



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

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1. Introduction

This paper is intended to provide background and ideas to contribute to discussions at the seminar “The Optional Protocol to the UN Convention against Torture: Implementation in Federal States” in Sao Paulo, Brazil from 22 to 24 June 2005. The seminar is jointly organized by the Association for the Prevention of Torture (APT), the Brazil Office of the Center for Justice and International Law (CEJIL/Brazil) and the Comissão Teotônio Vilela (CTV).

The paper:

- Sets out the key elements of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment* (the “Optional Protocol” or “OPCAT”);
- Briefly identifies the wide range of ways in which States may be decentralized;
- Analyzes issues arising in the implementation of the OPCAT in federal and other decentralized States, including:
 - providing an overview of the nature of the measures required by OPCAT,
 - identifying subject-matter areas which are generally part of a federal division of legislative authority and which are of particular interest in relation to OPCAT,
 - suggesting strategies and potential solutions to the challenges of implementing OPCAT in federal and other decentralized States:
 - describing the processes leading to the creation of “National Preventive Mechanisms” in several States as illustrative examples.

2. The Optional Protocol to the Convention against Torture

The Optional Protocol, adopted by the UN General Assembly in December 2002, will enter into force once it is ratified by at least 20 States. To date¹ some 34 States had signed the OPCAT and 9 had notified the UN of their ratification. The key elements of the OPCAT are as follows:²

- An emphasis on **prevention**, rather than after-the-fact investigation and fact-finding;
- **Collaboration** with the States Parties to prevent violations, rather than public condemnation of States Parties for violations already committed;
- Creation of an **international expert body** within the UN (the UN “Subcommittee on Prevention”), **and national expert bodies** (“National Preventive Mechanisms” or “NPM”s) that must be established by each State Party;
- Both the international and national mechanisms will conduct **regular visits** to places of detention for the purpose of monitoring the situation, proposing **recommendations** and working constructively with States Parties for their **implementation**, for the better prevention of torture and other cruel, inhuman or degrading treatment or punishment;
- The OPCAT intentionally incorporates a degree of flexibility in the structure of the **National Preventive Mechanism**, in order to ensure that establishment of an NPM is possible regardless of the internal structure of the state:
 - The NPM can consist of one body or several.³
 - The State can establish a new national body, or can designate already-existing bodies.⁴ These could include human rights commissions, ombudsmen, parliamentary commissions, lay people schemes, civil society organisations, or composite schemes.

However, the flexibility is not without limits. In every case, the overall NPM structure for the State, and if it has multiple bodies, each of those bodies, must meet requirements of **independence and effectiveness** (including expertise, representativeness, and sufficient resources).⁵

- The national system, including both the National Preventive Mechanism and any changes to domestic law and procedures to enable the work of the

¹ As of 24 May 2005.

² For more detail, see D. Long and N. Boeglin Naumovic, *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (San José and Geneva: Inter-American Institute of Human Rights and Association for the Prevention of Torture, 2004).

³ OPCAT Article 17.

⁴ OPCAT Article 17.

⁵ See Long and Boeglin Naumovic, note 2 above, at 132-135.

international Subcommittee, **must be in place within one year** after the entry into force of the Optional Protocol or, once it is in force, one year after that State's ratification or accession.⁶

- The members of the international and national mechanisms must be provided **access to every place**, official or unofficial, where an individual is deprived of liberty, including:
 - prisons and police stations,
 - pre-trial detention facilities,
 - centres for juveniles,
 - places of administrative detention,
 - security and military forces facilities,
 - detention centres for migrants and asylum seekers,
 - transit zones in airports,
 - check-points in border zones,
 - medical and psychiatric institutions

- Visiting experts must be guaranteed certain rights and powers to make their visits effecting, including:
 - the right to conduct **interviews in private** and without witnesses with any person deprived of his or her liberty, as well as to interview other persons such as security or medical personnel and family members of detainees;
 - the right to **unrestricted access to the full records** of any detainee or prisoner and the right to examine disciplinary rules, sanctions and other relevant documents such as those recording the number of persons deprived of their liberty and the number of places of detention;
 - the right to **access to all premises** of the facility, including, for example, dormitories, dining facilities, kitchens, isolation cells, bathrooms, exercise areas, and healthcare units.

- At the end of their visit, the preventive mechanisms will issue a **report** and a series of **recommendations** to the relevant authorities (such as ministries of justice, the interior or security, as well as penitentiary authorities and others). The overall approach is one of cooperation, requiring States to discuss possible implementation measures with the mechanisms.⁷

- The international Subcommittee will generally deal with States on a completely **confidential** basis, subject to exceptional circumstances where the State itself publishes only a part of a Subcommittee report or fails to cooperate with the work of the Subcommittee.⁸ The NPM, on the other hand,

⁶ Unless the State makes a declaration under Article 24 of the OPCAT, at the time of ratification, which allows the State to opt out of the NPM requirement for up to three years, with the possibility of a further two-year extension thereafter.

⁷ Article 12(d) obliges States "to examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures." Article 22 makes similar provision in relation to implementation of NPM recommendations.

⁸ See Article 16.

is not necessarily restricted to working on a confidential basis: to the contrary, the OPCAT obliges States to publish and disseminate at least an annual report on the work of the NPM.⁹

3. Decentralized States

Decentralization in State structures can take many forms. Delegation of certain limited authority to municipal or local governments, often including authority over some forms of local policing, is one common form of decentralization. The Constitution of Mexico, for example, provides that municipalities will have responsibility for a range of public services including “public security” and “municipal preventive policing”.¹⁰ The authority of municipal governments, however, is often subject to consent or override by a higher level of government.¹¹

Also common is a more entrenched “federal” division of authority between a centralized “federal” or “national” government and regional “state” or “provincial” governments. In the Americas, such structures are found in Brazil, Mexico, Argentina, Venezuela, Canada, and the United States. For the purposes of this paper, the centralized government will generally be referred to as the “Federal Government” and the decentralized governments will generally be referred to as “Regional Governments.”

Generally, decentralization divides authority on the basis of defined geographic units and/or categories of subject-matter. The Constitution may set out a list of subjects such as “health”, “national defence”, “immigration” for the Federal Government, with a similar list for the Regional Government, purporting to divide almost all possible authority more-or-less evenly between the two levels of government.¹² Or one level of government may be given power over all matters not specifically allocated to the other.¹³ However, some decentralized States may also define the competencies of different levels of government in terms of jurisdiction over particular kinds of individuals, for instance indigenous peoples and non-citizens. Thus the Canadian Constitution states that the Federal Government is to have exclusive jurisdiction over, among other things, “Indians” and “Aliens”.¹⁴

Even in federal systems that nominally treat the Federal and Regional Governments as having “exclusive” competency over certain subject-matters, overlap inevitably arises. This can be because the differences between the grants of authority given to

⁹ See Article 23.

¹⁰ Constitution of Mexico, Article 115 (II) and (III)(h). See also Article 178(7) of the Constitution of Venezuela, placing “neighbourhood prevention and protection and municipal police services” under Municipal governance and administration.

¹¹ Thus Article 115 of the Constitution of Mexico says that Municipalities have responsibility “with the concurrence of the States when it is determined necessary and as the laws determine” and Article 178 of the Constitution of Venezuela provides that authority over municipal police services is to be exercised in accordance with applicable national legislation.” See also Article 123 of the Constitution of Argentina.

¹² See, for example, sections 91 and 92 of the Canadian Constitution Act, 1867.

¹³ See the discussion in Jose Ma. Serna de la Garza “Constitutional Federalism in Latin America” (2000), 30 Cal. W. Int’l L.J. 277.

¹⁴ Article 91(24) and (25) of the Canadian Constitution Act, 1867.

each of the Federal and Regional Governments may not be easily understood: in Canada, for instance, the Federal Government is given authority over “the establishment, maintenance, and management of penitentiaries” while the each Province is given authority over “the establishment, maintenance, and management of public and reformatory prisons in and for the Province.”¹⁵ (The distinction is clearer in practice, however: under the terms of regular criminal legislation, all individuals sentenced to terms of imprisonment of two years or more are incarcerated in a Federal penitentiary, while those sentenced to less than two years are placed in a Provincial prison. Yet this division is nowhere found in the written Constitution.)

Overlap may also arise due to administrative arrangements entered into on a contractual basis between different levels of government: for example, certain Provinces in Canada have entered into “Exchange of Services Agreements” with the Federal Government whereby federally sentenced prisoners may be confined in provincial prisons and provincially sentenced prisoners may be confined in penitentiaries. Further, in Canada most Provinces contract with the Federal Government to have the Federal Royal Canadian Mounted Police actually provide policing services otherwise under exclusive Provincial jurisdiction.¹⁶

Overlap can also occur where measures that are necessarily implied by or connected to an express grant of power to, for instance, the Federal Government resemble measures that could be taken pursuant to an express grant of power to the Regional Government. For example, the Regional Government may normally have exclusive authority to deal with policing within its territory, but the Federal Government might have implied authority over policing within international airports if it has express authority over air travel or international airports.

Some States may also formally recognize areas of concurrent authority over a single subject-matter. For instance, 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 defense of health”.

In any situation where overlap can occur, the constitution may or may not expressly provide a formula for resolving conflicts between the central and decentralized political units. For example, Article 24(4) of the Constitution of Brazil specifies that Federal legislation implementing general rules in an area of concurrent authority “suspends the effectiveness of a state law to the extent that the two are contrary.” In the absence of clear constitutional rules, courts may be forced to work out rules and sort out disputes on a case-by-case basis. This is the case in Canada, where Courts develop and apply competing, complicated theories and achieve sometimes contradictory results in the absence of a clear constitutional formula for resolving the conflicts.¹⁷

¹⁵ Articles 91(28) and 92(6) of the Canadian Constitution Act, 1867.

¹⁶ See http://www.rcmp-grc.gc.ca/ccaps/contract_e.htm <accessed 26 May 2005>.

¹⁷ See Joseph E. Magnet, “Special Topics: Paramountcy and Interjurisdictional Immunity”, <http://www.constitutional-law.net/paramountcy.html> <accessed 26 May 2005>.

Federal Governments may also seek to work around limitations on their authority by resorting to forms of political leverage that do not directly depend on legislative competence in the area. For instance, though exclusive jurisdiction over most aspects of healthcare is clearly allocated to the Provincial Governments in Canada, a relatively uniform national health care system was created, with the guiding principles set out in Federal legislation, the *Canada Health Act*. The basis for this arrangement relies in essence on political and economic leverage and negotiation, rather than constitutional-legislative authority *per se*: the Federal Government makes some funding for health care provision available to the Provincial Governments, but only so long as they continue to comply with the rules set out in the Federal legislation.¹⁸ In this way, the Federal government relied on its relatively unbounded authority to spend its revenues in order to indirectly achieve national policy aims otherwise outside its jurisdiction, illustrating that realistic political strategies coupled with good faith negotiations between all Federal and Regional Government actors can overcome serious structural constitutional obstacles.

The range of variations in State structures is potentially infinite; however, in most situations cooperation between the different levels of government is politically feasible and can allow for effective nation-wide implementation of unified objectives, including treaty obligations, even where the authority of both Federal and Regional Governments is engaged. The following sections examine general trends and specific illustrations of the law and practice of decentralized States in implementing human rights treaties such as the OPCAT, then turning to a specific focus on the National Preventive Mechanism.

4. Implementation of OPCAT in Decentralized States

(a) Nature of Implementing Measures Required

Overview:

Following from the description of the key elements of the OPCAT set out above, States are bound to take the following implementation measures, among others:

- Provide the international Subcommittee with:
 - a statutory right of access¹⁹ to all places, without prior notice to the particular place,²⁰ where persons are deprived of liberty;

¹⁸ See Government of Canada, “1957 - Advent of Medicare in Canada: Establishing Public Medical Care Access”, <http://canadianeconomy.gc.ca/english/economy/1957medicare.html> and Canada Parliament, Research Service, “The Canada Health Act: Overview and Options” (16 June 2003), <http://www.parl.gc.ca/information/library/PRBpubs/944-e.htm> <accessed 26 May 2005>.

¹⁹ With respect to the international Subcommittee, though not the National Preventive Mechanism, it may not be necessary to directly authorize the Subcommittee to carry out its mandate; though such statutory authority is clearly preferable to meet the obligations of the OPCAT, it may be sufficient if the executive government(s) clearly have the power to require all relevant individuals and institutions to permit and cooperate with the Subcommittee’s work.

²⁰ While the international Subcommittee obviously will need, for logistical reasons if no other, to inform the State of its visit to the State in advance, an element of surprise in the visits to individual places of detention will need to be retained, in order to obtain a true picture of the treatment of persons

- the right to access all relevant records and other information,
 - the right to interview in private all persons involved in the deprivation of liberty.
- Ensure that the right of the Subcommittee to carry out visits is subject to no exceptions, other than, optionally, exceptional and temporary restrictions under the limited circumstances prescribed in the OPCAT;²¹
 - Empower the National Preventive Mechanisms with a statutory right of access to all places,²² records and other information, and the right to interview in private all persons involved in the deprivation of liberty, without exceptions;
 - Ensure that the empowering statute for the National Preventive Mechanisms incorporates the required guarantees of independence and effectiveness;
 - Establish statutory protections for all individuals, including law enforcement officials and individuals deprived of liberty, who cooperate with the international Subcommittee and National Preventive Mechanisms;
 - Ensure the empowering statute for the National Preventive Mechanism(s) authorizes it to make recommendations and to have the recommendations published;
 - Establish a process for receiving, responding to, and acting on the recommendations of the international Subcommittee and National Preventive Mechanism.

Division of Authority over Implementation Measures:

In the context of the Optional Protocol, the allocation as between Federal and Regional Governments, of executive and legislative competence over the following subjects is of particular interest:

- Implementation of treaties generally,
- Human rights in general (or torture and other ill-treatment in particular),
- Police and police stations,

deprived of their liberty and conditions of detention: Long and Boeglin Naumovic, note 2 above, at pp. 71, 124.

²¹ Access to a place can only be refused where the criteria in Article 14(2) of OPCAT are satisfied: objection can only be made in respect of a particular individual place of detention, there must be urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that prevents carrying out of the visit, and the visit can only be delayed on a temporary basis. The OPCAT specifically states that the existence of a declaration of state of emergency cannot in itself form the basis of an objection to a visit.

²² Again, as was the case in relation to the international Subcommittee, the right of NPM access required by article 20(c) of OPCAT should be read as including the right to visit places *without prior notice*: such an interpretation is necessary for the NPMs to effectively prevent torture and other forms of ill-treatment, as the OPCAT intends: See Long and Boeglin Naumovic, note 2 above, at p. 132.

- Criminal law, administration of justice, trial facilities, and pre-trial detention facilities,
- Prisons including youth detention facilities,
- Mental health and psychiatric institutions,
- Border areas, airports and immigration facilities,
- Military facilities,
- Education facilities, particularly residential schools,
- Medical facilities, especially disease control facilities with quarantine responsibilities and long-term care facilities housing individuals who may not have full decision-making control over their personal liberty (i.e. in some circumstances, the elderly),
- Any jurisdiction based on the identity of the original: indigenous persons, youth, non-citizens, for example.

Treaty-making is often formally the exclusive authority of federal government institutions, but the situation with respect to treaty *implementation* varies widely. In some States, the Federal Government has the power to pass legislation to implement a ratified treaty, even if the subject-matter of the treaty would otherwise fall within the competence of a Regional Government. For instance, in Australia, Section 51 (xxix) of the Constitution gives the Commonwealth (Federal) Parliament the power to legislate to make Australia's treaty obligations part of Australian law. The Commonwealth Parliament may legislatively implement any treaty, regardless of its subject matter.²³

In other States, the Federal Government cannot implement a ratified treaty alone: if all or part of the subject-matter of the treaty falls within the Regional Governments' fields of competence, a role must be played by the Regional Government's legislative processes. For instance, Canada must rely both on Federal legislation but also legislation and actions by its Provincial and Territorial Governments, in order to satisfy its obligations under the *International Convention on Civil and Political Rights*, since the Federal Government itself cannot enact implementing legislation on those areas that touch on provincial competence.²⁴

Middle positions are also possible, where the Federal Government can legislate if the Regional Government has not already legislated on a given subject-matter. See for instance Article 24 of Brazil's Constitution, which indicates that in the field of

²³ State of Victoria, "Federal-State Relations Committee Report on International Treaty Making and the role of the States", Chapter 1, <http://www.parliament.vic.gov.au/fsrc/report1/front/Summary.htm>.

²⁴ See, e.g., Fifth Periodic Report to the Human Rights Committee by Canada, UN Doc. CCPR/C/CAN/2004/5.

“penitentiaries”, among other subjects, the absence of a federal law would allow the states to exercise full legislative jurisdiction until the Federal Government decided to “occupy” the subject-matter area with a federal enactment.²⁵

Another possibility is that an international treaty can be implemented through powers that are *implied* as necessarily connected to an *express* field of Federal Government legislative authority. For instance, in the United States, the Federal Government has relied on “implied” constitutional powers, associated with the “general welfare” clause in the Preamble and the “necessary and proper” and commerce clauses in Article I, to establish large scale social welfare programs, built the interstate highway system, provide federal funding for public education, and engage in thousands of other activities not expressly allocated to its competence by the U.S. Constitution.

A further distinction is that some States will not ratify a treaty until they are already fully compliant with it: Switzerland is an example. Where constitutional divisions of power are engaged by a treaty in such a State, a federal solution must be found *before* ratification. In other States, a Federal Government will proceed to ratify a treaty before completing internal processes with Regional Governments to put implementing measures in place: Argentina is one example. In these States, ratification by the Federal Government can help bring all actors to the negotiating table to find a solution.

If a Federal Government does not have overriding exclusive authority to legislate implementation of international treaties in general, it may still have sufficient constitutional authority to implement a given treaty on the basis that the treaty falls within its regular areas of competence. This may be defined in a broad unified manner as “human rights”,²⁶ or it may be the combination of a range of sources of authority such as “prisons”, “policing” and “health”.

In any situation where the Federal Government cannot implement a human rights treaty alone, some method of obtaining the agreement and action from the Regional Governments is necessary. International human rights treaty bodies have sometimes indicated that establishing Federal-Regional cooperation and implementation-monitoring mechanisms is a *duty* of federal states in order to meet their international human rights obligations.²⁷ The next section of this paper examines examples and possibilities of strategies for finding the necessary national cooperation to implement human rights treaties in decentralized states.

(b) Strategies and Solutions

From the perspective of general international law, self-imposed internal restrictions on State processes for the implementation of treaties provide no excuse for a failure to implement the treaty, even if the restrictions arise from divisions of power formally

²⁵ See discussion in Serna de la Garza, note 13 above, p. 293.

²⁶ See, e.g., article 23 of the Constitution of Argentina.

²⁷ See, e.g., *Concluding observations of the Human Rights Committee: Germany*, 04 May 2004, UN Doc. CCPR/CO/80/DEU, paragraph 12: “The State party is reminded of its responsibilities in relation to article 50 [federal states clause] of the Covenant; it should establish proper mechanisms between the federal and Länder levels to further ensure the full applicability of the Covenant.”

entrenched in a written Constitution.²⁸ This is reinforced in the case of OPCAT by an express provision that “the provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.”²⁹

However, from the perspective of seeking universal ratification and full and effective implementation of international human rights treaties, it must be acknowledged that decentralized States face special challenges in practice. If new international instruments are to be widely-ratified and actually implemented, the international community must work with national governments, institutions, and members of civil society to find solutions to the special obstacles facing decentralized States.

Through a series of country-specific examples, the next part of this section will consider the different ways in which decentralized States are proceeding to implement OPCAT. At the outset however, based on the experience of States to date, the following general framework for OPCAT implementation in decentralized States should be considered, either after ratification or as a process of negotiating consent to ratification:

1. Assess whether the Federal Government has sufficient constitutional authority to enact implementing legislation on its own and/or whether action or consent on the part of the Regional Governments will also be necessary.
2. Refer to any existing process to deal with ratification or implementation of international treaties or to deal with human rights, or establish an ad hoc consultation and negotiation process. In either event the State should ensure that civil society, particularly national NGOs, are included throughout the process
3. Assess whether legislative changes are necessary to ensure the international Subcommittee will have the powers required by the OPCAT and if so, which government(s) will be involved?
4. Review existing national mechanism(s) that carry out visits to places of detention, to assess any gaps in coverage, independence or powers, as compared to the criteria required of NPMs by the OPCAT.³⁰

²⁸ See *Vienna Convention on the Law of Treaties*, Article 27; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932), Advisory Opinion, P.C.I.J. (Ser. A/B) No. 44 at 24; Ariel E. Dulitzky, “Implementación del Derecho Internacional de Los Derechos Humanos en Los Sistemas Federales: El Case de la Convención Americana Sobre Derechos Humanos Y La Republica Argentina” (forthcoming, El Centro de Estudios Legales y Sociales, Argentina).

²⁹ OPCAT, Article 29. Thus, the problems sometimes encountered with the Federal States Clause of the *Inter-American Convention on Human Rights* (see Ariel E. Dulitzky, note 27 above), do not arise in respect of OPCAT. Federal Governments certainly have an obligation to do all in their power to ensure that Regional Governments take the steps necessary to give effect to the OPCAT, but there is no question that the Federal Government remains in all circumstances accountable to the international community for any failure, even by a Regional Government, to fully implement and respect OPCAT obligations.

³⁰ For greater detail on assessment of existing visiting mechanisms, see Walter Suntinger, “National Visiting Mechanisms: Categories and Assessment” (26 June 2003), in Association for the Prevention of Torture, *Visiting Places of Detention: Lessons Learned and Practices of Selected Domestic Institutions, Report on an expert seminar, Geneva, July 2003* (Geneva, 2003). Suntinger assesses a

5. Determine the frequency and duration of visits necessary to be effective in the State's geographic and institutional context. Prepare financial and human resource needs estimates.

6. In light of the assessment of existing mechanisms and resource needs, determine through consultation, dialogue and negotiation with all stakeholders, whether to designate existing mechanism(s) with any necessary legislative changes or to create a new national preventive mechanism:
 - As will be seen in the illustrations that follow, possible models for an NPM, whether new or existing, in decentralized states include the following:
 - A **unified national body**
 - Enacted and appointed by the Federal Government only;
 - Enacted and appointed by all Federal and Regional Governments together, each acting under its own constitutional authority, but creating an administratively shared delegated national mechanism.
 - **Multiple bodies**³¹
 - Each acting on a regional basis for the territory for which the individual government is responsible;
 - One body enacted and appointed by the Regional Governments together (covering all Regional Government jurisdiction), and a second body enacted and appointed by the Federal Government (covering all Federal Government jurisdiction);
 - Each acting in different categories of detention types: e.g. immigration detention facilities, pre-trial detention centres, prisons, psychiatric facilities, military facilities;
 - Specialized agencies dealing with individuals based on identity, such as indigenous status; or
 - Any combination of the above.

7. Determine the method of selection of members of the National Preventive Mechanism(s) and how national NGOs and other members of civil society will be involved.

range of existing visiting mechanisms through the following categories: internal administrative inspection, inspection by outside/mixed body established within the respective authority/ministry, inspection by national human rights institutions, including the ombudsman, inspection by parliamentary organs, judicial inspection, inspection by NGOs, and other models.

³¹ In any model where multiple bodies are contemplated, extra effort and resources may be necessary to ensure consistency between NPM activities and to ensure the NPMs and international Subcommittee can effectively and efficiently communicate as required by the OPCAT. In most cases, this will involve creating some form of national co-ordinating agency. See the paragraphs below for further discussion of issues associated with multiple-NPM models.

The decision as to what form of NPM will be best suited to and politically acceptable in any given state will turn on a range of factors. In some decentralized States, a relatively small geographic size and national constitutional authority, or the presence of very small Regional Governments with low populations, may mean that a single unified NPM represents the most efficient and effective model. In other States, geographically large with a disperse population and divided constitutional authority, it may be both less costly and more effective to have multiple NPMs throughout the country's jurisdictions.

However, where a multiple NPM approach is contemplated, it may be difficult to maintain consistency in recommendations and findings, which is of concern both to individuals and governments affected. For this reason, it should be remembered that an administratively unified NPM can still have a relatively large number of members and geographically dispersed offices, or committees, reducing travel and other costs. For instance, the Austrian Human Rights Advisory Board has responsibility to evaluate police activity with a special emphasis on maintaining human rights standards; within its membership, six expert visiting committees have been set up on a regional basis following the territorial organisation of the Austrian courts.³² While the overall work may be divided among regional offices or committees, the cost estimates for any NPM(s) should include not only the costs of visits themselves but also for at least one "plenary" session per year, where all members of the NPM(s), or representatives of each NPM, come together to exchange findings and methodology, to better ensure consistency.

In every case, it is essential to ensure that all places where an individual may be deprived of liberty are covered, that each visiting mechanism has the expertise and enjoys all the powers and guarantees required by OPCAT, and that the overall scheme will be administratively manageable and will obtain effect and consistent results. In this regard, relying on too loose a patchwork of existing entities can be difficult to reconcile with the requirements of OPCAT. A State must be able to report aggregate information on OPCAT implementation to the International Subcommittee.³³ States implementing multiple-NPM models should consider establishing a single co-ordinating agency, in order to ensure that the international Subcommittee and NPMs can effectively and efficiently communicate with one another, as required by the OPCAT.³⁴

Further, where a State designates existing visiting mechanisms as NPMs under OPCAT, any visit by those mechanisms to "places where persons are deprived of liberty" as defined in OPCAT would automatically constitute a visit that must comply with the requirements of OPCAT, regardless of whether it was or was not labelled an "OPCAT Visit" by the State. In other words, if a non-expert volunteer group of individuals is designated as an NPM under OPCAT, and in the course of carrying out a visit is denied the right to a private interview with anyone they wish,³⁵ or is denied access to a part of the place of detention,³⁶ it would not be open to the state to say

³² For detail on the structure and operation of the Austrian Human Rights Advisory Board, see the Board's website at http://www.menschenrechtsbeirat.at/en/index_en.html <accessed 6 June 2005>.

³³ OPCAT, Article 12(b).

³⁴ OPCAT, Articles 12(c) and 20(f).

³⁵ OPCAT, Article 14(d).

³⁶ OPCAT, Article 14(1)(c).

that this was not actually an “OPCAT Visit” but was rather the “everyday domestic work” of the organization or individual and so not subject to OPCAT guarantees.

It must be emphasized that changes to the powers and mandates of existing mechanisms will often be necessary if they are to be designated as OPCAT NPMs. For instance, independence and the work of an NPM requires that it be the NPM and not the State that decides the timing, type and location of visits; existing mechanisms may not already have this discretion. It is also important to recognize that certain forms of existing mechanisms, while serving an important function, are inherently unable to meet OPCAT requirements for independence: for instance, internal administrative inspection systems.³⁷

(c) Examples of Decentralized-State OPCAT Implementation Processes

In order to illustrate a range of issues, strategies, and solutions for OPCAT implementation in decentralized States, the following paragraphs summarize the situation in a number of States, including:

- The use of permanent consultative processes (Canada);
- The creation of ad hoc cooperative processes (Switzerland);
- The designation of multiple existing bodies in a single state to meet the NPM requirement (UK);
- Legislation by some or all levels of government to authorize a joint NPM (Germany);
- The first federal State party to OPCAT (Argentina);
- A broad consultation process (Mexico).

The country-specific information in these sections is drawn from a variety of sources available to the Association for the Prevention of Torture, including an informal meeting on the implementation of the Optional Protocol to the Convention against Torture in Federal States, held at the Permanent mission of Canada in Geneva in January 2005. However, it by no means is the result exhaustive research, the situation in each country may change or develop quickly, and the information is provided as background information only: these summaries do not represent an endorsement of any particular State process or action by APT.

Permanent Consultative Mechanisms: Canada

Some states, such as Canada, have established permanent mechanisms to deal with international human rights obligations, including the ratification and implementation of new international human rights treaties. In Canada the Federal government has constitutional authority to sign and ratify treaties and is responsible in international law for implementation of treaties. If, under the division of powers in the Canadian Constitution, the Federal government is allocated legislative authority in respect of the actual subject-matter of the treaty, it can take action to implement

³⁷ See Suntinger, note 30 above, at pp. 76-77.

the treaty; however, if the subject-matter of the treaty falls within provincial legislative authority, it is the Province that must implement the treaty.

Places of detention fall under overlapping areas of authority, depending on the length of the prison sentence, the arresting police force, the location of the facility, and other factors. Therefore, in practice the Federal government will seek the consent of the Provinces before it signs or ratifies the OPCAT, because the Federal government cannot force the Provinces to comply with the obligations in OPCAT.³⁸

The Federal government and Provinces together created, in 1975, a “Continuing Committee of Officials on Human Rights” that includes civil servants representing federal departments relevant to human rights, as well as representatives of each of the provincial and territorial governments within Canada.³⁹ The Committee deals with Canada’s international human rights obligations (including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights). The Committee meets in private: in person twice a year, and by teleconference on a monthly basis.

The Provinces were kept informed during the process of adoption of OPCAT by the UN General Assembly, and provincial concerns were raised through the Continuing Committee. NPMs were a concern, as were the legislative amendments at the provincial level that would be needed to give the Subcommittee the access contemplated by OPCAT.

Frequency of visits may have an impact on costs, particularly in a geographically dispersed country such as Canada. It appears that the allocation of costs of implementing OPCAT, as between the Federal and Provincial Governments, may be an issue.

Provinces will have to assess whether existing visiting mechanisms meet OPCAT independence requirements. Existing mechanisms also currently carry out visits in response to complaints, but do not generally undertake preventive visits. Coordination will be key. However, these issues have not yet been discussed in detail at the Standing Committee, and so Canada has not yet collectively decided whether it will sign or ratify the OPCAT.

Ad Hoc Co-operative Processes: Switzerland

In other cases, a specific process for consultation and implementation of the OPCAT may be created. In Switzerland, for instance, a federal inter-departmental Working

³⁸ “In order to avoid the problem of being internationally accountable for obligations that it cannot fulfil, the Federal government has adopted a practice of consulting with the provinces and territories, and obtaining their consent, before signing and ratifying treaties relating in whole or in part to matters within their jurisdiction.” The practice was formalized in an agreement reached at a 1975 meeting of federal and provincial ministers responsible for human rights. At the same meeting, the Continuing Committee of Officials on Human Rights was set up. *per* Parliament of Canada, Senate, *Promises to Keep: Implementing Canada’s Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights (December 2001).

³⁹ See Koren Bell, “From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties” (2002) 5 Yale H.R. & Dev. L.J. 255.

Group, led by the Federal Office of Justice, was established to study how to implement the NPM requirement of OPCAT. One representative for the group of twenty-six Cantons (the Swiss sub-national governments) was a part of this process, and that representative regularly consulted with the individual Cantons. NGOs were formally consulted throughout the process.

Almost all of the twenty-six Cantonal governments agreed at all times that Switzerland should ratify OPCAT. At the outset, all but three Cantons preferred a single federal entity rather than a multiplicity of cantonal authorities. Faced with the prospect of having themselves to pay for cantonal NPMs, the three Cantons ultimately decided that recognizing federal jurisdiction would be preferable. In Switzerland it is theoretically possible for one Canton to block such an arrangement if Cantonal legislation is needed to implement the treaty.

In this case, however, the federal government believed it had sufficient legislative competency to enact a federal NPM: while the “execution” of civil and criminal law is a Cantonal prerogative, the federal government took the position that the NPM would not directly interfere with “execution” of criminal law, but will rather simply observe and make recommendations. Responsibility for execution of treaties falls to the Federal government under its Constitutional power over foreign relations⁴⁰ and under public international law, and the Federal government is competent to “monitor” internal implementation or execution of treaties. Further, the Swiss Constitution specifically requires Cantons to respect Federal law, and this includes international law.⁴¹

The Swiss Working Group had considered three options:

- (a) each Canton to have its own NPM, therefore 26 NPMs for Switzerland;
- (b) conclude a new “concordat” (treaties between Cantons) expressly giving the Federal government jurisdiction to establish an unified NPM;
- (c) create a single national body under existing Federal authority.

Option (c) was ultimately favoured based on the following factors:

- Cantonal support,
- efficiency,
- reduced costs,
- uniform standards / law, and
- speedier procedure towards ratification.

The unified national Swiss NPM will be established by a federal statute. Some articles of OPCAT are sufficiently precise to be directly applicable – e.g. right of access, independence – but others may not; it was therefore decided that all the elements set out in the Optional Protocol should be repeated and/or elaborated in the national legislation. The law will adopt a broad definition of places of deprivation of liberty, as mandated by OPCAT, including prisons, police stations, asylum-seeker detention centres, psychiatric establishments, and old persons homes. The NPM will be empowered to undertake surprise visits, as the Swiss government takes this to be a requirement implicit in the OPCAT concept of “free access”.

⁴⁰ Article 54 of the Swiss Constitution.

⁴¹ Article 49(2).

The Federal government will appoint members, on recommendation of the Federal Office of Justice and the Department of Foreign Affairs. The Federal government would prefer to see the Cantons contribute a portion of the cost of the NPM, on the basis that Cantons benefit from “quality control” by the NPM and would have to establish their own inspection mechanisms if the Federal government did not. If Cantons were to provide funding for the NPM, they could also participate in selection of NPM members (providing a list of perhaps half of members of the NPM). However, if there is no funding from Cantons the selection process will involve only the Federal government. NGOs will be able to propose candidates through Department of Justice and/or Cantons.

The Swiss model, then, represents an example where through exercising leverage through a combination of recognized Constitutional authority, financial support, moral commitment and a consultative process lead by the Federal Government, a single unified NPM was eventually agreed upon by all relevant governments in the Federal structure.

Multiple NPMs in a Single State: The United Kingdom

The United Kingdom is not a federal State but has a significantly decentralized structure in respect of Scotland, Wales, and Northern Ireland. While there was no question, then, that the national government had sufficient constitutional authority to unilaterally ratify and implement OPCAT, in practice a consultative process was undertaken in order to ensure effective support and implementation throughout the UK. Prior to signing the OPCAT, the Human Rights department of the UK Foreign Office consulted with all national government departments likely to be affected, with independent statutory authorities, and with the devolved administrations in Scotland, Wales, and Northern Ireland. All the entities concerned confirmed to the national government that an existing body that met the requirements of OPCAT already covered them. The national government concluded that the NPMs required for OPCAT were already in place and no new mechanism needed to be created. All departments gave their consent to ratification and designation of NPMs under OPCAT.

Thus, there was never a proposal to create new visiting mechanisms in the UK to comply with OPCAT. Article 3 of OPCAT explicitly recognizes that NPMs can be one or several. Prior to ratification, the UK created a list of 20 independent bodies potentially relevant to the OPCAT. Some are regional: in England and Wales, for instance, the list of mechanisms includes various Inspectorates for prisons and youth detention centres, lay visits to police custody facilities, visits to court lock-ups and psychiatric hospitals. UK-wide there are immigration and asylum-seeker detention and removal centres.

Maintaining links between the International Subcommittee and the multiplicity of UK NPMs will be an administrative challenge. Originally the thinking was that the Subcommittee would work directly with all the UK NPMs. Now the UK is considering designating whether some of the larger bodies should be tasked with co-ordinating roles.

Sub-federal cooperation and Joint Legislative Authority: Germany

In Germany, the Federal government is very committed to ratify the OPCAT, and that this determination includes all ministries of government. However, the sub-federal governments, the “Länder” have areas of exclusive jurisdiction, as does the Federal government, while other areas are overlapping “competitive” jurisdiction. In areas such as mental health and police, the Länders have exclusive jurisdiction. For such facilities, then, Länder consent is mandatory for OPCAT implementation.

Federal and Länder authorities have met to assess the situation for implementation. They concluded that Germany does not presently have organizations that would meet the NPM requirements of OPCAT. Therefore, the question is whether to establish a single federal institution, sixteen separate Länder institutions, or a combination of both. The Länder do not want to give the Federal government exclusive competence in this area, nor do they want sixteen separate institutions. Consequently, the currently favoured model is to establish one Commission of the sixteen Länder. To implement the Länder Commission, there first must be a concordat between the Länder, and then each Länder must legislate to enable the Commission to function. Therefore there would be two German institutions, the Länder Commission for all non-federal institutions, and an individual Ombudsman for all federal institutions. If there were a dispute between one Länder and the Commission, the 16 Ministers of Justice of the Länder would meet to discuss and resolve the issue. Ultimately, however, there is no way to legally force a Länder to comply with recommendations.

First federal state party to OPCAT: Argentina

Argentina ratified OPCAT on 15 November 2005, becoming the first federal State to do so.⁴² The next day in Geneva, Argentina formally informed the UN of its ratification during the session of the UN Committee against Torture in which the Committee was to review Argentina’s fourth periodic state report. In its Concluding Observations at the end of the session, the Committee against Torture specifically stated that it “warmly welcomed” the ratification as a positive development in Argentina’s work against torture.⁴³ Ratification followed a number of advocacy activities to promote monitoring of places of detention, organized by various actors, both governmental and nongovernmental.

In Argentina’s federal system, the constitutional division of power presents challenges with respect to implementing international obligations at a provincial level. The Federal Government has clear constitutional authority to ratify treaties, which then become incorporated into the National Constitution, and is internationally responsible for their implementation. Legally, the Provinces are expected to implement the requirements of the Constitution, but in practice effective

⁴² The United Kingdom had ratified even earlier, on 10 December 2003, but while it has some decentralization in its administration it is not a “federal” State *per se*.

⁴³ Committee against Torture, *Conclusions and recommendations: Argentina*, 10 December 2004, UN Doc. CAT/C/CR/33/1, paragraph 4(a).

implementation depends also on the political will on the part of the Provinces. Under existing legislation, for example, Provincial governments have the responsibility to implement the federal criminal code. The Federal Government can only send comments; it is up to the Provinces to implement such comments.

In the case of OPCAT, the Federal Government decided to act on its authority to ratify quickly, only subsequently initiating detailed discussions with Provincial governments regarding implementation. In the opinion of the Federal Government, the fact that the international obligation had already been established should help to provide an incentive to Provincial governments to move forward in establishing the visiting mechanism(s) required by OPCAT, in cooperation with the Federal Government.

Various NPM schemes are being put forward by a variety of stakeholders.. The need for some level of involvement by civil society in the NPM has been widely acknowledged, including by the Federal Government. A model recently established in the Province of Rio Negro creates an inter-institutional “observatory” to monitor detention facilities; established with the support of the Federal Human Rights Bureau (*Secretaría de Derechos Humanos*) under the Ministry of Justice, this model could eventually be replicated in other provinces. Another proposed scheme involves a network of civil society organizations with official recognition functioning in parallel to the governmental system. A possible role for the judiciary is also envisioned. The Centre for Public Defence Studies (CEDEP) in the Province of Buenos Aires, for example, is currently running a training project on detention monitoring with a view to OPCAT implementation.

The existence of various bodies with mandates to visit places of detention at both the federal and provincial level, coupled with financial challenges in Argentina, make it difficult for some to envision the creation of new bodies. For example, Argentina is the only country in Latin America with an established Prison Ombudsman (*Procuración Penitenciaria*) whose powers have recently been expanded from visiting only federal *prisons*, to visiting *all* places of detention under federal jurisdiction. The country also has a general ombudsman office (*Defensor del Pueblo*) at the federal level, a body that also exists in some of the Provinces. Implementation of the OPCAT could therefore also take place through the existing bodies, with supplemented mandates and powers. In this scenario, a national coordination scheme would be needed.

Still others advocate for the creation of a completely new body, such as a committee of distinguished experts. Through the personal reputation and recognition of its members initially and through the professionalism of its prevention work as it develops, such a body could establish for itself the level of legitimacy needed to confront effectively the grave human rights problems in detention facilities, in cooperation with existing bodies.

The NPM proposals mentioned above are not exhaustive, only an indication of the variety of possible ways forward under discussion in Argentina. The final decision for designation will have to be taken by the Federal Government, presumably with the consent of the provinces.

A broad consultation process: Mexico

In Mexico, national consultations on implications of OPCAT ratification were initially carried out in the framework of the Commission on Human Rights Governmental Policy, established by law in March of 2003. The Commission is the main mechanism through which consultations on the most important human rights issues have been carried out by the present administration. The Commission invites civil society to participate in its sessions. A subcommittee of Federal Government agencies and civil society discussed ratification of the Optional Protocol, culminating in the identification of ratification of the Optional Protocol as an objective in the National Programme of Human Rights. On 9 December 2004, the Senate gave its consent to ratification of the Optional Protocol by the Executive, and the OPCAT was ultimately ratified on 11 April 2005.

Two options for the NPM are under consideration:

- designation of the existing National Commission of Human Rights and/or the human rights commissions that already exist in each Mexican state, with the participation of civil society. The Federal Government considers that this approach would not require amendments to existing legislation, either at the federal level or at the local level.
- Another possibility is that the NPM could include independent persons and organizations of civil society. Under this scheme, Mexico would create new independent national mechanisms via legislative reforms. The amendments would provide legal powers to the mechanism so that the corresponding authorities recognize the legal standing of the mechanism and allow it to have access to the places of detention in the terms that were established by the Senate by its interpretative declaration when it approved ratification of OPCAT.

A variety of existing legislation has been identified for amendment in order to implement OPCAT, at both the federal and local level, especially if a new body is to be created for the NPM requirement:

- The law that established the minimum norms for the social readaptation of sentenced persons (*Ley que establece las Normas Mínimas sobre Readaptación Social de Sentenciados*);
- The law on prevention and social readaptation (*Ley de Prevención y Readaptación Social*);
- The law for the treatment of minors (*Ley para el Tratamiento de Menores Infractores*);
- The rules of the federal centers of social readaptation (*Reglamento de los Centros Federales de Readaptación Social*);
- The law that establishes the bases for the coordination of the system of public security (*Ley General que establece las bases de coordinación del sistema de seguridad pública*);

- The rules of the Executive secretariat of the national system of public security (*Reglamento Interior del Secretariado Ejecutivo del Sistema Nacional de Seguridad Pública*);
- The laws and rules that regulates the functioning of the national Attorney General (*Ley Orgánica de la Procuraduría General de la República y Reglamento Interior de la Procuraduría General de la República*);
- other laws of the same nature at the local level.

The Ministry of Foreign Affairs and the UN Office of the High Commissioner for Human Rights in Mexico, with advice from and sponsorship by the APT, are collaborating on a two-year project on OPCAT implementation. The project consists of a series of seminars directed at public officials and civil society representatives, which will take place between 2005 and 2006 in different regions of the country, including the Regional Governments. The aim is to disseminate widely the content of OPCAT to all those who might have a role to play in its implementation throughout the country and to discuss with these same actors the implications of various NPM models.

5. Conclusion

This paper has explored, in a preliminary way, some of the issues arising in respect of implementation of the OPCAT in federal and other decentralized states. As was mentioned earlier, in most situations cooperation between the different levels of government is politically feasible and can allow for effective nation-wide implementation of OPCAT, even where the authority of both Federal and Regional Governments is engaged. Various strategies and processes may be appropriate to each State. These may include political negotiations, negotiations on and strategic planning of human and financial resources, legal arguments and moral persuasion.

In all cases it should be recalled that the OPCAT is designed to help States meet the obligations already imposed on them by the *Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment* and general international law. With this in mind, and an ongoing dialogue and exchange of information between federal and other decentralized States, rapid ratification and effective implementation of the OPCAT in federal States should not be viewed as an obstacle that is *possible to overcome*, it should be seen for what it is: a *positive and desirable* achievement for the State, including all its component Governments and communities, that will serve it well both at the domestic and international levels.

Additional Resources:

D. Long and N. Boeglin Naumovic, *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (San José and Geneva: Inter-American Institute of Human Rights and Association for the Prevention of Torture, 2004).

Walter Suntinger, "National Visiting Mechanisms: Categories and Assessment" (26 June 2003), in Association for the Prevention of Torture, *Visiting Places of Detention: Lessons Learned and Practices of Selected Domestic Institutions, Report on an expert seminar, Geneva, July 2003* (Geneva, 2003)

Parliament of Australia, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995), Chapter 10 "Practices in other Federations", http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/c10.htm.

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"Informe de La Relatoria de la Reunion de Expertos Sobre El Tema 'Apoyo a Los Instrumentos Interamericanos de derechos humanos'" (6 mayo 2002), OEA/Ser.K/XVI, REIIDH/doc.18/02 rev.1.

Jose Ma. Serna de la Garza "Constitutional Federalism in Latin America" (2000), 30 Cal. W. Int'l L.J. 277.

Koren Bell, "From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties" (2002) 5 Yale H.R. & Dev. L.J. 255.

Stefan Oeter "Symposium: International Human Rights and National Sovereignty in Federal Systems: The German Experience" (2001), 47 Wayne L. Rev 871.

Ariel E. Dulitzky, "Implementación del Derecho Internacional de Los Derechos Humanos en Los Sistemas Federales: El Case de la Convención Americana Sobre Derechos Humanos Y La Republica Argentina" (forthcoming, El Centro de Estudios Legales y Sociales, Argentina).