OPCAT Briefings

Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in **Federal and other Decentralised States**

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Contents

I. Introduction and background

The Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the UN General Assembly in 2002 and came into force in 2006. It aims to prevent torture and other ill-treatment by establishing a system of regular visits to all places of deprivation of liberty within the jurisdiction and control of States Parties, undertaken by independent international and national experts. On the basis of these visits, recommendations are made to improve domestic prevention measures. They are submitted to the authorities of the States Parties which examine them and enter into dialogue with the preventive bodies on how to implement them.

Federal and other decentralised States[1] face challenges over and above those routinely encountered in the implementation of international human rights law. Their traditional reporting obligations to UN Treaty Bodies, such as the UN Committee against Torture, are already complicated by the division of responsibility between national and sub-national governments, but a new layer of complexity is added when the treaty requires the establishment of a national monitoring mechanism, as does the OPCAT, and incidentally also the UN Convention on the Rights of Persons with Disabilities.

This paper is intended to update and consolidate the Association for the Prevention of Torture's (APT) work on the implementation of the OPCAT in federal and other decentralised States. Two previous APT discussion papers were produced – one in the context of a conference on this issue in Sao Paulo, Brazil in June 2005, and the other in the context of a follow-up conference in Buenos Aires, Argentina in September 2008.[2]

With the benefit of experience of several recent projects to implement the OPCAT in federal and other decentralised States, the APT hopes this paper will provide some practical suggestions, ways forward and interesting examples for future implementation. With these aims in mind, the paper sets out the relevant peculiarities of the OPCAT and attempts to analyse the legal, political and practical considerations arising in its implementation in federal and other decentralised States (for example in relation to consultation, split jurisdiction, adaptation of various NPM models and coordination between multiple authorities). Following a brief conclusion, the recommendations made throughout the paper are gathered together in the final section.

As the OPCAT is still in early stages of ratification and implementation, the examples given in this paper are subject to continual change. For further and

[1] In this paper, the term 'other decentralised States' is intended to capture States which are not federations yet which share executive power between national and sub-national (e.g. regional, provincial, territorial or local) authorities – examples including the UK and Spain. India is an interesting example of a State which is "federal in structure with certain unitary features" – see: http://india.gov.in/govt/constitutions_india.php.

[2] Both conferences were co-organised by the local offices of the Centre for Justice and International Law (CEJIL).

regularly updated information on specific countries, please refer to the APT's online tool, the OPCAT Database: www.apt.ch/opcat.

A. Federalism and other forms of political decentralisation

The most common form of political decentralisation is federation. A federation is formed when several autonomous provinces, states or regions form a federal union, creating a single State with international legal personality. For those who are not familiar with the federal system of government, it can seem overly complex, but it has the advantage of more localised representation, avoiding the concentration of all political power in the national capital.

The Forum of Federations, a worldwide association of States which have adopted such a structure, lists 24 States with federal governmental structures on its website, with three further States considering or transitioning to a federal system.[3] As the site points out, this may sound like a small proportion of States, but in fact their citizens comprise around 40% of the world's population.

In addition to federations in the strict sense (for example Germany or the United States), several countries are politically decentralised in other ways (such as Spain or the United Kingdom). It is the autonomy of their internal political entities which is relevant for the purposes of this paper, and indeed which present challenges for the implementation of international law generally. As such, the following information and recommendations can be taken to apply equally to either form of decentralised State.

B. The Optional Protocol to the UN Convention against Torture (OPCAT): an overview

Unlike most other human rights treaties, which leave it up to States to determine how best to promote and protect the rights they contain, the OPCAT aims to facilitate implementation of its parent Convention (the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment or UNCAT). It requires States Parties to establish a system of regular visits to places where people may be deprived of their liberty by independent expert bodies known as National Preventive Mechanisms (NPMs).[4] In addition, it provides the legal basis for the creation of the UN Subcommittee on Prevention of Torture (SPT), which conducts visits of its own and has an advisory role in relation to States' implementation of the OPCAT. The international and national preventive mechanisms are designed to be complementary, and the SPT also advises the NPMs directly on their powers, independence, functioning as well as means necessary to strengthen preventive measures in their countries (for example legal safeguards relating to detention).

[3] See: http://www.forumfed.org/en/federalism/by_country/index.php. Please note the APT does not necessarily endorse the content of websites other than its own. The APT also understands Nepal plans to make the transition to federalism once its next Constitution comes into force.

[4] For a fuller and more general introduction to the OPCAT, see APT/IIHR, OPCAT Implementation Manual, 2010, available at: http://www.apt.ch/index.php?option=com_docman&task=doc_download&gid=784&Itemid=256&lang=en.

At the time of writing, 57 States have become party to the OPCAT and many are well on their way to setting up their NPMs (if they have not already done so). In addition, there are 21 States which have signed the OPCAT but not yet ratified it. Amongst these States are several federal and otherwise decentralised nations, including Argentina, Bosnia & Herzegovina, Brazil, Germany, Mexico, Nigeria, Spain, Switzerland and the United Kingdom (parties) and Australia, Austria, Belgium and South Africa (signatories).[5] NPMs have already been established in Germany, Mexico, Spain, Switzerland and the United Kingdom. In Argentina and Brazil, some preventive mechanisms have been designated locally (in states and provinces), although national NPM laws have yet to be adopted.

The OPCAT's active, preventive philosophy places significant, albeit necessary, demands on States. It foresees a system whereby independent experts bodies (the NPMs) are created to monitor places of deprivation of liberty and to make recommendations to improve conditions and reduce the risk of torture and other forms of cruel, inhuman or degrading treatment or punishment. Depending on the domestic context, there may be multiple bodies comprising the NPM and multiple levels of government with responsibility for implementing the recommendations.

The OPCAT also requires that NPMs be granted unfettered access to all places where people may be deprived of their liberty,[6] and this includes not only prisons and police stations, but also less typical places of detention such as immigration centres, psychiatric and care facilities for older persons, social care homes for persons with disabilities and military bases. Even places used as temporary holding facilities and certain transport vehicles can fall within the ambit of the OPCAT. As such, there may be a wide range of government authorities, at both the national and sub-national levels, with relevant responsibilities.

It should be emphasised that the framework of the OPCAT is one of cooperation – the overall aim of the instrument is to facilitate dialogue between the SPT, NPMs and governments at all levels with a view to reducing the risk of torture and other ill-treatment.

For the purposes of this paper, the specific considerations for decentralised States when implementing the OPCAT can be grouped into three broad categories – legal, political and practical.

[5] For up to date information, see APT's OPCAT Database: www.apt.ch/opcat.
[6] See article 20(c).

II. Ratifying and implementing the OPCAT: legal considerations for federal and other decentralised States

A. International obligations for federal and other decentralised States

- International legal responsibility for ratifying and implementing human rights treaties

Whatever the State structure is, at the international level, it is only national governments that have legal personality and can conclude treaties and other international agreements (with very rare exceptions). As such, national governments have a responsibility not only to ensure treaties are in the interests of the country as a whole, but also to see that international obligations are honoured by sub-national governments.

The OPCAT recognises political decentralisation explicitly and Article 29 makes it clear:

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

Such an article is not novel – for example it also appears in the International Covenant on Civil and Political Rights (article 50) and the International Covenant on Economic, Social and Cultural Rights (article 28). It reflects the customary principle in article 27 of the 1969 Vienna Convention on the Law of Treaties, which provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[7]

Furthermore, the OPCAT acknowledged the different States' structure in relation to domestic implementation. The very possibility of having "several independent NPMs" in article 17 was clearly drafted with decentralised States in mind. The last sentence of the article makes this clear:

> "Mechanisms established by decentralized units may be designated as NPMs for the purposes of the present Protocol if they are in conformity with its provisions."

- From ratification to implementation: ensuring that international obligations are fulfilled

Any federal or otherwise decentralised State intending to become party to the OPCAT will need to secure sufficient internal support for implementation if it is to

[7] http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

fulfil its obligations.[8] This will be particularly germane to the question of delay – the OPCAT allows States Parties one year from the date of ratification or accession to designate or establish their NPM. NPM designation and establishment is often a time-consuming process that requires thorough analysis. Federal and other decentralised States will have to decide whether NPM designation can take place either before or after ratification.

For States that foresee difficulties with the one-year deadline but wish to become party to the OPCAT as soon as possible, article 24 provides that a declaration can be made postponing implementation for up to three years.[9] This is a provision of which federal and otherwise decentralised States such as **Germany** have already taken advantage.

Apart from delay in implementation allowed by the OPCAT, article 29 may be relevant in a situation where a sub-national government is reluctant to cooperate in a State's implementation of OPCAT. Clearly, such a reason cannot justify a failure to implement fully the State's obligations under the treaty, so a State wishing to comply fully with the OPCAT in this regard must obtain the cooperation of each affected sub-national government – even if this involves political compromise. One of the major issues arises when regional authorities refuse to accept recommendations from a federal preventive body. If the responsible regional government cannot (or will not) fund its own preventive mechanism, the national government may need to fund the regional mechanism or find another suitable compromise. The APT has also seen instances of disagreement over which visiting body may have contact with the SPT. Under article 20(f) of the OPCAT, States are obliged to grant their NPMs "the right to have contacts with the Subcommittee," but it is for each State to determine how this is to be implemented, and to resolve any conflict where more than one body wishes to have contact with the SPT.

The APT recommends States develop a clear implementation plan, including ways to address potential challenges arising from decentralisation, as early as possible to ensure they are able to fulfil their obligations to set up an NPM under article 17 in a timely fashion.

B. Domestic implementation of the OPCAT: the issue of division of powers

- Division of powers in the federal system

Particularities and complexities

The essence of decentralisation (in the present context) is divided governmental authority, whether it be delegated or allocated directly under a State's constitution. A federation typically entails an entrenched division of authority between a

[8] See discussion under section 3 a) of this paper on the need for consultation in relation to OPCAT ratification and implementation.
[9] Five with the assent of the Committee Against Torture – see article 24(2) of the OPCAT.

national (also called federal, central or commonwealth) government, and sub-national (eg regional, provincial, state, territory, community, local or municipal) governments. Whether the authority is divided according to region or subject matter – or indeed a combination of these things – depends on the constitution. Some constitutions, such as **Australia**'s,[10] set out a list of subjects such as immigration and emigration, marriage and military defence over which the federal (Commonwealth) Government has sole competence, and reserves all other powers to the regions (states and territories). Other constitutions, such as **Canada**'s,[11] enumerate the powers of both levels of government (federal and provincial). Both of these constitutions also grant powers over certain sections of the population – namely "aliens" (ie non-citizens) and indigenous peoples – to the federal level of government.[12]

Sometimes, the division of powers is less clear. One example relevant to the OPCAT is that in **Canada** the Federal Government has authority over "the establishment, maintenance and management of penitentiaries," whereas provincial governments have power over "the establishment, maintenance and management of public and reformatory prisons in and for the Province."[13] In practice, under regular Canadian criminal legislation, prisoners serving a term of two years or more are incarcerated in federal penitentiaries, while those serving less than two years are detained in a provincial prison – a pragmatic way of dealing with the uncertainty created by the Constitution. In **Australia** there are no federal prisons, so individuals sentenced under federal criminal law (eg for crimes relating to immigration, importation of prohibited substances etc.) are detained in correctional facilities under the authority of a state or territory government. However, the Commonwealth Government is responsible for immigration detention centres in which individuals who are deemed to be "unlawful non-citizens" under the *Migration Act 1958* are mandatorily detained, and it has its own police service (the Australian Federal Police) as well as intelligence agencies with powers to detain.

There exist in many federations agreements by which the regional and national governments exchange services or delegate/receive constitutional authority. For example, in both **Australia** and **Canada**, regional governments contract with the federal government to provide policing services in areas which would otherwise come under the exclusive jurisdiction of the territory/province.[14] In addition, federal facilities (such as courthouses, (air)ports, federal government agency buildings and immigration detention centres) are often situated on land owned by provincial/state governments and leased to the federal government.

[10] See Commonwealth of Australia Constitution Act: http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/CB49A63C9DF867ACCA256F71004F2624, in particular section 51.
[11] See Canadian Constitution Act 1867, sections 91 and 92.
[12] See Commonwealth of Australia Constitution Act, section 51(xxvi) and Canadian Constitution Act 1867, sections 91(24) & 92(6). Technically the Australian power in s51(xxvi) is over "the people of any race for whom it is deemed necessary to make special laws."
[13] See Canadian Constitution Act 1867, sections 91(28) and 92(6).
[14] E.g. the Australian Federal Police in the Australian Capital Territory and the Royal Canadian Mounted Police in most provinces of Canada.

Some States also formally recognise areas of concurrent authority over a single subject-matter. For example, article 24 of the Constitution of **Brazil** expressly provides that "the Union, the states and the Federal District have the power to legislate concurrently on a range of topics including "penitentiary law" and "protection and defence of health."[15]

A successful implementation of the OPCAT requires absolute clarity concerning responsibility for places of deprivation of liberty. The broad OPCAT definition of such places means that many governmental authorities may be implicated, including not only justice, but also immigration, health, defense and social services, among others. The APT recommends thorough mapping of all such places (and existing monitoring bodies, if any), including a determination of who is responsible for each place, so that the most appropriate monitoring bodies are designated as part of the NPM and recommendations made under the OPCAT can be directed to the proper authorities and properly implemented.

Sometimes there is overlap or inconsistency in the law passed by different levels of parliament/congress. In such circumstances, the constitution may provide a mechanism for solving such problems. Article 24(4) of the Constitution of Brazil provides that Federal legislation implementing general rules in an area of concurrent jurisdiction "suspends the effectiveness of a state law to the extent that the two are contrary." [16] Similarly, section 109 of the Australian Constitution provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."[17] However, in the absence of such a clear constitutional rule, courts may have to resolve disputes between the different levels of government on a case-by-case basis. This is the case in Canada, where courts develop and apply competing, complicated theories and achieve at times contradictory results.[18] In practice the Australian rule has not prevented a similar situation from arising in that country, where the 'federal balance' (of power) has shifted continually over the years since federation (in 1901), as the High Court and parliaments interpret and reinterpret various provisions of the federal constitution.[19]

The APT recommends decentralised States consider carefully the potential legal pitfalls involved in OPCAT implementation, in order to minimise the risk of legal challenges affecting NPM operations.

[15] See: http://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%C3%A7ao.htm (unofficial translation of article).
[16] As above
[17] See: http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/ or www.comlaw.gov.au.
[18] See Joesph E Magnet, Special Topics: Paramountcy and Interjurisdictional Immunity: http://www.constitutional-law.net/paramountcy.html.
[19] See Scott Bennet, The Politics of the Australian Federal System, http://www.aph.gov.au/library/pubs/rb/2006-07/07rb04.pdf (Parliamentary Research Brief).

Possible ways forward: leverage and formal consultation mechanisms

Federal governments may seek to work around limitations on their authority by resorting to forms of political and/or economic leverage that do not directly depend on legislative competence in the area. For instance, many federal governments have relatively unbounded authority to spend their revenues in order to achieve national policy aims indirectly when their implementation would otherwise be outside federal jurisdiction. Realistic political strategies, coupled with good faith negotiations between all government actors at the various levels, can overcome serious structural (constitutional) obstacles.

In **Australia**, there is a formal forum for political decision-making involving the balance of power: the Council of Australian Governments.[20] This Council involves not only the heads of the federal and state/territory governments, but also a representative of municipal (known as local) governments. The role of this Council is to "initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments...." Relevant issues may arise from (amongst other things) international treaties which affect the states and territories or major initiatives of one government (particularly the federal Government) which impact on other governments or require the cooperation of other governments. There is also a Standing Committee of Attorneys-General[21] (SCAG) which works to harmonise and consolidate the proliferation of laws resulting from Australia's federal system.

Some states may have Councils for specific issues, including human rights. This is the case in **Argentina**, where a Federal Council for Human Rights was established by decree in 2008. The Council comprises the human rights authorities of each Province and is coordinated by the Human Rights Secretariat of the Ministry of Justice of the Nation. It serves as a forum for dialogue on human rights policies amongst the provinces and the federal authorities, including on the implementation of the OPCAT.

Similarly, **Canada** has a Continuing Committee of Officials on Human Rights, which it describes as "the principal federal-provincial/territorial body responsible for intergovernmental consultations and information sharing on the ratification and implementation of international human rights treaties."[22]

The APT recommends that, where appropriate, formal inter-governmental consultation mechanisms such as the Council of Australian Governments or the Argentinean Federal Council for Human Rights should be utilised to facilitate the discussion on OPCAT ratification and domestic implementation.

[20] See http://www.coag.gov.au/about_coag/index.cfm.
[21] See: http://www.scag.gov.au/.
[22] See Canada's 6th Periodic Report under the Convention against Torture, available at: http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT-C-CAN-6.pdf (At § 3)

This overview is necessarily superficial – the full range of federal State structures and avenues for cooperation is much too broad to cover in this paper. However, in most situations, cooperation between the different levels of government is politically feasible and can allow for effective nation-wide implementation of shared objectives, including treaty obligations.

- Division of power in other forms of decentralisation and avenues for cooperation

The **United Kingdom of Great Britain and Northern Ireland** is an example of a State which, although not federal, is extensively administratively decentralised. Northern Ireland, Wales and Scotland have their own elected governments, and municipal (county, borough, shire and city) governments throughout the British Isles have significant powers.[23] Broadly speaking, the divisions along regional lines mirror those in federal States – the principal difference being that they are not based on a single constitutional law with enumerated powers. As a result of this decentralisation and the United Kingdom's generally progressive approach to ensuring independent oversight of places where persons may be deprived of their liberty, there were already several different agencies doing relevant work when the United Kingdom ratified the OPCAT, and no fewer than 18 discrete bodies were eventually designated as the NPM.

In the United Kingdom, the national government has absolute sovereignty, which it could use to push through the implementation of international obligations such as those under the OPCAT, even in the face of opposition from relevant sub-national authorities. However, a cooperative approach is far more likely to produce an effective NPM (even if it takes longer). The United Kingdom Government recognised this and undertook relevant consultations.

The APT recognises that national legal coordination challenges are faced by federal and other decentralised States routinely – particularly in the implementation of other treaty obligations and schemes of national significance. Generally speaking therefore, any legal problems which arise in the implementation of the OPCAT in decentralised States should be surmountable through existing avenues of cooperation. The APT encourages decentralised States to consider at the earliest opportunity which of its internal mechanisms could best serve in this regard.

[23] See http://www.communities.gov.uk/localgovernment.

III. Political issues faced by federal and other decentralised States in relation to the OPCAT

In theory, the greatest political challenge associated with the OPCAT is the initial one of convincing stakeholders to approve the ratification of the instrument in the first place. However, States should not take a smooth implementation process for granted once consensus has been reached on ratification.

It should be noted that in some States the federal authorities act unilaterally on their sovereign powers to ratify treaties and then undertake a more thorough consultation process with sub-national authorities on implementation once the international legal obligation has already been acquired.

This brings us to the importance of an inclusive, meaningful consultation process. The OPCAT is based on a foundation of dialogue. The treaty itself provides for cooperation between NPMs and the SPT, as well as between both of these bodies and the relevant authorities in each State party. The confidence of these authorities in processes under the OPCAT is critical to the success of the dialogue model.

Even where national governments have broad powers to implement treaty obligations (eg in **Australia** and the **United Kingdom**), the implementation of OPCAT is likely to be more effective in the long run with the full and informed support of the relevant sub-national actors who will have the main responsibility to examine and implement the OPCAT bodies recommendations.

A. Consulting relevant actors on the implications of OPCAT ratification and implementation

- The need for an inclusive and timely process of consultation

Consultation on the implications of OPCAT ratification and implementation, in particular regarding the future NPM structure, is possibly even more important in federal and other decentralised States than unitary ones. As with all issues of national significance, broad consultation is desirable before a State becomes party to the OPCAT (or as soon as possible afterwards, in order to meet the requirements of article 17). However, the potential implications of the OPCAT in terms of budgets, legislative changes and education require consideration at all levels of government if the treaty's implementation is to be successful.

The SPT recommends the

> "...NPM should be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society."[24]

There are several reasons for which a thorough consultation process is desirable when establishing an NPM. One of the most important is that places of deprivation of liberty, as defined by the OPCAT, extend far beyond prisons and police cells, and may fall under the responsibility of any number of government bodies (or possibly even solely under the responsibility of the private sector – for example care homes for older people and facilities maintained by charities). In a decentralised State, the number of possible relevant actors is multiplied. Consultation needs to include all of these actors in order to provide a comprehensive overview of the scope of the monitoring task to be undertaken, and so to form a proper basis for determination of the shape and size of the required NPM.

Consultation is also critical because for many of the institutions to be monitored it will be the first time they have been subjected to independent scrutiny, and those responsible for them are more likely to cooperate during visits if consulted on NPM development at an early stage. It should be seen as an opportunity for unprecedented cooperation in the field of deprivation of liberty, which in the APT's experience is uncoordinated and fragmented in many countries (for example, States rarely have a national prisons strategy, often leaving management of such institutions to sub-national authorities).

While maintaining the need for a consultation process which results in the best possible national implementation of the OPCAT, the APT recommends States take care not to become mired in the detail of NPM configuration such that ratification and implementation are unduly delayed. In this regard, strong and consistent leadership of the consultation and implementation processes as a whole is very important. If States believe the one year deadline in article 17 to be difficult to achieve, they should consider the option of a declaration under article 24 rather than simply delaying ratification.

Switzerland is an example of a generally positive OPCAT consultation. The cantonal governments, which have the constitutional powers to manage their own finances and places of detention, eventually agreed with the federal government (Confederation) to permit a new federal Commission for Prevention of Torture to carry out OPCAT-mandated visits to institutions for which they are responsible. However, the cantons were reluctant to accept visits by a federally-created body and, under the mandate eventually adopted,[25] the federal Commission[26] can only

[24] SPT, Guidelines on national preventive mechanisms, UN. Doc CAT/OP/12/5, 9 December 2010. Available at www.ohchr.org.

[25] See Federal Law on the Commission for Prevention of Torture: http://www.admin.ch/ch/f/ff/2009/1821.pdf (in French).

[26] The National Commission for the Prevention of Torture is based in Fribourg. It was decided not to base it in Bern to emphasise its independence from the federal government, to access expertise

make non-binding recommendations to the 'competent authorities' – whether they be federal, cantonal, municipal or even private. The Swiss process is an example of the sort of compromise which may be required to implement an NPM which all relevant parties will support, despite some shortcomings.[27]

The examples of the consultation processes in **Australia**, **Germany**, **Mexico**, **Spain** and the **United Kingdom** may also be of interest to States contemplating or conducting similar consultations in their own jurisdictions.

- Local vs. federal or the consequences of lack of timely consultation?

Argentina and **Brazil** are examples of OPCAT consultations with more complex histories. Both countries ratified the OPCAT without conducting thorough consultations with their respective provinces and states. Both countries' national governments produced several draft laws on NPM establishment, some of which were discussed in public meetings.[28] However, civil society organisations raised concerns regarding the lack of transparency and delays in both processes. Argentina was effectively legally required to establish or designate its NPM by 2007 and Brazil by 2008.[29] At the time of writing, national legislations implementing the OPCAT have yet to be adopted. Consequently, both consultation processes on how to implement the OPCAT had the side-effect of raising expectations around the country. All of the draft national laws produced in Argentina and Brazil foresee a structure allowing for local mechanisms in each state (in addition to a federal coordinating body).[30] In this context, a number of state- or province-level preventive mechanisms have now been designated or approved independently in the in the provinces of Chaco and Rio Negro in Argentina as well as in the states of Alagoas, Minas Gerais and Rio de Janeiro in Brazil. The APT understands that daft local laws are at various stages of legislative consideration in a number of other Argentine provinces, including Mendoza, Neuquén, Santa Fe and Tierra del Fuego. The delays in implementation and NPM fragmentation in Argentina and Brazil have made finding effective implementation solutions complicated for their respective national governments but also contribute to pressure the federal government to promptly adopt national legislations implementing the OPCAT.[31]

Even though the draft legislations in Argentina and Brazil allow for local preventive mechanisms, the fact that the local laws have been adopted prior to the national

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and share resources with the academic and police training institutions in Fribourg, and to benefit from the bilingual (French and German) culture of the city. For further information see: http://www.ejpd.admin.ch/ejpd/fr/home/die_oe/organigramm_ejpd/kommissionen/nkvf.html

[27] The Swiss NPM is further discussed in section 3 b) of this paper, *The cost of Implementation.*

[28] The APT was informed in March 2010 that the fourth and (likely) final draft had been accepted by the Brazilian Presidency and would be submitted for Congressional approval in the near future. As of February 2011, the draft NPM law has not been presented yet to the Congress. Once this draft is made public, it will be posted on APT's OPCAT Database.

[29] Argentina was the first federal State to become party to the OPCAT (on 15 November 2004).

[30] Argentina and Brazil NPMs structures are further discussed in section 4 c) – Option 4: Hybrid division.

[31] For full details of consultation processes, see APT's OPCAT Database available at: www.apt.ch/opcat.

NPM designation is not a situation envisaged by the OPCAT and which may have implications for the eventual smooth running of the national mechanism as a whole. The situation is instructive for other States wishing to establish multiple mechanisms, while ensuring adequate coordination and avoiding conflict and fragmentation in their NPMs. In the APT's view, the main lesson to be drawn from the experience of these two countries is that consultations need to be timely and genuinely inclusive.

All of these examples demonstrate the need for genuine and comprehensive consultation on the part of a federal/national government – preferably beginning well before ratification of the OPCAT. Compromises can work as long as all the relevant parties agree – national governments which overrule sub-national governments, existing monitoring bodies or civil society concerns clearly risk fragmentation in their NPM or even a breach of their treaty obligations.

B. The cost of OPCAT implementation

- The costs of not preventing torture

In discussing political challenges, the affordability of implementing the OPCAT cannot be ignored. Regular monitoring of every place where a person may be deprived of his or her liberty in a State Party is a resource-intensive undertaking. The OPCAT recognises this specificity and establishes clear obligations for States Parties to provide necessary resources for the functioning of the NPMs.[32] For this reason, it will usually be incumbent on national governments to take the lead, assuming they have the most power over State revenue. Some federal States, such as Switzerland, have different arrangements: its 26 cantons retain fiscal autonomy under the Constitution, as well as all other powers not specifically delegated to the federation.

Value for money in the context of the OPCAT comes from a national implementation which effectively reduces the risk of ill-treatment. When it is revealed, ill-treatment can severely damage the reputation of a government – both at home and overseas. The administrative and legal costs associated with investigations[33] and defending the authorities against allegations of ill-treatment are also significant. Furthermore, poorly functioning places of detention and ineffective systems of deprivation of liberty, generate high costs, including in relation to persons deprived of their liberty's health, national security, public safety and the stress that such problems may place on the criminal justice system.[34] In addition to the international legal obligation and moral duty to stamp out torture, these are the considerations that federal governments – which are the

[32] See Article 18.3 of OPCAT.
[33] Under articles 12 and 13 of UNCAT, States Parties are obliged to conduct an examination of any allegation of torture, and to follow this up with a full investigation if there are reasonable grounds to believe an act of torture has been committed.
[34] See APT/IIHR, OPCAT Implementation Manual, 2010, p 191. Available at www.apt.ch.

duty-bearers at international law – should bear in mind and impress upon their sub-national government counterparts in the consultation process.

- Investing in effective national preventive mechanisms

In his 2010 report to the General Assembly, the Special Rapporteur on Torture pointed out that: "Even the most independent [NPM] with the strongest mandate cannot function without sufficient resources."[35] He went on to single out **Germany** as "[a] particularly worrying example…where the [NPM] has an alarming lack of human and financial resources. As the country with the largest population in Europe, it is merely assigning four part-time unpaid staff members to the regional [NPM] body and one unpaid person to the federal [NPM] body, with a budget of only €300,000."[36]
The German Government responded in its 2009 report to the Committee against Torture[37]:

> The Federal Government is aware that the preventive mechanism has been criticised by various parties as too small and too poorly equipped. Once the Joint *Länder* Committee has submitted its first reports it will thus be necessary to review whether the mechanism is adequately equipped. The evaluations of the Federal Office and the *Länder* Committee themselves will thereby be of decisive importance.

Switzerland faced a similar challenge during the consultation process. Three cantons were initially reluctant to accept visits by a federally-created body, but, due partly to the cost involved, eventually assented.[38] However, as discussed above, they refused to agree that the federal body should be able to make recommendations which would bind cantonal authorities.

The APT recommends that, no matter how a State decides to implement the OPCAT, there should be an inter-governmental agreement on funding to ensure the mechanism as a whole has the resources it needs to conduct its business in an effective fashion. This is not only a prerequisite for a serious NPM, but also a specific obligation under article 18(3) of the OPCAT.

[35] See Special Rapporteur on Torture, Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN.DOC A/65/273, 10 August 2010, §83, available at www.ohchr.org.
[36] As above. This annual budget is split between the Federal (€100,000) and Länder (€200,000) bodies. The overall size may be contrasted with that of the French NPM's annual budget, which was € 3.2 million for 2009. The APT is also aware of plans to expand the staff of the German NPM, but the budget will certainly limit any such expansion. Finally, it is also complicated by the objection of *Länder* governments to funding federal work.
[37] Fifth periodic report of the Federal Republic of Germany concerning measures to implement the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, August 2009, available at www.ohchr.org.
[38] For more details and results of the process of consultation with the cantons, see: http://www.news-service.admin.ch/NSBSubscriber/message/attachments/5196.pdf (in French).

The cost of OPCAT implementation will also be affected by a State's decision on the structure of its NPM, which is discussed in the following section.

IV. Practical considerations to implement effectively the OPCAT in federal and other decentralised states

A. Is there a preferred model for an NPM operating in a federal or otherwise decentralised State?

There are myriad practical issues with NPM selection, which apply to all States; not just decentralised ones. One of the first to be addressed is that every State considering OPCAT implementation needs to ensure it has a detailed knowledge not only of places of deprivation of liberty, but also existing visiting bodies (if any) and other oversight mechanisms which could eventually form part of the NPM. In fact, assessments of pre-existing bodies have already been done in **Australia**, **Brazil** and **South Africa**, and one was also undertaken in Mexico prior to that country's decision to establish an NPM.[39] A fuller treatment of these issues as they relate to all States Parties is to be found in the APT/IIHR's publication, OPCAT Implementation Manual.[40]

Since the OPCAT does not specify any particular form the NPM should take, it is up to States Parties to determine the model which best suits their national circumstances. As the SPT states in its third Annual Report:

> In meeting their obligations under the Optional Protocol to set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other ill-treatment, States parties must choose the model they find most appropriate, taking into account the complexity of the country, its administrative and financial structure and its geography.[41]

Whichever NPM model is chosen, it must be capable of fulfilling the OPCAT's object and purpose (that is, the elimination of the risk of torture and other ill-treatment). Accordingly, the primary consideration for any State in the selection of an NPM model should be efficacy. There may be several reasons – political or other – for a State to adopt a certain type of NPM, but the resulting body must at least be able to carry out regular, frequent visits to a wide range of places of deprivation of liberty and to propose preventive measures to improve the system of deprivation of liberty.

Another, no less vital consideration is the NPM's independence. Article 18(1) of the OPCAT requires that States "shall guarantee the functional independence of

[39] See APT's OPCAT Database for further information, www.apt.ch/opcat
[40] See APT/IIHR, OPCAT Implementation Manual, 2010, Chapter IV, OPCAT Ratification and NPM Designation: Domestic Challenges, section 5.2, p 202. Available at www.apt.ch
[41] See SPT, Third annual report of the SPT (April 2009 to March 2010), UN. Doc CAT/C/44/2, § 49, 25 March 2010.

the national preventive mechanisms as well as the independence of their personnel."[42]

Finally, as noted above, a thorough mapping of places of deprivation of liberty is a prerequisite for determining the size and shape of the NPM required in each country. This is especially important in decentralised States where the responsible authorities may report to different levels of government, without any sort of national overview.

B. Designation of existing bodies, establishment of new ones or a combination?

Associated with the decision to go with a single- or multiple-body approach is the decision each State Party must make – whether to establish a new body or bodies to be (or coordinate) the NPM. The alternative – designation of an existing body or bodies as NPM – should not necessarily be seen as an efficient, cost-saving measure. A thorough assessment of their compliance with the requirements of the OPCAT must be undertaken before they can be designated under article 17. Setting up a new purpose-designed body or bodies may seem more expensive at first, but as mentioned above the potential cost to the State of ill-treatment far outweighs this – both in terms of legal costs and the risk of damage to a State's reputation, and a new purpose-designed body may be the best way to reduce this risk.

The existence of National Human Rights Institutions (NHRIs) or other bodies which already have a mandate similar to that envisaged by the OPCAT for an NPM may (but need not) be decisive. Examples include Her Majesty's Inspectorate of Prisons for **England and Wales** and the Office of the Inspector of Custodial Services in **Western Australia** or the federal Prison Ombudsperson's Office of **Argentina** (*Procurador Penitenciario*).

The desire to avoid duplication and make the best use of existing resources is understandable, but it should be noted that compliance with the Paris Principles on the independence of NHRIs[43] does not necessarily imply compliance with the requirements in Part IV of the OPCAT, and hence suitability for designation under article 17.[44] In addition, an NHRI with a broad mandate to promote and protect human rights in a country, and a modus operandi of complaints handling, may face challenges in carrying out the preventive work specified in the OPCAT.

[42] See also SPT, Fourth annual report of the SPT (April-December 2010), UN Doc. CAT/C/46/2, 3 February 2011, §62.
[43] See: http://www2.ohchr.org/english/law/parisprinciples.htm.
[44] See also SPT, Third Annual Report, §61.

In this specific context, the SPT recommended that:

> "where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget."[45]

In addition, public perception of the organisation as an investigative body may also affect its relations with the relevant authorities.[46]

The APT recommends a clear-eyed assessment of any existing visiting bodies for compliance with all OPCAT requirements. If they fall short in any way which is not readily reparable, a new body or bodies should be created to carry out the NPM functions.

Finally, as discussed below, there is no reason why any NPM should be limited to just one agency. A multiple-body NPM might comprise several existing or new bodies, or a combination of the two.

C. Single or multiple bodies?

The size of a country, its degree of political and geographical decentralisation and the number and type of persons detained within its jurisdiction could make it difficult for a single body to do all of the work required of an NPM.[47] As this is a particular problem for federal and other decentralised States, it makes sense that many of them are likely to designate or create multiple NPM bodies.

Another factor in the equation is that each State Party is required under article 20 of the OPCAT to guarantee access for the NPM to all places of deprivation of liberty, which may be more complicated if a national government agency wishes to inspect an institution under the jurisdiction of a sub-national government. The detaining authorities may also be reluctant to accept recommendations from a national body, as they are used to dealing with the hierarchy of the sub-national government.

It is already apparent from national discussions that multiple bodies will be established and/or designated in **Argentina** and **Brazil**. **Australia, South Africa** and other larger countries are currently considering this approach as well. At the time of the writing, three federal or decentralised States had designated a single body as NPM: Mexico, Spain and Switzerland.

[45] SPT, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5, 9 December 2010, §32. Available at www.ohchr.org

[46] For further information on the advantages and challenges related to the designation of existing human rights institutions as NPM, please refer to APT/IIHR, OPCAT Implementation Manual, Chapter IV.

[47] Of course, this may also apply to large, unitary States – one example in APT's experience is Kazakhstan.

- Establishing a single body NPM in federal and other decentralised States: overview of challenges and possible ways forward

Some considerations related to single body NPMs can be discerned from the experience of federal and other decentralised states that have chosen this approach.

Mexico decided to opt for a single, federal NPM answerable only to the legislature, despite a two-year process of consultation which proposed a mixed model involving multiple agencies. The Mexican government ultimately decided instead to delegate this function exclusively to the existing National Human Rights Commission, which set up an NPM Unit to fulfil this role. The final decision on the designated NPM reduced the legitimacy and support for the NPM from relevant stakeholders. As the single preventive body in a large federal State, the Mexican NPM faces significant challenges in achieving regular and consistent coverage of all places of deprivation of liberty due to the sheer size of the country and number of detainees.[48] It has signed cooperation agreements with local Human Rights Commissions in various states in an effort to overcome these challenges, but according to the SPT report on its visit to Mexico in 2008, further reinforcement of its coverage of places of detention and collaboration with other monitoring bodies, as well as its independence and capabilities, is required. The report also revealed problems with the implementation of the NPM's recommendations.[49]

In **Spain**, the National Ombudsperson's Office [*Defensoría del Pueblo*] was designated as sole NPM in October 2009, following a controversial process. Despite provision in the relevant law[50] for a Consultative Council to the NPM consisting of civil society members with relevant expertise (which has yet to be established), this decision was opposed by some elements of civil society and regional bodies and organisations. Upon designation as NPM, the Ombudsperson's Office was not allocated any extra funding for its new OPCAT work. Similarly to Argentina and Brazil, the discussions held in Spain contributed to raise expectations and interest on OPCAT around the country. In this context, the Catalan Parliament decided independently to grant its Ombudsperson's Office [*Síndic de Greuges*] new preventive functions in the spirit of the OPCAT. The Catalan Parliament appointed a 12-member Advisory Council to its Ombudsperson's Office to assist in the Office's NPM work in July 2010. This action responded to the willingness of the Catalan authorities to play an active role in the implementation of the OPCAT at the local level. In addition to the lack of resources that the Spanish NPM is facing, the need to coordinate its work and cooperate with other existing bodies is one of the challenges they will face in the near future to ensure an effective functioning of the system of prevention in Spain.

[48] Mexico has a large area of 1,972,550 sq km. In addition, as of 2010, the total of prison population (including pre-trial detainees and remand prisoners) amounted to 222,330 persons, held in 429 establishments. For further information, please see the website of the International Centre for Prisons Studies (http://www.kcl.ac.uk/schools/law/research/icps/)

[49] See SPT, Report on the Visit of the SPT to Mexico, UN Doc. CAT/OP/MEX/1, 31 May 2010, §24-32. Available at www.ohchr.org

[50] Organic Law 3/1981, as amended on 15 October 2009 (see: http://www.apt.ch/npm/eca/Spain7.pdf at pp13-14).

As mentioned previously in this paper, **Switzerland** established a new 12-member National Commission for Prevention of Torture. At the time of writing, all but one member have full-time positions in other institutions: availability of members and restricted financial resources are some of the challenges that the Commission is currently facing. Making targeted and context-wise recommendations is also an area where the Swiss NPM may face some challenges. For instance, some cantonal authorities expressed regret that the National Commission did not refer expressly to local standards in the reports of its visits.[51]

There may also be situations in which sub-national governments decide that setting up their own NPM is undesirable (for reasons including cost, potential for duplication, lack of expertise, lack of political support etc.) and acknowledge (or indeed grant) the national government's jurisdiction in this area.

The APT recommends States keep in mind that a basic, single-body OPCAT implementation which seems ideal and highly cost-effective from the national government perspective may not necessarily be the most effective in practice, because cooperation of sub-national governments is critical to effective functioning of the NPM.

If a State decides to implement a single-body NPM, the body in question will need significant resources (both human and financial) to achieve sufficient coverage of all places of deprivation of liberty. Such coverage is extremely important to ensure risks of torture and other ill-treatment are eliminated in a country, rather than simply displaced to darker corners.

- Setting-up a system of multiple bodies acting as NPM: general considerations

Any State Party that decides to establish an NPM with several constitutive bodies should, as a minimum, ensure that:

- all places where an individual may be deprived of his or her liberty are able to be visited,
- each visiting body (as well as each member) has the independence, expertise and all the powers and guarantees required by the OPCAT, and
- the overall scheme is administratively manageable in order to achieve positive and consistent results.

In the case of multiple body NPMs, the internal structure of each NPM should be clear in terms of procedures and division of tasks, roles and responsibilities. In addition, the structure of the overall system should remain manageable, coherent and understandable to all actors (including the authorities, persons deprived of their liberty, and the NPMs themselves). Thus, best practice suggests identifying a

[51] See Prise de position du Canton de Valais suite au rapport final de la Commission nationale de prévention de la torture, 3 November 2010, available at http://www.nkvf.admin.ch/nkvf/fr/home.html.

coordinating body. One of the existing bodies may take on this role or another body may be set up specifically for the purpose. In federal systems, it is possible to have one or several bodies at the federal level co-existing with one or several bodies at the sub-national level.

All of the bodies designated as part of the NPM must meet all of the OPCAT's requirements regarding independence, resources, powers, guarantees and immunities. At least one body must have authority over places that are not normally used for detention but in which persons may in fact be detained with government involvement or acquiescence. Furthermore, at least one body must have a clear coordinating role and the means of generating system- or sector-wide analysis and recommendations, publishing an annual report, and liaising with the SPT.[52] The State Party should also guarantee "contacts between the SPT and all units of the mechanism".[53]

The role of the coordinating body will vary depending on the nature of the NPM and may be policy- or visit-oriented. In general, the role of a visit-oriented coordinating body is to avoid duplication or gaps in relation to visits to places of detention. The coordinating body should ensure coherence and consistency of methodology and recommendations. It may also be given the capacity to represent the NPM internationally by maintaining direct contact with the SPT. The role and decision making powers of the coordinating body should be clearly defined, as should the responsibilities of the coordinating body versus each NPM regarding comments on legislation, annual reports, and media strategy. Each of the bodies that together comprise the NPM should be in agreement in relation to these issues.

There are already central coordinating bodies in, for example, **New Zealand** and the **United Kingdom**. Although New Zealand is not a decentralised State, it made the decision to set up a multiple-body NPM due to the fact that it already had several monitoring mechanisms it considered suitable for designation. The National Human Rights Commission has taken on the coordinating and external reporting roles, but does not undertake visits to places of deprivation of liberty. In contrast, in the United Kingdom, Her Majesty's Inspectorate of Prisons for England and Wales specialises in visiting but has also been designated as the coordinating body for the national preventive mechanism.

Ideally, the coordinating body should have experience and expertise in detention monitoring, but it must also have the resources (both financial and human) and time to act in an administrative capacity. In a multiple-body NPM, the consolidation of reports and other information can be a demanding task. In addition, it is possible for NPMs to submit proposals for legislative and policy reform and to comment on draft legislation under article 19 paragraphs (b) and (c). These roles should also be taken into account in calculating NPM budgets.

[52] APT, NPM Guide, p 89.
[53] SPT, Third annual report, §53.

If a decentralised State decides to proceed with a multiple-body NPM structure, coordination is critical to avoid gaps and contradiction and/or duplication of efforts. The APT recommends extensive consideration be given to which body is best suited to the coordinating role (or whether it is better to establish one), as well as to the resources required to enable this body to facilitate the smooth, effective functioning of the NPM as a whole.

- What are the possible configurations for multiple-body NPM?

In establishing a multiple-body NPM, States have a number of options:

Option 1 – Jurisdictional division

The jurisdictional option involves the division of NPM work according to existing responsibilities – so separate bodies are given the tasks of visiting places of deprivation of liberty under the control of federal/national governments, and those under the control of sub-national governments.

This is perhaps the obvious choice for many federations, as they are used to dividing internal administration between the various levels of government. It also avoids the potential for tension which could be created by a federal preventive mechanism making recommendations to a state or province-level Department of Corrections (or equivalent) or vice-versa.

Germany is an example of a country which has chosen this option, albeit with a twist. The State decided, after consultations with the *Länder*, to establish one NPM body to visit places of deprivation of liberty under federal jurisdiction and one for *Land* jurisdiction (rather than a separate body for each *Land*). The *Länder* argued that a small Commission was sufficient to address the risk of torture and other ill-treatment existing in Germany. On ratification, Germany declared:

> "The distribution of competences within the Federal Republic of Germany means that a treaty between the Länder (federal states), which requires parliamentary approval, is needed in order to establish the national preventive mechanism at Länder level. Because of this requirement, Germany shall postpone the implementation of its obligations under Part IV of the Optional Protocol. The Subcommittee will be informed as soon as possible of the date from which the national prevention mechanism is operational."[54]

The Federal Agency has been operational since May 2009, but at the time of writing the Joint Commission for the *Länder* had only just begun its work.[55] Neither body has been allocated adequate resources considering the scope of their duties

[54] See: http://treaties.un.org/doc/Publication/MTDSG/Volume I/Chapter IV/IV-9-b.en.pdf.
[55] The inter-governmental treaty to establish the Commission only came into effect in September 2010. See: http://www.antifolterstelle.de.

in a country the size of Germany[56] – for the moment, the entire Federal Agency consists of one visiting member (the Director of the Commission) and one assistant.[57] Moreover, the intention for the *Länder* Commission is for all four visiting members to work only part-time on NPM duties. The two NPM bodies were nominally separate but both are supported by a single small secretariat based at the Centre for Criminology and now forms the National Agency for the Prevention of Torture. The NPM's budget is a line in the overall budget of the Centre, and the Centre also provides it with administrative support. None of the visiting Members is paid.

The German bodies have already discovered that it is difficult to separate responsibility for some places of deprivation of liberty into national and sub-national jurisdictions, and they are refining their methods and modes of cooperation to address this (for example in visits to airports, where both *Länder* and federal police and other officials have various relevant powers).[58] Without a presence in each of the 16 Länder, the two German NPM agencies are likely to face challenges in achieving adequate coverage of a country with some 190 prisons and hundreds (possibly thousands) of other places of deprivation of liberty. Nevertheless, the two-body German model would have greater potential for efficacy if it were allocated adequate resources.

The ideal implementation of the jurisdictional option would see a preventive body designated or established in each sub-national jurisdiction, as well as at least one federal body.

Option 2 – Thematic division

Under this option, States may decide to designate several bodies, each with specific thematic expertise (i.e. concerning juveniles, migrants, police, etc.) to carry out NPM tasks. Each institution would be responsible for monitoring the places of deprivation of liberty falling within its thematic area of expertise (e.g. police detention units, places of detention for juveniles, homes for older people, etc.)

This approach may result in national bodies making recommendations to sub-national government-run facilities (or vice-versa), but this may be offset by the thematic expertise of the visiting bodies (which should enable them more readily to build a rapport with the detaining authorities, and lend their recommendations to governments more weight).

[56] An initial assessment revealed the NPMs will be responsible for visiting more than 350 federal places of detention (police, military and customs) and more than 1500 sub-national places (including police cells, psychiatric and juvenile facilities). To this may eventually be added over 11,000 nursing homes.
[57] The APT is aware of plans to recruit extra staff members in 2011.
[58] Further details may be found in the NPM's first Annual Report, which is available (in German only for the time being; English translation pending) at: http://www.antifolterstelle.de/fileadmin/dateiablage/Dateien_fuer_News/Jahresbericht.pdf

So far the principal proponent of this option has been **New Zealand**. Although not a decentralised State, New Zealand has different visiting bodies mandated to visit military places of detention, police cells, youth justice facilities, prisons and other places of deprivation of liberty. There is some overlap, but broadly speaking the divisions between the five bodies constituting the NPM are along thematic lines.

A thematic approach could be a viable option for decentralised States that wish to harness the capabilities of existing monitoring mechanisms with mandates to visit particular types of places of detention. At least one of the bodies designated should have a broad mandate covering places of deprivation of liberty that are not monitored by the thematic preventive bodies in order to avoid any gaps.

Option 3 – Geographical division

This option entails an NPM comprising bodies whose mandates are limited to defined geographical areas. Often these areas will correspond with the jurisdiction of a sub-national government, but a visiting body could also cover, for example, all of the sparsely-populated or remote regions of a country.

This may be the simplest way to establish a multiple-body NPM, but careful attention would need to be paid to, for example, the situation described earlier in this paper where federal detention centres are situated on land controlled by a sub-national government.

As described above, **Argentina**'s planned NPM will entail 23 provincial mechanisms with mandates circumscribed geographically, but when the federal mechanism is taken into account the NPM will be more properly categorised under Option 4 below.

This geographical option may have implications for cooperation between jurisdictions, and may be more appropriate for large, unitary States. However, if there is sufficient trust and cooperation between the different levels of government, it could still be an effective choice.

Option 4 – Hybrid division

Naturally, there will be States in which elements of Options 1-3 suit the domestic circumstances, but for which a hybrid of two or more of the options turns out to be the best choice.

The **United Kingdom**'s NPM is a prime example, the Government having designated 18 preventive bodies with mandates defined thematically, regionally and jurisdictionally and coordinated by one specific body. Its complexity presents real challenges for internal coordination and methodological harmonisation. However, it has the advantage of harnessing an existing collection of monitoring bodies which previously operated independently, and coordinating their efforts.

Nevertheless, in its first Annual Report, the United Kingdom's NPM reckoned that despite the number of bodies designated, there remain places of detention which are not covered by designated members, in particular regarding military detention facilities and court custody in England and Wales. The UK NPM also highlights that the designated members were not systematically granted powers to fulfil the NPM function or additional resources: consequently, all the designated members do not meet all OPCAT criteria, such as independence, nature and composition and frequency of visits[59]

Argentina's planned model could be characterised as a jurisdictional-geographical hybrid. The draft federal NPM law provides for a system composed of a National Committee for Torture Prevention, a National Council of Local Preventive Mechanisms, local preventive mechanisms and other civil society or public institutions involved in the objectives of the OPCAT. The National Committee would be the main coordinating body of the system, charged with devising standards and overseeing their application, as well as compiling information for a national registry and the production of the annual report. It is also expected to support the designation and effective functioning of the local preventive mechanisms in each province. In addition to these coordination and advisory functions, the Committee also has a mandate to conduct visit to places of detention throughout the country irrespective of jurisdiction, acting in a subsidiary fashion to the other organs closer to the ground. Finally, it has a representative role; acting as the NPM's interface with the SPT and national authorities. The Argentinean example could be characterised as a hybrid model as the National Committee is to have its own mandate to conduct visits, which (unlike those of the provincial mechanisms) is not limited to any particular part of the country.

According to this model, each province and the Autonomous City of Buenos Aires will create or designate one or more local preventive mechanism(s). They will be empowered to visit places of detention within the territorial jurisdiction of their parent government entities – regardless of whether the facilities in question are operated by provincial or federal agencies. Additionally, the Prison Ombudsman Office will continue to have a mandate to visit all places of detention under federal jurisdiction. All local preventive mechanisms must meet the basic requirements of the OPCAT, as well as have a system of accountability. Their interests will be represented through the National Council of Local Preventive Mechanisms, comprised of one representative of each province and the Autonomous City of Buenos Aires.

While this system is undoubtedly complex, it also has the potential of great impact. The entire system rests on the principles of coordination, collaboration and complementary action (the National Council will meet twice a year and the entire system once a year). An additional principle is to strengthen the capacity of existing visiting schemes, avoiding gaps and duplications, and guaranteeing coverage throughout the country in a coherent way.

[59] See National Preventive Mechanism, Monitoring places of detention, First Annual Report of the United Kingdom's National Preventive Mechanism, 1 April 2009- 31 March 2010, available at http://www.justice.gov.uk/inspectorates/hmi-prisons/2536.htm.

Similarly, the draft law in **Brazil** foresees the creation of a torture prevention system to strengthen and complement existing practice. The Brazilian draft lists 14 types of existing bodies with mandates to visit places of detention in the country, which will play a role in the system.[60] The National Committee to Prevent and Combat Torture will also be expanded and have its mandate reinforced (it is currently only mandated by decree). As in Argentina, the Committee coordinates the national system. The Brazilian draft law also foresees the creation of a specific body called the National Mechanism to Prevent and Combat Torture, to conduct visits to places of detention. The National *Committee* will be responsible for overseeing the process to designate the members of the National *Mechanism*. The draft law also specifies that each state and the federal district "may" create their own local preventive mechanisms, as it was thought that a federal law could not impose such a duty on sub-national governments.

The provisions on coordination in this law are much less detailed than those in the Argentine draft. Such a complex NPM will undoubtedly present a considerable challenge for the national coordinating body.

A mixed model could suit States that already have a number of bodies carrying out OPCAT-related functions, with mandates based on different criteria.

[60] Not only a new National Committee to Prevent and Combat Torture and a new national visiting body, but also mechanisms to be established in each of the 26 states and designation for bodies which already have a visiting mandate (including judges from the federal and state levels, members of the Public Prosecutor's & Defender's offices, various National and Community councils, Ombudsman offices and Internal Affairs offices of the police and penitentiary systems, and the Human Rights Commissions of the Federal Congress and the state legislatures). Finally, non-governmental organisations with recognised experience in combating torture may also be incorporated.

V. Conclusion

Federal and other decentralised States clearly face a number of challenges over and above those every State faces in implementing the OPCAT. In particular, the political challenges posed by the complex nature of decentralised States have proven to be significant in several of the processes APT has been following around the world.

There are so many variables in each national context that it is difficult to make recommendations applicable to more than one country. Nevertheless, there are some features of successful OPCAT implementation processes which are consistent, and which federal and other decentralised States which have yet to ratify (or are still in the process of implementing) OPCAT should adopt.

The choice of NPM model is clearly a decision for each State Party, but now there is at least some guidance to be drawn from studying the experiences of those States which ratified or acceded earlier, as outlined above.

The practical challenges in implementing the OPCAT are not negligible. However, with careful preparation and planning, as well as adequate support and funding, the APT is firmly of the view that all of them can be overcome. We have endeavoured to identify these features in the recommendations throughout this paper.

The implementation of the OPCAT in federal and other decentralised States need not be a troublesome exercise. We hope this overview based on our experience to date will assist in future implementation.

VI. Summary of recommendations

1. The APT recommends States develop a clear implementation plan, including ways to address potential challenges arising from decentralisation, as early as possible to ensure they are able to fulfil their obligations to set up an NPM under article 17 in a timely fashion.

2. A successful implementation of the OPCAT requires absolute clarity concerning responsibility for places of deprivation of liberty. The broad OPCAT definition of such places means that many governmental authorities may be implicated, including not only justice, but also immigration, health, defense and social services, among others. The APT recommends thorough mapping of all such places (and existing monitoring bodies, if any), including a determination of who is responsible for each place, so that the most appropriate monitoring bodies are designated as part of the NPM and recommendations made under the OPCAT can be directed to the proper authorities and properly implemented.

3. The APT recommends decentralised States consider carefully the potential legal pitfalls involved in OPCAT implementation, in order to minimise the risk of legal challenges affecting NPM operations.

4. The APT recommends that, where appropriate, formal inter-governmental consultation mechanisms such as the Council of Australian Governments or the Argentinean Federal Council for Human Rights should be utilised to facilitate the discussion on OPCAT ratification and domestic implementation.

5. The APT recognises that national legal coordination challenges are faced by federal and other decentralised States routinely – particularly in the implementation of other treaty obligations and schemes of national significance. Generally speaking therefore, any legal problems that arise in the implementation of the OPCAT in decentralised States should be surmountable through existing avenues of cooperation. The APT encourages decentralised States to consider at the earliest opportunity which of its internal mechanisms could best serve in this regard.

6. All the examples provided in this paper demonstrate the need for genuine and comprehensive consultation on the part of a federal/national government – preferably beginning well before ratification of the OPCAT. Compromises can work as long as all the relevant parties agree – national governments which overrule sub-national governments, existing monitoring bodies or civil society concerns clearly risk fragmentation in their NPM or even a breach of their treaty obligations.

7. The APT recommends that, no matter how a State decides to implement the OPCAT, there should be an inter-governmental agreement on funding

to ensure the mechanism as a whole has the resources it needs to conduct its business in an effective fashion. This is not only a prerequisite for a serious NPM, but also a specific obligation under article 18(3) of the OPCAT.

8. The APT recommends a clear-eyed assessment of any existing visiting bodies for compliance with all OPCAT requirements. If they fall short in any way which is not readily reparable, a new body or bodies should be created to carry out the NPM functions.
9. The APT recommends States keep in mind that a basic, single-body OPCAT implementation which seems ideal and highly cost-effective from the national government perspective may not necessarily be the most effective in practice, because cooperation of sub-national governments is critical to effective functioning of the NPM.

10. If a State decides to implement a single-body NPM, the body in question will need significant resources (both human and financial) to achieve sufficient coverage of all places of deprivation of liberty. Such coverage is extremely important to ensure risks of torture and other ill-treatment are eliminated in a country, rather than simply displaced to darker corners.

11. If a decentralised State decides to proceed with a multiple-body NPM structure, coordination is critical to avoid gaps and contradiction and/or duplication of efforts. The APT recommends extensive consideration be given to which body is best suited to the coordinating role (or whether it is better to establish one), as well as to the resources required to enable this body to facilitate the smooth, effective functioning of the NPM as a whole.

12. There are several options available for States that choose to set up multiple-body type of NPM:

    a) The ideal implementation of the jurisdictional option would see a preventive body designated or established in each sub-national jurisdiction, as well as at least one federal body.

    b) A thematic approach could be a viable option for decentralised States that wish to harness the capabilities of existing monitoring mechanisms with mandates to visit particular types of places of detention. At least one of the bodies designated should have a broad mandate covering places of deprivation of liberty that are not monitored by the thematic preventive bodies in order to avoid any gaps.

    c) The geographical option may have implications for cooperation between jurisdictions, and may be more appropriate for large, unitary States. However, if there is sufficient trust and cooperation between the different levels of government, it could still be an effective choice.

d) A mixed model could suit States that already have a number of bodies carrying out OPCAT-related functions, with mandates based on different criteria.

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