

## **The Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture**

The Optional Protocol to the UN Convention Against Torture (OPCAT) requires states to ‘maintain, designate or establish...one or several independent national preventive mechanisms’ to visit places of detention at the national level (Article 17). The Protocol sets out several requirements for these NPMs centred around the need for them to be independent. OPCAT also creates an independent international body, the Sub Committee for the Prevention of Torture (SPT) whose tasks are to visit places of detention in states, advise and assist in relation to NPMs and cooperate with relevant international, regional and national bodies for the prevention of torture (Article 11).

The International Coordinating Committee of National Human Rights Institutions (ICC) is the representative body of national human rights institutions (NHRIs) and has established a Sub Committee on Accreditation from among its members which then accredits NHRIs as being in compliance with the Paris Principles. The National Institutions Unit is the secretariat of the ICC.

There has been some discussion over the relationship between the accreditation given to NHRI by the ICC’s Subcommittee on Accreditation, and the suitability of that same institution as a national preventive mechanism (NPM) under OPCAT.

The reasons why this discussion is important are:

- There is explicit reference to the Paris Principles in the OPCAT text.<sup>1</sup>
- The Subcommittee on the Prevention of Torture (SPT) is currently attempting to define its own criteria for approaching NPMs and its relationship with them, through the recent adoption of its Preliminary Guidelines on National Preventive Mechanisms and its first Annual Report,<sup>2</sup> among other measures;
- Several states have selected or are considering selecting a NHRI as their NPM,<sup>3</sup>
- Some NHRIs are using their accreditation by the ICC as a reason why they should be accorded NPM status. Similar calls have also been made by the Deputy High Commissioner for Human Rights;<sup>4</sup>
- ICC accreditation is a powerful tool for NHRIs and needs to be considered carefully in the context of OPCAT (as well as other Conventions, such as the UN Disability Convention);

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<sup>1</sup> Article 18 (4), OPCAT.

<sup>2</sup> First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CAT/C/40/2; 14 May 2008; para 28.

<sup>3</sup> APT, NATIONAL PREVENTIVE MECHANISMS. COUNTRY-BY-COUNTRY STATUS UNDER THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE (OPCAT); Report of 11 August 2008, <http://www.apr.ch/content/view/44/84/lang.en/>; See also: APT, List of Designated National Preventive Mechanisms; Available at: <http://www.apr.ch/content/view/138/152/lang.en/>

<sup>4</sup> See address of Deputy High Commissioner at meeting in Nairobi, October 2008, [www.nhri.net](http://www.nhri.net).

- Some governments might look to whether a NHRI is accredited by the ICC as a factor in determining their choice of NPM under OPCAT (and national monitoring framework under the Disability Convention);
- There is some overlap between the criteria and standards for NPMs in OPCAT and for NHRIs in the Paris Principles (e.g. independence, pluralism, functions and information-gathering powers);
- At present the ICC accreditation process deals with NHRIs such as National human rights commissions, human rights ombudsman and specialised agencies. It might happen in the future that the ICC is requested to consider applications for membership by national human rights bodies which undertake NPM functions.<sup>5</sup> As to whether the ICC should further elaborate on how to cover those types of bodies as well, is also open to debate.
- The National Institutions Unit of the OHCHR is also encouraging all UN treaty bodies to engage with NHRIs when reviewing the human rights performance of a given country.<sup>6</sup>
- In addition OHCHR in its capacity as the Secretariat of the ICC (and therefore of its Sub-Committee on Accreditation) has recognised the need to develop with the ICC a stronger, more transparent and reliable accreditation process that includes the development of General Observations on the implementation of the Paris Principles in practical terms.
- The current accreditation process for NHRIs assess their compliance with the Paris Principles both from a legal point of view as well as by increasingly considering their effectiveness at the national level;
- Nowadays only “A” accredited NHRIs are allowed to address the Human Rights Council. The UPR process and the Treaty Bodies taken the accreditations status very seriously when considering a country.<sup>7</sup>
- The High Commissioner for Human Rights has asked NHRIs specifically to look at the issue of torture.<sup>8</sup>

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<sup>5</sup> The language NHRIs is used for all kind of national human rights institution including ombudsman, commissions, procuradurias or specialized institutions.

<sup>6</sup> It is noted that the ICC has the authority to approve general observations. According to General Observation 1.4 re Interaction with the International Human Rights System, The Sub-Committee highlights the importance for NHRIs to engage with the international human rights system, in particular the Human Rights Council and its mechanisms (Special Procedures Mandate Holders) and the United Nations Human Rights Treaty Bodies. This means generally NHRIs making an input to, participating in these human rights mechanisms and following up at the national level to the recommendations resulting from the international human rights system. In addition, NHRIs should also actively engage with the ICC and its Sub-Committee on Accreditation, Bureau as well as regional coordinating bodies of NHRIs.

<sup>7</sup> See Conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies (Berlin, 23 and 24 November 2006), UN Doc. HRI/MC/2007/3.

<sup>8</sup> Resolution 2005/74, para 9. As part of the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights the OHCHR has chosen to focus on issues of detention and in this regard has invited NHRIs to undertake activities in this arena, see Statement on UDHR 60 Anniversary Initiatives, Ms. Kyung-wha Kang, UN Deputy High Commissioner for Human Rights, ICC 20<sup>th</sup> Session, April 2008, Geneva, Draft report of the Twentieth Session of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), [http://nhri.net/2008/ICC20\\_Final\\_Record\\_of\\_Proceedings.DOC](http://nhri.net/2008/ICC20_Final_Record_of_Proceedings.DOC). See also Nairobi Declaration, Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights Nairobi, Kenya, 21-24 October 2008, <http://demotemp360.nic.in/2008/Nairobi%20Declaration%20-%20ENGLISH.pdf>.

We wish to argue in this paper that there should not be a presumption that because an institution is accredited by the ICC that it would make an effective or appropriate NPM under OPCAT (or a national framework under the Disability Convention).<sup>9</sup> This is because of the manner of the accreditation process by the ICC, the very specific way of working by the SPT, the nature of OPCAT and what it requires of NPMs, that particular functions are to be performed by the NPM which a NHRI may not be always able to fulfil. In addition, there is a potential conflict of roles between a broadly construed ‘independent’ NHRI which may perform some monitoring functions by invitation and a preventive mechanism which is undertaking visits under OPCAT. On the one hand, the accreditation process of the ICC could certainly be improved in order to assess when/whether a NHRI is effectively and appropriately performing the functions of NPM. On the other hand, in addition, as per article 18 (3) of OPCAT, if an NHRI is to be appointed as NPM additional resources should be allocated to it to fully perform this new task.

### **ICC Accreditation**

The criteria applied by the ICC are based on the Paris Principles. Written documentation is required, namely:

- 2.1 A copy of the legislation or other instrument by which the NHRI is established and empowered (statute, and/or constitutional provision, and/or presidential decree);
- 2.2 An outline of the organizational structure of the organization, including details of staff and annual budget;
- 2.3 A copy of the most recent annual report or equivalent document;
- 2.4 A detailed statement showing that the organization complies with the Paris Principles using the framework document provided by the ICC Secretariat as a guide; and
- 2.5 Any other relevant documents to support the application.<sup>10</sup>

There is also the ‘Statement of Compliance with the Paris Principles’ Template which NHRI applicants have to fill in.<sup>11</sup> The questions raised here cover, inter alia, establishment, independence, pluralism, autonomy, the appointments process and organisational infrastructure, mandate and jurisdiction, relationships with civil society and other human rights institutions, interaction with the UN and the international human rights machinery, accessibility and working methods.

Additional information (e.g. by NHRIs, CSOs, international human rights actors) can also be received by the Subcommittee on Accreditation. The NHRI is then considered by the Subcommittee at one of its meetings. The ICC Committee also has also developed ‘General Observations’ which guide it in its determinations.<sup>12</sup> These Observations further expand the criteria in the Paris Principles and relate to aspects such as NHRIs’ constitutional or statutory status, their remit, whether they can encourage ratification of international instruments, how they interact with the international human rights system, and how they cooperate with other

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<sup>9</sup> Article 33 of the UN Convention on the Rights of Persons with Disabilities states ‘States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention’.

<sup>10</sup> Guidelines for Accreditation & Re-Accreditation of National Human Rights Institutions to the International Coordinating Committee of National Human Rights Institutions, Version 3 – April 2008, para 2.

<sup>11</sup> [www.nhri.net](http://www.nhri.net) [last accessed 9 Sep 2008].

<sup>12</sup> ICC Sub-Committee on Accreditation, *General Observations*, Geneva, April 2008, [http://nhri.net/2008/General\\_observations\\_En.pdf](http://nhri.net/2008/General_observations_En.pdf) [last accessed 9 Sep 2008].

national bodies. At the very beginning of the accreditation process (late 1990s), accreditation determinations were based on information submitted by the NHRI itself, not on other information, and broader information on pluralism and independence was all taken at face value, in terms of who its members are, how they are appointed, their background, etc. rather than how the NHRI is perceived from the outside by others. More recently the Sub-Committee also analyses the effectiveness of the NHRI by receiving information from other sources such as UN and OHCHR field presences and civil society organisations, among others.

The ICC Accreditation Committee can grant the following accreditation:

**A:** Compliance with the Paris Principles;<sup>13</sup>

**B:** Observer Status - Not fully in compliance with the Paris Principles or insufficient information provided to make a determination;

The recommendation of the Subcommittee is then sent to the NHRI who then has 28 days to respond. After that time, the Subcommittee sends the report of its recommendations to all 16 ICC voting members of the ICC Bureau along with any feedback received from the NHRI.

A and B status are reviewed every five years, although they can also be considered if there is a change of circumstances that may affect their compliance with the Paris Principles (e.g. special review).

In its Decision Paper on the Review of ICC Accreditation Procedures for National Human Rights Institutions (NHRI) of March 2008<sup>14</sup> the ICC Working Group on Accreditation recommended that a 'new accreditation process be developed' which would be based on the principles of 'transparency, rigour and independence'.<sup>15</sup> This would mean, among other things, that 'only applicant Institutions which conform to both the letter and the spirit of the Paris Principles and demonstrate this through their actions, will be accredited'.<sup>16</sup> This new procedure includes 'a full documentation and statement of compliance submitted in advance of the session by NHRIs'. A detailed summary of the NHRI is prepared by the OHCHR NIU in its capacity as the Secretariat of the ICC and its Sub Committee on Accreditation, in close coordination with relevant parts of OHCHR. This summary is then shared with the applicant NHRI itself for comments before sending it to the Sub-Committee on Accreditation. OHCHR is actively involved in the reviews and the Sub-Committee [on Accreditation] can also address NHRIs themselves, if necessary, through conference calls.<sup>17</sup>

As a result, since October 2007 the ICC says that it now checks the information sent in by the NHRI with additional sources of information, such as from civil society organisations. In addition, the OHCHR NI Unit in its capacity as Secretariat of the ICC in the accreditation process<sup>18</sup> indicates that it is using (as and where possible) the field offices of the UN and says

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<sup>13</sup> An additional two previous categories existed: 'A(R): Accreditation with reserve – granted where insufficient documentation is submitted to confer A status' and 'C: Non-compliant with the Paris Principles'. Since 2006 and 2008 respectively these categories are no longer used by the ICC.

<sup>14</sup> <http://nhri.net/2008/DecisionPaper-NHRI-March2008.DOC> [last accessed 9 Sep 2008].

<sup>15</sup> Para. 5.

<sup>16</sup> Para 5.

<sup>17</sup> General Assembly, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General, Report of the Secretary General, A/HRC/7/70, para 10.

<sup>18</sup> 'Requests the Secretary-General to continue to provide, from within existing resources, the necessary assistance for holding meetings of the International Coordinating Committee during the sessions of the Commission, under the auspices of, and in cooperation with, the Office of

it seeks information proactively from them in order to double-check whether the information obtained from the NHRI in the accreditation process is correct.<sup>19</sup> The NI Unit then takes this additional information and includes it in a summary document of its findings.<sup>20</sup> As it can sit in on the accreditation Committee meetings it can feed this information into the decision-making process. It has also assured us that from November 2008 these summary documents will be made public. This new process of verification of information, the NI Unit claims, is intended to increase the rigorousness of the accreditation process. As a result of the new accreditation process the ICC has recommended that a number of NHRIs be downgraded from A status from 2007 onwards.<sup>21</sup> In line with the ICC's rules of procedure, such institutions are given 12 months to provide written evidence deemed necessary to establish their continued conformity to the Paris Principles.

The accreditation process can be seen as 'work in progress'. Its improvement and effectiveness relies on a number of factors: coordination of a broad range of actors around it and consolidating efforts to make the accreditation process effective and reliable (e.g. through effective source/flow of information, dissemination of ICC recommendation, ICC recommendations in line with those of the Treaty Bodies, etc.) are crucial steps towards its further strengthening.

The inclusion of alternative views on an NHRI from NGOs and UN officers in the field is crucial to ensuring the credibility of the ICC accreditation process which up till October 2007 was based solely on NHRI and a process of peer review.

According to the Nairobi Declaration 'NHRIs should encourage their governments to ratify the Convention Against Torture (CAT) and its Optional Protocol (OPCAT) and to consider their designation as national preventive mechanism in that context, only if the necessary powers and resources are made available to them'.<sup>22</sup>

Moreover, further challenge to the practice has been brought by some NGOs which have been submitting alternative reports on the NHRIs to the Subcommittee. Thus, for example, more than thirty eight NGOs from Sri Lanka submitted reports criticising the Sri Lankan Human Rights Commission and the Subcommittee on Accreditation did call on the respective Commission to respond to the criticism raised. It appears that the NGO reports influenced significantly the decision of the Subcommittee to downgrade the Sri Lankan Human Rights Commission from status 'A' to status 'B'.<sup>23</sup> This example however is more an exception than a rule: the NGOs were encouraged to submit reports by the Network of NGOs in Asia (ANNI) which saw an opportunity to feed-into the NHRI accreditation process in the absence

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the High Commissioner', Commission on Human Rights, National Institutions for the Promotion and Protection of Human Rights, Human Rights Resolution 2005/74, para 19.

<sup>19</sup> Interview with Gianni Magezzeni and Francesca Albanese, June 2008.

<sup>20</sup> Ibidem.

<sup>21</sup> The Human Rights Commission of Sri Lanka (A status placed under review in March 2007, reviewed in October 2007); Commission Nationale des Droits de l'Homme of Burkina Faso, reviewed March 2007, A(R) status; Cameroon's National Commission on Human Rights and Freedoms, previous A status, reviewed October 2006 to B status. Nigerian Human Rights Commission, placed under review in March 2007, from A to B. Slovakia National Centre for Human Rights, B Status, reviewed October 2007. Madagascar, Commission Nationale des Droits de l'Homme de Madagascar, A status withdrawn in April 2006, reviewed October 2006, now C, see Charter of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Annex I, A/HRC/7/70, [www.nhri.net](http://www.nhri.net) [last accessed 9 Sep 2008].

<sup>22</sup> Kenya, 28 October 2008.

<sup>23</sup> ANNI 2008. Report on the Performance and Establishment of National Human Rights Institutions in Asia; Bangkok, Thailand; p. 176.

of an explicit prohibition to submit such reports. There have been no calls from the Subcommittee itself nor specific rules have been adopted in its Rules of Procedure to that effect. During the 9<sup>th</sup> International Conference of National Institutions for the Promotion and Protection of Human Rights in Nairobi on 23-25<sup>th</sup> October 2008, there were many calls upon the Subcommittee on Accreditation to formalise the practice of NGO reports by including respective provisions in its Rules of Procedure.

As a result of such a move to a more sophisticated approach to accreditation by the ICC Subcommittee, the NI unit is therefore strongly of the view that if the NHRI is given A status by the ICC Accreditation Subcommittee then it should be the NPM under OPCAT in order to avoid duplication and proliferation of bodies. Consequently, it is also of the view that the ICC Subcommittee on Accreditation should be able to make a statement on whether the NHRI should be an NPM or not.

### **OPCAT Criteria**

The criteria required by OPCAT includes, firstly, that the NPM may be composed of one or several bodies.<sup>24</sup> In this context, therefore, it may be that a NHRI is only one of a number of bodies that will form the NPM (as is the case in New Zealand), or is the NPM together with NGOs (as it is in Slovenia and Moldova with the creation of a new National Commission to be combined with civil society organisations among others to form the NPM).<sup>25</sup> The choice that the OPCAT allows here was aimed at accommodating the differences that may exist between the states parties: some may have OPCAT compliant bodies, others may not. This was designed to enable some flexibility, indeed flexibility was the aim.<sup>26</sup>

Secondly the NPM must be independent. Article 18 of OPCAT provides that the state shall guarantee the functional independence of the NPM as well as independence of personnel. In this regard the state is to ensure necessary measures are taken for the appointment of experts with the 'required capabilities and professional knowledge' to the NPM, and 'gender balance and adequate representation of ethnic and minority groups in the country'. States should also make 'available the necessary resources for the functioning' of the NPM and give 'due consideration to the Paris Principles' when establishing an NPM.

Lastly, minimum powers as set out in Articles 19-21 OPCAT refer to the need for the NPM to be able to examine regularly those deprived of their liberty, make recommendations to the authorities, submit proposals on draft and existing legislation, access all information, places of detention and have the opportunity to interview individuals in private, choose the places they want to visit and have contacts with the SPT. There are protections against recriminations for those who contact the NPM and confidential information.

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<sup>24</sup> Article 17, OPCAT.

<sup>25</sup> APT, National Preventive Mechanisms. Country-By-Country Status Report, pp.99-102 and 88 respectively.

<sup>26</sup> see Debra Long, *Commentary on the Optional Protocol to the UN Convention against Torture* in OPTIONAL PROTOCOL TO THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT. A MANUAL FOR PREVENTION (IIHR and APT, 2005); at p. 74; see also Malcolm D. Evans and Claudine Haenni-Dale, *Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture*, 4(1) HUMAN RIGHTS LAW REVIEW (2004) at p. 50.

## Discussion

It is important at this stage to say a little about the role of the SPT. Article 11(b) outlines this in the context of NPMs as being:

- (i) Advise and assist States 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 or 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 or degrading treatment or punishment;

In practice, however, states, NPMs and civil society organisations often want the SPT to give them some feedback on the suitability of a particular institution as an NPM, whether any changes are required in terms of its legislative, framework, resources or infrastructure, if it is already in existence, or advice on drafting legislation or other measures to establish it. Therefore, one could argue that the role of the SPT is not to ‘accredit’ an NPM as such, but simply to advise states on the most suitable model for the purposes of OPCAT in that particular jurisdiction and provide advice to the NPM itself in ensuring its effectiveness. As to whether this advice should be public is also open to debate.

There are certain commonalities between OPCAT and the Paris Principles which require further consideration and where closer collaboration between the NI Unit and Sub Committee on Accreditation and the SPT could be mutually beneficial:

- (a) The scope of the mandate: NHRIs are bound to be charged with a whole range of issues under the Paris Principles including (in many cases) a mandate to visit places of detention and discharge quasi-judicial functions. OPCAT requires very specific and targeted functions to be performed. This will inevitably require: 1. dedicated staff: visits are to be regular, they should maintain contacts with other relevant national bodies, NPMs and the SPT, and adopt preventive reports which, while need not to be separate from their regular annual report, still must be at least a separate chapter. 2. specialist expertise, particularly in the context of making recommendations. 3. additional resources: all the OPCAT tasks will require more money to cover more staff, physical visits to places, or a need to contract-in expertise, for example.<sup>27</sup> In addition, if an NHRI is to be the NPM in addition to their other work, then it may require some form of internal restructuring to address these demands.
- (b) independence: the concept of independence is central to both the OPCAT and the Paris Principles but may not necessarily be exactly the same for both. It would be useful for the SPT to consider the concept in more detail and to examine ICC guidance in this context. The ICC should in turn examine what is appropriate and poses challenges from the SPT’s perspective in terms of OPCAT. The ICC accreditation documentation requires, for example, when the NHRI provides information in its ‘Statement of Compliance with the Paris Principles’ that it provide

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<sup>27</sup>Thus Carver and Korotaev argue that NHRIs are already suffering from lack of resources in the region they looked at. to add NPM on the top must be coupled with additional resources: See: Richard Carver and Alexey Korotaev, *Assessing the Effectiveness of National Human Rights Institutions 6* (Report on the behalf of the UNDP Regional centre in Bratislava, October 2007, Section 3.6)

‘the mechanisms that guarantee the independence of the NHRI’, such as ‘the nature of the institution’s accountability, i.e. indicate the line of accountability; whether or not the NHRI receives instruction from the government; by what means conflicts of interest are avoided; whether members incur legal liability or not for actions taken in their official capacity’.<sup>28</sup> Additional sources of information may be picked up by the SPT on its visits or in its discussions with various stakeholders in that jurisdiction. If the SPT could feed this information into the ICC accreditation process this might assist the latter.

- (c) More problematic is the requirement in the Paris Principles that the NHRI’s mandate be ‘set forth in a constitutional or legislative text’<sup>29</sup> which has been suggested as applying in the context of the NPM. This raises some problems in the context of setting out the mandate of the NPM in a constitutional text where more flexibility is required. If the constitutional text, for example, is not OPCAT-compliant then it may in fact entrench some unwelcome provisions within the constitution, rather than in more easily amended legislation.
- (d) Similarly, the minimal powers in OPCAT are not reflected in the Paris Principles. In particular, for example, OPCAT requires that States are to ensure that ‘the experts of the national preventive mechanism have the required capabilities and professional knowledge’. This, taken together with the fact that the NPM is regularly to visit such places of deprivation of liberty as penitentiary institutions, psychiatric hospitals and social care homes means that the NPM must have the necessary medical, psychological and social care expertise. If one looks at the Danish Ombudsman, for instance, where there is no medical expertise in-house, this has been pointed out as one of the main reasons why the RCT thought that establishing a brand new institution for NPM purposes was advisable.<sup>30</sup> Similarly, the offices of the Estonian Chancellor of Justice, the Czech Ombudsman and also Polish Ombudsman are predominantly if not purely legal and are considering contracting-in the expertise if necessary.<sup>31</sup> If, therefore, a NHRI is mandated to act as NPM then it should be ensured all additional powers as required under OPCAT.
- (e) Broad issues of effectiveness are of relevance to the SPT and ICC respectively.<sup>32</sup> But the effectiveness of the NHRI as a visiting body specifically, in respect of its particular mandate under OPCAT in preventing torture is something that the ICC and its Subcommittee on Accreditation are not likely to consider and not necessarily in a position to consider or have the expertise to do so. The NI Unit has indicated, however, that input and support from practitioners and experts in this field (such as this Bristol University Project) on the ICC template could be of great help. The SPT, however, clearly needs to be able to come to some view on this.
- (f) Lastly, OPCAT does not spell out that it is *national human rights institutions* specifically that are to be NPMs. The drafters of the Protocol only made a reference

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<sup>28</sup> Statement of Compliance with the Paris Principles, p.1.

<sup>29</sup> Paris Principles, para 2.

<sup>30</sup> Alternative Report to the list of issues (CAT/C/DNK/Q/5/rev.1) dated 19 February 2007 to be considered by the UN Committee against Torture during the examination of the 5<sup>th</sup> periodic report of Denmark; 38<sup>th</sup> Session, May 2007; Rehabilitation and Research Centre for Torture Victims (RCT), Copenhagen, Denmark, April 2007; pp. 18-22.

<sup>31</sup> APT Country-by-country status report: see p. 66 for Estonia, p. 63 for Czech Republic and p. 93 for Poland.

<sup>32</sup> Richard Carver and Alexey Korotaev, *Assessing the Effectiveness of National Human Rights Institutions 6* (Report on the behalf of the UNDP Regional centre in Bratislava, October 2007; Foreword to the Report)



to the Paris Principles but made no prescription that NHRIs, where available, must be NPMs. In some countries there may be no NHRIs, in some countries these, despite their ICC accreditation status, might not be the most suited for the specific tasks under OPCAT. For example, in New Zealand the human rights commission has A status but it was insufficient for it to be the only NPM in the country. Similarly, in the UK, the Equality and Human Rights Commission and the commissions in Northern Ireland and Scotland are not being considered among the collective of over twenty bodies designated under OPCAT as they do not have visiting functions to places of detention that other statutory bodies possess.

The processes of the SPT considering an NPM as well as the ICC's accreditation of an NHRI should be similar to the state reporting system under human rights treaties in that they ideally should be built upon a 'constructive dialogue': not condemning but working with NHRIs and states in an honest fashion to improve their human rights record. If seen in this way, then the process of considering an NPM by the SPT as well as the process of accreditation by the ICC should also, inevitably, draw upon other sources of information, as UN committees do in the state reporting process, in order to verify that the report submitted (in this case by the NHRI) is accurate.

### **A way forward?**

The following is recommended:

1. The SPT should avoid 'accrediting' NPMs *per se*, given that its task is to liaise with them and with states and to give advice in order to 'strengthen the capacity and mandate' of the NPM.<sup>33</sup> The SPT is simply required to provide advice and assistance.
2. This also reflects the SPT's position that engagement with NPMs is an on-going process.<sup>34</sup> In this situation, therefore, if an NHRI is not accredited by the ICC but is recognised as an NPM this should cause little problem as the SPT could continue to assist the NPM so as to make its work more efficient and effective, part of which may result in the possibility of the NPM eventually becoming accredited by the ICC.
3. The Subcommittee on Accreditation of the ICC should ensure that it does not give statements whereby it recommends that a particular NHRI be the NPM under OPCAT.
4. It is essential that the SPT and the Subcommittee on Accreditation, with the support of the OHCHR in its capacity as secretariat of the ICC, develop a closer relationship in order better to understand each other's perspectives and requirements. In this context, it would be particularly useful if the SPT were able to attend the ICC Accreditation sessions or at least be able to feed into the process through documentation.
5. It could be possible, as a way of gathering information, if the NI Unit could, in its contacts with the NHRI, ask whether any discussions have taken place on the particular NHRI being part of the NPM, or whether it has indeed been designated as such, for example. Such information gathering would be of particular benefit to the SPT and should be sent back to the SPT. If, however, the ICC is to ask these questions, then it is essential that the NI Unit liaise closely with the SPT to ensure that the approach is consistent and that the former is informed by the latter's experience on the ground. Conversely, the SPT needs also to be familiar with the ICC process. The NI Unit has said that it would be desirable for the SPT to provide its input on the ICC template for accreditation, so as to provide the former with clear guidance on the requirements regarding visiting places of detention.

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<sup>33</sup> Article 11(b)(iv), OPCAT.

<sup>34</sup> First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CAT/C/40/2; 14 May 2008; para 28 (xiv).

6. The SPT should liaise directly with the NI Unit and the ICC Subcommittee to gain an insight into information about specific NHRIs. It would be particularly useful if the SPT and ICC could make a joint statement to clarify the relationship between them and between ICC accreditation and OPCAT. A workshop can also be proposed to further explore this issue.
7. The ICC Subcommittee and its Secretariat in the NI Unit should sit down with the SPT to discuss their respective approaches and how they can inform one another. Similarly, the NI Unit should draw upon the empirical experience and information obtained by the SPT in the course of its visits and discussions with states to look at the actual operation in practice of any NHRI.
8. The ICC should continue its new approach to finding ways to verify the information it obtains about an NHRI and to test it further against other sources, such as civil society, parliamentarians and other statutory or constitutional bodies, as well as with other UN treaty bodies, special procedure mechanisms and regional bodies.

## **Conclusion**

Whilst ICC accreditation has in the past been based solely on a NHRI's own evaluation and information, this has changed recently. The process of evaluating this information is still carried out by peer-review, albeit under the auspices of and in cooperation with OHCHR. There is some evidence that civil society has been able to feed into this process, but so far it appears to be an exception rather than a rule. The fact that the NHRI is accredited (or not) should be only one factor to be used by the SPT when considering its suitability as an NPM. The SPT, as it has done so far, must proactively seek out other information in order to gain an holistic picture of the extent to which the NHRI is functioning effectively at the national level and its suitability for the very specific purposes of OPCAT.

At this stage it is important that ICC accreditation and SPT consideration of a potential NPM be kept separate and distinct but mutually informed, with the hope that in the future there may be a possibility of closer links between the two.

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