prisons. These bodies were selected on the basis of their expertise and scope of jurisdiction.[103]

The main advantage in designating several institutions to assume the NPM mandate is that it secures better thematic and regional coverage of places of detention. However, this option is not without challenges. This option requires good coordination between bodies to avoid gaps and/or duplication of efforts, and to ensure sufficient coherence of standards and methodologies. The overall scheme must be administratively manageable, and it must obtain effective and consistent results. All the bodies designated as NPMs must meet all the OPCAT's requirements regarding independence, resources, powers, guarantees and immunities.

102 Office of the Ombudsman, Independent Police Conduct Authority, Office of the Children's Commissioner, and Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces.

103 APT, *OPCAT Country Status*.

Furthermore, at least one body must have authority vis-à-vis places that are not normally used for detention but in which persons may, in fact, be detained with government involvement or acquiescence. At least one body must have a clear coordinating role and the means of generating system- or sector-wide analysis and recommendations, publishing an annual report, and liaising with the SPT.[104] The State Party should also guarantee "contacts between the SPT and all units of the mechanism".[105]

### 7.5 Other bodies

Some existing bodies cannot execute the NPM mandate effectively when acting alone; however, they may still play an important role in torture prevention at the domestic level by providing information and assistance to the country's NPM(s), or complementing the work of the NPM(s). These bodies may include certain judicial offices, community-based independent visiting schemes, and NGOs.

#### 7.5.1 Judicial offices[106]

The involvement of the judiciary in the process of deprivation of liberty means that judicial offices may not be eligible to be NPMs due to the potential for conflicts of interest when those mandated with making decisions about deprivation of liberty are also involved in monitoring detention. The final paragraph of the Preamble to the OPCAT emphasises that NPMs are intended to constitute a "non-judicial means" of torture prevention. This suggests that the independence required includes independence from the judiciary as well as from the executive.

The confidential, independent, and non-adjudicative nature of NPMs' work is intended to engender an atmosphere of openness on the part of detainees and officials at places of detention. Prisoners may be less willing to disclose their own misconduct or to complain about conditions, and individual prison staff may be less willing to admit problems, if they are not sure whether a judicial authority will make use of the information as evidence in

104 APT, *NPM Guide*, p.89.

105 SPT, Third annual report, §53.

106 APT, *NPM Guide*, p.86.









another setting.[107] Thus, conflicts of interest may arise if judicial authorities are also carrying out NPM functions. The OPCAT was intended to open places of detention to outside observation and analysis by experts from a range of disciplines. This preventive/ policy approach differs from the legal 'after the fact' adjudication approach that characterises the work of the judiciary. That said, judicial institutions undertaking detention monitoring may play an important role in the prevention of torture and they may, thus, represent ideal partners for NPMs at the domestic level.

#### 7.5.2 Community-based independent visiting schemes[108]

Community-based independent visiting schemes may also initially seem suitable for designation. Community-based independent visiting schemes promote inspections of places of detention (usually prisons or police stations) conducted by individuals (some of whom are volunteers) from the community. Visitors are usually appointed to a specific place of detention, which they visit on a regular and frequent basis in order to collect complaints, and to check conditions and the treatment of detainees. Thus, they acquire an in-depth knowledge of the functioning and management of the place and the situation of persons deprived of their liberty there.

However, this system is not without limitations in relation to OPCAT criteria. As community-based independent visiting schemes are usually attached to a specific place of detention, they may lack the objectivity and professional distance required to engage in constructive dialogue on implementation of system-wide recommendations. Furthermore, community-based visiting schemes are generally designed to focus on frequency of visits, rather than the development of system-wide analysis. Thus, ensuring coherence of standards, working methods and recommendations is a challenge. In addition, most schemes actively recruit non-expert volunteers who may not have the privileges and immunities required by the OPCAT. Finally, such schemes may lack the power to

107 Note that, with the consent of the individual concerned, under Article 21(2) of the OPCAT an NPM may legitimately pass any information that it receives concerning allegations of torture to the competent authorities for action. For further information, see commentary in Chapter II of this manual.

108 APT, *NPM Guide*, p.87.

submit observations and comments on draft and existing OPCAT-related legislation.

Introducing changes to a community-based visiting scheme often drastically reduces the number of individuals who can be involved, especially when these changes involve making professional qualifications a pre-requisite for participation as this essentially defeats the purpose – broad coverage and high frequency of visits – of such a scheme. However, community visitors may be excellent external sources of information for NPMs. They can often provide an external network of surveillance that helps the NPM in strategically and efficiently targeting its professional knowledge, expertise, and legislative powers.

Community-based visitors can also complement the work of professional monitoring bodies involved in carrying out the NPM mandate. In such cases, independent visitors help to ensure the transparency of the relevant place of detention via ensuring there is a regular outside presence. Often visitors from community-based schemes are in an ideal position to collect complaints; these can then be reported to other bodies, which can, in turn, conduct in-depth visits.

In **South Africa**, the Judicial Inspectorate of Prisons is mandated to inspect prisons in order to report on the treatment of prisoners and the conditions of detention. The institution regularly appoints Independent Correctional Centre Visitors.[109] Appointments are made in consultation with community organisations, after a public call. The visitors receive complaints through private interviews with prisoners and then report through an electronic system to the Office of the Inspecting Judge, which may then conduct an in-depth follow-up visit. The data collected also enables the Office of the Inspecting Judge to identify systemic problems.

109 As of 31 March 2009, there were 191 Independent visitors appointed nationally on a three year contract. See Inspecting Judge of Prisons, Annual Report for the period 1 April 2008 to 31 March 2009. Available at http://judicialinsp.pwv.gov.za/Annualreports/Annual%20Report%202008%20-%202009.pdf.









### 7.5.3 NGOs[110]

NGOs may, at first glance, seem like good candidates for designation. Some NGOs undertake preventive and monitoring visits to places of detention and, by definition, they generally enjoy structural independence from executive government. However, the statutory authority, power, structure and finances that designation involve also imply responsibilities and a lack of flexibility that an NGO (and its membership) may find difficult to accept and which may threaten its public advocacy work. Moreover, NGOs may find it difficult to adopt a policy of cooperative dialogue with governments, especially when they usually enjoy a more confrontational relationship with governmental authorities. Although NGOs alone do not represent suitable NPM options, they can complement and support the work of NPMs, as demonstrated by the NHRI plus civil society organisations option.[111]

NGOs may, thus, be well-placed to undertake other activities in respect of NPMs. These activities include participation in discussions about the selection of NPM members, and the provision of training and expertise to the future members and staff of the NPM. NGOs often play the role of 'watch dog', providing external scrutiny to ensure accountability, particularly by monitoring implementation of recommendations and reviewing aspects of the relevant NPM's work, including:

- its access to people, places and information;
- the effectiveness of its detention monitoring; and
- the way civil society, persons deprived of their liberty, and detention authorities perceive the NPM's work.

The on-going, external evaluation that NGOs can offer enables NPMs to take action to tackle weaknesses. These findings may also be conveyed to the SPT for further input.

Above all, the designation and establishment of an NPM should never be viewed as an opportunity to close places of detention to external scrutiny by NGOs and other civil society organisations.

110 APT, *NPM Guide*, p.84.

111 For further information, see Section 7.3 of this chapter; Sections 6.3 and 7.3 of Chapter V of this manual; and APT, *Civil Society and National Preventive Mechanisms*.

## 8. Enshrining the NPM mandate in law

Once consultation has led to a decision on the NPM's organisational form, the next step is to create draft proposals to establish the NPM by law, either in a constitutional or legislative text.[112] A constitutional basis is generally preferable to a basis in ordinary legislation, or even to a decree, as it confers additional independence on the institution.[113] It is vital that the law specifies the NPM's roles and responsibilities, particularly when the intention is to create more than one body to fulfil the NPM mandate. It should also be made clear that the NPM's mandate is a preventive one.

Depending on whether the intention is to designate an existing body, or create a new one, it may be necessary to amend existing laws or draft new ones. In either case, the law establishing the NPM should encompass the key elements set out by the OPCAT. The APT has provided a detailed explanation of these provisions in its publication *NPM Guide*. The key requirements for effective NPMs are summarised below.[114]

- Mandate and powers[115] – The independence of the NPM will be undermined if the executive government has the legal authority to alter its mandate, composition and powers, or to dissolve or replace it, at will.
- Composition[116] – An NPM's founding legislation should include specific provisions regarding the composition of the body, including the need for multidisciplinary expertise relevant to torture prevention, members of both sexes, and adequate representation of the country's key ethnic and minority groups.
- Funding[117] – Since independent and sufficient financing is vital to ensure both operational autonomy and independent decision-making, legislation must specify the source and nature of funding, including annual funding allocation procedures, public reporting and audit procedures, and independence from executive control.
- Immunities and privileges for members[118] – Under Articles 21 and 35 of the OPCAT, legislation should ensure protections for NPM members, such as immunity from personal arrest or detention, and from seizure or surveillance of papers and documents; non-interference with communications; and protection from legal action in respect of words spoken or written, or acts carried out in the course of the performance of their duties. Exceptions to general search and seizure powers under criminal, civil, or administrative law may also be necessary to protect confidential information from disclosure.
- Duration of office, and appointment, dismissal and appeals procedures and criteria for members[119] – To ensure independence, legislation should encompass, among other issues, selection procedures for members; members' personal and institutional independence from state authorities; methods to resolve incompatibilities of functions; methods to ensure non-interference from the executive; the need for both transparency and on-going consultation with relevant bodies; and operational autonomy in the appointment of staff. It is also important for NPM members to have sufficient security of tenure for the duration of their terms of office.

In some instances, consultation on legislation finishes before parliamentary debate starts. The same actors should be able to comment on draft legislation before and during presentation to parliament to ensure that the law that is eventually passed does not differ from draft proposals to an unacceptable degree. The drafters of the NPM proposal should remain involved at all stages of legislative review, including when the proposal is examined by relevant parliamentarian committees (e.g. committees concerned with human rights).

112 Paris Principles, Competence and Responsibilities, §2.

113 APT, *NPM Guide*, p.39.

114 See Section 5.1 of this chapter for a more detailed discussion of these issues. See also the commentary on the various Articles mentioned below in Chapter II of this manual.

115 APT, *NPM Guide*, p.39.

116 APT, *NPM Guide*, p.52.

117 APT, *NPM Guide*, p.47.

118 APT, *NPM Guide*, p.42.

119 APT, *NPM Guide*, p.41; and SPT, Third annual report, §52.

In **Paraguay** and **Togo**, OPCAT working groups (comprising representatives from the Ministries of Foreign Affairs and Justice, NHRIs, and civil society organisations) were formed to draft OPCAT-related legislation. In **Honduras**, the National Congress adopted a formal measure recognising the need for a broad and inclusive process to draft a law to establish the country's NPM. The National Congress involved a wide range of stakeholders in the drafting process of the NPM law, which was adopted in September 2008.[120] In **Argentina**, Members of Congress are considering a draft NPM legislation based on a proposal prepared by a civil society platform. The draft NPM legislation examined by the Argentinean Congress also includes some elements from two additional proposals presented by other stakeholders.

Once an NPM is designated, its development is an on-going obligation for the relevant State Party. The State Party should inform the SPT when relevant laws enter into force. This facilitates direct contact between the designated NPM(s) and the SPT, in accordance with the State Party's duties under the OPCAT.

Depending on the level of detail provided in the legislation, implementing laws or policies may also be needed to regulate practical elements of the future work of the NPM. As discussed above,[121] it is vital that the NPM be granted sufficient human, financial, and logistical resources to enable it to carry out its mandate independently. NPM legislation drafters and other key actors should remain mobilised to ensure this happens.

120 Following drafting meetings with relevant actors, a law to create an NPM was produced in November 2007, debated by Congress, and finally adopted in September 2008.

121 See Section 5.1 of this chapter; and also Section 5 of Chapter V in this manual.









## 9. Steps towards OPCAT ratification and NPM designation

1. Put the OPCAT on the political agenda
2. Decide on the timing of OPCAT ratification and implementation
3. Conduct an assessment of existing monitoring bodies and an exercise to map all places of detention
4. Promote continuous dialogue with interested actors via:
   - Involving torture prevention actors in the national dialogue on the OPCAT, and
   - Consultations on NPM options
5. Consider the NPM options:
   - New specialised body
   - NHRI
   - NHRI plus civil society organisations
   - Multiple bodies
6. Enshrine the NPM's mandate in law

# Chapter V

# Operational Functioning of NPMs

Contents

## 1. Introduction

The previous chapter dealt with OPCAT ratification and National Preventive Mechanism (NPM) designation. This chapter focuses on the next phase of the process: it aims to examine the practical challenges associated with the establishment and functioning of NPMs. Examining the operational aspects of existing NPMs' work is particularly useful for NPMs that are starting to implement their mandates. This chapter aims to assist them, as well as other external stakeholders, in assessing their own work and practice. However, this chapter may also prove useful at the designation stage in terms of assessing existing bodies and/or defining criteria for the establishment of a new body.

As the title of its Preliminary guidelines on the on-going development of NPMs ('Preliminary guidelines')[1] indicates, the Subcommittee on Prevention of Torture (SPT)[2] considers that establishing an effective NPM should be viewed as a process that will develop and evolve over time. Therefore, this chapter explores examples of good practice in order to assist designated NPMs to identify aspects of their functioning that may need to be improved for their work to be more effective. However, as the treaty only entered into force in 2006, OPCAT implementation is still at an early stage and, thus, there are relatively few operational NPMs to examine.

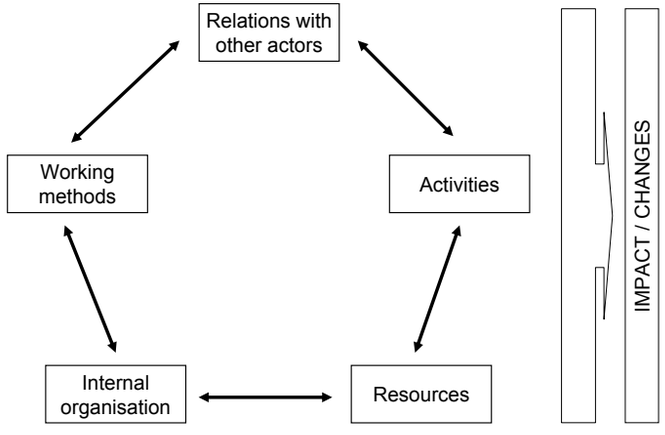
The APT has developed a holistic analytical framework to consider the key aspects of the functioning of an NPM.[3] This analytical tool is composed of five interrelated dimensions. The issue of independence intersects all five dimensions. As discussed in Chapter IV of this manual, independence should be enshrined in the legal basis for the NPM.

1 Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (the 'Paris Principles'), UN Doc. GA Res 48/134, 20 December 1993.

2 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

3 The initial version of the tool was jointly developed by the APT and TC-Teamconsult, a company based in Switzerland and Germany that specialises in institutional development. It was further refined during a meeting in Geneva in March 2009.

**Elements of NPM Functioning**




| | |
|---|---|
| Working methods | Preventive approach, visit methodology (interviews in private, selection of detainees, access to files and registers, cross-checking information, etc.), preventive analysis beyond visits. |
| Activities | Visits, visit reports, recommendations, annual reports, observations on existing or draft legislation. |
| Resources | Human (members, staff, experts), financial (budget, budget approval procedures), logistical (offices, equipment). |
| Internal organisation | Structure, roles and responsibilities, internal procedures (these will depend on the type of NPM: national human rights institution (NHRI), multiple NPMs, NHRI plus civil society organisations, etc.). |
| Relations with other actors | Authorities (in relation to NPM independence, cooperation), the media, civil society, the SPT, international and regional organisations, other NPMs. |
| Impact | The work of the NPM should result in positive changes in efforts to prevent torture; it should contribute to the reduction of risks of torture and ill-treatment (including via reinforcing safeguards) and to the improvement of both detention conditions and the treatment of persons deprived of their liberty. |







## 2. Establishing an NPM: getting started

As discussed at the end of Chapter IV, NPM designation should be enshrined either in the State Party's constitution or its legislation; the legal basis for the NPM should ensure that the key guarantees and powers required for the NPM to carry out its mandate are provided.

The implementation of this legal basis via the establishment of the NPM is especially challenging when a new specialised body is created to carry out the NPM mandate.[4] The selection of the NPM's members is of particular importance as the first members will be responsible for establishing the legitimacy, credibility and independence of the new body. Initial funding must be adequate to ensure the effective functioning of the NPM. Once the members have been selected and funding ensured, important steps must be taken regarding logistical resources (offices, personnel), internal organisation and development of working methods: the adoption of internal procedures and the creation of a programme of work, with associated methodologies, are especially important.

When an existing institution is designated as the NPM, it should not be assumed that the NPM mandate can be effectively implemented within the institution's existing legal basis, budget, structure and working methods. As noted in Chapter IV (Section 7.2.1), existing institutions will usually have to amend their legal basis and make key operational changes (regarding staff, funding, institutional priorities, methodology, etc.) in order to take on the NPM mandate. Therefore, institutions should assess their functioning in light of the OPCAT requirements, with a particular focus on the following aspects:

- identifying the resources allocated specifically to the NPM and the need for additional resources (human, logistical and financial);
- defining the internal organisation (structure) of the institution, particularly in relation to which department(s) will carry out NPM tasks; and
- defining the NPM's working methods, particularly in relation to adopting a preventive approach.

4 See Section 7.1 of Chapter IV of this manual.

The initial phase of establishing an NPM is key as many important institutional features are defined and established during this stage of the process. However, NPM development is an incremental process: NPMs will not be fully operational from the first day of establishment. A periodic review of the different aspects of NPMs' work and functioning, on the basis of the five interrelated dimensions of the analytical framework, is crucial for guiding development.

## 3. Working methods

Under Articles 3 and 17 of the OPCAT,[5] NPMs are established to prevent torture and other forms of ill-treatment at the domestic level: they fulfil this mandate through conducting regular visits to places of deprivation of liberty, submitting reports, and making recommendations on existing or draft legislation accordingly to Article 19 of the OPCAT.[6] Therefore, NPMs' working methods should reflect the fact that this broad preventive approach goes beyond visits to places of detention.

### 3.1 Preventive approach

Article 4(1) of the OPCAT states that "Visits are undertaken with a view to strengthening the protection of persons deprived of liberty against torture and other cruel, inhuman or degrading treatment". Thus, the NPMs' preventive approach revolves around identifying and analysing factors that may directly or indirectly increase or decrease the risk of torture and other ill-treatment. It seeks to systematically mitigate or eliminate risk factors and to reinforce protective factors and safeguards. The NPMs' mandate differs from that of other bodies working against torture at the domestic level in a number of key ways.

5 See commentary on Articles 3 and 17 in Chapter II of this manual.

6 See commentary on Article 19 in Chapter II of this manual.







| | |
|---|---|
| Broad human rights approach | NPMs should work to prevent torture and ill-treatment by protecting human dignity from the broadest possible human rights perspective. |
| Forward-looking | Rather than documenting or investigating past acts or omissions following complaints, the NPMs' preventive approach seeks to identify possible risks and to detect early signs that situations may degenerate into ill-treatment or torture. |
| System-wide analysis | Rather than trying to resolve individual situations, the NPMs' preventive approach analyses systems of deprivation of liberty to identify the root causes of violations. |
| Collaborative approach | The NPMs' preventive approach does not aim to denounce situations but rather to focus on improving them through constructive dialogue, proposed safeguards and other measures. |
| Holistic approach | The NPMs' preventive approach implies a holistic examination of risk factors within society as a whole rather than just in places of detention. |
| Long-term perspective | A preventive approach requires time; it will rarely produce immediate results and changes. |

### 3.2 Visiting methodology[7]

Visits constitute a unique means to gain first-hand information about the reality of the treatment of detainees, their conditions and functioning of places of detention. During visits, NPMs examine all aspects of places of detention: material conditions, safeguards and protection measures, processes, medical services, working conditions of the staff, inter-prisoner relations, staff-prisoner relations, and so forth. The role of the management and leadership in each particular place of detention is key and may have a significant impact on the atmosphere and functioning

7 For more information on this issue, see APT, *Monitoring Places of Detention: a practical guide*, APT, Geneva, April 2004. Available at www.apt.ch.

of the institution. Therefore, the administration should also be analysed during the visit: this analysis should take into account internal policies, directives, registers and documentation, management processes, internal communication, hierarchical structures, trainings and promotion.

The text of the OPCAT specifies a series of powers and guarantees for NPMs to enable them to carry out visits to places of detention. These powers should be fully exercised by NPMs during their visits and in their relations with the authorities. Under Article 20(c) of the OPCAT, NPMs must have access to all places were persons are deprived of their liberty.[8] They should have the power to carry out unannounced visits although, in practice, some visits may be announced in advance for practical reasons (e.g. to ensure the presence of the person in charge of the institution). The OPCAT also provides for:

- private interviews with detainees and the liberty to choose persons to interview (under Articles 20(d) and 20(e));
- access to all installations and facilities within places of detention (under Article 20(c)); and
- access to all information relating to places of detention and persons deprived of their liberty (under Article 20(b)).

Private interviews with persons deprived of liberty lie at the heart of the preventive monitoring process. Interviews held in private should be conducted out of hearing, and possibly out of sight, of staff and other persons deprived of liberty.[9] NPMs may also conduct group interviews as a means of collecting general information and interacting with a higher number of detainees. However, sensitive issues (e.g. treatment, inter-prisoner relations, or relations with staff) should not be discussed in collective settings. The liberty to choose persons to interview is an essential power. NPMs should not only talk to the persons indicated by the authorities or those requesting an interview, but should proactively and randomly select a significant number of persons deprived of liberty for additional interviews.[10]

8 See commentary on Article 20 in Chapter II of this manual.

9 See commentary on Article 14 in Chapter II of this manual; and Section 4.5.3 of Chapter III.

10 For further information on the selection of detainees, see APT, *Detention Monitoring Briefing No 2: The Selection of Persons to Interview in the Context of Preventive Detention Monitoring*, APT, Geneva, 2009. Available at www.apt.ch.







During their visits, NPMs should have access to all relevant files and re-gisters.[11] Access to individual medical files will require the consent of the person concerned. In the case of an audit approach, NPMs may, however, consult numerous medical files providing that personal data are concealed. Confidential information and potentially sensitive information should be protected.[12]

Preventive visits to places of detention require constant cross-checking of information from one source with information from other sources, including empirical observation. Information received during interviews in private can be cross-checked through examination of files and registers, through interviews with staff, and through direct observations made by visitors (what they smell, see, taste, hear and touch). Processes within places of detention should also be checked (e.g. arrival and disciplinary procedures, food distribution, complaints procedures, emergencies, and access to medical services).

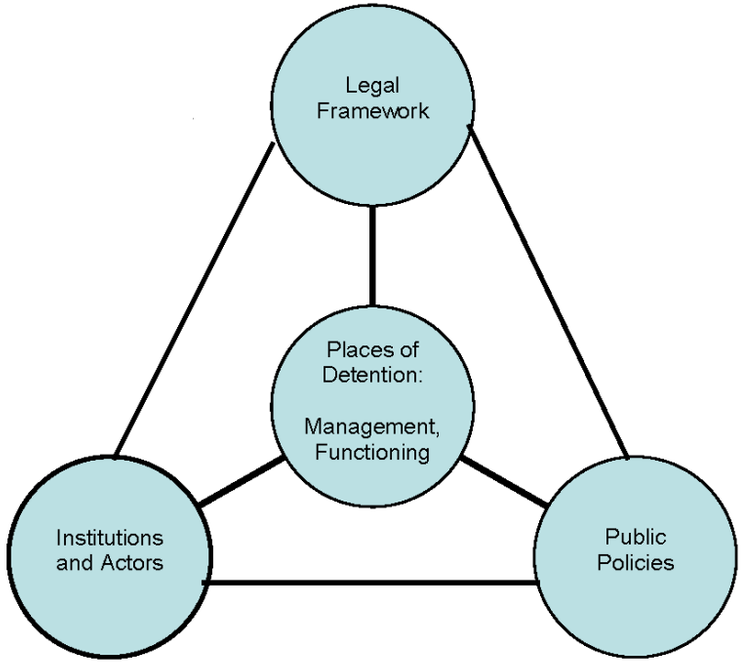
### 3.3 Beyond visits to places of detention

Visits to places of detention enable NPMs to gain first-hand information. However, they only constitute the first step of a holistic preventive strategy. NPMs should go beyond the facts found in places of detention to try to identify possible root causes of problems, and risks of torture and other ill-treatment. A problem encountered during a visit to a place of detention may be the result of external factors and it is therefore essential for NPMs to analyse the legal framework, public policies, and institutions and actors involved.

11 OPCAT, Article 20.

12 Article 21(2) of the OPCAT states that "Confidential information collected by the national preventive mechanisms shall be privileged. No personal data shall be published without the express consent of the person concerned". For further information, see commentary on Article 21 of the OPCAT in Chapter II of this manual.

**Holistic approach to prevention of torture and other ill-treatment**




NPMs should analyse the domestic legal framework for both the deprivation of liberty and the administration of justice. This will require examining international obligations undertaken by the State and other applicable international human rights standards (i.e. obligations under customary law). NPMs should analyse whether the domestic legal framework (laws and regulations) are in conformity with international obligations and proactively propose revisions, changes or new legislation (if necessary). This forms an integral part of the NPM mandate.

As part of their holistic analysis, NPMs should also consider public policies as these may have an important direct or indirect impact on torture prevention. NPMs should be perceived as independent and apolitical; therefore, they should not take sides in political debates but, instead, should analyse issues that may positively or negatively impact on human rights in places of detention. This analysis should form part of a





strategy of identifying possible risk factors and root causes of torture and other forms of ill-treatment. General public policies should be examined (e.g. to determine if there is an effective national human rights action plan and, if so, how this may impact on the NPM's work). Specific public policies that directly affect detention should also be analysed, especially public policies on crime (e.g. zero tolerance policies), drug users, juvenile justice, and immigration. In addition, other policies that seem only indirectly related to torture prevention or deprivation of liberty may also be worth looking at, such as mental health and public health policies (e.g. in relation to HIV and AIDS).

Institutions and actors that implement legal frameworks and public policies should also be examined from a preventive perspective. Individual places of detention form part of larger administrative entities (e.g. the police, penitentiary, immigration, and/or psychiatric services). These ser-vices/ departments are attached to ministries that define the orientation of the government's policies. The analysis of the institutional framework should cover both the relevant services and their respective ministries, and should take account of the services/ministries' institutional cultures and philosophies; their internal structures and functioning; the procedures and content of their recruitment and training processes; the existence and functioning of internal oversight mechanisms; their institutional guidelines, procedures and regulations; and their human, logistical and financial resources. Other institutions and actors, in particular the judiciary and public prosecutors' offices, should also be looked at. Finally, the interaction (both formal and informal) between the different institutions should be examined.

In summary, the NPMs' preventive strategy requires a holistic approach that goes beyond the actual situation and functioning of places of detention in order to analyse possible root causes of torture and other ill-treatment.

**Working methods: key elements**

- Methodology employed during visits, including interviews in private with persons deprived of liberty, consultation of registers, and cross-checking of information
- Analysis of the management and administration of places of detention during visits
- Analysis of public policies, and legal and institutional frameworks

## 4. NPM Activities

NPM activities constitute the tangible results of an NPM's work and include all the activities carried out by the NPM in the implementation of its mandate. According to Article 19 of the OPCAT, read in conjunction with Articles 1 and 4, NPMs should undertake the following activities:

- making regular visits to all places within the jurisdiction and control of the relevant State Party where persons are or may be deprived of their liberty;
- producing visit reports and recommendations;
- producing annual reports; and
- making observations and recommendations on relevant legislation.

### 4.1. Visits

The main focus of activity for NPMs is making regular preventive visits to all places where persons are or may be deprived of their liberty within the jurisdiction and control of the relevant State Party. The scope of places to be visited is wide as the definition of "places of detention" in Article 4 of the OPCAT is very broad. NPMs should visit all places where persons are deprived of their liberty, including traditional places of detention (e.g. police stations, prisons for sentenced or/and remand prisoners) and non-traditional places (e.g. international ports, detention facilities in military







camps, social care homes, centres for migrants, psychiatric institutions, and means of transport).

In small countries with a limited number of places of detention, the NPM should be able to make both regular and frequent visits to each place every year.[13] However, considering the scope of the NPM mandate, most NPMs will find it difficult to make frequent regular visits to all places where persons are deprived of their liberty. Thus, most NPMs will need to select which places to visit each year; they should also define a certain minimum frequency for visiting each place. In the case of multiple NPMs, particularly when each NPM focuses on a specific type of place of detention, the number of places to be visited by each NPM is smaller and, thus, more manageable.[14] However, the majority of NPMs will still need to define a programme of visits. This is also envisaged by Article 20(e) of the OPCAT, which provides that NPMs have the liberty to choose which places to visit.

Defining a programme of visits will, ideally, form part of a holistic strategic planning exercise. It is important for NPMs, particularly in the early phase of their development, to define clear objectives and strategies and to adopt plans of action. The NPMs in **Costa Rica** (*Defensoría de los Habitantes*) and the **Maldives** (National Human Rights Commission) have conducted such strategic planning exercises to draft NPM action plans.[15]

As a key initial step, the definition of a programme of visits requires a thorough mapping or inventory of all places of detention in the country. Ideally, this inventory will have been produced during the designation phase and so will already be available to the NPM.[16]

13 In Liechtenstein and Malta, for example, there is only one main prison and a few other places of detention.

14 In New Zealand, there are four NPMs and a central NPM. One of the NPMs, the Inspector of Service Penal Establishments, is responsible for visiting defence force facilities (i.e. the Services Corrective Establishment) and the small number of holding cells in each base/camp.

15 These processes were facilitated by the APT. A strategic planning workshop was conducted in Costa Rica in April 2009. In the Maldives, the NPM Action Plan 2009-2010 was drafted during a workshop in January 2009, then revised and finalised in July 2009. It was finally integrated into the National Human Rights Commission's Plan 2010-2013.

16 See Section 5 of Chapter IV of this manual.

### 4.1.1 Defining a programme of visits

The programme of visits constitutes a tool that assists NPMs in implementing their mandates and achieving two of the key objectives of preventive visiting:

- a deterrent effect (the mere fact of being able to enter places of detention unannounced reduces the risk of torture and other forms of ill-treatment);[17] and
- a system-wide analysis that aims to identify risks of torture and other ill-treatment and, thus, allows root causes to be addressed.[18]

The programme of visits should be flexible enough to enable the NPM to respond to evolving situations or needs, but it should define the total number of visits or the number of days of visits planned, the places to be visited, and the type of each planned visit. The programme should also take into account the available resources.[19]

Preventive visits to places of detention, as foreseen by the OPCAT, require not only resources but time. Therefore, in order for an NPM to ensure a certain regularity of visiting, despite the limited time and resources available, the visiting programme should combine different types of visits:

- in-depth visits: these will usually last several days and involve a large multidisciplinary team. They may be announced in advance. In-depth visits look at all aspects of the functioning of a place of detention: their main objective is to document the situation thoroughly, analyse risks factors, and identify both problems and good practice.
- *ad hoc* visits: these are usually short, unannounced visits to one particular place, with a small team. *Ad hoc* visits are primarily intended to have a deterrent effect and should, thus, be unpredictable. They may be undertaken in between visits of other types to ensure that there is an external presence in the place of detention; they may also be carried out in response to unanticipated situations, as follow-up visits to check on

17 See Sections 4 and 5.1 of Chapter I of this manual.

18 See Section 5.2 of Chapter I of this manual.

19 See Section 5 of this chapter.





implementation of recommendations, or to examine specific issues in individual places of detention.

- thematic visits: these are usually short, focused visits to a number of places. Generally, they involve a specialised team. Thematic visits concentrate either on one specific aspect of detention (such as health services or disciplinary measures) or one specific category of persons deprived of liberty (e.g. prisoners with life sentences, or recently arrived prisoners) in a number of places of detention. Their objective is to enable a cross-sectional analysis of risk factors and patterns of good and bad practice.

A mixed programme, combining less frequent in-depth visits with regular short ad hoc visits, is the most effective way for NPMs to respond to the need for there to be both regular monitoring of places of detention and on-going system-wide analysis of the situation in the country as a whole. In **England** and **Wales**, Her Majesty's Inspectorate of Prisons carries out at least one in-depth (i.e. week-long) visit to each prison every 5 years, while shorter ad hoc visits are carried out at least once every two years.

- **Selection of places to visit**

NPMs use the inventory of places of detention discussed above to strategically select places to visit. Strategies for selection tend either to be based on specific priorities or to involve a cross-section of places of detention.

Selection based on priorities

NPMs may decide to prioritise certain categories of places of detention based on:

- risk factors: NPMs may decide to visit places where the risk of ill-treatment is particularly high. Places used for the initial phase of detention, those where interrogations are carried out, and those with a high turnover of persons deprived of liberty (e.g. police stations and pre-trial facilities) are common foci.

- lack of information: NPMs may decide to concentrate on places of detention that would otherwise not be open to public scrutiny or external oversight (e.g. psychiatric institutions, social care homes or centres for migrants).[20]

20 In New Zealand, the Ombudsmen decided to focus its attention on psychiatric

- available information: places with a record of problems (e.g. recent complaints, reports from other organisations or the media) are often considered visiting priorities.

In order for NPMs to fulfil their mandates as regards regular visits to all types of places of deprivation of liberty, prioritisation should not mean exclusiveness and there should be some flexibility in the implementation of the visiting programme. Ad hoc visits to places that are not considered priorities should also be included in the visiting programme; a balance of this nature is important from a preventive and deterrent perspective. Moreover, the criteria for defining visiting priorities should be regularly reviewed. In the **Czech Republic**, the NPM (the Public Defender of Rights - Ombudsman) defines one or two categories of places as visiting priorities each year; other places may be visited on an ad hoc basis. In 2009, the NPM visited 25 homes for people with mental disabilities; in addition, 9 pre-trial prisons and 6 psychiatric hospitals were visited (the latter as part of a programme of follow-up visits).

Cross-section of places

NPMs may also decide to visit a variety of places of detention in order to produce a cross-sectional analysis of the situation in the country as a whole or in individual regions. In **Poland**, during 2008 the NPM (the Human Rights Defender) carried out 76 visits to 15 types of places of detention throughout the country.[21] In **Mexico**, the National Human Rights Commission (NPM) carries out missions to different states in the



institutions. During the NPM's first year of activity, it visited 74 mental health sites, 11 prisons, and 2 immigration centres. See Human Rights Commission, Annual Report of activities under the OPCAT, 1 July 2008 to 30 June 2009, p.12.

21 The Polish NPM visited the following places: 13 penal institutions, 15 remand centres, 1 external division remand centre, 2 sobering-up stations, 11 rooms in police premises for apprehended persons, 4 police emergency centres, 3 youth care centres, 1 youth socio-therapy centre, 3 juvenile detention centres, 4 refuges for minors, 1 quarter for persons detained at border guard centres, 4 quarters for foreigners set to be deported (under the jurisdiction of police or border guard authorities), 3 guarded centres for foreigners, 8 psychiatric hospitals, and 3 military places of detention. See Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2008, Warsaw, April 2009, pp.18-63.





Federation during which it visits a variety of places in each state.[22] This variety enables the NPM to gain an overview of the different places of detention and also, in relation to judicial detention, to understand the functioning of the system of deprivation of liberty as a whole, from initial detention by the police to execution of sentences.

### 4.1.2 Regularity and frequency

The programme of visits should ensure that places of deprivation of liberty are visited with a certain regularity and frequency. In its Preliminary guidelines,[23] the SPT states that "the periodicity of NPM visits should ensure effective monitoring of such places as regards safeguards against ill-treatment".[24] However, the frequency of visits will vary from one NPM to another depending on the size of the country; the number, size and location of places to visit; the NPM's resources; and its structure. It is important to ensure a balance between the number of visits (i.e. quantity) and their objectives (i.e. quality); striking an appropriate balance requires NPMs to develop strategies that allow them to respond to the issues and risks in different categories of places of detention. A mixed programme, combining different types of visits, will afford a constant review of different places of detention as well as a higher frequency of visits to places that the NPM has identified as requiring more regular monitoring.[25]



22 For example, during the visit to the state of Sinaloa in November 2009, the NPM visited 44 places of detention: detention facilities of the Public Ministry; a centre for juveniles; police stations; centres for the execution of sentences; a psychiatric hospital; and a centre for social reintegration of the mentally disabled. See www.cndh.org.mex.

23 See Annex 2 of this manual for the full text of the SPT's Preliminary guidelines.

24 SPT, First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 2007 to March 2008, UN Doc. CAT/C/40/2, 14 May 2008, §28.

25 The APT recommended that places with a high turnover of persons deprived of liberty be visited at least once per year and that other places be visited at least once every three years. APT, *NPM Guide*, APT, Geneva, 2006, p.33.

## 4.2 Visit reports and recommendations

Visits are only the first step of the preventive monitoring process. The first-hand information collected during visits needs to be analysed before it can form the basis of reports and recommendations. Reports must then be sent to the authorities with a view to improving the situation in places where problems and shortcomings are identified.

### 4.2.1 Types of reports

Post-visit reporting practices may vary, but usually NPMs draft the following types of reports:

- internal visit reports: based on a standard format, internal reports are important in terms of record-keeping and follow-up visits.
- visit reports: these detail the findings of the visiting team, together with analysis, feedback and recommendations. A visit report should be submitted shortly after the visit. It should be addressed directly to the person in charge of the place visited, though copies may be sent to higher authorities as well. In its Preliminary guidelines, the SPT recommends that "States should encourage NPMs to report on visits with feedback on good practice and gaps in protection to the institutions concerned, as well as with recommendations to the responsible authorities on improvements in practice, policy and law".[26]
- thematic reports: these reports may discuss several places of detention but will focus on a single issue (e.g. health services in prisons). Thematic reports are generally more analytical than reports of the other two types.

In **Mexico**, an internal report regarding each place visited is drafted by the NPM visiting team. These reports are then compiled by the NPM report team in the form of a synthesis report covering a series of places in one region and/or places under one specific authority.[27]

26 See SPT, First annual report, §28; and also Annex 2 in this manual.

27 See, for example, National Human Rights Commission, *Informe 1/2008 del Mecanismo Nacional de Prevención de la Tortura sobre los lugares de detención e Internamento que dependen del Gobierno del Distrito Federal*, México DF, 27 February 2008 ; National Human Rights Commission, *Informe 4/2008 del Mecanismo Nacional de Prevención de la Tortura sobre los hospitales psiquiatricos que dependen del Gobierno Federal*, México DF, 27 June 2008; and National Human Rights Commission, *Informe 7/2008 del Mecanismo Nacional de Prevención de la Tortura sobre lugares de detención e internamiento que dependen del gobierno del Estado de Tabasco*, México DF, 25 September 2008.

28 See commentary on Article 16(1) in Chapter II of this manual.

29 See Section 11 of Chapter I of this manual; and also the commentary on Article 22 in Chapter II.

30 See commentary on Articles 16(2) and 21(2) in Chapter II of this manual.









### 4.2.2 Publication of visit reports

Whereas the text of the OPCAT explicitly mentions the confidentiality of SPT reports,[28] there is no similar provision regarding the confidentiality of reports produced by NPMs. Therefore, NPMs can decide whether or not to publish their visit reports: such decisions should be part of the overall outreach strategy of the NPM.[29]

In making decisions about publication of reports, NPMs should take into account the need for transparency, the importance of establishing a cooperative dialogue with the authorities, and the on-going development of the NPM. In States Parties with multiple NPMs, each may have a different institutional culture and, thus, a different position on publication of reports; therefore, the development of a common strategy should be discussed. The publication of visit reports contributes to the transparency and accountability of places of deprivation of liberty and of NPMs themselves. Reports also provide all the authorities responsible for deprivation of liberty with information about the work, methodology, expectations, and standards applied by NPMs. However, personal data should never be published without the express consent of the person(s) concerned.[30]

When an NPM decides to publish visit reports, the timing and process of pre-publication consultations are crucial to maintaining a strong framework of the cooperation with the authorities. Good practice suggests that visit reports should be sent confidentially to the authorities first for comments and factual checking. NPMs can then decide whether to include any of the authorities' comments in the version of the visit report that is made public. This practice gives the NPM the flexibility to encourage cooperative relations while, at the same time, promoting transparency and accountability.

In **France**, the General Inspector of Places of Deprivation of Liberty sends a report of its findings (*'rapport de constat'*) directly to the person in charge of the place visited for a factual check first; on average, this occurs 25 days after the visit. After receiving a reply, the NPM sends an updated visit report to the competent ministry, which has one month to respond. Finally, the General Inspector may decide to draft a public recommendation on the basis of the report and the observations of the ministry: these are published in the official journal.[31] Some visit reports are also published as examples on the NPM's website and in the appendix of its annual report.[32]

### 4.3. Annual reports

Under Article 23 of the OPCAT, States Parties are obligated "to publish and disseminate the annual reports of the NPM". In its Preliminary guidelines, the SPT has reiterated that "the annual report should be published in accordance with article 23 of the OPCAT".[33]

An NPM's annual report represents important communication tool and serves several important purposes:

- making the NPM visible and ensuring it is accountable;
- informing relevant actors and the public about the activities and functioning of the NPM;
- identifying and analysing key issues relating to torture prevention;
- proposing recommendations;
- measuring progress (or lack of progress) in torture prevention; and
- establishing and sustaining on-going dialogue with the authorities.

The target audience of the annual report may be broad, ranging from high-level governmental authorities to persons deprived of their liberty. Therefore, NPMs should clearly define the primary target audience and adapt the style and format of the annual report accordingly. The OPCAT does not establish a reporting procedure; therefore, the target audience

31 *Contrôleur général des lieux de privation de liberté*, Rapport Annuel 2008, p.10. Available at www.cglpl.fr.

32 *Contrôleur général des lieux de privation de liberté*, Rapport Annuel 2008.

33 SPT, First annual report, §28.







of the NPM annual report is not the SPT. However, sending a copy of the annual report to the SPT is important and should be seen as a way of maintaining direct contact with the SPT. The SPT has developed the practice of making the NPM annual reports available on its website, though it declines responsibility for their content.[34] NPMs may also consider it useful to send their annual reports to other international and regional bodies as a way of sharing information and encouraging discussion.

If the designated NPM is (part of) an existing institution, the NPM annual report should be published as a separate report or, at the very least, should have a separate chapter in the institution's general annual report.[35] The NPM report, or NPM chapter, should cover all aspects of the NPM's work, including observations on legislation and cooperation with the authorities and other actors.

An NPM annual report should not only contain factual information regarding the functioning and activities of the NPM during the year, but should also provide substantive analysis of torture prevention issues. NPMs are best placed to provide in-depth analysis of key risk factors, best practice in different types of places of detention, and other issues related to deprivation of liberty and torture prevention. The content of the analytical part of the report will depend on whether other substantive information has already been made public by the NPM. When visits reports are published regularly, the substantive part of the NPM's annual report may synthesise key issues in relation to different types of places of detention, or it may analyse cross-cutting thematic issues. When no visits reports are made public, the annual report should include information about the main issues encountered during visits, and subsequent annual reports should include information regarding follow-up work, the level of implementation of recommendations, and a general evaluation of progress made in preventing torture and other forms of ill-treatment.

34 See http://www2.ohchr.org/english/bodies/cat/opcat/annualreports.htm.

35 See discussion of Article 23 in Chapter II of this manual.

### 4.4 Observations on legislation

The capacity to make observations on, and propose change to, draft or existing legislation, which is provided in Article 19(c) of the OPCAT, constitutes a key aspect of the NPMs' mandate and represents an important complement to visits: problems identified during visits to places of detention may be the result of inadequate laws or regulations. The capacity to propose revisions to respond to gaps in legal protections, or/and to propose legal safeguards, constitutes an important tool for NPMs.

In 2008, the NPM in **Poland** (the Human Rights Defender) requested the Minister of Justice to introduce appropriate legal regulations regarding the use of CCTV cameras in penitentiary institutions. It also requested the Minister of Interior and Administration to issue an ordinance on the technical requirements for vehicles used to transport detainees.

**Activities: key elements**

- Inventory of places of detention
- Programme of visits
- Number of visits conducted (by category of place)
- Average length of visits
- Proportion of places visited (by category of place)
- Average frequency of visits (by category of place)
- Visit reports sent to the persons in charge of the places visited, and to higher authorities
- Publication of visit reports
- Annual reports, including substantive sections on torture prevention issues and the situation in places of detention
- Comments and observations on existing or draft legislation







## 5. Resources

The number and frequency of visits to places of detention, as well as the production of reports, will depend on the resources available. Although Article 18(3) of the OPCAT requires States Parties to "make available the necessary resources for the functioning of the NPM", in practice the resources (financial, human and logistical) provided are rarely sufficient for an ideal preventive programme to be undertaken. It is important to note that resources will probably have to be increased over time, as the NPM develops. It is also vital that the NPM has the autonomy to decide on their use independently.

### 5.1 Financial resources

An NPM needs an adequate budget to pay members, staff and experts, and to conduct regular visits to places of detention in all parts of their country's territory. When the NPM mandate is given to an existing body, an increase in the institution's budget will be necessary to enable it to carry out the additional work and to allow it to respect the specificity of the OPCAT's preventive approach. In such situations, the SPT has underlined the necessity of ring-fencing the NPM budget and ensuring that the NPM's independence extends to budget allocation processes.[36]

The issue of financial resources is closely linked to the issue of functional independence.[37] Not only should an adequate budget be provided by the State, but budget approval processes should respect the independence of the NPM. In practice, it is recommended that:

36 Guideline G of the SPT Preliminary guidelines states that "Adequate resources should be provided for the specific work of national preventive mechanisms, in accordance with article 18.3 of the Optional Protocol; these should be ring-fenced, in terms of both budget and human resources." SPT, First annual report, §28.

37 The Paris Principles (Composition and guarantees of independence and pluralism, Section, Guideline 2) provide that "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 subject to financial control which might affect its independence."

- the NPM drafts its own annual budget;
- the NPM budget is submitted directly to the country's parliament for approval; and that
- the NPM should autonomously determine how it spends the budget approved by parliament.

Financial autonomy goes hand in hand with financial accountability; therefore, the NPM should conform to regular public financial reporting and audit procedures.

### 5.2 Human resources

Preventive monitoring is a specialised task that requires specific skills: thus, human resources are key in effective implementation of the NPM mandate. With regard to NPMs, there are three key categories of human resources: the members of the NPM, the staff of the NPM, and external experts. Members are persons officially appointed to the institution, whereas staff are hired by members to support their work. In some cases (for instance, when the NPM is composed of a single member, as in ombudsperson offices), the distinction between members and staff is less clear-cut. In any case, members, staff and experts should be independent. They should also have the professional expertise and skills required for the effective execution of their duties.

#### 5.2.1 NPM members

Selection and appointment processes should respect the independence of the NPM. Furthermore, clear terms of office should be defined in the legal basis of the NPM.[38] Depending on their type and structure, NPMs may either be composed of a single member or they may have several members. The OPCAT did not foresee the possibility of NPMs having a single member: Article 18(2) of the OPCAT speaks about "experts" and refers to the global composition of NPMs. It also states that NPMs should strive for gender balance, and adequate representation of the country's ethnic and minority groups. In addition, NPM members should represent different professional backgrounds in order to ensure

38 See Section 8 of Chapter IV of this manual.







the multi-disciplinarity of visiting teams. In the case of a single person body, these requirements are transferred to the staff.

Independence of members is a key issue[39] that concerns both personal and institutional independence. Institutional independence requires that visiting teams have no professional links with the institutions visited.

Given the time required to carry out the NPMs' preventive mandate effectively, the APT recommends that members who do not work full-time for the NPM receive an honorarium for working days.[40] Although this should not equate to a salary, it should represent a reasonable amount in addition to costs that are reimbursed by the NPM (i.e. travel expenses, and accommodation and meals during working days). Fees ensure that working for the NPM is sustainable for members and avoid limiting possible membership to retired persons living on pensions and/or people who are financially independent.[41]

#### 5.2.2 Staff

Whatever the structure of an individual NPM, staff play a key role in the effective execution of the body's mandate. However, in the case of a single member body, the role of the staff is even more important: sometimes the staff carry out most of the NPM's duties. When an existing institution is designated as an NPM, the SPT recommends that the NPM should be granted with its own staff.[42] The number of staff should be sufficient to enable the NPM to carry out its mandate effectively in the national context. Staff should enjoy the same powers, immunities and privileges

39 For a detailed discussion, see Chapter IV of this manual, especially Sections 5.1, 7 and 8.

40 Working days should include days spent on visits and also those spent drafting reports and attending meetings.

41 Community-based independent visitors sometimes work on a purely voluntary basis. As discussed in Section 7.5.2 of Chapter IV of this manual, community-based visiting bodies are not suitable as NPMs, though they often have a vital role to play in supporting and complementing NPMs.

42 SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, 25 March 2010, §51.

as members.[43] The independence of the staff should also be carefully considered: for instance, when staff are seconded by the authorities, independence may be threatened. In small countries, independence is more difficult to ensure in practice. When recruiting former members of staff of places of detention, the risks of conflicts of interest should be considered as it is vital for the NPM to be both independent and perceived as such.

#### 5.2.3 Other human resources: experts and interpreters

The OPCAT does not expressly stipulate that NPMs may hire outside experts, but this is generally provided for in NPM-related legislation. This enables NPMs to temporarily increase their expertise in a cost effective way: experts are usually hired on an ad hoc basis for a specific visit to a specific place. This ensures that the NPM's in-house visiting team is complemented by persons with relevant professional knowledge and skills; this allows the team as a whole to respond to the specific needs and/or problems of the place of detention and, thus, to meet the specific objectives of the visit. Depending on its existing expertise and needs, an NPM may need to hire experts in the fields of psychology, psychiatry, forensic medicine, nutrition, public health, juvenile justice, social work, and so forth. Experts should be adequately paid and should work under clear terms of reference. In order for them to form an integral part of the visiting team, they should receive initial training regarding the mandate of the NPM and its working methods. Experts should not only be involved in conducting the visit but should also participate in preparation for the visit, as well as in the drafting of the visit report (if relevant). The terms of reference should specify:

- the expert's roles and responsibilities in relation to the different aspects of a visit; and
- the expert's obligation to respect the confidentiality of certain information (e.g. personal data).

When selecting experts, attention should also be paid to the candidates' independence and to any potential conflicts of interest.

43 See commentary on Article 35 in Chapter II of this manual.





On occasion, NPMs may also need to hire interpreters to conduct private interviews with persons deprived of their liberty. Like experts, interpreters should understand the mandate and methodology of the NPM in question; they should also be informed of the confidential nature of aspects of the NPM's work.[44]

### 5.3 Logistical resources

Logistical resources are often neglected in discussions, but are crucial in allowing NPMs to work effectively. In order to be independent from the government, NPMs should have their own premises, as noted in the Paris Principles. NPMs should also have appropriate means of transport to carry out visits to all places of detention, including remote ones. Ideally, vehicles should be owned by the NPM. In the case of NHRIs as NPMs, sharing vehicles across departments and units may unduly limit travel for NPM purposes (for instance, if cars are available only on certain days, or there is a complex administrative procedure to request the use of a vehicle). However, the lack of technical equipment (such as computers or cameras) should not constitute an impediment to the execution of the NPM mandate, although it is useful for an NPM to have its own equipment if resources allow.

**Resources: key elements**

- Total budget of the NPM (or specific budget for the NPM when part of larger institutions, such as an NHRI)
- Budget approval procedures
- Number, gender, and professional background of staff, members and external experts
- Own premises and means of transport

44 APT, Detention Monitoring Briefing No 3: *Using interpreters in Detention Monitoring*, APT, Geneva, May 2009. Available at www.apt.ch.

## 6. Internal organisation

In terms of NPMs' organisational form, the OPCAT is silent on the issues of structure and internal organisation. Articles 3 and 17 only mention the option for a State Party to have "one or several" NPMs. However, Article 17 also mentions that "Mechanisms established by decentralised units may be designated as NPM".[45]

Whatever their organisational form, it is important that NPMs have a clear internal organisation. Accordingly, NPMs should define and adopt policies to establish:

- a clear structure for the NPM (i.e. an organigram);
- an appropriate division of tasks (i.e. by identifying who will carry out visits, who will draft reports, who will comment on legislation, and whether this will vary);
- roles and responsibilities (i.e. by identifying who will establish the visiting programme, who will propose recommendations, and who will maintain contact with the authorities and SPT);
- decision making processes (e.g. by identifying who will decide the visiting programme, and who will have the final word on reports and recommendations);
- internal rules and regulations (i.e. staff regulations); and
- internal procedures regarding administrative, logistical and human resources.

Experience has shown that these elements need to be clarified in order for NPMs to function effectively and cope with challenges. Although these elements are applicable to all NPMs, some are especially relevant to particular types of NPM.

### 6.1 Clear Structure

Having a clear internal structure is especially important in the case of NHRIs holding the NPM mandate. In such cases, there are two possible options: either the mandate is shared among different units or a separate

45 Possible NPM options, and different organisational forms, are considered in detail in Section 7 of Chapter IV of this manual. See also APT, *NPM Guide*, Section 10.







NPM unit is created to execute the NPM mandate. When visits are carried out by a variety of units (usually thematic ones) it is important to have internal procedures in place to ensure common working methods, sharing of information, and clear responsibilities with regard to the drafting of reports and recommendations. The main challenge in this type of organisational structure is that the persons in charge of the NPM mandate also continue to carry out other duties, such as investigating individual complaints. This may be confusing for both the authorities and persons deprived of their liberty. The creation of a separate NPM unit is therefore recommended.[46] It is worth noting that in such cases, although the NPM tasks are usually delegated to one unit, the host institution as a whole is designated as the NPM, not the unit. In **Costa Rica**, although the initial idea was for the NPM mandate to be implemented by the different thematic units of the Ombudsperson's Office (*Defensoría de los Habitantes*), the creation of a separate unit with three staff members was eventually deemed a better option.

In the case of multiple NPMs, it is vital that the internal structure, procedures, and division of tasks, roles and responsibilities of each NPM are made clear. In addition, the structure of the overall system should remain manageable, coherent and understandable to all actors, including the authorities, persons deprived of their liberty, and the NPMs themselves. Thus, best practice suggests identifying a coordinating body; one of the NPMs may take on this role or another body may be set up specifically to handle this task. In federal systems, it is possible to have one or several bodies at the federal (i.e. national) level co-existing with one or several bodies at the state (i.e. local) level. In such complex situations, the need to have a clearly and coherently structured system is even more important.[47]

### 6.2 Internal procedures and division of tasks

Clearly defined division of tasks (including in relation to specific roles and responsibilities) and internal procedures (including decision-making procedures) are essential for any NPM option.

In the case a separate unit is created within the NHRI to execute the

46 See Section 7.2.1 of Chapter IV of this manual; and SPT, Third annual report, §51.

47 See Chapter IV of this manual, especially Section 7.4.

NPM mandate, the division of tasks between the NPM unit and other units/ departments in the NHRI should be clear, especially in relation to how the individual complaints that the NPM may receive during its preventive visits are handled and processed. The system by which the NPM unit refers complaints to the unit that will deal with them must respect the confidentiality of personal data and the need for the express consent of the person(s) involved for such information to be shared and disseminated.[48] A division of tasks may also be needed in relation to offering comments on legislation: responsibility for this will often be delegated to a legal unit within the NHRI. It is also important to clarify decision-making processes relating to:

- the composition of visiting teams;
- drafting, adopting and publishing visit reports, annual reports and recommendations; and
- communicating with the authorities and the media.

Clear division of tasks, responsibilities and procedures are essential for the NHRI plus civil society NPM option.[49] When individual members of civil society or civil society organisations are formally involved in the implementation of the NPM mandate (e.g. through participating in visits to places of detention) experience has demonstrated the importance of having clear procedures regarding:

- decision-making processes;
- the selection and dismissal of civil society organisations and/or members;
- the respective roles and responsibilities of the NHRI and of civil society organisations/ members during visits and the reporting process;
- the respective roles and responsibilities of the NHRI and of civil society organisations/ members with regard to other aspects of the NPM's work (e.g. offering observations on legislation, engaging in on-going dialogue with the authorities and the SPT, and establishing relations with the media);

48 See commentary on Article 21(2) in Chapter II of this manual.

49 See Chapter IV of this manual, especially Section 7.3.





- the duties and rights (e.g. with regard to confidentiality of information) of the civil society organisations/ members; and
- the privileges and immunities of the civil society organisations/ members.

In **Slovenia**, the Ombudsman is implementing its NPM mandate in cooperation with three non-governmental organisations (NGOs) that he selected on the basis of a public tender. A Cooperation Agreement was concluded with each NGO to regulate the mutual relationship. In addition, the persons from the selected organisations who are involved with the NPM have to make a written declaration that they will act according to the instructions and regulations of the Ombudsman. During visits, which are carried out by mixed teams, members of civil society organisations have exactly the same rights and duties as members of the Ombudsman Office.

In some cases, civil society organisations may be formally invited to participate in advisory bodies: they are usually responsible for providing substantive advice and support to the NPM but are not involved in the actual implementation of the NPM mandate. The roles and responsibilities of advisory bodies should be clearly defined, ideally in their legal basis or in specific terms of reference. In particular, there should be clear decision-making processes in case of diverging opinion between the NPM and the consultative body. The capacity of civil society organisations to represent the NPM during dialogue with the authorities, the SPT, and the media should also be defined.

In the case of several bodies designated to fulfil the NPM mandate, a coordinating body is useful,[50] but its role should also be clearly defined. This role will vary depending on the nature of the bodies involved: it may be policy- or visit-oriented. In general, the role of a visit-oriented coordinating body is to avoid duplication or gaps in relation to visits to places of detention. The coordinating body should also ensure coherence and consistency of methodology and recommendations. It may also be given the capacity to represent the NPM internationally by maintaining direct contact with the SPT. The role and decision-making powers of the

50 See Section 7.4 of Chapter IV of this manual.

coordinating body should be clearly defined, as should the responsibilities of the coordinating body versus those of each NPM regarding comments on legislation, annual reports, and media strategy. Each of the bodies that together comprise the NPM should be in agreement in relation to these issues.

**Internal organisation: key elements**

- Clearly defined structure
- Clearly defined division of tasks, roles, responsibilities and decision-making processes
- Internal rules, regulations and procedures

## 7. Relations with external actors

NPMs do not work in isolation: they are expected to interact closely with a variety of actors, including the authorities, other stakeholders, civil society, the SPT, and other international and regional human rights mechanisms.

### 7.1. Relations with authorities

The OPCAT foresees a series of obligations for States Parties in relation to their NPM(s). Under Article 18(a) of the OPCAT, States Parties must refrain from interfering with the work of their NPM(s) and must guarantee the functional independence of the NPM(s). Under Article 20, they should grant and respect NPMs' powers of access to places, to persons, and to information. Under Article 21(1), States Parties are also required not to "order, apply, permit or tolerate" any sanctions against persons who come into contact with the NPM in order to assist in the normal execution of the NPM's mandated duties. Furthermore, under Article 12(c), States Parties must encourage and facilitate direct contact between their NPM(s) and the SPT. In addition, under Article 22, the competent authorities have positive obligations to cooperate with the







NPM. In practice, this means that the authorities should examine the recommendations of the NPM and enter into dialogue on possible implementation measures. Finally, States Parties also have an obligation to publish and disseminate their NPM's annual reports.

NPMs should be proactive in building cooperative relations with the authorities. On-going constructive dialogue with the authorities requires mutual trust that needs to be built progressively, usually through undertaking awareness-raising activities to ensure that all the relevant authorities know and understand the objectives, mandate, and powers of the NPM. At the same time, NPMs should protect their independence and exercise the full range of their powers. Driving change forwards and producing results requires time: thus, a long-term perspective is needed.

### 7.2 Relations with other domestic stakeholders

When other visiting bodies exist at the domestic level, it is important for the NPM to establish formal cooperative relations with them in order to discover possible synergies, and to avoid duplication and overlap of efforts. NPMs need to establish positive relations with the country's parliament, which should be considered a key partner in preventing torture. Cooperation may be established through presentation of the annual report, contributions to parliamentary policy or legislative debates, and hearings on specific torture prevention measures (among other issues). Relations with the judiciary may be more complex as problems in places of detention (e.g. overcrowding) may be the result of a dysfunctional judiciary. Since NPMs visit places under the responsibility of the judiciary and then submit recommendations on improving the situation in these places, their work may have a direct impact on that of the judiciary.

### 7.3 Relations with civil society[51]

Civil society organisations may play a key role in the work of the NPM even when they are not formally involved in the implementation of the NPM mandate. Human rights organisations, academics, trade unions, committees of persons deprived of their liberty, and associations of vulnerable

51 See Sections 6.1 and 7.5.3 of Chapter IV of this manual.

groups constitute important sources of information. They also represent potential partners in the field, not least because they are in a good position to relay findings and recommendations, and to pressure the authorities to implement proposed changes. Civil society organisations may also exercise a watchdog role in relation to the work, functioning and impact of NPMs. NPMs should consider developing both regular and *ad hoc* contact with civil society organisations active in the field of deprivation of liberty in order to facilitate formal and informal consultation and discussion.

In **Poland**, the NPM (the Human Rights Defender) meets with the Association for the Implementation of the OPCAT, which is composed of academics and NGOs, once every two or three months. Meetings provide opportunities for exchanges on issues relevant to the functioning of the NPM, such as the problems faced by penitentiary facilities. The interview questionnaires used by the NPM's visiting team in private interviews with persons deprived of liberty have also been discussed during these regular meetings. Furthermore, the Association supports the NPM in its fund-raising efforts.[52]

### 7.4 Relations with the media

The media may represent an important partner for NPMs; however, the media's objectives will not necessarily match those of the NPM. Therefore, NPMs should develop a media strategy aimed at using media intervention to support cooperative relations with the authorities. Dissemination of visit reports through the media should be pursued in a strategic manner; for example, in response to a lack of cooperation on the part of the authorities. Specific NPM activities (such as publishing annual reports) may represent part of a media campaign to increase coverage of the NPM's activities, findings and recommendations.

### 7.5 Relations with the SPT

NPMs are required to have direct contact with the SPT, while States Parties are required to encourage and facilitate this contact.[53] In the context of multiple NPMs, States Parties should guarantee direct contacts between

52 Report of the Human Rights Defender on the activities of the NPM in Poland in 2008, Warsaw, May 2009, pp.81-82.

53 See OPCAT, Articles 11(b)(ii) 12(c) and 20(f).





the SPT and all NPM bodies.[54] Direct contact means, at a minimum, exchange of written correspondence. It is important for NPMs to send information to the SPT, particularly annual reports. NPMs also may also decide to meet with the SPT during its plenary sessions in Geneva.

SPT in-country visits represent an important opportunity for contact with NPMs. In preparation for a visit, NPMs should send the SPT detailed information regarding the situation in the country.[55] During the visit, they will also be key interlocutors for the SPT, so meetings and exchanges should be arranged in advance. Following the visit, reports are sent confidentially to the authorities. However, under Article 16(1) of the OPCAT, the SPT can communicate its reports and recommendations to NPM "if relevant". NPMs are best placed to follow-up on implementation of the SPT's recommendations and should provide the SPT with information in this regard.[56] NPMs may also choose to advise the SPT on their position with regard to their State Party's responses to reports, recommendations and follow-up work.

Under Articles 11(b)(ii) and 11(b)(iii), the SPT is also mandated to "advise and assist them [NPMs] in the evaluation of needs and the means necessary to strengthen the protection of persons deprived of their liberty" and to "offer them training and technical assistance with a view to strengthening their capacity". This support and advice is crucial for the effective functioning of NPMs.[57]

### 7.6 Relations with regional and international actors

NPMs are the key interlocutors regarding the domestic situation for other regional and international human rights mechanisms interested in preventing torture. They are in a unique position to provide first-hand, independent analysis of detention conditions, and of the treatment of persons deprived of their liberty, to bodies such as the UN Committee against Torture (CAT), the Human Rights Committee, the Human Rights Council (in particular, for its Universal Periodic Review procedure)

54 SPT, Third annual report, §53.

55 See Section 4.4 of Chapter III of this manual.

56 See Sections 4.7.2 and 4.7.4 of Chapter III of this manual.

57 See commentary on in Chapter II of this manual; and also Chapter III, especially Sections 3, 4.5.1 and 4.7.

and the Special Rapporteur on Torture.[58] NPMs are also well-placed to follow-up on the implementation of recommendations from international and regional bodies, including:

- in Africa, the African Commission on Human Rights, especially the newly named Committee for the Prevention of Torture in Africa and the Special Rapporteur on Prisons and conditions of detention in Africa;
- in Europe, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and
- in the Americas, the Inter-American Commission on Human Rights and its thematic Rapporteurships (especially the Rapporteur on the Rights of Persons deprived of liberty, the Rapporteur on the Rights of Migrants and their Families, and the Rapporteur on the Rights of Women).

### 7.7 Relations with other NPMs

Relations with other NPMs may also help an NPM to develop its practice and enhance its effectiveness. Relations may take the form of informal bilateral exchanges or study visits, or more formal multilateral encounters and meetings.[59] Direct peer to peer exchanges and networking, particularly at the regional or sub-regional level, offer opportunities for NPMs to share good practice and discuss their experiences.

58 Other special procedures (such as the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of human rights while countering terrorism; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on extrajudicial, summary or arbitrary executions) may also be interesting interlocutors for NPMs.

59 At the European level, the Council of Europe is developing a European NPM Project aimed at creating an NPM network promoting exchange of information, thematic discussions and in-country training. The 2010-2011 European NPM Project is managed by the Council of Europe and funded by the European Commission, the Council of Europe and voluntary contributions. The APT is the implementing partner.





**Relations with external actors: key elements**

- Strategies to ensure cooperative dialogue with the authorities
- Direct contacts with the SPT (information sent to the SPT, including NPM annual reports)
- Media and communication strategies
- Engaging with civil society
- Developing relationships with international and regional mechanisms
- Transparency

## 8. Impact of the NPMs' work

When NPMs are well-resourced, have a clear internal organisation, and have effective preventive working methods they will be able to execute a comprehensive strategy of torture prevention (comprising visits, reports, and comments on legislation) and to establish good cooperative relations with the authorities and other actors. In such a situation, the work of the NPM may contribute to positive changes, reducing the risks of torture and ill-treatment, improving safeguards and conditions in places of detention, and ensuring better protection for persons deprived of their liberty.

However, the impact of NPMs' work should be considered from a long-term perspective. First, NPM development is an incremental process and NPMs will rarely be in the ideal situation described above in their first years of existence. NPMs may be able to carry out regular visits and publish reports and recommendations during the early stages of their existence, but the development of effective working methods and the establishment of constructive relations with the authorities requires time. Moreover, resources are often insufficient for NPMs to fully implement their holistic preventive mandates. Second, preventive visits, reports and recommendations that look at mitigating risks factors rarely produce immediate results. Some concrete, practical recommendations regarding

material conditions or basic safeguards may be easy to implement, but most of the recommendations dealing with structural issues or legal reform require more time and patience to implement. The competent authorities have an obligation to examine the recommendations of NPMs and to enter into dialogue on possible implementation measures. The establishment of constructive dialogue may, in itself, represent an important first step towards achieving results.

As such, the impact of preventive work is usually difficult to measure due to its very nature, not least because it is often difficult to establish a direct causal link between positive developments and the work of NPMs.

The fact that independent NPMs can enter places of detention at any time has an important deterrent effect that should not be underestimated, though it constitutes only one aspect of a broader preventive approach. In the long-term, the development of strategic analytical work resulting in recommendations tailored to the national context and supported by cooperative dialogue with the authorities may confirm that NPMs are key in driving forward efforts to prevent torture and ill-treatment. The existence of a system of prevention in which the work of national bodies (i.e. NPMs) is complemented and reinforced by an international body (i.e. the SPT) constitutes a unique conjunction of preventive measures that has the potential to produce significant positive changes in the conditions and treatment of persons deprived of their liberty.

# Annexes

1. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
2. Subcommittee on Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment:

   Preliminary Guidelines for the on-going development of National Preventive Mechanisms (NPMs)
3. States Parties and Signatories to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (10 December 1984) and its Optional Protocol (22 June 2006) and

   Voting Record on the Optional Protocol to the UN Convention against Torture
4. Useful addresses
5. Further reading on OPCAT

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

**Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.**

**Entered into force on 22 June 2006**

## 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

1. 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 St ate 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.







# Subcommittee on Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

## Preliminary Guidelines for the on-going development of National Preventive Mechanisms (NPMs)[1]

1. In order to facilitate the dialogue with NPMs generally, the SPT wishes to indicate some preliminary guidelines concerning the process of establishing NPMs, by the development of either new or existing bodies, and concerning certain key features of NPMs.

1. The mandate and powers of the NPM should be clearly and specifically established in national legislation as a constitutional or legislative text. The broad definition of places of deprivation of liberty as per OPCAT shall be reflected in that text.
2. The NPM should be developed by a public, inclusive and transparent process of establishment, including civil society and other actors involved in the prevention of torture; where an existing body is considered for designation as the NPM, the matter should be open for debate, involving civil society.
3. The independence of the NPM, both actual and perceived, should be fostered by a transparent process of selection and appointment of members who are independent and do not hold a position which could raise questions of conflict of interest.
4. Selection of members should be based on stated criteria relating to the experience and expertise required to carry out NPM work effectively and impartially.
5. NPM membership should be gender balanced and have adequate representation of ethnic, minority and indigenous groups.
6. The State shall take the necessary measures to ensure that the expert members of the NPM have the required capabilities and professional knowledge. Training should be provided to NPMs.

1 First annual report of the SPT (February 2007 to March 2008), UN Doc. CAT/C140/2, 14 May 2008.

7. Adequate resources should be provided for the specific work of NPMs, in accordance with Article 18, 3 of the OPCAT; these should be ring-fenced, in terms of both budget and human resources.
8. The work programme of NPMs should cover all potential and actual places of deprivation of liberty.
9. The periodicity of NPM visits should ensure effective monitoring of such places as regards safeguards against ill-treatment.
10. Working methods of NPMs should be developed and reviewed with a view to effective identification of good practice and gaps in protection.
11. States should encourage NPMs to report on visits with feedback on good practice and gaps in protection to the institutions concerned, as well as with recommendations to the responsible authorities on improvements in practice, policy and law.
12. NPMs and the authorities should establish an on-going dialogue based on the recommendations for changes arising from the visits and the action taken to respond to such recommendations, in accordance with Article 22 of the OPCAT.
13. The annual report of NPMs shall be published in accordance with Article 23 of the OPCAT.

The development of NPMs should be considered an on-going obligation, with reinforcement of formal aspects and working methods refined and improved incrementally.







# States Parties and Signatories to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) and its Optional Protocol (22 June 2006)[2]

# and

# Voting Record on the Optional Protocol to the UN Convention against Torture

2 Current as of 11 October 2010.

| STATE | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **AFRICA** | | | | | | |
| **Algeria** | 26 Nov 1985 | 12 Sep 1989 | | | A | A |
| **Benin** | | 12 Mar 1992 a | 24 Feb 2005 | 20 Sep 2006 | Y | Y |
| **Botswana** | 8 Sep 2000 | 8 Sep 2000 | | | | Y |
| **Burkina Faso** | | 4 Jan 1999 a | 21 Sep 2005 | 7 Jul 2010 | Y | Y |
| **Burundi** | | 18 Feb 1993 a | | | Y | Y |
| **Cameroon** | | 19 Dec 1986 a | 15 Dec 2009 | | A | A |
| **Cape Verde** | | 4 Jun 1992 a | | | Y | Y |
| **Chad** | | 9 Jun 1995 a | | | | |
| **Comoros** | 22 Sep 2000 | | | | | |
| **Congo** | | 30 Jul 2003 a | 29 Sep 2008 | | Y | Y |
| **Côte d'Ivoire** | | 18 Dec 1995 a | | | | Y |
| **Democratic Republic of the Congo** | | 18 Mar 1996 a | | 23 Sep 2010 a | Y | Y |
| **Djibouti** | | 5 Nov 2002 a | | | | A |
| **Egypt** | | 25 Jun 1986 a | | | A | A |



| STATE | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Equatorial Guinea** | | 8 Oct 2002 a | | | | Y |
| **Ethiopia** | | 14 Mar 1994 a | | | A | A |
| **Gabon** | 21 Jan 1986 | 8 Sep 2000 | 15 Dec 2004 | 22 Sep 2010 | | Y |
| **Gambia** | 23 Oct 1985 | | | | Y | Y |
| **Ghana** | 7 Sept 2000 | 7 Sept 2000 | 6 Nov 2006 | | Y | Y |
| **Guinea** | 30 May 1986 | 10 Oct 1989 | 16 Sep 2005 | | | Y |
| **Guinea-Bissau** | 12 Sep 2000 | | | | | |
| **Kenya** | | 21 Feb 1997 a | | | A | A |
| **Lesotho** | | 12 Nov 2001 a | | | Y | Y |
| **Liberia** | | 22 Sep 2004 a | | 22 Sep 2004 a | | |
| **Libyan Arab Jamahiriya** | | 16 May 1989 a | | | A | A |
| **Madagascar** | 1 Oct 2001 | 13 Dec 2005 | 24 Sep 2003 | | Y | Y |
| **Malawi** | | 11 Jun 1996 a | | | Y | Y |
| **Mali** | | 26 Feb 1999 a | 19 Jan 2004 | 12 May 2005 | Y | Y |
| **Mauritania** | | 17 Nov 2004 a | | | A | A |
| **Mauritius** | | 9 Dec 1992 a | | 21 Jun 2005 a | Y | Y |

| | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Morocco** | 8 Jan 1986 | 21 Jun 1993 | | | Y | Y |
| **Mozambique** | | 14 Sep 1999 a | | | Y | Y |
| **Namibia** | | 28 Nov 1994 a | | | Y | Y |
| **Niger** | | 5 Oct 1998 a | | | | |
| **Nigeria** | 28 Jul 1988 | 28 Jun 2001 | | 27 Jul 2009 a | N | N |
| **Rwanda** | | 15 Dec 2008 a | | | | |
| **Sao Tome and Principe** | 6 Sep 2000 | | | | | Y |
| **Senegal** | 4 Feb 1985 | 21 Aug 1986 | 4 Feb 2003 | 18 Oct 2006 | Y | Y |
| **Seychelles** | | 5 May 1992 a | | | | Y |
| **Sierra Leone** | 18 Mar 1985 | 25 Apr 2001 | 26 Sep 2003 | | | Y |
| **Somalia** | | 24 Jan 1990 a | | | | A |
| **South Africa** | 24 Jan 1993 | 10 Dec 1998 | 20 Sep 2006 | | Y | Y |
| **Sudan** | 4 Jun 1986 | | | | A | A |
| **Swaziland** | | 26 Mar 2004 a | | | Y | Y |
| **Togo** | 25 Mar 1987 | 18 Nov 1987 | 15 Sep 2005 | 20 Jul 2010 | A | A |
| **Tunisia** | 26 Aug 1987 | 23 Sep 1988 | | | A | A |



| | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Uganda** | | 3 Nov 1986 a | | | Y | Y |
| **Zambia** | | 7 Oct 1998 a | 27 Sep 2010 | | Y | Y |
| | | | | | | |
| **ASIA AND THE PACIFIC** | | | | | | |
| **Australia** | 10 Dec 1985 | 8 Aug 1989 | 19 May 2009 | | A | A |
| **Bangladesh** | | 5 Oct 1998 a | | | A | A |
| **Cambodia** | | 15 Oct 1992 a | 14 Sep 2005 | 30 Mar 2007 | | Y |
| **China** | 12 Dec 1986 | 4 Oct 1988 | | | N | A |
| **India** | 14 Oct 1997 | | | | A | A |
| **Indonesia** | 23 Oct 1985 | 28 Oct 1998 | | | Y | Y |
| **Japan** | | 29 Jun 1999 a | | | N | A |
| **Republic of Korea** | | 9 Jan 1995 a | | | Y | Y |
| **Maldives** | | 20 Apr 2004 a | 14 Sep 2005 | 15 Feb 2006 | | |
| **Mongolia** | | 24 Jan 2002 a | | | Y | Y |
| **Nauru** | 12 Nov 2001 | | | | Y | Y |
| **Nepal** | | 14 May 1991 a | | | A | A |

| | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **New Zealand** | 14 Jan 1986 | 10 Dec 1989 | 23 Sep 2003 | 14 Mar 2007 | Y | Y |
| **Pakistan** | 17 Apr 2008 | 23 June 2010 | | | A | A |
| **Philippines** | | 18 Jun 1986 a | | | A | A |
| **Sri Lanka** | | 3 Jan 1994 a | | | Y | Y |
| **Thailand** | | 2 Oct 2007 a | | | A | A |
| **Timor-Leste** | | 16 Apr 2003 a | 16 Sep 2005 | | | Y |
| | | | | | | |
| **MIDDLE EAST** | | | | | | |
| **Afghanistan** | 4 Feb 1985 | 01 April 1987 | | | Y | |
| **Bahrain** | | 6 Mar 1998 a | | | A | Y |
| **Israel** | 22 Oct 1986 | 3 Oct 1991 | | | N | Y |
| **Jordan** | | 13 Nov 1991 a | | | Y | Y |
| **Kuwait** | | 8 Mar 1996 a | | | A | A |
| **Lebanon** | | 5 Oct 2000 a | | 22 Dec 2008 a | | Y |
| **Qatar** | | 11 Jan 2000 a | | | A | A |
| **Saudi Arabia** | | 23 Sep 1997 a | | | A | A |



| | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Syrian Arab Republic** | | 19 Aug 2004 a | | | N | A |
| **Yemen** | | 5 Nov 1991 a | | | | Y |
| | | | | | | |
| **AMERICAS** | | | | | | |
| **Antigua and Barbuda** | | 19 Jul 1993 a | | | Y | Y |
| **Argentina** | 4 Feb 1985 | 24 Sep 1986 | 30 Apr 2003 | 15 Nov 2004 | Y | Y |
| **Bahamas** | 16 Dec 2008 | | | | A | A |
| **Belize** | | 17 Mar 1986 a | | | A | A |
| **Bolivia** | 4 Feb 1985 | 12 Apr 1999 | 22 May 2006 | 23 May 2006 | Y | Y |
| **Brazil** | 23 Sep 1985 | 28 Sep 1989 | 13 Oct 2003 | 12 Jan 2007 | Y | Y |
| **Canada** | 23 Aug 1985 | 24 Jun 1987 | | | Y | Y |
| **Chile** | 23 Sep 1987 | 30 Sep 1988 | 6 Jun 2005 | 12 Dec 2008 | Y | Y |
| **Colombia** | 10 Apr 1985 | 8 Dec 1987 | | | Y | Y |
| **Costa Rica** | 4 Feb 1985 | 11 Nov 1993 | 4 Feb 2003 | 1 Dec 2005 | Y | Y |
| **Cuba** | 27 Jan 1986 | 17 May 1995 | | | N | A |

| | UNCAT | | OPCAT | | VOTE AT THE GA | |
|---|---|---|---|---|---|---|
| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Dominican Republic** | 4 Feb 1985 | | | | Y | Y |
| **Ecuador** | 4 Feb 1985 | 30 Mar 1988 | 24 May 2007 | 20 Jul 2010 | Y | Y |
| **El Salvador** | | 17 Jun 1996 a | | | Y | Y |
| **Guatemala** | | 5 Jan 1990 a | 25 Sep 2003 | 9 Jun 2008 | Y | Y |
| **Guyana** | 25 Jan 1988 | 19 May 1988 | | | A | A |
| **Honduras** | | 5 Dec 1996 a | 8 Dec 2004 | 23 May 2006 | | Y |
| **Mexico** | 18 Mar 1985 | 23 Jan 1986 | 23 Sep 2003 | 11 Apr 2005 | Y | Y |
| **Nicaragua** | 15 Apr 1985 | 5 Jul 2005 | 14 Mar 2007 | 25 Feb 2009 | Y | Y |
| **Panama** | 22 Feb 1985 | 24 Aug 1987 | 22 Sep 2010 | | Y | Y |
| **Paraguay** | 23 Oct 1989 | 12 Mar 1990 | 22 Sep 2004 | 2 Dec 2005 | Y | Y |
| **Peru** | 29 May 1985 | 7 Jul 1988 | | 14 Sep 2006 a | Y | Y |
| **Saint Vincent and the Grenadines** | | 1 Aug 2001 a | | | | Y |
| **United States of the Americas** | 18 Apr 1988 | 21 Oct 1994 | | | N | N |
| **Uruguay** | 4 Feb 1985 | 24 Oct 1986 | 12 Jan 2004 | 8 Dec 2005 | Y | Y |



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| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Venezuela** | 15 Feb 1985 | 29 Jul 1991 | | | Y | Y |
| | | | | | | |
| **EUROPE AND CENTRAL ASIA** | | | | | | |
| **Albania** | | 11 May 1994 a | | 1 Oct 2003 a | Y | Y |
| **Andorra** | 5 Aug 2002 | 22 Sep 2006 | | | Y | Y |
| **Armenia** | | 13 Sep 1993 a | | 14 Sep 2006 a | Y | Y |
| **Austria** | 14 Mar 1985 | 29 Jul 1987 | 25 Sep 2003 | | Y | Y |
| **Azerbaijan** | | 16 Aug 1996 a | 15 Sep 2005 | 28 Jan 2009 | Y | Y |
| **Belarus** | 19 Dec 1985 | 13 Mar 1987 | | | | Y |
| **Belgium** | 4 Feb 1985 | 25 Jun 1999 | 24 Oct 2005 | | Y | Y |
| **Bosnia and Herzegovina** | | 1 Sep 1993 d | 7 Dec 2007 | 24 Oct 2008 | Y | Y |
| **Bulgaria** | 10 Jun 1986 | 16 Dec 1986 | 22 Sep 2010 | | Y | Y |
| **Croatia** | | 12 Oct 1992 d | 23 Sep 2003 | 25 Apr 2005 | Y | Y |
| **Cyprus** | 9 Oct 1985 | 18 Jul 1991 | 26 Jul 2004 | 29 Apr 2009 | Y | Y |
| **Czech Republic** | | 22 Feb 1993 d | 13 Sep 2004 | 10 Jul 2006 | Y | Y |
| **Denmark** | 4 Feb 1985 | 27 May 1987 | 26 Jun 2003 | 25 Jun 2004 | Y | Y |

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| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Estonia** | | 21 Oct 1991 a | 21 Sep 2004 | 18 Dec 2006 | Y | Y |
| **Finland** | 4 Feb 1985 | 30 Aug 1989 | 23 Sep 2003 | | Y | Y |
| **France** | 4 Feb 1985 | 18 Feb 1986 | 16 Sep 2005 | 11 Nov 2008 | Y | Y |
| **Georgia** | | 26 Oct 1994 a | | 9 Aug 2005 a | A | Y |
| **Germany** | 13 Oct 1986 | 1 Oct 1990 | 20 Sep 2006 | 04 Dec 2008 | Y | Y |
| **Greece** | 4 Feb 1985 | 6 Oct 1988 | | | Y | Y |
| **Holy See** | | 26 Jun 2002 a | | | | |
| **Hungary** | 28 Nov 1986 | 15 Apr 1987 | | | Y | Y |
| **Iceland** | 4 Feb 1985 | 23 Oct 1996 | 24 Sep 2003 | | Y | Y |
| **Ireland** | 28 Sep 1992 | 11 Apr 2002 | 2 Oct 2007 | | Y | Y |
| **Italy** | 4 Feb 1985 | 12 Jan 1989 | 20 Aug 2003 | | Y | Y |
| **Kazakhstan** | | 26 Aug 1998 a | 25 Sep 2007 | 22 Oct 2008 | A | Y |
| **Kyrgyzstan** | | 5 Sep 1997 a | | 29 Dec 2008 a | Y | Y |
| **Latvia** | | 14 Apr 1992 a | | | Y | Y |
| **Liechtenstein** | 27 Jun 1985 | 2 Nov 1990 | 24 Jun 2005 | 3 Nov 2006 | Y | Y |
| **Lithuania** | | 1 Feb 1996 a | | | Y | Y |
| **Luxembourg** | 22 Feb 1985 | 29 Sep 1987 | 13 Jan 2005 | 19 May 2010 | Y | Y |



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| **STATE** | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Malta** | | 13 Sep 1990 a | 24 Sep 2003 | 24 Sep 2003 | Y | Y |
| **Monaco** | | 6 Dec 1991 a | | | Y | Y |
| **Montenegro** | | 23 Oct 2006 a | 23 Oct 2006 d | 6 Mar 2009 | | |
| **Netherlands** | 4 Feb 1985 | 21 Dec 1988 | 3 Jun 2005 | 28 Sep 2010 | Y | Y |
| **Norway** | 4 Feb 1985 | 9 Jul 1986 | 24 Sep 2003 | | Y | Y |
| **Poland** | 13 Jan 1986 | 26 Jul 1989 | 5 Apr 2004 | 14 Sep 2005 | Y | Y |
| **Portugal** | 4 Feb 1985 | 9 Feb 1989 | 15 Feb 2006 | | Y | Y |
| **FYR Macedonia** | | 12 Dec 1994 d | 1 Sep 2006 | 13 Feb 2009 | Y | Y |
| **Republic of Moldova** | | 28 Nov 1995 a | 16 Sep 2005 | 24 Jul 2006 | | |
| **Romania** | | 18 Dec 1990 a | 24 Sep 2003 | 2 Jul 2009 | Y | Y |
| **Russian Federation** | 10 Dec 1985 | 3 Mar 1987 | | | A | A |
| **San Marino** | 18 Sep 2002 | 27 Nov 2006 | | | Y | Y |
| **Serbia** | | 12 Mar 2001 d | 25 Sep 2003 | 26 Sep 2006 | | |
| **Slovakia** | | 28 May 1993 d | | | Y | Y |
| **Slovenia** | | 16 Jul 1993 a | | 23 Jan 2007 a | Y | Y |

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|---|---|---|---|---|---|---|
| | Signature | Ratification Accession (a) Succession (d) | Signature | Ratification Accession (a) Succession (d) | Third Committee A/C.3/57/L.30 (07/11/02) | Plenary session A/RES/57/199 (18/12/02) |
| **Spain** | 4 Feb 1985 | 21 Oct 1987 | 13 Apr 2005 | 4 Apr 2006 | Y | Y |
| **Sweden** | 4 Feb 1985 | 8 Jan 1986 | 26 Jun 2003 | 14 Sep 2005 | Y | Y |
| **Switzerland** | 4 Feb 1985 | 2 Dec 1986 | 25 Jun 2004 | 24 Sep 2009 | Y | Y |
| **Tajikistan** | | 11 Jan 1995 a | | | | Y |
| **Turkey** | 25 Jan 1988 | 2 Aug 1988 | 14 Sep 2005 | | Y | Y |
| **Turkmenistan** | | 25 Jun 1999 a | | | | |
| **Ukraine** | 27 Feb 1986 | 24 Feb 1987 | 23 Sep 2005 | 19 Sep 2006 | Y | Y |
| **United Kingdom of Great Britain and Northern Ireland** | 15 Mar 1985 | 8 Dec 1988 | 26 Jun 2003 | 10 Dec 2003 | Y | Y |
| **Uzbekistan** | | 28 Sep 1995 a | | | A | A |





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# Further reading on the Optional Protocol to the UN Convention against Torture

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## OPCAT Manual on Preventing Torture

***The Optional Protocol to the UN Convention against Torture: Implementation Manual*** is a joint publication of the Association for the Prevention of Torture (APT) and the Inter-American Institute of Human Rights (IIHR).

This manual is an updated and revised version of the APT-IIHR 2004 manual on the Optional Protocol to the UN Convention against Torture (OPCAT), which was an essential advocacy tool for securing the OPCAT's prompt entry into force, on 22 June 2006.

The new manual is divided into five chapters, each of which can be read separately:

1. Fundamental aspects of the OPCAT
2. Commentary on the Articles of the OPCAT
3. The UN Subcommittee on Prevention of Torture
4. OPCAT Ratification and National Preventive Mechanism Designation: Domestic Challenges
5. Operational Functioning of NPMs

This publication aims to support and strengthen the work of international, regional and national actors involved in OPCAT ratification and implementation. It provides examples of good practice drawn from around the world by the APT. In addition to taking into account the latest developments in all regions of the world, this revised version of the manual emphasises the process and challenges of implementing the OPCAT.

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