



## **Implementation of the Optional Protocol to the UN Convention against Torture**

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### **The Establishment and Designation of National Preventive Mechanisms**

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## Introduction

The Association for the Prevention of Torture (APT) is an international non-governmental organisation committed to preventing torture and ill-treatment worldwide. In particular the APT promotes the establishment of preventive control mechanisms such as visits to places of detention. The APT therefore played a central role in the realisation of the Optional Protocol to the UN Convention against Torture (OPCAT).<sup>1</sup> This treaty aims to establish a system of regular visits to places of detention by independent international and national expert bodies, in order to prevent torture and other forms of ill-treatment.<sup>2</sup> This innovative dual approach entailing the establishment of a new international body, the Subcommittee to the Committee against Torture, and an obligation for States Parties to have complementary national preventive mechanisms, provides a novel means to prevent torture.

Visits to places of detention have already proven to be an effective means to prevent torture and to improve conditions of detention. However, until now no international instrument provided a means to conduct visits worldwide. The Subcommittee to be established, will conduct such visits to all States Parties.

Further, for the first time in an international instrument, criteria and safeguards for **national preventive mechanisms** are set out. Lastly, the Optional Protocol breaks new ground by prescribing a complementary inter-relationship between preventive efforts at the international and national level, aiming to ensure the effective implementation of international standards at the local level.

Upon ratifying the Optional Protocol, States Parties will be obliged to establish, designate or maintain national preventive mechanisms. Some States will need to create a new body, whilst others who may already have such a mechanism will need to consider whether it fully complies with the obligations under the Optional Protocol.

The aim of this paper is to provide a commentary on the provisions within the Optional Protocol regarding national preventive mechanisms, and to present APT's views and recommendations on the requirements for the effective establishment and functioning of these bodies.

It contains some practical examples selected on the basis of a seminar organised by the APT and the Office of the High Commissioner for Human Rights (OHCHR), in Geneva in July 2003. A variety of domestic visiting

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<sup>1</sup> Adopted by the UN General Assembly on 18 December 2002.

<sup>2</sup> Article 1 of the Optional Protocol to the UN Convention against Torture.

bodies<sup>3</sup> participated in this activity, in order to exchange their experiences for preventing torture through visits to places of detention.

The inclusion of these bodies in this publication should therefore not be seen as an endorsement for them to be designated as national preventive mechanisms under the OPCAT. Rather they should serve to illustrate the variety of visiting bodies that already exist throughout the world and the diverse approaches already taken in regard to this issue.

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<sup>3</sup> For the purpose of this paper, the term national preventive mechanism refers to the mechanism foreseen by the OPCAT, while the term domestic visiting bodies refers in general to bodies conducting visits to places of detention at the national level.

## Part One:

### Obligations of States Parties to set-up, designate or maintain national preventive mechanisms

*"Article 3*

*Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (herein referred to as the national preventive mechanism)."*

*"Article 17*

*Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions."*

According to Articles 3 and 17, States Parties are obliged to set up, designate or maintain one or several independent national mechanisms to conduct visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

#### **1. When do the mechanisms have to be in place?**

States Parties are obliged to have national preventive mechanisms in place *within one year* of the entry into force of the Optional Protocol or, once it is in force, one year after ratification or accession of the Optional Protocol. However, States may make a declaration upon ratification under Article 24, to temporarily postpone their obligations in respect of the national mechanisms (or international mechanism) for an initial three years, with the possibility of extending this for a further two years.<sup>4</sup>

#### **2. What form do the national mechanisms have to take?**

The Optional Protocol does not prescribe any particular form that the national preventive mechanisms must take. States Parties therefore have the flexibility

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<sup>4</sup> Note that a State can not postpone its obligations in respect of both the national and international preventive mechanisms:

*Article 24*

- 1. Upon ratification, States Parties can make a declaration postponing the implementation of their obligations either under Part III or Part IV of the present Protocol.*
- 2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.*

to choose the type of national mechanisms that is most appropriate for their particular country context i.e. political structure, or geographical structure. A variety of domestic bodies that are mandated to conduct visits are already in existence throughout the world, these include: human rights commissions; ombudsmen; parliamentary commissions; lay people schemes; non-governmental organisations; as well as composite mechanisms combining elements of some of the above. Any of these could be designated as the national preventive mechanisms under the Optional Protocol if they meet the criteria laid out by the instrument.

The possibility to have several mechanisms was especially foreseen for federal states, where decentralised bodies can be designated as national preventive mechanisms.

States Parties could also decide to have several national preventive mechanisms based on a thematic rather than a geographical division. If a State already has a well functioning preventive mechanism, for example for psychiatric institutions, it could continue to operate and others could be created for different types of places of detention.

**The APT recommends** when a State Party decides to have several national preventive mechanisms, be they regional or thematic, it would be essential to find a means to achieve co-operation between them. We believe it would be advisable in this instance to have **one co-ordinating body at the national level**, to harmonise the work of each preventive mechanism.

### 3. Mandate of the national preventive mechanisms

*"Article 4*

- 1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.*
- 2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which that person is not permitted to leave at will by order of any judicial, administrative or other authority".*

**"Article 19**

*The national preventive mechanisms shall be granted at a minimum the power:*

- (a) To regularly examine the treatment of persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection from torture, cruel, inhuman or degrading treatment or punishment;*
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;*
- (c) To submit proposals and observations concerning existing or draft legislation."*

In accordance with these provisions, the national mechanisms should be mandated to conduct regular visits to places of detention and to make recommendations in order to prevent torture and to improve conditions of detention.

**Example:** a) ***The Uganda Human Rights Commission***<sup>5</sup> was established in 1995 under the Constitution of the Republic of Uganda (article 51) and in conformity with the Paris Principles. The Commission is empowered according to article 53 "to visit jails, prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and make recommendations". This Commission, which possesses quasi-judicial powers, is furthermore empowered to order the release of a detained or restricted person and order payment of compensation.

b) ***The Bulgarian Helsinki Committee (BHC)***,<sup>6</sup> is a non-governmental organisation created in 1992. On the basis of article 99 of the Bulgarian Law on the execution of penalties,<sup>7</sup> the BHC negotiates agreements with relevant ministries responsible for the places of detention<sup>8</sup>. In accordance to these, the BHC can monitor conditions of detention of people deprived of their liberty in order to observe the conformity of the facilities and environment there with relevant UN and European standards.

Although national preventive mechanisms designated under the OPCAT will focus on the prevention of torture and other forms of ill-treatment, this does

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<sup>5</sup> For further information, please see: <http://www.uhrc.org>

<sup>6</sup> For further information, please see: <http://www.bghelsinki.org>

<sup>7</sup> According to this provision, non-governmental organisations in Bulgaria are allowed to visit places of detention.

<sup>8</sup> The BHC has agreements with several ministries in Bulgaria such as the Ministry of Justice, the Ministry of Social Welfare, the Ministry of Education and the Ministry of Health.

not exclude the possibility for the mechanisms to have a broader mandate. Indeed, this would enable them to also take into account other related human rights violations that persons deprived of their liberty may be subjected to, (such as the right to medical assistance, to receive outside visitors, to adequate food, etc.) or to make use of other means, in addition to visits to places of detention, to prevent torture and ill-treatment.

#### **a) Places to be visited**

The APT considers that places of detention, as broadly defined by the Protocol, will include but are not restricted, to: police stations; security force stations; all pre-trial centres; remand prisons; prisons for sentenced persons; centres for juveniles; immigration centres, transit zones at international ports, centres for detained asylum seekers, psychiatric institutions and places of administrative detention.

It is important to highlight that this list is not exhaustive as some existing domestic visiting bodies conduct visits to other places of detention than those listed above.<sup>9</sup>

#### **b) Frequency of visits**

In order to be effective, **the APT recommends** that national preventive mechanisms should be able to **determine the exact frequency of their visits**, taking into account the differing types of places of detention. For example, pre-trial detention facilities could be visited more frequently than penal establishments because of the more rapid turn-over of persons deprived of their liberty and their limited contact to the outside world.

It must be stressed that the regularity of the visits is important for several reasons, namely to monitor improvements or deterioration in conditions of detention and to protect people deprived of their liberty in general and from reprisals in particular. Furthermore, carrying out regular visits will enable the visiting team to create a constructive dialogue with both the persons detained and the authorities and to assess the working conditions of the staff.

***Example:** In Argentina, the Office of Government Procurator for the Prison System<sup>10</sup> was created in 1993 through a presidential decree and is especially mandated to protect the human rights of inmates who are part of the federal penitentiary system. In order to fulfil its mandate, the Prison Procurator conducts weekly visits (mainly in Buenos Aires where 60% of the national prison population is held) and private interviews with the detainees, and*

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<sup>9</sup> The Bulgarian Helsinki Committee conducts visits to military subdivisions and the Uganda Human Rights Commission visits refugee camps, as well as camps where internally displaced persons are held. Another example is the Office of the Commissioner for Civil Rights Protection in Poland, which was established in 1987, and conducts visits in special units for people under the excessive influence of alcohol (known as “sobering chambers”).

<sup>10</sup> For further information, please see: <http://www.jus.gov.ar/Ppn>



*thereby maintaining a constant dialogue with them and the penitentiary authorities.*

The APT also considers that for the national mechanisms to effectively prevent torture and other forms of ill-treatment, these should have **access to any place of detention at any time**. According to this principle, national preventive mechanisms can, in addition to planned regular visits, react to any special event and carry out ad hoc visits.

In practice most existing domestic visiting bodies throughout the world have a reactive approach and conduct visits to places of detention only after having received a complaint. Nevertheless, some domestic visiting bodies combine a reactive approach with a preventive approach. This is the case, for example, of the Polish Ombudsman and of the Ombudsman Office of Colombia, that conduct preventive visits according to a yearly plan as well as visits carried out following a particular request or complaint.

## **Part Two:**

### **Criteria and Guarantees for the effective functioning of national preventive mechanisms**

#### *"Article 18*

- 1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.*
- 2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and adequate representation of ethnic and minority groups in the country.*
- 3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.*
- 4. When establishing national preventive mechanisms, States shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights."*

Read as a whole Article 18 lays down the specific guarantees that will ensure the national preventive mechanisms are free from *any* interference from the State. These provisions are not mutually exclusive; they are inter-linked and must be taken together in order to ensure the independence of these bodies.

In accordance with Article 18(4), the Optional Protocol requires States Parties to give due consideration to the "Principles relating to the status of national institutions for the promotion and protection of human rights" (The Paris Principles). These Principles set out criteria for the effective functioning of national human rights institutions and provide an important resource of guiding principles for national preventive mechanisms. The Optional Protocol has also elaborated upon the Paris Principles that are most relevant and applicable to the specific mandate of national preventive mechanisms. It has

prescribed very distinct criteria and guarantees for the effective functioning of preventive mechanisms conducting visits.

It is important to emphasize that while the Paris Principles are applicable only to national human rights institutions, the OPCAT does not specify that the national preventive mechanism take this form.

## 1. Functional Independence

The independence of the national preventive mechanisms is essential to ensure the effectiveness of these bodies to prevent torture and other forms of ill-treatment.

Article 18(1) of the Optional Protocol is the primary provision that guarantees the national preventive mechanisms their functional independence. In practice this means that the national preventive mechanism must be capable of acting independently and without hindrance from State authorities, in particular the prison and police authorities, government and party politics. It is also essential that the national preventive mechanisms be *perceived* as independent from the State authorities.

**The APT recommends** that to ensure the functional independence of national preventive mechanisms the following aspects should be taken into consideration by States Parties:

### **a) *Independent basis:***

The national mechanisms should be **separated in someway from the executive and judicial administrations** in order to maintain a real and perceived independence. Therefore, their founding basis must be appropriately defined so as to ensure that the national preventive mechanisms can not be dissolved or their mandate modified by the State, for example upon a change of Government. The legal basis for their mandate could be founded by, for example, the constitution (e.g. the Fiji Human Rights Commission and the Polish Commissioner for Civil Rights Protection)<sup>11</sup>, an act of parliament (e.g. the National Human Rights Commission of Nepal and the Parliamentary Visiting Commission of the Canton of Geneva) or a presidential decree (e.g. the Senegal Committee for Human Rights and the Office of Government Procurator for the Prison System, Argentina).

Furthermore, **the APT recommends** that national preventive mechanisms should be able to **draft their own rules and procedures** and these must not be open to modification by any external authorities.

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<sup>11</sup> The South African Human Rights Commission, the Ombudsman Office of Colombia and the Uganda Human Rights Commission are also based on a Constitutional act.

**b) Independent personnel:**

In order to ensure the independence of national preventive mechanisms as a whole, **the APT recommends** that they should be composed of **independent experts** and in particular that they should be independent from the State authorities. These experts must be at liberty to **appoint their own staff**.

**c) Independent appointment procedure:**

*"The Paris Principles:*

*Composition and Guarantees of Independence and Pluralism: (...)*

*3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."*

The Paris Principles act as a guide to the appropriate appointment procedure for the expert member(s) of the national preventive mechanisms that will guarantee non-interference from the State authorities.

**The APT recommends** more specifically that the appointment procedure should determine:

- The method of appointment;
- The criteria for appointment;
- The duration of the appointment;
- Immunities and privileges;
- The dismissal and appeals procedure.

The APT considers that a good appointment process is one that is **transparent** and involves **effective consultations with relevant civil society groups** such as non-governmental organisations, social and professional organisations, universities, and other experts, in order to identify appropriate potential candidates to serve on the national preventive mechanism.

**The APT recommends** that it would be preferable for the member(s) of the national preventive mechanisms to be appointed for a fixed minimum period of at least two years.

Examples: a) **The South African Human Rights Commission**<sup>12</sup> was established in 1995 according to section 184 of the Constitution of South Africa and has a mandate to conduct visits to places of detention. Commissioners are elected by a majority of the members of the National Assembly and the president confirms the appointments. Commissioners hold office for a fixed term, not exceeding seven years. Although the Human Rights Commission

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<sup>12</sup> For further information, please see: <http://www.sahrc.org.za>

*Act does not specify that the appointment process should be made in consultation with civil society, in practice, this process is open and transparent, with public interviews.*

*b) The **Office of the Commissioner for Civil Rights Protection (Ombudsman)** <sup>13</sup> in Poland was established by the Constitution in 1987. The Commissioner is appointed by the Sejm<sup>14</sup> upon approval of the Senate for a fixed term of five years. He/She must be a Polish citizen of outstanding legal knowledge, professional experience and high prestige due to the individual's moral values and social sensitivity. The visiting team consists of at least three or four persons and the Ombudsman has the right to call on specialists such as doctors (forensic doctors, doctors from the private sector) to take part in the visit of an institution.*

**d) Financial independence:**

*"The Paris Principles*

*Composition and Guarantees of Independence and Pluralism (...)*

*2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."*

Financial autonomy is a fundamental criteria, without which the national preventive mechanisms would not be able to exercise their operational autonomy, nor exercise their independence in decision-making. The Paris Principles stress the importance of adequate funding as a means to ensure independence.

**The APT recommends** that, where possible, the **source and nature of funding** should be specified in the inaugural instrument of the national preventive mechanisms. It would be advisable for the national preventive mechanisms to have their own budget rather than one subsumed under a government ministry or department. This would ensure that the national preventive mechanism is financially and independently capable of performing its basic functions. The expert member(s) must be enabled to pay their own staff, once again as a means to ensure their independence.

**e) Transparency:**

The public reporting of its work and functioning will assist the independence and *perceived* independence of the national preventive mechanisms. The APT therefore considers it essential for relevant civil society groups to be able

<sup>13</sup> For further information, please see: <http://www.brpo.gov.pl>

<sup>14</sup> The Sejm is one of the two chambers constituting the Polish National Assembly. The second one being the Senate.

to have access to information concerning the work of the national preventive mechanisms and to take part in and comment upon the effective functioning and independence of the national preventive mechanisms.

## **2. Composition of national preventive mechanisms**

In accordance with Article 18(2) of the Optional Protocol, the State Parties shall take necessary measures to ensure that the expert member(s) have the required capabilities and professional knowledge to carry out their work appropriately. It also advises to seek a gender balance and appropriate representation of ethnic groups and minorities within the composition of the national preventive mechanisms. This provision is in line with the Paris Principles, which also stress the importance of a pluralistic composition.

**The APT recommends** that for national mechanisms conducting visits to places of detention a **pluralistic, multidisciplinary composition** is most appropriate so as to include: lawyers, doctors including forensic specialists, psychologists, representatives from NGOs, as well as specialists in issues such as human rights, humanitarian law, penitentiary systems, and the police.

*Example: In Rio de Janeiro, Brazil, one of the most active bodies in the defence of the rights of people deprived of their liberty is the **Community Council**. Created in 1992, this council, which works on a voluntary basis, has the power to conduct unannounced and unimpeded visits to any penal institution. It is composed of a broad variety of people from civil society and public institutions coming from a wide range of backgrounds including representatives of NGOs, former prisoners, social workers, university personnel and public defenders. Its heterogeneous composition constitutes one of the strengths of this mechanism.*

### 3. Guarantees and powers in respect of visits

The Optional Protocol also prescribes certain powers that States Parties must grant to the national preventive mechanisms in the conduct of their mandate.

#### a) *Access to places, information and people*

*"Article 20*

*In order to enable the national preventive mechanisms to fulfil their mandate the States Parties to the present Protocol undertake to grant them:*

- a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;*
- b) Access to all information referring to the treatment of those persons as well as their conditions of detention;*
- c) Access to all places of detention and their installations and facilities;*
- d) The opportunity to have private interviews with the persons deprived of their liberty with their consent and without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the national preventive mechanism believes may supply relevant information;*
- e) The liberty to choose the places they want to visit and the persons they want to interview;*
- f) The right to have contacts with the Subcommittee on prevention, to send it information and to meet with it."*

Article 20 is one of the cornerstones for the effective functioning of the national preventive mechanisms in carrying out their preventive mandate.

Under Article 20 (a) and (b), national preventive mechanisms are allowed access to all the necessary background information that will assist them to get a full picture of the types of places of detention that exist, the situation as regards conditions of detention, whether there is any overcrowding. Access to detainees files is a particularly important safeguard for protection.

Article 20 (c) ensures that the national preventive mechanisms are allowed to have access not only to all places of detention but to all premises or facilities within these places such as, for example: living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, staff quarters. By visiting all areas within the places of detention, the national preventive mechanisms can obtain a full impression of the conditions of detention and treatment of persons deprived of their liberty. They can visualise the layout of the detention facilities, their physical security arrangements, architecture etc. which all play an important part in the overall daily life of those persons deprived of their liberty. An exhaustive examination of all quarters guarantees that certain situations are not hidden from view.

Article 20(d) also grants the national preventive mechanisms the power to conduct private interviews with persons of its choice. This provision is fundamental to guarantee that the NPM get a more complete view of the situation in a detention facility by hearing from those directly affected. The possibility of interviewing in private is essential to allow people deprived of their liberty to speak more openly with less fear of reprisals.

The mechanisms are also able to decide which places of detention they will visit and the persons they will interview by virtue of Article 20 (e). This is a further safeguard to ensure that the national preventive mechanisms act independently and are allowed to obtain a realistic and complete picture of all persons deprived of their liberty.

Article 20 (f) allows the national preventive mechanisms to have contact with the international Subcommittee that will be established under the Optional Protocol. This is essential to ensure that the international and national preventive mechanisms work in a complementary way. It is also essential that the national preventive mechanisms are granted the power to have contact with the Subcommittee expressly in Part IV of the Optional Protocol because States Parties can decide, under Article 24, to opt-out temporarily from either their obligations in respect of the Subcommittee in Part III or the national preventive mechanism under Part IV, in order to prepare for the full implementation of the Optional Protocol.

If States do exercise this option, then it would still be necessary for the international and national preventive mechanisms to have contact with each other. Without a direct reference guaranteeing both mechanisms the right to have contact with each other, then a State Party could interfere with the dialogue between these mechanisms during the opt-out period, a time which is designed to be used to prepare the ground work for accepting visits by both the international and national preventive mechanisms.

Therefore, taken together as a whole, the provisions of Article 20, when adhered to, will enable the national preventive mechanisms to conduct their visits fully and without hindrance from the state authorities.

### ***b) Protection from interference***

*"Article 21*

- 1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organisation for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organisation shall be otherwise prejudiced in any way.*
- 2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned."*

This provision affords protection against any interference or retaliation by State authorities as well as an assurance for persons, particularly those deprived of their liberty, and organisations coming into contact with the national preventive mechanisms. Furthermore, any confidential information collected by the national preventive mechanisms such as medical information, must be privileged. This ensures respect for the right of privacy of an individual.

As a further assurance of non-interference by the State, member(s) of the national preventive mechanisms are to be granted such privileges and immunities as are necessary to ensure the independent exercise of their mandate. This should include immunity from personal arrest, detention and from seizure of their personal baggage, as a result of the exercise of their functions.<sup>15</sup>

#### 4. Recommendations, reports and follow-up to visits

*"Article 22*

*The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into dialogue with it on possible implementation measures".*

*"Article 23*

*The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms."*

##### 4.1 Recommendations

The national preventive mechanisms are mandated not only to conduct visits but also to make recommendations to the appropriate authorities outlining the means to undertake improvements. In accordance with the provisions outlined above, the relevant authorities have a specific obligation to consider these recommendations.

This aspect is inter-linked with the general objectives of the Optional Protocol to establish co-operation and dialogue between the relevant authorities and the national preventive mechanisms.

**The APT recommends** that to assist this process, the **relevant authorities should be informed of the result of the visit**, as soon as possible by the visiting delegation of the national preventive mechanism. This will enable the mechanisms to make immediate recommendations for improvements and to establish a constructive working dialogue with the authorities.

Example: *The Georgian Young Lawyer's Association (GYLA)<sup>16</sup> is a non-profit union created in 1994. In addition to the annual report and to*

<sup>15</sup> See Article 35 of the OPCAT and the UN Convention on the Privileges and Immunities, *UN Treaty Series No.15, 13 February 1946*

<sup>16</sup> For further information, please see: <http://www.gyla.ge>



*internal reports, the various commissions which conduct the visits to places of detention, can submit recommendations on the overall penitentiary or police system and on individual cases to the prison administration. These recommendations can be made directly after the visit.*

The APT considers that at least an oral meeting with those directly in charge of the detention facilities after the visit should be arranged, and that it is advantageous for more formal written feedback to be provided as soon as possible after the visit.

## **4.2 Reports**

In order to ensure sustained improvement of the treatment of persons deprived of their liberty and conditions of detention, the national preventive mechanisms must be able to report upon and disseminate their findings. Article 23 ensures that an annual report of the work of national preventive mechanisms is published and disseminated by the State Parties themselves.

The APT considers that this provision does not preclude national preventive mechanisms from publishing and disseminating their annual reports independently of the official State Party report. This would provide a further guarantee that their reports will be made public and that there is transparency in the functioning of the national preventive mechanisms.

*Examples: a) The **Parliamentary Visiting Commission** of the Canton of Geneva, Switzerland, based on cantonal legislation, presents an annual report containing a summary of its activities, as well as relevant recommendations or observations. This report is sent to the Council of States and to the General Attorney for discussion, as well as to the institutions that have been visited and to the directors of the penitentiary system under which these institutions are managed. The Commission can also, after discussions within the plenary, make recommendations directly to the relevant authorities.*

*b) The **Fiji Human Rights Commission**,<sup>17</sup> established under the 1997 Constitution of Fiji, must (according to section 42 of the Human Rights Commission Act) within three months after the end of each financial year, present to the President a report on the exercise of its functions (and give a copy to each House of Parliament), which include visits to places of detention. Following the tabling of the Annual Report in both Houses of Parliament, the Commission must hold a public meeting to discuss the contents of the report and the carrying out of its functions during the year.*

**The APT recommends** that in addition to its general report, the reports of the specific visits of the national preventive mechanisms should also be made

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<sup>17</sup> For further information, please see: <http://www.humanrights.org.fj>

**public**, subject to the respect for confidential information and the need for express consent prior to the publishing of personal data, as contained in Article 21(2).

Examples: a) ***The Association for the Protection of Human Rights and Detained Persons***, in Burundi, was created in 1997. In order to enhance its transparency, the Association sends its reports to the media, as well as to international non-governmental organisations. The Association also produces urgent appeals and works with the media through national radio programmes devoted to discussions on various human rights issues in order to raise awareness among the society.

b) ***The Ombudsman Office of Colombia***<sup>18</sup> was established in 1991 by the Constitution. In addition to publishing its bi-annual report, the Ombudsman has the duty to denounce specific violations through official resolutions.<sup>19</sup> These resolutions, coupled with the “moral judiciary”, which aims to mobilize public opinion through different means including press releases, seek to compel authorities to make positive changes in cases where they may not have otherwise implemented the recommendations.

Also as part of their ongoing and follow-up activities, in accordance with Article 19(c), the national preventive mechanisms can submit proposals and observations concerning **existing or draft legislation**.

Example: ***The South Africa Human Rights Commission***<sup>20</sup> created in 1994 by the Constitution, is mandated to make recommendations on a broad area of legislation. In this framework, the Commission has introduced changes and made recommendations on the “Promotion of Access of Information Act”.

### 4.3 Other follow-up activities

Other follow-up activities that national preventive mechanisms should consider undertaking could include promotion and training activities such as **organising seminars** for relevant personnel concerned with or in charge of persons deprived of their liberty, as well as public awareness raising activities.

Examples: a) ***The Association for the Protection of Human Rights and Detained Persons*** organises regular seminars with the judicial authorities, as well as with magistrates, administrative personnel and representatives of civil society.

b) ***The Georgian Young Lawyer’s Association (GYLA)*** works in three main areas: free legal aid to detained persons, raising awareness and legal training. GYLA has a “Legal Training and

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<sup>18</sup> For further information, please see: <http://www.defensoria.org.co>

<sup>19</sup> One of its resolutions was devoted to the analysis of the prison crisis in the country.

<sup>20</sup> For further information, please see: <http://www.sahrc.org.za>

*Information Centre” which provides training to various groups of society but especially for professional staff of the organisation, including those conducting visits to places of detention. In this framework, the Association works with national and international partner organisations.*

The APT is convinced that civil society has a key role to play in the dissemination of the reports and follow-up activities of the national preventive mechanisms, which can lead to increased **public awareness and national debate on relevant issues**, as well as assistance with education programmes, training and other aspects of the implementation of the recommendations.

### **Part Three :**

#### **Co-operation and Dialogue**

##### **1. Co-operation between the authorities and the national preventive mechanisms**

The effectiveness of the Optional Protocol as a preventive instrument lies in the principle of co-operation and dialogue, which underscores the provisions of the instrument. The provisions detailed above set out expressly the way in which the State authorities are to co-operate with the national preventive mechanisms.

In addition to the obligations already described, both the State authorities and national preventive mechanisms must respect the right to privacy of individuals. Therefore, in accordance with Article 21(2), (detailed above), any confidential information collected by the national preventive mechanisms must be treated as privileged and no personal data can be published by the State authorities or national preventive mechanisms without the express consent of the person concerned.

**The APT recommends** that it is only through **working constructively** with the State authorities and by establishing an **appropriate and regular dialogue** with them that the national preventive mechanisms will be able to ensure the effective implementation of their recommendations, thereby assisting to prevent torture and improve conditions of detention. Therefore, the national preventive mechanisms must actively seek ways in which to establish a **co-operative relationship** with the authorities concerned.

*Example: **The Peace and Justice Service (SERPAJ)** in Uruguay, an NGO established in 1981, has been regularly monitoring national prisons for almost fifteen years. In addition to sharing their initial conclusions with prison directors after each visit, SERPAJ directs annual reports and recommendations to all relevant authorities, particularly members of parliament, the Director of the Penitentiary System and the Secretary of Interior, following up specific actions.*

*They have thus achieved concrete advances such as the establishment of a parliamentary commission to attend to the urgent need of the penitentiary system, in which SERPAJ has an active role.*

It must be noted that this practical and productive relationship with the authorities shall not as a result decrease the independence of the national preventive mechanisms but rather strengthen it by ensuring that their work has a greater, more effective impact. In return, the States Parties will benefit by receiving practical advice and assistance to prevent torture and improve conditions of detention.

**The APT recommends** that national preventive mechanisms should also establish a constructive relationship with other existing bodies monitoring places of detention, in order to enhance their complementary efforts to prevent violations to people deprived of liberty.

Example: ***The Sentencing Judge in Costa Rica*** was created in 1998. According to the Criminal Procedure law, the sentencing judge has an obligation to visit prisons and deal with individual complaints from people deprived of their liberty. In this framework the sentencing judge cooperates with another existing domestic visiting body in Costa Rica, the Ombudsman Office, often by conducting joint visits to places of detention and related follow up action.

Collaboration with civil society groups would also be an asset for national preventive mechanisms, as they constitute an independent and valuable source of information often highly committed and active in working towards the same goals as the national preventive mechanism.

Example: ***The Austrian Human Rights Advisory Board*** was established in 1999. The Board has a general mandate to monitor and observe police activity. In order to have a dialogue on its activities and exchange information, the Advisory Board organises a meeting with NGOs twice a year.

## 2. Co-operation and inter-relationship with the Subcommittee

*"Article 11*

*The Subcommittee shall: (...)*

*(b) In regard to the national prevention mechanisms:*

- (i) Advise and assist State Parties, when necessary, in their establishment;*
- (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;*
- (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman and degrading treatment or punishment;*
- (iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman and degrading treatment or punishment."*

This article is very important as it enables the national and the international bodies to have substantial exchanges on methods and strategies to prevent torture and other forms of ill-treatment. Therefore, the Subcommittee and the national preventive mechanisms **can meet and exchange information**, if necessary on a confidential basis. The national preventive mechanisms can reciprocate and forward their reports and any other information to the international mechanism.

Another important dimension of this relationship is the possibility for the Subcommittee to provide **assistance and advice** to States Parties concerning the national preventive mechanisms. Therefore, pursuant to Article 11, the Subcommittee has the mandate to advise States Parties on the establishment of national mechanisms and to make recommendations on the strengthening of their capacity to prevent torture and other forms of ill-treatment.

The Subcommittee will also be able to offer **training and technical assistance** directly to national preventive mechanisms with a view to enhancing their capacities. The Subcommittee can also **advise and assist them to evaluate the needs and means necessary** to improve the protection of persons deprived of their liberty.

### 3. Direct contact with the Subcommittee

*"Article 12*

*In order to enable the Subcommittee on Prevention to comply with its mandate as laid out in article 11, the States Parties undertake: (...)*

*(c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms. (...)"*

*"Article 20*

*In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them: (...)*

*(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it. (...)"*

Articles 12 and 20 taken together complement Article 11 (discussed above) by ensuring that States Parties have a positive obligation to encourage and facilitate contact between the national preventive mechanisms and the international Subcommittee

### Conclusion

The Optional Protocol is a unique and innovative instrument that adds a new dimension to international efforts to prevent torture at the national level. It recognises that for effective protection against torture and other forms of ill-treatment, sustained national as well as international efforts are required.

Therefore States Parties have obligations not only in respect of the Subcommittee, but also the national preventive mechanisms to ensure their effective functioning. For the first time in an international instrument the mandate, scope of application, composition and methodology of national visits to places of detention have been prescribed.

It is envisaged that this new approach of codifying national efforts to prevent torture in co-operation with an international mechanism will assist the implementation of international standards at the local level. This approach will also provide a means to increase public awareness, as well as a national debate on the treatment of persons deprived of their liberty and the conditions of detention.

It is therefore essential to the effective functioning of the Optional Protocol as a preventive instrument that appropriate, competent independent national mechanisms are established, maintained or designated by States Parties.