



Civil Society and National Preventive Mechanisms under the *Optional Protocol to the Convention against Torture*¹

June 2008

Introduction

The Optional Protocol to the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an instrument designed to assist states to prevent incidences of torture and other forms of ill-treatment by establishing a system of regular visits to places of detention by expert bodies. It is based on the premise that, the more open and transparent places of detention are, the less abuse will take place.² With this objective in mind the OPCAT obliges States Parties to designate or establish a national body or bodies - so-called National Preventive Mechanisms (NPMs) - that will conduct regular preventive visits to all places where persons are or may be deprived of their liberty. These NPMs must be in place within one year after ratification of or accession to the OPCAT.

The NPM ideally engages in a constructive dialogue with the State Party to address problems arising in relation to deprivation of liberty by making relevant recommendations and proposals, as envisaged in Article 19 of the OPCAT.³ The NPM also interacts with a UN Subcommittee on the Prevention of Torture (SPT), which was set up following the entry into force of the OPCAT in June 2006. The SPT, comprising ten independent experts who meet periodically in Geneva, Switzerland, conducts periodic field visits to the States Parties, but also has the function of advising them as well as NPMs on the strengths and weaknesses related to the functioning of these independent monitoring bodies.

The OPCAT allows some flexibility for each country to structure its NPM according to its own national circumstances.⁴ However, in order to ensure that the ratification of the OPCAT is not an empty formality, it should not be the state alone that determines its implementation, but this process should also include other national actors, particularly human rights defenders. In short, States Parties should consult widely as

¹ This paper is based on the research and the initial drafts undertaken and prepared by Giulia Di Mattia, to whom the APT is extremely grateful for her valuable input.

² For more information about the OPCAT, please see the APT publication: *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention*.

http://www.apr.ch/component/option,com_docman/task,doc_download/gid,42/Itemid,59/lang,en/

³ For more information about NPMs, please see the APT publication: *Guide on Establishment and Designation of National Preventive Mechanisms*.

http://www.apr.ch/component/option,com_docman/task,doc_download/gid,102/Itemid,59/lang,en/

⁴ More information about the current status of NPM establishment and designation in each signatory and State Party to the OPCAT can be found in the APT's Country-by-Country NPM Status summary report.

http://www.apr.ch/component/option,com_docman/task,doc_download/gid,124/Itemid,59/lang,en/

to the design of their NPM to ensure the adoption of an effective monitoring mechanism. Moreover, genuine consultation with members of civil society will add legitimacy and credibility to both the process of determining the NPM and ultimately the institution itself. It is relevant to note that in its first annual report the SPT also underscored this crucial point, stating: “*The NPM should be developed by a public, inclusive and transparent process of establishment, including civil society and other actors involved in the prevention of torture; where an existing body is considered for designation as the NPM, the matter should be open for debate, involving civil society.*”⁵ Finally, as is illustrated in this paper, civil society actors can also play a crucial role in the NPM once it is functioning.

The paper is divided into three main parts: *The role of civil society in the process of determining a country’s NPM*; *Civil society participation in different NPM models*; and *Civil society actors outside of the NPM*. The first focuses on the all-important process of determining an NPM, while the second and third parts highlight the role of civil society in relation to the NPMs themselves. It is structured in the following way:

- I. The role of civil society in the process of determining a country’s NPM
 - A. The role of civil society of initiating and sustaining a national dialogue;
 - B. The role of civil society in conducting an inventory of existing national monitoring mechanisms;
 - C. Civil society’s participation in regional events;
 - D. The imperativeness of genuine consultation with civil society;
 - E. Recommendations to civil society and government representatives.

- II. Civil society participation in different NPM models
 - A. Introduction: the formal participation of civil society actors in NPMs;
 - B. The participation of civil society actors in NPMs in a personal capacity;
 - C. The involvement of civil society actors in NPMs as institutions;
 - D. The involvement of civil society actors in NPM advisory bodies;
 - E. Recommendations to civil society and government representatives.

- III. Civil society actors outside of the NPM
 - A. The participation of civil society actors in the NPM appointment procedure;
 - B. Civil society collaboration with NPMs;
 - C. Civil society’s watchdog role;
 - D. Recommendations to civil society and government representatives.

- IV. Conclusion.

⁵ Please see UN Doc. CAT/C/40/2, 25 April 2008 - paragraph 28 (i).

For the purpose of this paper, the term civil society refers to a range of actors including, for example, non-governmental organisations (NGOs), specifically human rights NGOs, rehabilitation centres for survivors of torture, associations of relatives of detainees, legal aid centres, prison pastoral groups, lay visiting schemes, charity or faith-based groups working in places of detention, bar and medical associations as well as academia.

The first and third sections of the paper (*The role of civil society in the process of determining a country's NPM* and *Civil society actors outside the NPM*) consider the participation of civil society in the wider sense of the term, including all the institutions, referred to above. In contrast, the second part of the paper (*Civil society participation in different NPM models*), which considers the actual structure of the NPM, adopts a narrower approach to the term and focuses more specifically on the participation of human rights NGOs in NPMs.

I. The role of civil society in the process of determining a country's NPM

For the work of the NPM to be effective, government officials and civil society must see it as credible and, for this to occur, the process of establishing an NPM must itself be inclusive and transparent. Thus, the widest possible range of relevant actors should be included in these discussions, particularly civil society organisations, which should ideally have a role in all stages of the process. Since the instrument concerns a wide range of different places of detention, a variety of specialist civil society entities should be included in this process. Equally, civil society organisations should also endorse the OPCAT and make its ratification and implementation an organisational priority. In this section of the paper various examples are given of possible activities for civil society in the process of determining a country's NPM, drawing heavily on practices found at the national level.

I A. The role of civil society of initiating and sustaining a national dialogue⁶

Civil society has a key role to play initiating and sustaining a national dialogue on the implementation of the OPCAT in any given country. The possible activities of civil society organisations in this respect are numerous. In the initial stages of an OPCAT ratification campaign, for example, civil society can influence public opinion in favour of the instrument and lobby the government to ratify and effectively implement it. In practice national round-tables, seminars and conferences have proven to be extremely useful fora for initiating and sustaining a nationwide discussion on these issues and for sharing ideas and strategies with other national actors. There have been many such examples of countries where civil society has organised or participated in such meetings. Regional round-tables, seminars and meetings have also proven to be important settings for sharing best practices between countries and

⁶ Please also see Chapter V of the APT publication, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention*.

there have been a number of such civil society inspired events in recent times (see below).

In addition to organising national and regional fora, civil society actors have helped convene and have participated in so-called 'OPCAT focal points' or 'OPCAT working groups' whose task has been to examine and advise the state regarding the legal and operational aspects of implementing the OPCAT. Such focal points or working groups have frequently included professionals from various domains such as lawyers, doctors, academics, judges, government officials, NGO representatives as well as persons and bodies already monitoring places of detention. They have also proved decisive for facilitating negotiations and consensus-building between civil society and the relevant state authorities ultimately responsible for defining the NPM. Experience has shown that the promotion of a broad-based dialogue in this manner can significantly strengthen the impact of the campaign on the implementation of the OPCAT.

The following two examples of Benin and Spain aptly illustrate the important role of civil society with regard to the question of OPCAT implementation. In both cases prominent human rights NGOs prioritized the OPCAT as an organisational goal and initiated and sustained national discussions on the implementation of the instrument.

The initiation of a national discussion on the OPCAT in Benin

Since 2005 Amnesty International Benin and Action by Christians for the Abolition of Torture (ACAT) Benin played a key role in promoting a national discussion on the effective implementation of the OPCAT in the country. The two organisations facilitated an initial dialogue between civil society and the government by organising conferences and seminars during the process of ratification. These initial activities in turn prompted the government to take the initiative in relation to this issue and in July 2007 the government co-organised with the APT a national seminar of approximately 30 interested actors on the establishment of an NPM. As a result of this seminar, a multidisciplinary *ad hoc* working group comprising nine persons including civil society representatives was established. The aims of the working group are to support the process of drafting the NPM legislation, lobby for its adoption in parliament and ensure the appointment of suitably qualified and experienced members to the NPM. Thus, the combined efforts of Benin's civil society and the government resulted in an inclusive national discussion on the question of the implementation of the OPCAT, which, to date, has clearly produced some positive outcomes.

The initiation of a national discussion on the OPCAT in Spain

Spain offers a unique example where an NGO coalition was created exclusively for the purpose of implementing the OPCAT. Public discussions about the OPCAT were initiated as early as 2004, when 37 NGOs came together under the umbrella of the Network for the Prevention of Torture to, among other things, promote ratification of the instrument. Since then, the Network has actively sustained the NPM process by drafting NPM proposals and participating in bilateral meetings with the Spanish government as well as in various events devoted to Spain's NPM. For example, in October 2007 representatives from the Network took an active part in the first official

national meeting to discuss the designation of the country's NPM, which was convened by the Ministries of Foreign Affairs, Interior and Justice. In a national context where the issue of torture has usually been discussed by governmental and non-governmental actors in a polarized manner, the Network continues to lobby and negotiate with the Spanish government in order to have an OPCAT compliant NPM in place as soon as possible. Irrespective of the final NPM outcome, the Network considers that its involvement around this and other torture prevention issues has been important in itself.

In addition, to the cases of Benin and Spain there are several other examples of civil society involvement in NPM processes at the national level. The experience of Paraguay, for example, has been recognized as a model of good practice by the UN Special Rapporteur on Torture and has, among others, inspired the process in Benin. In the country an NPM drafting committee comprising state and civil society representatives was established by consensus during a national NPM consultation forum.

Another relevant example is Honduras, where a local NGO, *Centro para la Prevención, Tratamiento y Rehabilitación de las Víctimas de la Tortura y sus Familiares* (CPTRT), mobilized national actors in a concerted OPCAT campaign resulting in the 20th ratification of the instrument. The organisation then succeeded in persuading the Congressional Human Rights Commission to commit itself to an NPM law drafting process which included civil society input. More detailed information about all of these NPM processes can be found in the APT's Country-by-Country NPM Status summary report.⁷

I B. The role of civil society in conducting an inventory of existing national monitoring mechanisms

In the context described above, civil society organisations have an important role to play providing technical advice to the state about the type of NPM to be put in place under the OPCAT. It is essential that they ensure that the NPM is in compliance with the requirements set out in the OPCAT text, particularly Articles 17 to 23, which, among others, relate to the independence, professionalism, composition, functions, powers, authority and privileges and immunities of the NPM and its members.

This task can be achieved by carrying out a study or inventory of existing national monitoring bodies as well as of the numbers and types of detention facilities in the country. The factual information about existing mechanisms and places of detention will help the participants involved in the process of determining the NPM to assess the strengths and weaknesses of existing bodies in relation to the minimum requirements of the OPCAT, identify existing gaps in the coverage of places of detention by existing monitoring bodies and estimate the human and financial resources required by any future NPM. The following case of South Africa is a very good example of such an inventory being conducted at the national level by local actors, which included an NGO.

⁷ Please see the APT website, which is regularly updated:
http://www.apr.ch/component/option,com_docman/task,doc_download/gid,124/Itemid,59/lang,en/

South Africa's audit of mechanisms monitoring places of detention

In 2006 a factual inventory of existing national monitoring mechanisms was carried out by the South African Human Rights Commission (SAHRC) in cooperation with a national NGO, the Centre for the Study of Violence and Reconciliation (CSVR). The study assessed relevant existing national visiting bodies in the country, examining their strengths and weaknesses in the light of the requirements of the OPCAT, and proposed alternative NPM models. Since the publication of the inventory the SAHRC and CSVR have convened a workshop to examine the preliminary findings and recommendations of the study. The outcome of the workshop was the establishment of an inclusive so-called Ad Hoc Anti-torture Committee coordinated by the SAHRC with the mandate, among other matters, to advocate for the ratification of the OPCAT and for the establishment of an effective NPM. The APT concluded an agreement with the SAHRC to provide technical assistance to the Committee to support it fulfil its mandate.

As can be seen in the example of South Africa, such an inventory will also help participants decide on whether there is a need to create as opposed to designate one or more existing institutions. Moreover, similar inventories have also been carried out in Brazil and Mexico. It should be noted that the process of designating an existing mechanism always requires a careful and exhaustive review of its mandate, jurisdiction, independence, membership, powers and guarantees in order to ensure that it fully complies with the requirements of the OPCAT. In almost all cases, some changes, through legislative amendments and/or increased resources as well as changes in structure and/or methodology will be necessary.⁸

I C. Civil society's participation in regional events

As was noted previously, in addition to civil society organising a series of national seminars, round-tables and conferences and participating in OPCAT working groups and focal points, events with a regional dimension have been very valuable as means to facilitate the implementation of the OPCAT. As common challenges and other relevant issues in determining an NPM may arise in several states across a region, regional events may be appropriate fora for sharing strategies and experiences aimed at facilitating national processes of OPCAT ratification and implementation. Civil society has an important role to play in this connection, bringing together different relevant actors to exchange information on past and ongoing efforts to establish visiting mechanisms at the national level. Interesting and useful discussions of best practice have also arisen from such regional exchanges and the peer pressure created between the states participating in such events can also serve to mobilize or jump-start national processes.

Notwithstanding these positive aspects, it is important to be aware that due to their potentially wide geographic coverage and the limited time allocated to such events, regional exchanges may have less analytical depth than national events. They have also proven to be more useful once national processes are already underway.

⁸ For more information please see chapter 10 of the APT publication: *Guide on Establishment and Designation of National Preventive Mechanisms*.

Nonetheless, they are potentially extremely useful events as the following examples reveal.

Promoting the effective implementation of the OPCAT in South America

On 29 May 2007 the first regional seminar on OPCAT implementation to be held anywhere in the world took place in Asunción, Paraguay, in the framework of the high-level authorities meeting of the regional bloc, MERCOSUR. The one-day meeting was organised by the Ministry of Foreign Affairs of Paraguay and the APT under the auspices of the Paraguay Human Rights NGO Network, CODEHUPY, and the Inter-American Institute of Human Rights. Official representatives from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela informed the participants of how the OPCAT was being implemented in their national contexts. The various challenges and other issues relating to OPCAT implementation were also debated by the various participants, who also included civil society representatives as well as international experts including members of the SPT. The event was an important moment to consider the steps being taken to establish NPMs in a region historically marked by torture. Furthermore, in its conclusions this inter-state meeting recognized that “the quality and depth of NPM process is essential for the social legitimacy and effectiveness” of future NPMs and, similar to the SPT in its first annual report, it recommended that such processes are “inclusive, participatory and transparent, in broad dialogue and cooperation between the State and civil society.”⁹

Promoting the effective implementation of the OPCAT in Europe

The first regional meeting on the OPCAT in Europe took place on 12-13 November 2007 in Armenia and was co-organized by the Armenian Helsinki Association, Bulgarian Helsinki Committee and the Open Society Institute’s Assistance Foundation. Representatives from several European and Central Asian countries met in the Armenian capital, Yerevan, to examine best practices of the implementation of the OPCAT at the national level. Participants from countries as diverse as Bulgaria, Georgia, Macedonia, Moldova, Montenegro, Tajikistan and Ukraine presented their divergent experiences of discussing independent detention monitoring and the establishment of NPMs in their respective countries. The exchange of information within a regional context was particularly valuable and gave the participants new ideas on how to approach the issue of the implementation of the OPCAT.

I D. The imperativeness of genuine consultation with civil society

For the purpose of ensuring a meaningful national dialogue on the implementation of the OPCAT it is imperative that this process is genuine and open. For the reasons explained in the introduction of this paper, NGOs and other civil society organisations can make an invaluable contribution to the establishment of an NPM in any given country. However, for this to happen there should be a genuine will on the part of the

⁹ For more information please see proceedings no.02/07 of the VIII Meeting of High Level Human Rights Authorities of MERCOSUR and Associated States, May 2006.

authorities to engage in meaningful dialogue with civil society throughout the process of implementation of the instrument and that this input is then taken into consideration in government decision-making.

As consultation with civil society is seen to add legitimacy and credibility to the process of establishing an NPM, there have, regrettably, been examples of governments, which have involved civil society in the initial stages of dialogue only to subsequently sideline or ignore their recommendations and observations. In such instances the dialogue was largely tokenistic and designed to mask the government's real intentions regarding the implementation of the instrument. The following example reveals such a flawed approach to conducting a national dialogue.

Mexico's contradictory NPM designation process

The Office of the UN High Commissioner for Human Rights in Mexico - under the auspices of the Ministry of Foreign Affairs of Mexico and the technical assistance of the APT - led a consultation process lasting over two years on OPCAT implementation which comprised four seminars. A range of actors participated in the process in this federal state, including international experts as well as representatives from various relevant ministries, NGOs, universities, the National Human Rights Commission and its equivalents in Mexico's individual states. Among the conclusions of this exemplary public process was that, while the NPM should take advantage of the practice and infrastructure of existing monitoring bodies, the breadth of its functions was so large and complex, particularly in a country with a federal structure of the territorial dimension of Mexico, that no single institution should act as the NPM. Nevertheless, with the change of authorities in Mexico and the impending one-year deadline to designate the NPM, a parallel closed-door negotiation process was initiated by the Ministry of Foreign Affairs with other ministries. This resulted in an agreement between them and the existing National Human Rights Commission, which was designated with the responsibility of the NPM. This controversial decision was publicly questioned by numerous civil society and other interested actors, including the APT. Despite this difficult start, the designated NPM has started its visits and found that, in practice, it is in its own interest to collaborate with both civil society actors as well as the individual human rights commissions in the regional states, to be more effective.

Thus, in order to enhance the credibility of the NPM, the process of determining it should assume the form of an open exchange and should genuinely take into account the opinions and suggestions of the relevant stakeholders, including civil society. Governments should therefore not only proactively publicise the opportunities for participation in the process of determining the NPM, but also be genuinely willing to consider alternative concepts and models advanced by all those involved in that process.

Finally, for a meaningful national dialogue to take place between the government and other relevant actors responsibility on the part of the state for the issue of the implementation of the OPCAT should be clearly defined. In most countries this has been achieved by delegating responsibility to an individual ministry, often the Ministry of Justice or Foreign Affairs, or in some cases an inter-ministerial commission. Moreover, the designated authority should clearly outline its intentions regarding the NPM process. Unfortunately, there have been examples of countries where this has

not been the case and there has been no clear point of responsibility for this matter. As a result it has been very difficult for civil society to constructively engage with the government on the issue, as the following example of Georgia aptly reveals.

Georgia's one-sided national dialogue on an NPM

In the period 2006 - 2008 eight round-table events were organised by several civil society organisations in Georgia, particularly Penal Reform International's Tbilisi Regional Office, Georgian Young Lawyers Association, Georgian branch of the Global Initiative on Psychiatry and the APT, to examine possible implementation of the OPCAT. Although representatives of various government ministries attended most of these events, the process of establishing a meaningful national dialogue on the issue was significantly frustrated by the absence of any clear point of responsibility for implementing the instrument on the part of the Georgian authorities. During this period it repeatedly proved to be extremely difficult to ascertain who in which ministry was responsible for this matter and, as a result, there was no clear counterpart on the side of government with which to discuss the issue. This state of affairs was only partially resolved after the government established an inter-agency council in June 2007 to look at this as well as other human rights matters. Unfortunately, however, this body met only on an infrequent basis and the issue of Georgia's NPM was not resolved until March 2008 when the authorities appeared to be on the verge of unilaterally designating the Georgian Defender of Rights as the NPM. Repeated calls by Georgian civil society throughout the period 2006-2008 to be included in the process of establishing the NPM as well as in the final mechanism itself appeared to have been ignored by the Georgian authorities.

I E. Recommendations to civil society and government representatives

To civil society:

- Civil society representatives should insist on their involvement in any national process to determine an NPM, particularly by contacting the Ministry responsible for the implementation of the OPCAT;
- Civil society should proactively support the process of implementation by providing relevant decision-makers with advice and information in relation to the effective implementation of the OPCAT. Such information and advice might include an inventory of the strengths and weaknesses of existing monitoring mechanisms in view of the requirements of the OPCAT as well as alternative NPM proposals;
- Civil society should ensure that there is adequate discussion of any expert studies commissioned by the government in this respect;
- Civil society may also wish to undertake initiatives aimed at facilitating and expediting a national dialogue by sponsoring or co-sponsoring with the authorities seminars, round-tables and other meetings and by participating in any OPCAT working groups or focal points;
- Civil society should consider the benefits of co-sponsoring or hosting regional events aimed at discussing the implementation of the OPCAT;

- In the process of designating or establishing an NPM civil society should promote the direct involvement of survivors of torture, persons deprived of their liberty and associations of former such persons and their relatives.

To governments:

- Governments should consult civil society representatives throughout the entire process of determining a country's NPM;
- Governments should therefore proactively contact all relevant civil society organisations, particularly those with experience in protecting the rights of persons deprived of liberty;
- Civil society should be regarded by the government as actors who will significantly increase the chances of an effective, credible NPM being designated or established in practice;
- Governments should consider commissioning independent expert studies on the strengths and weaknesses of existing monitoring mechanisms in view of the requirements of the OPCAT. Such studies will help inform the process of determining the final NPM;
- Governments should consider a range of national activities to facilitate national dialogue on the implementation of the OPCAT, including the possibility of sponsoring or co-sponsoring seminars and round-tables and convening with OPCAT working groups or focal points with civil society actors.

II. Civil society participation in different NPM models

As was noted earlier in this paper, the OPCAT does not prescribe a unique organisational form for NPMs and as a result States Parties have flexibility to structure their NPMs according to their own circumstances. Subject to guarantees of independence, diverse expert composition and the granting of the necessary powers, each State Party can select a structure appropriate to its social, political and geographic context. As has been argued in other APT publications, specific advantages and disadvantages are associated with the design of a new body versus the designation of an existing body and with the use of a single unified mechanism for the whole country or several mechanisms for different regions or different types of institutions.¹⁰

Although few countries already have independent specialized mechanisms for carrying out preventive visits to all places of detention as contemplated by the OPCAT, existing domestic bodies in some countries already do have a mandate to conduct visits to certain types of detention facilities. These bodies could in theory be designated as NPMs under the OPCAT providing they make the necessary adjustments to meet the criteria established by the instrument. These include human rights commissions, ombudspersons offices, civil society organisations such as NGOs as well as composite arrangements combining elements of some of the above. This section of the paper focuses on the potential role which these latter, civil society actors could play related to a country's NPM. It is important to note that no approach discussed below is superior to any other, as in all cases it is essential that whatever the formal structure of an NPM, it will not be effective unless its individual members are themselves personally independent and effective in carrying out preventive visits. Nonetheless, the involvement of civil society representatives in the NPMs of a small, albeit growing number of countries should be regarded as a positive development.

Finally, it is important to stress as a related issue that under no circumstances should the designation or establishment of an NPM - irrespective of the involvement of civil society - be used as a pretext to prevent or curtail the access of civil society actors to places of deprivation of liberty. Such a move would be completely unacceptable and against the spirit in which the OPCAT was conceived by those who inspired it. The example below from Argentina underscores the vital importance of ensuring such access to the third sector.

Safeguarding the role of civil society in Argentina

In an interesting development in Argentina an NPM law has been drafted by the Ministry of Justice, which includes a specific article bolstering the role of civil society organisations to monitor places of detention irrespective of their involvement in the NPM. The said article states: *“None of the dispositions of the present norm can be used to restrict the access of organisations and bodies which in the present conduct visits to all places of detention, or that will conduct them in the future, even if they do*

¹⁰ For more information please see chapter 10 of the APT publications: *Guide on Establishment and Designation of National Preventive Mechanisms* and *National Human Rights Commissions and Ombudspersons' Offices/Ombudsmen as National Preventive Mechanisms*.

*not meet all the requirements necessary to be designated as National Preventive Mechanism.*¹¹ At the time of writing the draft law was under inter-ministerial consultation.

II A. Introduction: the formal participation of civil society actors in NPMs

In its publication, *Guide on Establishment and Designation of National Preventive Mechanisms*, the APT outlined the various strengths and weaknesses of different types of visiting bodies acting as a country's NPM, which were also referred to on the previous page. While civil society organisations undoubtedly have an important role to play in this regard, it is important to be aware that, like any other potential visiting body, there are distinct strengths and drawbacks associated with their inclusion in any NPM. To briefly recap some of the positive points made in the APT guide (see above) these have included their experience of carrying out visits to places of detention and the relationship of trust they may have established with detainees, their usefulness as a source of information, their unquestioned commitment to human rights and their structural independence of the government.

On the other hand, the inclusion of civil society organisations could represent a challenge when one with a solid track-record in monitoring places of detention has had or has an antagonistic relationship with the government. Moreover, certain civil society actors may have difficulties reconciling a critical attitude to authority with the cooperative dialogue approach required by the OPCAT. By becoming a formal part of the NPM, the statutory authority, power, structure and finances may bring with it responsibilities, a lack of flexibility and a requirement to act independently of the interests of the NGO itself that certain civil society entities may find difficult to accept.

Irrespective of these factors, a number of NPM models and proposals have emerged which foresee a role for civil society representatives, several of which are discussed below. In addition, there are several other countries, where at the time of writing the processes of setting up NPMs was ongoing and where civil society had repeatedly called on the authorities responsible for the implementation of the OPCAT to be included in the final NPM. It remains to be seen, however, whether the authorities in these countries will be responsive to such demands.

II B. The participation of civil society actors in NPMs in a personal capacity

Civil society representatives can participate in NPMs in a personal capacity, providing their expertise as qualified individuals with proven experience in a range of relevant fields. Such participation may evade some of the problems, referred to above, that may arise from civil society's participation in the NPM in an organisational form. Independent experts with experience in torture prevention and, more specifically, in monitoring places of detention can be either full or part-time members of the NPM, as required. Examples of this type of involvement are found in the NPM models and

¹¹ Please see Article 30 of the draft NPM Law for Argentina, version distributed by the Ministry of Justice of Argentina during the *Jornadas Nacionales sobre la Implementación del Protocolo Facultativo de la Convención contra la Tortura*, Buenos Aires, Argentina, 14-15 December 2006.

proposals of several countries, including in Moldova and Paraguay, as illustrated below.

The establishment of Moldova's Consultative Council

Amendments made to legislation in 2007 resulted in the designation of the National Center for Human Rights (Ombudspersons' Office) as part of the NPM. The law also established a so-called Consultative Council, composed of eleven representatives, which will undertake the thrust of the overall NPM's activities. Ten of the eleven members of the Consultative Council represent civil society, while one of the country's three Ombudspersons will act as its Chair. In the final part of 2007 the Organization for Security and Co-operation in Europe's Mission to Moldova, which played a key role in setting up the NPM, helped facilitate the process of drafting a legal statute for the Consultative Council. This legal statute determines its range of functions including its goals and guiding principles, composition, selection and dismissal of its members, their privileges and immunities as well as the activities and duties of the institution. Final approval of the legal statute was secured at the end of January 2008, after which the Center for Human Rights began the process of recruiting the ten civil society members of the Consultative Council. By April 2008 a five-person recruitment panel, comprising representatives of the Center for Human Rights, human rights NGOs and academia had just completed the recruitment process of the body's ten civil society representatives. The latter come from a range of professions and different walks of life and will perform their NPM related duties on an entirely unremunerated basis including of per diems. At the time of writing the body was set to start its monitoring activities soon.

Guaranteeing citizen participation and drawing on their expertise in Paraguay's NPM

The involvement of civil society representatives in the NPM is foreseen in Paraguay, where representatives of civil society and the state, who are directly involved in monitoring places of detention, jointly drafted the NPM law. The latter provides for the creation of a National Commission to Prevent Torture, comprising six Commissioners and three substitutes. Interestingly, however, the overall NPM will comprise the National Commission to Prevent Torture, its secretariat, civil society organisations and so-called independent experts known as '*escabinos*'. The latter are citizens elected by the six Commissioners on the basis of their expertise in a relevant field. The independent experts are seen as a way of guaranteeing citizen participation in the NPM and of providing it with additional expertise. According to the draft NPM law, the Commissioners can only take decisions regarding the annual planning and budget of the National Commission if at least three independent experts or '*escabinos*' are present. The latter have a voice and vote in all Commission decisions concerning their particular area of expertise (for example, psychiatric institutions). The independent experts (who are given a per diem but are not paid a salary) also have the same ability to conduct visits, request information and to exercise the other NPM related powers of the Commissioners. At the time of the writing the draft NPM law was under consideration by the relevant parliamentary commissions.

Similarly, there existed at the time of writing a draft NPM law in Brazil which foresaw the creation of an entirely new body as the NPM, referred to as the Mobile Unit for the Prevention of Torture. According to the draft legislation, which may be subjected to change after ongoing inter-ministerial consultation, it is envisaged that this newly created body will comprise civil society representatives as well as a diversity of professional groups.

II C. The involvement of civil society actors in NPMs as institutions

It is possible for civil society organisations such as NGOs to be included in the NPM as institutions, working along side other existing monitoring mechanisms such as an Ombudsperson's Office. This mixed model has been referred to by some parties as the so-called 'Ombudsman or Ombudsperson plus' model. A distinct strength of this approach is that it builds on the existing expertise and available human and financial resources in society with a view to establishing an effective NPM. Ideally, the civil society organisations involved in the NPM should already have been monitoring places of detention for some time and have accumulated a significant amount of experience as a result.

To date, Slovenia is the only country which has officially opened up the way for NGOs to participate in the NPM, namely in cooperation with the Human Rights Ombudsperson's Office. Nonetheless, as previously stated, there are a number of other countries where civil society has repeatedly called on the authorities responsible for the implementation of the OPCAT to be included in the NPM. Thus, further Ombudsman or Ombudsperson plus models may emerge with time.

Slovenia's 'Ombudsperson plus' model

Slovenia is a particularly interesting example of a country which has explicitly foreseen a role for civil society actors in the NPM. When acceding to the OPCAT in January 2007 Slovenia made a formal declaration, stating: *"In accordance with Article 17 of the Protocol, the Republic of Slovenia declares herewith that the competencies and duties of the national preventive mechanism will be performed by the Human Rights Ombudsperson and in agreement with him/her also by nongovernmental organisations registered in the Republic of Slovenia and by organisations, which acquired the status of humanitarian organisations in the Republic of Slovenia."* For this purpose on 5 October 2007 interested organisations were invited through a public tender to submit applications to the Ombudsperson's Office in order to be considered as part of the NPM. Two NGOs subsequently submitted applications and were successfully selected by the Ombudsperson's Office. These include the Peace Institute (*Mirovni inSTITUTE*) and the Legal Information Centre for NGOs (*Pravno-informacijski center nevladnih organizacij-PIC*), both of which are said to have experience in relation to monitoring places of detention as well as issues relating to asylum-seekers and refugees. Initially, the NGO and Ombudsperson's Office representatives will jointly undertake visits to places of detention, although future visits could also be undertaken on an individual organisational basis, as according to the enacting legislation, all parties have equal powers and authority. More detailed information about Slovenia's NPM can be found in the APT Country-by-Country Status Report.

NPM proposals to enhance civil society monitoring in Argentina

In addition to a proposal by the Ministry of Justice, in Argentina there currently exist several other draft proposals which envisage a role for civil society organisations in the country's NPM. The *Procuración Penitenciaria* or Prison Ombudsman and the NGO *Centro de Estudios Legales y Sociales* presented such proposals for debate in early 2008. The two proposals both anticipate a so-called mixed NPM which would include various civil society organisations, other existing monitoring bodies and a newly established Committee or Commission to Prevent Torture as the NPM. Among the principal functions of the latter body would be to bolster existing monitoring practice, by, amongst others, setting standards for monitoring places of detention, conducting training and accrediting existing institutions, including NGOs, as part of the overall mechanism. It is also interesting to note that there exist other proposals which are under discussion in several provinces of Argentina, a federal state, which also foresee such a role for civil society organisations in the NPM.

The involvement of civil society actors in NPMs as institutions is not confined to the Slovenian NPM and a proposal in Argentina. In Paraguay (please refer to the more detailed example given earlier) draft NPM legislation states that the National Commission to Prevent Torture can sign Agreements of Understanding with civil society organisations, which have been selected through a competitive process to work on specific projects.¹² Likewise, discussions between the Human Rights Defender (Ombudsperson's Office), which has been designated as the NPM in Armenia, and civil society were said to be ongoing at the time of writing regarding the latter's involvement in the NPM. However, it remained to be seen if anything came of these discussions.

II D. The involvement of civil society actors in NPM advisory bodies

Another possible role that civil society organisations can play vis-à-vis the NPM is a consultative one. In certain countries consultative bodies have, to date, been proposed in draft laws establishing the NPM. These bodies are potentially very important, as they will support the work of the NPMs and thereby hopefully make them more effective mechanisms. There are undoubtedly risks associated with civil society's participation in such advisory bodies to NPMs, especially if in practice their involvement is regarded by the authorities as mere symbolism and if their expertise is ignored. Nonetheless, such entities may well reveal themselves to be extremely useful supplementary bodies to the NPM.

The role of the Consultative Council in the proposed Honduran NPM

In Honduras the NPM draft law, which was drawn up by the Human Rights Commission of the Congress with civil society input, foresees the creation of a new National Committee to Prevent Torture to act as the NPM. This National Committee of three independent experts will be assisted by a secretariat as well as by a so-called Advisory Council. The latter will comprise the President of the National

¹² Draft NPM Law of Paraguay, which has been under consideration by the Paraguayan Congress since June 2007.

Committee, one representative respectively of the National Human Rights Commission, Human Rights Prosecutor's Office and judiciary as well as two representatives from civil society organisations. The mandate of the Advisory Council would be, among other matters, to advise the National Committee about torture prevention, conduct relevant specialized studies and to develop proposals with a view to improving the NPM. According to the draft law, the Consultative Council will have the right to call on other institutions or individuals either through the creation of working groups or individually to contribute to the NPM.

It is relevant to note that draft legislation in both Argentina and Brazil envisages the involvement of civil society representatives in advisory bodies which will support the activities of the NPMs in the countries. More information about the Argentine and Brazilian advisory bodies can be found in the APT Country-by-Country Status Report.

II E. Recommendations to civil society and government representatives

To civil society:

- Civil society should insist on their involvement in any national process to determine the NPM, as argued in the first section of this paper;
- This involvement could include their participation in the process of determining the members of the NPM and even in the final NPM itself;
- Civil society should advance compelling arguments for their inclusion in the NPM, if deemed appropriate and desirable. In order to do so, civil society should proactively develop NPM proposals which envisage such a role for them;
- Civil society representatives, if formally included in the NPM, should be prepared to adopt a collaborative approach, as envisaged by the OPCAT text, towards the government.

To governments:

- Governments should carefully consider the valuable contribution that civil society can make to the effective functioning of an NPM as well as the various forms this can assume, including their involvement in the NPM or advisory body;
- As actors who will significantly increase the chances of an effective, credible NPM being designated or established in practice, governments should be willing to discuss and explore such options in good faith;
- Governments should under no circumstances perceive the designation or establishment of an NPM as a restriction on the existing or future activities of civil society organisations engaged in the monitoring of places of detention.

III. Civil society actors outside of the NPM

Civil society organisations can play different roles in relation to the NPM, even if they are not an official part of it. It is essential for them to oversee the manner in which NPMs are set up and how they operate in practice. Thus, civil society organisations have several important functions in relation to the NPM including monitoring the work of the NPM, making useful recommendations aimed at improving its functioning as well as supporting its work by providing information about various pertinent issues relating to places of detention and by providing training to the members of the NPM. If need be, however, civil society organisations also have the important function of critically evaluating the activities of the NPM. What follows are several instances of how civil society can interact with the NPM without being formally part of it.

III A. The participation of civil society actors in the NPM appointment procedure

Practical experience has demonstrated that a good appointment process is one that is transparent and involves genuine consultation with civil society. Moreover, in its first annual report the SPT has also stressed this key point, stating: *“The independence of the NPM, both actual and perceived, should be fostered by a transparent process of selection and appointment of members who are independent and do not hold a position which could raise questions of conflict of interest.”*¹³

It is essential, however, that any appointment procedure determines the method, criteria and duration of the appointment of the NPM members as well as their immunities and privileges, as has been explained elsewhere in greater detail by the APT.¹⁴ Experience so far has revealed various ways in which a role is foreseen for civil society in the procedure of appointing the members of the NPM. It is clear from the following examples that the degree of involvement of civil society in this process varies significantly.

The proposed participation of civil society in Paraguay’s NPM

In Paraguay the draft NPM law foresees that the six Commissioners and the three substitutes of the National Commission to Prevent Torture (please refer to the more detailed example given earlier) are elected through electoral colleges. One Commissioner will be elected respectively by the legislature, executive and judiciary, while the three remaining Commissioners will be elected by civil society organisations. Once candidacies are received by each electoral college a short-list will be drawn up, which will be submitted for public consultation through a process of public hearings with a view to the selecting candidates. The procedure, which to the outside observer may seem rather complex, seeks to put in place checks and balances in order to avoid the repetition of past experiences whereby important human rights institutions have been occupied by less than ideal candidates.

¹³ Please see UN Doc. CAT/C/40/2, 25 April 2008 - paragraph 28 (iii).

¹⁴ Please see *Guide on the Establishment and Designation of National Preventive Mechanisms* (2007) – pp 41-42.

The draft NPM legislation in Honduras also envisages the involvement of civil society in the appointment process. The draft NPM law provides for the establishment of a three-person National Committee to Prevent Torture, of which one member will each be appointed by the executive, legislature and civil society organisations respectively. According to this proposal, the civil society representative will be selected at a general meeting attended by various relevant non-governmental organisations.

In the Africa and Europe regions, the recruitment processes for the members of Moldova's Consultative Council and Benin's National Observatory for the Prevention of Torture involve civil society. As was previously mentioned in section II of this paper, in Moldova a five-person recruitment panel, comprising representatives of the Center for Human Rights, human rights NGOs and academia conducted the recruitment process of the NPM's ten civil society representatives. Likewise, a central role is also earmarked for civil society in this same process in Benin, as the following example illustrates:

Recruitment of Benin's National Observatory for the Prevention of Torture

Draft legislation in Benin foresees the establishment of a single new body as the country's NPM, the so-called *Observatoire National pour la Prévention de la Torture*, which comprises five full-time members. The draft NPM legislation in the country envisages the involvement of civil society in the appointment process. It is anticipated that the Ministry of Justice will call for applications for membership of the NPM on the basis of the criteria laid down in the draft law. This criteria includes the candidate's human rights experience and expertise in an area related to the OPCAT as well as the requirement that the person is older than 25 years of age and is not engaged in any other public activity that could call into question his or her independence.

After this initial stage of the recruitment process, the Ministry of Justice will submit candidates' applications to a selection committee. The body consists of one member of the Parliamentary Legal Committee, two judges from the Constitutional Court and the Court of Appeal and one representative respectively from the Bar Association, Medical Association, Presidency and human rights NGOs. The draft law states that the representatives from these various bodies will themselves be nominated by their respective peer groups to participate in the selection committee. In short, the selection committee has a very important role to play in the appointment process and, in practice, the Ministry of Justice will serve more as a coordinator of the overall process.

In both Argentina and Switzerland a role is prescribed for civil society to propose candidates to the countries' NPMs. For example, the Argentine draft NPM law proposed by the Ministry of Justice (please refer to the more detailed example given earlier) envisages that the executive branch will designate the ten-person National Committee for Torture Prevention based on the recommendations of the legislature and civil society organisations. The executive branch will then make public a short-list of candidates, after which non-governmental organisations, professional bodies and academia will have 30 days to make any relevant observations in writing. Parallels to the Argentine process can be found in Switzerland, as the following example reveals:

Switzerland's Commission for the Prevention of Torture

Draft legislation in Switzerland anticipates the establishment of a single body as the country's NPM, the so-called Commission for the Prevention of Torture, comprising twelve voluntary members. Although the members will be appointed by the federal government on the recommendation of the Federal Office of Justice and the Department of Foreign Affairs, civil society organisations including NGOs can also propose their own candidates to these offices. As Switzerland has yet to ratify the OPCAT and to establish its Commission for the Prevention of Torture it remains to be seen how seriously civil society nominations will be taken by the Swiss authorities in practice.

III B. Civil society collaboration with NPMs

Civil society organisations can potentially be important sources of information, not only for NPMs but also for the SPT. In particular, organisations with access to places of detention or expertise in a specific area will be in a very good position to exchange valuable information with both bodies. In countries where NPMs are under-resourced in terms of staffing and finances such information will be an important boon to their work.

In addition to providing the NPM with useful substantive information, the experience of civil society organisations in monitoring places of detention may prove to be invaluable to the NPM from a methodological perspective. Organisations with established expertise in monitoring places of detention will be able to advise and to make recommendations aimed at strengthening the working methods of the NPM. The same observations and recommendations could also be conveyed to the SPT, which itself has a mandate to advise and assist NPMs.

A similar collaborative approach can be taken by civil society in relation to the annual report of the NPM as well as its other public documents. By distributing and discussing the findings and recommendations of the NPM and monitoring any related progress in the latter's implementation civil society will actively help support the ongoing work of the national monitoring body.

Civil society also has an essential role to play to ensure that the NPM is suitably qualified to undertake its work by providing its members with relevant training, if required. A commitment to providing appropriate professional training and to building capacity domestically through training is an area where civil society could potentially be very active.

III C. Civil society's watchdog role

In addition to the collaborative approach described above, a dual function of civil society is to keep a watchful eye on the functioning in practice of the NPM and, in doing so, to play a watchdog type role. Civil society should ensure that the NPM, which is designated or established by the State Party, meets the minimum criteria envisaged by the OPCAT text. If this is not the case, it should be ready to actively

engage with the NPM and the State Party to address any shortcomings. It will be essential for civil society organisations to keep a close eye on a number of factors such as the suitability of the members of the NPM, their working methods, the NPM's program of activities and regularity of work as well as its findings and recommendations. The examples below aptly illustrate the importance of the watchdog function.

The role of civil society vis-à-vis Denmark's NPM

In Denmark the Rehabilitation and Research Centre for Torture Victims (RCT) is an example of an NGO which has already embraced this all-important watchdog role. In February 2007, the RCT submitted its *Alternative Report to the list of issues to be considered by the UN Committee against Torture during the examination of the 5th periodic report of Denmark*, which took place in Geneva in May 2007. In its report the RCT stated: "In anticipation of Denmark's establishment of its NPM, RCT made a legal study of the existing Danish visiting mechanisms and assessed them against the OPCAT... The main conclusion of the study was that the existing domestic visiting mechanisms of the Ombudsman and the parliamentary Section 71-Inspection, respectively, would not be able to live up to the obligations of Denmark under the OPCAT."¹⁵ The organisation argued that several factors undermined the NPM's compliance with the criteria laid down in the OPCAT text, including: its homogenous (legal) professional composition; limited resources; so-called mode of operation; and the standards of assessments used by the mechanism during visits. A detailed account of these criticisms can be found in the RCT's report.¹⁶

The role of civil society vis-à-vis the Czech Republic's NPM

In the Czech Republic civil society is currently in the process of monitoring the work of the country's NPM, the Public Defender of Rights. The Czech NGO, Human Rights League plans to take stock of the activities of the NPM at the end of 2008, by which time the mechanism will have been operating as the country's NPM for some time. At this point it will make observations and recommendations aimed at improving the NPM's overall functioning. It is anticipated that these observations and recommendations will also be the subject of discussion at a later date in a government-civil society joint committee which has the mandate to examine the issues of torture and other forms of ill-treatment.

¹⁵ See page 19 of the report, which is available at:

http://www.ohchr.org/english/bodies/cat/docs/ngos/RCT-Alternative_report.pdf

¹⁶ *Alternative Report to the list of issues to be considered by the UN Committee against Torture during the examination of the 5th periodic report of Denmark*, (19 February 2007) – pp 19-21.

The role of civil society vis-à-vis Mexico's NPM

As described earlier in this paper, a closed-door NPM designation process resulted in the National Human Rights Commission being designated as the country's NPM in June 2007 without due consideration of the prior consultation with civil society and other relevant actors. Subsequently, the National Human Rights Commission invited a dozen NGOs to form an Advisory Council to the NPM. Unsurprisingly, given the history of lack of trust towards the National Human Rights Commission and the manner in which it was designated as the NPM, only a few civil society organisations have so far accepted this invitation to meet and discuss this proposal. Some organisations have chosen to maintain a role of monitoring the work of the NPM from the outside, which they deem to be more a more effective use of their time. Despite such reservations, the NPM has notably remained open to dialogue with civil society and the APT promotes a policy of rapprochement with all relevant actors, in the interest of ensuring that the OPCAT is effectively implemented.

In addition to keeping a watchful eye on the activities of the NPM, civil society has a critical role to play in monitoring the reactions of the state to the observations and recommendations of the NPM. By ratifying the OPCAT it is inferred that States Parties have an obligation to enter into a constructive dialogue with the NPM with the aim of implementing its various obligations. Civil society should therefore pay close attention to the steps taken by the state to fulfil this obligation. Finally, civil society should remain vigilant to ensure that the authorities do not under any circumstances undertake any actions which undermine the integrity of the NPM, particularly its independence, authority and overall effectiveness or which prevent civil society organisations from continuing to monitoring places of detention in the country.

III D. Recommendations to civil society and government representatives

To civil society:

- As argued in section II of this paper, civil society should insist on their involvement in any national process to determine the NPM;
- In this connection civil society should call upon the state authorities to be included in the process of selection and appointment of the members of the NPM with a view to ensuring the independence of the institution and its members;
- Civil society actors not included in the NPM have an important dual function to play in relation to the NPM. This includes both constructively working with the NPM to support its effective functioning and keeping a watchful eye on its overall activities;
- Civil society should also exercise this same watchdog function vis-à-vis the state in order to monitor the extent to which the state implements the NPM's recommendations;
- Similarly, civil society should remain vigilant to ensure that the government or other state authorities do not under any circumstances undermine the effective functioning of the NPM;

- Civil society should inform the SPT of causes of the risk of torture and ill-treatment and national/local measures that could have been/be taken to prevent these acts.¹⁷

To governments:

- Governments should carefully consider the valuable contribution that civil society can make to the both the establishment and effective functioning of an NPM;
- States Parties should therefore act on the recommendation of the SPT to foster the independence of the NPM through a transparent process of selection and appointment of its members, including by the inclusion of civil society actors in this process;
- Governments should also be willing to consider the observations and recommendations of civil society in relation to the effective functioning of the NPM and regard it as a potentially useful source of information and advice.

¹⁷ Please see the APT Briefing Note, Role of civil society in preparation of SPT visits.

IV. Conclusion

At its outset this paper argued that in order to ensure that the ratification of the OPCAT is not an empty formality, it should not be the state alone that determines its implementation, but that this process should also include other national actors, particularly the human rights movement. States Parties should therefore consult widely as to the design of their NPM to ensure the adoption of an effective monitoring mechanism. In turn, genuine consultation with civil society will add legitimacy and credibility to both the process of determining the NPM and the institution itself, both of which are essential for an effective system of monitoring of places of detention.

Regrettably, not all States Parties have adopted such an open, inclusive approach. The SPT has recognized this common failing in its first annual report. It stated: *“The SPT is concerned about the lack of progress to date in many States Parties as regards the required process of consultation for the establishment of NPMs and the necessary legislative and practical provision to ensure that they can work effectively. Unless the NPMs are able to fulfil their role as the on-the-spot visiting mechanisms for the prevention of ill-treatment, the work of the SPT will be seriously limited and adversely affected.”*¹⁸

Nonetheless, from this paper it is clear that some States Parties have taken on board these important lessons and civil society has been included in the all-important process of defining the structure and form of the mechanism. We have also seen that in a small, albeit growing number of countries, civil society actors have been included in the membership of the NPM itself. It will be interesting to observe how this trend develops in the coming years. However, this paper has also argued that, even in instances when civil society is not formally included in the NPM or a related advisory body, it has a significant role to play monitoring, supporting and critically evaluating its work in practice.

Ultimately, the task of putting in place an NPM that fully complies with OPCAT requirements should not be underestimated. It is a process that will take much time and effort to achieve and will invariably prove to be a longer-term process. Nonetheless, it is clear from this paper that civil society has an important contribution to make to this process that has the potential to radically improve the steps taken to prevent torture and ill-treatment.

¹⁸ Please see UN Doc. CAT/C/40/2, 25 April 2008 - paragraph 29.