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Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania

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LIST OF ABBREVIATIONS

APT	Association for the Prevention of Torture
APADOR-CH	Romanian Helsinki Committee
CLS	Center of Legal Resources
CPC	Child Protection Commission
CPT	European Committee for the Prevention of Torture
CSO	Civil Society Organisation
DIP	Directorate of Inspection - National Administration of Penitentiaries National Administration of Penitentiaries
ECPT	European Convention for the Prevention of Torture
ECHR	European Court of Human Rights
EU	European Union
GIP	General Inspectorate of the Police
GDSSCP	General Department for Social Security and Child Protection - Ministry of Labor, Family and Social Protection
HRAB	Austrian Human Rights Advisory Board
ICC	International Coordination Committee of National Human Rights Institutions
MoH	Ministry of Health
MoI	Ministry of Interior and Administration
MoJ	Ministry of Justice
NAP	National Administration of Penitentiaries
NAPRC	National Authority for the Protection of the Rights of the Child
NGO	Non-governmental organisation
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture
PSSS	Public Social Security Service
SPT	Subcommittee on Prevention of Torture
UN	United Nations

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1. Introduction

The Twinning Light project 'Support for setting up an efficient National Preventive Mechanism for an increased promotion and protection of human rights in the places of detention' was designed to support the Romanian Government, and in particular the Ministry of Justice, in implementing its obligations under the Optional Protocol to the Convention against Torture (OPCAT)[1] and establishing a so-called National Preventive Mechanism (NPM) for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

With the ratification of OPCAT on 2 July 2009[2], Romania has acknowledged the importance of preventive monitoring of places of detention by an independent body in the fight against torture and other forms of ill-treatment, including inhuman conditions of detention. OPCAT marks a significant development in combating torture by setting its specific focus on prevention. The rationale behind OPCAT is based on the experience that torture and other forms of ill-treatment mainly happen in places of detention due to their opaqueness to the outside world and the lack of external scrutiny. The perpetrators of torture and ill-treatment feel that they will not be held accountable for their practices and potentially inhuman conditions of detention remain unknown. By opening up places of detention to independent external monitoring they shall be made more transparent, revealing any possible abusive treatment of detainees, inhuman conditions of detention and deterring torture by holding the perpetrators accountable. OPCAT takes a two-pillar approach with on the one hand an international Subcommittee on Prevention of Torture (SPT), and on the other hand National Preventive Mechanisms in each State Party. Through these bodies OPCAT aims to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman and degrading treatment or punishment" (art. 1 OPCAT).

The aim of the present project was to provide the relevant Romanian authorities with a sound basis for deciding on the form of its NPM. This decision must be based on a comprehensive understanding of the minimum conditions for an effective functioning of an NPM as prescribed by OPCAT and the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles).[3] In addition, a thorough analysis of existing detention inspection mechanisms in Romania and their compliance with the requirements under OPCAT and the Paris Principles had to be provided, since OPCAT does not prescribe a specific form for an NPM but foresees the possibility to "maintain, designate or establish"[4] such a mechanism. Thus, existing mechanisms responsible for inspecting places of detention in Romania had to be screened with a view to their possible designation as NPM. In accordance with the wishes of the beneficiaries on the Romanian side, five EU Member States[5] that have already established an NPM and one country[6] that has a comparable monitoring mechanism (which has, however, a too narrow mandate and is lacking independence in order to be in compliance with OPCAT) were analysed with the intention of providing for different country models that could serve as examples for Romania.

[1] A/RES/57/199, 18 December 2002, entered into force 22 June 2006
[2] Law no. 109/2009
[3] Adopted by UN General Assembly resolution 48/134 of 20 December 1993.
[4] Art. 17 OPCAT.
[5] Czech Republic, France, Germany, Poland and Slovenia.
[6] Austria

The project started on 15 December 2009 and ended on 14 July 2010. Under the responsibility of the project leader, Mr Peter Best, a number of experts from Austria, Czech Republic, France, Germany, Poland and Slovenia were involved in the different parts of the project:

In order to receive a comprehensive overview of the state of affairs in Romania, Mr Moritz Birk and Ms Ulrike Kirchgaesser conducted a **fact-finding mission** to Romania from 22 to 26 February 2010. In the course of this visit, the experts held talks with representatives of relevant national institutions, including the National Administration of Penitentiaries (NAP), the Directorate of Inspection of Penitentiaries (DIP) of NAP, the Directorate of Inspection of the Ministry of Justice, the General Inspectorate of the Police (GIP), the Division of Preventive Arrests of the Bucharest Metropolitan Police, the Legal Department of the National Authority for the Protection of Family and Child Protection, the Medical Department of the Ministry of Health, Delegated Judges and the Director of Rahova Penitentiary, the Ombudsman office, and the Legal Department of the Centre of Legal Resources (CLS).[7]

Based on the information gathered during these interviews, Mr Birk, Ms Kirchgaesser and Mr Hannes Tretter conducted a **consultative round-table** with the participation of representatives of the above-mentioned institutions as well as of the Legal Drafting Department, the Department of European Affairs and Human Rights and the Department for European Programmes of the Ministry of Justice, the Romanian Helsinki Committee (APADOR-CH) and the Jesuit Refugee Council on 22 and 23 March 2010. At the round-table the experts presented and discussed the requirements of establishing an NPM under OPCAT and the Paris Principles; based on the information gathered during the interviews, the existing inspection mechanisms were examined with a view to their compatibility with the international requirements. Further, the general options for establishing an NPM were discussed.

The round-table was followed on 13 April 2010 by an **informal follow-up meeting** with representatives of the Ombudsman office, the Romanian Ministry of Justice and the Ministry of Interior. Aim of the meeting was a discussion of a letter sent by the Romanian Ombudsman, in which he declared his reservations regarding a designation of his institution as NPM.[8] Furthermore, the meeting was used to provide the participants with an in-depth discussion of the visiting powers of the future NPM, in particular with regards to private places of detention. In order to gain a more comprehensive insight into the functioning of existing inspection mechanisms in Romania, the experts handed out specific questionnaires to the participants, requesting inter alia information on the number and type of places of detention under the respective authorities, visits undertaken to these places as well as cooperation with civil society.[9]

The contents and results of the fact-finding mission, the consultative round-table as well as the follow-up meeting were summarised by Mr Birk and Ms Kirchgaesser in a **State of Play Report**, which contains a commentary on the requirements of OPCAT and the Paris Principles as well as a comprehensive analysis of all Romanian mechanisms mandated with inspections of places of detention regarding their suitability to be assigned with the functions

[7] For a comprehensive list of all interview partners as well as participants at the following round-table, follow-up meeting and workshops see Annex I.
[8] See Annex II.
[9] A summary of the information gathered by these questionnaires is contained in chapter 4.1. of this report.

of an NPM. In addition, a general analysis of the options for establishing an NPM in Romania and the way forward were provided.

In April and May 2010, six experts from the EU Member States identified by the Romanian project partners as possible models for the establishment of an NPM elaborated **country reports** on their respective mechanisms. Ms Johanna Lober was responsible for the report on the Austrian Human Rights Advisory Board (HRAB) and its six visiting Commissions; Ms Anna Šabatová for the report on the Czech Public Defender of Rights; Mr Xavier Dupont for the report on the Contrôleur Général des Lieux de Privation de Liberté; Ms Sarah Mohsen for the report on the German Federal Agency for the Prevention of Torture and Joint Commission of the Länder; Ms Marzena Górzyhska for the report on the Polish Human Rights Defender; and Mr Aleš Butala for the report on the Slovenian Human Rights Ombudsperson. Within these reports, the experts focused on the legal and institutional framework, the mandate, working methods, cooperati on with other actors, and the effectiveness of the mechanism at stake.

A **workshop** held on 10 and 11 June 2010 on the possible solutions for the establishment of an NPM in Romania brought together 17 participants from the relevant authorities mentioned above and representatives from the Immigration and Customs Departments; the workshop was implemented by Mr Birk, Mr Butala, Ms Kirchgaesser and Ms Lober. In the course of the workshop the experts presented the six country reports. Based on the information contained therein, the participants could develop an understanding of good practice models as well as challenges faced by the mechanisms in the different EU Member States.

On 21 June 2010, Ms Kozma and Mr Tretter **met the Romanian Ombudsman**, Prof Ioan Muraru, as well as his Deputy responsible for army, justice, police and penitentiaries, in order to discuss a possible designation of the Ombudsman office as NPM.

The **final workshop** held in Bucharest on 21 and 22 June 2010 by Ms Kirchgaesser, Ms Kozma, Ms Górzyhska and Mr Tretter concluded the substantive part of the project by developing together with the participants from the relevant authorities possible solutions for the establishment of an NPM in Romania. Substantively, both workshops had covered questions relating to the mandate and structure of the NPM, membership and composition, independence, and relationship of the NPM with civil society. The second workshop, however, put an additional emphasis on the concrete possibilities of establishing an NPM in Romania, e.g. the two options of creating a completely new body and the designation of the Romanian Ombudsman office as NPM.

In accordance with the chronology of the project, the present report is structured as follows: Main findings and conclusions on the currently existing national detention inspection mechanisms in Romania; a comparative study of NPMs and other mechanisms in selected EU Member States, including their structure and institutional framework, mandate and visiting powers, membership and composition, independence and relations to civil society; possible solutions for the establishment of an NPM in Romania, including a chart and map of places of detention in Romania, a detailed comparison of the advantages and disadvantages of creating a new body or designating the Romanian Ombudsman as NPM, as well as concrete solutions for questions of mandate and structure, membership, independence and relationship with civil society independent of the decision the Romanian legislator will finally take regarding the two possible models for an NPM in Romania.

2. The State of Play of Current Inspection Mechanism in Romania

As part of the project, a report on the current mechanisms in Romania inspecting places of detention (State of Play Report) was submitted in May 2010. The object of the State of Play Report was to provide the Romanian authorities and project participants with a sound basis for deciding on the form of its future NPM. The report provides a detailed description and analysis of the NPM requirements according to OPCAT and the Paris Principles and a 'factual inventory' of the current visiting mechanisms in Romania; it examines different options for an effective NPM in Romania and the further steps to be taken in establishing or designating the future NPM.

In the subsequent section a brief overview of the existing mechanisms of the executive and judicial branch as well as the Ombudsman office and non-governmental organisations that are carrying out visits to places of detention will be provided with a view to their compliance with OPCAT and the Paris Principles and the possibility to transform them into a future NPM.

Currently there are the following mechanisms in Romania that already inspect places of detention:

- Under the executive branch:
  - Ministry of Justice: Directorate for the Inspection of Penitentiaries (DIP) under the National Administration of Penitentiaries (NAP);[10] Directorate of Inspection of the Ministry of Justice[11]
  - Ministry of Administration and Interior: General Inspectorate of the Police (GIP)[12]
  - Ministry of Health: General Control Mechanism (national level), National Centre for Mental Health, Special Commission[13]
  - Ministry of Labour, Family and Child Protection and the subordinated administrations: National Authority for the Protection of the Rights of the Child (NAPRC);[14] Child Protection Commission (CPC), General Department for Social Security and Child Protection (GDSSCP), Public Social Security Service (PSSS) – all subordinated to the local administration[15]

Under the judicial branch: Delegated judges[16] and the courts on their specific competences

- The Ombudsman office (Avocatul Poporului)[17]

- Non-governmental organisations (e.g. APADOR-CH, the Center for Legal Resources, the Jesuit Refugee Council)

[10] Art. 15 (paras. 1- 4) Law no. 275/2006 on Enforcement of Punishment and Measures ordered by the Judicial Bodies during the Criminal Procedures and Government Decision no. 1897/2006 for the approval of the Regulations of the Application of Law no. 275/2006.
[11] Art. 21 Law no. 652/2009 on Organisation and Functioning of Justice and Civil Liberties.
[12] Art. 15 (5) of Law no. 275/2006; Order no. 318/2007 regarding the Organisation of the Inspection of the Ministry of Interior; Order No. 218/2002 on the Legal Framework of the GIP.
[13] See Health Reform Law no. 95/2006; Law no. 487/2002 on Mental Health.
[14] Art. 100 Law no. 272/2004 on the Protection and Promotion of the Rights of the Child.
[15] Art. 104 -106, art. 4 (i), 4 (j), 4 (k) of Law no. 272/2004.
[16] Art. 6 of Law no. 275/2006 on serving of penalties and measures taken by the judicial authorities during criminal trial and the Government Decision no. 1897/2006 regulating its application.
[17] Law no. 35/1997 on the Organisation and Functioning of the Institution of the Advocate of the People.

While in Romania a comprehensive system of monitoring of places of detention already exists, the current inspection mechanisms display significant shortcomings in view of independent preventive monitoring.

The interviews and discussions with the different actors playing a role in inspecting places of detention have yielded that the current **executive mechanisms** have an entirely different purpose and 'philosophy' than an NPM. Their mandate is mainly to react to complaints regarding any misconduct of personnel or deficiencies regarding the conditions or administration of detention. When conducting preventive inspection visits those are not focused on the prevention of torture and other forms of ill-treatment, but include inspecting the safety of staff, hygiene, finances and the effectiveness of administration. They primarily serve as mechanisms of self-control with the purpose of improving the management of detention facilities rather than preventing torture. As internal self-control mechanisms the executive mechanisms are not independent, and becoming independent from the authorities is also not desired. In the opinion of the representatives encountered throughout the project, it is important that the current mechanisms maintain their link to the authorities to fulfil their particular function.

The specific composition and membership of the current executive mechanisms which do not meet the requirement of expertise and pluralistic composition in art. 18(2) OPCAT, can equally be explained by their object and purpose, which is different from those of NPMs. As mechanisms inspecting the management and administration of the facilities, its members need to have different capabilities than those of an NPM. As a consequence, a transformation of the existing executive mechanisms or their incorporation in a future NPM was neither seen as feasible nor useful.

Nevertheless, the executive mechanisms can function as useful partners for the future NPM, as they have a broad expertise regarding the administration and management of places of detention and could be able to implement recommendations of the NPM in an appropriate manner. Due to the fact that the mechanisms have the right to issue binding recommendations to the respective authorities, the future NPM should maintain close contacts and enter into a regular dialogue with those mechanisms when it comes to the adequate and timely implementation of its recommendations.[18]

As for the **judicial mechanism**, the delegated judges play a key role in combating torture and other forms of ill-treatment and in observing the rights of detainees. However, they are not designed as preventive but reactive mechanism and thus not capable of fulfilling the functions of an NPM. The different approach of delegated judges makes their incorporation or transformation into an NPM impossible. Nevertheless due to their specific purpose of protecting detainees, their permanent presence in penitentiaries and permanent availability to receive complaints of detainees, they can play a significant role in preventing torture and other forms of ill-treatment. Thus, the future NPM should closely cooperate with delegated judges, as they, being in permanent and direct contact with detainees and the penitentiary authorities, are an ideal independent contact point and source of information.[19]

[18] State of Play Report, p. 20.
[19] State of Play Report, p. 21.

While the **Ombudsman office** appears to comply with OPCAT's requirement of independence, it currently fulfils a different mandate than an NPM, namely that of a reactive mechanism for complaints. While it can in principle also carry out preventive visits ("conduct his own inquiries", art. 22 Law no. 35/1997), it has done this only twice in 2009; those visits did not have a particular focus on the prevention of torture and ill-treatment. Further, the Ombudsman office can only visit public but not private places of detention. In addition to a restricted mandate, it is further lacking the necessary resources to carry out regular monitoring of places of detention and is almost entirely composed of lawyers, thus it is not meeting the requirement of a pluralistic composition according to art. 18 (2) OPCAT. In its current form it is not able to fulfil the mandate of an NPM.[19] Nevertheless, as independent human rights institution the Ombudsman should be the closest partner of the future NPM. In how far the future NPM in Romania could even build upon the structures of the Ombudsman will be explored below.

Non-governmental organisations already perform an important role as independent external monitoring mechanisms despite some obstacles regarding the immediate access to places of detention and the possibility to conduct private interviews with detainees. Although they do not have the financial or human resources to carry out systematic monitoring in the sense of OPCAT, they are currently the most proactive actors in the field of independent preventive monitoring of places of detention. Their experience and expertise in detention monitoring, gained over the last years, can be very useful for the future NPM. It was therefore agreed that it is advisable to integrate the current NGOs operating in the field of detention monitoring in the future NPM as much as possible.[20]

In conclusion, the transformation or incorporation of existing State visiting mechanisms into a future NPM was not seen as feasible in Romania due to the different objects pursued and functions performed. Consequently, the establishment of a new mechanism with a different mandate is necessary. Nonetheless, the existing mechanisms should continue their functions parallel to a future NPM and closely cooperate with it for the purposes of preventing torture and other ill-treatment.[21] The possibility of integrating non-governmental organisations in the work of the NPM and/or the designation of the Ombudsman as NPM will be discussed below.

3. Comparative Study of NPMs in Selected EU Member States

The Romanian Ministry of Justice, together with the project partners and experts, selected six EU Member States that already have an NPM in place or have another relevant mechanism that, although not complying with the requirements of OPCAT, can serve as an example for a body monitoring places of detention.

It must be kept in mind that OPCAT does not provide for detailed guidance as to how an NPM in the different States Parties is supposed to look like, but rather offers a set of minimum requirements, which are complemented by the provisions of the Paris Principles.[22] Therefore, States have great flexibility to establish a new body, maintain an existing NPM or designate a suitable existing mechanism with the tasks of an NPM, as long as the minimum requirements of OPCAT and the Paris Principles are fulfilled. Accordingly, States Parties

[20] See the official point of view of the Romanian Ombudsman of April 2010, 3727/2010, reaching the same conclusion; document included in Annex II to this report.
[21] State of Play Report, p. 21.
[22] Cf. art. 18 (4) OPCAT.

have taken different approaches in implementing their obligations under part IV of OPCAT. Hence, the one perfect model for an NPM does not exist, as the structures, mandates and compositions of the mechanisms might vary from country to country, according to the needs and specifics of the country as well as resources available.[23] However, a comparison of different mechanisms provides a valuable stock-taking of best practices and shortfalls of the diverse models, which shall serve the Romanian legislator as guidance.

Since the existing detention inspection mechanisms in Romania all fall short of fulfilling the requirements of OPCAT and the Paris Principles,[24] Romania has the option of either establishing a completely new body or assigning an existing (independent) body with the tasks of an NPM by making the necessary legal amendments in order to bring it in line with OPCAT. Consequently, the country examples depicted below are divided into EU Member States that decided to establish a new body (France, Germany), and those that designated existing Ombuds offices as NPM, partly under inclusion of civil society organisations as part of the NPM (Czech Republic, Poland, Slovenia). As mentioned earlier, the Austrian mechanism cannot be regarded to constitute an NPM; however, at the time of its establishment in the year 2000 it was designed as a newly created, stand alone monitoring mechanism and would thus fall under the first category.

[23] For a chart of the six EU Member States providing an overview of the size of the countries concerned, number of prisons, prison population etc. see below, chapter 3.1.
[24] See above, chapter 2.

3.1. Overview of the NPM in selected EU Member States

Countries that have established a new body:

Countries	Area in sq km	Population	Number of Prisons	Prison Population	Prison Population Rate[25]	Budget in Euro	Relation to Civil Society Organisations	Number of NPM members
Austria[26]	83,870	8,192,880	28	8,766	95	946.000 *(2009)*	Members of NGOs included	11 (HRAB) + 42 (Commissions)
France	547,030	60,876,136	188	52,009	96	2.500,000,00	Cooperation *(3 former NGO members)*	14 full-time 14 part-time
Germany	357,021	82,422,299	195	72,259	89	300,000	Cooperation	1 Honorary head *(4 commissioners to be appointed)*

Countries that have designated the Ombudsperson (+):

Countries	Area in sq km	Population	Number of Prisons	Prison Population	Prison Population rate	Budget	Relation to Civil Society	Number of NPM members
Czech Republic	78,866	10,235,455	26	21, 780	182	300, 000	Cooperation, part time employments	7 (core members)
Poland	312,685	38,536,869	86	85,694	221	362,000	Cooperation	17 *(Ombudsman staff, partly also responsible for other tasks)*
Slovenia	20,000	2,000,000	6	1,280	65	124,822	NGOs included in the NPM	6 (core members) *(Ombudsman staff, partly responsible for other tasks)* + Members of 3 NGOs
Romania	237,500	22,303,552	45	35,429	124	(-)	(-)	(-)

3.2. Structure and Institutional Framework

Process of establishment

Austria, France and Germany have each established a new body entrusted with monitoring places of detention with a view to preventing torture and ill-treatment. While *France* had its NPM, the *Controleur General des lieux de privation de liberte* (hereafter *Controleur General*), established and functioning even before ratifying OPCAT in November 2008, *Germany* has yet to establish a fundamental part of its NPM, namely the Joint Commission of the Länder, despite ratifying OPCAT already in December 2008. Thus far, only the Federal Agency for the Prevention of Torture, which is responsible for monitoring federal detention facilities in Germany, has been set up, while detention facilities under the jurisdiction of the 16 States (Länder) are still not being monitored by the responsible part of the NPM, the Joint Commission.

[25] World Prison Population List, January 2009 (prisoners per 100,000 of national population).

[26] Note that Austria does not have an NPM in accordance with OPCAT; the six Commissions of the Human Rights Advisory Board are only mandated to monitor police detention facilities as well as factual police command and enforcement powers.

On a completely different note, *Austria* has established a comparable body, the Human Rights Advisory Board (HRAB) and its Commissions, already in the year 2000, following the repeated recommendation of the European Committee for the Prevention of Torture (CPT) in this respect.

On the other hand, the Czech Republic, Poland and Slovenia decided to entrust an existing Ombudsperson institution with the tasks of the NPM. This decision was taken due to the perceived speediness, cost efficiency, independence, previous experience and synergetic effects a designation of an Ombudsperson would have over the establishment of a new body. In *Poland* and *Slovenia*, the institution of Ombudsperson is based on the respective Constitutions and additional implementing laws, while in the *Czech Republic* it is only based on ordinary law.

In the *Czech Republic*, a separated department dealing with the tasks of an NPM was set up within the institution of the Public Defender of Rights, whose law of 1999 had been amended accordingly. In *Poland*, the Commissioner for Civil Rights Protection, which had been established in 1987, was entrusted with the function of NPM after the ratification of OPCAT in September 2005. In contrast to the Czech Republic, however, it was the Polish Government and not Parliament, who mandated the Ombudsman by means of a resolution of the Council of Ministers. The law of the Ombudsman has despite international criticism thus far not been amended in order to provide the NPM within the Polish Ombuds office with a firm legal basis. In *Slovenia*, the parliamentary Bill of 29 September 2006 encompassing the ratification of OPCAT at the same time designated the Human Rights Ombudsperson's Office as NPM.

External and internal structure

The Ombuds offices - and with them the respective NPMs - in the *Czech Republic*, *Poland* and *Slovenia* follow the classical models of parliamentary Ombudspersons, e.g. they are accountable only to their respective Parliaments and are usually obliged to report at least annually to Parliament. The *German* NPM, which is organisationally annexed to the Centre for Criminology but otherwise independent, has an annual reporting obligation vis-à-vis the German Federal Government as well as the Federal Parliament. In *France*, the Controleur General is heard by the President, the President of the Senate and the President of the National Assembly before he/she submits his/her annual report to the President and the Parliament. The *Austrian* HRAB, which cannot be considered an NPM in the sense of OPCAT, is institutionally integrated into the Ministry of Interior, although it is legally endowed with independence. The Commissions of the HRAB are under a reporting duty to the HRAB, while the HRAB are merely a consultative organ of the Ministry of Interior.

In relation to the internal structure of the different bodies, a variety of models can be observed. The independent, newly established bodies of France, Germany and Austria naturally have a different form as the NPMs that are located within existing Ombuds offices.

In *France*, the NPM is headed by the Controleur General, who is appointed for a non-renewable six year period by President's decree after consultations with the Parliament. The body has a staff of 20 public agents, of which 14 are full-time inspectors; the Controleur General can call on an additional 14 inspectors to participate in specific missions. A number of additional assistants are responsible for replying to complaints, financial management, secretariat functions, and media relations. The inspectors are bound by contract to the NPM and only answer to the Controleur General.

In stark contrast to the French model is the *German* NPM (e.g. the existing Federal component), which is comprised of one honorary member, who at the same time is also the head of the NPM. He/she is elected for a four year term with the possibility of re-election by the Federal Ministries of Justice, Interior and Defence. The body has currently two part-time staff (not members of the NPM). The structure of the German NPM cannot be regarded as a recommendable example, as it is not in compliance with OPCAT and the Paris Principles (lack of resources, impossibility of pluralistic, multi-disciplinary composition etc.).[27] Since the *Austrian* HRAB does not constitute an NPM, its rather complex structure will be only briefly described. The Board, which has mainly an advisory function to the Ministry of Interior, is comprised of eleven members, including the chair. The six Commissions of the Board, which conduct monitoring visits to police detention, are geographically distributed throughout the country and have currently seven members each.

Regarding the NPMs that are established within Ombuds institutions, it is of interest whether they were set up as completely separated units or whether staff implementing the tasks of the NPM are as well mandated with other functions of the Ombuds institution, such as dealing with complaints. As mentioned above, the *Czech* NPM constitutes a unit that is completely institutionally separated from the department dealing with complaints within the Ombuds office. The unit is staffed with seven core employees including the head of the department; some former employees of the Ombuds office experienced in visiting places of detention were relocated to the new unit, others were recruited through recruitment proceedings. The visits can be conducted not only by official members of the NPM (e.g. employees of the unit), but also by other employees of the Ombuds office. In addition, external experts often accompany the visiting team. In *Poland*, the tasks of the NPM are performed by staff of four specialised departments and three regional departments within the Ombuds office, which were exiting previously; these staff members carry on to fulfil their former tasks in addition to the ones of an NPM. In the course of the designation of the Ombuds office as NPM, the personal resources of the four specialised departments were increased by five persons; out of the total staff of these departments as well as of the three regional departments, 17 persons conduct monitoring visits to places of detention. In addition, staff from other departments of the Ombuds office can take part in visits. Finally, the *Slovenian* model can be regarded as a combination of the two alternatives described above, since a separate NPM unit was established within the Ombuds office but the six members of this unit also fulfil other tasks of the Ombudsperson. The Slovenian NPM is regarded to constitute an 'Ombuds plus' model, because selected civil society organisations also provide it with members, who have the same rights and obligations as the NPM members employed by the Ombuds office.

The members of all the NPMs within Ombuds offices, with the exception of the members of civil society organisations in Slovenia, are employed by the Ombudsperson and are directly responsible to him/her. The Ombudspersons in these models can thus be regarded the chair of the NPM.

[27] Country Report, Germany, pp. 5-6.

Budget

Concerning the budgets of the NPMs within the selected EU Member States, great differences can be observed. The NPM that definitely has the greatest financial liberty is the *French* Controleur General, with 2.5 million Euro at his disposal in 2010. Again, on the other end of the spectrum is the *German* NPM, whose Federal Agency was equipped with a one-time payment of 50.000 Euro for its initial costs and an annual budget of 100,000 Euro. Thus, France, which has around 61 million inhabitants, currently provides 25 times more budget to its NPM than Germany, which has almost 83 million inhabitants. The German Joint Commission, once it is set up, will have an additional 200,000 Euro at its disposal. The functions of the *Austrian* HRAB and the Commissions were budgeted with 946.000 Euro in 2009, which is considerable taking into account the limited mandate of the HRAB and the rather small size of the country (approximately eight million inhabitants), in comparison to e.g. Germany and France. The *Czech Republic* (about ten million inhabitants) provided the separate NPM unit within the Ombuds office with an initial payment of 100,000 Euro, while the annual expenses amount to approximately 300,000 Euro. In *Poland* (38.5 million inhabitants), the costs of the NPM have to be borne out of the general budget of the Ombuds office, which amounts to 8.25 million Euro in 2010. At the time of ratification of OPCAT it was estimated that the functions of the NPM within the Polish Ombuds office would amount to approximately 113,000 Euro. However, in 2009, the Ombuds office had to be granted an extra sum of 350,000 Euro specifically for the NPM tasks; such extra allocations were refused in 2010, which means that the NPM's costs have to be covered by the general Ombuds office's budget, which in turn will lead to substantial restrictions of the NPM's functions.[28] The *Slovenian* NPM in contrast receives a separate budget, which in 2010 added up to nearly 125,000 Euro. Again, one has to take into account the very small size of the country (two million inhabitants).

Centralised or de-centralised structure

The *French* Controleur General has its headquarters in Paris and is working on a centralised level, which raises questions regarding the geographical coverage of the country, which even includes the overseas departments. However, the visits undertaken last 15 days each, which makes it possible for the teams to travel also to remote areas and stay there for a longer time. This method, however, is only possible due to the vast budget at the Controleur's disposal. Other examples of centralised NPMs include Germany, the Czech Republic and Slovenia. The *German* Federal Agency is located in Wiesbaden, although the sole member has his residence in Berlin; with its extremely limited resources it is not capable of effectively visiting places of detention throughout the country. Also the Joint Commission, which has yet to be established and will be responsible for places of detention under the responsibility of the Federal States, is expected to be seated in Wiesbaden. The *Czech* Ombuds office is situated in Brno; monitoring visits might take up to three days, which enables the NPM also to monitor remote places of detention in this relatively small country. In *Slovenia*, the Ombuds office and with it the NPM is located in the capital, Ljubljana. However, since no place of detention is further away than 250 km and can be reached within two to three hours, the centralised structure is only reasonable.

On the other hand, Poland and Austria display rather de-centralised structures. In *Poland*, the members of the NPM in the specialised departments of the Ombuds office in Warsaw are supported by NPM members of the three regional departments of Wroclaw, Katowice and

[28] Country Report, Poland, p. 5.

Gdansk. The *Austrian* HRAB is located in the capital Vienna; however, its six visiting Commissions are geographically distributed throughout the country, providing for an ideal coverage of their monitoring visits.

3.3. Mandate and Visiting powers

The mandate and visiting powers are clearly prescribed in OPCAT (art. 19, 20, 22, 23 OPCAT). Upon its ratification, the selected Members States have chosen different ways to ensure the effective fulfilment of the NPM's tasks to access all places of detention and all relevant information for the purpose of regularly examining the treatment of detainees. The different ways of mandating the NPMs as well as their specific working methods will be described below with a view to identifying their strengths and weaknesses.

Access to all places of detention

While most selected Member States appear to respect the broad definition of places of detention in OPCAT, including private and unofficial places where persons are prevented to leave at free will,[29] different modes were chosen to implement the definition into national law.

In *Germany, Poland* and *Slovenia* the places of detention covered by the NPM are not specified in a law. Instead, the broad definition of OPCAT is directly incorporated into national law. This ensures that the NPM is mandated to visit all places of deprivation of liberty as stipulated by art. 4 OPCAT, providing a non-exhaustive and flexible understanding. On the other hand, the reference to the broad and rather vague definition may create problems in practice, requiring an NPM to argue over the interpretation of OPCAT each time it wants to visit a 'non-traditional' place of detention. To provide better clarity regarding the interpretation of OPCAT, *Germany* has decided to provide an official commentary ('Denkschrift') annexed to the ratification act.[30] The commentary provides an exemplary, non-exhaustive list of places of deprivation of liberty including closed psychiatric institutions, detention facilities for aliens awaiting deportation, transit zones at airports, youth welfare institutions, closed institutions for children and homes for the elderly.[31]

In the *Czech Republic* and *France,* the places to be covered by the NPM are explicitly mentioned in the law. The Ombudsman law of the *Czech Republic* provides a list of places that can be visited including "places where persons restricted in their freedom are or may be confined as a result of dependence on the care provided, especially social service facilities and other facilities providing similar care, healthcare facilities and facilities providing social/legal protection of children."[32] While this provides an unambiguous basis for the NPM to visit places of detention in a broad sense, such clear definition appears exhaustive, thus excluding new categories of places of detention and not meeting the open definition foreseen by OPCAT.

The problem of restricting OPCAT definition by specifying the places of detention to be visited by the NPM in the national legislation becomes apparent in *France*, where the NPM law stipulates that it may visit "any place where persons are deprived of their liberty by virtue

[29] See State of Play Report, pp. 2 et seq.
[30] Bundestag-Drucksache 16/8249, 22 February 2008, p. 23 et seq.
[31] Bundestag-Drucksache 16/8249, 22 February 2008, p. 27.
[32] Section 1, para. 4 Act on the Public Defender of Rights, No. 381/2005.

of a decision of a public authority, as well as any health establishment entitled to receive patients who are hospitalised without their consent, as defined in art. L. 3222-1 of the public health code."[33] Thereby, it excludes places where persons are or may be deprived of their liberty with the "consent or acquiescence" of a public authority (art. 4 (1) OPCAT) meant to include private and unofficial places of detention.[34] By restricting the mandate of the NPM to premises where persons are deprived of their liberty following an administrative or court decision,[35] the French NPM law fails to comply with OPCAT. In practice, the restrictive definition of places of detention currently bars the Controleur General to inspect facilities where elderly people with 'mental deficiencies' (such as Alzheimer or mental disabilities) are held in closed institutions on a doctor's prescription.[36]

In conclusion, while it may be useful to define and list places of detention in the national laws to ensure legal clarity for the NPM, such definition should strictly respect the broad understanding in OPCAT, by expressly including private and unofficial places of detention and refrain from listing the places exhaustively.

Enforcement of access

While in all selected Member States the authorities responsible for places of detention are obliged to grant access to the NPM and assist it in carrying out its visiting function, special procedures for ensuring unrestricted access are mostly missing. However, it was stated that in practice the selected NPMs are usually not hindered from freely accessing the places of their choice.

In *France*, where the Controleur General cannot be denied access to these facilities unless "urgent and compelling grounds of national defence, public safety, natural disasters or serious disorder in the place to be visited"[37] prevail, it has only been denied access once due to extreme weather conditions which interfered with the normal functioning of a prison.[38] In such a case, the authorities need to provide the Controleur with a justification and a suggestion for postponement.[39] For the purpose of facilitating access to a facility, the inspectors wear an identity card and produce the letter of assignment signed by the Controleur General.

In *Poland*, the NPM also holds official identity cards and an official authorisation. The Ombudsman office has with its designation officially notified the headquarters of all relevant authorities of his new function. Subsequently, this information was forwarded by the headquarters to all the subordinate units. While the Polish NPM was denied access a few times, the visiting team was always let in immediately after contacting the relevant authority.

In *Germany*, the sentries in the Federal Armed Forces and police stations have received special orders by their headquarters to ensure the NPM's right to unlimited access. In addition, the Federal Agency has named liaison officers in each relevant ministry who can be contacted in case of denial of access. In practice, the NPM has never experienced any restrictions. However, such situation might occur when the first unannounced visit to a place of detention will be conducted.

[33] art. 8 (1) Law no. 2007/1545, 30 October 2007 – Appointing an Inspector General of Places of Detention.
[34] State of Play Report, pp. 3-4.
[35] Country Report, France, p. 6.
[36] Country Report, France, p. 7.
[37] Law no. 2007/1545, art. 8 (2).
[38] Country Report, France, p. 6.
[39] Law no. 2007/1545, art. 8 (2).

In the *Czech Republic* the law stipulates that in case of denial of access the Ombudsman office "a) shall inform a superior Authority, or if there is no such Authority, the Government, b) may inform the public of his findings, including the disclosure of the names and surnames of persons authorised to act on behalf of the Authority."[40] Thereby, the entry shall be enabled as soon as possible and the authorities shall be deterred from denying access in the future.

In *Austria* and *Slovenia*, no specific procedures are in place. However, it was not reported that the inspectors were ever denied access.

In conclusion, clear procedures in case of denial of access to the NPM appear to be useful. While the relevant authorities from highest to lowest level should be informed of the rights and duties of the NPM immediately after its establishment, a clear identification for the NPM (badges, authorisation documents) should be made available, special orders from the relevant ministries and headquarters be issued as well as official and competent contact points/liaison officers be provided in cases of denial. If access is denied despite of those measures the possibility for the NPM to go public should be considered as it can send out a clear message to all responsible authorities and thus have a useful deterrent effect.

Access to information

While the NPMs shall in principle be granted access to all information regarding the number of persons detained, the places of detention as well as the treatment and the conditions of detention (art. 20 (a) and (b) OPCAT), this can be difficult when it comes to confidential information. Most NPMs explicitly regulate the NPM's unrestricted access to all information deemed relevant for an effective monitoring of places of detention (e.g. including medical files of the detainees).

In *Slovenia*, the Ombudsman office has "unrestricted access to all the data and documents within the competence of the state bodies" while having to respect the rules of secrecy of data.[41] This right automatically confers to the NPM (including the civil society organisations (CSO) cooperating with it, as specifically stipulated in art. 5 (3) of the Ratification Act).

Equally in *Germany*, the NPM may request access to any information deemed relevant as stipulated by the Administrative Order and State Treaty in reference to art. 19 and 20 OPCAT.

In *Austria*, the visited authorities are obliged to grant access to all documents and provide all necessary information relieving them from official secrecy (section 15 c (4) Security Police Act).

A detailed regulation guaranteeing access to confidential information can be found in the Ombudsman law of the *Czech Republic*. Section 15 (4) states that "at the Defender′s request, a person authorised to do so pursuant to a special law shall relieve individual employees of an Authority from the obligation to maintain confidentiality that has been imposed on them by a specific law. […] For the purposes of an inquiry under this Act, the Defender cannot be required to comply with the obligation to maintain confidentiality imposed by a contract." This provides a strong and unambiguous guarantee for the NPM against any State

[40] Section 20 (2) and (3) in conjunction with sections 15 and 16 Act on the Public Defender of Rights, no. 381/2005.
[41] Art. 35 Human Rights Ombudsman Act.

interference in accessing relevant information.

Some countries foresee certain restrictions when it comes to accessing confidential or classified information.

In *Poland*, the NPM is said to have access to all relevant information in the sense of OPCAT.[42] However, when it comes to 'classified information' the Defender is "subject to the principles and procedures set forth in relevant regulations on the protection of classified information" applying to any other representative of public institutions.[43] Almost none of the information of interest to the NPM was said to have a status of classified information.[44]

In *France*, it is stipulated that "the privileged nature of information, documents and objects requested by the of the Inspector General of Places of Detention, shall not bar their communication, except where their disclosure could lead to a breach of national defence secrecy, state security, the confidentiality of investigations and inquiries, medical confidentiality, or the privilege applicable to lawyer-client communications."[45] This constitutes a very broad restriction potentially encompassing all information relevant to an NPM. Particularly, the exception of documents subject to medical confidentiality that are crucial to inspecting the treatment of detainees is concerning. Further, the restriction in cases of state security is highly unspecific and thus open to abuse.

In conclusion, any restriction of access to information is to be seen with great caution. When an NPM is subject to a procedure regulated by the authorities when wanting to access confidential information, this opens up ways for undue and arbitrary State interference and may obstruct the effective and timely monitoring of places of detention. Clear rules should be established to relieve the NPM from any restrictions of confidentiality or from decelerating procedures for accessing information under the authority of State authorities, however respecting the protection of data.

Working methods

The working methods of an NPM are not specified in OPCAT. It is up to the NPM how it prepares, conducts and follows up its visits as long as it respects the prescribed requirements for ensuring effective monitoring. For this purpose it can issue internal guidelines or rules of procedure.

Selection of places

The decision which places are to be visited usually remains with the head of the NPM (e.g. Ombudsman in *Slovenia*, Controleur General in *France*).

In the *Czech Republic* and *Slovenia,* the selection of the places to be visited is done by an annual plan/programme of visits.

In *France*, the decision appears to be taken progressively by the Controleur at the suggestion of his general secretary. The sites chosen are notified to the inspectors only a few days before

[42] Country Report, Poland, p. 5.
[43] Art. 13.1 (2) Ombudsman Act of 15 July 1987 on the Human Rights Defender; see Country Report, Poland, pp. 5, 6.
[44] See Country Report, Poland, p. 6.
[45] Law no. 2007/1545 art. 8 (4).

the visit and distributed to all members of the NPM. The decisions take into account the specific needs of monitoring in the country.

While an annual plan/programme of visit can be useful in order to ensure regularity and geographical coverage, such plan should not be handled rigidly and be adapted according to upcoming needs. A clear responsibility for the selection of the places is necessary for the effective functioning of the NPM. However, the decision should be taken in a participative manner also taking into account the views of the members of the NPM.

Preparation of the visits

In principle, in all selected Member States the preparation of the individual visits take into account all relevant sources of information available to the NPM including its own prior reports, reports by other State and non-State organisations as well as international bodies such as the SPT and the CPT, jurisprudence (e.g. of the European Court of Human Rights), media reports and direct allegations from detainees. As the selected models show, the advantage of an Ombudsman office acting as NPM is that they usually already have experience in inspecting places of detention prior to their designation as NPM and continuously receive individual complaints of detainees in their regular function as Ombudsman office. This provides a useful source of information for the NPM when selecting the places of detention to be visited and preparing the individual visit. However, also new bodies as NPM can and should avail themselves of such information by closely cooperating with and consulting the National Human Rights Institution or Ombudsman office in place.

Duration and frequency of visits

The duration of visits always depends on the size and complexity of the facility to be inspected. In the selected countries small facilities like police stations were said to be inspected for one day whereas larger prisons or psychiatric institutions may be visited for several days. Naturally, the duration and intensity of a visit is dependent on the resources of an NPM. In *France*, where the NPM is particularly well-resourced one visit to the largest detention facility has involved almost all members for a period of 15 days.[46]

The frequency of visits, aimed at achieving an adequate regularity and a complete geographical coverage also depends largely on the resources of the NPM. While the Federal Agency in *Germany* was said to be able to carry out no more than 10 to 15 visits to the facilities under its competence due to the resource constraints,[47] the NPM in *France* conducts approximately 13 visits a month (150 a year). A certain frequency of visits must be deemed necessary to fulfil the purpose of OPCAT to "regularly examine" the treatment of persons in all places of detention.

Execution of visits

The visits are carried out in a similar manner in all selected Member States respecting the requirements of OPCAT. All selected NPMs foresee the possibility of unannounced visits. In practice, this is mostly done regarding smaller facilities while thorough inspections of larger facilities are usually announced (e.g. *France*, *Slovenia*). This ensures a productive inspection and the adequate cooperation of the authorities in place. Further, the inmates are given time to prepare comments for potential meetings and the inspectors to receive and study

[46] Country Report, France, p. 10.
[47] Country Report, Germany, p. 8.

documents on the layout of the premises in advance.[48]

In practice, the ratio of announced and unannounced visits varies greatly among the selected Member States. In *Germany*, all visits of the NPM have so far been announced,[49] Similarly in the *Czech Republic*, it appears that in practice the visits were notified to the management of the facility.[50] On the contrary in *Poland*, 99 per cent of the visits are unannounced. An exception from this rule is only made regarding institutions with more than 800 to 1,000 persons.[51] In *Austria*, all visits to police premises are unannounced.

An NPM should explicitly be given and exercise the right to carry out unannounced visits to receive an objective and "distortion-free" picture of the treatment of detainees and the conditions in a facility, and uphold a deterrent effect.[52]

All selected NPMs can and do conduct interviews in private as explicitly foreseen by OPCAT.

Reporting procedure

All selected NPMs draft reports and recommendations upon their visits as obliged by art. 19 (b) OPCAT. While the recommendations are not legally binding they can nevertheless be linked to a deadline of implementation that is checked by the NPM (see *Slovenia*). There are, however, differences when it comes to the submission and publication of the reports. Article 23 of OPCAT only foresees the obligation of a State Party to "publish and disseminate the annual reports of the NPM." How the NPM deals with the individual visiting reports is left to the State Party.

In *France* and *Slovenia*, the visiting reports are first submitted to the responsible authorities to give them the opportunity to respond to any deficiencies in the facility. Only after receiving a reply the report it is published on the website. In *France*, the visiting and annual reports can be complemented by general, structural recommendations published in the Official Journal to send a strong signal to the authorities and the civil society that urgent action needs to be taken. This is usually received attentively and critically by the general media.

The NPM in *Poland* publishes besides the annual and quarterly reports extracts of visiting reports together with answers from the concerned authorities.

In the *Czech Republic* no individual visit reports are published but only final reports on visits to a number of institutions of a similar nature summing up the common problems and inadequacies. The final reports, which refrain from naming individual facilities but focus on the problems in a structural, general manner, are sent to all relevant institutions and made accessible on the website. However, the Czech NPM reserves itself the right to go public with

[48] Country Report, France, p. 13; see also the practice of the CPT to announce some of its visits to bigger facilities while at the same time carrying out unannounced visits.
[49] Country Report, Germany, p. 9.
[50] Country Report, Czech Republic, p. 10.
[51] Country Report, Poland, p. 8.
[52] See the view of the Special Rapporteur on Torture, Manfred Nowak, on the necessity of unannounced visits, E/CN.4/2006/6, 23 December 2005, para. 24: "Were he [the Special Rapporteur] to announce in advance, in every instance, which facilities he wished to see and whom he wished to meet, there might be a risk that existing circumstances could be concealed or changed, or persons might be moved, threatened or prevented from meeting with him."

individual observations in case the authorities fail to inform the Ombudsman of the corrective measures taken within 30 days or if those measures are deemed insufficient.[5353] An annual report is submitted to the Chamber of Deputies presenting the most relevant problems and inadequacies. In *Austria* and *Germany*, only the annual report is published.

When deciding whether to publish visiting reports a balance has to be struck between the cooperative and non-confrontational character of an NPM and external scrutiny, transparency and a deterrent effect. In principle, the publication of visiting reports appears useful after the consultation of the concerned authorities, giving them the opportunity to respond to the criticism and recommendations made. In any case, it is useful to grant an NPM the possibility to publish its findings on a visit when the concerned authority proves to be uncooperative and refuses to implement the recommendations made.

The responsibility for the reports is principally with the head of the NPM (e.g Ombudsman, Controleur General). However, the individual 'field notes' of each member should be considered. In case of discrepancies or dissent it may be useful to provide for the possibility of attaching a dissenting opinion to the report (see *Slovenia*).

Follow-up

In principle, OPCAT requirement of regularly examining places of detention makes follow-up visits to the inspected facilities necessary. This possibility is foreseen by all selected Member States. However, in practice, it naturally depends greatly on the resources available to the NPM. A poorly-resourced NPM, as in *Germany*, will have to balance the need of ensuring complete geographical coverage of its monitoring against the need to re-visit places where it has uncovered problems and shortcomings to observe the implementation of the recommendations. In *Slovenia*, follow-up visits have been carried out to verify the implementation of the recommendations and to ensure that the interviewees do not suffer reprisals for their contact with the NPM. In *France*, so far two follow-up visits have been conducted.

In view of ensuring a practical impact of the NPM, follow-up visits are an absolutely crucial element of its work. Only then can the adequate implementation of recommendations be observed and ensured. Further, it is a strong preventive measure for the protection against reprisals of the detainees interviewed. Therefore, an NPM is urged to integrate follow-up visits into its regular visiting plans. Other avenues for following up the implementation of the NPM's recommendations, such as regular meetings with representatives of the responsible authorities and other involved State and non-State actors or a regular reporting procedure for facilities where great deficiencies were found, could be explored.

3.4. Membership and Composition

The number of persons employed for the purposes of visiting places of detention varies greatly among the selected Member States. The NPM in *France* employs 14 full-time and 14 part-time inspectors as well as six to eight additional staff members. In *Poland*, 13 employees at the Ombudsman office are assigned (among other possible duties) to fulfil the tasks of the NPM, supported by four employees from the office's Regional Departments, responsible for cooperation with the NPM and taking part in the NPM's visits. The significantly smaller Member States *Czech Republic* and *Slovenia* have only six and seven core employees at the

[53] Section 20, para. 2 (b) Act No. 349/1999

Ombudsman offices assigned to the NPM while the Slovenian NPM is complemented by NPM members from three selected CSOs (see chapter 3.6. below). The *German* NPM consists of merely four (Joint Commission of the Länder) plus one (Federal Agency) members of which none are employed full-time. Rule 15 (a) (1) of the Rules of Procedure of the *Austrian* HRAB provides that the six Commissions of the HRAB (which is itself composed of eleven honorary members) shall comprise a minimum of six and a maximum of nine members, including a Head of Commission. These members, who remain within their specific profession, are appointed for a certain period and go on visits on an ad hoc basis. In practice, the six Commissions have currently seven members each, thus in total 42 members. Each Commission is in addition supported by a half-time staff member responsible for coordination (he/she is not member of the Commissions).

Relation between full-time, part-time and ad hoc experts[54]

The relation between full- and part-time experts also differs between the selected NPMs. The great number of full-time and part-time inspectors in *France* contrasts the *Austrian* model where all experts of the Commissions are employed on an ad hoc basis. Permanent experts guarantee for consistency in the work of the NPM and make it possible to plan visits on a regular basis without the great coordination efforts connected with a team composed of persons who have permanent other professional commitments. However, the availability of a

team of permanents as in France naturally requires extensive resources. The advantage of relying on ad hoc experts is that they only have to be paid for their individual contributions to the NPM (e.g. visits, preparations, drafting of reports) and that it allows an NPM in view of restricted resources to draw from a larger pool of experts who can come from various institutions and have various backgrounds. Thus, the composition of the visiting teams can be adapted to the specific needs of each visit. Nevertheless, such approach requires great commitment and flexibility of the contracted ad hoc experts as well as a thorough and dedicated coordination of the expert work, by means of a qualified permanent administrative coordinator, without which an adequate composition of visiting teams and an effective response to urgent situations is not possible.

The selected NPMs' functioning within Ombudsman offices rely greatly on the employees at their offices. While in the *Czech Republic* a newly set up department for the NPM engages solely on this agenda, in *Slovenia* and *Poland,* some of the employees at the offices are employed full-time for the NPM, while some work part-time for the NPM or as needed. The reliance on part-time members at their own offices makes the NPM particularly flexible and the part-timers more easily available for the NPM.

Slovenia, which formally provides for a separate NPM unit, takes a flexible approach in practice and all employees of the NPM also work in the field of other competences of the Ombudsman. Additionally, the Slovenian model provides for the possibility to second civil servants from other public institutions to add to the NPM's expertise without having to make additional employments (regarding potential independence concerns connected with this possibility see below, chapter 3.5.). However, in practice such secondments have thus far not taken place.

[54] In the following, full-time and part-time experts are persons that are regularly employed by the NPM. Ad hoc experts are members of the NPM that are not employed but merely contracted for the period of the monitoring visits. External experts are not members of the NPM but merely assistants to the members taking part in the visits. They are also contracted only for the period of the visit to provide their specific expertise (e.g. doctors, interpreters).

Similarly in *Poland*, where the members of the NPM are drawn from the full-time employees who, in case of necessity, also fulfil other duties of the Ombudsman office, the NPM can in turn be supported by other employees of the office. All employees and the director of the Criminal Executive Law Department (coordinating the NPM and assigning six of 14 employees to the NPM) can participate in the NPM visits if necessary.

The advantage of a flexible embedding of the NPM in an Ombudsman office is that the NPM can avail itself of the expertise of different departments in the office as needed (e.g. criminal justice, child rights, minority rights, healthcare, migration). The expertise available at an Ombudsman office can strengthen the NPM while the NPM's practical experiences can add to the experiences of Ombudsman office as a whole, thus creating synergy effects. Furthermore, a flexible approach can significantly lower the costs of an NPM.[55] It can, however, also have negative effects for both the NPM as well as the Ombudsman office. The flexibility in responsibilities can in practice mean that the NPM members at the office are constantly overloaded with other commitments and responsibilities impeding their availability for the NPM. For the Ombudsman office the disadvantage may be that in case of a low increase of resources with its designation as NPM, the tasks of the NPM may take away a significant amount of time and resources of the office and thus impede its previous, traditional functions (e.g. handling of complaints, commenting on draft laws, research and other particular thematic areas of work).

Consequently, a flexible approach towards the functioning of an NPM in an Ombudsman office needs to be carefully handled and rules and fields of competencies have to be established to ensure the smooth functioning of the NPM as well as the Ombudsman office in other areas. In addition, sufficient resources have to be allocated to the Ombudsman office.

External experts

The difficulties of an NPM in terms of availability of the necessary expertise among their full- or part-time or ad hoc visiting teams can be remedied by additionally contracting external experts on a case-by-case basis, meaning without specified framework contracts. Such option exists in all selected Member States and is an important way to allow for flexibility in the performance of the NPM's functions and to adapt to the specific needs for each visit (e.g. some visits may require very particular expertise such as in disability rights, minority issues, sexology). Of course the mode of hiring external experts has to be carefully reviewed in order to ensure quality and consistency of the NPM and avoid any internal conflicts. Thus, clear criteria for the external experts and clearly spelled out rules of procedure for their function are strongly recommended.

Pluralistic composition

An obligatory requirement regarding the membership of the NPM spelled out in art. 18 (2) OPCAT is the pluralistic composition ("required capabilities and professional knowledge"), which is crucial for its effective functioning. The need for diverse qualifications for the complicated task of monitoring all places of detention – ranging from prisons to homes for the elderly – is acknowledged in all selected Member States. While *France* takes this into account regarding its permanent as well as temporary inspectors, some countries (*Germany, Poland, Czech Republic*) in practice have to rely entirely on the hiring of external experts for ensuring the necessary qualifications of the visiting teams. The lack of a medical doctor among the members of the NPM was criticised in the case of *Slovenia*. The fact that he/she

[55] Country Report, Slovenia, p. 5.

only works part-time on a contractual basis would not guarantee his/her indispensable presence at all visits; this was justified with the financial constraints of the NPM.[56] In principle, it should not really matter whether the pluralistic composition of visiting teams is ensured by full-time, part-time, ad hoc or external experts as long as their availability (if necessary on short notice) is ensured.

In *Poland*, where the regular NPM staff is commonly accompanied by external experts, some problems with finding external experts who would participate
were acknowledged.[57]

On the contrary in *Austria*, the participation of ad hoc experts with multidisciplinary professional expertise (law, medicine, psychology, sociology, social work) in the fulfilment of the Commissions' tasks seems to function well. The members of the Commissions are selected on an individual basis and are each nominated for a minimum of two years. Each of the six Commissions has one coordinator who is responsible for bringing together a sufficient number of experts on a visit by visit basis. The members are remunerated in accordance with the number and length of the visits they factually undertake.

In *Germany*, where the draft administrative agreement foresees the possibility to hire external experts to fill gaps in the team composition, the visits of the NPM were said to be "normally conducted by the honorary director [former prison director] and his research associate [lawyer]."[58] Thus, in practice there is no pluralistic composition of the visiting team. Consequently, the theoretical possibility of hiring external experts for guaranteeing a pluralistic visiting team is not sufficient. When the permanent members of the NPM are not pluralistically composed, a careful procedure has to be elaborated to ensure that in practice the visiting teams always comprise the members absolutely necessary for an effective monitoring visit (e.g. doctors).

Gender balance and representation of ethnic minorities

Another important issue regarding the composition of the NPM is the gender balance and the adequate representation of ethnic and minority groups in the country, art. 18 (2) OPCAT. An adequate gender and ethnical balance is naturally impossible where the NPM consists of only one person like the Federal Agency in *Germany*. Equally in *Slovenia*, this criterion does not seem to be taken particularly seriously.[59] In *Poland* of the 17 persons fulfilling the NPM functions on a regular basis, nine are women and eight men. The Rules of Procedure of the *Austrian* HRAB explicitly foresee balanced gender proportions within the Commissions (Rule 15 (a) (2)), which is also factually implemented. In addition, a relatively high number of members of the Commission have either migrant background or represent ethnic minorities in Austria, as stipulated in the Rules of Procedure of the Commissions.

The representation of ethnic minority groups is particularly important in countries where the percentage of a minority group in prisons is significantly higher than in the general population (e.g. Slovenia, Romania). In practice, this requirement appears to be largely ignored by the selected Member States other than *Austria*.[60] The gender and ethnical balance of the visiting teams should be given more importance and can be ensured by hiring external

[56] Country Report, Slovenia, p. 5.
[57] Country Report, Poland. p. 4.
[58] Country Report, Germany, p. 8.
[59] Country Report, Slovenia, p. 5.
[60] See the explicit criticism against Slovenia, Country Report, Slovenia, p. 5.

experts and cooperating with civil society organisations (e.g. through agreements with organisations and associations with a minority rights focus).

Selection procedure

The NPMs in the selected Member States have different procedures in place for the selection of their members. The Ombudsman offices acting as NPMs in the selected Member States are themselves responsible for the recruitment of the NPM members. Since the designation of the Ombudsman office as NPM in the selected countries (*Czech Republic*, *Poland, Slovenia*) specifically aims at economising resources by availing itself of the existing infrastructure of the offices, the NPM members were not all newly recruited but partly drawn from the existing departments and services.

In *Poland*, five new positions to deal with the NPM functions were created in the Office in the Ombudsman office.

In *Slovenia*, four new employments were made with the designation as NPM which were said to be used "to cover the needs of the office" while also being available for the NPM unit when necessary.[61]

In the *Czech Republic*, where a completely new and separate department within the Ombudsman office was set up for the purpose of fulfilling the task of the NPM, some qualified employees which had already been involved with enquiries at places of detention were relocated to the NPM department. In addition, new recruitments were made specifically for the NPM. The applicants were required to pass a professional test in law as well as psychometric and personality tests. They were interviewed by a Recruitment Committee in which the Head of Office and the Head of the Legal Department as well as the Ombudsman himself was present. The applicants were made aware of the 'specific agenda' of the jobs they were applying for. The only obligatory criterion was a qualification in law, other qualifications such as in the area of psychology and social work were not considered essential.

In the countries where completely new bodies were set up as NPMs new recruitments had to be made. In *France*, the Controleur General has full freedom of choice when it comes to selection of the NPM members. The criteria the Controleur General takes into consideration are specific competences in the field of detention, previously held control or inspection positions and a personal commitment to human rights.

In *Germany*, the selection of the NPM members is particularly problematic since neither the law nor an administrative order regulates the procedure. The decision on nomination of candidates and their final selection is solely carried out by the Ministries of Justice (on federal and State level). There is no open or transparent procedure and the selection of members is said to have taken place "behind the (political) scenes."[62] Furthermore, the law spells out no criteria for the members. While the eleven members of the HRAB in *Austria* are appointed by the Minister of Interior on the proposal of relevant ministries (five members) and human rights NGOs (five members),[63] the members of the six Commissions are chosen after a public call for applications and a formal hearing of the applicants based on objective

[61] Country Report, Slovenia, p. 5.
[62] Country Report, Germany, p. 7.
[63] The chairperson has to be elected from among the judges of the High Courts or Constitutional law professors of the Austrian universities.

criteria of professional background and experience in human rights. The HRAB then nominates the suitable candidates, which are in turn officially appointed by the Minister of Interior. The respective Heads of Commission have to be heard in this procedure.

In conclusion, many of the selected countries appear to be missing clear procedures and guidelines on the selection of its members. The recruitment is carried out in a rather pragmatic way, and clear criteria for the selection of members corresponding with the requirements of OPCAT are often lacking. This is not only concerning in view of objectivity and transparency but also in terms of ensuring visiting teams of high qualification, expertise and multidisciplinary composition. Clear, transparent and inclusive selection procedures (e.g. through public tender) including the formal right to propose candidates for other than executive institutions (e.g. CSOs, the Parliament) and objective and sound selection criteria are to be preferred to ensure a composition respecting the requirements of professional capabilities and balanced composition.

Contractual basis

Another important issue is the contractual basis on which the members of an NPM are hired. While this is primarily an issue regarding the independence of the NPM members (see below 3.6.), it can also have influence on the composition of the teams. As mentioned above, the members can be hired on full-time or part-time contracts as well as on an ad hoc basis. While

the full-time and part-time employees of the selected NPMs have contracts with clearly spelled out rights and duties and receive adequate payment this may differ for the ad hoc experts.

As mentioned, in *Germany* all members of the NPM are part-time and hold honorary positions. Thus, no salary or professional fees are provided and only the travel expenses and daily allowances (max. 34 EUR/day) can be reimbursed. This can be problematic as this may prevent active professionals of high qualifications to become members of the NPM due to their professional commitments. Thus, the lack of adequate payment of NPM members narrows down the scope of possible applicants. Lastly, also the commitment of the experts may suffer under a lack of adequate honorarium and recognition.[64]

In *Austria*, all members of the Commissions conducting the visits receive remuneration commensurate with the expenditure of the time for each visit. This has been considered "crucial to maintain the high quality of monitoring and to secure membership of professional experts who have to be able to afford the necessary time among other professional commitments."[65]

In *Slovenia*, the members of CSOs taking part in the visiting teams are not paid but reimbursed and only receive a symbolic sum for their participation (5 EUR/hour or part hour) as well as a separate sum for the completion of a visiting report (100 EUR). This may prevent the most qualified and committed CSOs and individuals to participate to take part in the NPM's visits.

In conclusion, the lack of adequate payment for NPM members is highly problematic and may weaken the availability to include highly qualified experts in the visiting teams. An adequate and specific contractual basis including adequate honorariums should be found for

[64] See the criticism in the Country Report Germany, p. 12; see also State of Play Report, p. 7.
[65] Country Report, Austria, p. 6.

all full-time, part-time or ad hoc members of the NPM to ensure a composition in line with the requirements of OPCAT and the Paris Principles. (However, it also has to be observed that the provision of an adequate remuneration of experts does not impede the complete functional and personal independence of the members.)

Initial and ongoing training

Not all members can have the expertise necessary for fulfilling the complex task of detention monitoring when joining the NPM. The practical knowledge on how to conduct a monitoring visit should be provided by means of initial and ongoing trainings of all members as well as careful supervision of new members by experienced ones.

In the *Czech Republic*, the employee appointed as head of the NPM department underwent thorough theoretical and practical training provided by an international NGO. All other employees receive an initial training as well as regular ongoing training sessions and seminars related to specific issues of detention monitoring.

In *Poland*, all employees of the Ombudsman office, the Regional Departments as well as external experts' part of the NPM receive an initial training to prepare them for their duties. They are further closely monitored by supervisors during their first visits. Furthermore, they participate in ongoing international trainings and projects organised by the EU and the Council of Europe.

In *Slovenia*, the members of the NPM should have practical experience and training in monitoring; the ad hoc experts from NGOs receive some initial training from the Ombudsman office in monitoring places of detention.

3.5. Independence

The full independence of the NPM is a crucial requirement for its effective functioning and is expressly prescribed in art. 18 (1) OPCAT to encompass not only institutional but also functional and personal independence.

Institutional independence

In the selected countries where the Ombudsman office was designated as NPM its independence is regulated in the same manner as that of the office. In *Poland* and *Slovenia*, the position of the Ombudsman is inscribed in an Ombudsman Act as well as the Constitution of the State providing a strong guarantee for its position. The Ombudsman office is in principle afforded institutional independence by law, as a completely separately and independently functioning institution.

The selected newly established bodies as NPMs in *France* and *Germany* are entirely separate and independent institutions as provided by law (art. 4 of the Administrative Order and the State Treaty of Germany; art. 1 Law 2007/1545 of 30 October 2007 of France). However in *Germany*, the proximity to State authorities of the NPM, which is annexed to the Centre of Criminology, an institution controlled and financed by the Federation and its States, was a point of criticism.[66]

[66] Petra-Follmar Otto, "Die Zeichnung, Ratifikation und Implementation des Zusatzprotokolls zur UN-Anti-Folter-Konvention in Deutschland", in: Prävention von Folter und Misshandlung in Deutschland, German

The HRAB in *Austria* is a special case as it is not an NPM under OPCAT. The HRAB is a 'consultative organ' of the Ministry of Interior and thus not institutionally independent.

Functional and personal independence

The Ombudsman laws of the *Czech Republic*, *Poland* and *Slovenia* foresee far-reaching guarantees of functional independence for the Ombudsman such as the appointment and (restricted possibility of) dismissal by, as well as accountability to a legislative and not executive body; the right of the Ombudsperson to employ and dismiss his/her employees independently, the right to develop own rules of procedure, immunity from persecution and incompatibilities with official State or party positions. However, those guarantees of independence are only expressly mentioned for the Ombudsperson him/herself without specifically including the members of the NPM. Thus, the latter's functional independence would have to be derived from the guarantees for the Ombudsman as well as the ratifying acts incorporating art. 18 OPCAT into national law. The preferred solution for guaranteeing the full functional independence of an NPM would naturally be to expressly include specific guarantees for its members in the Ombudsman law.

In *France*, the Controleur General as head of the NPM does not receive instructions from any authority. He/she cannot hold any elective position or carry out any other duty, and enjoys immunity from prosecution for his/her opinions and actions carried out in his/her functions. The Controleur General can choose his/her assistants independently who are to renounce any

activity related to the inspected facilities and are not bound by instructions of anyone else than the Controleur (see art. 4 III of Law 2007 - 1545).

In *Germany*, the functional independence of the members is provided for in art. 4 of the Administrative Order and the State Treaty. The members of the NPM are free from any instructions.

The same goes for *Austria*, while the Rules of Procedure for the Commission are, however, issued by the Ministry of Interior and not by the HRAB itself.

Personal independence

Another crucial aspect is the personal independence of the NPM members. In order to fully guarantee the personal independence of the NPM, its members should not hold any active function in the criminal justice system, not be subjected to instructions as civil servants during their terms of office and ideally not even have any strong personal ties to persons in the executive government or law enforcement personnel.[67]

In *Slovenia*, active civil servants could be seconded to the NPM (art. 53 of the Human Right Ombudsman Act), which has, however, not happened in practice so far. Even if the civil servants are for the period of the fulfilment of the NPM's tasks free from instructions of their usual employer, their connection and subordination to State authorities create serious concerns regarding their personal independence. An active civil servant will have serious conflicts of interest in the fulfilment of the NPM's tasks and may even endanger his/her position and professional career by independently assessing other public institutions. Therefore, the incorporation of active civil servants in the NPM cannot be deemed a

Institute for Human Rights (ed.), pp. 57-70; Country Report, Germany, p. 6.

[67] See State of Play Report, p. 6.

satisfactory solution.

In *France*, the majority of the inspectors are former civil servants from the Ministry of Justice (ten), Ministry of Health and Social Services (six), and the Ministry of Interior (four). While their experiences from the various fields may be useful for the functions of the NPM, it is to be critically noted that they may maintain close professional and private ties with State authorities that could impede their independence, especially when they plan to return to the respective State authority.

Appointment procedure and contractual basis

Also the appointment procedure of the members must guarantee the independence of the NPM. Therefore, the appointment of members should not be directly decided by the executive branch of the government.[68]

In *Germany*, the appointment procedure has raised particular concerns. The nomination of the members was said to happen behind the (political) scenes (see above –chapter 3.4.) and the final appointment is done by the Ministries instead of a legislative body. Similarly in *Austria*, the members of the HRAB as well as the Commissions are lastly appointed and can be dismissed by the Ministry of Interior. In theory, this enables the executive authorities to select the most 'convenient' experts and thereby influence the work of the NPM.

In the *Czech Republic*, *France*, *Poland* and *Slovenia*, the members of the NPM are appointed by the head of the NPM, the Ombudsperson or, in the case of France, the Controleur General. While the Ombudspersons are themselves appointed by legislative bodies, the Controleur General is appointed by a President's decree after consultations with the Parliament. It appears that the members of the NPM are selected according to objective and reasonable criteria although the exact procedure is not always clear (see above 3.4.).

In principle, the process of appointment should be most inclusive, involving the legislative bodies but also civil society actors. The selection criteria should be clear and the procedure as well as the decision of appointment should be made transparent to prevent any political influence. For the purpose of guaranteeing the full independence of the NPM, its members must be employed on a sound contractual basis and be protected from any arbitrary dismissal. While the Ombudspersons in the selected Member States enjoy good protection from arbitrary dismissal (only under special circumstances and with the approval of a legislative body), such basis is not clearly specified regarding the members of the NPM. However, since it is the Ombudsperson him/herself responsible for the appointment and dismissal of the staff, they are protected from any State interference.

In *France*, the Controleur General, who cannot be dismissed before the termination of his/her mandate (six years, not renewable) except by resignation or impediment, has the complete independent authority to appoint and dismiss the members. Thereby any arbitrary interference by State authorities is prevented. In *Germany*, where the appointment of the members is done by the executive, they enjoy the same guarantees against dismissal as judges. Thus, they can only be dismissed due to criminal conduct or other judicial conviction (e.g. disqualification from holding public office – Section 24 German Judiciary Act).

[68] See State of Play Report, p. 6.

In *Austria*, the members of the Commissions were initially contracted on a service contract according to civil law that could be terminated any time. Due to the serious concerns over independence this practice was revised in 2004. However, according to the revised Rules of Procedure they can be dismissed by the Ministry of Interior upon a written well-founded request. Even if in practice this has never happened, such unspecified possibility for the executive to dismiss experts is not an adequate solution for an NPM.

Financial independence

The NPM must be afforded financial independence by sufficient resources as well as budgetary autonomy to exercise operational independence.

In the *Czech Republic*, *Poland* and *Slovenia* the NPMs receive their budgetary independence through that of the Ombudsman offices which are allocated specified resources from the government budget. In *France*, the financial resources come from the State budget under a program named "protection of rights and liberties". This program is run by the Government's General Secretariat and is examined and approved specifically by the Parliament.

While also in *Germany* there is a specific and autonomous budget allocated to the NPM, this is so low (300,000 EUR/year maximum and an upper limit of the travel expense of 10,000) that it cannot properly fulfill its mandate. Even in *Austria*, where the budget of the HRAB depends entirely on the Ministry of Interior, the HRAB is autonomous in the management of the budget.

Perception as independent

It is of utmost importance that besides the formal independence an NPM is also perceived as independent and credible by detainees and the public at large. Particularly when designating an existing institution as NPM it has to be carefully scrutinised how this institution is perceived in public so the NPM does not take on any existing credibility deficiencies. Such concerns have not been noted regarding the offices in the *Czech Republic*, *Poland* and *Slovenia*, despite the lack of an 'A' accreditation (full compliance with the Paris Principles) of the International Coordinating Committee of National Human Rights Institutions (ICC) for the *Czech Republic* and *Slovenia*.

In *Austria* and *Germany*, the non-transparent and politically influenced selection and appointment procedure have a negative influence on the mechanisms' perception in society.

3.6. Relations to Civil Society Organisations

The cooperation with CSOs is an important aspect of an NPM's work, as in many countries they play an important role in the field of prevention of torture and ill-treatment and the protection of rights of detainees. CSOs are often active in detention monitoring and receiving complaints of detainees that have become victims of torture and ill-treatment. Their long-standing expertise in the field of detention monitoring and torture prevention can significantly contribute to the work of an NPM. But besides the expertise and additional resources the NPM can gain by cooperating with CSOs, their standing as independent actors can make the NPM more inclusive and open, adding to its credibility and legitimacy and instilling greater confidence from the side of the detainees.

All NPMs in the selected Member States cooperate with CSOs in some form which varies from formal, institutional collaboration to individual and informal cooperation channels.

Formal and institutional cooperation

The most far-reaching cooperation with CSOs can be found in *Slovenia* where the NPM cooperates formally with partner CSOs forming part of the NPMs visiting teams. It is expressly stipulated in the ratification act of OPCAT that registered NGOs or humanitarian organisations "may cooperate with the Ombudsman in execution of tasks and responsibilities of the protocol when monitoring places of detention" (art. 5). The cooperating CSOs are selected by public tender published in the Official Gazette of the Republic of Slovenia and chosen by the Ombudsperson him/herself. The main criterion of selection is experience in the field of human rights and torture prevention. Additionally, the individuals that are to participate in the visits must show that they do not have a criminal record (e.g. final judgment for a criminal offence to an unconditional imprisonment of more than three months). In the past, two public tenders were conducted, for which five CSOs applied; all of them were chosen (first: two organisations; second: three organisations). A contract of cooperation is drawn up between the NPM and the CSOs regulating the mutual obligations of both sides. The aim is cooperation on an equal basis between the members of the office and the CSOs. While the CSOs have to submit a written statement that they will work according to the instructions of the Ombudsman and are bound by the same laws and regulations as the office, they hold the same competences and powers as the NPM members from the office. In principle, the visiting teams are comprised of the office's and CSO representatives. The reports and recommendations are drawn up on the basis of field notes of each team member.

If the Ombudsman disagrees with a view of a CSO representative, this can be presented as a separate opinion. The participation of CSOs is not paid. The Rules on the Reimbursement of Costs and other Rewards only foresee a reimbursement for costs, a symbolic sum of 5 EUR/hour for the visits and payments for producing a complete report on a visit (EUR 100). A formal and institutionalised cooperation with CSOs enables the NPM to have continuous strong ties to civil society[69] and avail itself of their long-standing experiences and expertise in the field of torture prevention. It further reduces the costs for an NPM. However, an institutional cooperation should not have as the main objective the economisation through outsourcing of responsibilities. An inadequate payment of CSO representatives may have a negative impact on the quality of the experts' work and prevent the most qualified organisations and individuals to cooperate with the NPM (see above, chapter 3.4.). Furthermore, an institutional cooperation with CSOs can only work when the communication between the different actors works well and the roles and competences are clearly divided. It is to be prevented that such an approach leads to conflict between both sides obstructing the NPM's everyday work and leading to inconsistent methods and poor outcomes. Only an NPM speaking with one voice can perform the complex and ambitious task entrusted to it by OPCAT. Clear rules and procedures are certainly important, as much as a good and cooperative spirit between the Ombudsman office and CSOs. Lastly, it has to be closely observed that an institutionalised cooperation does not lead to an instrumentalisation of CSOs for the purposes of the Ombudsman. Their independence and critical and open approach have to be respected. The mentioned concerns are of a general nature which have so far not been uttered in the case of Slovenia but should be borne in mind when attempting to make an example of it for other States.

[69] The idea behind the formalised cooperation was said to include 'ordinary people' from different backgrounds in the visiting delegations and thereby enable to receive the input and participation of lay persons, their everyday experiences and common sense, see Country Report, Slovenia report, p. 6.

Informal cooperation

Less close forms cooperation with CSOs can be found in the other selected Member States.

In the *Czech Republic*, the cooperation only takes place on an individual basis. There is no institutional cooperation with CSOs foreseen in the law and there are no set procedures or contracts in that regard. The inspections can under no circumstances be entrusted to a CSO. Members of CSOs can only take part in the functions of the NPM on an individual basis in which case they are selected on account of their individual expertise and experience disregarding their institutional belonging. When part of the visiting teams, CSO members are not subject to any different rules than any other NPM member.

Similarly in *Austria*, the HRAB as well as the Commissions allow for the cooperation with members of CSOs only on an individual level. In the HRAB an equal representation of governmental officials and members from civil society is intended. However, the NGOs that can nominate members to the Board are designated by the Ministry of Interior, which raises serious concerns regarding an impartial and objective selection process.[70] In the Commissions, the members are nominated by the Board following a public application procedure that can include CSO representatives and thus ensures a more objective and transparent selection procedure that focuses on the individual capacities of an applicant. The CSO members part of the HRAB and the Commissions are subject to the same contractual obligations as all the other members. All commissioners receive an adequate remuneration for their services commensurate with the expenditure of the time of each visit.

In *Germany*, the external experts that may be hired by the NPM to accompany the team at the inspection visits may as well belong to an NGO, but then would act in their function as associated experts to the NPM. Further than that the NPM only holds informal consultations with CSOs.

In *France*, no CSO is linked directly to the Controleur General. However, the NPM seeks to cooperate with CSOs in many different ways. Three of the inspectors are former employees or committed members of NGOs. This, however, means that by becoming members of the NPM they are no longer part of the NGOs and the direct link to civil society that remains in case of an institutional cooperation or individual cooperation with CSO members is lost. Furthermore, the Controleur General pays due consideration to the opinions and activities of relevant CSOs. During their visits the inspectors also gather the viewpoints of CSOs that should be present on the premises of a place of detention. The Controleur General regularly consults NGOs through bi-annual meetings with their chairpersons, where the activity report and issues of concern are discussed. He further sends representatives to general meetings or symposia organised by NGOs, and maintains bilateral relations with several directors of relevant organisations.

Similarly in *Poland*, the cooperation with CSOs happens on a purely informal level. Members of NGOs are not allowed to participate in the visits of NPM. However, NGOs can carry out visit to places of detention in their own capacity for which they require the permission of the respective authority. In order to ensure the permanent cooperation with other institutions dedicated to the protection of the rights of detainees, there is a network in place called "Agreement on the implementation of OPCAT" that gathers a number of NGOs and scholars with the objective of supporting the Ombudsman office in its role as NPM. The

[70] Country Report, Austria, p. 7.

members of the network meet every three to four months at the Ombudsman office to share best practices in the monitoring of places of detention and to exchange reports of monitoring visits.

3.7. Conclusion

The above described different modes of establishing an NPM in the selected Member States show that it is does not depend *what* model is chosen for the implementation of OPCAT but *how* it is implemented in practice. Each mode whether by designation of an Ombudsman office or by establishing of a new body comes with advantages and disadvantages. When choosing how to establish an NPM one should be entirely oriented towards the clear requirements of OPCAT and the Paris Principles for creating the most effective mechanism and take into account the specificities of the concerned country. The specific requirements of OPCAT and the Paris Principles and the possibilities for implementing an NPM accordingly in Romania shall be explored in detail in the subsequent chapter.

4. Possible Solutions for the Establishment of an NPM in Romania

The aim of the project was to elaborate together with Romanian experts from the relevant line ministries, representatives of civil society organisations as well as spokespersons from the Ombudsman office (Avocatul Poporului), including the Ombudsman, a set of options for the establishment of an NPM in Romania. Particularly the last workshop held in Bucharest on 21 and 22 June 2010 focused on concrete solutions, taking into account two possible alternatives for establishment,

e.g. the creation of a new independent body and the designation of the Ombudsman, supplemented with members of civil society, as the NPM.

In chapter 4.1., an overview of the number and different types of places of detention, as well as existing bodies responsible for inspection of these places is provided. Chapter 4.2. focuses on the pros and cons of designating the Romanian Ombudsman institution or establishing a new body as NPM. However, certain principle issues, such as structure, membership and involvement of civil society, must be discussed in a general matter, detached from the question whether the Ombudsman or a new institution will carry out the functions of the NPM. These issues are analysed in chapters 4.3. to 4.7.

4.1. Overview of Facts regarding Places of Detention and Inspections in Romania

The following list intends to provide an overview of the currently existing places of detention in Romania. However, it does not constitute an exhaustive enumeration of all places of detention in the country. In particular, no information was provided to the authors on places of detention under the Ministry of Defence, on the number of psychiatric hospitals or places for persons with mental disabilities, and on the number of police lock-ups.

Detention Facilities under the Ministry of Justice:

Penitentiaries for male adults (turquoise)

1. Penitenciarul Aiud
2. Penitenciarul Arad
3. Penitenciarul Bacău
4. Penitenciarul Baia Mare
5. Penitenciarul Bârcea Mare (Deva)
6. Penitenciarul Bistrița
7. Penitenciarul Botoşani
8. Penitenciarul Brăila
9. Penitenciarul Bucureşti-Jilava
10. Penitenciarul Bucureşti-Rahova
11. Penitenciarul Codlea
12. Penitenciarul Colibaşi
13. Penitenciarul Craiova
14. Penitenciarul Drobeta-Turnu Severin
15. Penitenciarul Focşani
16. Penitenciarul Galați
17. Penitenciarul Gherla
18. Penitenciarul Giurgiu
19. Penitenciarul Iași
20. Penitenciarul Mărgineni
21. Penitenciarul Miercurea Ciuc
22. Penitenciarul Oradea
23. Penitenciarul Pelendava
24. Penitenciarul Ploieşti
25. Penitenciarul Poarta Albă
26. Penitenciarul Satu Mare
27. Penitenciarul Slobozia
28. Penitenciarul Târgu Mureş
29. Penitenciarul Târgu-Jiu
30. Penitenciarul Timişoara
31. Penitenciarul Tulcea
32. Penitenciarul Vaslui

Penitentiary for female adults (pink)

1. Penitenciarul Târgşor

Penitentiaries for male and female juveniles (light yellow)

2. Penitenciarul de Minori şi Tineri Craiova

3. Penitenciarul de Minori şi Tineri Tichileşti

Hospital Penitentiaries (green)

4. Penitenciarul-Spital Bucureşti-Jilava
5. Penitenciarul-Spital Bucureşti-Rahova
6. Penitenciarul-Spital Colibaşi
7. Penitenciarul-Spital Dej
8. Penitenciarul-Spital Poarta Albă
9. Penitenciarul-Spital Târgu-Ocna

Reeducation Centres (dark yellow)

1. Centrul de reeducare Buziaş
2. Centrul de reeducare Găeşti
3. Centrul de reeducare Târgu Ocna

All facilities under the Ministry of Justice underlie the control of the National Administration of Penitentiaries (NAP) under the authority of the Ministry of Justice and the Directorate of Inspection of the Ministry of Justice.

Detention Facilities under the Ministry of Interior:

Police Detention Centres

There are 52 Police Detention Centres in Romania, twelve in Bucharest and one in each county except for the county of Ilfor. These centres underlie the control of the General Inspectorate of the Police under the authority of the Ministry of Interior and Administration. The number of police holding cells was not made available to the authors of the present report.

Closed Centres for „Public Custody”, including Airport Transit Zones

There are two so-called closed centres for “public custody for aliens”, one in Bucharest (International Airport Henri Coanda) and one in Arad.

Centres for Asylum Seekers

Five Centres for Asylum Seekers exist in Romania (Bucharest, Timisoara, Galați, Radauți, Maramureş).

Detention Facilities under the Ministry of Labour, Family and Child Protection and under the local administration:

Child Placement Centres

There are 108 'classic child placement centres' in Romania with a maximum occupancy rate of 100 minors. These specific centres underlie the control mechanism of the General Department for Social Security and Child Protection. Further, 31 'classic child placement centres' are subordinated to authorised private bodies. While it cannot be excluded that those places fall under the definition of places of detention, this must be examined on a case-by-case basis. Thus, it should be up to the future NPM if it deems necessary to inspect any of those places.

Shelters for Victims of Trafficking of Human Beings

Numbers were not made available to the authors of the report.

Homes for Elderly

Numbers were not made available to the authors.

Psychiatric Hospitals; Facilities for Persons with mental Disabilities

There are 37 psychiatric hospitals in Romania of which four are closed institutions. Further numbers and details were not made available to the authors.

Detention Facilities under the Ministry of Defence:

Information was not provided to the authors.

4.2. 'Ombuds plus' model vs. new independent structure? An overview of the respective advantages and disadvantages

In the following, the advantages and challenges regarding the establishment of a new body and the assignment of the tasks of an NPM to the Ombudsman and members of civil society ('Ombuds plus') will be presented. In principle, as long as the mandate and conditions of the NPM equally comply with OPCAT and the Paris Principles it should not matter whether a new body is created or an existing body such as the Ombudsman office is designated as NPM.[71] However, there are some principal arguments brought forward in favour of the designation of the Ombudsman office as NPM and the establishment of a completely new body. The main arguments for the designation of the Ombudsman office as NPM are usually the speediness and cost effectiveness of such an approach. The establishment of an entirely new institution is often met with great reluctance especially when the respective State is concerned with reducing bureaucratic structures and public expenses. Furthermore, the Ombudsman office is mostly deemed to be the ideal institution for taking over monitoring of human rights due to its previous expertise and experiences in dealing with complaints of human rights violations. The proponents of establishing an entirely new body mostly argue with the existing deficiencies of the Ombudsman office.

[71] See APT, Establishment and Designation of National Preventive Mechanisms, Guide, p. 78.

When the NPM is integrated into the Ombudsman office it risks taking over any of its potential problems and shortcomings in terms of competences, independence, composition and overall effectiveness. The establishment of a new body presents the opportunity to closely implement all requirements of OPCAT learning form the potential shortcomings of the existing institutions such as the Ombudsman office. Additionally, an entirely new body may make the NPM more visible to detainees and the public at large and show the respective State's particular commitment to combating torture and other forms of ill-treatment.[72]

Budgetary implications

Although the *budgetary implications* of the instalment of an NPM should not be the only or most important concern of the State implementing OPCAT, it is reasonable for a State to search for the most economic solution when establishing an NPM. Time and again the argument goes that the Ombuds plus model would help the State save resources since it allowed to resort to existing structures. However, this presumption should be scrutinised thoroughly with the consultation of economic experts.

The current structure of the Ombudsman office in Romania foresees the assistance of the Ombudsman by Deputy Ombudspersons in four specific fields, including one department for the army, justice, police and penitentiaries (Law no. 35/1997, art. 10 (1) (c)). According to the responsible Deputy Ombudsman, Mr Alexandru Bălănescu, this department is currently staffed with six persons, who are entirely absorbed with the task of dealing with complaints from individuals. Visits to places of detention were conducted only in exceptional circumstances (two in 2009), and mostly in reaction to individual complaints. Without anticipating the discussion on the exact size of the NPM in Romania, it became clear that the Ombudsman office at its current structure fundamentally lacks resources in order to conduct preventive fact-finding effectively. Furthermore, representatives from the Ombudsman office reported that office space for the Ombudsman's staff was already now rather scarce and that up to seven persons had to share one office.

Thus, from a purely financial point of view, it is questionable whether the assignment of the Ombudsman office would really lead to a significant reduction of costs, taking into account the need for additional staff, office space, and infrastructure, such as computers, printers etc. Thus, the Romanian decision makers should conduct an objective evaluation with the support of economic experts of the costs involved when opting for the Ombudsman plus model or establishing a new body.

Timeline for implementation

Romania has ratified OPCAT on 2 July 2009. At the time of ratification, it has made a declaration in accordance with art. 24 OPCAT, postponing the obligation to establish an NPM for three years. Thus, Romania is obliged to establish an NPM at the latest until July 2012, but preferably at an earlier time. It is arguable whether the *time period* necessary for the drafting of a new law would be considerably longer than the time needed for the amendment of the existing law on the organisation and functioning of the Ombudsman (Law no. 35/1997). The current law on the Ombudsman would need significant amendments regarding the mandate and the structure in order to become compliant with the provisions of OPCAT and the Paris Principles. Thus, it is estimated that the time factor would be quite similar in relation to both options.

[72] See State of Play Report, pp. 21-24.

Existing institutional framework and expertise of the Ombudsman

Based on the legal provisions guiding the Ombudsman's organisation and functioning, a few advantages could be identified favouring the designation of the Ombudsman's office as NPM. The shortcomings/disadvantages would, however, have to be rectified by legal amendment; they will be discussed in detail below.

It was positively noted that the Ombudsman legally complies with the criteria of *independence* purported by OPCAT and the Paris Principles. The institution has a strong legal basis in the Romanian Constitution (Title II, Chapter IV) and is explicitly provided with autonomy and independence from any public authority (art. 2 (1) of Law no. 35/1997). According to art. 36 of the same law, the Ombudsman institution has a separate budget at its disposal. In addition, the mode of appointment and possibilities of removal from office of the Ombudsman by both Chambers of Parliament provide for some guarantees of independence; his/her staff are not civil servants but enjoy a similar status as parliamentary experts. Despite concerns expressed by some interlocutors regarding the selection procedure for the appointment of staff of the Ombudsman office and a general criticism of the overall effectiveness of the institution, in principle the independence of the Ombudsman office was not challenged.[73] Thus, an NPM situated within the structures of the Ombudsman office could profit from the legal independence of the existing body. On the other hand, a newly established NPM would have to be granted the same legal guarantees of independence, preferably also within the Constitution.

Another advantage of the Ombudsman institution is the constitutional obligation of all public authorities to provide the Ombudsman with the *support* necessary to exercise his/her powers (art. 59 (2)). Again, a newly established body would have to be endowed with the same right, preferably by constitutional amendment. In practice, a newly created NPM would first have to establish the necessary relationship of trust with the authorities that is a precondition for genuine support.

In principle, the *geographic distribution* of the regional offices of the Ombudsman is considered an advantage of this institution. Although a decentralised structure of the NPM is no explicit precondition stipulated in OPCAT, a broad geographic dispersal is nevertheless seen as a strong factor favouring effective monitoring also in places of detention in remote areas of the country. Details on the discussion regarding the geographical structure of the Romanian NPM and possible risks and problems identified by the participants in the workshops in connection with a decentralised structure will be provided below.

Prior experience in monitoring of places of detention with a view to the prevention of torture has to be taken into account when comparing the two different alternatives. According to art. 22 Law. 35/1999, the Ombudsperson "can conduct his [or her] own inquiries", which is interpreted as a power to visit also places of detention. However, in accordance with the main mandate of the institution, these visits did thus far not have a preventive character but were

rather conducted in reaction to specific complaints. In 2009, the Deputy Ombudsman responsible for army, justice, police and penitentiaries only conducted two announced[74] visits

[73] However, the factual independence of the Ombudsman should be further scrutinised. It is highly advisable that the Ombudsman seeks an official accreditation by the ICC before its designation as NPM to resolve any potential problems and openly face any existing criticism brought forward by civil society actors.

[74] According to Deputy Ombudsman Alexandru Bălănescu, the law foresaw that all visits to places of detention had to be announced.

to places of detention. Both visits did not focus on torture and ill-treatment but rather on the right to information, health care, secrecy of correspondence and child protection. It is thus hardly an argument that the staff of the existing Ombudsman institution would have greater experience in preventive monitoring of places of detention than persons who would have to be recruited for a new body, if such experience is made a decisive criterion for their selection.

On the other hand, it cannot be disputed that valuable *synergies* between the current functions of the Ombudsman and the preventive mandate of an NPM could develop if the NPM was installed within the existing Ombudsman's structures. The Deputy Ombudsman for army, justice, police and penitentiaries has to deal with a number of complaints from detainees, who have the explicit right to address the Ombudsman without any restrictions (art. 17 (1) Law no. 35/1997). For example, in 2009, the Deputy Ombudsman received 65 petitions regarding the penitentiary system. Linking the preventive functions of an NPM with the mandate to receive complaints by detainees could lead to a more comprehensive picture of structural deficiencies in places of detention.

Concerns raised by the Ombudsman and civil society

Last but not least this short overview of the most apparent advantages and disadvantages of the two possible options of implementing OPCAT and establishing an NPM in Romania cannot but refer to the very vocal *views that were raised by different relevant actors*. These voices emanated on the one hand from members of NGOs who strongly argued for the establishment of a new body. The main concern of these interlocutors was the lack of efficiency and transparency of the existing Ombudsman office and a fear that this inefficiency would also guide the work of the NPM if it was to be established within the ranks of the Ombudsman office. Its suitability for being designated was strongly challenged due to its poor composition, qualification of staff and non-transparent working methods. The Ombudsman was said to be overly passive and invisible to the public regarding the protection of detainees and thus not perceived as a credible and factually independent institution for the protection of detainee rights.

However, the much louder criticism regarding a designation of the Ombudsman institution as NPM came from the current Ombudsman, Prof. Ioan Muraru, himself, as well as from his deputies and subordinates. Not only was he adamant about the fact that his institution was lacking human and financial resources to fulfil the tasks of an NPM; he also rightly assessed the Ombudsman office not to be in compliance with OPCAT[75] regarding the composition of staff and its mandate. Also, taking into account the current organisation of the Ombudsman, he was reluctant to a meaningfull cooperation with the NGOs.

The conditions under which the Ombudsman could envisage taking over responsibility for the tasks of an NPM were that the office was provided with a substantial number of additional human resources (Prof. Muraru was speaking of 30 persons) with the necessary background and expertise (law, medicine, psychology etc.). In addition, he insisted on a separate structure of the NPM within the Ombudsman institution, e.g. a completely separate department. The legislator, when deciding on the model of the future NPM in Romania, should thus not only take into account legislative and financial obstacles towards the fulfilment of the obligations under OPCAT, but should also consider the necessity of finding some means of cooperation between NGOs and the Ombudsman in a future Ombuds plus model. The tasks of an NPM are too important to - quoting a participant of the final workshop - "dump them into the backyard" of an institution who is openly opposed to its designation.

[75] See State of Play Report, pp. 15, 19, 21 and Annex II – Official Point of View.

Moreover, there is much work to be done regarding the cooperation of the Ombudsman and his staff with the civil society organisations (and vice versa) especially when designing a mechanism that is essentially based on cooperation towards a common aim.[76]

In conclusion, it is not evident which model for an NPM is to be preferred in Romania. In either case it is to be closely observed that the minimum requirements of OPCAT and the Paris Principles, reiterated in the following sub-chapters, are fulfilled.

4.3. Structure

The OPCAT or Paris Principles do not prescribe a specific structure for the NPM but leave it entirely up to the State Parties how to ensure its effective functioning. The structure of the future NPM was subject of intense discussions during the final workshop. In this respect, the question of a centralised or decentralised body, the number of members of the NPM, the issue of chairpersonship and final responsibility for reports and decisions within the NPM, the involvement of external experts, and the question of a separate budget were analysed. The assessment on the diverse issues below can be applied no matter which of the two models, a new body or designation of the Ombudsman, will finally be chosen by the legislator. The involvement of civil society into the NPM will be described below at 4.7.

Decentralised structure

From the outset, the experts participating in the final workshop principally regarded the decentralised structure of the Ombudsman as an asset of this institution, which could serve as a model for the new NPM. However, in the course of the discussion, certain doubts were voiced as to the feasibility of such a structure with its 14 regional branch offices. In particular, the participants noted that this structure could foster fraternisation and corruption among the members of the NPM in the regional office and regional authorities.

Each of the 14 regional offices would have to be equipped with at least two members in order to function, which would already amount to 28 members without counting the members situated in the headquarters in Bucharest. A covering of the necessary disciplines making up an NPM (lawyers, physicians, psychologists, psychiatrists, social workers etc.) could still not be achieved, even if each regional office hosted two members. In addition, the danger of a lack of objectivity was identified if mainly the same two members went on preventive visits to places of detention in their particular region. On the other hand, due to the local proximity, regional members of the NPM could face certain personal risks when speaking out against regional authorities.

A proposal from side of the experts, which was taken up by the participants, was not to give up the decentralised model altogether but to reduce the number of local branches to three (based on the historical regions of Romania) or four branches and a headquarter in Bucharest; such a model would allow for a broader coverage of necessary disciplines and an alleviation of the valid objections described above, since more NPM members could be deployed in fewer branch offices. A decentralised structure of the NPM appears to be even more difficult when establishing an entirely new body as NPM since that would require the set up of several new offices.

[76] This situation should be urgently addressed irrespective of the question of designating an NPM. The Paris Principles foresee a pivotal role of CSOs for the functioning of National Human Rights Institutions. See Paris Principles B1 (a), C (g).

Number of members

As to the exact number of members of the NPM and whether they should be employed full-time or part-time or on an ad hoc basis, one has to take into account a number of different factors. The most basic evaluation will start at the number of places of detention the NPM would have to visit on a regular basis. Another figure that might influence the outcome is the number of detainees in comparison to the general national population. These numbers are put in comparison with the figures from other countries. In the case of Romania, only an approximate estimate could be made based on the figures that were provided by the Government as well as those publicly accessible on the internet.[77]

Internal responsibility for the NPM

Regarding the chairing and final (political, financial, etc.) responsibility of the body, different models were identified.

On the one hand, a *collective body with equitable membership* modelled after the CPT could be envisaged. Although the CPT also has a "Bureau", comprised of a President and two Vice-Presidents elected by the members of the CPT, the decision making and responsibility for all its reports finally lies with the whole organ. This model is, however, rooted in the fact that the 47 members of the CPT are elected in respect of each State Party to the European Convention for the Prevention of Torture (ECPT). It requires a high degree of discipline and its functioning is only possible with the support of a very strong and professional secretariat. In addition, the necessity of regular meetings of all 47 members makes it a rather cost intensive model.

On the other side of the spectrum of possible models for an NPM is the *autocratic approach*, which combines all powers and responsibilities in the head or chair of the body and reduces the other members to mere staff or assistants of the chair. Although the decision making would be simplified enormously with this model, it can still not be favoured in this extreme form, since it runs counter all principles of democracy and participation and makes the whole body reliant on the personal qualities of one individual. Thus, structural models which are somewhat between the two extremes of autocracy and collective body should be prioritised. One of the options would be to establish a board comprised of a certain number of persons as the chair of the NPM. Another possibility, which could be implemented in connection with the first option, would be to establish a kind of medium level responsibility, e.g. by nominating heads of regional commissions or branches, who are responsible for the administrative and substantive functioning of their respective branch offices.

Involvement of experts in the NPM

With respect to the involvement of experts in the NPM, the principle is postulated that essentially all disciplines and expertise necessary (see below chapter 4.5.) to conduct effective monitoring of places of detention should be represented in the NPM itself. While it is immaterial whether the members are employed on a full-, part-time or ad hoc basis, the consistency of the work of the NPM and the constant availability of the necessary experts to ensure visits even on a short notice, should be guaranteed. Due to the geographical dimensions of Romania, the possibility of members of the NPM being prevented, or the need of very

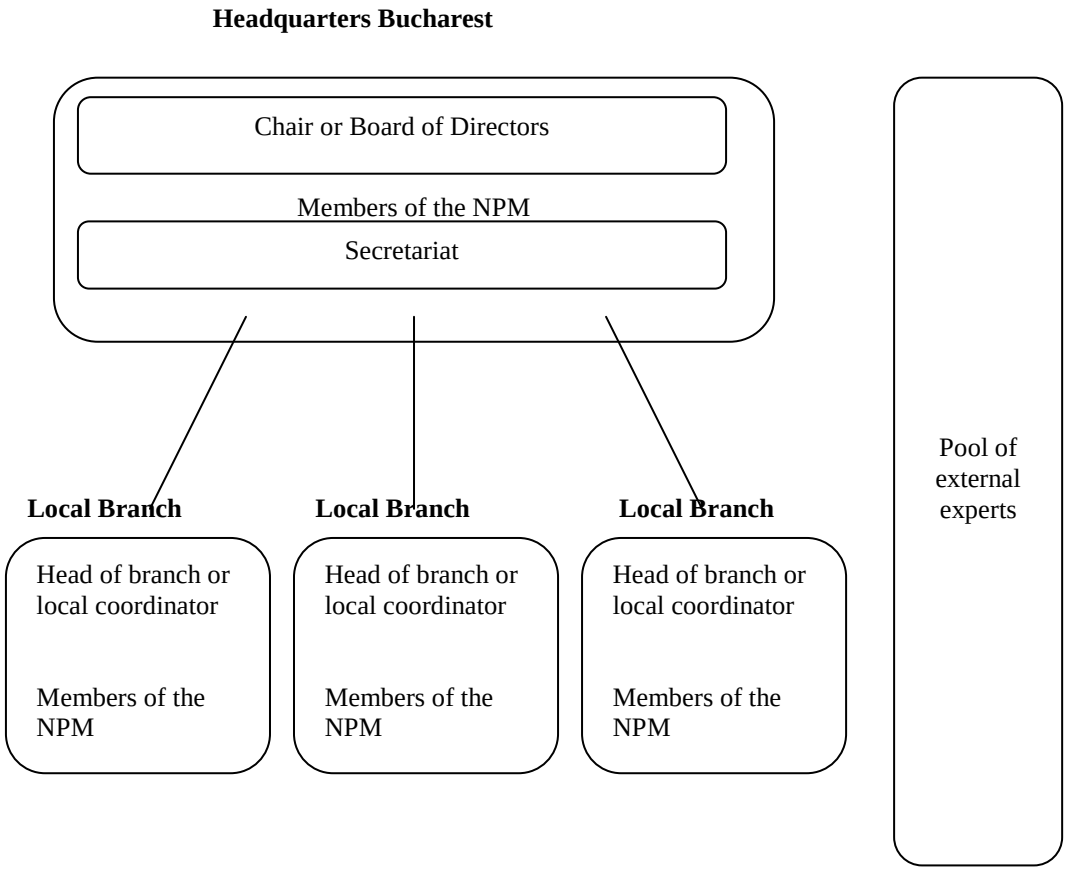
[77] Involved experts on the side of the Romanian State made estimates of approximately 30 full-time members (Ombudsman); or ten to 20 members in the headquarters in Bucharest and five members in three to four regional branches (workshop participants).

specific expertise, it is advisable to establish a pool of external experts, including interpreters for different languages, who can be consulted on a short time contractual basis when necessary. A model for such an expert pool could be found in the list of experts usually established for court proceedings; due consideration should be given to geographical distribution when establishing the pool in order to provide for availability of experts also in remote areas. It goes without saying that the selection procedure for external experts into the pool as well as in the concrete case of deployments must be based on objective criteria and transparency.

Budget

Last but not least, there was consensus among the participants that the NPM, whether established within the Ombudsman office or as new body, possibly directly under the aegis of the Parliament, should be provided with its own autonomously administered budget. This was deemed necessary to ensure a completely independent and fully unrestricted functioning of the work of the NPM. The amount of financial resources necessary depends on the model of NPM chosen. For the calculation of the necessary budget, the number and distribution of places of detention should be taken into account for determining what resources are necessary to guarantee an adequate and regular coverage of the NPM of all places of detention in the country.

In conclusion, the future NPM could be structured in the following manner:



4.4. Mandate and Visiting Powers

The mandate and visiting powers of an NPM are clearly prescribed in art. 19, 20, 22, 23 OPCAT. The core mandate and powers of an NPM are to regularly visit places of detention in view of examining the treatment of detainees (art. 19 (a) OPCAT), to make recommendations to the relevant authorities (art. 19 (b) OPCAT), and to submit draft legislative proposals and observations (art. 19 (c) OPCAT). For this purpose unrestricted access to all places of detention, their installations and facilities and all relevant information must be guaranteed (art. 20 OPCAT). State Parties shall allow NPMs to visit "any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence" (art. 4 (1) OPCAT). Deprivation of liberty is defined 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" (art. 4 (2) OPCAT). The wording of art. 4 OPCAT, and the omission of an exhaustive list of institutions considered as places of detention show that NPMs are meant to have the broadest possible access in view of providing the most comprehensive protection. The essential criterion for the definition of a place of detention is the *inability to leave at will*. Therefore, OPCAT aims at granting NPMs access beyond detention facilities in a strict sense such as penitentiaries and police stations and includes also closed institutions that deprive persons of their liberty for their legal and social protection or health purposes, such as psychiatric institutions, orphanages and homes for the elderly as well as unofficial and private facilities.[78] For an NPM to be granted access to a facility, the possibility that persons are deprived of their liberty is sufficient ("*may* be deprived of their liberty"). Ultimately when determining the places to be visited by the NPM, the decisive question should not be which facilities are formally considered as places of detention but rather in which places torture and other forms of ill-treatment may occur due to their closed character and the particular restrictions and controls that result in an increased vulnerability of the concerned individuals.

Throughout the project a large proportion of the discussions was dedicated to the question of the mandate of the future NPM. Within this area, the following subtopics could be indentified: places of deprivation of liberty that should be covered by the mandate of the NPM, including the question of private places of detention; access to places of detention and to relevant documents and files, including the enforcement of access by the NPM; and finally public reporting of findings and recommendations by the NPM, including the procedure for handling State responses.

Places of detention

Aside from the *'traditional' places of detention under the direct control of the State,* such as penitentiaries, pre-trial detention facilities, police lock-ups, Stately psychiatric hospitals etc., a certain number of other places were identified that should fall under the visiting mandate of the NPM. Among those are disciplinary cells within the armed forces, waiting rooms/cells in courthouses, police vans and other means of transportation, centres for asylum seekers (even if they are only partly restricting the liberty of the inmates, in particular at night), centres for public custody for 'undesirable aliens', holding zones at the airport for administrative custody as well as the transit zone, and detention centres for juvenile offenders.

[78] For a detailed discussion on the inclusion of unofficial and private facilities in the mandate of an NPM see State of Play Report, pp. 3, 4.

Another question in this respect was the issue of *monitoring of deportations* on planes when the deported person is being accompanied by public officials. While due to budgetary constraints it might not be feasible to monitor every deportation, the NPM should on the other hand also not be excluded from attending such flight deportations. In particular, if such deportations are identified as bearing a certain risk of ill-treatment of the deported person, it might be necessary for the NPM to receive first-hand impressions in order to make recommendations for structural changes.[79] Thus, the law should not foresee any restrictions in this regard.[80]

As stated above, *private and unofficial places of detention* are included in the mandate of an NPM. The private places of detention that were explicitly identified in the course of the workshops included private hospitals and psychiatric clinics with closed wards, homes for elderly persons, juveniles or persons with disabilities, and places for victims of trafficking, as these might be factually deprived of their liberty due to the fact that they do not have a passport or do not speak Romanian.

Regarding the definition of places of detention within the law, both the possibility of having a very broad and vague definition corresponding to the wording of OPCAT and a clear list of all places in the law were discussed. The concern about the first option was that a vague definition would not provide a sufficient guarantee for the NPM when trying to enter less 'traditional' places of detention and could lead to constant discussions of the NPM with the respective public or private authorities. The latter option was feared to unnecessarily restrict the definition of OPCAT leading to a decrease in flexibility and difficulties to adapt to new developments. In conclusion, it was agreed by all participants that the best solution would be to identify all places of detention currently existing in Romania and include them into the law establishing the NPM. However, there was also consensus that this list must be open for future developments and should thus be only drafted in a demonstrative and not in an exhaustive manner. 'Private places of detention' should be explicitly mentioned in the definition in order to avoid any misunderstandings. According to the specific needs and developments in the country, the NPM should have the competence to define places of detention falling under its mandate.

Enforcement of access

Turning to the issue of enforcement of access to places of detention (whether public or private), it was noted that all members of the NPM shall have the same unrestricted right of access; this right should be explicitly included in the law establishing the NPM, with a specific clause that access shall be granted without restrictions as to time (e.g. only daytime). The obligation of public authorities to grant immediate and unimpeded access to places of detention should be guaranteed by a clear procedure stipulated by law, e.g. the possibility of the NPM to address the superior authorities of those who delay or obstruct their access. Additionally, a clause on individual (disciplinary) responsibility should be inserted stipulating legal sanctions against those public officials who deny or delay access.

It was seen advantageous to issue in addition to the provision in law internal decrees to all

[79] Naturally, the monitoring of deportations presupposes a certain information policy from side of the State authorities. In order to avoid any future problems in this respect it is suggested to insert a general obligation of public authorities to inform the NPM via the proper channels of any activity that principally falls under the mandate of the NPM, such as planned flight deportations.

[80] In addition, certain other safeguards, such as medical checks of the person concerned before entering the plane and follow-up measures, such as an information sheet on complaints mechanisms after deportation etc. should be taken into consideration.

places of detention explaining and reinforcing the right of unrestricted access of NPM members to all authorities concerned. From a practical point of view, members of the NPM should be provided with specific identification documents. Additionally, in each ministry one high-ranking official should be identified as a focal point for the NPM, who can be reached any day and night time by phone in case the NPM gets obstructed from entering a place of deprivation of liberty.

Working methods

Due to time constraints the issue of *unannounced visits to places of detention* could not be discussed in detail. However, the possibility of monitoring places of detention without prior notice is crucial for any NPM to gain an objective and distortion-free insight. While in some cases, e.g. when visiting large penitentiaries, it might be useful for the NPM to indicate to the authorities that a visit will take place, the principle should be that the NPM has access to places of detention at all times without prior notice. The aim of unannounced visits is to minimise the risk that existing circumstances are concealed or that certain inmates are moved, threatened or prevented from meeting the NPM.[81]

It goes without saying that the NPM must receive the explicit entitlement within the law that its members can conduct *private interviews with all detainees*, or other persons they deem important for fulfilling their mandate (see art. 20 (d) OPCAT). Unsupervised and confidential interviews, e.g. entirely out of hearing and eyesight of any public official, with persons in detention lie at the core of monitoring; they should be conducted in places chosen by the NPM or in cooperation with the detainee. Time and again, security concerns are brought forward when independent monitors try to speak to detainees in private as reported from civil society representatives. However, it should be clarified that it is the responsibility of the NPM members to take care of their own security; they must be enabled to make their own choice whether they wish to speak to a detainee in private or not. It is thus undesirable that a legal provision foresees any exceptions to the rule that all interviews must be conducted in private without supervision, since such an exception will inevitably lead to excessive interpretation and abuse. In single cases, when NPM members wish to request visual supervision of guards due to the exceptional dangerousness of a detainee, it should suffice that they can refer to the general obligation of public authorities to grant the NPM any kind of support in the fulfilment of their functions.

Another detail that seemed to be in need of clarification was the question whether the NPM should be able to *monitor also ongoing interrogations*. Again, the principle should be that the NPM has unhindered access to all places within the facility and should be able to monitor also ongoing interrogations. It has to be borne in mind that the vast majority of cases of torture happen at the time of interrogations, for the purpose of obtaining a confession or information. A comparison with the regulations in other Member States shows that none of these laws contain an explicit provision on the right to monitor or the possible exclusion of the NPM from interrogations. Thus, the general principle of access to all places within the facility, including interrogation rooms, applies. However, for the NPM members it is also important to remember that monitoring an interrogation does by no means signify any right of involvement into the investigation, that they do not play the role of a lawyer, and that they are bound by confidentiality.

[81] See Report of the United Nations Special Rapporteur on Torture, UN Doc. E/CN.4/2006/6 of 23 December 2005, para. 24.

Access to confidential information

Access to confidential or classified files or documents, which the NPM wishes to inspect, should follow the same rules as access to places of detention, e.g. unlimited access with the possibility of enforcement by approaching superior authorities in case of refusal and individual sanctions for officials refusing the data should be explicitly stipulated by law. However, the Romanian law foresees a certain certification procedure for access to classified documents. Taking into account this Romanian specific, two possible solutions could be identified.

On the one hand, it could be foreseen that all members of the NPM should be provided with the said certificate at the moment of their selection. Since the selection will inevitably involve some kind of security screening, this procedure could at the same time be made use of in order to obtain the certificate. However, serious misgivings were voiced from a considerable number of participants about such a procedure, since the security screening for obtaining the certificate was conducted in a non-transparent manner by the secret security service without the possibility of challenging a negative decision. Thus, this option could lead to the result that persons would be prevented from receiving a certificate and at the same time from becoming members of the NPM on the basis of a possibly arbitrary decision by the secret security.

On the other hand, for most of the participants in the final workshop, including representatives of civil society, it seemed to suffice that members of the NPM could decide to apply for the certificate after being appointed. In any case, the law establishing the NPM must foresee the right of all members of the NPM to have immediate access to confidential documents, such as medical files of persons who have alleged torture or ill-treatment or prison registers etc., whether they are in the possession of a certificate or not. If classified information is needed for the proper fulfilment of the NPM's tasks, this could be requested by members holding the necessary certificate. Since the unauthorised disclosure of such secret information is already regulated in criminal law, no additional provision needs to be inserted in the law establishing the NPM.

In any case ways should be found to prevent that State authorities are given the opportunity to interfere with the NPM's possibility to access confidential information since this would seriously obstruct its effective functioning.

Reporting procedure

The final issue discussed under the topic of the mandate and powers of the NPM was the reporting and publication of reports. Similar to the methodology developed by other national, regional or international monitors of places of detention (other NPMs, the CPT or the UN Special Rapporteur on Torture), the law should foresee the possibility of the NPM to make immediate observations to the officers in charge of the facility regarding problematic issues that require an immediate remedy, such as demanding a medical examination of a sick or injured inmate.[82] Every visit of a place of detention should be followed by a *written report*; the members of the NPM who have conducted the visit shall be responsible for drafting this report. In order to ensure that the opinion of each member is recognised, their individual field notes of the visits should be taken into account for the drafting of the report. In case of

[82] If the NPM observes or is notified of a case of torture or ill-treatment, it is obliged in accordance with a general provision in Romanian law to report the crime to the competent prosecutor.

differing views regarding the conclusions and recommendations upon the visit, the possibility for individual members and/or the chair of the NPM to attach separate opinions to the final report may be useful.

The report should be drafted within a *reasonable time* after the visit, e.g. within 30 days. A particular point of discussion was the form of publication of the visiting reports. While OPCAT specifically obliges the State Parties to "publish and disseminate" the annual report (art. 23), it contains neither an obligation nor a restriction regarding the publication of the individual visiting reports. Among the participants it was commonly agreed that in principle all visiting reports should be published. Some participants expressed that an immediate publication of each visiting report is necessary to provide for high transparency of the NPM's work, create a preventive effect for other places of detention and ensure the topicality of the reports. However, others feared that this could lead to a pure 'naming and shaming' character of the NPM and obstruct its non-confrontational and cooperative spirit foreseen by OPCAT. Therefore, it was agreed that in order to find a balance between an adequate scrutiny and the maintenance of a cooperative working method, a clear and well-thought-through procedure for publication would have to be found. In this regard, the consensus was that the State authority concerned shall be given the chance to reply to the concerns voiced in the report and to indicate how a certain observed situation is rectified. The response of the authority must also be provided within a certain deadline, which could again be about 30 days. After this deadline has expired, the NPM shall publish the report and the response of the State authority on its website. In case no reply is received within the deadline, the NPM can publish the report without the reply, indicating that the State had failed to respond in due time.

As much as certain situations might justify an urgent ad hoc visit of the NPM, e.g. in case of a prison riot or mass arrests, as much might it be necessary to issue an *urgent report* if a situation needs prioritised handling, such as in the case of imminent danger to detainees. In such cases, the report should be elaborated within a shortened period of time, e.g. within five days, and the response of the State authorities on the action that will be taken should be received in an even shorter time. This does not mean that the action needs to be taken within one or two days, but that the NPM gets immediately informed about the steps the State will take and the timeline of these actions. If the State fails to respond immediately, if the action proposed to rectify the urgent situation is insufficient, or if in the following the State does not take the necessary steps as indicated in its response, the NPM should have the right to make a publication or press release in this respect.

A subtopic of the question of reporting related to the *protection of personal data.* Again, there are a number of approaches possible: For instance, the CPT automatically makes personal data (names etc.) anonymous if it refers to individual cases in its reports, which is not very frequently done in the first place. On the other hand, other comparable monitors attach interviews with detainees to their reports and publish them with full name, if the person concerned has given his or her informed consent. Both options are equally feasible; the protection of data of persons who can not give their full consent, such as persons with mental disabilities or children, should, however, always be observed.

4.5. Membership and Composition

In accordance with Article 18 (2) OPCAT, the members of an NPM should have the "required capabilities and professional knowledge" to fulfil their important function. Due to the complex task of an NPM it should not be comprised only of lawyers as is currently the case with the Romanian Ombudsman office. In order to examine the different aspects of

treatment of detainees and the conditions of detention, an NPM must be *composed of persons from different backgrounds* such as human rights lawyers, doctors, forensic medical experts, psychologists, psychiatrists, social workers and anthropologists. Ideally, the NPM should include experts with prior experience in visiting places of detention and working with vulnerable groups. Besides a multidisciplinary composition the members of the NPM must also ensure gender balance and an adequate representation of "ethnic and minority groups" in the respective country. Additionally, as stated above, the NPM should have the right to engage outside experts for particular visits to complement their expertise whenever necessary.

Different models can be taken into account regarding membership: a number of highly qualified persons from different professional backgrounds could be employed full-time or part-time to serve as members of the NPM. Another option is to nominate members, who stay within their original professions and continue working as, e.g., doctors, lawyers or psychologists; these members could conduct visits whenever their time allows and be remunerated on an ad hoc basis. Also a combination of these two models is imaginable, provided that all members enjoy the same rights and responsibilities. The ratio between full-, part-time and ad hoc experts is immaterial as long as the constant availability of the necessary expertise and the consistency of the NPM's work is ensured.

In order to enable qualified persons to work for the NPM, its members should receive an *adequate honorarium*, making such function possible for the most competent and professional individuals.

Whatever model will be chosen by the Romanian legislator, it is of paramount importance that the *selection procedure* of the future members follows the principles of objectivity, non-discrimination and transparency. In other words, a public tender for applications for membership should be issued and broadly disseminated. The selection procedure itself should be conducted by an independent selection commission. Objective criteria for the selection should be applied, such as professional background in the fields mentioned above, declared commitment to and experience in human rights related work, and prior experience in monitoring of places of detention. As mentioned above, balanced gender representation and inclusion of persons belonging to a minority (e.g. Roma or ethnic Hungarians), especially when such minorities are overrepresented in places of detention, should guide the selection procedure.

The inclusion of members of civil society organisations or NGOs, as well as of civil servants as members of the NPM will be discussed below.

4.6. Independence

The NPM shall be *functionally and personally independent* (art. 18 (1) OPCAT). Therefore the NPM should have a priori an independent basis. Paris Principle A2 demands the composition and mandate of a national institution to be "clearly set forth in a constitutional or legislative text." The NPM must be guaranteed structural independence from all branches of the government and neither its members nor its staff should be bound by instructions of any State authority. The NPM should choose and employ its own staff according to its own criteria and develop its own rules of procedure.

As stipulated by Paris Principle B3, the members of the NPM shall be "effected by an official act which shall establish the specific duration of the mandate". The appointment procedure

must guarantee the independence of the NPM which is why the appointment should not be directly decided by the executive branch of the government. Ideally the members and staff should be appointed for a minimum of four to six years and be protected against arbitrary removal. Articles 21 and 35 OPCAT specifically grant the members of the NPM the privileges and immunities necessary for the carrying out of an independent monitoring function.

Furthermore, NPM staff should not have any personal connections with leading political figures in the executive government or law enforcement personnel such as close friendships or political alliances or previous professional relationships.

On the specific subject of the inclusion of (seconded) civil servants into the NPM, the following arguments have to be taken into consideration: While it might be true that persons who work as police officers, prison guards, or within the public management of places of detention have in-depth knowledge of the problems arising in such facilities, a number of reasons speak against the inclusion of active or even seconded civil servants in an NPM. On the one hand, civil servants do not comply with the criteria of personal independence vital for the functioning of an NPM. Even if they are seconded to the NPM and formally endowed with independence, their links to the government agency that pays their salary might still be very strong. On the other hand, they might feel pressured not to jeopardise their future career after the secondment within public administration by frankly criticising other State authorities. In addition, detainees and the public at large will likely perceive them as biased and not independent, which would in turn imperil the reputation of the NPM as a whole. However, in order to profit from the knowledge and expertise of civil servants working in relevant fields, it is quite feasible to include retired civil servants who fulfil the other criteria outlined above (professional background, declared commitment to and experience in human rights related work, prior experience in monitoring places of detention) and are factually independent.

Particularly important is also the financial independence of the NPM without which it is not able to exercise operational autonomy, nor reach independent decisions. Therefore art. 18 (3) OPCAT requires States to provide "necessary resources for the functioning of an NPM". Further, Paris Principle B2 obliges States to provide adequate funding to such institutions enabling them to have their own staff. The latter expressly states that such an institution should not be subjected to financial control by the government "which might affect its independence". Consequently, an NPM must be provided with its own autonomous budget.

Lastly, it is not only important for an NPM to be formally independent but also that it is perceived as independent and credible. Only then are detainees and other persons likely to speak freely to experts during monitoring visits. The problem that an NPM is not perceived as credible and independent by detainees and the public at large can particularly arise when a pre-existing institution that is seen as having strong ties with the public administration is designated as NPM.[83]

[83] Such concerns have been raised by CSOs regarding the Romanian Ombudsman office

4.7. Integrating Civil Society Organisations

The Paris Principles explicitly stipulate the cooperation with and involvement of civil society,[84] which is inter alia comprised of non-governmental organisations in the field of human rights and anti-discrimination, trade unions, bar associations, associations of doctors, journalists or eminent scientists, as well as universities and individual qualified experts. Thus, the definition of civil society is not limited to NGOs. Diverse models of integration of civil society in the NPM can be observed in different Member States (see above chapter 3.6.), ranging from the conclusion of specific contracts with NGOs on cooperation relating to the participation in monitoring visits (institutional cooperation) or on regular exchanges between the NPM and NGOs, to the inclusion of individual members of civil society within the NPM (individual cooperation).

Institutional cooperation

Based on the need for individual expertise of all members of the NPM, it is argued that the conclusion of contracts with selected NGOs, who can in turn decide who they will send to participate in visits, is not entirely unproblematic. A number of issues might arise from such a construct: First, such a system can foster great incoherencies, as the NGOs involved could decide to send always another representative to each visit. In addition, there is no guarantee or control that all the persons sent by NGOs to serve for the NPM fulfil the criteria of independence, capacity or necessary professional background. However, such concerns could be overcome by requiring the cooperating

NGOs to specify the individuals taking part in the monitoring visits of the NPM and guaranteeing that they comply with the conditions of expertise, pluralistic composition and other criteria deemed necessary (such as the absence of a final criminal conviction). Second, as the low level of cooperation displayed by the Romanian Ombudsman vis-à-vis members of NGOs indicates, it is more than likely that a system that foresees 'proper' members of the NPM, e.g.. those employed by the body, and members that are employed by their respective NGOs will lead to two different categories of members within the NPM. Such a development could in turn lead to frustration of NGO representatives and the feeling that they have to 'take the law in their own hands' by, e.g., publishing information they gained during visits in their function as NPM members on their own NGO's website. Yet another shortcoming of this model is the possibility that the most important NGOs in the field of human rights in the country might not be interested in providing resources to the NPM or that their internal regulations even prevent them from becoming involved in this function.

While it can be useful for an NPM to institutionally cooperate with CSOs in order to enable their most comprehensive involvement as well as to instil greater confidence and legitimacy in the NPM's work, clear rules have to be found for ensuring an added value of such a model. Further it is of particular importance that such cooperation is built on a common foundation of trust and cooperation between the NPM and CSOs. The NPM must speak with one voice to be perceived as a credible institution monitoring torture and ill-treatment in detention and proposing the structural changes needed. When leading to internal conflicts an institutional cooperation of the NPM with CSOs would only be to the detriment of its functioning and perception. In Romania, a foundation of

[84] See Paris Principles B 1 (a), C (g)

trust and cooperation between the Ombudsman office and CSOs appears to be missing. Consequently, a sustainable confidence-building process would be necessary before envisaging its institutional cooperation with CSOs.

Individual cooperation

On the other hand, a system that provides for participation of members of civil society on an individual basis will resolve most of the problematic issues mentioned above. If all members of the NPM, whether they are employed full-time or half-time by the body or whether they are staying within their respective job and conduct visits and write reports on basis of an honorarium, are selected for a determined period of time, the NPM will benefit from greater coherence and consistency. An objective and transparent selection procedure will guarantee that only the most able personalities are included in the NPM; naturally, members of NGOs working in the field of human rights will more often than not qualify for membership. By means of an official nomination procedure of all the individuals chosen, each member can be sworn in to conduct their tasks independently, impartially, confidentially and to the best of his/her ability. Thus, all members will be provided with the same rights and responsibilities and mutual distrust can be reduced.

4.8. Process of establishment

As to the process of establishing an NPM, two core principles are to be respected: *transparency and inclusiveness*.[85] Those principles are necessary to ensure that the future NPM is truly independent, as well as perceived independent and credible by detainees and society at large. An open and inclusive discussion on the future NPM further provides an opportunity to generate greater interest and commitment of politics and the public with regard to the prevention of torture and other ill-treatment in places of detention.

In order to guarantee transparency and inclusiveness the widest possible range of actors should be included in the discussions.[86] Besides government representatives, these should include civil society organisations, the Ombudsman office, State or non-State mechanisms that already carry out visits to places of detention and members of the legislature. The final choice, which is presented to the Parliament, should not be a unilateral decision by the government, but should be made in close consultation with civil society organisations. This is also important in view of getting them involved in the work of the NPM. In order to ensure transparency, with the view of establishing future credibility of the NPM, the process, including the opportunities of participation, the criteria, methods and reasons for the final decision, should be publicised.[87]

In the case of Romania, by help of the Twinning Light project, an open and inclusive discussion on the solutions for the establishment of an NPM was initiated. By means of a round-table and two workshops conducted in March and June actors from all relevant line

[85] See the Preliminary Guidelines for the on-going development of NPMs by the Subcommittee on Prevention: "The NPM should be developed by a *public, inclusive and transparent process* of establishment, including civil society and other actors involved in the prevention of torture." CAT/C/40/2 (14 May 2008), paras. 24-28.
[86] See the list of actors to be included provided by the APT Guide, pp. 8-9.
[87] APT Guide, p. 9

ministries, the Ombudsman office as well as civil society organisations were invited to participate in the process. For the purpose of the present report, the opinions and concerns of all participants from the State and non-State side were taken into account. The present dialogue and consultation with civil society should be continued after the conclusion of the project and taken into consideration when reaching the final decision on the establishment which should be done by Parliament following a broad and transparent discussion. The result and discussion should eventually be published to ensure the future visibility of the NPM.

The process of implementing an effective NPM in accordance with OPCAT and the Paris Principles does not end with its formal establishment. The work of the NPM should be closely scrutinised and made transparent to constantly review its effectiveness in practice and the possibilities for improvement and reform. Fulfilling the mandate of an NPM is a complex and ambitious task that needs to adapt and develop over time. For the purpose of continuously improving the functioning of the NPM, Romania should provide ongoing training to the members and continue to consult and avail itself of the support and expertise of international organisations and institutions (e.g. UN Subcommittee for Prevention, Committee for the Prevention of Torture of the Council of Europe, non-governmental organisations such as the Association for the Prevention of Torture and other independent institutions such as the ones providing the expertise to the present project).

In order to give the Romanian NPM a sound basis to fulfil its mandate it is to be hoped that the recommendations below will be considered by the decision makers. It is to be reiterated that those were developed taking into account the views of all interested Romanian State as well as non-State actors involved in the project.

4.9. Recommendations

- ➔ **Before deciding on designating the Romanian Ombudsman office with the role of NPM or establishing a new body, the Government should make an objective evaluation with the support of economic experts of the costs involved with each model. The assessment should duly take into account the following recommendations;**
- ➔ **If the Government decides to establish a new body, it should receive a firm legal basis, preferably in the Romanian Constitution; the law must provide for similar guarantees of independence (institutional, functional, personal and financial) and privileges and immunities as enjoyed by the Ombudsman office; and public authorities must be legally obliged to support the NPM similarly to the provision relating to the Ombudsman (Article 59 (2) of the Constitution);**
- ➔ **If the Government decides to designate the Romanian Ombudsman office as NPM, the necessary legal amendments of Law no. 35/1997 must as a minimum contain additional provisions on the mandate and visiting powers, the pluralistic and multi-disciplinary composition and transparency of work (public reporting);**
- ➔ **The legislator should also take into consideration the opinions of relevant actors, e.g. the members of the Ombudsman office as well as representatives of civil society, when deciding between the two possible options of establishing an NPM;**
- ➔ **Taking into account the geographical magnitude of the country, the NPM should preferably have a sufficient number of regional branch offices in addition to the headquarters in Bucharest;**
- ➔ **The law on the NPM (new body or amendment to Law no. 35/1997) should contain a demonstrative list of all currently identified places of detention,**

including an explicit reference to private places of detention; the NPM should have the competence to define further places of detention falling under its mandate if the need arises;

- ➔ **All members of the NPM should have the same unrestricted access to places of detention, which should be clearly stipulated in law; in addition, an explicit clause should be included that this access is not subject to any limitations regarding time;**
- ➔ **A clear procedure in case access is denied should be inserted into the law, including the possibility of addressing superior authorities and a provision on individual disciplinary responsibility in case of denial or delay of access;**
- ➔ **A clear provision in law shall stipulate the right of the NPM to conduct unannounced visits to places of detention;**
- ➔ **Equally, the law shall clearly provide members of the NPM with the right to conduct private interviews with all persons, in particular with detainees. Private means that there is no visual or acoustical supervision by any public official;**
- ➔ **In addition, internal decrees should be issued to all places of detention clarifying the legal rights of the members of the NPM, including the right to unrestricted and unannounced access as well as to private and unsupervised interviews with detainees and other persons;**
- ➔ **NPM members should be issued a specific identification document; high-ranking officials should be nominated as contact points that can be reached any time in case the NPM gets obstructed in its work;**
- ➔ **Similar to access to places of detention, the law must explicitly provide for unrestricted access of all NPM members to confidential information, e.g. prison registers or medical files of detainees. The consequences of denial of such access shall be the same as with regard to access to places of detention;**
- ➔ **The law should foresee a possibility for members of the NPM to make immediate observations to the officers in charge of a specific place of detention in case a situation warrants immediate remedy;**
- ➔ **The members of the NPM taking part in a visit shall draft a written report of the visit, including their findings and recommendations; the possibility of separate opinions should be foreseen;**
- ➔ **The report should be drafted within a reasonable time after the visit (e.g. 30 days); the public authority concerned should have a right to respond to the report within a reasonable deadline (e.g. 30 days);**
- ➔ **After this deadline has expired, the NPM should publish all reports on its website;**
- ➔ **The possibility of urgent reports with shortened deadlines should be explicitly mentioned within the law;**
- ➔ **All members of the NPM shall receive an adequate honorarium, either by being employed full- or part-time or on an ad hoc basis for each visit/report;**
- ➔ **The NPM shall be comprised of members from various relevant disciplines, including lawyers, medical doctors, psychologists, psychiatrists, social workers and others. The constant availability of the necessary experts to ensure visits also on short notice should be guaranteed. The NPM must take into account adequate gender balance and representation of Romanian ethnic and minority groups;**
- ➔ **In addition, a pool of experts, including interpreters, by means of an objective and transparent procedure should be established; these experts should be geographically distributed;**
- ➔ **The selection procedure of members of the NPM shall follow the principles of objectivity, non-discrimination and transparency; an independent selection**

commission should choose the members on the basis of objective criteria, e.g. professional background in one of the required disciplines, declared commitment to and experience in human rights, prior experience in monitoring places of detention;

- ➔ **The members of the NPM must be appointed by an official act which establishes the duration of the mandate;**
- ➔ **The NPM must have the right to choose and employ its own staff and develop its own rules of procedure;**
- ➔ **The NPM must have financial independence and be provided with its own autonomous budget;**
- ➔ **The NPM should seek the most far-reaching cooperation with CSOs; in case the legislator opts for an institutional cooperation between CSOs and the NPM (Ombudsman office or new body), clear rules on the rights and responsibilities of all members of the NPM (including CSO representatives) must be established;**
- ➔ **After the establishment of the NPM all members should receive periodic training on human rights monitoring in places of detention, possibly with the consultation of international experts or members of NPMs of other States.**

ANNEX I – INTERVIEW PARTNERS AND PARTICIPANTS AT MEETINGS AND WORKSHOPS

I.) Interview partners (fact-finding mission 22-26 February 2010)

1. **Marian Stancovici -** Director, Guard and Penitentiary Regime Department, National Administration of Penitentiaries (NAP), on 23 February 2010
2. **Mircea Decu -** Officer, Guard and Penitentiary Regime Department, NAP, on 23 February 2010
3. **Marin Cornel -** Head of Office, Guard and Penitentiary Regime Department, NAP, on 23 February 2010
4. **Dragoş Străjeru -** Specialised officer, Directorate of Inspection of Penitentiaries (DIP), on 26 February 2010
5. **Monica Şerbănescu -** Head of the Directorate of Inspection of the Ministry of Justice, on 26 February 2010
6. **Vasile Timaru -** Police Inspector of the General Inspectorate of the Police (GIP) Internal Control Department, Ministry of Administration and Interior, on 23 February 2010
7. **Relu Muşat -** Police Sub-inspector, Custody Division, Bucharest Metropolitan Police, on 23 February 2010
8. **Amalia Tîrnoveanu -** Legal Adviser, Legal Department, National Authority for the Protection of Family and Child's Rights, on 23 February 2010
9. **Daniel Verman -** Counsellor, General Department for Public Health, Medical Assistance and Programmes, Ministry of Health, on 26 February 2010
10. **Cătălin Ciubotaru -** Delegated Judge at Rahova Penitentiary, on 25 February 2010
11. **Sergiu Ilina -** Delegated Judge at Rahova Penitentiary, on 25 February 2010
12. **Denis Alexandru Darie -** Director of Rahova Penitentiary, on 25 February 2010
13. **Emma Turtoi -** Legal Adviser, „Army, justice, police and penitentiary" Department, Ombudsman office, on 25 February 2010

II.) Participants at the consultative round-table (22-23 March 2010)

1. **Alina Barbu** – Head of Office, Legal Drafting Department, Ministry of Justice
2. **Alina Ion** – Legal Consultant, Legal Drafting Department, Ministry of Justice
3. **Radu Geamănu** - Legal Consultant, Legal Drafting Department, Ministry of Justice
4. **Alexandru Olaru** – Legal Consultant, Department for European Programmes, Ministry of Justice
5. **Mirela Toma** – Legal Consultant, Department for European Programmes, Ministry of Justice
6. **Mihaela Mereuță –** Counsellor for European Affaires, Department of European Affaires and Human Rights, Ministry of Justice
7. **Emma Turtoi** – Legal Adviser, „Army, justice, police and penitentiary" Department, Ombudsman office
8. **Amalia Tîrnoveanu** – Legal Adviser, Legal Department, National Authority for the Protection of Family and Child's Rights
9. **Nicoleta Popescu -** Lawyer, Romanian Helsinki Committee, APADOR-CH
10. **Georgiana Pascu -** Programme Manager, Center for Legal Resources (CLS)
11. **Georgiana Iorgulescu -** Director, CLS
12. **Vasile Timaru** - Police Inspector of the General Inspectorate of the Police (GIP) Internal Control Department, Ministry of Administration and Interior

13.**Marin Cornel -** Head of Office, Guard and Penitentiary Regime Department, NAP
14. **Dragoş Strajeru -** Specialised officer, Directorate of Inspection of Penitentiaries (DIP)
15. **Ştefan Leonescu -** Legal Adviser, Jesuit Refugee Council

III.) Participants at the informal follow-up meeting (13 April 2010)

1. **Cornel Călinescu** - General Director, General Directorate for Cooperation, Ministry of Justice
2. **Alina Barbu -** Head of Office, Legal Drafting Department, Ministry of Justice
3. **Alina Ion -** Legal Consultant, Legal Drafting Department, Ministry of Justice
4. **Radu Geamănu -** Legal Consultant, Legal Drafting Department, Ministry of Justice
5. **Alexandru Olaru** – Legal Consultant, Department for European Programmes, Ministry of Justice
6. **Mirela Toma** – Legal Consultant, Department for European Programmes, Ministry of Justice
7. **Emma Turtoi** – Legal Adviser, „Army, justice, police and penitentiary" Department, Ombudsman office
8. **Amalia Tîrnoveanu** – Legal Adviser, Legal Department, National Authority for the Protection of Family and Child's Rights
9. **Mihaela Mereuță -** Counsellor for European Affaires, Department of European Affaires and Human Rights, Ministry of Justice
10. **Marin Cornel -** Head of Office, Guard and Penitentiary Regime Department, NAP
11. **Vasile Timaru** - Police Inspector of the General Inspectorate of the Police (GIP) Internal Control Department, Ministry of Administration and Interior
12. **Lucia Răileanu** - Specialised officer, European Affaires, Programmes and International Cooperation, General Inspectorate of the Police, Ministry of Administration and Interior
13. **Marian Tudor** – Specialised officer, Head of Preventive Custody Office, General Inspectorate of the Police, Ministry of Administration and Interior

IV.) Participants at the workshop on 10 and 11 June 2010

1. **Alina Barbu -** Head of Office, Legal Drafting Department, Ministry of Justice
2. **Alina Ion -** Legal Consultant, Legal Drafting Department, Ministry of Justice
3. **Radu Geamănu -** Legal Consultant, Legal Drafting Department, Ministry of Justice
4. **Oana Petrescu -** Counsellor for European Affaires, Department of European Affaires and Human Rights, Ministry of Justice
5. **Mirela Toma** – Legal Consultant, Department for European Programmes, Ministry of Justice
6. **Emma Turtoi** – Legal Adviser, „Army, justice, police and penitentiary" Department, Ombudsman office
7. **Amalia Tîrnoveanu** – Legal Adviser, Legal Department, National Authority for the Protection of Family and Child's Rights
8. **Nicoleta Popescu -** Lawyer, Romanian Helsinki Committee, APADOR-CH
9. **Maria Nicoleta Andreescu -** Lawyer, Romanian Helsinki Committee, APADOR-CH
10. **Georgiana Pascu -** Programme Manager, Center for Legal Resources (CLS)
11.**Vasile Timaru** - Police Inspector of the General Inspectorate of the Police (GIP) Internal Control Department, Ministry of Administration and Interior
12**. Relu Muşat -** Police Sub-inspector, Custody Division, Bucharest Metropolitan Police
13. **Ilie Dănuț** - Specialised officer, National Administration of Penitentiaries (NAP)

14. **Carmen Suditu** (MoJ) - Specialised officer, National Administration of Penitentiaries (NAP)
15. **Valentin Dumitriu Trandafir** - Police officer, Romanian Immigration Office, Ministry of Administration and Interior
16. **Adrian Aldea** - Police officer, Customs Department, Ministry of Administration and Interior
17. **Daniel Verman -** Counsellor, General Department for Public Health, Medical Assistance and Programmes, Ministry of Health
18. **Stan Corina** – Social assistant, National Center for Mental Health and Fight against Drugs

V.) Participants at the workshop on 21 and 22 June 2010

1. **Alina Ion -** Legal Consultant, Legal Drafting Department, Ministry of Justice
2. **Radu Geamănu -** Legal Consultant, Legal Drafting Department, Ministry of Justice
3. **Nicoleta Stan** – Legal Consultant, Department for European Programmes, Ministry of Justice
4. **Vasile Timaru** - Police Inspector of the General Inspectorate of the Police (GIP) Internal Control Department, Ministry of Administration and Interior
5. **Adrian Aldea** - Police officer, Customs Department, Ministry of Administration and Interior
6. **Ilie Dănuț** - Specialised officer, National Administration of Penitentiaries (NAP)
7. **Daniel Verman -** Counsellor, General Department for Public Health, Medical Assistance and Programmes, Ministry of Health
8. **Nicoleta Popescu -** Lawyer, Romanian Helsinki Committee, APADOR-CH
9. **Maria Nicoleta Andreescu -** Lawyer, Romanian Helsinki Committee, APADOR-CH
10. **Emma Turtoi** – Legal Adviser, „Army, justice, police and penitentiary" Department, Ombudsman office
11. **Ştefan Leonescu -** Legal Adviser, Jesuit Refugee Council (JRS)
12. **Benedicte Michanaon -** Intern, Jesuit Refugee Council (JRS

ANNEX II – OFFICIAL POINT OF VIEW OF THE ROMANIAN OMBUDSMAN REGARDING ITS POTENTIAL DESIGNATION AS NPM

Unofficial translation (original document in Romanian attached):

Dear Mr. Managing director,

Through the registered address at the Ombudsman institution under no. 3727 of April 12, 2010 you have sent the request of designation of a participant from the institution's side to provide / support **an official point of view** of the Ombudsman institution, in the meeting dated April 13, 2010 as well as the communication of the point of view regarding the categories of "places of detention" (within the meaning of the Optional Protocol) to be included within the scope of responsibility / jurisdiction of future institution.

In response to the request from, we inform you that the Ombudsman institution will be represented by Mrs. Emma Turtoi, adviser within the Field of activity: army, justice, police, and penitentiaries.

In addition, we make the following specifications:

1. The respect for the human person represents an intrinsic component of any democratic system and is achieved by a combination of legal means and public institutions, which have as essential scope the defense of fundamental rights and freedoms, as well as of subjective rights of the citizens.

Among the State institutions which ensure protection and respect for the human person is included also the Ombudsman, whose role is to defend rights and freedoms of citizens.

Appeared in Sweden in 1766, the Ombudsman is an independent institution created to protect the rights and freedoms of citizens. It focuses its entire activity to counteract the bureaucratic, abusive attitudes of public institutions, particularly the ones of executive nature.

Romanian Constitution, adopted in 1991, marked the society's transition towards a state of law, democratic and social, in which human dignity, citizen's rights and freedoms, free development of human personality represent supreme and guaranteed values. In order to achieve these goals and emphasizing the tradition and experience of Western European Ombudsman, through the Constitution was created the Romanian Ombudsman institution, equivalent to the Ombudsman. Subsequently, in order to apply the provisions of Art. 58 paragraph (3) of the Constitution, according to which the "Organization and functioning of the Ombudsman is established by organic law", it was adopted the Law no. 35/1997 regarding the organization and functioning of Ombudsman, which was republished in 2004.

In order to achieve its constitutional and legal role, the Ombudsman receives, examines and decides, according to law, petitions addressed by any natural person, irrespective of nationality, age, gender, political affiliation or religious beliefs. The petitions addressed to the Ombudsman must be in writing and mailed, including electronic mail, telephone, fax, or directly with audiences, which represents the main mean of dialogue with citizens.

Ombudsman, in order to resolve the addressed problems, is entitled to request the relevant public administration authority to take the necessary measures to protect the rights and freedoms of individuals, as well as to notify the hierarchically superior public administration institutions regarding the lack of response of those notified to take the necessary measures. Also, the Ombudsman may make investigations or recommendations.

Therefore, the Ombudsman has the right to make its own investigations, to require the public administration authorities any information or documents necessary for the investigation, to hear and take statements from leaders of public administration authorities and from any other official who can give the information necessary to resolving the petition. Also, for the performance of its duties, the Ombudsman makes recommendations which are not subject to any parliamentary or judicial review or control. Through the issued recommendations, the Ombudsman shall inform public administration authorities of illegality of documents or administrative acts.

2. In order to apply the provisions of Art. 10 paragraph (1) letter c) of Law no. 35/1997 regarding the organization and functioning of the Ombudsman, republished, in the Ombudsman institution operates the field of activity: army, justice, police, penitentiaries, and is coordinated by Mr. Alexander Balanescu, Deputy of Ombudsman.

In 2009, in the Field of activity: army, justice, police, penitentiaries were registered **65 petitions** related to penitentiaries, out of which **11 petitions** were clarified as a result of undertaken approaches to the public authorities involved in solving the aspects claimed by the detainees.

A category of petitions received from persons deprived of their liberty were related, for example to: ►the right to medical assistance; ►the right to a decent living;
►participation to socio-educational activities, to cultural and religious activities; ►request of transfer to other penitentiaries; ►change of detention regime;
►the right to receive, keep, and use during the detention period, computers and informatics equipments;
►the rights to consultation of documents of personal interest included in the personal file and obtain copies of its content;
►presentation to the expertise committees of medical and recovery of work capacity in order to be included in a degree of disability; ►the right to intimate visits; ►the right to petition and right to correspondence; ►use for work.

Another category of petitions made by detainees had as subject documents of judicial authorities and were related, for example to: the dispute of judgments of conviction, of how the courts solved the claims of penalty execution interruption for medical grounds and of the requests for parole on medical grounds.

According to Art. 17 paragraph (1) of Low no. 35/1997 regarding the organization and functioning of the Ombudsman, republished, management of prisons, juvenile correctional centers, prison hospitals, as well as Public Ministry and police are obliged to allow, without limitation, to the persons executing the prison penalty or, as the case, are arrested or detained, as well as to the juveniles in correctional centers to address, in any way, to the Ombudsman regarding the violation of their rights and freedoms, except for the legal limitations.

During 2009, the Ombudsman institution has conducted **two surveys**, in places that could be considered "places of detention" in the meaning of the Optional Protocol to the Convention

against Torture and Other punishments or cruel, inhuman or degrading treatment:

- 1 survey regarding the way of respecting the right to information, right to health protection, right to petition, the secrecy of correspondence and of a decent standard of living, in **Craiova Penitentiary**;
- 1 survey regarding the child and youth protection and the right to health protection at the **Placement Centre no. 8 "Hope" - Huedin**;

3. Ombudsman institution noted the obligation undertaken by the Romanian State by Law no. 109 of April 14, 2009 to ratify the Optional Protocol, adopted in New York on December 18, 2002, at the Convention against Torture and Other punishments or cruel, inhuman or degrading treatments, adopted in New York on December 10, 1984, of founding a mechanism for torture prevention at national level.

By adopting a law on the organization of the new mechanism of prevention could be fulfilled all the requirements established by the Optional Protocol, the new normative document will include provisions related to: the practical aspects of formation; the functional independence of the mechanism of prevention as well as of each member; term of mandate for the members of the mechanism; the manner and criteria for appointing the members; attributions of the mechanism and how to exercise them (visits, recommendations, observations, annual reports); the procedure for making visits; liability, immunities and incompatibilities; funding.

Compared to current legal provisions, the Ombudsman has no attributions to carry out systematic and unannounced visits to places of detention.

Therefore, according to Art. 14 paragraph (1) of Law no. 35/1997, republished, the Ombudsman shall exercise its attributions ex officio or upon request by persons aggrieved by violations of citizen's rights or liberties by the public administration authorities. Ombudsman institution, following the realized inspection, only surveys on referrals from natural persons, or if they notify ex officio, so that cannot make systematic visits (regular) in places of detention (prison establishments, police arrest, detention places for foreign citizens or stateless persons, military units, social units, units of health protection, institutional care facilities for children).

Moreover, the Ombudsman institution cannot carry out verifications in **private** places of detention (e.g., private social welfare institutions, as organized by the Government Ordinance no. 68/2003 regarding social services, as modified and amended), because its mission concerns only the relation of natural persons with public administration authorities.

In this circumstances, should be considered the provisions of Art. 4 section 2 of the Optional Protocol, under which imprisonment may be ordered in any **public or private place of detention**.

Ombudsman institution has a lack of sufficient financial resources which should enable the development of a system of regular visits in places of detention, and cover the necessary personnel and suitable equipment. Regarding the employment conditions of the members of national prevention mechanism, Art. 18 section 2 of the Optional Protocol provides that States Parties must ensure a balance in terms of gender representation and ethnic and minority groups in the country, or the employment of Ombudsman institution personnel is made after a competition.

Ombudsman institution personnel is mostly composed of lawyers, while for the efficient operation of prevention mechanism is needed the employment of experts with diverse training: specialists in criminal law, refugees and asylum rights, international protection of human rights, medicine and forensic medicine specialists, psychologists, psychiatrists, persons with experience in police service and psychiatric institutions.

In addition, members of prevention mechanism must have relevant experience in a specific field, situation which would determine, on one hand a greater impact of the body recommendations, and on the other hand the reduction of situations which would engage the services of experts as collaborators.

Sincerely,

Deputy of Ombudsman

Alexandru Bălănescu

R O M Â N I A
Avocatul Poporului

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Cabinet Secretar de Stat

3727/2010

Domnului Cornel Virgiliu CĂLINESCU

Director general

Direcţia Generală Cooperare

Ministerul Justiţiei şi Libertăţilor Cetăţeneşti

Str. Apolodor nr. 17

Stimate domnule director general,

Prin adresa înregistrată la instituția Avocatul Poporului sub nr. 3727 din 12 aprilie 2010, ne-ați adresat rugămintea desemnării unui participant din partea instituției care să prezinte/să susțină **un punct de vedere oficial** al instituției Avocatul Poporului, în cadrul întâlnirii din data de 13 aprilie 2010, precum şi comunicarea punctului de vedere cu privire la categoriile de „locuri de detenție” (în sensul Protocolului opțional) care ar trebui incluse în sfera de competență/jurisdicție a viitoarei instituții.

Față de solicitarea transmisă, vă facem cunoscut faptul că instituția Avocatul Poporului va fi reprezentată de către doamna Emma Turtoi, consilier în cadrul Domeniului de activitate: armată, justiție, poliție, penitenciare.

În plus, facem următoarele precizări:

1. Respectul față de persoana umană reprezintă o componentă intrinsecă a oricărui sistem democratic şi se realizează printr-un ansamblu de mijloace juridice şi instituții publice, care au ca rol esențial apărarea drepturilor şi libertăților fundamentale, precum şi a drepturilor subiective ale cetățenilor.

Printre instituțiile statului, care asigură protecția şi respectul față de persoana umană, se numără şi Ombudsmanul, al cărui rol este apărarea drepturilor şi libertăților cetățenilor.

Apărut în Suedia în anul 1766, Ombudsmanul este o instituție independentă, creată pentru protecția drepturilor şi libertăților cetățenilor. Acesta îşi concentrează întreaga activitate pe contracararea atitudinilor birocratice, abuzive ale autorităților publice, în special a celor cu caracter executiv.

Constituția României, adoptată în anul 1991, a marcat trecerea societății spre un stat de drept, democratic şi social, în care demnitatea omului, drepturile şi libertățile cetățenilor, libera dezvoltare a personalității umane reprezintă valori supreme şi sunt garantate. În vederea realizării acestor deziderate şi

valorificând tradiția și experiența ombudsmanului vest-european, prin Constituție, a fost creată instituția Avocatul Poporului- echivalentul Ombudsmanului. Ulterior, în aplicarea prevederilor art. 58 alin. (3) din Constituție, potrivit cărora “Organizarea și funcționarea instituției Avocatul Poporului se stabilesc prin lege organică” a fost adoptată Legea nr. 35/1997 privind organizarea și funcționarea instituției Avocatul Poporului, care a fost republicată în anul 2004.

Pentru realizarea rolului său constituțional și legal, Avocatul Poporului primește, examinează și soluționează, în condițiile legii, petițiile adresate de orice persoană fizică, fără deosebire de cetățenie, vârstă, sex, apartenență politică sau convingeri religioase. Petițiile adresate Avocatului Poporului trebuie formulate în scris și transmise prin poștă, inclusiv cea electronică, prin telefon, fax, sau direct prin audiențe, care reprezintă principalul mijloc de dialog cu cetățenii.

Avocatul Poporului, pentru soluționarea problemelor cu care este sesizat, are dreptul de a solicita autorității administrației publice în cauză, luarea măsurilor ce se cuvin pentru apărarea drepturilor și libertăților persoanelor fizice, precum și de a sesiza autoritățile publice ierarhic superioare în legătură cu lipsa de reacție a celor somați să dispună măsurile necesare. De asemenea, Avocatul Poporului poate face anchete sau poate formula recomandări.

Astfel, Avocatul Poporului are dreptul să facă anchete proprii, să ceară autorităților administrației publice orice informații sau documente necesare anchetei, să audieze și să ia declarații de la conducătorii autorităților administrației publice și de la orice funcționar care poate da informațiile necesare soluționării petiției. De asemenea, în exercitarea atribuțiilor sale, Avocatul Poporului emite recomandări, care nu pot fi supuse nici controlului parlamentar și nici controlului judecătoresc. Prin recomandările emise, Avocatul Poporului sesizează autoritățile administrației publice asupra ilegalității actelor sau faptelor administrative.

2. În aplicarea prevederilor art. 10 alin. (1) lit. c) din Legea nr. 35/1997 privind organizarea și funcționarea instituției Avocatul Poporului, republicată, în cadrul instituției Avocatul Poporului funcționează domeniul de activitate: armată, justiție, poliție, penitenciare, care este coodordonat de către domnul Alexandru Bălănescu, adjunctul Avocatului Poporului.

În anul 2009, în Domeniul de activitate: armată, justiție, poliție, penitenciare au fost înregistrate **65 petiții** referitoare la penitenciare, din care **11 petiții** au fost clarificate ca urmare a demersurilor întreprinse la autoritățile publice implicate în soluționarea aspectelor sesizate de către deținuți.

O categorie a petițiilor primite de la persoanele private de libertate s-au referit, spre exemplu la:

►dreptul la asistență medicală;
►dreptul la un nivel de trai decent;
►participarea la activități socio-educative, la activități culturale și religioase;
►solicitarea transferării la alte penitenciare;
►schimbarea regimului de detenție;
► dreptul de a primi, păstra și folosi pe perioada detenției calculatoare și echipamente informatice;
►dreptul la consultarea documentelor de interes personal incluse în dosarul personal și obținerea de fotocopii din acesta;
►prezentarea la comisiile de expertiză medicală și recuperare a capacității de muncă în vederea încadrării într-un grad de invaliditate;
►dreptul la vizita intimă;
►dreptul de petiționare și dreptul la corespondență;
►folosirea la muncă.

O altă categorie a petițiilor formulate de către deținuți a avut ca obiect acte ale autorității judecătorești și s-au referit, spre exemplu la: contestarea hotărârilor judecătorești de condamnare, a modului de soluționare de către instanțele de judecată a cererilor de întrerupere a executării pedepsei pe motive medicale și a cererilor de liberare condiționată pe motive medicale.

Potrivit art. 17 alin. (1) din Legea nr. 35/1997 privind organizarea și funcționarea instituției Avocatul Poporului, republicată, conducerea penitenciarelor, a centrelor de reeducare pentru minori, a spitalelor penitenciare, precum și Ministerul Public și organele de poliție sunt obligate să permită, fără nici o restricție, persoanelor care execută pedeapsa închisorii sau, după caz, se află arestate ori reținute, precum și minorilor aflați în centrele de reeducare să se adreseze, în orice mod, Avocatului Poporului cu privire la lezarea drepturilor și libertăților lor, cu excepția restrângerilor legale.

În cursul anului 2009, instituția Avocatul Poporului a efectuat **două anchete**, în locuri care ar putea fi considerate “locuri de detenție” în accepțiunea Protocolului opțional la Convenția împotriva torturii și altor pedepse ori tratamente cu cruzime, inumane sau degradante:

- 1 anchetă referitoare la respectarea dreptului la informație, dreptului la ocrotirea sănătății, dreptului de petiționare, secretului corespondenței și a nivelului de trai decent la **Penitenciarul Craiova**;
- 1 anchetă referitoare la protecția copiilor și a tinerilor și dreptul la ocrotirea sănătății la **Centrul de Plasament**

nr. 8 "Speranța" – Huedin;

3. Instituția Avocatul Poporului a luat act de obligația asumată de către Statul român prin Legea nr. 109 din 14 aprilie 2009 pentru ratificarea Protocolului opțional, adoptat la New York la 18 decembrie 2002, la Convenția împotriva torturii și a altor pedepse ori tratamente cu cruzime, inumane sau degradante, adoptată la New York la 10 decembrie 1984, de a înființa un mecanism pentru prevenirea torturii la nivel național. file:///C:/Documents and Settings/emmat.AVP-INT/Sintact 2.0/cache/Legislatie/temp/00121757.HTM -

Prin adoptarea unei legi de organizare a noului mecanism de prevenire ar putea fi îndeplinite toate cerințele stabilite de Protocolul Opțional, noul act normativ urmând să cuprindă dispoziții referitoare la: modalitățile concrete de constituire; independența funcțională a mecanismului de prevenire precum și a fiecărui membru în parte; durata mandatului membrilor mecanismului; modalitatea și criteriile de numire a membrilor; atribuțiile mecanismului și modul de exercitare a acestora (vizite, recomandări, observații, rapoarte anuale); procedura de efectuare a vizitelor; răspundere, imunități și incompatibilități; finanțare.

Raportat la prevederile legale actuale, Avocatul Poporului nu are atribuții de efectuare a vizitelor sistematice și neanunțate în locurile de detenție.

Astfel, potrivit art. 14 alin. (1) din Legea nr. 35/1997, republicată, Avocatul Poporului își exercită atribuțiile, din oficiu sau la cererea persoanelor lezate prin încălcarea drepturilor sau libertăților cetățenești de către autoritățile administrației publice. Instituția Avocatul Poporului, urmare a controlului realizat, efectuează anchete numai la sesizarea persoanelor fizice sau dacă se sesizează din oficiu, astfel încât nu poate efectua vizite sistematice (cu caracter regulat) în locurile de detenție (unități penitenciare, aresturile poliției, locuri de detenție pentru cetățeni străini sau apatrizi, unități militare, unități de asistență socială, unități de ocrotire a sănătății, unități instituționalizate de ocrotire a copiilor).

Mai mult, instituția Avocatul Poporului nu poate efectua verificări în locurile de detenție **private** (de exemplu, la instituțiile private de asistență socială, astfel cum sunt organizate prin Ordonanța Guvernului nr. 68/2003 privind serviciile sociale, modificată și completată), deoarece atribuțiile sale vizează numai raporturile persoanelor fizice cu autoritățile administrației publice.

În acest context, trebuie avute în vedere prevederile art. 4 pct. 2 din Protocolul Opțional, potrivit cărora privarea de libertate poate fi dispusă în orice loc **public sau privat de detenție**.

Instituția Avocatul Poporului nu dispune de resurse financiare suficiente care să-i permită realizarea unui sistem de vizite sistematice în locurile de detenție, acoperirea necesarului de personal și dotarea materială corespunzătoare.

În privința condițiilor de angajare ale membrilor mecanismului național de prevenire, art. 18 pct. 2 din Protocolul Opțional prevede că statele părți trebuie să asigure un echilibru în ceea ce privește reprezentarea sexelor și a grupurilor etnice și minoritare din țară, or angajarea personalului instituției Avocatul Poporului se realizează în urma susținerii unui concurs.

Personalul instituției Avocatul Poporului este preponderent format din juriști, în timp ce pentru funcționarea eficientă a mecanismului de prevenire este necesară angajarea unor experți cu pregătire profesională variată: specialiști în drept penal, dreptul refugiaților și al azilanților, protecția internațională a drepturilor omului, specialiști în medicină și medicină legală, psihologi, psihiatri, persoane cu experiență în poliție și în instituții psihiatrice.

În plus, membrii mecanismului de prevenire trebuie să aibă o experiență relevantă în domeniul specific, situație care ar determina, pe de o parte un impact mai mare al recomandărilor organismului, iar pe de altă parte reducerea situațiilor în care s-ar apela la serviciile unor experți în calitate de colaboratori.

Cu stimă,

Adjunct al

Avocatului Poporului

Alexandru Bălănescu