

The Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the Optional Protocol to the Convention Against Torture

1. Introduction

During its 131st regular period of sessions held in March 2008, the Inter-American Commission on Human Rights adopted the 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' (the Principles).¹ According to the Special Rapporteur on the Rights of Persons Deprived of their Freedom of the Inter-American Commission, the aim of the Principles is to expand on the existing normative framework and thus establish precise standards pertaining to the conditions of detention of persons deprived of their liberty as well as those to torture and other cruel, inhuman and degrading treatment.² As a means of fulfilling this aim, the Principles advocate, among other things, the use of independent institutions and organizations to carry out visits and inspections to places where persons are deprived of their liberty. This is similar to the approach that lies at the heart of the Optional Protocol to the UN Convention Against Torture (OPCAT), which is to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment, through the establishment of two-pronged system of visits to places of detention.

Given the similar aims of the Principles and the Optional Protocol to the UN Convention Against Torture (OPCAT), to strengthen the rights of persons deprived of their liberty, as well as the means prescribed to achieve them, through regular visits by independent bodies, it is necessary to examine the relationship between different elements found in both instruments, and how these can be strengthened. To place this discussion in a proper context, a general overview of the Principles and the circumstances in which they were adopted will be first provided. This will then be followed with a description of the Inter-American system as it relates to the prevention of torture, before discussing the Principles in more detail and their relation to the system established by the OPCAT.

2. The Principles: Background and general content

The Principles are the result of a seven year process which started in 2001 when the General Assembly of the Organization of American States (OAS) requested the Permanent Council of the Organization to consider the advisability of studying together with other bodies of the Inter-American system the question of the rights and

¹ See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OAS Doc. OEA/Ser/L/V/II.131 doc. 26

² See Summary of the Thematic Meeting on the Implementation of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment before the Inter-American Commission on Human Rights requested by the APT, 7 March 2007, available at <http://www.apt.ch/region/americas/MemoCELS.pdf> (last visited on 25 July 2009).

the care of persons under any form of detention or imprisonment.³ This initiative followed proposals among members of the OAS gathered in Meetings of Ministers of Justice or of Ministers or Attorney Generals of the Americas to draft a document to protect the fundamental rights of detained persons.⁴ The original aim of this exercise was to prepare in due course a Declaration on the rights and the care of persons under any form of detention or imprisonment (hereinafter referred to as the Declaration).⁵

Following up on a request by the General Assembly of the OAS to “[...] report on the situation of persons under any form of detention or imprisonment in the Hemisphere, using as a basis its work on the subject[.]”⁶ the Inter-American Commission took it upon itself to

“[...] compile regional and world standards concerning detention and prison conditions. It also proposes, by assembling its own work to date on the subject, to identify and enumerate both the problems and the good practices now existing in the Hemisphere.”⁷

The appointment of a Special Rapporteur on the Rights of Persons Deprived of Freedom in 2004 added some impetus to the process of preparing such a compilation.⁸ In response to his preliminary findings in his mandate’s first year of operation, as well as a contribution to the normative development of the Inter-American Commission on the issue of protection, and as a means of facilitating future efforts towards drafting the Declaration, the Special Rapporteur decided to prepare the “Draft Declaration of Principles on the Protection of Persons Deprived of their Liberty in the Americas.”⁹ According to the Special Rapporteur the aim of the Draft Declaration of Principles was to promote the use of those principles, which have been acknowledged in the various international human rights instruments intending to protect those persons deprived of their liberty.¹⁰ The underlying intention of the effort was to help to inspire Member States to elaborate public policies and internal legislation as well as to offer civil society organizations a control tool, and provide normative support to the Inter-

³ See Resolution of the General Assembly of the OAS, OAS Doc. AG/RES. 1816 (XXXI-O/01) of 5 June 2001 on Study of the Rights and the Care of Persons Under any Form of Detention or Imprisonment.

⁴ See for example, preamble of Resolution of the General Assembly of the OAS, OAS Doc. AG/RES. 1897 (XXXII-O/02) of 4 June 2002 on the Study of the Rights and the Care of Persons Under any Form of Detention or Imprisonment.

⁵ *Ibid.*, para. 3.

⁶ See Resolution of the General Assembly of the OAS, OAS Doc. AG/RES. 1927 (XXXIII-O/03) of 10 June 2003 on the Study of the Rights and the Care of Persons under Any Form of Detention and Imprisonment, para. 3.

⁷ See Presentation by the Executive Secretariat of the Inter-American Commission on Human Rights (IACHR) on the Situation of Persons Under Any Form of Detention or Imprisonment in the Hemisphere, Committee on Juridical and Political Affairs, Permanent Council of the Organization of American States, OAS Doc. CP/CAJP-2096/03 corr.1, 21 November 2003.

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

⁹ See Presentación del Dr. Florentín Meléndez, Relator Especial de la CIDH Sobre los Derechos de las Personas Privadas de Libertad en las Américas, Committee on Juridical and Political Affairs, Permanent Council of the Organization of American States, OAS Doc. OEA/Ser.G CP/CAJP/INF.25/06, 2 March 2006.

¹⁰ *Ibid.*

American Commission when it deals with cases concerning conditions of detention¹¹. Following consultations with various experts, civil society organizations, and Member States between 2005 and 2008, the Special Rapporteur concluded the drafting of the Principles, which were presented in March 2008 during the Inter-American Commission's 131st session.

The Principles' Preamble recognizes the right of all persons deprived of liberty to humane treatment, and to have their dignity, as well as their life, and their physical, mental, and moral integrity respected and ensured. The Preamble also points to over 30 international and regional human rights and international humanitarian law and soft law instruments that have direct bearing on the subject.¹² Paragraph 6 of the Preamble refers in particular to the OPCAT.

The Principles consist of the following:

- Principles I – VII are of a general nature and restate general human rights principles pertaining, *inter alia*, to the protection of persons deprived of their liberty from torture and inhuman treatment, the issue of non-discrimination, the right to personal liberty,¹³ the principle of legality, due process of law, and judicial control and supervision of punishments.
- Principles VIII – XX relate to the conditions of deprivation of liberty and XIX, reaffirming the importance of aspects relevant to detention such as the admission, registration and examination of persons who are going to be deprived of their liberty. They also deal with aspects such as health including access to healthcare, food, accommodation and hygiene work and education, freedom of expression and religion, measures against overcrowding, contact with the outside world and the separation of categories of detainees.
- Principles XX – XXIV are related to the systems governing the day-to-day operation of places of detention including the personnel, inspections of the installation by the authorities, disciplinary regime and measures against violence.

In this respect, the Principles provide some guidance on the best practice with regard to conditions of detention, based on general standards established by some of the international instruments mentioned in paragraph 6 of the Preamble. As such it may be possible to consider them as a type of regional standard, albeit non-legally binding.

¹¹ Ibid.

¹² Other instruments include the American Convention on Human Rights; Inter-American Convention to Prevent and Punish Torture; International Covenant on Civil and Political Rights; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; 1949 Geneva Conventions and their Additional Protocols of 1977; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care; Standard Minimum Rules for the Treatment of Prisoners; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

¹³ It is worth mentioning that Principle III pays particular attention to the deprivation of liberty of persons with mental disabilities.

Of particular interest with regard to the discussion as to the relationship between the Principles and the OPCAT is Principle XXIV on Institutional Inspections,¹⁴ which highlights the importance of regular visits and inspections to places of deprivation of liberty by national and international bodies and states that

“[...] regular visits and inspections of places of deprivation of liberty [which] shall be conducted by national and international institutions and organizations, in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect for human rights.”

Principle XXIV also reaffirms the role of the Special Rapporteur on the Rights of Persons Deprived of their Liberty and the Inter-American Commission to carry out visits to “verify the respect for the dignity and the fundamental rights and guarantees of persons deprived of liberty in Member States of the Organization of American States.”¹⁵

Arguably Principle XXIV was inspired by the OPCAT which aims to establish a system of regular visits by “by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”¹⁶ Currently, 12 States in Latin America have ratified the OPCAT.¹⁷ Until now, four of them have designated their NPMs: Honduras, Uruguay, Costa Rica and Mexico, but only the latter two are operational.¹⁸ Both countries have appointed existing institutions as NPMs, the Defensoría de los Habitantes and the National Human Rights Commission of Mexico respectively to fulfil the role of NPM. Honduras has only recently created a new institution to function as NPM, the National Committee for the Prevention of Torture, while Uruguay has recently decided to establish a national human rights commission that will also fulfil the role of NPM.¹⁹

3. Torture and the Inter-American system

¹⁴ Please note that institutional inspections and visits are used throughout this paper as equivalents of each other.

¹⁵ Principle XXIV.

¹⁶ See Article 1 OPCAT. The OPCAT was adopted in December 2002 and came into force in June 2006. A 10 member Subcommittee on the Prevention of Torture (SPT) as established by the OPCAT, was created in December 2006 with a mandate to conduct visits to the places of detention of the States Parties to the OPCAT. In addition, the OPCAT requires States Parties to establish, designate or maintain national preventive mechanisms (NPMs), which must have powers to visit places of detention under their jurisdiction and control on a regular basis.

¹⁷ As of 11 August 2009, the ratifying Latin American states are Argentina, Bolivia, Brazil, Chile, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay. In addition, Ecuador signed the OPCAT in 2007.

¹⁸ See Compilation of information on NPMs based on State Parties submissions to the SPT available at <http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm> (last visited on 1 August 2009). See also OPCAT Country Status Ratification and Implementation, Association for the Prevention of Torture, 29 June 2009, available at http://www.apr.ch/component/option.com_docman/task.doc_download/gid.124/Itemid.59/lang.en/ (last visited on 1 August 2009).

¹⁹ It is envisaged that this institution will commence its operation in 2010. See: APT, OPCAT Country Status Report Ratification and Implementation of 29 June 2009 available at, available at http://www.apr.ch/component/option.com_docman/task.doc_download/gid.124/Itemid.59/lang.en/ (last visited on 11 August 2009).

The Inter-American system of human rights has now developed a comprehensive approach towards the issue of torture. However initially the American Declaration of the Rights and Duties of Man,²⁰ which was adopted a number of months before the Universal Declaration of Human Rights,²¹ did not include an independent provision prohibiting torture. Thus, Article XXV on the right of protection from arbitrary arrest states that every individual who has been deprived of his liberty “[...] also has the right to humane treatment during the time he is in custody.” Article XXVI on the right to due process of law states that “[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.” Thus, at the inception of the system there was no free-standing prohibition of torture or obligation to prevent. An independent prohibition of torture or other cruel, inhuman or degrading treatment was only later established in Article 5(2) of the American Convention on Human Rights (ACHR), which did not include a reference to the prevention of torture.²²

The adoption of the Inter-American Convention to Prevent and Punish Torture²³ in 1985 introduced a new layer to the issue of torture in the Inter-American system. Thus, the obligation to prohibit torture was complemented with an obligation to prevent torture: Article 1 of the Inter-American Convention to Prevent and Punish Torture provides that

“[t]he State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.”²⁴

The system was reinforced with the appointment of the Special Rapporteur on the Rights of Persons Deprived of their Freedom of the Inter-American Commission in 2004. His mandate includes, *inter alia*,

- Gathering and obtaining information about the conditions of detention of persons deprived of their liberty in the OAS Member States;
- Carrying out (unannounced) visits to places of detention or centres for the deprivation of liberty of minors, and holding interviews in private with

²⁰ See American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia on April 1948.

²¹ See Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948.

²² Article 5 of the American Convention on Human Rights deals in general with a right to humane treatment, which is of a more general nature. Paragraph 2 of Article 5 provides, however, more specifically that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment and that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

²³ See Inter-American Convention to Prevent and Punish Torture, Adopted at Cartagena de Indias, Colombia, on 9 December, 1985.

²⁴ Incidentally the Inter-American Convention’s definition of torture is more detailed than the one found in the UN Convention Against Torture, including, *inter alia*, “[...] the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” The Inter-American Commission has asserted that the Inter-American Convention to Prevent and Punish Torture develops in more detail the principles found in Article 5 of the American Convention, and represents thus an auxiliary tool to Article 5. See *Bámaca Velásquez v. Guatemala*, judgment on the merits, Inter-American Court of Human Rights, 25 November 2000, Series C No. 70, para. 215.

detainees as well as with staff members of those places of detention and relevant authorities;²⁵

- Preparing reports and making recommendations on the basis of those visits for the Inter-American Commission;
- Making recommendations to Member States on the conditions of detention;
- Promoting the adoption of legislative measures to guarantee the rights of persons deprived of their liberty; and
- Coordinating verification and follow-up activities of Ombudsmen or National Human Rights Institutions with regard to conditions of detention.²⁶

An interesting aspect of the Special Rapporteur's mandate is that during his visits he also verifies the fulfilment of precautionary measures and provisional measures issued by the Inter-American Commission under Article 25 of the Commission's Rules of Procedure and by the Inter-American Court under Article 63 of the American Convention on Human Rights respectively with regards to situations related to conditions of detention. In September 2006, for example, the Special Rapporteur visited a detention centre for minors in Brazil to verify whether provisional orders issued by the Court in November 2005 had been implemented.²⁷ It would appear that the Inter-American Court had considered the adoption of these measures partially based on the report of his visit to the detention centre in July 2005.²⁸ In September 2008, the Special Rapporteur visited a neuropsychiatric hospital in Paraguay to verify whether precautionary measures adopted July 2008 by the Inter-American Commission to protect the lives and physical integrity of the hospital's patients, and to prevent further acts of physical violence and sexual abuse inside the hospital.²⁹

4. Prevention

²⁵ Additionally, the Special Rapporteur may interview the relatives of persons deprived of their liberty, members of NGOs, and other witnesses.

²⁶ For a further description of the mandate, see the website of the Special Rapporteur at <https://www.cidh.oas.org/PRIVADAS/mandato.htm> (last visited 23 July 2009).

²⁷ See Order of the Inter-American Court of Human Rights of 3 July 2007, Provisional Measures regarding Brazil, *Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM*. The Court had ordered Brazil to "[...] adopt immediately the necessary measures to protect the life and personal integrity of all the children and adolescents residing in the Tatuapé Complex, as well as that of all the persons within it; to maintain the necessary measures to prevent the young inmates from being subjected to cruel, inhuman or degrading treatment; to maintain and adopt the necessary measures to reduce substantially the overcrowding in the Tatuapé Complex; to confiscate the weapons in the possession of the young people, and to separate the interns in keeping with the corresponding international standards and taking into account the best interests of the child and to provide the necessary medical care to the children interned, in order to ensure their right to personal integrity; to take steps to ensure the participation of the representatives of the beneficiaries of the measures (hereinafter "the representatives") in their planning and implementation; to facilitate the entry of the representatives into the units of the Tatuapé Complex; to forward to the Court an updated list of all the young people who reside in the Tatuapé Complex; and to investigate both the facts that gave rise to the adoption of the provisional measures and the violent events that have occurred subsequently." *Ibid.*, para. 2. Arguably these provisional measures ordered by the Court can be called to be preventive.

²⁸ See Order of the Inter-American Court of Human Rights of 30 November 2005, Provisional Measures regarding Brazil, *Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM*, para. 2.

²⁹ See website of the Special Rapporteur found at <https://www.cidh.oas.org/PRIVADAS/visitas.htm> (last visited 1 August 2009).

The Inter-American Convention to Prevent and Punish Torture, does not further specify what is understood under the notion of ‘prevention of torture’, limiting itself to state in Article 6 that the States Parties shall take effective measures to prevent and punish torture, and other types of inhuman or degrading treatment within their jurisdiction. Nevertheless, the measures specified in Article 7 can be seen as examples of preventive measures aimed at deterring torture:

“[...] States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.”

However, other examples of preventive measures as understood under the OPCAT or the Principles (i.e. regular proactive visiting by independent inspecting bodies to monitor conditions of detention; obtaining information and interviewing persons deprived of their liberty; engaging in cooperative dialogue with authorities responsible for these places; and making recommendations following these visits and/or making recommendations to change or adopt new legislation) are not found in the Inter-American Convention. It is worth emphasizing in this respect that the Preamble to the Inter-American Convention refers to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and its Optional Protocol, as well as soft-law standards dealing with the treatment of persons deprived of their liberty such as the Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Standard Minimum Rules for the Treatment of Prisoners; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). The Inter-American Court however has not until now officially given an interpretation of the obligation to prevent torture found in Article 6 of the Inter-American Convention.³⁰ Since the Inter-American Court’s role also includes providing interpretation of the American Convention and “of other treaties concerning the protection of human rights in the American states[,]”³¹ perhaps the Inter-American Commission could request the Court to prepare an advisory opinion on the interpretation of the concept of prevention.

³⁰ In the first case to deal with the Inter-American Convention to Prevent and Punish Torture, the *Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala*, the Inter-American Court concluded that there had been a violation of Article 6 of that Convention, but did not give any further indication as to whether this involved a violation of the obligation to prevent or the obligation to punish torture (or both) and the exact content of these obligations. See *Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala*, judgment on the merits, Inter-American Court of Human Rights, 8 March 1998, Series C No. 37, para. 136. Subsequent cases like the *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala (Merits)*, and the *Case of Cantoral-Benavides v. Peru (Merits)* reveal a similar approach although, the Inter-American Court makes it clearer that the violations found in those cases pertain more to a breach of the obligation to punish torture and to the right of victims to have an impartial examination of their cases (Article 8 of the Inter-American Convention to Prevent and Punish Torture). See *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*, judgment on the merits, Inter-American Court of Human Rights, 19 November 1999, Series C No. 63, para. 251, and *Case of Cantoral-Benavides v. Peru*, judgment on the merits, Inter-American Court of Human Rights, 18 August 2000, Series C No. 69, paras. 185 – 191.

³¹ Article 64 of the American Convention on Human Rights.

The Principles are not legally binding but reflect existing legal concepts of international and human rights law that relate to conditions of detention. As already observed, the Preamble to the Principles point to the CAT and the OPCAT as two of the international instruments that enshrine principles, which are relevant for the protection of persons deprived of their liberty. However the Principles contain no further direct reference to the OPCAT, and while they do not refer explicitly to the issue of torture prevention *per se*, the underlying concepts that they expound reflect a certain preventive approach, which is also at the core of the OPCAT. Thus the main thrust of the Principles is geared towards moving the OAS Member States to adopt policies aimed at reforming or restructuring their administration of justice system as well as improving conditions of detention, training and educating staff working in places of detention,³² and facilitating regular inspections by independent bodies in an effort to enhance the protection of persons deprived of their liberty. This certainly can be said to constitute the essence of the prevention of torture and other forms of ill-treatment as aims at systemic changes, achieved through a holistic approach.

Principle XXIV on Institutional Inspections arguably embodies some of the core aspects of the preventive approach of the OPCAT, namely the use of international and national bodies to visit places of detention with the aim of preventing torture and other forms of ill-treatment, as stipulated in Article 4 of the OPCAT. This Principle acknowledges implicitly the possibility that States will allow institutional visiting by the SPT and NPMs as required by the OPCAT. It also gives room to other international bodies such as the UN Special Rapporteur on Torture or the UN Working Group on Arbitrary Detention and other national bodies like National Human Rights Institutions or Prison Inspectorates/Ombudsmen or civil society organizations that are not part of the OPCAT system to carry out such visits. This is of great importance for those countries that have not yet ratified the OPCAT or perhaps do not consider its ratification.

There are several ways in which the Principles could be strengthened to give further content to the concept of prevention. For example, Principle XXIV could be amended to include a reference to the prevention of torture and refer directly to the OPCAT as one of the means of potentially strengthening the concept of institutional inspections highlighted by the Principles. Another way of achieving this without amending the Principles would be for the Inter-American Commission to issue an interpretation by way of recommendation to States as provided by Article 18(b) of the Commission's Statute, which elucidates more on the core aspects stated in Principle XXIV. Such an interpretation could also make more specific references to what can be expected of the mandate of the visiting institution in terms of independence and powers. This could happen by referring directly to the text of the OPCAT and its relevant articles or by including more detailed provisions to that effect. In addition, since the Principles also point to a role of 'other' organizations such as NGOs, the Inter-American Commission could also further expand on the type of role these could have beyond visiting since these can have an important role in the implementation of the Principles and the OPCAT. It would also probably be useful if the Inter-American Commission

³² The preamble to the OPCAT observes that prevention also requires education and a combination of various legislative, administrative, judicial and other measures.

ascertains in a similar fashion as it did in Principle XXIV, that the Principles do not affect the activities of NGOs currently engaged in visiting.³³

5. Meaning of ‘deprivation of liberty’ and inspections pursuant to the Principles

The Principles start by defining the concept of ‘deprivation of liberty’, which to a certain degree resembles the definition deprivation of liberty found in Article 4 of the OPCAT, although the Principles’ approach is more detailed. According to the Principles, deprivation of liberty is

“Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.”

This definition encompasses a very broad understanding of the concept of deprivation of liberty and of places of detention. Although the Principles list a broad range of places of detention, it also observes that this list is not exhaustive (“...and any other similar institution the purpose of which is to deprive persons of their liberty.”). In comparison, Article 4 (2) of the OPCAT, which also provides a definition of ‘deprivation of liberty’, is less detailed and defines it as “[...] any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.” It does not provide any further example of places of deprivation of liberty as the Principles do.

On the other hand, Article 4 (1) of the OPCAT does mention that deprivation of liberty can take place through an “[...] an order given by a public authority or at its instigation or with its consent or acquiescence [...]” This is not found in the Principles, potentially/possibly entailing a more limited scope (only official detentions are recognized by the Principles, whereas the OPCAT recognizes unofficial detentions with the State’s consent or acquiescence). However, the Principles go to greater length than the OPCAT to explain that detention is not only the result of an order by a

³³ The last two paragraphs of Principle XXIV state that “[t]he mandate of the Inter-American Commission on Human Rights and its Rapporteurships, in particular the Rapporteurship on the Rights of Persons Deprived of Liberty, shall be respected in all circumstances, so that they may verify the respect for the dignity and the fundamental rights and guarantees of persons deprived of liberty in Member States of the Organization of American States[,]” and “[t]hese provisions shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1997, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.”

judicial, administrative or other authority, but also of the result of their de facto control for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. In addition, the Principles explicitly state that deprivation of liberty goes beyond traditional incarceration of those accused or convicted for crimes by including situations of custody and supervision in psychiatric institutions, institutions for children and the elderly, and detention centres for migrants and refugees, although they fail to mention military places of detention.

With regard to visits and inspections, Principle XXIV states that these have to be regular. It also prescribes unannounced inspections (“[...] at any time and under any circumstance [...]”) which have to be carried out with full access to places of deprivation of liberty and their installations.³⁴ Full access also entails

“[...] access to the information and documentation relating to the institution and the persons deprived of liberty therein; and the possibility of conducting private and confidential interviews with persons deprived of liberty and personnel.”

It should be noted that it is not altogether clear whether ‘full access’ entails full access to any installations within a particular place of deprivation of liberty as is specified in Articles 14(c) and 20(c) of the OPCAT. Perhaps the Commission could further clarify in the future if this is also the case under the Principles.

Principle XXIV makes it clear that the mandate of the Inter-American Commission and its Rapporteurships, in particular the Rapporteurship on the Rights of Persons Deprived of Liberty, has to be respected, and that the inspections shall not affect the obligations of States Parties to the 1949 Geneva Conventions and their 1977 Additional Protocols. More specifically, the possibility of allowing the ICRC to visit places of detention has to remain intact.³⁵

6. Inspection by the Special Rapporteur on the Rights of Persons Deprived of their Freedom, and relationship with SPT

Article 11(c) of the OPCAT enables the SPT to cooperate with the relevant UN organs and mechanisms as well as with other international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment. In addition, and more importantly, under Article 31 of the OPCAT the SPT is encouraged to consult and cooperate with bodies established under regional conventions establishing a system of visits to places of detention in order to avoid duplication and promoting effectively the objectives of the OPCAT.³⁶ It is worthwhile to observe that both the Inter-American Commission and the SPT have taken some steps to strengthen their ties. Thus, the Executive Secretary of the Inter-American

³⁴ As it will be observed below, visits by the Special Rapporteur on the Rights of Persons Deprived of their Liberty will require previous invitation from the country being visited.

³⁵ A similar provision can be found in Article 32 of the OPCAT.

³⁶ See Relationship between the Optional Protocol to the UN Convention against Torture (OPCAT) and other international and regional visiting mechanisms, policy paper prepared by the OPCAT Research Team at Bristol University, available at <http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs> (forthcoming).

Commission was invited by the SPT to attend its second session in June 2007 to participate in its exercise on developing working methods.³⁷ The Special Rapporteur on the Rights of Persons Deprived of their Liberty has also indicated that there have been some initiatives to engage with the SPT, although no further information has been made available as to the content of these initiatives.³⁸ In addition, one of the SPT members was present during the sessions of the Inter-American Commission in March 2008 during which the imminent adoption of the Principles was announced by the Special Rapporteur.³⁹ Thus, on the 4th of March the Inter-American Commission held a working luncheon with the Committee against Torture (CAT), the SPT member, and the Association for the Prevention of Torture (APT), for the purpose of strengthening mechanisms of mutual cooperation.⁴⁰ The fact that a number of the current members of the SPT have first-hand knowledge of and experience with the Inter-American human rights system has probably contributed in a positive way to forge this relationship.⁴¹ This is an encouraging development, although concrete steps to strengthen this relationship are yet to be made. Although it would appear that the SPT and the Inter-American Commission have made proposals to formalize the relationship between both bodies to join efforts and complement each other's activities as well as avoid duplication as required under Article 31 of the OPCAT,⁴² it is still not clear how this is being concretized. A starting point would be the appointment of a focal point within the SPT to deal directly with the Inter-American Commission and the Special Rapporteur on a permanent basis to keep each other informed of their respective activities.⁴³

³⁷ See First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 2007 to March 2008), SPT, UN Doc. CAT/C/40/2 (14 May 2008), para. 38.

³⁸ See speech by Florentín Meléndez, President of the Inter-American Commission on Human Rights and Special Rapporteur on the Rights of Persons Deprived of their Liberty presented during the opening of the 130th period of sessions of the Inter-American Commission, 9 October 2007 available at <http://www.oas.org/speeches/speech.asp?sCodigo=07-0121> (last visited on 25 July 2009).

³⁹ Summary of the Thematic Meeting on the Implementation of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment before the Inter-American Commission on Human Rights requested by the APT, 7 March 2007, available at <http://www.apr.ch/region/americas/MemoCELS.pdf> (last visited on 25 July 2009).

⁴⁰ See Press Release N° 10/08, by the Inter-American Commission on Human Rights, "IACHR Concludes its 131st Period of Sessions", available at <http://www.cidh.org/Comunicados/English/2008/10.08eng.htm> (last visited on 25 July 2009). During the meeting, emphasis was placed on the importance that all OAS Member States ratify the OPCAT. On a later meeting, the SPT member made a presentation containing suggestions as to how the bodies of the Inter-American system and the SPT could engage in further cooperation. See presentation by Mario Coriolano, member of the SPT, before the Inter-American Commission on Human Rights of 7 March 2008, available at <http://www.apr.ch/region/americas/PresentationCIDH.pdf> (last visited on 25 July 2009).

⁴¹ The current president of the SPT, Mr. Victor Rodríguez Rescia, for example is a consultant for the Inter-American Institute for Human Rights. The Inter-American Institute supports the work of the Inter-American system on human rights and is an independent international academic institution, created in 1980 under an agreement between the Inter-American Court of Human Rights and the Republic of Costa Rica.

⁴² See Summary of the Thematic Meeting on the Implementation of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment before the Inter-American Commission on Human Rights requested by the APT, 7 March 2007, available at <http://www.apr.ch/region/americas/MemoCELS.pdf> (last visited on 24 July 2009).

⁴³ It should be noted, however, that a number of SPT members come from Latin America and maintain close albeit informal contacts with the relevant mechanisms of the System.

An important issue in this regard is the fact that both the SPT and the Special Rapporteur are mandated to carry out visits to places of detention and issue recommendations to the respective authorities on their findings during such visits. The SPT has until now carried out two visits to Latin America, to Mexico in September 2008 and Paraguay in March 2009.⁴⁴ These are countries that have already been visited by the Special Rapporteur (in 2007 and 2008 respectively). It is not known in how far the SPT benefited from the information obtained from these visits (in particular the one to Mexico) in its preparation for its visits. To help prepare the SPT in its visits to countries already or recently visited by the Special Rapporteur and thus also avoid duplication of efforts, the Special Rapporteur should be encouraged to relay his findings to the SPT, especially given the fact that there are no strict confidentiality rules applicable to the work of the Special Rapporteur as those applicable to the work of the SPT.⁴⁵ The SPT equally need to proactively engage with the work of the Special Rapporteur so as to complement the work carried out within the framework set out, taking into the consideration the applicable rules of confidentiality.

Another issue to reflect upon is the fact that visits by the Inter-American Commission, and thus also by the Special Rapporteur, can only take place at the invitation of the OAS Member States.⁴⁶ This stands in contrast with the SPT's position: under the OPCAT, States are required to allow the SPT to visit them without prior invitation.⁴⁷ On the other hand, the Special Rapporteur can in theory visit all the OAS Member States who have expressed consent notwithstanding whether they have ratified or not the American Convention or the Inter-American Convention on the Prevention and Punishment of Torture, whereas the SPT can only visit those States that have ratified the OPCAT.

A final comparison point is the use of experts during visits. Pursuant to Article 13 (3) of the OPCAT, the SPT may be accompanied by "[...] experts of demonstrated professional experience and knowledge in the fields covered by the" OPCAT. The use of experts may be necessary to complement the knowledge and expertise of the SPT members carrying out the visit. This is directly related to the types of places of detention that the SPT is entitled to visit. The broad range of places of detention that fall under Article 4 of the OPCAT means that the visiting SPT team must have sufficient expertise to allow it to properly cover 'traditional' (like prisons and police cells) and 'less traditional' places of detention such as psychiatric institutions, hospitals, care homes for the elderly or for the youth, military places of detention or migrant places of detention. By comparison, it appears that the Special Rapporteur of the Inter-American system does not avail himself of the use of experts to accompany

⁴⁴ The SPT is planning to visit Honduras in the second half of 2009, the details of the planned visit have not been announced at the time of this writing

⁴⁵ Article 16 of the OPCAT: the report ensuing from the visit by the SPT remains confidential unless the State Party visited requests the publication and at the time of this writing, only Maldives (the first country visited by the SPT) and Sweden (the third country visited by the SPT) have made such requests.

⁴⁶ See Article 18 (g) of the Statute of the Inter-American Commission on Human Rights. Although once invited, the Special Rapporteur can carry out unannounced visits to places of detention. See f.e. the visit to

⁴⁷ See Article 4(1) and 12 of the OPCAT. It should be noted that this obligation could be postponed under Article 24 of the OPCAT for a maximum of three years with a possible extension of two years.

him during his visits due to lack of resources.⁴⁸ In addition, although the Special Rapporteur's mandate allows him to visit any place of detention, and this has arguably been clarified with the broad approach to the deprivation of liberty used in the Principles, it appears that since its inception in 2004, the Special Rapporteur has mainly focused on traditional places of detention such as penitentiary institutions and police cells.⁴⁹ The only visit to a less-traditional place of detention was carried out in September 2008 when he visited a psychiatric institution in Paraguay to verify whether precautionary measures adopted by the Inter-American Commission were being respected.⁵⁰ This brings up also the question of the nature of the visit by the Special Rapporteur. Although both bodies share a similar mandate, the focus of visits by the SPT is prevention, whereas a visit by the Special Rapporteur may be more in the context of verifying compliance with measures adopted by the Inter-American Commission. In addition, visiting places of deprivation of liberty is only one aspect of the preventive mandate of the SPT as the body also 'focus [es] on broader elements of the situation in a particular country, like analysing legal and system features and current practices, in order to identify gaps in the protection against ill-treatment'.⁵¹

In sum, if concrete and effective cooperation between the SPT and the Inter-American system is to mature, a proper understanding and assessment of the mandate and activities of both systems and their limitations has to take place. Sharing information between the SPT, the Inter-American Commission, and the Special Rapporteur about places visited and the recommendations issued will be vital in this regard to ensure that they operate in a coordinated way and complement the work of each other.

7. Inspections by national visiting bodies

The Principles promote the use of national bodies or institutions to carry out visits to places of detention, although it does not further detail how these institutions should look like or what type of mandate they should have. The Principle XXIV embodies some of the elements found in the OPCAT with regard to the functional characteristics of national visiting bodies, like requirement to have full access to places of deprivation of liberty and its documentation as well as the possibility of conducting interviews in private with persons deprived of their liberty and the personnel of the detention facilities. However it falls short of some important institutional guarantees that the OPCAT sets out in respect to the NPMs. Thus, in contrast to Articles 18 and 19 of the OPCAT, Principle XXIV:

- Does not mention whether national institutions that conduct visits must be independent (both functionally and financially);
- Does not detail what the composition in terms of expertise and representation should be within these institutions;

⁴⁸ Interview with Mr. Leonardo Hidaka, former legal assistant to the Special Rapporteur on the Rights of Persons Deprived of their Freedom, 4 March 2009 (on file with authors).

⁴⁹ See the Special Rapporteur's website for a list of the countries and places visited by him since 2004.

⁵⁰ See <https://www.cidh.oas.org/PRIVADAS/visitas.htm> (last visited on 1 August 2009).

⁵¹ Relationship between the Optional Protocol to the UN Convention against Torture (OPCAT) and other international and regional visiting mechanisms, policy paper prepared by the OPCAT Research Team at Bristol University, available at <http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs> (forthcoming).

- Does not open the possibility for the institutions to provide recommendations following the visits or make suggestions or proposals to amend existing legislation, or to make their findings public through the publication of a report.

Moreover, Article 18 of the OPCAT contains a direct reference to the Paris Principles⁵² which states are to ‘give due regard to’ when establishing their NPMs, which in turn contain further guidance on such important aspects as, for example, how the members of the institution should be elected, their representativeness and further independence guarantees.

The Principles do not further specify which type of bodies could take part in the institutional inspections. The OPCAT allows in this respect ample freedom to State Parties to either designate existing institutions as NPMs, or establish new ones.⁵³ At the time of this writing most of the countries in Latin America have ratified the OPCAT. However, only two Latin American OPCAT States have operational NPMs: Costa Rica and Mexico have chosen to appoint existing bodies as their respective NPMs.⁵⁴ Uruguay has appointed its National Human Rights Commission which at the time of this writing has not yet been created⁵⁵. Similarly to this, Chile is likely to appoint a yet to be created National Human Rights Commission to fulfil the task of NPM.⁵⁶ Honduras, on the other hand, has adopted the necessary legislation for the creation of the National Committee for the Prevention of Torture, which has been designated as the country’s NPM⁵⁷ and similarly Paraguay is in the final process of establishing new institution purposefully created to fulfil the NPM task.⁵⁸ The rest of OPCAT States in the region appear to be struggling with the NPM process and are looking for guidance from the SPT on the course to proceed. While there appears to

⁵² Paris Principles relating to the Status and functioning of National Institutions for Protection and Promotion of Human Rights, G.A.Res. 134, UN GAOR, 48th Sess., UN Doc. A/RES/48/134 (1993).

⁵³ See Article 17 of the OPCAT

⁵⁴ The National Human Rights Commission of Mexico has been designated as the NPM. A specific unit within the Commission, the ‘Tercera Visitaduría, which is composed of a Director and 13 interdisciplinary staff, some of whom were formerly involved in prison monitoring within the NHRC, has been appointed to carry out the task of visiting, engaging in dialogue with authorities, and coming up with the necessary recommendations. It has recently published its first annual report, which details that it has carried out over 300 hundred visits to places of detention in some of the federal states in the country. To facilitate this, it has signed agreements with a number of human rights commissions of some of those states.

In Costa Rica, the Defensoría de los Habitantes (the Ombudsman) was designated through a presidential decree in 2007 as the NPM. The Ombudsman’s office has created a small unit within the office to carry out the NPM tasks. See APT OPCAT Country Status Report Ratification and Implementation of 29 June 2009 available at http://www.apt.ch/component/option.com_docman/task_doc_download/gid,124/Itemid,59/lang,en/ (last visited on 29 July 2009).

⁵⁵ See correspondence between SPT and the Government of Uruguay with respect to the designation of the National Human Rights Commission as NPM, available at <http://www2.ohchr.org/english/bodies/cat/opcat/docs/NPM/Uruguay.pdf> (last visited on 1 August 2009).

⁵⁶ APT OPCAT Country Status Report Ratification and Implementation of 29 June 2009.

⁵⁷ See correspondence between SPT and the Government of Honduras with respect to the designation of the National Committee for the Prevention of Torture as NPM, available at <http://www2.ohchr.org/english/bodies/cat/opcat/docs/NPM/Honduras.pdf> (last visited on 1 August 2009).

⁵⁸ The Paraguayan legislature is still considering a draft law to establish a National Committee for Prevention of Torture. See APT OPCAT Country Status Report Ratification and Implementation of 4 March 2009.

be a tendency in the region to establish new bodies as the NPMs,⁵⁹ there is also a possibility that some Latin American States may opt for a pragmatic approach and resort to appoint bodies such as National Human Rights Institutions (NHRIs) like Ombudsmen or National Human Rights Commissions, which are already in place.⁶⁰ While the NHRIs such as Ombudsmen offices can be capable of performing as NPMs, it is by no means a foregone conclusion that they will always be the best choice to fulfil the task of an NPM under the OPCAT.⁶¹ The main consideration for the choice of the NPM within the country must therefore remain that of what is suited for the particular geopolitical, legal, social and cultural contingencies of the country.

It should also be noted that in contrast to the African Commission on Human and Peoples' Rights, the Inter-American Commission does not have an established procedure on how to engage with NHRIs.⁶² At the moment, there are some efforts to establish a system of cooperation between NHRIs and the Inter-American Commission. Thus, the General Assembly of the OAS has issued a number of resolutions on Strengthening of the National Human Rights Systems of the Member States and Support for the Work of Defenders of the People, Defenders of the Population, and Human Rights Attorneys or Commissioners (Ombudsmen)⁶³ encouraging to promote "[...] the establishment of forums for dialogue between institutions of the kind to which this resolution refers and the pertinent organs of the inter-American system, in order to strengthen their contribution to the democratic order in the Hemisphere."⁶⁴ In an address during the opening of the 130th session of the Inter-American Commission, the President of the Commission observed that it had held various meetings with ombudsmen throughout the region "[...] to exchange views on possible cooperation with national human rights institutions, in order to strengthen the Inter-American system and in particular to enforce the decisions of the Court and the Commission itself."⁶⁵ These discussions included prospects for cooperating in joint activities. Thus, the President of the Commission noted that in his capacity as Special Rapporteur on the Rights of Persons deprived of their liberty he carried out a joint visit to a penitentiary in Mexico City together with the State

⁵⁹ INSERT FOOTNOTE TO APT's country by country with examples of Bolivia and Guatemala

⁶⁰ Thus in Nicaragua and Peru, there are serious discussions to designate existing Ombudsmen Offices as the NPMs of their respective countries. See APT OPCAT Country Status Report Ratification and Implementation of 29 June 2009.

⁶¹ Policy Paper prepared by the OPCAT Research Team of Bristol University on the Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture, available at <http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/iccaccreditationandnpps.pdf> (last visited 3 August 2009).

⁶² With regard to the African Commission's procedure see Policy Paper prepared by the OPCAT Research Team of Bristol University on the Relationship between the African Commission on Human and Peoples' Rights Robben Island Guidelines and the Optional Protocol to the UN Convention Against Torture (OPCAT) available at <http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/rigrelationshipwithopcat.pdf> (last visited on 29 July 2009).

⁶³ See Resolutions of the General Assembly of the OAS, OAS Doc. AG/RES. 2132 (XXXV-O/05) and AG/RES. 2221 (XXXVI-O/06) of 7 June 2005 and 6 June 2006 respectively on Strengthening of the National Human Rights Systems of the Member States and Support for the Work of Defenders of the People, Defenders of the Population, and Human Rights Attorneys or Commissioners (Ombudsmen).

⁶⁴ *Ibid.*, para. 4.

⁶⁵ Address by the President of the Inter-American Commission on Human Rights, Florentin Melendez, at the Opening of the 130th Regular Session 9 October 2007 collected in Annex 3 to the Annual Report of the Inter-American Commission on Human Rights 2007, OAS Doc. OEA/Ser.L/V/II.130, Doc. 22, rev. 1, 29 December 2007.

Commission of Human Rights of Mexico.⁶⁶ So far, however, these initiatives have not lead to further engagement, in spite of the fact that at the level of the Americas there is a regional network for NHRIs which already has a collaborative relationship with the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).⁶⁷

Given the important role of NPMs in the context of the OPCAT, and the relationship between the Principles and the Optional Protocol, the most pertinent question in regard to the NPMs is therefore how the Inter-American Commission and the Special Rapporteur engage with these bodies, given the fact that it is the SPT who has been charged with the mandate to work with the NPMs. It is thus essential to ensure that the NPMs do not get mixed messages from the Inter-American bodies and the SPT. There is in this regard a need for more communication between the SPT, the Inter-American system's bodies, States and potential NPMs to discuss the various options that are available for the states parties when making the choice for their respective NPMs as well as on their operational modalities. This could happen through holding special joint sessions between the Inter-American Commission and the SPT with the participation of the stakeholders such as NHRIs to discuss about approaches and best practices. The participation of representatives of the Inter-American Commission and the SPT in each other's respective sessions would be beneficial, and already seems to take place,⁶⁸ although admittedly the time available during these sessions for such meetings and the fact that the SPT meets in camera may limit this possibility. In addition, the Inter-American Commission could gather information from the national institutions that could be relayed to the SPT. Similarly, organizing regional training sessions for national visiting bodies with the participation of the SPT could also be a vehicle for this, although given the SPT's financial limitations, this may prove to be difficult. Engagement could also take place by carrying out joint visits as the Special Rapporteur has already done with the Commission of Human Rights of the State of Mexico. Here, however, consideration must also be given to the issue of confidentiality as the visits carried out by the SPT to places of detention are strictly confidential. It is also important that the Inter-American Commission and the Rapporteur are informed of the NPM process in each OPCAT ratifying State in Latin America. This could take place by establishing a coordinating mechanism for NPMs within the Inter-American Commission, which could be led by the Special Rapporteur on the Rights of Persons Deprived of their Liberty.

It is also important to observe that NPMs are posed to become important interlocutors providing valuable information to the Special Rapporteur, potentially becoming his 'eyes' on the ground. Thus they could provide deeper, more detailed analysis with regard to the improvement or deterioration of the conditions of detention in Latin America as well as informing the Inter-American system of the fulfilment of for example precautionary or provisional measures issued by the Inter-American Commission and Court. The Inter-American Commission could expand on the Principles to encourage deeper commitment and cooperation between NPMs and the

⁶⁶ Ibid.

⁶⁷ The Red de Instituciones Nacionales para la Promoción y Protección de los Derechos Humanos del Continente Americano (Network of National Institutions for the Promotion and Protection of Human Rights of the Americas).

⁶⁸ See First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 38.

bodies of the Inter-American system. Setting up and actively participating in a regional coordinating network of NPMs as suggested above to share information and experiences as well as engaging in joint visits and inspections could be means of achieving this.

Finally, it is necessary to discuss the relevance of the Principles to the work of the visiting bodies. Can the Principles be used as guidelines in the practical work of the visiting bodies? The Principles are not legally binding but reflect existing legal concepts of international and human rights law that relate to conditions of detention as summarized in paragraph 6 of the Preamble. If the Principles can be considered as regional standards, similar to the European Prison Rules issued by the Council of Ministers of the Council of Europe, this may have some implications to the inspections carried out by the visiting bodies, be them NPMs or regional and international ones like the SPT. The Principles can provide a reference point of what is expected from the national legislative framework and the ways it ought to be reflected in the physical conditions, system and regime applicable to the places of deprivation of liberty. Thus in carrying out their inspections, the visiting bodies should be encouraged to assess compliance of the places they visited against the Principles.

8. Suggested ways forward and conclusion

It would be helpful if the Inter-American Commission provided further content to the concept of prevention, either through amendments to the Principles which could include a specific reference to the prevention of torture and refer to the OPCAT as one of the means of potentially strengthening the concept of institutional inspections highlighted by the Principles, or through issuing an interpretation which elucidates more on the core aspects stated in Principle XXIV. Such a resolution could also make more specific references to what can be expected of the mandate of the visiting institution in terms of independence and powers. It could also request the Inter-American Court to prepare an advisory opinion on the interpretation of the concept of prevention found in the Inter-American Convention to Prevent and Punish Torture.

A stronger relationship between the SPT and the Inter-American bodies is also crucial to enhance the applicability of OPCAT in the American system. This could be done in a number of ways, for example, through the appointment of an official focal point for the Americas within the SPT who can have responsibility to deal directly with the Inter-American Commission and its Special Rapporteur, to keep each other informed of their respective activities. In terms of information sharing, the Special Rapporteur could also relay his findings and recommendations to the SPT following his visits so that the latter can take these into consideration while preparing a visit to the countries visited by the Rapporteur.

A more formal process by which the Inter-American Commission can engage with NHRIs and NPMs will also facilitate better coordination between OPCAT and the Americas. This could be done through the Inter-American Commission encouraging the establishment of regional coordinating networks of NPMs and actively engaging with such a structure itself.

In turn, however, some responsibility should also be placed on the NPMs themselves to make better use of the Inter-American system by engaging with the various actors who may have relevance to their mandate.

The Special Rapporteur could also engage more firstly, with NPMs through for example utilizing them as resources during his country visits, and secondly with the SPT in terms of coordinating their respective visits. Further discussion between the Special Rapporteur and SPT members could facilitate sharing of information and reports on a regular basis, exchange of methods of work methodology of visits, and approaches to relevant standards. The opportunity for the Special Rapporteur to participate in visits by the SPT has been raised as a possibility⁶⁹ and could be explored further.

Overall, while the Inter-American human rights system has not neglected OPCAT or its important elements, it has developed in parallel to the Protocol and some differences in approach and gaps are starting to appear. There are numerous opportunities at this stage for the Inter-American institutions to engage with OPCAT more fully to ensure greater coordination and consistency between them.

University of Bristol OPCAT Research Team
August 2009

⁶⁹ See Report on the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT) organized by the OPCAT Research Team at the Law School, University of Bristol April 19-20, 2007, available at <http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/conferenceproceed.doc> (last visited 1 August 2009).