

## **Relationship between the Optional Protocol to the UN Convention against Torture (OPCAT) and other international and regional visiting mechanisms**

The Optional Protocol to the UN Convention against Torture (OPCAT)<sup>1</sup> is a very different international human rights treaty in that it does not provide for a new set of rights or require states parties to report on how these are implemented on a domestic level. Rather, the OPCAT establishes a double-tier system of prevention of torture<sup>2</sup>: on the national level it obliges every state party to establish one or more national preventive mechanisms (NPMs)<sup>3</sup> while on the international level the Subcommittee on Prevention of Torture (SPT) has already been established as one of the newest UN treaty bodies.<sup>4</sup> Moreover, the role of this treaty body is strikingly different from the roles of other treaty bodies: the SPT is to carry out visits to the places of deprivation of liberty which are under the jurisdiction and control of states parties and issue recommendations to states parties as well as advise and assist the NPMs and cooperate with other international and regional mechanisms that have a role to play in the prevention of torture and other forms of ill-treatment.<sup>5</sup> The NPMs, in turn, are almost to mirror the SPT's mandate on the national levels of states parties<sup>6</sup> and thus, in effect, are to become an extension of the SPT, providing almost daily presence in the country's places of deprivation of liberty. Thus the system of preventive visiting that OPCAT puts in place has the potential of addressing one of the biggest shortcomings of the various existing bodies: with such a double-tier system, the OPCAT can almost guarantee very frequent oversight over the places of deprivation of liberty in states parties, ensuring the true regularity of systematic visiting, frequency of engagement with the states that the existing international and regional mechanisms have not been able to provide.<sup>7</sup>

However this double-tier system of prevention will not operate in a vacuum as there are a number of bodies at both international and regional levels that carry out somewhat similar functions. Also on the national levels of states aside from NPMs, there are other bodies that engage in similar activities, like the National Human Rights Institutions (NHRIs), whether those would be human rights commissions or ombudspersons, statutory visiting bodies and non-governmental organisations (NGOs). Moreover, in order to maximise the potential impact of the OPCAT, it is clear that the SPT and NPMs are to work with the existing mechanisms; the work of

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<sup>1</sup> GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on 18 December 2003 by 127 votes to 4, with 42 abstentions; came into force 26 June 2006

<sup>2</sup> OPCAT, Article 1

<sup>3</sup> OPCAT, Article 18

<sup>4</sup> OPCAT, Article 2

<sup>5</sup> OPCAT, Article 11

<sup>6</sup> OPCAT, Articles 17; 19-23

<sup>7</sup> M D Evans *The place of the Optional Protocol in the scheme of international approaches to torture and torture prevention and resulting issues* in H C Scheu & S Hybnerova (eds) *International and National Mechanisms against Torture* (2004) University Karlova (Prague) Law School Publication; p. 32

these various entities must complement each other and efforts must be made so as to avoid contradictory recommendations to states parties etc.<sup>8</sup> This is something that was recognised at the time of drafting the OPCAT and thus Article 11(c) mandates the SPT to cooperate ‘with the relevant UN organs and mechanisms as well the international, regional and national institutions or organisations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment’. Furthermore, Article 31 clarifies that the system put in place by the OPCAT is not to affect the obligations of states parties under any regional conventions where there are visits to places of deprivation of liberty and that the SPT and bodies established under such regional conventions are to consult and cooperate so as to avoid duplication and promote effectively the objectives of the OPCAT. Finally Article 32 makes a special reference to the Geneva Conventions and the work carried out by the International Committee of Red Cross (ICRC), noting that the provisions of OPCAT are not to affect the obligations of states parties in that regard.

All these provisions however raise a series of questions as to how the cooperation between the SPT and the various other international and regional bodies is to take place. Thus the aim of this paper is to explore, firstly, what other bodies at the international and regional levels may have an impact on the OPCAT-related issues; secondly, how do the SPT and other international visiting mandates interact and collaborate, and thirdly, what role do the other international and regional mechanisms then have with respect to NPMs, given that it is only the SPT which OPCAT puts in direct relationship with the NPMs.

## **Which bodies are we talking about?**

- **International Bodies**

The SPT is only but one of the growing number of UN treaty bodies, albeit with a strikingly different mandate. Nevertheless, various other treaty bodies deal with the issues related to the SPT’s mandate and in fact have been engaging with the OPCAT directly through their own procedures. Thus the Human Rights Committee (HRC), for example, has been welcoming the ratification of the OPCAT<sup>9</sup> and noting that such a step would ensure better compliance with Article 7 of the International Covenant on Civil and Political Rights (ICCPR).<sup>10</sup> The HRC has also showed some engagement with the NPM issue by recommending the states parties to OPCAT to expedite the process of their designation<sup>11</sup> as well as noting a development of a particular type of an NPM as a positive aspect in states compliance with its obligations under the ICCPR.<sup>12</sup>

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<sup>8</sup> Conference Report of the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT) *The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards* Law School, University of Bristol, April 19-20, 2007; p. 38; Available at: <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html> (last visited on 22 July 2009)

<sup>9</sup> See, for example, Concluding observations Panama CCPR/C/PAN/CO/3 (17 April 2008), para 10; Concluding observations Paraguay CCPR/C/PRY/CO/2 (24 April 2006), para 4

<sup>10</sup> See, for example, Concluding observations Costa Rica CCPR/C/CRI/CO/5 (16 November 2007), para 4; Concluding observations Czech Republic CCPR/C/CZE/CO/2 (9 August 2007); para 3

<sup>11</sup> See, for example, Concluding observations Spain CCPR/C/ESP/CO/5 (5 January 2009), para 13; Concluding observations Georgia CCPR/C/GEO/CO/3 (15 November 2007), para 10

<sup>12</sup> See, for example, Concluding observations Austria CCPR/C/AUT/CO/4 (30 October 2007), para 3

The most obvious relationship however exists between the SPT and the Committee Against Torture (CAT) as envisaged in Article 16 (4) of the OPCAT: in case of a failure of a state party to cooperate with the SPT or to take steps in the light of the recommendations issued by the SPT, the SPT may request the CAT to make a public statement or publish the report of the SPT, which until such a time is to remain confidential unless the state party in question requests its publication or publishes a part of it, in which case the SPT may publish the remainder.<sup>13</sup>

Another role for the CAT in the execution of the OPCAT system is envisaged in Article 24 which allows the state party to make a declaration postponing either the acceptance of the SPT visits or designation of the NPM. Such a postponement may be valid for a maximum of three years, but the CAT may extend this for a period of additional two years.<sup>14</sup> The obvious issue here is the procedure that the two treaty bodies will follow when engaging in the exercise of these provisions. This is something that presumably is on the agenda of the Contact Group that has been established between the SPT and CAT,<sup>15</sup> even though no information has been made public on the matter as of yet.

Through its own mechanisms, most notably, through review of state parties reports CAT encourages states to ratify the OPCAT,<sup>16</sup> welcomes the ratification of OPCAT,<sup>17</sup> requests the state party to inform the CAT about the NPM designation process,<sup>18</sup> encourages the state party to designate an NPM,<sup>19</sup> notes the NPM designation as a positive aspect<sup>20</sup> and even expresses concerns over the appropriateness of the designation of particular bodies as NPMs.<sup>21</sup> Indeed, on the issue of the NPMs, it has been recognised that given the close relationship between the CAT and the OPCAT, the CAT should use its influence to support the creation of NPMs.<sup>22</sup>

Aside from the treaty bodies, the Special Procedures system of the UN has several mandates whose remits are similar to that of the SPT. First of all, it is the mandate of the UN Special Rapporteur on Torture (SRT)<sup>23</sup> who, *inter alia*, visits countries upon their invitations, provided that these invitations afford the necessary guarantees of freedom of movement, freedom of inquiry and contact etc.<sup>24</sup> During the country missions, the SRT visits places of deprivation of liberty and issues recommendations to the state party concerned. Moreover, the SRT has engaged with

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<sup>13</sup> OPCAT, Article 16 (2)

<sup>14</sup> OPCAT, Article 24 (2)

<sup>15</sup> First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CAT/C/40/2; 14 May 2008; paras 33-34

<sup>16</sup> See, for example, Concluding observations Indonesia CAT/C/IDN/CO/2 (2 July 2008), para 39

<sup>17</sup> See, for example, Concluding observations Montenegro CAT/C/MNE/CO/1 (19 January 2009), para 24

<sup>18</sup> See, for example, Concluding observations Ukraine CAT/C/UKR/CO/5 (3 August 2007), para 12

<sup>19</sup> See, for example, Concluding observations Kazakhstan CAT/C/KAZ/CO/2 (12 December 2008), para 22

<sup>20</sup> See, for example, Concluding observations Costa Rica CAT/C/CRI/CO/2 (7 July 2008), para 26

<sup>21</sup> See, for example, Concluding observations Sweden CAT/C/SWE/CO/5 (4 June 2008), para 25

<sup>22</sup> *Supra* note 8; p. 38

<sup>23</sup> In resolution 1985/33, the United Nations Commission on Human Rights decided to appoint an expert, a special rapporteur, to examine questions relevant to torture. The mandate was extended for 3 years by Human Rights Council resolution 8/8 in June 2008.

<sup>24</sup> See: <http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm#list> (last visited on 22 July 2009)

the OPCAT issues directly by recommending its ratification,<sup>25</sup> encouraging the NPM designation,<sup>26</sup> meeting the designated NPMs during the field missions,<sup>27</sup> scrutinising the appropriateness of the designated NPMs<sup>28</sup> as well as examining the work the NPMs have carried out.<sup>29</sup> The SPT has also met with the SRT on a number of occasions.<sup>30</sup>

Another mandate of the Special Procedures that is related to the work of the SPT, is the Working Group on Arbitrary Detentions (WGAD),<sup>31</sup> which, similarly to the SRT, undertakes country missions and examines places of detention, engaging in a direct dialogue with the authorities and issuing recommendations.<sup>32</sup>

Furthermore, other Special Procedures mandate-holders, while not directly mentioning OPCAT, have engaged with issues related to the scope of the instrument. Thus Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism<sup>33</sup> has recommended that systems of independent oversight over the places of deprivation of liberty are put in place.<sup>34</sup> The Special Rapporteur on the Situation of Human Rights Defenders<sup>35</sup> has issued various recommendations on strengthening the capacities and powers of Ombudsperson institutions.<sup>36</sup>

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<sup>25</sup> See, for example, Follow-up to the recommendations made by the Special Rapporteur in the report of his visit to Jordan of June 2006 (A/HRC/4/33/Add.3, paras. 72-73), para 19; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Indonesia A/HRC/7/3/Add.7 (10 March 2008), para 84

<sup>26</sup> See, for example, Follow-up to the recommendations made by the Special Rapporteur in the report of his visit to Georgia in February 2005 (E/CN.4/2006/6/Add.3, paras. 60-62), para 13

<sup>27</sup> See, for example, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to the Republic of Moldova, A/HRC/10/44/Add.3 (12 February 2009), para 4

<sup>28</sup> See, for example, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Denmark, A/HRC/10/44/Add.2 (18 February 2009), para 25;

<sup>29</sup> See, for example, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to the Republic of Moldova, A/HRC/10/44/Add.3 (12 February 2009), para 73-74

<sup>30</sup> Supra note 15, para 35 and Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CAT/C/42/2; 7 April 2009; para 48

<sup>31</sup> The WAGD was established by resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended by Commission's resolution 1997/50. The Human Rights Council assumed the WGAD's mandate by its decision 2006/102 and extended it for a further three-year period by resolution 6/4 of 28 September 2007: see: <http://www2.ohchr.org/english/issues/detention/index.htm> (last visited on 22 July 2009)

<sup>32</sup> See: <http://www2.ohchr.org/english/issues/detention/visits.htm> (last visited on 22 July 2009)

<sup>33</sup> The Commission on Human Rights Resolution 2005/80 established a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Most recently the mandate has been extended by the Human Rights Council in 2007 in resolution 6/28: see: <http://www2.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm> (last visited on 22 July 2009)

<sup>34</sup> See, for example, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin of 4 February 2009; A/HRC/10/3, para 68; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. Addendum Mission to South Africa. 7 November 2007; A/HRC/6/17/Add.2, para 76

<sup>35</sup> The mandate was established by the Commission on Human Rights Resolution 2000/61; in March 2008, the Human Rights Council, with resolution 7/8, decided to renew the mandate for a period of three years: see: <http://www2.ohchr.org/english/issues/defenders/mandate.htm> (last visited on 22 July 2009)

<sup>36</sup> See, for example, Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani. Addendum.Mission to the Former Yugoslav Republic of Macedonia; A/HRC/7/28/Add.4 (3 March 2008), para 91

Moreover, the Human Rights Council, through the process of the Universal Periodic Review (UPR) has been engaging with the OPCAT-related issues. Thus the countries have been asking questions about the OPCAT ratification,<sup>37</sup> the NPM designation process<sup>38</sup> and the OPCAT ratification has been among the recommendations in the outcomes of the UPR processes.<sup>39</sup>

Within the system of the United Nations and the Office of the High Commissioner for Human Rights (OHCHR), there are also entities whose work is of relevance to the SPT's mandate, like the National Institutions (NI) Unit within the Field Operations and Technical Cooperation Division of the OHCHR. This Unit is the secretariat of the International Coordinating Committee of National Human Rights Institutions (ICC), which in turn is the representative body of national human rights institutions (NHRIs) and has established a Subcommittee on Accreditation from among its members which then accredits NHRIs as being in compliance with the Paris Principles.<sup>40</sup> It should be noted here that Article 18 (4) of the OPCAT contains a direct reference to Paris Principles to which states parties are to 'give due consideration' when designating an NPM.<sup>41</sup> The SPT has met with the NI Unit on various occasions.<sup>42</sup>

Moreover, the OHCHR has a number of regional and country offices around the world which represent 'a strategic entry point for promoting and protecting human rights at the country level; mainstreaming human rights, that is, integrating a human rights perspective into the work of the United Nations Country Teams; and helping strengthen national institutions and civil society'.<sup>43</sup> Indeed, these have been

of detention and with the wider aim of preventing torture and other forms of ill-treatment.<sup>46</sup> The SPT has met with the ICRC on various occasions.<sup>47</sup>

- **Regional Bodies**

- **Europe**

Arguably, the European region has the most advanced system of visiting bodies which was created within the Council of Europe (CoE) through the adoption of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention) in 1987.<sup>48</sup> Pursuant to Article 1, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has been established which is mandated to ‘by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment’.

Every state party is to allow such visits<sup>49</sup> and at the end of the visit, the CPT is to issue recommendations to the relevant authorities.<sup>50</sup> Thus in many respects the CPT’s mandate resembles that of the SPT and indeed the main difference lies with the fact that the European Convention does not provide for the establishment of the NPMs.<sup>51</sup> However, since the OPCAT has entered into force, the CPT has started to engage with the issues that arise from the OPCAT’s system. Thus, while not directly encouraging states to ratify the OPCAT,<sup>52</sup> the CPT has met with the SPT.<sup>53</sup> In addition, three of the CPT’s members are also members of the SPT,<sup>54</sup> and it has engaged with the NPMs during its visits, even following up on the work the NPMs have done<sup>55</sup> whilst not always acknowledging that the particular body is working in the capacity of the NPM.<sup>56</sup> It should be noted that there are 25 states which are subjected to the jurisdiction of both the CPT and SPT (and 12 of the current OPCAT signatories are

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<sup>46</sup> Alain Aeschlimann *Protection of detainees: ICRC action behind bars* International Review of the Red Cross; Volume 87 Number 857 March 2005; pp. 109-116; Available at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0861?opendocument> (last visited on 22 July 2009)

<sup>47</sup> Supra note 15, para 40 and Supra note 42, para 51

<sup>48</sup> CPT/Inf/C (2002) 1 [EN] (Part 1) - Strasbourg, 26.XI.1987

<sup>49</sup> Ibid, Article 2

<sup>50</sup> Ibid, Article 10

<sup>51</sup> Summary and Recommendations for the Conference *OPACT in the OSCE region: What it means and how to make it work?* Prague, Czech Republic, 25-16 November 2008; p. 2; Available at:

<http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf> (accessed on 22 July, 2009)

<sup>52</sup> Ibid; p. 4

<sup>53</sup> Supra note 15, para 37 and Supra note 42, para 54

<sup>54</sup> See: <http://www2.ohchr.org/english/bodies/cat/opcat/membership.htm> (last visited on 22 July 2009)

<sup>55</sup> Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 20 June 2008; CPT/Inf (2009) 6; para 17

<sup>56</sup> In case of Denmark, for example, the CPT commended the visiting methodology of the Danish Parliamentary Ombudsman without mentioning that this institution has been designated as the Danish NPM. See: Report to the Government of Denmark on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 20 February 2008; CPT/Inf (2008) 26; para 13

parties to the European Convention) and thus a fruitful synergy between the two bodies has been pointed out as essential.<sup>57</sup>

There is also a post of the CoE Commissioner for Human Rights,<sup>58</sup> who regularly conducts contact and assessment visits to help raise the standards of human rights protection in all CoE member states. Thus during his visit to Moldova in 2009, for example, the Commissioner looked into the issues relating to persons deprived of their liberty by the police by visiting a number of places and talking to those deprived of liberty as well as the authorities.<sup>59</sup> It should be noted that in his report on Moldova the Commissioner issued some recommendations to the state also concerning the Moldovan NPM, specifically referring to the entity as the NPM.<sup>60</sup>

Finally, the field missions of the Organisation for Security and Cooperation in Europe (OSCE) also ought to be mentioned. Based on a broad concept of security, the OSCE deals also with the human rights issues, among which prevention of torture has been one of the focuses.<sup>61</sup> The field missions provide the OSCE with direct presence in various countries and these have in fact been instrumental in bringing about the ratification of the OPCAT as well as the establishment of the NPMs in some countries.<sup>62</sup> It should also be noted that the SPT itself has noted the importance of the OSCE for its work and thus has met with the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE.<sup>63</sup>

#### ○ **The Americas**

In the Americas, the Inter-American Commission on Human Rights in March 2008 adopted the 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas'.<sup>64</sup> This instrument is a soft-law document, but it is the only instrument in the Inter-American system which deals specifically with the issue of *prevention* of torture in some detail as the Inter-American Convention to Prevent and Punish Torture in 1985<sup>65</sup> introduced only a general obligation upon states to prevent and punish torture.<sup>66</sup>

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<sup>57</sup> Supra note 51; p. 3

<sup>58</sup> Resolution (99) 50 on the Council of Europe Commissioner for Human Rights; Adopted by the Committee of Ministers on 7 May 1999 at its 104th Session

<sup>59</sup> See: Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe Following his visit to Moldova - 25 to 28 April 2009; Strasbourg, 17 July 2009 CommDH(2009)27

<sup>60</sup> Ibid; para 42

<sup>61</sup> Eric Manton and Bernhard Knoll *Monitoring within the OSCE Office for Democratic Institutions and Human Rights (ODIHR)*; Available at: <http://www.osce.org/odihr/35864.html> (last visited on 17 July 2009)

<sup>62</sup> For example, Supra note 44; pp. 107-108; p. 71

<sup>63</sup> Supra note 15, para 39 and Supra note 42, para 56

<sup>64</sup> See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OAS Doc. OEA/Ser/L/V/II.131 doc. 26

For more details on the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and OPCAT, see: *The Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the Optional Protocol to the Convention Against Torture* Policy Paper of the OPCAT Research Team, University of Bristol (2009); Forthcoming on: <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html>

<sup>65</sup> Inter-American Convention to Prevent and Punish Torture, Adopted at Cartagena de Indias, Colombia, on 9 December, 1985.

<sup>66</sup> Ibid; Article 1

In 2004, a Special Rapporteur on the Rights of Persons Deprived of Freedom was appointed<sup>67</sup> who, *inter alia*, carries out visits to places of deprivation of liberty in the member states of the Organization of American States (OAS) and issues recommendations to the authorities and thus has a mandate which bears similarities to that of the SPT.

It should be noted that the SPT has met with the members of the Inter-American Commission on Human Rights.<sup>68</sup>

#### ○ Africa

In the African region, the mandate of a Special Rapporteur on Prisons and Conditions of Detention was created by the African Commission on Human and Peoples' Rights (the African Commission) in 1996 as a result of lobbying by the NGO, Penal Reform International. Although not defined at the outset, the terms of reference refer to the need for the Special Rapporteur to 'examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights'.<sup>69</sup>

Moreover the African Commission adopted 'The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (RIG) in 2002.<sup>70</sup> At the same time a Follow-Up Committee (RIG Committee) was established which, *inter alia*, is to engage in various activities to disseminate the RIG and encourage the states to implement these.<sup>71</sup>

The SPT has met with the RIG Committee.<sup>72</sup>

### **Relationship between various international and regional bodies**

The overview of the various mandates clearly indicates that there are a lot of similarities between the mandates of the SPT and all the other entities described above. As Article 31 of the OPCAT indicates, cooperation between the SPT and other bodies is necessary in order to avoid duplication. Indeed, as noted by Mr Mumba Malila, Special Rapporteur on Prisons and Conditions of Detention, the work of the SPT should be complementary and not contradictory to that of other bodies.<sup>73</sup>

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<sup>67</sup> See Resolution of the General Assembly of the OAS, OAS Doc. AG/RES. 2037 (XXXIV-O/04) of 8 June 2004 on the Study of the Rights and the Care of Persons Under any Form of Detention or Imprisonment.

<sup>68</sup> Supra note 15, para 38 and Supra note 42, para 53

<sup>69</sup> As set out in an appendix to the Report of the Special Rapporteur on Prisons and Conditions of Detention to the 21st Session of the African Commission on Human and Peoples' Rights, Tenth Activity Report 1996–1997, Annex VII, para. 2.

<sup>70</sup> Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 32nd Session, Banjul, The Gambia, October 2002.

<sup>71</sup> For more details on the Robben Island Guidelines and the OPCAT see *Relationship between the African Commission on Human and Peoples' Rights Robben Island Guidelines and the Optional Protocol to the UN Convention Against Torture (OPCAT)* Policy Paper of the OPCAT Research Team, University of Bristol (2008); Available at: <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html> (last visited on 22 July 2009)

<sup>72</sup> See: <http://www.bris.ac.uk/law/research/centres-themes/opcat/conferenceafrica2008.html> (last visited on 22 July 2009)

<sup>73</sup> Supra note 8, p. 14



Moreover, the issue of credibility must also be taken into account: if the various bodies work in isolation and the respective authorities realise that each visiting body works as a monad in isolation without taking into consideration the activities, recommendations, *modus operandi*, standards etc of the other mechanisms, the credibility and thus also the effectiveness of the body will suffer.

There is however a distinction to be drawn between the *duplication* and *overlap* as the latter should not be necessarily viewed as problematic but rather a guarantee of making the system of prevention of torture ‘water-tight’. Duplication of mandates and work, on the other hand, may represent an ineffective use of the available resources, which are generally rather scarce for all the existing bodies. Most importantly however it should also be noted that avoiding duplication is essential if the bodies are to maintain their credibility.<sup>74</sup> Thus complementarity should be the key for the relationships between the SPT and all the other various bodies<sup>75</sup>. This should include coordination of visits as well as of their content and focus, following up the recommendations of other bodies and thus reinforcing the common work. Moreover, the various bodies should be careful not to issue contradictory recommendations to the states parties but rather ensure their complementarity and coordinated approach. Such an approach will not only allow the most effective use of the resources but ensure credibility with the authorities and thus allow the various bodies to maximise their potential effectiveness.

Given the relationship that the OPCAT establishes between the SPT and CAT, more consideration needs to be devoted by these two treaty bodies to their interactions. This far, it is clear that the treaty bodies have had sessions at the same time, as stipulated by Article 10 (3) of the OPCAT and regular meetings have taken place, both with the two committees in session and when SPT is not in session, a more limited meeting has taken place. In addition a Contact Group has been established between the two to facilitate meetings and collaboration.<sup>76</sup> It is though unclear if any decisions have been reached as to how the two bodies will interact in particular on the execution of their respective duties as per Articles 16 and 24 of the OPCAT. However, leaving that aside, it is clear that there is little duplication between the remits of the respective mandates of the SPT and CAT. The SPT seems to have clear mandate in its own right, particularly with respect to NPMs, as stipulated in Article 11 of the OPCAT and the CAT this far has steered clear from detailed comments on the NPMs and rather used its state reporting system to reinforce the general stipulations of OPCAT on the NPMs.

The comparison of the SPT’s and CPT’s mandates leads to a slightly different conclusion however as there appears to be more duplication between the two bodies in that both are charged with the mandate to visit places of deprivation of liberty in states parties to their respective treaties and in fact the two bodies have 25 states parties in common. On the practical level however this duplication may for the time being be easily avoided, given the fact that several of the SPT members are also members of the CPT. This may not always be the case, especially as the membership

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<sup>74</sup> Ibid, p. 13

<sup>75</sup> Ibid, p. 38

<sup>76</sup> Supra note 15, paras 33-34

of the SPT expands when the number of OPCAT states parties reaches 50,<sup>77</sup> and it is clear that more coordination between the work of the SPT and CPT is required.

Similarly, more duplication is perhaps likely between the work of the SPT and the SRT. It should be noted, moreover, that while the visits of the SRT are not, strictly speaking, preventive in their methodology, in practice there appears to be little distinction between preventive and protective mission at this international level.

Turning to the issue of the content of visits, the underlying issue that makes cooperation problematic is that of applicable standards. It is clear that the various visiting mechanisms may choose to use different sets of standards in their work which can be rather context-specific, reflecting the realities of a particular country or region. It has been noted that the SPT should not disregard the standards that have been applied by the regional mechanisms<sup>78</sup> as those are reflective of the specifics of the region and the UN standards thus may not always be the best ones to apply. On the other hand it ought to be noted that some issues are of universal standard, like the *jus cogens* status of prohibition of torture<sup>79</sup> and here no variations can be accepted. It thus appears that the visiting bodies need to apply their expertise and knowledge of the particular country and the region and take the standards most commonly used and apply those as the starting point as this may represent a practical way to approach the situation. Furthermore another consideration that ought to be taken into account when deciding on the applicable standards is the issue of which standards afford the highest level of protection to the individual.

Moreover, the issue of confidentiality is one that needs particular attention and the various existing bodies must acknowledge that in this aspect rather important differences between their mandates and approaches prevail. Whilst some bodies operate in the manner of complete transparency (like SRT) others' work is shielded by the veil of considerable close to, if not, total confidentiality (like the ICRC) while again others have more (like the SPT and CPT) or less (like the NPMs) strict confidentiality rules. The existing bodies need to clearly coordinate between themselves the stipulations of the applicable confidentiality rules to their work, which needs to be done in a systematic and structured way.

Finally, it should also be noted that cooperation between the bodies should be context-based, informal and discreet and such factors as reliability, independence and effectiveness of the other body will play an important role in determining whether the cooperation is possible and how best it be conducted. Therefore while at times clear and structured cooperation may be required, it should equally be noted that at times the contingencies of the specific situation at hand or specifics of the mandate of a given body may call for more discreet and informal cooperation.

### **Engagement with the NPMs**

Research from the Bristol University project indicates that the NPM issue is the key defining feature of the SPT mandate, not necessarily the SPT visits themselves. It is also clear that other international and regional bodies have mentioned

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<sup>77</sup> Article 5 (1) of the OPCAT

<sup>78</sup> Supra note 15, p. 14

<sup>79</sup> See: *Prosecutor v Furundzija* (10 December 1998, case No It-95-17/I-T, (1999)38 ILM, 317), paras 151-153; *Prosecutor v Delalic and Others*, 16 November 1998, case no. IT-96-21-T, para 454; *Prosecutor v Kunarac*, 22 February 2001, case no. IT 96-23-T and IT-96-23/1, para 466

OPCAT in their work and on visits they have taken to states and places of detention as explained in detail earlier in this paper. Most ask questions about OPCAT ratification and the process of the NPM designation, while some have made more detailed comments regarding specific in-country situations, and in those instances there does appear to be consistency with what the SPT has said so far. However, these are still very early days and given the lack of strategic structure for engagement as identified above, there is a risk, particularly as the workload of the SPT increases and the number of states parties to the OPCAT grows, that this will not always be the case.

Therefore the international and regional bodies should be careful about the recommendations they issue in relation to the NPMs, respecting the role that OPCAT envisages for the SPT in respect to the NPMs. The existing bodies should strive to achieve a consistency in their approach to the NPMs.

The further issue is the role of the ICC and its accreditation of NHRIs, many of whom have been designated as NPMs or are being considered for that role.<sup>80</sup> The ICC is an international association of NHRIs which promotes and strengthens NHRIs so as to achieve their compliance with the Paris Principles and provides leadership in the promotion and protection of human rights.<sup>81</sup> The review of the NHRIs is carried out by the Sub-committee on Accreditation which is mandated to consider and review applications for accreditation, re-accreditation and accreditation reviews of NHRIs on the basis of written evidence submitted (including special reviews). The accreditation

acknowledgement that just as publicity of findings and reports can be beneficial, at times confidentiality may be a very useful and pragmatic tool in achieving results.

There needs to be some acknowledgement of the differences of focus between the various bodies: some mandates focus on broader elements of the situation in a particular country, like analysing legal and system features and current practices, in order to identify gaps in the protection against ill-treatment (like SPT, CPT, NPMs), others also have a remit to deal with specific incidents in particular places of detention (like SRT, ICRC, NPMs), while others have a permanent presence in the state (NPMs, ICRC, OSCE and OHCHR field offices) and others only visit rather infrequently (like the CoE Commissioner for Human Rights).

Once this mapping exercise has been carried out, this may then help to develop strategic links between the various bodies, so that each can identify where it can build on its own weaknesses and each other's strengths.

Secondly, there is a need for more opportunities for further meetings between various members of these bodies and their secretariats which would allow further discussion of the intricacies of their various mandates.

Thirdly, in a very practical sense, there is a need to develop a tool which would allow for an easy reference for the existing bodies on each other's work.<sup>84</sup> The existing bodies should not only ascertain the work that has been carried out by others, but also exchange information on the planned activities and thus coordinate their future efforts.

Fourthly, each international and regional body needs to carefully consider the ways in which they can engage with NPMs themselves, either through procedures and fora set up for NHRIs or alternative methods. It should also be acknowledged that the experience and presence on the ground of NHRIs and other national visiting mechanisms, like statutory visiting bodies, may provide additional contribution to the work of the international and regional visiting mechanisms.

Fifthly, detailed, up-to-date and reliable information on the nature of the NPM in each state party to OPCAT is crucial and needs to be made available not only to the SPT but also to all the other relevant bodies so as to enable international and regional bodies to make a judgement as to their suitability and whether they can rely on them as an objective source of information. The international and regional bodies can then vary their approach to the NPM depending on the context. The international and regional bodies, however, should refrain from making any pronouncements on the appropriateness of the states parties' choice in respect of the NPM, respecting that OPCAT charges the SPT with such a function.

The system of prevention of torture that OPCAT puts in place is not intended to work in isolation. Rather, the instrument was adopted in the acknowledgement of the shortcomings that have emerged in the existing system and the SPT and NPMs have been added to the web of various international, regional and national bodies that work in the field of prevention of torture and other forms of ill-treatment. It is thus essential that all actors of this web recognise the existence of each other and actively explore the avenues for effective collaboration. Only that way does the system of prevention of torture and other forms of ill-treatment have the chance of true success.

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<sup>84</sup> See the website developed by the members of the Law School of the University of Bristol: <http://www.humanrightsvisits.org>

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