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**The role of the Ombudsman and prevention of torture under the Optional Protocol
to the Convention Against Torture (OPCAT)**

Abstract

Just ten years after the adoption of the United Nations Optional Protocol to the Convention Against Torture (OPCAT), the number of States Parties has reached 63, with a further 22 States Signatories. This treaty is of great relevance to Ombudsmen around the world, given that at its core, it is concerned about transparency and government accountability in relation to all places of detention in order to uphold the dignity of those deprived of their liberty. The OPCAT requires that a domestic torture-prevention framework be established, known as a 'National Preventive Mechanism' (NPM), that can be tailored to best suit country conditions. In many cases, the Ombudsman has taken up this role. The Ombudsman may add significant value in contributing to the torture prevention framework under the OPCAT, derived from attributes such as independence, experience in dealing with places of detention, an ability to develop constructive working relations with government in pursuit of accountability; and an already-developed public profile that can be utilized to advocate for systemic change.

An Ombudsman contemplating taking up the role of NPM should be aware of significant challenges, which may include a shift from focusing on mal-administration to a rights-based approach, a need for a multi-disciplinary team of monitors, and a shift from a reacting to complaints to a preventive approach involving systemic analysis of conditions and procedures to ascertain risk factors. There are also challenges for Ombudsman in taking on the additional NPM mandate if funding is not commensurately increased.

Yet the key point to make is that regardless of their status as NPMs or otherwise, the Ombudsman have an important part to play in preventing torture and ill-treatment.

I would like to thank the International Ombudsman Institute and in particular Beverley Wakem for inviting me to attend and present at this conference. It is a privilege to be here in the company of such highly esteemed colleagues from across the world, who all share a common interest in ensuring fairness, justice and accountability in the use of power by the state.

For those of you who are not familiar with the Association for the Prevention of Torture (APT), we are an international NGO that work worldwide to prevent torture. The APT was established in 1977 by a Swiss banker, Jean Jacques Gautier. The APT was founded on the simple and perhaps utopian idea that torture and cruel, inhuman and degrading treatment (CIDT) can be prevented by opening up places of detention to external scrutiny. The APT played a key role in the drafting of international and regional instruments (such as the European Convention for the Prevention of Torture and the UN Optional Protocol to the Convention Against Torture (OPCAT) which entered into force in 2006. Today, we continue to work with governments, civil society and National Human Rights Institutions, including Ombudsman around the world to promote monitoring and transparency of places of detention, ensure that adequate legal frameworks function correctly and build national capacities to prevent torture.

Nelson Mandela has said that ‘no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest’.¹ People deprived of their liberty are amongst the most vulnerable in our society – dependent on the state to carry out even the most basic bodily functions, and for physical nourishment and mental well-being. As Ombudsman you all know how vulnerable detainees are to CIDT and torture. And you know the key role that your office can play in acting as a bulwark against state excess, be it through resisting cultures where cruel treatment is the norm, countering the influence of a few bad apples, or as can often be the case, providing oversight over government departments that have good intentions that may be poorly implemented in practice. Ombudsman around the world can and do play a very practical role in upholding dignity of persons deprived of their liberty through

¹ Nelson Mandela (2004) Long Walk to Freedom. Little, Brown and Company, London.

activities such as handling complaints from detainees, visiting places of detention and conducting own motion inquiries.

Today I would like to talk to you about what I consider to be one of the most practical of human rights treaties in upholding the dignity of people in detention, the UN Optional Protocol for the Convention Against Torture (or OPCAT as it is known). It is also a treaty that is highly relevant to you all as Ombudsman because ensuring appropriate treatment of citizens by the state, which is what the OPCAT aims to do, is your bread and butter. In terms of practical relevance of OPCAT to an Ombudsman's office we can envisage three possible scenarios. First, if your state has not yet ratified the OPCAT: In this scenario your voice and your actions are important in lobbying your state to ratify. You could explain the benefits of oversight and transparency regarding places of detention, in order to prevent torture and other forms of ill-treatment. If you have done own-motion investigations into places of detention this could be an example of how oversight can prevent torture at a system wide level.

The second and third scenarios are where your state has ratified the OPCAT. Under the OPCAT, states must officially designate a National Preventive Mechanism (NPM) under this treaty, which is an independent body that carries out regular monitoring and inspection of all places of detention. Under the second scenario, another institution has been designated to perform the NPM role. In some cases, the Ombudsman will not be the most appropriate organization to be NPM. However, this does not exclude cooperation with the NPM to contribute to the goals of OPCAT. The final scenario is one where the Ombudsman's office is designated with an official NPM role under the OPCAT – either on its own or in concert with other organizations.

For the purposes of today's presentation I will concentrate on different opportunities and pitfalls for an Ombudsman performing the role of NPM. In this respect it may seem most relevant to those of you in countries that have not yet ratified the OPCAT, or that have ratified but not yet designated an NPM. For those of you in this situation, I hope it will convey a realistic picture of what it could mean for your office to be designated as an

NPM (since it will necessitate a change to your work methods, your internal structure, your staffing profile, and your resource needs). Ideally, you should decide in advance whether or not it is something you wish to take on. For those of you past the fork in the road where the choice of NPM model in your country has been made, I hope it will give you some fresh insights into your role as the Ombudsman in a state that is party to the OPCAT. I do hope also that you come away realizing that even if the Ombudsman is not designated as the NPM there are still important functions for the Ombudsman to play in the prevention of ill treatment and the implementation of the OPCAT.

In my presentation today I will begin by giving you an overview of the OPCAT as a treaty, before explaining the requirements are for an institution to perform the role of NPM under the OPCAT. I will then turn to look more specifically at the opportunities and challenges that the role of NPM presents for the Ombudsman.

1. What is the OPCAT?

The OPCAT is based on the conviction that torture and CIDT is most likely to occur in places of detention, far from public view. The treaty establishes a system of regular, unannounced visits to places of detention by independent experts as a way to prevent torture and CIDT from happening. This monitoring system has a domestic and international component. At a domestic level, the OPCAT requires state parties to establish or designate their own domestic institution, called an NPM. The NPM is tasked with the role of monitoring all places of detention in a country, making recommendations to detaining authorities, and working constructively to follow up on the recommendations. When ratifying OPCAT, states have the option of creating a new institution to serve as NPM, or designating an existing institution to perform the role (such as an Ombudsman's office, a National Human Rights Commission, a specialized institution or a combination of these).

In terms of the international component, the OPCAT also sets up a UN Committee, called the Subcommittee for the Prevention of Torture or SPT that can conduct in-country visits

to places of detention, and work constructively with state governments and NPMs. The SPT is composed of 25 independent and impartial experts coming from different backgrounds and from various regions of the world (including the New Zealand Judge, Justice Lowell Goddard). There are two parts to the SPT's function. First, an operational function which involves conducting country visits to places of detention in States parties. This is done by a group of between 4 to 6 SPT members accompanied by staff from the SPT Secretariat (in the UN OHCHR). The SPT must be granted access to all places of detention, access to relevant documentary material, and they must be able to conduct private interviews with detainees. After a visit, the SPT will prepare a report with recommendations which is provided confidentially to government, although a good practice has been established by some states to publish the SPT report. The OPCAT stipulates that the SPT is to conduct "regular" visits and the SPT has publically stated that the goal is to visit state parties every 4-5 years, although whether this will eventuate remains to be seen, given an increasing number of OPCAT state parties (63 at the time of writing) and SPT secretariat resource limitations.² The current programme of visits includes 6 missions per year to countries that have ratified the OPCAT.

Second, the SPT has an advisory function which involves providing assistance and advice to States parties and the NPMs on the establishment and functioning of NPMs. In 2012 it developed a practice of short missions to countries to provide advice on NPM development (Honduras, Moldova and Senegal this year). An interesting point of difference between the SPT and other UN committees is that the SPT conducts its work in a spirit of co-operation to analyze the dangers and make relevant recommendations. It aims to engage with States parties via constructive dialogue and collaboration to prevent rather than criticism and condemnation of cases.

2. What are the requirements of an NPM under OPCAT and some different models?

² Rachel Murray, Elina Steinerte, Malcom Evans & Antenor Hallo de Wolf (2011) *The Optional Protocol to the UN Convention Against Torture*, at 101.

The provisions of the OPCAT give States considerable flexibility in determining which institution or institutions are best suited to perform the role of NPM. States can also establish a completely new institution. There is no one-size-fit-all approach, or a template that states can apply upon ratification to establish an NPM, and the diversity of the initial NPMs demonstrates this. To date, of the current 63 States Parties, 44 have designed their NPM under OPCAT, of which at least 22 have formal involvement of the Ombudsman's office. Broadly, we can divide types of NPM under the OPCAT in one of four categories:

- In 24 states, the National Human Rights Institution has been designated as the NPM. Of these NHRIs, 15 are Ombudsman's office (accredited as Ombudsman's Office with the IOI).
- In 9 states, a completely new body has been created as NPM. For example, in France, where a Ombudsperson's Office existed (*Médiateur de la République*), it was decided to create a specific and specialized institution dedicated to prevent torture and other forms of ill-treatment (French Controller of Places of Deprivation of Liberty). A reform took place a couple of years ago to gather existing independent institutions – including the French NPM and the Ombudsperson's Office – into one new umbrella institution: The Defender of Rights. However, a discussion took place at the National Assembly to keep separate the French NPM from the larger NHRI as its specialization, competencies and the impact of its work on the situation of deprivation of liberty was deemed essential to prevent torture and other abuses.
- Four states have opted for what has been termed the “National Human Rights Institution plus” model, where the NHRI (be it a Human Rights Commission or Ombudsman) performs the function of the NPM in cooperation with civil society organizations, which may bring additional expertise with respect to certain types of detention, or add experience in adopting a rights-based approach. Of these NHRI Plus models, 3 involve the Ombudsman (according to the IOI list of Ombudsperson's Offices). This is the case in Slovenia, where the legislator decided to give the NPM mandate to the Human Rights Ombudsman's Office, in formal collaboration with

civil society organisations. Every year since it started operating as NPM in 2008, the Human Rights Ombudsman's Office select civil society organisations interested in participating in its NPM activities, in particular in the labor intensive work of regular monitoring of places of detention. To date, 5 civil society organisations have entered into memorandums of agreement with the Human Rights Ombudsman's Office.

- A further six states have a multiple body NPM. Under this approach a number of different institutions are designated NPM and may be responsible for oversight of different thematic places of detention, or different geographic areas. The United Kingdom has adopted this approach with 18 separate institutions making up the NPM. They are all coordinated by the HM Inspectorate for Prisons. In the case of New Zealand, there is one central body, the National Human Rights Commission that is responsible for coordination between the 4 other NPMs (one of which is the Ombudsman's Office) and for contact with the SPT.

In terms of trends across regions, European states have predominantly designated existing institutions as NPMs and for the most part, these have been Ombudsman. The rationale behind this in many cases is a view held by States that the Ombudsman (or other entity designated) can perform this additional role with few changes or additional resources. It is harder to generalize trends in other regions, given the low numbers of NPMs designated, with only four designated each in Africa and Latin America, and only two designated in the Asia Pacific region.

Rather than giving in-depth examples of each type of NPM arrangement, allow me to add some more detail on the mandate for an NPM under the OPCAT. OPCAT requires that each NPM undertake a programme of preventive visits to places of detention. What are preventive visits, and how do they differ from reactive visits? In the words of the SPT:

“Prevention necessitates the examination of rights and conditions from the very outset of deprivation of liberty until the moment of release. Such examination should take a multi-disciplinary approach and involve, for example, the medical profession, children and gender specialists and

psychologists in addition to a strict legal focus. This means the monitoring of compliance with the vast array of human rights directly or indirectly affected by deprivation of liberty, even in cases where no complaints have been received. The ideal and ultimate goal of prevention is to counter the need for any complaints in the first place.”³

In order to effectively carry out its functions, an NPM must have full access to visit all places of detention in a state. They must have the power to carrying out unannounced visits, and they must have access to all relevant detainee information in those places of detention such as detention registers and health records. The NPM must have the right to talk to detainees in private. Importantly, any body designated as NPM must be functionally and financially independent from government and adequately resourced to perform all its functions. This resourcing issue is not insignificant.

For states that have not yet ratified OPCAT, the Ombudsman’s office can have a key role to play in laying the groundwork for ratification and implementation of the OPCAT. As mentioned earlier, Ombudsman can lobby their government to ratify and also be part of NPM designation groundwork including mapping out all the existing institutions and civil society organizations that currently perform a role of detention monitoring. Ombudsman can also reflect on their own role and functions and conduct an internal assessment on their own suitability for the role.

3. What opportunities does the NPM role present for the Ombudsman’s office?

Ombudsman around the world play a key role in upholding the rights of detainees. Because Ombudsman often act as an interface between detainees and authorities, and also often have power to conduct own-motion inquiries into conditions of detention, there may be some significant complementarities and synergies arising out of a designation of the Ombudsman as the NPM or part of a multi-body NPM. These advantages include

³ Report on the Visit of the Subcommittee on the Prevention of Torture and other Cruel, Inhuman and Degrading Treatment or Punishment to Sweden, CAT/OP/SWE/1, 10 September 2008, para 36.

avoiding duplication of institutions, and using the credibility and profile that an Ombudsman has already established with authorities, detainees, the media, and the public to enhance the legitimacy of a newly-designated NPM. The Ombudsman's office is often familiar with visiting places of detention, albeit in a more reactive rather than preventive framework and this practical knowledge could be an asset to the NPM function. Having a deep familiarity with the kinds of issues leading to complaints, and the geographic or institutional distribution of these complaints may also enable an Ombudsman to swiftly and accurately pinpoint key areas of concern across the system.

Independence from government is a vital component for an NPM. The OPCAT is specific on this point, requiring State Parties to guarantee NPMs' functional, financial and personal independence.⁴ Many Ombudsman already operate with such independence, although in other cases existing relationship to government may not meet the OCPAT requirements. In terms of a constructive relationship with authorities, Ombudsman's offices that already conduct own-motion inquiries may also already be familiar with the requirement under OPCAT that NPMs provide reports and recommendations to detaining authorities. OPCAT envisages that NPMs will have an open, frank and constructive relationship with detaining authorities, an approach that will not be foreign to many of the Ombudsman present today.

Whilst there may be advantages to a state in designating an Ombudsman as NPM in terms of maximizing on existing knowledge and expertise, it should be noted that this does not mean it is a 'cheaper' option for governments. There seems to be a tendency for governments to designate existing institutions thinking they can require them to perform additional roles without a commensurate increase in funding. The SPT has criticized states for this assumption and for assuming it is possible to carry out the significant obligations without commensurate funding⁵.As my co-panelists may well touch on,

⁴ Articles 18(1), 18(3) and 18(4), 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.

⁵ See generally the background to the designation of the Parliamentary Ombudsman and the Chancellor of Justice being designated as NPM in Sweden: Report on the Visit of the Subcommittee on the Prevention of Torture and other Cruel, Inhuman and Degrading Treatment or Punishment to Sweden, CAT/OP/SWE/1, 10 September 2008, para 22.

adequate resourcing is essential for an NPM to function effectively and so it is important for you to ensure that your government is fully aware of the need to appropriately finance an NPM.

4. What are the challenges presented by the Ombudsman taking on the NPM role?

Although there may be many potential benefits to a state of the Ombudsman taking on the role of NPM, it is important to be fully aware of the challenges, and how it will impact on existing work.⁶ Some of these challenges exist for any institution taking up the the Ombudsman is best placed to perform the NPM role, here are a few points you might like to consider:

In states where the Ombudsman's central role is focused on maladministration and reviewing the legality of government action (along the lines of the traditional Swedish Ombudsman model), then taking up the role of NPM might entail an Ombudsman shifting its methodology to adopt a human-rights based approach to its work. Rather than finding fault in a public body's actions on grounds such as being contrary to law, unjust, oppressive, discriminatory, arbitrary and so forth, an NPM must look more broadly at material conditions of detention, whether use of force and restraint is proportionate, whether protection measures such as registers are effectively functioning, whether there are adequate and appropriate activities for detainees, whether health needs of detainees are being met, whether training of staff and recruitment policies are appropriate and so on. The NPM's mandate should be interpreted even more broadly and extend to the political and legal conditions in the country as it relates to detention. This includes commenting on draft laws relating to prevention.

⁶ See for example comments from the former President of the International Ombudsman Institute, Sir John Robertson warned in 1998 that the Ombudsman model will only remain relevant on into the middle of the next century if it continues to operate in its core business, regardless of what other roles are assigned to it.' J Robertson 'The Ombudsman around the World' The International Ombudsman Journal, Volume 2, 1998, pp112-128. Taken from Riitta-Leena Paunio , 'The Ombudsman as Human Rights Defender', Paper delivered to International Ombudsman Institute Conference, Sweden, 10 June 2009 at 3. Available online at: <http://www.theioi.org/publications/the-stockholm-2009-conference-papers>.

This rights-based approach to prevention of torture will require consideration of not just national law but also international human rights law, as Article 19(b) of the OPCAT specifically requires that NPMs take ‘the relevant norms of the United Nations’ into account in carrying out its work. This may be a paradigm shift for some Ombudsman. For others it may not be a significant change, particularly in countries where human rights are firmly entrenched in national laws and Ombudsman’s functions are more broadly defined than the original Swedish Ombudsman model from over 200 years ago. Interestingly, from 1 July last year, the Swedish Parliamentary Ombudsman established a special unit to perform the NPM role under the OPCAT⁷. Many Ombudsman today will, as part of their usual mandate, examine not just compliance with the law but to what extent human rights of the individual have been respected.⁸ So, how big a change this aspect of NPM work will be for Ombudsman will vary from country to country.

Earlier, I made the distinction between preventive visits under the OPCAT and reactive visits in response to complaints from prisoners. It is important that any institution performing the role of NPM in addition to carrying out their traditional reactive mandate clearly distinguishes the two functions, in interactions with detainees, with detaining authorities, with the public generally. This is to reduce confusion, so that for example, a detainee doesn’t expect that they can follow up on an individual complaint whilst a visit is occurring in an NPM capacity, or that if for example, adequate clothing is an issue for a detention centre, detainees don’t expect that the NPM will then lobby centre management on behalf of individual detainees for access to additional socks or underwear. There is a risk that detainees and detaining authorities may find it confusing to have an institution that has previously established a more complaints-based approach.

The distinction between preventive functions under OPCAT and other institutional functions is also important internally, something that has been recognized by the SPT

⁷ See

http://www.jo.se/Page.aspx?MenuId=21&MainmenuId=12&ObjectClass=DynamX_Documents&Language=en.

⁸ Riitta-Leena Paunio, ‘The Ombudsman as Human Rights Defender’, Paper delivered to International Ombudsman Institute Conference, Sweden, 10 June 2009 at 14. Available online at: <http://www.theioi.org/publications/the-stockholm-2009-conference-papers>.

which states that ‘where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget’⁹. It may be necessary to ring fence the NPM budget from other functions,¹⁰ and set up a firewall so key aspects of confidentiality are preserved. If it is important that, for example, an officer who visits a prison to deal with an individual complaint doesn’t divulge that there will be an unannounced NPM preventive visit shortly, thus allowing the prison to prepare. However, the proactive or ‘preventive’ approach is not necessarily foreign to the Ombudsman. To paraphrase Ann Abraham, in many cases the role of Ombudsman has shifted from being a ‘fire fighter’, to performing the role of ‘fire watcher’, a role of ‘proactive prevention rather than remedial cure’.¹¹

The scope of places that must be visited by an Ombudsman performing the role of an NPM may be broader than under an Ombudsman’s current mandate. A state’s NPM must visit all places where persons are deprived of their liberty, including prisons, remand centres, youth justice facilities, police stations, immigration detention centres, closed psychiatric facilities, and in some cases even closed aged care facilities and private care homes. If these thematic areas of detention are new, the Ombudsman is likely to need additional expertise from other professions, a point I will touch on later. This also goes back to the issue that taking on a mandate to visit such a broad range of places of detention regularly will need additional financial, staffing, and office resources. Amendment to the organizations enabling legislation is also likely to be required.

Identifying signs of torture and ill treatment during visits to places of detention requires participation from experts with a range of professional backgrounds. A lawyer will be attuned to whether procedural safeguards have been complied with, such as whether detainees have been granted access to a lawyer, but not necessarily the best placed to analyze medical files in the way a doctor would. For this reason, OPCAT encourages

⁹ SPT, Guidelines on NPMs, para 32.

¹⁰ See, eg, SPT first annual report, para 28(viii).

¹¹ Riitta-Leena Paunio (2009) ‘The Ombudsman as Human Rights Defender’, Paper delivered to International Ombudsman Institute Conference, Sweden, at 14. Available online at: <http://www.theioi.org/publications/the-stockholm-2009-conference-papers>.

NPMs to have a multi-disciplinary team which could include lawyers, medical professionals, psycho-social workers, gender or children's experts or people who have worked in corrections previously. This may be a challenge for an Ombudsman in taking up the role of NPM, as they tend to be lawyer-heavy. Of course, changes can be made to staffing profile to address this issue and NPMs can engage additional experts in an advisory capacity. This has occurred in Denmark, with the Danish Ombudsman and NPM entering into a formal arrangement with the Danish Institute for Human Rights, for expert advice on international human rights law.¹²

Finally, if the preferred approach is an "NHRI plus" civil society model, there needs to be consideration about the relationship between the Ombudsman and civil society organizations being partnered with and possible implications for the credibility of the Ombudsman. If the Ombudsman works in partnership with civil society there is a need for a clear division of roles and responsibilities. At times it might be a finely tuned balance to work with civil society organizations in a way that maintains effective working relationships with government so that recommendations get implemented.

5. Concluding remarks

The key message I want to convey to you today is that because the Ombudsman is a key player in efforts to prevent torture everywhere, it is important that you are aware of, and involved in discussions and implementation of OPCAT in your country. If your state has not yet ratified, you can play a role in lobbying for ratification. If your state has ratified but not yet designated an NPM, you can lobby for and play a part in an open, transparent and consultative debate about the most appropriate institutional arrangements for your country. If your country already has an NPM, and if the Ombudsman is designated to perform this role alone or with other institutions, it goes without saying how key your role is. But even if your office is not part of the officially designated NPM, you will have a key role to play. Data on the complaints to your office from detainees might assist identify systemic issues of relevance to the NPMs work preventing torture, or you may

¹² See, eg, *OPCAT - The Danish Parliamentary Ombudsman – Folketingets*. Online at: <http://en.ombudsmanden.dk/opcat/...en.ombudsmanden.dk/opcat/Cached>. Accessed 18 September 2012.

wish to work cooperatively with the NPM through the use of your own-motion investigative powers. Further, you can monitor the work of the NPM, or liaise with the SPT (for example, be in contact before a visit to share information, meet with the SPT during a visit and potential cooperation afterwards if the report is made public).

The role of the Ombudsman under OPCAT will be varied, based on the role and function of the Ombudsman's office in your country, and the many and varied prevailing institutional, legal and political factors. However, there is no denying of the link between Ombudsman and torture prevention, given that at their core, both missions are concerned with controls on the power of the state and upholding dignity of some of the most vulnerable in society.

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