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"Rights of persons deprived of their liberty: the role of national human rights structures which are OPCAT mechanisms and of those which are not"

9 -10 April 2008 Padua (Italy)

WORKSHOP DEBRIEFING PAPER

University of Padua
Interdepartmental Centre on
Human Rights and the Rights of Peoples

Université de Padoue
Centre Interdépartemental pour
les Droits de la Personne et les Droits des Peuples

The present publication[1] was prepared by Stefano Valenti of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua, with contributions and suggestions from a number of participants in the workshop.

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[1] *The electronic version of this publication is also available at www.centrodirittiumani.unipd.it*

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Introduction

Co-financed by the Council of Europe (CoE) and the European Union (EU), the *"Peer-to-Peer Project"* consists of a work programme to be implemented, in 2009, by the Council of Europe's Directorate General of Human Rights and Legal Affairs (DGHL) and the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua[2]. The main tool of the programme is the organisation of workshops for staff members of the National Human Rights Structures (NHRSs), in order to convey information on the legal norms governing priority areas of NHRS action and to proceed to a peer review of relevant practices used or envisaged throughout Europe.

The 9-10 April 2008 workshop was the first of three events, which were organised in 2008 in Padua by the Human Rights Centre in co-operation with the Office of the Commissioner for Human Rights, and focussed on the *"Rights of persons deprived of their liberty: the role of national human rights structures which are OPCAT mechanisms and of those which are not"*. The aim of the workshop was a) to convey selected information on the notion of ill-treatment and relevant international standards and mechanism to prevent and punish torture and other forms of ill-treatment and b) to promote a peer-to-peer discussion on the role of NHRSs *vis à vis* the obligation for each State party to the Optional Protocol to the UN Convention against Torture (OPCAT) to establish a new or designate an already existing institution as OPCAT National Preventive Mechanism (NPM). The two-day workshop was attended by a total of 62 persons, including participants, speakers and organisers. Participants were mainly from NHRSs

[2] *The Interdepartmental Centre on Human Rights and the Rights of Peoples is the structure of the University of Padua established in 1982 with the mandate to carry out teaching, training and research activities in the field of human rights.*

of CoE non EU countries such as Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Montenegro, the Russian Federation, Serbia (including the Provincial Ombudsman of Vojvodina), the Former Yugoslav Republic of Macedonia and Ukraine, as well as from Kosovo[3].

Concerning the establishment or designation of NPMs, experiences made by NHRS colleagues from other CoE member States were presented, thus facilitating a peer-to-peer contribution to the discussion on obstacles encountered and new avenues that might be tried in taking effective measures to enhance the role of NHRSs in the prevention of ill-treatment.

As a follow up to this event, it was decided to produce this workshop debriefing paper which summarizes the findings of the workshop and provide practical information to the NHRSs and references to documents concerning the role of NHRSs in the field of prevention of ill-treatment[4]. The contributions of a number of experts, who had participated in the workshop, were further developed and updated to be included in this document. Information provided in each chapter is complemented with quotations from relevant material published on this topic by the Association for the Prevention of Torture (APT)[5].

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[3] *All reference to Kosovo, whether to the territory, institutions or population, in this document shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

[4] *All information contained in this publication is updated till April 2009.*

[5] *We would like to thank for their contributions all experts who participated in the workshop, in particular Ms Carmen Comas Mata-Mira, Chief Cabinet of the First Deputy of the People's Defender of Spain, Mr Paolo de Stefani of the Human Rights Centre of the University of Padua, Mr Ivan Šelih, Senior Advisor of the Office of the Ombudsman of Slovenia, and Ms Marina Narvaez, UN & Legal Programme Officer of the APT, who kindly suggested relevant APT material and authorised its reproduction in this publication.*

1]

Chapter 1

Universal, European and domestic systems of punishing and preventing torture and ill-treatment: self-sufficiency v. complementarity

The proscription of torture and any other treatment or punishment cruel, inhuman or degrading, is enshrined in the Universal Declaration of Human Rights (UDHR) as well as in virtually all universal and regional instruments on human rights and fundamental freedoms. Indeed, the freedom from torture is an essential feature in any bill of rights and an absolute, non-derogable, human right. The prohibition of torture belongs to the peremptory norms of customary international law *(ius cogens)* whose infringement involves the international criminal responsibility of the State officer who inflicts, instigates or just acquiesces to acts of torture, as well as the international responsibility of the State. The general definition of torture and ill-treatment contained in the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) has been complemented since 1984 by the more precise notion established in the UN Convention against Torture (CAT). Although the actual scope of the norm on torture is open to some interpretative fluctuation in the case law of international and national courts, it is worth reminding that the state engagement against torture is not confined to sanctioning the occurrence of acts of torture within their respective jurisdiction, but also encompasses a wide range of preventive actions. In the perspective of torture prevention, the distinction between *"torture"* and *"ill-treatment"* is blur, as well as the need of a strict legal qualification of the targeted practice (as it is required for adjudicative purpose, especially in criminal prosecutions and trials). It was actually the long lasting and positive experience of the European Committee for the Prevention of Torture (CPT), whose field of action is not limited to a strict notion of torture and

ill-treatment, that inspired the OPCAT[6]. The NPM operating under the OPCAT restores the role of State in the area of monitoring detention places. NPM must adopt standards of independence and effectiveness equivalent to those granted to the CPT and the other international bodies. States parties to the OPCAT are called to show political willingness and a great deal of transparency.

Definition of torture: evolution

Traditionally, torture and ill-treatment have been considered from the ex post factum perspective of penal law and State responsibility. The UDHR (1948), Article 5, and the ECHR (1950), Article 3, have settled in general terms the human right to not be subjected to torture or to any cruel, inhuman or degrading treatment or punishment. In the Greek case (1969)[7] the European commission of Human Rights stated that, in order to qualify as torture, the treatment deliberately causing severe mental or physical suffering must be inflicted to the victim for a specific purpose, namely to obtain information or a confession, punish him/her, or, as Article 1 of the CAT later clarified, for any reasons based on discrimination of any kind. Thus, the purpose seems to characterise torture as opposed to other forms of ill-treatment. This was not the conclusion of the European Court of Human Rights (ECtHR) in the Irish case (1978)[8], where the intensity of the pain caused to the victim seemed to be the key factor. The CAT definition emphasises another element of the conduct: the official capacity of the perpetrator. The recent General Comment No. 2 of the UN Committee against

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[6] *Text of the OPCAT www2.ohchr.org/english/law/pdf/cat-one.pdf*

[7] *Report of the European Commission of Human Rights on the "Greek Case" (Application No. 3321/67, Denmark vs. Greece; No. 3322/67, Norway vs. Greece; No. 3323/67, Sweden vs. Greece; No. 3344 Netherlands vs. Greece).*

[8] *"Ireland v. the United Kingdom" (Case No. 5310/71).*

torture (Nov. 2007)[9] maintains that both the purposes (which are typical to state officers – especially the police) and severity of harm are necessary elements of torture. Interpreters and human rights activists have tried to further elaborate the legal notion of torture and ill-treatment with the aim of covering as many situations as possible. The case law of the international human rights courts – in particular the ECtHR – has highlighted the evolutionary nature of the concept, stemming from the assumption that human rights treaties are *"living instrument[s] which must be interpreted in the light of present-day conditions"* (ECtHR, *Selmouni v. France*, 1999, § 100)[10]. This interpretation of Article 3 by the ECtHR has underlined the positive obligations of states and extended the apparently limited scope of the provision. Positive obligations stemming from the prohibition of torture include the duty to commence effective official investigations in case of alleged torture; the prohibition of deporting individuals of foreign nationality to states (including the state of citizenship) where torture is widespread or likely to be inflicted to some target group (the Soering jurisprudence has been confirmed also in cases where the individual to expel is a suspected terrorist whose presence in a European country poses serious risks to the local population security: see *Saadi v. Italy*, 2008)[11]; the obligation to ensure protection from torture inflicted by private individuals (esp. within the family: cf. *Z. and others v. UK*, 2001)[12]. The last point seems particularly relevant, as it confirms the state's duty not to tolerate private-to-private violence (corporal punishment, intimidation and gender-based discrimination).

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[9] www2.ohchr.org/english/bodies/cat

[10] *Judgement in the case of Selmouni v. France (application no. 25803/94)* www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

[11] *Grand Chamber Judgement in the case of Saadi v. Italy (Application no. 37201/06)* www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

[12] *Judgement in the case of Z. and others v. United Kingdom (Application no. 29392/95)* www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

Sanctioning of torture to punish or to prevent too?

There is a need for co-ordination and synergies to enhance complementarities between sanctioning of, protecting from and preventing ill treatments. For example the standards set by the judicial bodies – e.g. the ECtHR – are extremely important also in strengthening the prevention of torture and ill-treatment, at least as a deterrent. The CAT however contains several provisions expressly aimed at getting rid of such an odious practice. States must adopt *"legislative, administrative, judicial and other measures"* (CAT, Article 2.1), including education, information and training initiatives, redress of victims and, of course, enacting appropriate criminal legislation (which is still missing in a number of States party to CAT). However, monitoring detention places and institutions where people are taken against their will is key in the efforts for torture prevention. The UN Committee against torture has be given a limited competence in this field: in addition to considering individual claims, it receives periodic reports of member States, to whom it addresses their recommendations. The Committee can also elaborate general comments providing directions as to the interpretation of the CAT provisions and can prompt a fact-finding procedure (CAT, Article 20). The constructive dialogue and the Article 20 confidential inquiry/fact finding mechanisms are remarkable powers of the Committee but far from providing it with the necessary teeth. At the UN level, the Special Rapporteur on torture is a very important Charter-based mechanism for monitoring universal respect of the torture prohibition. Its mandate though is shaped according to the rule of State consent and accordingly the Rapporteur cannot issue any legally binding decision. He/she can however provide the UN system (through the Human Rights Council) and the NGO community with guidelines, studies and data.

The novelty of OPCAT[13]

The OPCAT requirement for the establishment of NPMs brings back to domestic level the positive obligation of States to prevent/protect from ill treatment. The CoE, with the 1987 European Convention for the Prevention of Torture, has established the CPT with the mandate of visiting detention places and submitting to the relevant state confidential reports; with the consent of the state, the report and the state's answer are made public; public statements can be used as an extreme form of sanction and pressure on non-complying states. The more recent OPCAT gives the Sub-Committee and the NPMs a similar monitoring mandate.
There is though a difference between the CPT and the OPCAT approach. The CPT follows roughly the model of the International Committee of the Red Cross, being a supra-national group of independent experts that visits detention facilities, with full access to any place, person and file. The OPCAT system is characterised by the NPMs, the Sub-Committee having mostly the role of providing supervision and guidance, in particular, it must assure that NPMs operate independently and professionally, implementing internationally accepted standard in substance and procedure. By imposing the member States to establish such NPMs, the OPCAT brings home, to the domestic level, the responsibility of monitoring and preventing the violations of the right not to be subjected to torture. It can be said that the OPCAT adopted a *"complementarity"* model[14], whereby States are encouraged to take up the primary responsibility to protect those under their jurisdiction from torture and ill-treatment, while the international bodies retain a role of second instance.

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[13] *For an updated status of OPCAT signatures and ratifications see the APT link: www.apt.ch/content/view/40/82/lang,en*

[14] *The term is borrowed from the Statute of the International Criminal Court http://untreaty.un.org/cod/icc/statute/romefra.htm*

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Chapter 2

Institutional and functional requirements regarding the national preventive mechanism to be set up under OPCAT

This session of the workshop aimed to support participants in assessing if in their respective country a potential NPM would meet minimal standards under the OPCAT, in understanding its strength and weaknesses, in improving the effectiveness of existing mechanisms or in understanding whether there was a need to create a completely new institution.

Basic requirements

Ms Marina Narvaez, UN & Legal Programme Officer of the APT, presented the basic requirements for an NPM to match OPCAT requirements concerning independence, mandate, expertise and composition, powers and authority, as well as right to make recommendations and publish reports. The APT material presented by Ms Narvaez was used to complement the content of this and other chapters.

Mr Maciej Dyboski, Advisor of the Office the Polish Commissioner for Civil Rights Protection (Ombudsman), shared his experience on how to start an NPM activity within an existing institution, and who and what can help in this endeavour. As mentioned in its intervention, the Polish Ombudsman is also designated as NPM, being a large institution with a wide mandate and considerable resources for its overall work. However, the Unit on Executive Criminal Law, which is actually charged with carrying out OPCAT work consists of approximately eight staff, of whom only four or five undertake visits to places of detention. According to APT, this does not

appear to represent any increase over its pre-OPCAT resources in order to reflect its new functions[15]. Mr Duboski listed the main difficulties as well as tools to succeed, such as adequate resources (financial means and expertise) independence and credibility of the institution. He stressed the need to adjust the existing institution to OPCAT requirements, taking into account the preventive role of an NPM compared to the traditional role of an Ombudsman which is more prone to react to complaints than to prevent cases of ill-treatment.

Checklist to match OPCAT requirements

On this subject the APT has prepared two checklists[16] (a short version comprising 15 criteria and a long version comprising 46 criteria) which are intended for national and international actors involved in designating or creating NPMs. They are practical tools which help compare and evaluate existing and/or proposed mechanisms against the requirements of the OPCAT. Both checklists are organized in order to provide:
1) Necessary background information about the mechanism and the country under the following themes and 2) necessary criteria to have an adequate mandate, capacity to carry out visits, functional capacity and independence, as well as the capacity to adopt follow up action after visits and reporting.
The criteria could also serve as useful concrete elements to be taken into account when setting up a new mechanism. Therefore, the criteria are complemented by some explanations and recommendations.

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[15] *We understand that in the meantime the staff of the Polish Ombudsman tasked with OPCAT work has increased.*

[16] *Comprehensive NPM Assessment Checklist:*
www.apt.ch/component/option,com_docman/task,doc_download/gid,285/Itemid,59/lang,en
Short NPM Assessment Checklist:
www.apt.ch/component/option,com_docman/task,doc_download/gid,128/Itemid,59/lang,en

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Chapter 3
Pros and cons of the various institutional options between using an existing body or setting up a new one

Article 3 of the OPCAT provides that *"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"*. States have the option of creating a new institution as NPM or designating an existing one provided they meet the numerous requirements under the OPCAT. Consideration of the pros and cons of the various institutional options is given below from the point of view of Ms Carmen Comas Mata-Mira, Chief Cabinet of the First Deputy of the People's Defender of Spain, an institution which has proposed to be designated as NPM. In addition to these useful and practical information, relevant parts of the APT document "*National Human Rights Commissions and Ombudspersons' Offices / Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture*"[17], are reproduced with quotation marks in order to provide a *"hard second look"* at the appropriateness of designating existing general purpose institutions as NPMs.

Choice of organisational form: the importance of the national context

The points explained below have to be translated in the reality of each national context. In some cases, careful consideration of the national context *"may lead to recognition that a new specialized institution will best enable*

[17] www.apt.ch/content/view/44/84/lang,en

the State to comply with the OPCAT; while in others it will help ensure that discussions between the government, civil society and national institutions is based on a realistic assessment of the legislative, human and financial implications of transforming an existing national institution into an NPM under the OPCAT".

Mandate: pros and cons

The point below *"Access to information and places of detention: pros and cons"* describes the added value of designating an existing institution to monitor places of detention as NPM, in consideration of the institutional experience of those institutions in visiting such places. However, distinctions between different kinds of visits will have to be clearly reflected in the mandate of an NPM. This is because *"not every type of visit to a place of detention will follow the OPCAT approach: the prevention of future human rights violations through exposure of existing problems on a regular and repeated basis and a process of direct dialogue with officials. Nor does every type of visit or visiting institution enjoy the guarantees and employ the methodology contemplated by the OPCAT. For instance, the OPCAT is based on a distinction between regular visits undertaken to all places of detention to prevent ongoing and future ill-treatment of any detainee in the place, and infrequent visits undertaken to particular individuals in order to investigate ill-treatment that has already taken place. While there can be considerable overlap between these two functions in practice, undertaking visits only after-the-fact to investigate individual cases will usually fail to achieve the broad preventive effect, which is the purpose and object of the OPCAT".*

Access to information and places of detention: pros and cons

Institutions for the prevention of torture must be able to monitor all cases of deprivation of freedom. When talking of deprivation of freedom we refer to many situations and different organizations and places, such as peni-

tentiary centres; centres for minors' reform; police stations (national, regional or local); centres for immigrants' detention; centres for migrants' transits (borders, airports, ports, etc.); psychiatric hospitals; military barracks; means of transport of arrested persons; centres of detention or retention outside the borders of the State, financed and/or managed by this later, and in general, any public or private premises where there are persons deprived of freedom against their will.
This wide list emphasizes the need to guarantee the capacities of performance foreseen in Article 20 of the OPCAT through a suitable regulation for the different types of centres to be visited (including the private centres); the civil servants; the staff in charge of the private centres, who could be comprised under the definitions of the Article 4 of the OPCAT. It might also be considered to provide for one or more specific crimes sanctioning the breaching of the obligations foreseen in Articles 20 and 21 of the OPCAT. In this regard, the designation of an existing institution or the creation of a new one might seem of little importance. However, it would be not only logical but more efficient to take advantage of the institutional experience of existing institutions, such as Ombudsmen, which have been carrying out their monitoring activity for years. In some cases, like in Spain (Article 502 of the Penal Code) or Portugal (Law 9/91 of April 9, Article 29, nº6) the crime of disobedience to the Ombudsman already exists for the authorities that do not co-operate with the institution, by not facilitating his/her investigations. These legal provisions can reinforce enormously the institutional position of the NPM.

It is also relevant to provide the mechanism or mechanisms with a statute, guarantying its/their functional independence (Article 18.1 OPCAT) as well as the principle of confidentiality as required in Article 21.2 of the OPCAT. The relevance of these requirements hardly seems to be compatible with a model of national mechanism of a weak structure. On the contrary, there is the need of establishing a system for collecting information with a clear responsibility for its managing and file keeping. It also implies the existence of a high security system for processing this information. An *ex-*

novo institution for this purpose could turn out to have high costs of maintenance and updating (in addition to the need to have a solid knowledge of the work to be carried out, whitout leaving any room for improvisation).

Expertise: pros and cons

The principle of an *"open to all"* membership in a preventive mechanism of such kind cannot be envisaged. Thus, regulating the appointment of the members of this mechanism or mechanisms (social entities or individuals) should be considered. This could cause pressure, even of political nature, from the ones willing to obtain representation. The NPM should be joined by persons who possess not only professional skills and verifiable knowledge, but also a strong commitment to human rights. In this respect, the composition of the mechanism should follow the Paris Principles (Principle B (1) on composition and guarantees of independence and pluralism). In any case, the participation of the main human rights institutions in each State seems to be unavoidable, especially when these institutions already comply with the Paris Principles. If the establishment of a mixed body (Ombudsman and representatives of the civil society) is being considered, it is necessary to stress the importance of the independence both of the Ombudsman and of the individuals coming from the NGOs, who could join the mentioned mixed body. In fact, the Ombudsman cannot be subjected in his/her work of monitoring to methods of investigation not supervised and/or executed by him/her. Otherwise, there is a high risk of limiting its independence. This very same risk concerns also NGOs having joined a public institution, which should avoid losing their independence from the public sector.
What seems to be clear, regardless of the type of institution (new or already existing), is the need to have teams made up of experts in technical fields so to carry out a comprehensive evaluation of the condition of the premises visited (physicians, psychologists, criminologists, IT experts, etc.). In this context, it is of particular relevance for the already existing institu-

tions to take into due consideration the observations made in the already mentioned APT document, which lists the necessary expertise to carry out a full programme of visits: *"a body that has historically only rarely or never undertaken field visits on a repeated basis, including to rural areas of a country, will always require additional physical and logistical resources to function under the OPCAT; A body that has not typically required ongoing advice from medical or psychological professionals will require additional personnel or financial resources to obtain such expertise; A body that historically has visited only a particular type of place of detention – prisons for instance – will always require additional resources if it is now to cover the full range of places of detention (police stations, psychiatric institutions, military detention centres, etc.) required by the OPCAT"*.

Resources: pros and cons

A particularly delicate question is how to ensure the necessary budgetary endowment of an NPM. The highest degree of functional independence would be ensured through the creation of an institution not linked to the public administration, which is precisely what happens with the budget of most of the Ombudsmen. Other formulae would eventually force to link the funding to a branch of the budget of the state´ s general administration. This, on the one hand, would force to devote staff to the budgetary negotiation and to the administration of the funds, and, on the other hand, to endanger its independence, which is one of the main concerns when establishing these mechanisms of prevention. In any case, *"additional financial and human resources will almost always be required for a general-purpose national human rights commission or Ombudsperson's office to be in a position to undertake a sufficiently focused and frequent programme of preventive visits to meet OPCAT obligations"*.

Credibility, impact, success rate, visibility and perception by media, public and detainees: pros and cons

Some stakeholders see as a contradiction the fact that an instrument recently created in order to correct the faults and mistakes of already existing mechanisms, could be carried out by pre-existing institutions: it is believed that an effective implementation of the OPCAT would demand for the creation of new mechanisms. As already said, the functional independence of an NPM must be indisputable. This functional independence must be combined with a strong perception of independence, sensed credible by the public at large, as well as by persons deprived of their freedom. Undoubtedly, the appearance of a new mechanism would have more visibility before the mass media, the public and detainees, than the simple attribution of new functions to a pre-existing institution.

Nevertheless, we should always consider the adequate weighting between performances and undesirable consequences, such as the overlapping that might take place with the creation of a new institution. We must not forget that the creation of a new mechanism with preventive functions, would not imply diminishing the scope of powers of other pre-existing institutions, as the NHRSs, which would continue carrying out their visits to places of detention. In Ms Renate Kicher' s words, Vice-President of the CPT, it is necessary to avoid excessive numbers of inspections to centres of detention: if there are too many and are carried out by too many institutions, the inmates will lose eventually their confidence on these institutions. When establishing a new NPM, the added value of already existing institutions, which usually enjoy a wide trust by the public, should never be underestimated.

Coordination at national and international level: pros and cons

The issue of national coordination has a different weight depending if the State is centralized or decentralized and if, in the latter case, the designation of diverse NPMs should also be taken into consideration. Anyway, the principle of indivisibility of human rights has to be considered so that an homogeneous protection of all human rights in all parts of the country can be achieved while respecting territorial independence or competence-related factors. The risk of coexistence of heterogeneous concepts related to the definition of detention as contained in Article 4 of the OPCAT must also be avoided. In this context, it must be underlined the importance of the relations between civil society and the NHRSs. Actually, the whole working system of the NHRSs in most of the countries where these exist, is meant to make things easier for the civil society (individuals, institutions or NGOs): the lack of formalism in submitting complaints, the absence of deadlines, and a good dialogue between Ombudsmen and NGOs allow for a fast, easy and accessible channel of communication. In this way, criticisms and complaints of the civil society can be heard not only by national authorities but also by international organizations. This also includes, most certainly, the presentation of complaints on police ill-treatment and other violations of human rights as foreseen by the OPCAT: Ombudsmen have a wide experience in this matter.

If we refer to the international coordination, the key issue does not seem to be the identification of the pros and cons of having an NPM as a brand new institution or an existing one, but rather the importance of ensuring good coordination, efficiency and efficacy in the use of limited resources (e.g. not duplicating visits), as well as the importance of ensuring a homogeneous concept in relation to the definitions of OPCAT's Article 4. If a designation of a multiple NPM is chosen, a clear channel of communication with the UN Subcommittee for the Prevention of Torture should be established.

Otherwise, NPM management could become very difficult, affecting the understanding by the Subcommittee of the situation concerning freedom from torture in a particular member State.

Conclusions: any recipes? Solution of compromise, multiple mechanisms or a new institution

As seen in the previous points, which are based on the practical experience of an already existing institution, there are certain advantages in entrusting an Ombudsman office as an OPCAT NPM. However, it is not granted that any human rights commission or Ombudsperson's office could be able to effectively act as an NPM within their existing budgets, structures and working methods. Additional financial, human, and logistical resources are almost always needed. The OPCAT specifically requires under Article 18(3) that each State party should *"make available the necessary resources for the functioning of its national preventive mechanism"*.
As a concluding remark, we think useful to remind the APT recommendations contained in its *"Guide for the establishment and designation of an NPM"*[18], regarding choices of organisational form: *"States can choose either to designate an existing mechanism or to create an entirely new mechanism. Neither model is universally and inherently better than the other; Civil society must be included in the process of deciding whether to use an existing or create a new mechanism; before designating an existing institution, the government and the civil society must carefully and exhaustively review its mandate, jurisdiction, independence, powers and guarantees, to ensure that it fully complies with OPCAT requirements, make any necessary legislative amendments and provide any increase in resources required"*.

[18] www.apt.ch/content/view/44/84/lang,en

Examples of national preventive mechanisms[19]

OMBUDSMAN AS NPM: POLAND

Poland has designated as its NPM the Commissioner for Civil Rights Protection (Ombudsman), which was established in 1987. The main task of the office was to deal mainly with complaints lodged by members of the public on an array of matters. In May 2007 Poland ratified the OPCAT. At the time of the designation, the Unit on Executive Criminal Law was reportedly the main department which implemented a programme on preventive visits. This department consisted of approximately 8 staff, of whom only 4 or 5 were undertaking visits to places of detention. The staff dedicated to the NPM has in the mean time increased. The visits are currently conducted by three Departments of the Office of the Commissioner for Civil Rights Protection, comprising 17 men and 12 women, of whom 9 women and 17 men are conducting preventive visits in places of detention. The Ombudsman's Office also started to hire external experts such as psychiatrist and other health professionals such as addiction experts. As from 2008 this NPM is hiring one expert to each preventive visit.

MIXED MODEL: SLOVENIA

Slovenia ratified the OPCAT in September 2006. Since ratifying the instrument several measures have been taken by the authorities to establish an NPM. Slovenia is a particularly interesting example of a country which has explicitly foreseen a role for civil society actors in the NPM. The competencies and duties of the NPM are performed by the Human Rights Ombudsperson in agreement with non-governmental organisations registered in the Republic of Slovenia and by organisations, which acquired the status of humanitarian organisations in the Republic of Slovenia. To date, Slovenia is the only European country which has officially opened up the way for NGOs to participate in the NPM in cooperation with the Human Rights

[19] *For more examples see the APT document "OPCAT Country Status report" at www.apt.ch/index2.php?option=com_docman&task=doc_view&gid=124&Itemid=59*

Ombudsman's Office[20]. Further Information about Slovenia's NPM are provided in the following chapter by a representative of the Ombudsman of Slovenia.

CREATION OF A NEW MECHANISM: FRANCE

In France, in June 2007 the Ministry of Justice decided to promote the creation of an entirely new mechanism, the so-called General Inspector for Places of Deprivation of Liberty *(Contrôleur général des lieux de privation de liberté)*. This was decided despite the fact that some national existing bodies were initially considered to be potential NPM, including the *Commission nationale de déontologie de la sécurité (CNDS) and the Médiateur de la République*. The Ministry of Justice subsequently elaborated a draft law, which was amended and then approved by the Senate on 18 October 2007. Finally, the Balladur Commission on institutional reforms recommended in December 2007 the creation of a Fundamental Rights Ombudsman, institution which would comprise, amongst others, the *Médiateur de la République* and the future General Inspector. On 23 April 2008, the Government approved a draft constitutional law on the modernization of the institutions of the 5th Republic. Article 31 officially introduces a new Defender of the Rights of Citizens (DRC): this new institution might be in place this year 2009 and it is likely that the mandate-holder will be the current Mediator of the Republic. The idea is for the General Inspector, which has been designated the NPM and initiated its activities in July 2008, to be brought under the jurisdiction of the Defender at a later stage. The General Inspector would become one of the deputies of the Defender.

[20] *A number of European States have expressed their interest in the Slovenian NPM model as their future model.*

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Chapter 4
Co-operation between national actors and international actors

Cooperation among international actors

As explained by Mr Eric Sottas, Director of the World Organisation against Torture, in view of the tendency to decrease the weight of the UN Human Right Council, and the resistances expressed against the good functioning of OPCAT by certain States, there is a real need to ensure a good cooperation between the different existing international mechanisms, in order to strengthen their efficiency. There are perhaps too many international actors operating in the context of prevention of ill-treatment. Even if the international actors have precise and different tasks, the lack of financial means prevents them from being effective: an example could be seen in the little number of inspections which were carried within a single year by the UN subcommittee on prevention on torture. In order to remedy this situation, the APT launched the idea in the eighties to create a regional preventive mechanism which resulted in the establishment in 1987 of the CPT[21]. The pros of regional systems are that they are closer to the field and in principle they cost less than universal systems. However, the regionalisation of preventive mechanisms risks having a number of cons, such as the possibility of different way of operating and using different standards, thus the need of an increased effort to co-operate among international actors. An example is the need of information sharing on standards: while it is imperative to have uniform standards these standards should be applied in the local context. To this end, all the existing mechanisms should cooperate to develop general minima standards that can be applied in all parts of the world.

[21] www.cpt.coe.int/en

Cooperation between international and local actors

Cooperation between international and local actors can find a proper frame within eight *"golden rules"* which were listed by Ms Renate Kicher, First Vice-President of the CPT, while explaining the possible cooperation between NPMs and international monitoring bodies.

1. It is important that NPMs agree on the minimum standards applying for inspections. In this context at the European level the CPT standards should form the agreed minimum level for inspections.
2. There should be also an agreement between NPMs and CPT on the working methods.
3. In this context, a possibility for NPM and CPT joint visits could be envisaged.
4. In the area of training, cooperation between international actors and NPMs could result in international inspectors engaging in practical oriented training of national actors on best practices.
5. In the area of information sharing, it is important to institutionalise exchange of inspection plans and inspections results so as to maximise synergies.
6. Following the observations and recommendations made after visits by international and national inspectors, joint follow-up actions could be organised.
7. Regular exchange of views between international and national inspectors could be organised to discuss matters of common interest and concern.
8. International and national actors should take advantage of all *"going public"* events such as awareness raising campaigns involving politicians and media, as well as using institutional networks, e.g. in annual conferences.

The possible role of NPMs in light of the CPT recommendations

Ms Renate Kicher reminded workshop's participants that the CPT has constantly recommended in its visit's reports the establishment of national independent inspection mechanisms. In this context, the CPT has developed criteria for the creation and functioning of these mechanisms. For an analyses on the comments by the CPT concerning national mechanisms against torture see the APT document *"Visiting places of detention at the national level: Recommendations of the European Committee for the Prevention of Torture in light of the OPCAT"* [22]. On the same subject see also *"Added value of the Optional Protocol for States Parties to the European Convention for the Prevention of Torture"*, an APT Position Paper of 2003[23].

[22] www.apt.ch/content/view/44/84/lang,en

[23] www.apt.ch/component/option,com_docman/task,cat_view/gid,48/Itemid,99999999/lang,en

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Chapter 5
Co-operation among national actors

During the discussion which took place at the working session related to the co-operation between the national actors, participants stressed the importance of the NGOs contribution to the process of establishing and developing an effective NPM. Contributions by two experts described two different models of possible NGOs involvement, namely the so called *"inclusion"* model (Slovenia) v. the *"independence"* model (France). We thought useful to summarize here below the written contribution to the workshop of Mr Ivan Šelih, Senior Advisor to the Human Rights Ombudsman of Slovenia.

The role of NGOs vis à vis NPMs: NGO 's inclusion model

The NPM in Slovenia is an example of cooperation with non-governmental organizations. Slovenia ratified the OPCAT on 29 September 2006. It entered into force on 1 January 2007. Article 5 of the Ratification Act states, that the tasks and powers of the NPM shall be performed by the Human Rights Ombudsman, and in agreement with him, also by the NGOs that are registered in the Republic of Slovenia, and organizations that have acquired the status of a humanitarian organization. The Ratification Act was prepared by the Ministry of Justice in cooperation with the Ministry of Foreign Affairs, the representative of the Human Rights Ombudsman and several NGOs.

ACTIVITIES AND PREPARATIONS FOR IMPLEMENTATION OF OPCAT
NGOs that were registered in the Republic of Slovenia, and organizations which had obtained the status of humanitarian organizations, were invited to apply to participate in the implementation of the tasks and powers of the NPM. The public invitation also contained criteria for the selection. Prior-

ity in the selection process was given to those organizations with more experience in the field of human rights or fundamental freedom protection, particularly in the field of preventing torture or ill-treatment. Two NGOs applied to the public invitation, the Peace Institute and the Legal-Informational Centre of NGOs– both of them were selected for cooperation due to their extensive experience with issues of asylum seekers and aliens. The Ombudsman signed a contract with the selected organizations – a so called *"Cooperation Agreement"*. It regulates the mutual relations of the contracting parties in more detail. The Cooperation Agreement was valid until 31 December 2008, thus the Ombudsman re-opened a public tender to include NGO participation in the work of the NPM. As a result of this new tender one new Slovenian NGOs replaced one of the two organisations which had been already accepted during the previous period[24].

METHODS OF WORK

Supervisory visits are carried out by mixed groups, consisting of representatives of the Ombudsman and persons from the cooperating organizations. The time and place of the supervisory visit and the number of members of each group are determined by the Ombudsman on a case-by-case basis. The size of the group depends on the size of the institution to be visited. The smallest group consists of three members: one representative of the Ombudsman and one person from each selected organization. Normally the Human Rights Ombudsman joins these visits personally. In cooperation with selected NGOs, the Ombudsman adopts a programme of visits. This programme is taken into consideration with determining the place of supervision. The nature of these visits is preventive – the aim is to prevent torture or ill-treatment before it happens. But, if a specific complaint is received from a detained person and such a complaint might require an immediate visit, such circumstances will be taken into consideration. Every person participating in the supervision prepares a brief written report on

[24] *Updated information contained in the APT "Monthly OPCAT Briefing" March 2009 www.apt.ch/component/option,com_docman/task,cat_view/gid,129/lang,en*

his/her findings and any recommendations, with the aim of strengthening the protection of persons deprived of their liberty, and improving the treatment and conditions of detained persons. Such reports are submitted to the Ombudsman after the supervisory visit. This contribution is part of the (final) comprehensive report on the visit. If, however, the Ombudsman does not agree with particular views, they can be presented within the report as a separate opinion of the cooperating organization. As the NPM, the Ombudsman made the first visit to a supervised institution (*Radeče* Re-education Centre – an institution for young offenders) in cooperation with the representatives of NGOs on 19 March 2008. Since then, up to five visits a month have been planned.

RESULTS

The first experience gained in cooperation with NGOs has been extremely positive and bodes well for future work. The persons from the selected NGOs have greatly contributed to the purpose for which the NPM was established. This means that the places of deprivation of freedom and treatment of persons who have been deprived of their liberty, are checked on a regular basis in order to strengthen the protection against torture and ill-treatment. According to the known data, Slovenia is currently the only European state in which the Human Rights Ombudsman has been cooperating with NGOs in the implementation of tasks and powers of the national prevention mechanism. However, other states have expressed an interest in this form of OPCAT implementation. Representatives from Montenegro, in preparation for the ratification of the OPCAT, visited the Human Rights Ombudsman and expressed their interest in the Slovenia's experience in this field. Similar interest in the *"Slovenian NGO cooperation model"* was expressed more recently by FYROM (Macedonia) when designating the Ombudsman Office as NPM. There is no doubt that the Ombudsman, as a national preventive mechanism in cooperation with NGOs, can have some impact in creating a culture of prevention, within places of detention, and in strengthening the protection of persons deprived of their liberty.

The role of NGOs vis à vis NPMs: NGO 's independence model

In the workshop's discussions and presentations, it was stressed that even if the NGOs do not have an official role within the NPM, as it is the case in Slovenia, civil society can still play an important role co-operating with NPMs, by monitoring, supporting and critically evaluating its work in practice. In particular, during the relevant workshop session Mr Patrick Marest, National Delegate, International Observatory of Prisons (IOP) explained the role of NGOs in France during the process of establishment of an NPM. For example, NGOs such as ACAT-France, AI- France and others publicly expressed their concerns about the draft law establishing the General Inspector as NPM in France. NGOs identified several key shortcomings in the law, including the process of nomination of the General Inspector for Places of Deprivation of Liberty; guarantees of independence of the proposed institution; composition of its staff; regularity and preventive approach of its visits program; restriction of visits only to the territory of France; and serious limitations on the right to visit places of detention and of access to information contained therein. Taking into account the concerns of NGOs and civil society, the National Assembly adopted several amendments to the legislation, particularly regarding the professional composition and the process of designation of the proposed institution. Modifications were also made to lower the restrictions on visiting places of detention. Nonetheless, NGOs expressed concern that the law does not entirely comply with the NPM criteria, as stipulated in the OPCAT text. Irrespective of these additional concerns, the amended law was finally approved by the French Senate on its second reading.

The APT has published a paper *"Civil Society and National Preventive Mechanisms"*[25] which is very pertinent to this subject. This paper provides

[25] www.apt.ch/content/view/44/84/lang.en

a comparative analysis of the role of civil society in national processes of determining the NPMs, the modalities of participation of civil society organizations in the NPMs and the role of civil society outside the NPMs. In particular, it contains at the end of each chapter useful recommendations addressed to NGOs and to Governments for pertinent actions.

Conclusions

The establishment of effective and reliable NPMs is a challenge for any State. Their creation would be the evidence of the genuine commitment to the eradication of torture and torture-like practices in the society. However, the NPMs occupy a tiny – although crucial – niche. The efforts required are much wider in order to actually prevent torture and ill-treatment, by adopting pertinent legislative, administrative and other measures, and implementing them consistently. The task entails the implementation of a full range of national institutions for human rights and cooperation among political institutions and civil society actors. NPMs can play therefore, in different contexts, besides a technical function of monitoring bodies, a role of catalyst for more effective national human rights institutions and policies.

The discussion, which took place during the last part of the workshop, indicated as a possible follow-up action the organisation of a programme transferring know-how to nascent European NPMs. The aim of the programme should be to convey international expertise to NPMs in CoE member States, to set-up a European network of NPMs and to nurture that network as part of the network of NHRSs. Another programme should initiate a network of European human rights structures at regional level.

Appendixes

List of background documents

OPCAT

- Text of the OPCAT
  www2.ohchr.org/english/law/pdf/cat-one.pdf
- About the OPCAT: frequently asked questions
  www.apt.ch/component/option,com_docman/task,cat_view/gid,44/Itemid,59/lang,en
- Establishment & Designation of National Preventive Mechanisms
  www.apt.ch/component/option,com_docman/task,cat_view/gid,117/Itemid,59/lang,en
- Country-by-Country Status Report
  www.apt.ch/component/option,com_docman/task,cat_view/gid,49/Itemid,59/lang,en
- National Human Rights Commissions and Ombudspersons' Offices / Ombudsmen as NPM
  www.apt.ch/component/option,com_docman/task,cat_view/gid,51/Itemid,59/lang,en

UN SPECIAL RAPPORTEUR ON TORTURE

www2.ohchr.org/english/issues/torture/rapporteur

- Report to the Human Rights Council, 2008: main report
- Summary of information received by States

CPT

- Text of the ECPT
  www.cpt.coe.int/en/documents/ecpt.htm
- About the CPT: the CPT in brief
  www.cpt.coe.int/en/about.htm
- The CPT Standards
  www.cpt.coe.int/en/documents/eng-standards-prn.pdf

ECHR
www.echr.coe.int

- Text of the ECHR
- About the ECHR and the CoE: The CoE and the protection of human rights
- The prohibition of torture: a guide to the implementation of Article 3 of the European Convention on Human Rights

Workshop programme

TUESDAY, 8 APRIL 2008
20.00 Arrival of participants and dinner

WEDNESDAY, 9 APRIL 2008
9.00 – 9.30 **Opening of the Workshop**
Professor Antonio Papisca, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua
Markus Jaeger, Deputy to the Director, Head of the National Human Rights Structures Unit, Office of the Council of Europe Commissioner for Human Rights

9.30 – 10.15 **OPCAT, European Convention on the Prevention of Torture, European Convention on Human Rights: complementary systems?**
Introductory presentation by Professor Paolo De Stefani, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua
Discussion chaired by Eliana Nicolaou, Ombudsman of Cyprus

10.15 – 11.00 **Institutional and functional requirements regarding the national preventive mecanism (NPM) to be set up under OPCAT**
Introductory presentations by Marina Narvaez, UN & Legal Programme Officer, Association for the Prevention of Torture (APT), by Maciej Dybowski, Advisor, Office of the Polish Ombudsman

11.00 – 11.15 Coffee break

11.15 – 13.00 Discussion chaired by Professor Paolo De Stefani

13.00 – 15.00 Lunch break

15.00 – 16.15 **Pros and cons of the various institutional options between using an existing body or setting up a new one**
Introductory presentations by Carmen Comas-Mata Mira, Head of First Deputy's Office, Office of Spanish People's Defender and Charlotte Clavreul, Human Rights Officer, Office of the French Republic Mediator
Discussion chaired by Christina Papadopoulou, Greek National Commission for Human Rights

16.15 – 16.45 Coffee break

16.45 – 18.00 Discussion continued

20.00 Dinner

THURSDAY, 10 APRIL 200
9.00 – 10.45 **The co-operation between the national actors (NPM, ombudsman, national human rights commission) and the international actors (UN Subcommittee on Prevention, CPT, CoE Commissioner for Human Rights, ...)**
Introductory presentation by Renate Kicker, First Vice-President of the European Committee for the Prevention of Torture (CPT), Council of Europe
Discussion chaired by Eric Sottas, Director of the World Organisation against Torture

10.45 – 11.15 Coffee break

11.15 – 13.00 **The co-operation between the national actors (NPM, ombudsman, national human rights commission, NGOs)**
Introductory presentations by Ivan Šelih, Senior Advisor, Office of the Human Rights Ombudsman of Slovenia and by Patrick Marest, National Delegate, International Observatory of Prisons (IOP)

Discussion chaired by Armen Galstyan, Head of the International Department, Office of the Ombudsman of Armenia

13.00 – 15.00	Lunch break
15.00 – 16.15	Discussion continued
16.15 – 17.00	**Winding-up of the workshop** by Markus Jaeger
17.00	**Close of the workshop** by Professor Antonio Papisca
20.00	Dinner

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This publication summarises the findings of the workshop on the *"Rights of persons deprived of their liberty: the role of national human rights structures which are OPCAT mechanisms and of those which are not"*, which was organised in Padua (Italy) on 9-10 April 2008 within the framework of the so-called *"Peer-to-Peer Project"*, a joint programme between the Council of Europe and the European Union.

This project aims at setting up an active network of independent non-judicial human rights structures in Council of Europe member States.