

# The National Preventive Mechanism

## A Key Human Rights Component of Well-Functioning Democracy

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### Abstract

The concept of a liberal democratic society requires that the state power is governed by the principle of rule of law and respects, protects, and fulfills the fundamental human rights and basic freedoms of every human being. A democratic society further establishes active oversight mechanisms, ensuring that its foundations are effectively protected. The National Preventive Mechanism, a unique oversight body that reveals and addresses torture and ill-treatment, acts which attack the very nature of democratic values, is indisputably a key component of a well-functioning democracy. However, only the understanding of how the NPM truly works and what its philosophy is will create a genuinely effective guardian of human rights and democratic values.

**Keywords:** Convention against Torture, human rights, ill-treatment, National Preventive Mechanism, Optional Protocol to the Convention against Torture, ombudsman, place of detention, torture.

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After the Second World War, the international community declared never again to experience the atrocities and horrors inflicted on people around the world during that conflict. The world started along the path to democracy by honoring its fundamental principle of recognizing and protecting the human rights and equality of every single human being. Human dignity became recognized as a core value of a democratic society that belongs to everyone and must be guaranteed in all circumstances.<sup>1</sup>

The prohibition of torture and cruel, inhuman, or degrading treatment or punishment (hereafter, “torture” or “torture and other forms of ill-treatment”),

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<sup>1</sup> For more about the conception of human dignity, see Aharon Barak, *Human Dignity—The Constitutional Value and the Constitutional Right* (Cambridge, UK: Cambridge University Press, 2015).

was instantly incorporated into the first universal human rights documents<sup>2</sup> and became globally recognized as a founding principle of human rights and fundamental freedoms. International human rights discourse commenced by considering torture as the most serious crime against humanity, which is never justifiable—even when a country is in a state of war or faces some other emergency. For its non-derogable nature, the prohibition of torture has been acknowledged as a principle of customary international law.

In order to strengthen protection from torture, the United Nations General Assembly adopted a comprehensive torture-focused document, the UN Convention against Torture, an umbrella document that imposes on the contracting states a variety of obligations, including both the negative obligation not to subject anyone to torture and a set of positive obligations aimed at further protection and prevention. The Convention entered into force on June 26, 1987, and since has been ratified by 165 countries.

After nineteen years, the international community, emphasizing preventive action and the strengthening of the protection of persons restricted in their liberty, reached the conviction that further action was needed to achieve the objectives of the Convention. Therefore, the Optional Protocol to the Convention against Torture (OPCAT) was adopted, with the ambitious aim of creating a unique preventative system for persons restricted in their liberty by opening places of detention to regular visits by an external, independent entity, the National Preventive Mechanism (NPM).

### **The Specific Aim of the OPCAT**

Unlike a traditional UN report system based on a periodic review of treaty obligations, the present OPCAT scheme creates two types of permanent monitoring bodies: the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), established at the international level via the United Nations, and the National Preventive Mechanism (NPM), created at the national level by each state party. The OPCAT thus requires a state party to become an active player in torture prevention by establishing and maintaining a fully functioning NPM and engaging in a continuous constructive dialogue with the SPT and other NPMs. The United Nations highlights the need for deep cooperation and stresses that, if the OPCAT is to be truly effective, all actors of the triangle relationship of the state party, the NPM, and the SPT need to be brought together.<sup>3</sup>

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<sup>2</sup> Art. 5 of the Universal Declaration of Human Rights, and art. 7 of the International Covenant on Civil and Political Rights.

<sup>3</sup> The United Nations, Office of the High Commissioner for Human Rights, 10th Anniversary of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (2016), <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCAT10.aspx> (accessed May 20, 2019).

Thus, while the Convention against Torture is a framework convention imposing on a state party a variety of negative and positive obligations, the OPCAT's focus is narrower, as it requires establishing a system of regular visits to places of detention by an independent expert "watchdog," with the aim of preventing torture and other forms of ill-treatment of persons who are restricted in their liberty. OPCAT stresses that preventing torture is a long-term continuous commitment that is different from the reactive approaches of traditional controlling bodies, and is based on a system of constant monitoring, nonbinding reporting, and close cooperation among the state (state actors), the NPM, and the SPT.

The long-term benefit of the OPCAT system is thus the goal-directed development of the conditions in places of detention; the creation of mutual understanding between detention staff and detainees; and the enhancement of public awareness of detention-related concerns, which strengthen human rights overall on both national and international levels.

The OPCAT's purpose has been aptly characterized by Steven Caruana in his research paper advocating the establishment of an NPM in Australia:

I see OPCAT as an important and unprecedented opportunity not only to further safeguard the human rights of detainees but to make detention environments safer places to work in and more attuned to the everyday experience of being detained and working in them. OPCAT's non-adversarial nature promotes discussions around problems and finding pragmatic solutions to those problems. OPCAT's preventive focus recognises that creating a safer work environment assists in creating a better working culture, reducing the likelihood of ill-treatment to those deprived of their liberty.<sup>4</sup>

### **The NPM as a Key Component of a Well-Functioning Democracy**

It is essential for any true democracy to be equipped with mechanisms persistent enough to provide its democratic underpinnings with real and effective safeguards. That is why a number of different review mechanisms and oversight bodies, institutions, and agencies have been created on national, regional, and universal levels. There is no doubt that the creation of the NPM to address the incidence of torture and other ill-treatment has a place among

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<sup>4</sup> Steven Caruana, *Enhancing Best Practice Inspection Methodologies for Oversight Bodies with an Optional Protocol to the Convention against Torture Focus—UK, Norway, Switzerland, Malta, Greece, New Zealand*, Churchill Fellowship (2017), p. 19, [https://www.churchilltrust.com.au/media/fellows/Caruana\\_S\\_2017\\_inspection\\_methodologies\\_for\\_oversight\\_bodies\\_with\\_an\\_OPCAT\\_focus.pdf](https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf) (accessed May 10, 2019), 19.

these safeguards.<sup>5</sup> Nevertheless, this essay shows that the role of the NPM is not limited to the prevention of torture itself, as it also has the potential to improve the overall human rights situation in a given country and thus support its democratic pillars.

Since the NPM has unlimited access to all places of detention involving all people, information, and premises therein, it may place immediate and undistorted knowledge about the human rights situation in a particular segment of a detained population under public scrutiny. It consequently may launch a constructive dialogue with state authorities and confront them with revealed human rights violations, resulting in the immediate abandonment of the forbidden practices or the drafting of strategies to progressively address the identified problems. The anticipated involvement of civil society (e.g., experts and nongovernmental organizations) may broaden public understanding, legitimacy, and authority regarding the monitoring of torture and enhance the impact of an NPM's recommendations. Moreover, cooperation with the SPT and partner NPMs around the world may further increase the use of international human rights standards in a domestic context as well as intensify commitments to international obligations.

Despite the aforementioned NPM achievements, it may be ambitious for the state party to establish, in practice, a fully functioning mechanism that enjoys a full range of powers and competencies. It has been shown in the cases of many OPCAT state parties that the establishment of and daily implementation of NPM duties are rather demanding and require in-depth academic consultation and broad public discussion.<sup>6</sup> Despite the difficulties, the international community does not leave the member states in the lurch; rather, it provides to them a considerable number of guidelines, tools, and methodologies. Further, it is always worth learning lessons from other NPMs around the world.

The aim of this essay is to highlight the leading principles governing the NPM's mandate in the field of torture prevention in order to fully understand its unique and irreplaceable position among key democratic safeguards. Both international soft-law documents and lessons learned from selected jurisdictions of the Czech Republic, Georgia, Norway, and Slovenia are analyzed to gain a holistic picture of the reality of the NPM.

## **The Design of the NPM**

Before examining specific OPCAT commitments, it is essential to highlight that the Optional Protocol does not define any preferred organizational form for an NPM. In fact, article 17 of the OPCAT provides considerable latitude to

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<sup>5</sup> The relations between torture and democracy are clearly demonstrated in Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007).

<sup>6</sup> See the SPT State Party reports referenced in the text below.

a state in deciding whether to create a completely new institution, designate a pre-existing institution, create an NPM as a single stand-alone institution, or appoint multiple institutions or bodies to fulfill NPM tasks. The same margin of flexibility applies to the NPM's internal structure, expert composition, monitoring methods, and so forth.

Thus, each state party must consider its own contextual circumstances, as the Association for the Prevention of Torture (hereafter “the APT”)<sup>7</sup> makes clear by explaining, “Each State Party can select a structure appropriate to its political and geographic context.”<sup>8</sup> A large federal state, for example, may tend to establish a multibody NPM (federal and national NPMs)<sup>9</sup> or designate several bodies with the NPM agenda, while smaller countries may be inclined to designate an existing general-purpose institution as the NPM. Ivan Šelih, head of the Slovenian NPM, provides an example of the latter approach:

Bearing in mind that Slovenia is also a small country, setting up an entirely new body in order to carry out the tasks and powers of the NPM did not seem reasonable from an economic point of view. Instead, a more reasonable solution was to upgrade and adjust an already existing body that is already engaged in protection of the rights of persons deprived of liberty.<sup>10</sup>

Nowadays, there are seventy-one existing national preventive mechanisms around the world. Among them, thirteen are established within the National Human Rights Commission;<sup>11</sup> thirty are designated within the existing Public Defender of Rights (Ombudsman) type of institution;<sup>12</sup> six are created within the existing Ombudsman model of institution, marked by formal cooperation with civil society (so-called Ombuds plus institutions);<sup>13</sup> fifteen are constituted as completely new specialized institutions;<sup>14</sup> four employ a multi-institutional

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<sup>7</sup> The Association for the Prevention of Torture (APT) is an international nongovernmental organization focused on the prevention of torture and other forms of cruel, inhuman, or degrading treatment or punishment. See <https://www.apr.ch>.

<sup>8</sup> Association for the Prevention of Torture (APT), *Establishment and Designation of National Preventive Mechanisms Published by the Association for the Prevention of Torture* (2006), p. 78, [https://www.apr.ch/content/files\\_res/NPM.Guide.pdf](https://www.apr.ch/content/files_res/NPM.Guide.pdf) (accessed April 2, 2019).

<sup>9</sup> This model is predominantly considered in the ongoing OPCAT discussion in Australia.

<sup>10</sup> Ivan Šelih, Head of the Slovenian NPM, email communication to author, March 25, 2019.

<sup>11</sup> Cape Verde, Mali, Mauritius, Mozambique, Rwanda, Togo, Chile, Uruguay, Maldives, Sri Lanka, Turkey, Lebanon, and Morocco.

<sup>12</sup> Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Peru, Albania, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Greece, Hungary, Lithuania, Luxembourg, Macedonia, Montenegro, Norway, Poland, Portugal, Romania, Spain, and Sweden.

<sup>13</sup> Denmark, Kazakhstan, Moldova, Serbia, Slovenia, and Ukraine.

<sup>14</sup> Burkina Faso, Nigeria, Senegal, Bolivia, Guatemala, Honduras, Paraguay, France, Germany, Italy, Kyrgyzstan, Liechtenstein, Switzerland, Mauritania, and Tunisia.

structure;<sup>15</sup> two consist of a federal-level NPM and several local NPMs;<sup>16</sup> and one includes other institutions that do not fit into the abovementioned categories, as they are significantly different or combine several features of each of them.<sup>17</sup>

Each type has its pros and cons. It is fully the decision of a state, after an in-depth evaluation of the legal, social, historical, and political contexts, to choose the one model that is most appropriate for the nation. There is no single, perfect model that is applicable to given circumstances. Similarly, there exist no patterns identifying a specific model for certain regions or countries of similar legal traditions.<sup>18</sup>

Once a state party accedes to or ratifies the OPCAT, it shall establish an NPM at the latest one year after the accession or ratification,<sup>19</sup> unless it issues a declaration postponing the creation of an NPM. Such postponement shall be valid for a maximum of three years.<sup>20</sup> When the state fails to establish an NPM in the given period, it violates its obligation to the OPCAT and appears on a public SPT “sinners” list.<sup>21</sup> Currently, seven countries have postponed the introduction of an NPM,<sup>22</sup> and eleven have been placed on the SPT list.<sup>23</sup>

### **Obligation to Create an Independent, Fully Functioning NPM**

Each state party has a positive obligation to create an independent and fully functioning NPM, irrespective of chosen type. As a rule, a state must proceed to legislative changes to clearly establish the independence, mandate, and powers of the NPM. Furthermore, when the NPM is designated within a long-

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<sup>15</sup> New Zealand, Malta, Netherlands, and the United Kingdom.

<sup>16</sup> Argentina and Brazil.

<sup>17</sup> Cambodia.

<sup>18</sup> See an ongoing NPM consultation process in Australia, by means of which all pros and cons are thoroughly evaluated: *Victorian Ombudsman, OPCAT in Victoria: A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People*, <https://www.ombudsman.vic.gov.au/getattachment/Publications/Parliamentary-Reports/OPCAT-in-Victoria-A-thematic-investigation-of-prac/OPCAT-in-Victoria-A-thematic-investigation-of-practices-related-to-solitary--September-2019.pdf.aspx> (accessed September 23, 2019).

<sup>19</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 17.

<sup>20</sup> *Ibid.*, art. 24.

<sup>21</sup> The list of state parties whose compliance with obligations defined in OPCAT article 17 is substantially overdue. See Office of the UN High Commissioner of Human Rights, *Non-compliance with Article 17*, <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Article17.aspx> (accessed March 23, 2019).

<sup>22</sup> Australia, Bosnia and Herzegovina, Germany, Hungary, Kazakhstan, Montenegro, and Romania.

<sup>23</sup> Currently, eleven countries are on the list. See Office of the UN High Commissioner of Human Rights, *Non-compliance with Article 17*. Bosnia and Herzegovina made a declaration postponing the designation of an NPM for three years; however, this term already is exceeded, so that is why Bosnia and Herzegovina is mentioned in both groups.

established and general-purpose institution (e.g., an Ombudsman Institution or a National Human Rights Institution, or NHRI), appropriate legal, organizational, and structural changes must be adopted to distinguish the NPM's specific position. Since the OPCAT does not regulate all particularities of an NPM, the provisions must be read together with their binding interpretations that are provided by the SPT (found especially in the SPT *Guidelines*<sup>24</sup> and the SPT *State Reports*<sup>25</sup>). Attention should be paid also to other relevant soft-law documents, especially those developed by the APT.

Analyzing OPCAT's core obligations, an NPM's mandate shall be three-fold. First, the mechanism shall conduct regular visits<sup>26</sup> to all places where people are or may be restricted in their liberty in order to protect them against torture and other forms of ill-treatment<sup>27</sup>—and it shall have unlimited access to all information, people, and premises, accordingly.<sup>28</sup> Second, an NPM shall make recommendations to the relevant authorities, taking into consideration the pertinent norms of the United Nations.<sup>29</sup> Third, it shall be equipped with the power to submit proposals and observations to the relevant state authorities regarding existing and draft policy or legislation which it considers to be relevant to its mandate.<sup>30</sup>

Further, an NPM shall (1) be composed of experts from various fields of expertise;<sup>31</sup> (2) have a preventive function different from the traditional reactive approach employed by other controlling bodies, such as an ombudsman or other human rights institution; (3) be equipped with competence to develop its own visiting strategy and methodology and to enhance its visibility; and (4) be closely involved in dialogue with stakeholders, other NPMs, the SPT, and civil society.<sup>32</sup> The following lines examine the nature of an NPM, its core competencies, and other requirements in considerable detail.

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<sup>24</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), *Guidelines on National Preventive Mechanisms*, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en) (accessed April 4, 2019).

<sup>25</sup> The Office of the UN High Commissioner of Human Rights—UN Treaty Body Database, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical) (accessed May 20, 2019).

<sup>26</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 1.

<sup>27</sup> *Ibid.*, art. 19 (a).

<sup>28</sup> *Ibid.*, art. 20.

<sup>29</sup> *ibid.*, art. 19 (b).

<sup>30</sup> *Ibid.*, art. 19 (c), and SPT, *Guidelines on National Preventive Mechanisms*, item 35.

<sup>31</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 18, para 2.

<sup>32</sup> *Ibid.*, art. 22.

## An NPM's Independence

The ability of an NPM to exercise its functions independently is the key requirement of effective monitoring. The OPCAT reiterates this requirement in several places in its text.<sup>33</sup> Article 18 stipulates that “the States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.” The SPT stresses that a state party shall guarantee the organizational and functional independence of the NPM and provide the resources necessary to enable it to carry out its functions in accordance with the requirements of the OPCAT.<sup>34</sup> Nevertheless, the SPT makes it clear that a state party shall refrain from supervising the mechanism.<sup>35</sup> It follows that an NPM should obtain at least the same guarantees of independence that are devoted to the NHRI under the Paris Principles,<sup>36</sup> and that these guarantees should be constituted by constitutional or legislative text,<sup>37</sup> a constitutional basis being preferable.<sup>38</sup>

In general, an NPM and its member(s) and personnel should be personally and institutionally independent from state authorities (i.e., executive power and judicial power). Neither the executive nor the judicial branch should have any legal power to establish, compose, dissolve, or control an NPM or its members or personnel. Constitutional or legislative text should specify the duration of the mandate of the member(s) of an NPM<sup>39</sup> as well as the rules and procedures for their designation and dismissal. These rules must meet the criteria of transparency and openness and forbid any pressure from executive or judicial power as well as lobbying by political parties or pressure groups.<sup>40</sup> The independence of an NPM may be compromised when political parties are involved in appointing processes, as has been identified, for example, in the case of the Austrian NPM.<sup>41</sup>

To be free from external pressure and to maintain true functional independence, an NPM must have a considerable level of self-governance

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<sup>33</sup> *Ibid.*, arts. 1 and 17.

<sup>34</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), *Analytical Assessment Tool for National Preventive Mechanisms* (2016), item 3, [https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf) (accessed February 2, 2019).

<sup>35</sup> *Ibid.*

<sup>36</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 18, para 4.

<sup>37</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 2.

<sup>38</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 78.

<sup>39</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 9.

<sup>40</sup> Subsidiary use of the Paris Principles according to the Optional Protocol to the Convention against Torture (OPCAT), art. 18, para. 4.

<sup>41</sup> UN Committee against Torture, *Concluding Observations on the Sixth Periodic Report of Austria, CAT/C/AUT/CO/6* (January 27, 2016), p. 3, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAUT%2fCO%2f6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAUT%2fCO%2f6&Lang=en) (accessed May 22, 2019).



and functional autonomy, for example, the power to design its organizational structure and internal rules, employ its staff, freely plan monitoring activity, and so forth. The SPT highlights that an NPM should enjoy complete financial and operational autonomy.<sup>42</sup> The APT further clarifies that an NPM should have: the authority to choose and employ its own staff, based on requirements and criteria which it alone determines; authority to develop its own rules of procedure; immunity from personal arrest and seizure or detention, including seizure or surveillance of baggage, documents, or communications; and permanent immunity from legal actions for things done in the course of one's performance of NPM duty.<sup>43</sup>

Further, it is essential to ensure that an NPM's members and staff do not hold positions that could cast doubts regarding conflict of interest,<sup>44</sup> such as personal or professional ties to state authorities, present occupation of active positions in the criminal justice system,<sup>45</sup> and so forth. Conflict of interest also may appear in an ad hoc situation while performing a monitoring function, for example, in a situation where an NPM expert has professional ties to a visited place of detention. It is an NPM's duty to vigilantly assess and avoid all perceived conflicts of interest.<sup>46</sup>

When an NPM is established within an Ombudsman Institution, it appears that it may benefit from the guarantees of independence designed for that institution. Research on the legislative acts regulating the Ombudsman Institutions in certain countries shows that these acts stipulate various types of independence guarantees for both the Ombudsman as an institution and the ombudsman as a person who is the head of this institution. The legislative provisions similarly state that the Ombudsman Institution and the ombudsman as its head are accountable only to the legislative body that receives and hears the ombudsman's annual report. Acts further set forth the ombudsman's personal immunity and the criteria for his or her exemptions.<sup>47</sup> They also determine the rules preventing a possible conflict of interest by enumerating positions that are incompatible with the functions of the ombudsman.<sup>48</sup>

A brief clarification of the terminology should be made at this point. As the domestic legislative texts as well as international documents use various terms such as ombudsman, ombudsperson, public defender of rights, defender, and so on, the present essay sets forth no differences among these terms as

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<sup>42</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 12.

<sup>43</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 37-48.

<sup>44</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 18.

<sup>45</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 39.

<sup>46</sup> Similarly, item 30 of the SPT *Guidelines* stresses: "The NPM should carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest."

<sup>47</sup> The Organic Law of Georgia on the Public Defender of Georgia, art. 5, para. 2.

<sup>48</sup> Ombudsman Human Rights Act of Slovenia, art. 19; Act on the Public Defender of Rights of the Czech Republic, sec. 3; and Act Relating to the Parliamentary Ombudsman for Public Administration of Norway, sec. 1.

long as they refer to the ombudsman as a person. When reference is made to the Ombudsman as an institution, the term “Ombudsman Institution” is used. The legal texts sometime use the term “Office” (for example, the Office of the Public Defender of Rights, the Ombudsman’s Office, and so forth), which refers to the organizational structure of the Ombudsman Institution. While the Ombudsman Institution is a general term for a unique human rights body of an ombudsman type, the Ombudsman’s Office is narrower in scope and refers to the structural and organizational form of this institution. The author uses these terms accordingly; however, where the essay refers to original texts, the terms are used in their authentic form.

Czech and Georgian ombudsmen are empowered to issue the Statute of the Ombudsman’s Office and specify its organization, structure, rules, and staff. Georgian legislation further grants permission to the ombudsman to establish specialized centers under his or her auspices and to determine their tasks, structure, rules, and other matters.<sup>49</sup>

In the given jurisdictions, the acts regulating the Ombudsman Institutions do not stipulate specific guarantees of independence for the NPM’s staff, thus they enjoy only those guarantees that are necessary to effectively implement the NPM’s mandate (e.g., they may not be forced to reveal confidential information without the ombudsman’s consent, but they lack some personal privileges, such as exception from criminal investigation).

### **Competence to Carry Out Preventive Visits to Places of Detention**

An NPM’s staff has the right to visit any place where people are or may be restricted in their liberty by virtue of an order given by a public authority, at its instigation, or with its consent or acquiescence (art. 4 of the OPCAT). From the wording of this article, it is evident that the OPCAT understands “detention place” broadly in order to cover all places where persons are or may be deprived of their liberty.<sup>50</sup> It is not decisive whether the place of detention is considered an official detention facility, or is governed by a public authority or a private person.<sup>51</sup> The key factor is that the person lacks the free will to leave the place due to the order of a judicial, administrative, or other authority. The APT confirms that besides official places of detention such as prisons, police stations, or juvenile detention centers, the NPM also must have access to

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<sup>49</sup> The Organic Law of Georgia on the Public Defender of Georgia, art. 26, para. 4.

<sup>50</sup> The Committee against Torture, *Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—Compilation of Advice Provided by the Subcommittee in Response to Requests from National Preventive Mechanisms*, CAT/OP/C/57/4 (March 22, 2016), p. 19, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/57/4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/57/4&Lang=en) (accessed May 22, 2019).

<sup>51</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 22.

so-called “unofficial places of detention,” where no public authority formally ordered the detention.<sup>52</sup>

A broad conception of the term “place of detention,” for instance, is explicitly enshrined in the Act on the Public Defender of Rights of the Czech Republic, which stipulates that “the Defender shall systematically visit places where persons restricted in their freedom by public authority, or as a result of their dependence on care provided, are or may be confined... ”<sup>53</sup> The wording of this provision constructs two types of places of detention: (1) detention “*de jure*,” which is managed by the public authority and officially recognized as a detention place in law (e.g., a police station, a prison), and (2) detention “*de facto*,” referring to any other place that accommodates people who are dependent on the care provided. Such places likewise may be managed by a public authority (e.g., public hospitals) but also involve private entities (e.g., private elderly homes). The Czech NPM frequently visits all these places: private elderly homes, nursery homes, psychiatric institutions and psychiatric units in hospitals, hospices, foster-care homes, as well as illegal social-care homes that are not officially recognized as registered institutions.<sup>54</sup>

The scope of places of detention also covers facilities where persons stay temporarily, for example, places for pre-trial detention or police custody, transit detention zones in international airports, areas of a courthouse, and means of transport (e.g., police or prison escort). These types of detention are expressly mentioned by the Norwegian NPM: “The Ombudsman can also visit places where people are temporarily detained, for example during transportation by car or plane, holding premises for people waiting to be questioned by the police, or urgent care or emergency rooms.”<sup>55</sup>

The OPCAT’s objective is to establish a system of regular preventive visits<sup>56</sup> (i.e., visits that are carried out before torture or ill-treatment occurs, with the aim to prevent it, as opposed to so-called “reactive visits” that address a particular problem that already has happened).<sup>57</sup> A preventive visit allows the monitoring body to observe the whole picture of life in the visited facility, as its focus is not limited to a particular problem or complaint, but instead is centered on a variety of predetermined issues.

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<sup>52</sup> Ibid., 21.

<sup>53</sup> Act on the Public Defender of Rights of the Czech Republic, sec. 1, para. 3.

<sup>54</sup> See more about these facilities at Public Defender of Rights, *Unregistered Social Care Facilities*, <https://www.ochrance.cz/en/protection-of-persons-restricted-in-their-freedom/unregistered-social-care-facilities/> (accessed February 17, 2019).

<sup>55</sup> Sivilombudsmannen, *Sectors Covered by the National Prevention Mechanism’s Mandate*, <https://www.sivilombudsmannen.no/en/torturforebygging/sectors-covered-npms-mandate/> (accessed March 5, 2019).

<sup>56</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 1.

<sup>57</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 14. Also see the comment of the UN Special Rapporteur on Torture, cited herein.

When an NPM's visits are only random or carried out after a long period of time, the preventive effect is compromised. That is why the OPCAT creates a system of regular visits that (1) establishes and maintains constructive dialogue with detainees and authorities; (2) allows an NPM to monitor progress or deterioration in the conditions of detention and treatment of detainees over a period of time; (3) has a deterrent effect and thus strengthens detainees' protection from abuse; and (4) protects detainees and staff from reprisals.<sup>58</sup> Frequency of visits depends on various country-specific issues;<sup>59</sup> however, the APT has developed a minimum standard of frequency that shall be observed by every NPM.<sup>60</sup> Further, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) suggests that visits should be based on a weekly, or at least a monthly, basis.<sup>61</sup>

The preventive impact may be further strengthened when visits are conducted without prior notice, preventing officials and staff from preparing for a visit and covering possible malpractice. As the APT makes clear, "undertaking shorter unannounced visits is the only way the NPM can be sure to see a true picture of day-to-day reality of places of detention."<sup>62</sup> The SPT highlights<sup>63</sup> and prioritizes<sup>64</sup> an NPM's power to carry out unannounced visits at all times to all places of deprivation of liberty. The research for this study reveals that unannounced visits are common to all analyzed NPMs, while announced visits are carried out only exceptionally. For example, in 2017, the Slovenian NPM conducted only four announced visits among a total of eighty visits.<sup>65</sup>

As mentioned above, an NPM shall be granted the right to access all information, places, and people. These competencies are essential to conducting independent preventive visits and belong to the core powers of

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<sup>58</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 16.

<sup>59</sup> Average number of visits per month conducted by selected NPMs (in round figures): three visits by the Czech NPM (2006–2018); thirteen visits by the Georgian NPM (2015–2017); one visit by the Norwegian NPM (2014–2018); and four visits by the Slovenian NPM (2008–2018). The sources of the statistical data are NPM annual reports.

<sup>60</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 36.

<sup>61</sup> European Committee Preventing Torture, *Report to the Turkish Government on the Visit to Turkey Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 29 March 2004* (2005)—CPT/Inf (2005), p. 18, item 94, <https://rm.coe.int/1680698246> (accessed May 22, 2019).

<sup>62</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 55.

<sup>63</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 25.

<sup>64</sup> SPT, *Visit to Mauritania from 24 to 28 October 2016: Comments and Recommendations Addressed to the National Preventive Mechanism* (2018), item 57, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fMRT%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fMRT%2f2&Lang=en) (accessed March 23, 2019).

<sup>65</sup> Human Rights Ombudsman—Republic of Slovenia, *Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism in 2017* (2018), p. 9, [http://www.varuh-rs.si/fileadmin/user\\_upload/pdf/DPM/Porocila/DPM\\_2017\\_ANG.pdf](http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/Porocila/DPM_2017_ANG.pdf) (accessed May 23, 2019).

an NPM's mandate. It is difficult to imagine effective torture prevention if the visited place of detention is able to prevent the NPM from accessing certain places, interviewing some detainees, or accessing relevant documents.

In a nutshell, the first competence ensures an NPM's access to all information concerning the number of persons who are deprived of their liberty, the number of places of detention and their locations, information referring to the treatment of the detained persons, as well as their conditions of detention.<sup>66</sup> The APT stresses that the scope of this information is broad and includes information from daily schedules to sensitive information in medical records.<sup>67</sup> It covers information received from interviews with detainees and staff, internal routines and procedures, local guidelines, administrative decisions on the use of force, logs, plans, and health documentation. Czech and Slovenian NPM monitors commonly use a camera to take pictures of the conditions of detention and a variety of written documentation.

The second competence provides an NPM with access to all places of detention and their installations and facilities.<sup>68</sup> As a rule, NPM monitors may not be prevented from seeing any place within the facility. The APT enumerated several examples of these places: "Living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters."<sup>69</sup> The Czech NPM also routinely visits dining rooms, storerooms, libraries, prison buses, kennel(s), medical centers, and so on. Given its unrestricted movement throughout an entire migrant detention center, the Czech NPM once discovered an unofficial unit of twenty-two portable cabins housing detained migrants that was not declared beforehand by the center's officials.<sup>70</sup>

Unrestricted access to all premises not only provides the possibility to uncover "unofficial places of detention," where authorities may hold detainees outside public control, but also permits observers to gain an overall impression of the facility. As the APT stresses, "walking through the entire facility also allows NPM members to visualise the overall layout of the detention facilities, physical security arrangements, architecture, and other structural elements that play an important part in the daily life of those persons deprived of their liberty."<sup>71</sup>

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<sup>66</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 20 (a) and (b).

<sup>67</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 58.

<sup>68</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 20 (c).

<sup>69</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 54.

<sup>70</sup> Public Defender of Rights, *Zařízení pro zajištění cizinců Bělá-Jezová, Vyhodnocení systematické návštěvy* [Migrant detention facility Bělá-Jezová: Evaluation of the systematic visit] (2015), [https://www.ochrance.cz/fileadmin/user\\_upload/ESO/24-\\_2015-NZ\\_Bela-Jezova-ZZ\\_vyhodnoceni\\_rijen\\_2015\\_pdf](https://www.ochrance.cz/fileadmin/user_upload/ESO/24-_2015-NZ_Bela-Jezova-ZZ_vyhodnoceni_rijen_2015_pdf) (accessed May 21, 2019).

<sup>71</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 54.

Third, the NPM monitors have the power “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.”<sup>72</sup> The NPM’s right to meet and talk to any person whose liberty is restricted as well as to any staff, without the presence of another person, is a highly effective preventive tool. The person selected for an interview usually has a limited time to prepare for answers, is free from any surveillance, and understands that the information provided will not be released to another person without his or her express consent. Consequently, his or her replies usually are genuine and provide the monitors with strong and reliable evidence.

On the other hand, such important competence imposes a heavy burden on NPM monitors to observe the principle “do no harm,” to keep interviews free from eavesdropping or other surveillance,<sup>73</sup> and to strive not to deteriorate the conditions of interviewees (e.g., by elevating the risk of reprisals or self-harm). It is further necessary to bear in mind that, since the monitors commonly interview vulnerable persons and persons with disabilities, they must adopt appropriate communication skills and have the required expertise. The Slovenia annual report stresses the need to adopt a sensitive approach to detainees, explain to them the purpose of the NPM visit, make an effort to gain their trust, carry out the interviews with full confidentiality, and so forth.<sup>74</sup> It further stresses that interviews shall be as informal as possible.<sup>75</sup> Numerous soft-law documents have developed different approaches toward children, the elderly, people with disabilities, women, prisoners serving life imprisonment, and so on. A starting point is the APT Guidelines that specify such matters as interrogation strategies, use of interpreters, individual and group talks, location of an interview, security considerations, an interview of a person alleging torture, and talks with staff.<sup>76</sup>

## Competence to Issue Recommendations

The second key NPM competence, to make recommendations to relevant authorities, clarifies an NPM’s preventive and collaborative nature. Although traditional controlling bodies usually have the power to enforce their resolutions, an NPM lacks the legal power to execute its observations and is

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<sup>72</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 20 (d).

<sup>73</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 60.

<sup>74</sup> Human Rights Ombudsman—Republic of Slovenia, *Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism in 2014* (2015), p. 177, [http://www.varuh-rs.si/fileadmin/user\\_upload/pdf/DPM/Porocila/Porocilo\\_DPM\\_-\\_Varuh\\_-2014\\_-\\_dvostranska\\_postavitev.pdf](http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/Porocila/Porocilo_DPM_-_Varuh_-2014_-_dvostranska_postavitev.pdf) (accessed May 23, 2019).

<sup>75</sup> *Ibid.*

<sup>76</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 80.

equipped with “only” the instrument of formally nonbinding recommendations. Thus, compliance with an NPM’s recommendations is ensured through a process of persuasion and cooperation, rather than through a process of legal enforcement. Given this fact, the expertise, well-founded evidence, and convincing arguments shall be given priority when elaborating an NPM’s recommendations.

Three types of recommendations have been analyzed among the researched NPMs. The first type, primary recommendation, refers to a visit to a particular place of detention and addresses its revealed shortcomings. The NPM, for instance, may recommend improvement to sanitary conditions, the termination of illegal use of restraint, adoption of internal rules to address prevention of self-harm and suicide, and so forth. An NPM has a wide margin of appreciation when elaborating on its recommendations, although it must observe the relevant norms of the United Nations and evaluate visit findings accordingly. As a rule, an NPM includes its recommendations in the visit report that is sent to the visited facility. Further, the recommendations usually provide a deadline period for the facility’s response.<sup>77</sup> The visit report becomes the basis for ongoing constructive dialogue between NPM observers and the visited facility. Depending on the recommendations, such dialogue may last from weeks to years.

The second type of recommendations refers to systematic problems that are revealed in one or several facilities, where the solution is beyond the competence of on-site management. This may occur in cases of prison overcrowding, inadequate human and financial resources, insufficient training of law-enforcement personnel, and so on. In such cases, relevant state authorities, especially relevant ministries or branches of government, are better positioned than the particular place of detention to address the systematic deficiencies. NPMs usually address these issues in a so-called “summarizing report” that is issued following a series of visits to a certain type of detention place.<sup>78</sup>

The third kind of recommendation is somewhat questionable, as it concerns the ombudsman’s mandate more than the NPM’s preventive powers. Given the limits of constructive dialogue (e.g., the visited facility may fail to comply with primary recommendations), some NPMs tend to utilize the benefits of being affiliated with an Ombudsman Institution and seek to use its enforcing powers (e.g., turning to the superior authority and number of relevant public

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<sup>77</sup> Czech and Slovenian NPMs usually provide a period of thirty days for a response from the visited facility to the visit report. Nevertheless, this period may be shorter if the NPM staff deems that it is necessary to act promptly, or longer if some recommendations require more time to be fully implemented.

<sup>78</sup> The Public Defender of Rights, *Report on Visits of Prisons (2016)*, [https://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/ZARIZENI/Veznice/2016\\_prisons.pdf](https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Veznice/2016_prisons.pdf) (accessed September 8, 2019).



authorities, and revealing findings to the public) to enforce the implementation of the primary recommendations.

In all countries that were studied, the NPMs take advantage of well-established ombudsman powers to enforce their recommendations. The Czech Ombudsman Act stipulates that, if the authority (visited facility, governmental agency, law-enforcing authority, and so forth) fails to cooperate with the ombudsman, he or she can inform the superior authority of this non-cooperative authority, or if there is no such authority, the Ombudsman can turn to the government. When, for example, a prison facility fails to cooperate with the ombudsman, he or she can turn to General Directorate of Prison Service that is the superior authority for all prisons in the Czech Republic. If the General Directorate of Prison Service likewise fails to meet the ombudsman's demands, he can then turn to the Ministry of Justice, the superior body for the prison service. Eventually, the ombudsman may reveal his or her findings to the public, including disclosure of the full names of persons who are authorized to act on behalf of the offending authority.<sup>79</sup> The Georgian Ombudsman Act expressly states, "Impediment of the activity of the Public Defender of Georgia shall be punishable by law."<sup>80</sup> Further, article 21 of the Ombudsman Act determines several actions that the ombudsman may take. He or she may inform mass media, apply in writing to the president of Georgia and the prime minister of Georgia, make proposals to relevant bodies, and so forth. The Norwegian Ombudsman Act does not establish a similar sanction mechanism, but it does empower the ombudsman to "inform the prosecuting authority or appointments authority of what action he believes should be taken against the official concerned." Further, he or she can make the appropriate administrative agency aware of observed shortcomings. Article 56 of the Slovenian Ombudsman Act further stipulates an offence with a fine of EUR 500 for those who "fail to submit [to] the ombudsman the materials requested...[and] fail to respond to the ombudsman's summon[s]."

Nevertheless, the NPM must bear in mind that turning to state authorities may be used as a last resort when all means of constructive dialogue have proven to be ineffective. Excessive cooperation with state authorities was criticized in a case of the Spanish NPM when the NPM's recommendations frequently were used as the basis for decisions by state authorities.<sup>81</sup> Similarly, Mari Amos, a former member of the SPT, explains that

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<sup>79</sup> Act on the Public Defender of Rights of the Czech Republic, sec. 20.

<sup>80</sup> The Organic Law of Georgia on the Public Defender of Georgia, art. 5, para. 7.

<sup>81</sup> SPT, *Visit to Spain Undertaken from 15 to 26 October 2017: Observations and Recommendations Addressed to the National Preventive Mechanism*, CAT/OP/ESP/2 (2018), item 26, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fESP%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fESP%2f2&Lang=en) (accessed March 19, 2019).



the SPT has always been in position that [*sic*] NPM should be a critical friend and also that cooperation/dialogue is the key to implementation... . At the same time, of course, it should avoid being actively engaged in working out the policies etc.<sup>82</sup>

Although it is always desirable that an NPM maintains an active constructive dialogue with state authorities, it must remain in its preventive role and give up the aspiration to instead become a reactive body, a part of a system of state authorities.<sup>83</sup>

It should be stressed that each NPM should establish its own strategy concerning making recommendations, following up on activities, and monitoring the implementation of recommendations.<sup>84</sup> Some NPMs have established a consultative body aimed at supporting NPM activities, including the evaluation of recommendations (for example, the Georgian NPM). A comprehensive study by the Ludwig Boltzmann Institute of Human Rights and the Human Rights Implementation Centre of the University of Bristol,<sup>85</sup> to which one may refer for further reading, describes the various strategies and methods that an NPM may use to enhance its recommendations.

### **Competence to Issue Legislative Proposals**

Article 19 (c) of the OPCAT stipulates that an NPM shall be granted the power to submit proposals and observations concerning existing or draft legislation. This power refers to any legislative act that concerns an NPM law itself, a law addressing places of detention, rights of detainees, and so forth.

The described power has a dual nature. First, an NPM has the power to make proposals to existing law (i.e., to redress systemic shortcomings, grounded in unsatisfactory legislation, that are revealed through the monitoring of places of detention). Second, an NPM has the power to make proposals to draft legislation in order to prevent the adoption of wrongful law that may decrease

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<sup>82</sup> Information provided by Mari Amos, former member of the SPT (email communication to author on April 27, 2019).

<sup>83</sup> See remarks on the relation between NPM effectiveness and independence by Mary Steinbrecher, in Marie Steinbrecher, *Challenges around Preventing Torture*, Howard League for Penal Reform (October 2018), pp. 27-33, <https://howardleague.org/wp-content/uploads/2018/10/conference-ECAN-bulletin-October-2018.pdf> (accessed March 13, 2019).

<sup>84</sup> SPT, *Visit to Spain Undertaken from 15 to 26 October 2017*, item 27.

<sup>85</sup> Ludwig Boltzmann Institute of Human Rights and the Human Rights Implementation Centre of the University of Bristol, *Enhancing Impact of National Preventive Mechanisms—Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward* (May 2015), [https://bim.lbg.ac.at/sites/files/bim/attachments/enhancing\\_impact\\_of\\_national\\_preventive\\_mechanisms.pdf?fbclid=IwAR1MCkxf7jSIId07cHb5WVot9KFTETOfkV55slszLNd77j-xkN-aTVhePsc](https://bim.lbg.ac.at/sites/files/bim/attachments/enhancing_impact_of_national_preventive_mechanisms.pdf?fbclid=IwAR1MCkxf7jSIId07cHb5WVot9KFTETOfkV55slszLNd77j-xkN-aTVhePsc) (accessed February 23, 2019).

human rights standards in places of detention. To fulfill this power, an NPM shall be informed about legislative drafts in advance.<sup>86</sup> The APT specifies that

the government should make a practice of proactively sending draft legislation to the NPM so that it has adequate time to analyse and provide its views. In keeping with Article 19 (c), there should also be a means for the NPM itself to initiate proposals for new legislation or amendments to existing legislation.<sup>87</sup>

Since the wording of Article 19 (c) of the OPCAT (proposals and observations concerning existing or draft legislation) is considerably broad, it does not preclude an NPM from making proposals regarding derogation of existing legislation (e.g., in the way of a petition to a Constitutional Court to propose the annulment of a particular legislative act).

The Czech Ombudsman Act authorizes the ombudsman to recommend that a legal or internal regulation be issued, amended, or cancelled. Such recommendations shall be addressed to the authority whose competence is concerned, and if the matter involves a regulation, a resolution, or a law, to the government.<sup>88</sup> Furthermore, the ombudsman may turn to the Constitutional Court and ask for the annulment of any regulation or individual provisions thereof,<sup>89</sup> and also provide proposals to the Constitutional Court as a friend of the court (*amicus curiae*). Similar competence also is devoted to the Georgian ombudsman.<sup>90</sup>

## Expert Composition

Unlike traditional control bodies, an NPM consists of professionals from various fields of expertise. Article 18 (2) of the OPCAT makes it clear that

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.

Item 17 of the SPT *Guidelines* further stresses that “members of the NPM should collectively have the expertise and experience necessary for its effective functioning.”

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<sup>86</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 19 (b), and APT, *Establishment and Designation of National Preventive Mechanisms*, 26.

<sup>87</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 26.

<sup>88</sup> Act on the Public Defender of Rights of the Czech Republic, sec. 22, para. 1.

<sup>89</sup> Constitutional Court Act, sec. 64, para. 2f.

<sup>90</sup> The Organic Law of Georgia on the Public Defender of Georgia, art. 21 (a).

The expert composition of an NPM is essential to its operations, which is apart from that of traditional controlling bodies. This is because an NPM focuses on a variety of purely expert issues, such as treatment of prisoners who have mental disabilities, administration of psychiatric medication in long-term facilities, assistance to patients suffering from malnutrition in elderly homes, attention to behavioral problems in child educational institutions, and so on. That is why the SPT stresses that in order for an NPM to fulfill its function, its multidisciplinary team must include professionals from the medical, psychiatric, legal, and psychosocial fields.<sup>91</sup> The APT similarly refers to lawyers, doctors, psychologists, psychiatrists, social workers, and other qualified professionals.<sup>92</sup>

It may be demanding for an NPM to employ full-time experts, especially with respect to physicians, psychiatrists, or social workers who usually must conduct their own business. That is why an NPM must establish a particular way to cooperate with experts. For example, the Czech NPM cooperates with ad hoc contractual experts who are selected on the basis of a public call for proposals and placed on the Ombudsman's list from which they are selected for the purpose of a specific visit according to a visit plan and actual need.<sup>93</sup> In Georgia, the monitoring of places of detention is conducted by the Ombudsman's employees (seven) from the National Preventive Mechanism Department, together with members of the Special Preventive Group (SPG) who act under special authority granted by the Defender and who are accountable to only him or her.<sup>94</sup> The SPG is multidisciplinary and includes thirty-six experts such as medical doctors, psychiatrists, psychologists, lawyers, addictionologists, and NGO representatives. The Norwegian NPM cooperates with contractual external experts with experience in fields such as mental health, cognitive and physical disabilities, elderly care, and child welfare.<sup>95</sup> Further, expert input is provided by the Advisory Committee, which contributes expertise,

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<sup>91</sup> SPT, *Report on the National Preventive Mechanism Advisory Visit to Ecuador Made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/OP/ECU/2 (2015), item 38, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fECU%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fECU%2f2&Lang=en) (accessed May 20, 2019).

<sup>92</sup> APT, *Visiting Places of Detention—What Role for Physicians and Other Health Professionals?* (2008), [https://apt.ch/content/files\\_res/RoleForPhysicians.pdf](https://apt.ch/content/files_res/RoleForPhysicians.pdf) (accessed April 19, 2019).

<sup>93</sup> In 2017, seventeen experts took part in NPM visits (four psychiatrists, one geriatrician, three general nurses, three psychiatric nurses, one specialist in education of children with behavioral disorders, two psychologists, and three social service experts). See Public Defender of Rights, *Protection against Ill-treatment 2017—Report of the Public Defender of Rights as the National Preventive Mechanism* (2018), p. 9, [https://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/Zpravy-vyrocnni/2017-DET-annual-report.pdf](https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/Zpravy-vyrocnni/2017-DET-annual-report.pdf) (accessed May 15, 2019).

<sup>94</sup> The Organic Law of Georgia on the Public Defender of Georgia, art. 19, para. 4.

<sup>95</sup> The Parliamentary Ombudsman of Norway, *Norway's National Preventive Mechanism—Annual Report 2014* (2015), p. 19, <https://www.sivilombudsmannen.no/wp-content/uploads/2017/06/NPM-Norway-Annual-Report-2014-low.pdf> (accessed March 10, 2019).

information, advice, and data concerning prevention work to the NPM and is comprised of fifteen organizations and professional groups that work with persons who are deprived of their liberty.<sup>96</sup>

Although the experts may not be full-time members of an NPM team, they must be included in a number of NPM activities and not used randomly for the purpose of a single visit. Experts must be familiar with an NPM's mandate, the purpose of monitoring, visit strategy, and so forth. That is why an NPM should provide appropriate education and training to experts. Further, it is necessary for an NPM to formalize patterns of cooperation and mutual obligations. As the SPT makes clear: “[An] NPM should develop policies and rules of procedure which address employment of ad hoc external experts, necessary qualifications and terms of reference for their work.”<sup>97</sup>

### **Preventive vs. Reactive Nature**

An NPM shall carry out regular and systematic preventive visits to all places of detention that are targeted at all detainees in order to gain a holistic and reliable picture of life in a given facility. By definition, an NPM is not intended to focus on a specific problem or deal with the complaints of individual detainees. That is why an NPM's visiting activity is labeled “monitoring,” rather than “investigative,” since the term investigation invokes in-depth examination of a particular problem.

The leading principle of an NPM's visits is prevention, as they are carried out before torture or ill-treatment occurs with the aim to prevent it from occurring in the future, as opposed to so-called “reactive visits,” which address a particular problem that already has happened, with the aim to investigate it and (or) punish the perpetrator(s).<sup>98</sup> Steven Caruana advises that

preventive visiting is distinct and has a depth that differentiates it from current practices. The depth of preventive visiting is in its holistic approach in assessing both the perspectives of detainees and staff. The distinction of preventive visiting is in the opportunities to foster real cultural and pragmatic change.<sup>99</sup>

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<sup>96</sup> Ibid., 29.

<sup>97</sup> SPT, *Analytical Assessment Tool for National Preventive Mechanisms* (2016), item 8, [https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf) (accessed February 2, 2019).

<sup>98</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 14. See also the comment of the UN Special Rapporteur on Torture, cited herein.

<sup>99</sup> Caruana, *Enhancing Best Practice Inspection Methodologies for Oversight Bodies*, 25.

As noted above, only fifteen NPMs have been created as specialized institutions. In other cases, where the existing broad-purpose institution is designated as the NPM, the NPM's mandate must be clearly distinguished from other agendas, such as the investigation of individual complaints, general inspection, review of fiscal performance, criminal or impartial fact-finding investigations as part of an adjudicative process, and so on.<sup>100</sup> The need to distinguish the NPM's role is expressly stressed by the SPT that requires the existence of a special NPM unit within the institution: "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."<sup>101</sup>

In order to meet the SPT requirement, the vast majority of Ombudsmen Institutions designated as the NPM created a specialized unit within the Ombudsman's Office that is focused primarily on the NPM's agenda. Among the thirty-five Ombudsmen Institutions around the world that are designated as an NPM, thirty-four<sup>102</sup> have established more or less an autonomous body,<sup>103</sup> department,<sup>104</sup> commissions,<sup>105</sup> advisory body,<sup>106</sup> structure including several cooperating bodies,<sup>107</sup> or similar unit(s) whose members (usually the employees of the Ombudsman Office) are charged with the NPM's mandate.

However, establishing the special NPM unit(s) is not redemptive, and additional human, logistic, and economic resources are necessary.<sup>108</sup> It is further necessary to make certain that the staff of a special NPM unit is focused only on the NPM's agenda and not charged with an unrelated mandate of the Ombudsman Institution (e.g., responsibility for addressing individual complaints). This practice was stressed in the SPT report to the Moldovan NPM: "At the same time, staff members...deal not only with NPM-related issues but also with a broad range of other activities under Ombudsmen Office

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<sup>100</sup> APT, *National Human Rights Commissions and Ombudspersons' Offices/Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture* (2008), p. 4, [https://www.rpo.gov.pl/sites/default/files/National\\_Human\\_Rights\\_Commissions\\_and\\_Ombudspersons\\_Offices.pdf](https://www.rpo.gov.pl/sites/default/files/National_Human_Rights_Commissions_and_Ombudspersons_Offices.pdf) (accessed April 22, 2019).

<sup>101</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 32.

<sup>102</sup> Finland decided not to create a special NPM unit.

<sup>103</sup> For example, Ecuador (National Directorate for the Prevention of Torture of the Ombudsman Office).

<sup>104</sup> For example, Costa Rica, Mexico, and the Czech Republic.

<sup>105</sup> For example, Austria.

<sup>106</sup> For example, Montenegro.

<sup>107</sup> For example, Portugal and Georgia.

<sup>108</sup> See, for example, SPT, *Report on the Visit Made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, CAT/OP/MDA/I* (2014), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fMDA%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fMDA%2f1&Lang=en) (accessed May 5, 2019).

mandate, such as individual complaints, which may undermine the preventive focus of the NPM work.”<sup>109</sup>

The problem of staff being responsible for work unrelated to the NPM also concerns the Portuguese NPM, where all staff members assigned to the NPM department also must deal with the “ombudsman agenda.” The CPT makes it clear that this is not the best way to ensure optimal functioning of an NPM,<sup>110</sup> believing that “the Ombudsman’s Office will be provided with sufficient resources to fulfill its NPM mandate properly.”<sup>111</sup> A similar matter concerns the Czech NPM, where the NPM department also focuses on the ombudsman’s agenda (dealing with individual complaints). On the other hand, Georgian, Slovenian, and Norwegian NPMs conduct only preventive visits, and distinguish them from other types of ombudsman visits.

The Slovenian NPM faced such a problem until its reform in 2017, when the situation was assessed as unsatisfactory and incompatible with item 32 of the SPT *Guidelines*. Thus, in 2017, the NPM unit was released from the mandate to review individual initiatives and has retained only the mandate to perform visits and other NPM duties. It is worthwhile to quote the assessment of this action in the Slovenian NPM annual report:

The implementation of the duties and powers of the NPM is now much more organised and effective, which is also reflected in the number of visits to different locations... . The improved organisation of work also contributes to better preparation for individual visits, their implementation, and the drafting of reports on the visits... .<sup>112</sup>

Lack of a clear line between a preventive and a reactive mandate may compromise effective NPM functioning in many ways. First, it would be problematic to enter into a constructive dialogue with the visited facility, when the same department of the Ombudsman’s Office or even the same staff members of this department visit the facility once as NPM monitors and the second time as the ombudsman’s representatives investigating the individual complaint. As Malcolm Evans highlights, NPM monitors instead should be partners to a visited facility (i.e., persons who do not present themselves as

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<sup>109</sup> *Ibid.*, item 15.

<sup>110</sup> CPT, *Report to the Portuguese Government on the Visit to Portugal Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 7 October 2016* (2018), item 7, <https://rm.coe.int/168078e1c8> (accessed March 11, 2019).

<sup>111</sup> *Ibid.*

<sup>112</sup> Human Rights Ombudsman—Republic of Slovenia, *Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism in 2017* (2018), p. 6, [http://www.varuh-rs.si/fileadmin/user\\_upload/pdf/DPM/Porocila/DPM\\_2017\\_ANG.pdf](http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/Porocila/DPM_2017_ANG.pdf) (accessed May 23, 2019).

“a manifestation of authority with a tick box,” but rather as persons who “just [visit] to sit alongside and just have a talk... ,”<sup>113</sup> persons employing sympathy for the facility’s struggles and effort to find consensual solutions. APT similarly points out that “it may be difficult to establish or maintain the cooperative relationship between the NPM and government officials upon which the OPCAT visits depending if those same officials are potentially subject to prosecution or judgment by the NPM.”<sup>114</sup>

Second, cross-over between preventive and reactive mandates causes a great deal of confusion for all—the NPM staff members themselves, the facility staff, detainees, as well state authorities and the general public.<sup>115</sup> As a consequence, lack of clarity may be an obstacle to establishing a relationship of trust and credibility. As APT makes clear: “Also, individuals may feel less willing to speak openly with the NPM if they fear their identity or the information they provide may be disclosed at some later stage (as part of a prosecution or hearing, for instance).”<sup>116</sup> Similar concerns are set forth in other SPT reports.<sup>117</sup> Third, when the NPM unit must deal with individual complaints, it may significantly overload the NPM staff and compromise the frequency of preventive visits (see the abovementioned SPT’s criticism of the Moldovan NPM).

Distinguishing the NPM’s mandate does not mean, however, that the NPM department should be isolated and not permitted to cooperate with other departments of the Ombudsman’s Office. Indeed, the APT highlights the benefits of mutual cooperation and information flow between the NPM unit and other departments, while stressing that the NPM unit must, at the same time, ensure that certain information (e.g., confidential information received during the course of a visit and its schedule for unannounced visits) are protected.<sup>118</sup> The APT summarizes that “information should be shared within the institution on a need to know basis,”<sup>119</sup> however, the SPT underscores that the decision to share information within the institution belongs to the NPM.<sup>120</sup> The mode of information sharing should be clearly specified in the NPM’s internal rules.

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<sup>113</sup> Caruana, *Enhancing Best Practice Inspection Methodologies for Oversight Bodies*, 23.

<sup>114</sup> APT, *National Human Rights Commissions and Ombudspersons’ Offices/Ombudsmen as National Preventive Mechanisms*, 5.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> For example, SPT, *Report on the National Preventive Mechanism Advisory Visit to Ecuador*, item 32.

<sup>118</sup> APT, *National Human Rights Commissions and Ombudspersons’ Offices/Ombudsmen as National Preventive Mechanisms*, 11.

<sup>119</sup> *Ibid.*

<sup>120</sup> Committee against Torture, *Ninth Annual Report*, 3.

## The Autonomy and Visibility of an NPM

An NPM's autonomy and self-governance must be ensured both externally and within the Ombudsman's Office. The latter may be demanding, as Ombudsmen Offices usually encompass multilevel employee management, starting with the ombudsman himself or herself, over the head(s) of the managing department(s), ending with the head of the NPM unit. In addition, there may be established departments or committees that further supervise and manage the work of all employees of the Ombudsman's Office. This may result in the strategic decisions as well as the daily monitoring decisions being removed from the NPM unit or the staff designated with the NPM's mandate and redirected to some internal structures of the Office, superiors, or other managers. Consequently, in such cases, the NPM's mandate would be scattered within the institution, blurred, invisible, and ineffective.

The SPT sets forth that analyzing the NPM's position within the NHRI is a common challenge for many NHRIs assuming the NPM's mandate<sup>121</sup> and stresses, as a starting point, that the NPM should be placed "as a parallel structure at the level of the Head of NHRI and to abstain from situations where the NPM is placed under several Departments, which diminishes its visibility."<sup>122</sup>

A case in point is the Czech Ombudsman's Office, where the NPM staff is subordinate to the head of the NPM unit, the head of the legal department of the Ombudsman's Office, the head of the Ombudsman's Office, and, finally, the ombudsman himself or herself. At all levels of management, the superiors (charged with the overall ombudsman agenda) may give instructions to the NPM's staff, assign individual complaint files to them, supervise and evaluate their work, and even impose disciplinary measures. Further, the NPM's staff must act in compliance with binding internal rules applied to the entire Ombudsman Office and all its departments.

The SPT addresses this issue in a report on Ecuador, recommending that

the Office of the Ombudsman enhance the capacity of the national preventive mechanism to act independently, in accordance with Article 18 (1) of the Optional Protocol. To this end, the Office of the Ombudsman and the national preventive mechanism should undertake a joint review of the current internal structure...with a view to facilitating the decision-making process of the national preventive mechanism.<sup>123</sup>

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> SPT, *Report on the National Preventive Mechanism Advisory Visit to Ecuador*, item 25.



Similarly, both the CAT and the SPT criticize Kazakhstan, where the NPM has not been able to undertake ad hoc visits owing to bureaucratic constraints.<sup>124</sup>

An NPM's situation may be further complicated when the institution is not represented by one single ombudsman and instead operates as a collective body composed of several members. When the NPM's official representatives (ombudsmen, commissioners, or others) are charged equally with the NPM's mandate, there can be a blurring of responsibility for NPM functions and a real risk of disagreement among the representatives, as each may perform his or her ideas about the NPM's operations differently (some may consider themselves to be merely formal representatives, others may be willing to be included in monitoring activities, some may adopt friendly dialogue with state authorities, others may employ more authoritative approaches, some may be willing to carry out detentions *de jure*, while others employ detention *de facto*, and so forth). These divergences paralyze the NPM's mandate. As the APT explains:

The NPM needs to be able to function and communicate as an entity. This is particularly challenging when made up of a relatively large number of individuals not engaged on a full-time basis. Appointing authorities have sometimes failed to consider the group dynamic. If a body is made up of several high-level individuals this might lead to a conflict of leadership within the NPM. Members of an NPM should, therefore, be ready to work in a team and respect each other and agree on a coherent joint methodology and purpose.<sup>125</sup>

The NPM of Georgia may be a good example to follow, as it enjoys considerable autonomy and independence from the Ombudsman Institution. Nika Kvaratskhelia and Akaki Kukhaleishvili of the Georgian NPM explain that the NPM has a lead in managing NPM activities and presents its annual plan to the Public Defender of Georgia. Regarding routine issues, the NPM can make autonomous decisions, while direction concerning substantive issues requires the Public Defender's approval.<sup>126</sup> The NPM works as an entity and consists

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<sup>124</sup> CAT, *Concluding Observations on the Third Periodic Report of Kazakhstan CAT/C/KAZ/CO/3* (December 2014), item 13, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fKAZ%2fCO%2f3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fKAZ%2fCO%2f3&Lang=en) (accessed May 23, 2019), item 29, and SPT, *Visit to Kazakhstan Undertaken from 20 to 29 September 2016: Observations and Recommendations Addressed to the State Party CAT/OP/KAZ/1* (February 2019), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/KAZ/CO/3&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/KAZ/CO/3&Lang=En) (accessed May 23, 2019).

<sup>125</sup> APT, *Membership of National Preventive Mechanisms: Standards and Experiences* (2013), p. 5, [https://apt.ch/content/files\\_res/opcat-briefing-on-npm-designation-en.pdf](https://apt.ch/content/files_res/opcat-briefing-on-npm-designation-en.pdf) (accessed May 22, 2019).

<sup>126</sup> Information provided by Nika Kvaratskhelia and Akaki Kukhaleishvili from the Georgia NPM (email communication to author on May 16, 2019).

of a clear-cut structure: (1) a Special Preventive Group responsible for the monitoring of places of detention; (2) an NPM Department that is responsible for managing the organization and coordination of the Special Preventive Group (e.g., establishing the methodology, creating visit plans, drafting a final report) and an Advisory Council that provides recommendations to the ombudsman concerning the NPM's plan of activities, methodology, training, thematic research, and so forth.<sup>127</sup>

In order to effectively carry out its preventive mandate as a specialized monitoring body that is fulfilling the tasks under the OPCAT, an NPM must establish its credibility and visibility. The aim of visibility is to help everybody—the visited facility representatives and staff, detainees as well as other actors, stakeholders, and the broad public—to be able to differentiate between the traditional mandate of an Ombudsman Institution and the specific preventive role of an NPM, and thus help to foster constructive dialogue and cooperation concerning the prevention of torture. Similarly, the visibility of an NPM and communication with it help to minimize the potential for fear and hesitancy among detainees and the detention facility's staff. The SPT stresses that “the mechanism's lack of visibility may have a detrimental effect on the efficiency and credibility of the NPM.”<sup>128</sup>

The requirement for visibility should be addressed first in legislative text that uses the wording, “The National Preventive Mechanism,” in any provision concerning the NPM's mandate. The SPT highlighted this point in a report on Ecuador:

The Subcommittee is concerned that the bill...does not ensure the visibility of the national preventive mechanism as a key player in the prevention of torture and ill-treatment. There is also the danger that the preventive mandate of the national preventive mechanism could become intertwined with or diluted by other functions of the Office of the Ombudsman, such as the reception and investigation of individual complaints.<sup>129</sup>

Besides in legislative text, visibility is important to a variety of NPM's tasks. A key factor is, for example, whether an NPM issues a separate annual report or instead reports on its activities in a specific chapter of a general report

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<sup>127</sup> Public Defender (Ombudsman) of Georgia, *Human Rights Situation in Closed Institutions, NPM 2017* (2018).

<sup>128</sup> SPT, *Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, CAT/OP/ARM/2* (2017), item 27, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fARM%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fARM%2f2&Lang=en) (accessed May 2, 2019).

<sup>129</sup> SPT, *Report on the National Preventive Mechanism Advisory Visit to Ecuador*, item 16.

of the Ombudsman Institution. Important aspects are whether the NPM's reports are disseminated to the public; how the NPM engages with media and civil society; how often the NPM visits the places of detention; whether it organizes advocacy activities, training, workshops or other educational events for the public; and so forth.<sup>130</sup> The APT advises that visibility also may be enhanced by means of a specific NPM webpage, an NPM logo, and even NPM clothing for visits.<sup>131</sup> The NPM should develop a strategy for enhancing its visibility and continuously raise its institutional profile within the Ombudsman Institution.<sup>132</sup>

The personality of the ombudsman also can affect, to a considerable extent, the overall functioning and visibility of an NPM. When the ombudsman considers an NPM to be an independent autonomous unit and perceives himself or herself as a guarantor and promoter of the NPM's mandate, the NPM may take advantage of formally being part of the Ombudsman's Office and, at the same time, freely develop its visibility. On the other hand, when the ombudsman perceives an NPM as a mere department fulfilling his or her mandate, it may restrict and compromise the NPM's mandate.<sup>133</sup> The attitude and enthusiasm of the ombudsman for the prevention of torture and for human rights protection, in general, likely would be decisive. Matters of responsibility may be further complicated when the Ombudsman Institution is represented by a collective body of ombudsmen, as each of them may pursue his or her own idea concerning an NPM's functioning, as discussed above.<sup>134</sup>

Ivan Šelih, the Head of the Slovenian NPM, makes it clear that because the NPM is linked with the Ombudsman Institution, communications with staff and detainees require further clarification of the purpose of a visit.<sup>135</sup> He insists, however, that "the NPM visits are externally apparent as each NPM visit also includes members of the selected NGOs carrying identification badges with the inscription 'National Preventive Mechanism'."<sup>136</sup>

## Cooperation with Stakeholders and Civil Society

As has been stated above, an NPM shall cooperate, primarily through constructive dialogue, with places of detention and relevant state authorities.

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<sup>130</sup> See the SPT recommendations in these regards to Kazakhstan: SPT, *Visit to Kazakhstan Undertaken from 20 to 29 September 2016*, items 30 and 31.

<sup>131</sup> APT, *National Human Rights Commissions and Ombudspersons' Offices/Ombudsmen as National Preventive Mechanisms*, 11.

<sup>132</sup> SPT, *Visit to Spain Undertaken from 15 to 26 October 2017*, item 17.

<sup>133</sup> SPT, *Report on the National Preventive Mechanism Advisory Visit to Ecuador*, item 28.

<sup>134</sup> The Austrian Ombudsman Board may well serve as an example of a collective ombudsman body.

<sup>135</sup> Information provided by Ivan Šelih, Head of the Slovenian NPM (email communication to author on March 25, 2019).

<sup>136</sup> *Ibid.*

This, however, does not exhaust all the NPM's possibilities for dialogue regarding the prevention of torture.

The SPT highlights that "the NPM should complement rather than replace existing systems of oversight and its establishment should not preclude the creation or operation of other such complementary systems."<sup>137</sup> Thus, an NPM should be "a team player" and maintain contacts with national and international oversight bodies, such as treaty bodies, domestic control and inspecting bodies, NGOs, and other NHRIs and NPMs.

The APT highlights that "the strongest commitment to human rights approaches might be found within the civil society of a particular country, and in NGOs in particular."<sup>138</sup> It is thus vital for an NPM to establish close contact with civil society, especially NGOs, with emphasis on those that focus on human rights in places of detention. However, these ties with civil society should be established before the particular NPM is introduced into national law. The APT stresses that "national human rights NGOs should always be included in the process of deciding upon the NPM for a given country."<sup>139</sup>

Learning through international comparison, all studied NPMs cooperate with civil society. Cases in point are Slovenia and Georgia. The Slovenian NPM model provides formal cooperation with selected NGOs, whose representatives are directly involved in the implementation of the NPM's duties (participating in visits to places of detention, writing visitation reports, elaborating on and evaluating recommendations, and other comparable activities). Such a close connection between the NPM and representatives of civil society who are directly included in monitoring activities, fosters mutual ties, enables information flow, and strengthens joint strategies toward public authorities. In Georgia, three types of cooperation with NGOs may be identified. First, members of NGOs are represented in the NPM Advisory Council, along with academics and individuals who work in the fields of prevention of torture and criminal justice.<sup>140</sup> Second, the NPM conducts regional meetings with NGOs and lawyers in order to obtain the information necessary for planning monitoring activity. Third, the Rules of the Public Defender of Rights<sup>141</sup> empower the NGOs that work on human rights or prevention of torture to submit a project application to the Public Defender in order to implement joint projects under the mandate of the NPM. These projects may include thematic visits to penitentiary institutions or other facilities where the freedom to conduct sector surveys or educational and awareness-raising activities

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<sup>137</sup> SPT, *Guidelines on National Preventive Mechanisms*, item 5.

<sup>138</sup> APT, *Establishment and Designation of National Preventive Mechanisms*, 84.

<sup>139</sup> *Ibid.*, 85.

<sup>140</sup> Public Defender (Ombudsman) of Georgia, *Practical Guidelines on Drafting Reports and Formulating Recommendations for the National Prevention Mechanism of Georgia*, 9.

<sup>141</sup> The Rules of Cooperation between Public Defender's National Preventive Mechanism and NGOs.

otherwise is restricted. Such cooperation permits NGOs to study the situation in various facilities in depth.<sup>142</sup> Besides these examples, NPMs usually participate in meetings with NGOs, human rights organizations, professional groups, interest groups, research centers, academia, and so forth.

## Conclusion

Based on lessons learned in studying a number of NPMs,<sup>143</sup> it is obvious that the creation of an independent and fully functioning NPM is a demanding task, even for countries with a long-lasting democratic and human rights tradition. The main obstacle to the effective functioning of an NPM is misapprehending its preventive mandate (i.e., the conviction that an NPM is an investigative body<sup>144</sup> conducting business as usual<sup>145</sup>) as well as underestimating or overlooking the scope of its mandate. In practical terms, an NPM's malfunction usually is rooted in insufficient legal grounds for the NPM's independence, mandate, and powers; unsatisfactory human, financial, and logistical resources; and an inappropriate line between the preventive and reactive mandates of a general-purpose institution. Further, specific shortcomings may severely compromise an NPM's preventive mandate, for instance, an inability to visit all places of detention or have access to all places of detention, people, and information; incapability to carry out systematic and regular visits; lack of expertise and sufficient follow-up activity; inadequate dialogue with visited facilities, stakeholders, or civil society; and unsatisfactory visibility, credibility, and cause for trust.

To avoid such shortcomings, the constitutional or legislative text should clearly stipulate all OPCAT obligations: To clearly set out the mandate and powers of the NPM (OPCAT, arts. 19–23), composition (OPCAT, art. 18, para. 2), guarantees regarding organizational and functional independence (OPCAT, arts. 18, para. 1, 21, and 35), and guarantees ensuring sufficient human, logistic, and financial resources (OPCAT, art. 18, para. 3). When the NPM is designated within the Ombudsman Institution, the law shall establish a clear legal basis that highlights a separate organizational structure for the NPM, including the creation or designation of a specialized NPM department, and determine the relationship between the NPM's structure and the rest of the organization. Preferably, the NPM's structure should include an advisory

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<sup>142</sup> Public Defender (Ombudsman) of Georgia, *Human Rights Situation in Closed Institutions, NPM 2017* (2018), 6.

<sup>143</sup> See the SPT reports sent to the state parties: SPT, *UN Treaty Body Database*, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical) (accessed May 23, 2019).

<sup>144</sup> The United Nations—The Office of the High Commissioner of Human Rights, *Preventing Torture—The Role of National Preventive Mechanisms* (2018), p. 5, [https://www.ohchr.org/Documents/Publications/NPM\\_Guide\\_EN.pdf](https://www.ohchr.org/Documents/Publications/NPM_Guide_EN.pdf) (accessed May 23, 2019).

<sup>145</sup> Caruana, *Enhancing Best Practice Inspection Methodologies for Oversight Bodies*.

committee and a special preventive group to perform its activities more effectively, thoughtfully, and systematically. The NPM and its members and personnel should not deal with individual complaints or oversee unrelated ombudsman agenda matters.

The NPM shall have functional independence as well as the independence of its members and personnel. Independence guarantees shall be constituted by constitutional or legislative text. Further, the NPM shall enjoy organizational independence, both outside and inside the Ombudsman Institution (e.g., have the power to develop its own methodology and strategy, establish a visitation plan, and be equipped with sufficient human, financial, and logistical resources).

The NPM also shall work as a team, composed of full-time monitors and experts from various fields of expertise. Experts shall strive for gender balance and adequate representation of ethnic and minority groups in the country.<sup>146</sup> The NPM shall be formally represented by a limited number of members, preferably by one ombudsman. When more ombudsmen manage the NPM agenda, their competences and mutual relations must be clearly stipulated by law. Nevertheless, it seems inappropriate to have more than three ombudsmen designated as NPM representatives. Further, the NPM's staff shall have a certain level of autonomy from the Ombudsman Institution and the ombudsman himself or herself. It seems desirable that the NPM's staff is directly subordinate to the ombudsman or other NPM member(s) who are officially appointed as the NPM's representative(s).

An NPM shall have the right to visit all places where persons are or may be deprived of their liberty, including private facilities and informal places of detention. An NPM shall have the right to regularly and systematically conduct preventive unannounced visits and follow-up activities.

National law shall expressly stipulate the NPM's right to cooperate closely with stakeholders and civil society. An NPM should standardize its cooperation with NGOs and other constituents of civil society. Such cooperation should be elaborated in the NPM's methodology or in the internal rules of the Ombudsman Institution. An NPM shall strive to continuously strengthen its visibility and credibility and shall regularly issue its own annual report, distinguished from the Ombudsman's report.

The author is convinced that the adoption of the abovementioned principles and working strategies is necessary for making an NPM a fully functioning mechanism for the prevention of torture. Only then can an NPM fully utilize its potential and become an irreplaceable constituent in support of the protection of human rights and the promotion of well-functioning democracy.

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<sup>146</sup> Optional Protocol to the Convention against Torture (OPCAT), art. 18, para. 2.