

National Preventive Mechanisms: Means of action and limits of their mandate in the face of violations against persons deprived of liberty

July 2012

Introduction

The Optional Protocol to the Convention against Torture (OPCAT) is an operational instrument which provides for the establishment of practical measures to prevent torture and other forms of mistreatment at the international level (Subcommittee on Prevention of Torture – SPT) and the national level (National Preventive Mechanism – NPM). The SPT and the NPM have mandates to conduct regular and preventive visits to all places of detention in order to detect potential abuse against detainees and to propose solutions to end it wherever it exists. NPMs adopt different structures, depending on the national context and the existing institutional landscape of the country concerned.¹

At present, the function of a NPM is exercised both by specialized institutions created expressly and exclusively to serve as national preventive mechanisms, by national human rights institutions (national human rights commissions or mediators), by national human rights institutions in formal collaboration with civil society organizations, or by multiple organizations.

Different issues arise depending on the model chosen. A recurring question relates to the compatibility of quasi-judicial powers and the mandate of a national preventive mechanism. This question is particularly relevant for States seeking to establish a new institution specializing in the prevention of torture, such as Tunisia. This document builds on existing practical experiences in this area and provides practical recommendations based on the expertise of the APT.

1. National preventive mechanisms: a non-judicial means to prevent torture

The States Parties to the UN Convention against Torture have acquired the obligation to implement a series of "legislative, administrative, judicial and other measures" to prevent torture and other ill-treatment at the national level.² NPMs, as provided for by the Optional Protocol to the UN Convention against Torture, were originally designed as a practical measure complementary to the preventive framework established by the UN Convention against Torture.

The final paragraph of the Preamble of the Optional Protocol stresses that NPMs are intended to represent "non-judicial means" to prevent torture.

The Optional Protocol aims to open places of detention to external observation and analysis by experts from various disciplines. This preventive and proactive approach differs from the legalistic procedures characterized by the work of the judiciary that are initiated "after the event". A judicial institution cannot therefore be designated a national preventive mechanism under the Optional Protocol. Similarly, national mechanisms to prevent torture are not intended to replace judicial institutions.

¹ For further information on the mandate of and criteria for establishing NPMs, see APT/IIDH, Optional Protocol to the Convention against Torture: implementation manual, chapter IV. Available at: www.appt.ch

² Article 2, UN Convention against Torture.

2. The means of action of national preventive mechanisms in the face of violations of the dignity of persons deprived of liberty

The provisions of the Optional Protocol regarding NPMs do not encompass a specific mandate for the resolution of individual cases of torture or other forms of ill-treatment.

In practice, however, NPMs are confronted with violations of the dignity of persons deprived of liberty during the exercise of their mandate, whether through allegations received during private interviews with detainees, communications from detainees' families, information submitted by civil society organizations, or letters or other communications addressed to NPMs. It is essential for NPMs to be aware of the means of action at their disposal and to respect the preventive nature of their mandate.

a) Interlocutory proceedings before the relevant bodies

Some NPMs refer allegations of torture and other forms of ill-treatment to the relevant authorities to enable them to conduct investigations to determine the extent of the violations and to take remedial action. Such interlocutory proceedings can only take place with the express consent of the person concerned.

- **If a NPM is part of a national human rights institution**, it may refer violations to another department of the institution in charge of investigating complaints. This procedure assumes a certain degree of coordination between the various departments of the national human rights institution concerned. Some NPMS have concluded agreements with the other departments of their institutions to share information on referred allegations of violations of the dignity of persons deprived of liberty. This is the case, for example, with the NPM in Maldives, which is a specific unit created within the National Human Rights Commission.
- **If a NPM is an institution specialized in the prevention** of torture, it may refer such cases to other existing bodies such as national human rights institutions, independent complaints mechanisms, mediators, or ombudsman.

Interlocutory proceedings are sometimes the object of a cooperation agreement between the NPM and the institution responsible for regulating issues such as the confidentiality of information obtained by the NPM. For example, the legal mandate of a MNP may allow it to engage in cooperation with other institutions, without it having to specify details of the activities involved in such cooperation.

The option of referring individual cases of alleged torture and other ill-treatment to a specialized and independent institution other than the NPM remains the most practical way for the latter to preserve its independence and preventive specificity.

b) Means of action complementary to interlocutory proceedings

- *Increasing prison management's sense of responsibility to act against violations*

The NPM can directly inform the management of a place of detention of allegations it has received of violations perpetrated by certain staff members with a view to encouraging management to follow up such cases and to ultimately take disciplinary action whenever necessary.

- *Prompting disciplinary action through referrals to the relevant authorities*

In the event that the management of a place of detention takes no action—and depending on the seriousness of the violation—the NPM can refer such cases to the highest relevant authorities and recommend that they take disciplinary action against those held responsible for the abuse. The right of a NPM to take such action should be enshrined in the law enacted to create this mechanism, as is the case in France.³

- *Denouncing criminal offences to the public prosecutor*

In the most serious cases where a criminal offence is suspected, a NPM can bring the facts to the attention of the public prosecutor so that an investigation and legal proceedings can be initiated. This competence should also be provided for in laws regulating NPMs,⁴ but should be limited: it should be withdrawn as soon as the violation has been denounced. It is essential that NPMs do not intervene in the judicial process in order to ensure their independence and specialization. The Subcommittee on Prevention of Torture recommends, in the same spirit of independence, that NPMs should consider “monitoring and analysing systematically the practice of proceedings against suspected perpetrators of torture and ill-treatment (...)”.⁵

3. The limits of the national preventive mechanism’s mandate and possible alternative strategies

In situations where a specialized and independent institution either does not exist or is not operational, the NPM can take various forms of action, depending on the severity of the violation. In such cases, the NPM may for example conduct private interviews with detainees to determine the severity of violations and make recommendations aimed at preventing their recurrence. However, preventive action that includes an analysis of general malfunctions relevant to its mandate should be at the heart of the work carried out by NPMs.

a) Respect for the principle of specialization

While NPMs should strive to reduce the risk of torture and ill-treatment affecting persons deprived of liberty, they should not supplant the legal system or the administration in place even if these institutions are weak and ineffective. This means that NPMs should not try to solve the operational problems of judiciaries or places of detention. NPMs must respect the specialized nature of their mandate. This is essential if they are to be considered credible and effective in discharging their mandate to prevent torture and other forms of ill-treatment.

³ Article 9, Law n°2007-1545 of 30 October 2007 regulating the French NPM: “*The Comptroller General shall without delay inform the authorities or persons vested with disciplinary powers of facts that might lead to disciplinary proceedings.*”

⁴ Article 9, Law n°2007-1545 of 30 October 2007: “*The Comptroller General has knowledge of facts that presume the existence of a criminal offence, and notifies the Public Prosecutor without delay, in accordance with Article 40 of the Code of Criminal Procedure.*”

⁵ Preliminary Guidelines of the Subcommittee for Prevention of Torture on the functioning of NPMs, § 27, UN. Doc CAT/OP/1, February 2012, available at: www.ohchr.org

b) Possible strategies

- *Considerations during the designation process*

During the process to designate a NPM, the existence of independent institutions with a mandate to investigate cases of torture and other forms of ill-treatment, as well as the existence of an independent and operational judiciary, must imperatively be taken into account in order to determine the most appropriate preventive mechanism model. Several options are available to national actors:

- The creation of a **specialized institution** for the prevention of torture, and the establishment of an independent complaints system with a mandate that may reach beyond the investigation of cases of torture and other ill-treatment to resemble, for example, the mandate of a human rights body;
 - The creation of an "**anti-torture agency**", with two functions: preventive action in accordance with the Optional Protocol, and investigations of allegations of torture and ill-treatment. The functions should be clearly separated administratively, with specific budget lines and separate staff so that the preventive activities respect the criteria of the Optional Protocol (e.g. in terms of staff composition).
- *Practical considerations once a mechanism has been designated*

Even in cases where judiciaries and public administrations are deficient, certain strategies can be put in place by NPMs to ensure their credibility among persons deprived of liberty.

Nothing prevents NPMs from **alerting public opinion** to systemic disorders. For example, the NPM can sound the alarm when recurrent failings are observed in the judicial system.

It is essential that the NPM is able to **identify the persons in charge of** institutions with authority over places of detention (e.g., the Ministry of Justice or the Ministry of the Interior) that are responsible for taking action to put an end to violations and for deciding on measures such as internal investigations aimed at preventing any recurrence of such abuse.

NPMs are also advised to keep a **written record** of all communications with the authorities and the judiciary concerning allegations of torture and other ill-treatment, and on cases that are not followed up by the relevant authorities.

Finally, the NPM should make use of its **advisory functions as provided for in Article 19c)** of the Optional Protocol and propose the necessary legislative reforms to enable it to carry out its functions. These reforms should include, inter alia:

- The criminalization of torture;
- The establishment of an independent complaints system;
- The establishment of a national complaints register for cases of torture, which would also record data on related investigations or criminal proceedings and their outcomes, as recommended by the Subcommittee on Prevention of Torture.⁶

⁶ Preliminary Guidelines of the Subcommittee for Prevention of Torture on the functioning of NPMs, § 27, UN. Doc CAT/OP/1, February 2012, available at: www.ohchr.org

Conclusion

NPMs are not intended to replace legal institutions and it is essential that their functions and mandate do not interfere with the judicial process in order to ensure the independence of both the judiciary and the NPM. NPMs cannot act alone: they must be an integral part of the institutional landscape and work in cooperation with relevant and independent institutions entrusted with a mandate to investigate violations of the dignity of persons deprived of liberty. It is clear that the establishment of a NPM cannot in itself end the torture and ill-treatment of detainees. The existence of an independent and operational judiciary as well as independent institutions mandated to investigate allegations of such abuse are complementary and indispensable pre-requisites for the establishment of an effective NPM.

APT/09.07.2012