IMPLEMENTING A NATIONAL PREVENTIVE MECHANISM FOR THE PREVENTION OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN PLACES OF DETENTION IN ROMANIA

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Abstract

With the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by Law no. 109/2009, Romania has taken a further step in strengthening the preventive monitoring of places of detention by an independent body as a form of preventing and combating torture and other forms of ill-treatment in different places of detention. Consequently, Romania is to establish a National Preventive Mechanism (NPM) for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

The paper will focus on the study of the OPCAT provisions regarding the NPM, aimed at establishing a system of regular visits undertaken by an independent national body to places where people are deprived of their liberty. Due attention will be granted to the existing domestic mechanisms and to the analysis of the legislation of certain European states that already implemented OPCAT.Furthermore, this article will assess the difficulties which the implementation of a NPM in Romania poses, the shortcomings of such an endeavour, with a view to the understanding of the minimum pre-requisites for an effective functioning of such a national body and taking also into consideration the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles).To close with, the study will attempt to present some recommendations meant to ensure a firm and efficient implementation of the NPM in Romania.

Keywords: *Places of detention, United Nations, Optional Protocol to the Convention against Torture (OPCAT), National Preventive Mechanism (NPM), Romanian legislation, torture and other forms of cruel, inhuman or degrading treatment or punishment.*

Introduction

Acknowledging the fact that the persons deprived of their liberty are in a fragile position, it is the duty of the states and of the international community to ensure the full respect of their fundamental rights. This was the reason for the United Nations to come with the adoption of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[1], being convinced, according to the Preamble, that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel,

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[1] The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 18 December 2002, entered into force on 22 June 2006 and was ratified by Romania through Law no. 109/2009, published in the *Official Journal of Romania*, Part I, no. 300 of May 7, 2009. For the full text of the OPCAT, see http://www2.ohchr.org/english/law/cat-one.htm, accessed on January 25, 2012.

Inhuman or Degrading Treatment or Punishment (CAT)[2], strengthening the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

The efforts of the United Nations in ensuring protection for the persons deprived of their liberty are continous, just to mention the recent discussions within an open-ended intergovernmental expert group in order to exchange information on best practices, as well as national legislation and existing international law, and on the revision of the existing United Nations standard minimum rules for the treatment of prisoners so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps.[3]

A presentation of the existing control mechanisms in Romania and a brief analyse of the legislation of certain European states will help us to assess more accurately the current situation in Romania and to observe different models of already implemented national prevention mechanisms, consequently allowing us to look at the whole picture, having all the elements, thus drawing the best fitting solutions in implementing a solid and functional national preventive mechanism in Romania, in full respect with OPCAT requirements.

CONTENT

I. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

1. General presentation. Observing that the protection of human rights is of paramount importance and is subject to continous evolution, the United Nations adopted the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* stressing out that further measures are necessary to achieve the purposes of the CAT and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

Although Romania ratified the OPCAT in 2009, based on the declaration made in accordance with article 24, paragraph 1, the implementation of the obligations under Part IV, concerning national preventive mechanisms[4] was postponed for three years, thus no NPM was designated in Romania up to this point. The three year period of postponement will expire on 1 August 2012, leaving a tight timeframe to the relevant national stakeholders in order to designate a NPM within the assumed term.[5]

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[2] ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984, entered into force 26 June 1987 and was ratified by Romania through Law no. 19/1990, published in the*** **Official Journal of Romania*****, Part I, no. 112 of October 10, 1990.***

[3] ***See the open-ended intergovernmental expert group meeting on the United Nations standard minimum rules for the treatment of prisoners, 31 January - 2 February 2012, Vienna, Austria, as requested by the General Assembly, in operative paragraph 10 of its Resolution 65/230 of 21 December 2010, entitled "*****Twelfth United Nations Congress on Crime Prevention and Criminal Justice*****", accessed on February 2, 2012,*** http://www.unodc.org/documents/justice-and-prison-reform/AGMs/General_Assembly_resolution_65-230_E.pdf.

[4] ***According to article 17 of the OPCAT, each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level.***

[5] ***According to article 2 of the Order no. 47/2010 of the minister of foreign affairs, published in the*** **Official Journal of Romania*****, Part I, no. 100 of February 15, 2010, the OPCAT entered into force for Romania on August 1, 2009, so the three year period of postponement will expire on August 1, 2012.***

Unlike other optional protocols to human rights treaties, the OPCAT is viewed as an operational treaty rather than a standard-setting instrument.[6] In this sense, it was stated that the OPCAT breaks new ground within the UN human rights system for four main reasons[7], namely: it emphasises prevention; it combines complementary international and national efforts; it emphasises cooperation, not condemnation and it establishes a triangular relationship (between the States Parties, the Subcommittee on Prevention and NPMs). In this respect it makes more sense to expose places of detention to public scrutiny and to make the entire system in which police, security and intelligence officials operate more transparent and accountable to external monitoring.[8] More specifically, the fact that detainees are locked away from society also means that society is prevented from knowing the truth about life behind bars. Many detainees feel that society has forgotten them and that nobody is interested in their fate. In fact, most people have never seen a place of detention from inside and are not really interested to know what is going on in closed institutions.[9]

The Optional Protocol aims to protect persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment by preventive non-judicial means, approaching the problem from two sides, as it establishes a system of regular visits undertaken to places where people are deprived of their liberty by an independent international body – the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture and by national preventive mechanisms for the prevention of torture at the domestic level, due to be created by each Member State.

The main mandate of the *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture* shall consist of visits in the places of detention and in making recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. In order to give assistance to the States and NPMs in fulfilling their obligations under the Optional Protocol, bearing in mind the provisions set out in the OPCAT, the Subcommittee on Prevention issued the Guidelines on national preventive mechanisms[10] aiming to add further clarity as to the expectations of the Subcommittee on Prevention regarding the establishment and operation of NPMs.

The *National Preventive Mechanisms* shall have both functional and personnel independence and shall visit the national places of detention in order to examine regularly the treatment of the persons deprived of their liberty, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment.

Also, they shall have the right to make contacts with the Subcommittee on Prevention, to send it information and to meet with it. It should be stressed out that the Guidelines of the Subcommittee on Prevention emphasize the fact that the NPM should complement rather than replace existing systems of monitoring and its establishment should not preclude the creation or operation of other such complementary systems.

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[6] Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the UN Convention against Torture: Implementation Manual*, revised edition, 2010, p.11, accessed January 31, 2012, http://www.apt.ch/index.php?option=com_docman&task=doc_download&gid=784&Itemid=256&lang=en.

[7] For an in-depth analysis of these reasons, see APT and IIHR, *op. cit.*, p.12 - 14.

[8] See Manfred Nowak, *Interim report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment*, A/61/259, 14 August 2006, para.67, accessed January 25, 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/468/15/PDF/N0646815.pdf?OpenElement.

[9] See Manfred Nowak, op. cit., para. 46.

[10] The *Guidelines on national preventive mechanisms* were adopted by the United Nations' Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 15–19 November 2010, accessed January 29, 2012, www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc.

When analysing the implementation of OPCAT, one should observe with particular attention the content of the notions of "*places of detention*" and "*deprivation of liberty*" explained in article 4, since the meaning of them is different from the commom understanding. *Place of detention* shall mean any place under the jurisdiction and control of the member states 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.

Deprivation of liberty shall mean 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.

So, it can be clearly outlined that places of detention falling under the provisions of OPCAT are broader, as they include not only the "*classical*" places of detention (penitentiaries, places of arrest, detention centers), but any place where a person is or may be deprived of his or her liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or approval, in this category being included, for exemple, psychiatric institutions, centers for the refugees, orphanages and homes for the elderly. Thus the NPMs' visiting mandate has a very wide range, as it comprises the right to visit all places where people are or may be deprived of their liberty. It was however emphasized that the aim of the OPCAT is the prevention and visits are only part of that preventive mandate. It is very important that any NPM looks to the broader picture of prevention under the OPCAT.[11]

2. National Prevention Mechanisms. Further, the paper will focus on analysing the provisions contained in the Optional Protocol regarding the National Prevention Mechanisms. Although the OPCAT does not prescribe a particular structure for the NPMs' it does set out several paraghraphs (articles 17-23) about the mandate and minimum powers the NPMs' must be given by States Parties. In accordance with article 19, NPMs shall be granted minimum the following powers:

"(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture, cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture, cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation."

The NPM should have a functional independence and an independence of its personnel, which has to have such capabilities and professional knowledge[12] necessary to achieve the scope of the mechanism.

In fulfilling the requirements of OPCAT, besides the pre-existence of the human resources requirements, the functional and budgetary independence, the experts within the NPM should have, in accordance to the provisions of article 20 of the OPCAT, access to all information concerning the number of persons deprived of their liberty in places of detention, the number of places and their location; access to all information referring to the treatment of those persons as well as their conditions of detention; access to all places of detention and their installations and facilities. Also,

[11] Rachel Murray, Malcolm Evans, Elina Steinerte, Antenor Hallo de Wolf, *Summary and Recommendations* from the Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, University of Bristol, 2009, p.5*,* accessed February 1, 2012, http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf.

[12] *E.g.:* prior experience in visiting places of detention, membership in certain professions relevant to the scope of the mechanism (lawyers, doctors, psychologists, psychiatrists, social workers etc.), moral authority and respect within the society.

they must have the opportunity to interview, in private, the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who can supply relevant information.[13]

3. The notion of "torture". As to the notion of *torture* in the sense of the United Nations' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[14], the accepted approach under international law has been to avoid drawing up an exhaustive list of acts that could be considered to amount to torture because of concerns that such a list may prove too limited in its scope and, thus, may fail to adequately respond to developments in technology and values within societies.[15] Also, the lack of a definition of "*other forms of ill-treatment*" from the text of the Convention is useful as it ensures that other types of abuse that may fail to meet the strict definition of torture as a crime, but that nevertheless cause suffering to individuals, are also absolutely prohibited.[16]

It can be observed that this definition has a four-part test: the intentional infliction; of severe pain or suffering weather physical or mental; for any purpose including, for example, to obtain information, inflict punishement or intimidate him or a third person; by a public official or person acting in an official capacity.[17] To strengthen the prohibition of torture, article 2 from the CAT[18] states the absolute prohibition of torture. Thus it can not be subject of defences, statute of limitations or amnesty and efforts by some States to justify torture and ill-treatment as measures to protect public safety or avert emergencies can not be recognized.

Evaluating the distinction made between torture and other cruel, inhuman or degrading treatment or punishment, the thorough analysis of the *travaux préparatoires* of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from *[cruel, inhuman or degrading treatment]* may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.[19]

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[13] As a consequence of this provision, article 21 of OPCAT underlines the fact that no authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false and no such person or organization shall be otherwise prejudiced in any way.

[14] According to article 1 para.1 from the CAT, the term *"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*.

[15] APT and IIHR, *op. cit.*, p.27.

[16] APT and IIHR, *op. cit.*, p.28.

[17] Jim Murdoch, *The treatment of prisoners. European standards*, Council of Europe Publishing, Strasbourg, 2004, p.118.

[18] According to article 2 para.2 from the CAT, *no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.* Moreover, according to article 16 from the CAT, *each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.

[19] Manfred Nowak, *Civil and political rights, including the questions of torture and detention. Torture and other cruel, inhuman or degrading treatment. Report of the Special Rapporteur on the question of torture, Manfred Nowak*, E/CN.4/2006/6, 23 December 2005, p.13, para.39, accessed February 1, 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/09/PDF/G0516809.pdf?OpenElement.

One common element of the definitions of torture and other forms of ill-treatment under the Convention against Torture is that all must involve a public official or someone acting in an official capacity. However, for the purposes of the CAT, cruel, inhuman or degrading treatment may "*not amount to torture*" either because it does not have the same purposes as torture, or because it is not intentional, or perhaps because the pain and suffering is not "*severe*" within the meaning of article 1.[20]

Indeed, the definition of torture in the United Nations' Convention is reflected also to the purpose of the actions, which is in opposition to the provisions of the article 3 from the European Convention for the Protection of Human Rights and Fundamental Freedoms[21], refined through the European Court of Human Rights case-law, stating that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*", as the European aproach proceeds upon degrees of severity of the suffering caused in setting up a distinction between torture and inhuman or degrading treatment or punishment.

II. Presentation of the national legislation regarding the current Inspection Mechanisms in Romania

1. Mechanisms of inspection under the authority of the Minister of Justice and the National Administration of Penitentiaries. According to the provisions of articles 21 and 33 from the Government Decision no. 652/2009[22], the control competences of the Ministry of Justice are exercised by the Directorate of Internal Control[23] placed under the direct coordination of the minister of justice. The Directorate can carry out preventive and reactive visits, *ex officio* or as a reaction to a direct complaint and, while not having a special focus, it includes the analysis of torture or ill treatment of the persons deprived of their liberty placed in the penitentiaries under the authority of the National Administration of Penitentiaries. The recommendations given by the Directorate as a result to such visits are binding to all penitentiaries throughout the country.

The internal inspection mechanism within the National Administration of Penitentiaries is the Directorate for the Inspection of Penitentiaries[24], placed directly under the General Director. The Directorate has competence to control all 45 penitentiaries with a total number of approximately 30,600 inmates and its main tasks are: conducting general inspections, which have various purposes such as inspecting safety, health and financial aspects as well as the rights of the detainees, *ad hoc* controls, as a reaction to a complaint, usually to inspect only on a particular aspect, concerning the complaint received and exercising thematic controls concerning an aspect decided upon by the National Administration of Penitentiaries.

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[20] Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), *Torture in International Law. A guide to jurisprudence*, 2008, p.12, accessed February 1, 2012, http://www.apt.ch/index.php?option=com_docman&task=doc_download&gid=326&Itemid=260&lang=en.

[21] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13 were ratified by Romania through Law no. 30/1994, published in the *Official Journal of Romania*, Part I, no. 135 of May 31, 1994.

[22] Government Decision no. 652/2009 regarding the organisation and functioning of the Ministry of Justice was published in the *Official Journal of Romania*, Part I, no. 443 of June 29, 2009. Consolidated text as of December 8, 2011.

[23] See articles 74 – 76 from the Order no. 120/C/2011 of the minister of justice on approving the Regulation for organization of the Ministry of Justice, published in the *Official Journal of Romania*, Part I, no. 116 of February 16, 2011. Consolidated text as of October 6, 2011.

[24] See articles 46 – 54 from the Order no. 2003/C/2008 of the minister of justice on approving the Regulation for organization of the National Administration of Penitentiaries, published in the *Official Journal of Romania*, Part I, no. 603 of August 13, 2004. Consolidated text as of January 5, 2009.

The personnel of the Directorate for the Inspection of Penitentiaries has access to all facilities, information and documents regarding the place of inspection, it can hold interviews with the detainees in private and is not subject to restrictions from the administration of the penitentiaries. After each visit the Directorate issues a note with its findings, recommendations and a deadline for the penitentiary to implement the recommendations.

2. Mechanisms of inspection under the authority of the Ministry of Administration and Interior and the General Inspectorate of the Police. The internal control mechanism within the Ministry of Administration and Interior is the Directorate of Internal Control[25], directly subordinated to the minister of administration and interior, having competence to all the structures within or subordinated to the Ministry.

The Directorate for Internal Control within the General Inspectorate of Romanian Police has the competence to visit and control all 54 police detention facilities. It specializes in organizing and carrying out inspections, checking petitions, preventing and countering infringement of law within the personnel of the General Inspectorate of Romanian Police and subordinated units.

3. Mechanisms of inspection under the authority of the Ministry of Labour, Family and Social Protection and under the public local administration. The internal control mechanism within the Ministry of Labour, Family and Social Protection is the Directorate of Internal Control.[26]

The protection of children that are placed in institution where they are not allowed to leave at will is ensured both on a central and local level. The main institution of the central public administration having competences in the protection of the children rights is the National Authority for the Protection of the Rights of the Child, subordinated to the Ministry of Labour, Family and Social Protection. It is the responsibility of the public local administration authorities to guarantee the rights of children within their territorial range.

4. Mechanisms of inspection under the authority of the Ministry of Health. In Romania there are approximately 37 psychiatric hospitals, 4 of which being psychiatric hospitals for safety measures, where patients are not free to leave at will due to the danger state they may pose to themselves or to others.

According to the provisions of the Government Decision no. 144/2010[27], the Directorate for Control functioning within the ministry inspects the hospitals in order to renew their licensing. If deficits are found, binding recommendations are made and a time frame for improvements is given.

Also, regarding the mental health institutions, according to the provisions of the Government Decision no. 1424/2009[28], the National Centre for Mental Health, a subordinated structure to the Minister of Health, deals with various issues regarding the management of mental health institutions and the medical treatment of the patients, carrying out preventive and reactive inspections, as it monitorises and evaluates the mental health services.

The preventive visits of these 2 mechanisms usually have the purpose of inspecting a broad range of issues and specifically to check the compliance with the medical and professional standards.

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[25] Order no. 118/2011 of the minister of administration and interior regarding the organization and execution of internal controls within the Ministry of Administration and Interior, published in the *Official Journal of Romania*, Part I, no. 443 of June 24, 2011.

[26] Government Decision no. 11/2009 regarding the organisation and functioning of the Ministry of Labour, Family and Social Protection was published in the Official Journal of Romania, Part I, no. 41 of January 23, 2009. Consolidated text as of August 23, 2011.

[27] Government Decision no. 144/2010 regarding the organisation and functioning of the Ministry of Health was published in the *Official Journal of Romania*, Part I, no. 139 of March 2, 2010. Consolidated text as of January 11, 2012.

[28] Government Decision no. 1424/2009 regarding the organisation and functioning of the National Centre for Mental Health was published in the *Official Journal of Romania*, Part I, no. 842 of December 7, 2009.

5. Conclusions on the existing mechanisms under the executive branch.

Despite the fact that all the above presented mechanisms functioning under the executive branch can carry out reactive or even preventive visits and can hold interviews in private with the persons deprived of their liberty, having access to all facilities and relevant persons and documents when visiting a place of detention, they lack the human and logistic resources in order to visit a relevant number of places of detention falling under their competence and, being subordinated to the executive branch, they lack functional and budgetary independence. Consequently, the relevant conditions needed to effectively and objectively examine the treatment of detainees and the conditions of detention, as required by OPCAT, are not present. 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.[29]

6. Delegated Judges. The new legal framework in the field of execution of criminal penalties, namely Law no. 275/2006[30], envisages a modern development of the Romanian prison system, as a delegated judge on the execution of prison penalties was introduced, thus the execution of these penalties being carried out under the surveillance, control and authority of this judge, ensuring the lawfulness of the execution.

Delegated judges are not part of the penitentiary administration, as they mentained their status of judge of the Romanian court system. Thus, they are independent from the executive branch and only subordinated to the judicial branch. According to article 15 para.(2) from the Government Decision no. 1897/2006[31], they are competent to carry out current, occasional, unexpected, thematic and specialised inspections and controls *ex officio* or based complaints. The delegated judges have the right to access all relevant facilities within the penitentiary and hold interviews in private with any detainee or staff member.

In conclusion, the delegated judges, although independent in exercising their competences, do not carry out preventive visits, but only react to the complaints filed by inmates and aiming to prevent ill-treatment of these persons, do not have the necessary expertise, logistics or budgetary independence to realise a full evaluation of a place of detention in order to prevent torture and other ill-treatements, not to mention the fact that their offices are placed on the premises of the penitentiary, thus their independence and credibility can be undermined.

7. Ombudsman. *Avocatul Poporului* (the Romanian Ombudsman) was established in 1991 through the Constitution, as an independent and autonomous public authority, with its own budget and having the purpose of defending the individuals' rights and freedoms in their relationship with the public authorities. The Ombudsman tries to unblock the conflicts between citizens and public administration, conflicts emerging, especially, from bureaucracy, as this was and still is a heavy disease of the state administration.[32] It shall exercise his powers *ex officio* or at the request of persons

[29] Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania,* p.8**,** accessed January 31, 2012, http://www.just.ro/LinkClick.aspx?fileticket=M%2B4HHbNMs10%3D&tabid=690.

[30] Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 627 of July 20, 2006. Consolidated text as of May 22, 2010.

[31] Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 24 of January 16, 2007. Consolidated text as of December 4, 2010.

[32] Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – comentarii și explicații (Romanian Constitution revized – comments and explanations)*, All Beck Publishing House, Bucharest, 2004, p.116.

infringed in their rights and freedoms, within the limits established by law, including the possibility to visit public places of detention, but not private ones.

Avocatul Poporului is organised by Law no. 35/1997[33], has its headquarters in Bucharest and 14 regional offices. According to these legal provisions, the domain of justice, police and penitentiaries falls under its competence. Consequently, the authorities of places of detention must provide anyone who is under arrest or detention, the right to address the Ombudsman concerning a violation of his/her rights and freedoms, except for the legal restraints.

Although he is empowered to deploy preventive visits, from the public reports it can be seen that it rarely does so; of two surveys in 2009, one focused on the rights of detainees in a penitentiary and the other on child and youth protection and the right to health care according to human rights standards in a children placement centre.

The Advocate of the People shall report before the two Parliament Chambers, annually or at the request thereof. The reports may contain recommendations on legislation or measures of any other nature for the defence of the citizens' rights and freedoms. The recommendations cannot be subject to parliamentary or judicial control.

Sumarising, the Ombudsman usually visits places of detention upon a complaint and it does not have the necessary human or financial resources to systematically carry out preventive visits as required by OPCAT. In spite of these shortcomings, the Ombudsman is, unlike the other mechanisms analysed, a truly independent institution.

8. Non-Governmental Organisations. In Romania there are several non-governmental organizations which carry out an intensive activity in monitoring places of detention (*e.g.* Association for the Defense of Human Rights in Romania - the Helsinki Committee, Romanian Group for the Defence of Human Rights, Centre for Legal Resources).

According to the provisions of the Law no. 275/2006, the representatives of the non-governmental organisations that carry out activities in the field of protection of human rights may visit the penitentiaries in the subordination of the National Administration of Penitentiaries or places of arrest in the subordination of the General Inspectorate of the Police and may contact the inmates, with the agreement of the general director of the National Administration of Penitentiaries or of the warden of the place of arrest. The meetings among the representatives of the non-governmental organisations and the persons deprived of their liberty are confidential, with visual surveillance.

The representatives of the non-governmental organisations performing visits need an annual general approval by the Romanian authorities for the visits. In addition, the approval is verified by the respective prison or police unit before each visit.

Regarding the psychiatric hospitals, the non-governmental organisations have an annual protocol signed with the Ministry of Health, by which representatives of these organisations can visit such hospitals, having access to all the facilities within the institution. Also, interviews with the patients are conducted in private.

Although non-governmental organisations are fully independent from the State, not receving any funding of any sorts for the monitoring visits and carry out preventive visits in the "*classical*" places of detention, they do not have the capacity neither the resources necessary to carry out systematic visits to all places of detention throughout the country, lacking, also the multidisciplinary expertise and the legal provisions to ensure that they can issue recommendations to the visited institutions.

[33] Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People was re-published in the *Official Journal of Romania*, Part I, no. 844 of September 15, 2004. Consolidated text as of January 16, 2011.

In conclusion, 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[34], none of these mechanisms being in compliance with the Paris Principles[35] and with the minimum requirements of OPCAT in order to be appointed as the National Prevention Mechanism.

III. Short analyse of the implementation of the National Preventive Mechanism in certain European Union states.

1. The Czech Republic ratified the Optional Protocol in 2006 and, subsequently, the Act on the Public Defender of Rights (Ombudsman) was ammended in order to implement the OPCAT. The law came into effect as of 1 January 2006. From this date on, the Public Defender of Rights (*Veřejný ochránce práv*) acts as a NPM, as it has independence both functionally and institutionally.

Being appointed as a NPM, the Defender was obligated to undertake systematic, comprehensive and preventive visits in places of detention, with the objective of strengthening the protection of these persons against torture or cruel, inhuman and degrading treatment or punishment and other maltreatment.[36] Places of detention falling under the mandate of the Defender are: facilities performing custody, imprisonment, protective or institutional education, or protective treatment or preventive detention; other places where persons restricted in their freedom by public authority are or may be confined, especially police cells, facilities for the detention of foreigners and asylum facilities and 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[37], regardless if they are state or private. Thus the Defender's competence is not limited to the places of detention where persons are deprived of their liberty *de jure,* as a result of a direct interference of a public authority, being included, also, places of detention where the freedom of a person is restricted *de facto,* giving the dependance of that particular person on institutional care.

Ombudsman´s staff empowered to carry out visits consists of a special department of 12 lawyers and other *ad hoc* experts, such as doctors, psychologists, psychiatrists. Visits of one to three days are carried out according to a prepared plan for a specific period, each visit being finalized with a report. If it considers necessary, the team can make recommendations or proposals for remedial measures, adressed to the director of the visited place of detention.[38] Recommendations following the visits may vary, in the case of remand prisons, from the necessity to give a preventive inspection to people taken into custody by a doctor on the same day they are admitted, to the possibility for the inmates to combine their own underwear with prison-issue clothing or, in the absence of work opportunities, to the recommendation that prison administration should offer defendants as wide a range of leisure-time activities as possible.[39]

[34] Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *op. cit.*, p.7.

[35] The Principles relating to the Status of National Institutions (*The Paris Principles*) were adopted on 20 December 1993*,* accessed January 26, 2012, http://www2.ohchr.org/english/law/parisprinciples.htm.

[36] Section 1 para.3 from the *Act no. 349/1999 on the Public Defender of Rights*.

[37] Section 1 para.4 from the *Act no. 349/1999 on the Public Defender of Rights.*

[38] See Filip Glotzmann and Petra Zdrazilova – *Presentation on the National Preventive Mechanism in the Czech Republic*, Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, accessed January 25, 2012, http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationglotzmann.pdf.

[39] For an in-depth analisys, see Public Defender of Rights Report on Visits to Remand Prisons, 2010, p.2*,* accessed January 25, 2012, http://www.ochrance.cz/fileadmin/user_upload/ENGLISH/2010_vazebni_veznice_ENG.pdf.

2. In ***France*** the General Inspector of Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*) was set up as the NPM, through Law no. 2007-1545 of 30 October.

The General Inspector in charge to control all the places where people are deprived of liberty is independent, cannot receive instructions from any authority and cannot be prosecuted for his opinions or for the actions he carries out in his functions, and has the power to check that all the fundamental rights of people in the places of detention are respected. So, the aim of the institution is not only to prevent torture and any other inhuman and degrading treatment in custodial establishments but rather to ensure the full respect of all the fundamental rights of persons deprived of liberty. Consequently, the *Contrôleur général* has three main tasks: to make sure that rights which are inherent in human dignity are enforced; to make sure that a good balance is established between fundamental rights enforcement of people who are deprived of freedom and observations on public order and security and to prevent any violation of their fundamental rights.[40]

The core of the NPM in France is formed of 12 full time appointed "*contrôleurs*" and 9 part time "*contrôleurs*". In the performance of their tasks, the inspectors are under the exclusive authority of the General Inspector.[41] Also, the *Contrôleur général* and all his team are compelled to professional secrecy, ensurying that no information allowing persons subject to the inspection to be identified is included in the documents published under the authority of the *Contrôleur général* or in his public statements.[42]

Based on article 8 from Law no. 2007-1545, the *Contrôleur général* can visit more than 5,000 custodial establishments, such as: prisons, psychiatric hospitals, hospitals where people stay without their consent, police custody cells, places of custody or customs detention, centers for detention of foreigners, court cells, administrative detention centres and facilities, waiting zones, secure educational centres and vehicles which are used to transport people deprived of freedom, where people are kept in custody.

There is an exception provided by the law regarding the visiting powers of the NPM: the authorities responsible for a place of detention may, for serious, compelling reasons connected with national defence, public security, natural catastrophes or serious disturbance within the visited facility, object to the visit, with a due justification for the objection and with the information of the NPM when the exceptional circumstances come to an end.

In the specialist literature it was said that, according to a model of classical action for the control of independent places of deprivation of liberty, the *Contrôleur général* may issue opinions and recommendations.[43]

The broad activity of this institution aims to highlight the good practices, on the one hand and to make recommendations when the fundamental rights of the persons deprived of their liberty are not fully respected, on the other hand.

Although an activity report in 2011 was not yet published, the opinions and recommendations given by the General Inspector are available. For example, the General Inspector issued an opinion on telephone usage in the places of detention, specifically prisons and detention centers[44], as the right

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[40] Central tasks of the *Contrôleur général des lieux de privation de liberté*: taking care of the respect of fundamental rights, accessed January 29, 2012, http://www.cglpl.fr/en/the-tasks-of-the-controleur-general-des-lieux-de-privation-de-liberte/.

[41] Article 4 para.(3) from Law no. 2007-1545 of 30 October establishing a *Contrôleur général des lieux de privation de liberté*. Consolidated text as of 31 March 2011*,* accessed January 25, 2012, http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf.

[42] Article 5 from Law no. 2007-1545.

[43] Jean-Paul Céré, *Le système pénitentiaire français* in *Les systèmes pénitentiaires dans le monde*, sous la direction de Jean-Paul Céré, Carlos Eduardo A. Japiassù, 2nd edition, Dalloz Publishing House, Paris, 2011, p. 183.

[44] Opinion of of the *Contrôleur général des lieux de privation de liberté* from 10 January 2011, regarding the telephone use in places of detention, published in the *Official Journal* of 23 January 2011, accessed February 1, 2012,http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110123&numTexte=25&pageDebut=&pageFin=.

for such a person to use the telephone is one of the ways to recognize his or her right to family life and to defend itself. The opinion tells, amongst other problems, about the respect of private and family life, in this sense, the abandonment of the installation of telephones in activity rooms or collective rooms being required. Also, it is desired to install telephone boots in order to protect the privacy of the inmates' conversations from the other inmates, several reccomendations already being made by the General Inspector in this sense. Further, it states that there is no possibility for the spouses or parteners, both of them being deprived of their liberty, to contact one another via telephone, despite the fact that they have the right to maintain the bonds of the family life.

3. The Federal Republic of Germany signed OPCAT on 20 September 2006 and it entered into force for Germany on 3 January 2009. The rights and responsibilities of the German NPM are defined in the Law of 26 August 2008 as well as in the Administrative Order of 20 November 2008, for the federal component and the State Treaty of 25 June 2009, for the Länder component.

Because of the Germany's federal structure, the NPM comprises two institutions: a Federal Agency for the Prevention of Torture for the Federation's jurisdiction, with competences over detention facilities operated by the Federal Armed Forces, Federal Police and the German Customs Administration and a Joint Länder Commission for the jurisdiction of the Länder with competences over the majority of the places of detention, namely: police, judicial, detention facilities in psychiatric clinics, establishments of custody pending deportation, nursing homes, youth welfare establishments.

The Agency and the Commission work together, they have the same material and personnel resources, and, most importantly, they are independent, not being subordinated to any federal or state ministry.[45] They both have to report annually to the federal and state governments and to the federal and state parliaments.

Regarding the Composition of the German NPM, both components of the German NPM are headed by honorary members.[46] In consequence, no salary or professional fee is allocated to them. Only travel expenses and daily allowances are paid.

There is no explicit selection procedure prescribed, the candidates being selected and proposed by the Federal Ministry of Justice and the Länder ministries of justice.

The NPM may be complemented by experts who could accompany the team during inspection visits. These experts might as well belong to a non-guvernmental organisation, but then they would act in their function as associated experts to the Mechanism.

The role of the Federal Agency's and of the Joint Commission of the Länder is to carry out regular or *ad hoc* visits to places of detention, identify problems and make recommendations to the relevant authorities. The German law has not reiterated the OPCAT provisions regarding the NPM right to submit proposals and observations to existing or draft legislation.

The Administrative Order and the State Treaty explicitly offer the Mechanism the right to enter any place of detention, with or without notification, access to any kind of information and the right to conduct confidential interviews with any person in the detention facility, but there is no special procedure provided to enforce access to places of detention. Regarding the places of detention, the German legislation does not explicitly name all relevant institutions that fall under the application of OPCAT. But the commentary to the Federal Law of 26 August 2008 mentions the following places as encompassed by article 4 of OPCAT: police stations, prisons (including remand prisons), closed units of psychiatric hospitals, centres for asylum seekers and persons awaiting

[45] According to article 4 of the Administrative Order of 20 November 2008 and article 4, para.1 of the State Treaty of 25 June 2009, accessed February 2, 2012, http://www.antifolterstelle.de/fileadmin/dateiablage/Dokumente/Presse/Organisationserlass_OPCAT_01.pdf.
http://www.antifolterstelle.de/fileadmin/dateiablage/Dokumente/Presse/Staatsvertrag_Laenderkommission.pdf.

[46] According to article 4 of the Administrative Order of 20 November 2008 and article 4, para.1 of the State Treaty of 25 June 2009.

deportation, international airport transit zones, police stations, youth welfare centres, secluded juvenile shelters, geriatric and nursing homes[47].

As to the NPM created in Germany, there can be raised serious suspicions about the efficiency and the conformity of this mechanism with the OPCAT. In this sense, the Committee against Torture is concerned about the lack of sufficient staff and financial and technical resources provided to the National Agency for the Prevention of Torture, comprised of the Federal Agency for the Prevention of Torture and the Joint Commission of the Länder, owing to which places of detention can be currently visited only once in four years, preventing the adequate fulfilment of the Agency's monitoring mandate and about the fact that the Joint Commission of the Länder had to announce, in some instances, its intention to visit the places of detention to the respective authorities in advance in order to gain access.[48]

4. Slovenia ratified the Optional Protocol in 2007 and, subsequently designated the Ombudsman as National Preventive Mechanism, which can give its agreement for the participation at the visits to the representatives of the non-guvernmental organizations registered in Slovenia or of organizations that have obtained the status of humanitarian organizations in Slovenia (the so-called Ombudsman plus' model).

As set out by the OPCAT and taken over by the Slovenian law, the scope of the visits and of the Mechanism itself is not to criticize, but to assist. A visit by an NPM should be based on cooperation rather than on confrontation. The Ombudsman visited the first place of detention as a NPM on 19 March 2008[49].

The Slovenian law recognizes the importance of the financial independence of the mechanism, which is indispensable in order to achieve its functional independence as required by the OPCAT. The source and nature of funding is specified in the law and the budget for the Ombudsman and the NPM is based on the proposal of the Ombudsman. The staff and premises are shared by the Ombudsman and its NPM unit.

The mandate of NPM is mainly to carry out visits[50] (programmed, *ad hoc* or follow-up visits) at the detention places in order to examine the situation of persons deprived of their liberty, both in relation to the treatment of detainees and the conditions of detention. Its mandate and recommendations cover very different aspects of factual and legal nature such as living and material conditions, health-care services, social conditions, procedural guaranties, behavior and training of the staff etc. According to the Slovenian law, within the meaning of place of detention can fall police detention units, prisons for remand and sentenced prisoners, means of transport for the transfer of prisoners, re-education centers for juveniles or young offenders centers for illegal immigrants, homes for asylum seekers with closed units, border police facilities and transit zones at international ports and airports, psychiatric hospitals where patients in the criminal or civil context are hospitalized against their will, closed wards of social care institutions, including homes for the elderly, special social care institutions where residents with learning difficulties, physically or mentally retarded

[47] See the Printed paper of the Bundestag no. 16/8249, commentary to Article 4 OPCAT, 2008, p. 27, accessed February 2, 2012, http://dip21.bundestag.de/dip21/btd/16/082/1608249.pdf.

[48] See the Committee against Torture, the Forty-seventh session, *Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Germany*, 2011, p.3-4, para.13, accessed February 1, 2012, http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.DEU.5_en.pdf.

[49] *About the National Preventive Mechanism of the Republic of Slovenia*, p.2, accessed February 1, http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/ABOUT-NPM-SLO.pdf.

[50] In 2010, the Mechanism performed 44 visits in prisons, remand centers, police stations, asylumsm aliens centers, psychiatric institutions, special social care institutions, retirement homes and juvenile facilities, as mentioned in the *Report on the National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the year 2010*, p.7, accessed February 2, 2012, http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/DrzavniPreventivniM-2010-web2.pdf.

residents are accommodated. Members of a delegation can move inside the place of detention without any restriction and they have access to any facility or space within the premises of a place of detention.

The visits result in a report containing an assessment of the facts found and, if necessary, some concrete recommendations to improve the situation, which are not obligatory neither legally binding. If there is an urgent need to improve the treatment of persons deprived of their liberty, the delegation can make immediate observations

5. In ***Poland,*** the competences of the National Preventive Mechanism are entrusted to the Ombudsman (Commissioner for Civil Rights Protection), an independent body established since 1987. The Constitution ensures the independence of the Commissioner from the executive branch and the Ombudsman Act provides that the right to appoint the Commissioner belongs to the Lower House of the Parliament (*Sejm*). The Parliament also holds the right to dismiss the Commissioner, only in the event of the Commissioner resignation, permanent inability to fulfill his or her duties or betrayal of the oath of the office.[51]

At present, the tasks of the NPM are carried out by four dedicated teams in the Office of the Commissioner for Civil Rights Protection: Team for Penal Executive Law; Team for Public Administration Issues, Healthcare, Protection of Aliens Rights; Team for Rights of Soldiers and Public Officers; Team for Labour Law and Social Insurance. Also, two staff members in each of the Commissioner offices in the country were assigned to permanent cooperation with the Mechanism.

Depending on the type of place of detention visited, the visiting groups may be completed with external professionals, such as physicians, psychologists, psychiatrists or addiction treatment specialists.

The objectives of the NPM are: to regularly examine the treatment of the persons deprived of their liberty in places of detention, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment; to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment taking into consideration the relevant norms of the United Nations; to submit proposals and observations concerning existing or draft legislation and to raise awareness of the society on the issues of preventing torture and on the relevant norms concerning the treatment of people deprived of their liberty.[52]

The NPM carries out visits in institutions such as: prisons, custody suits, juvenile detention centers, juvenile refugees, juvenile reform schools, youth sociotherapy centers, spaces within Police organizational units designed for persons apprehended or brought in to sober, emergency centers for children, detoxification centers, social care facilities, psychiatric institutions, guarded facilities for foreigners, deportation custody facilities, and military disciplinary custodies. There are about 1826 institutions in Poland that can be identified as places of detention, according to the definition provided by. In 2010 the National Preventive Mechanism carried out 80 visits to 79 to such places of detention.[53]

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[51] Articles 3.1 and 7.1 of the Act of 15 July 1987 on the Human Rights Defender (Ombudsman Act) accessed February 2, 2012, http://www.rpo.gov.pl/index.php?md=7512&s=3.

[52] See *The role of the National Preventive Mechanism and its activities in practice* in Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009. Bulletin of the Human Rights Defender No.5, Sources, Warsaw, 2010, p.98, accessed February 2, 2012, http://www.rpo.gov.pl/pliki/12821222200.pdf.

[53] *Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2010,* Warsaw, 2011, p.13, accessed February 2, 2012, http://www.rpo.gov.pl/pliki/13125459170.pdf.

After each visit a report is prepared within two – three weeks, with an attached opinion by a psychologist, psychiatrist or other external expert. Annual reports are also published and disseminated, in conformity to the requirements of the OPCAT.

IV. Implementing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention in Romania. Challenges regarding the implementation.

1. ***When evaluating the shortcomings regarding the implementing the National Preventive Mechanism in Romania***, it should be emphasized that this mechanism must not replace the national monitoring systems already in place. Moreover, the OPCAT does not interdict the States to designate an existing institution as a NPM, if this institution fulfills both the requirements set out in OPCAT and in the *Paris Principles*.

It should be stressed out that no specific form is prescribed in the Optional Protocol as to the implementation of a NPM in domestic legislation. When analysing the different European NMPs already in place, some models can be outlined:

- designating one of the existing monitoring bodies (e.g. Ombudsman in Czech Republic or Poland)

- Ombudsman plus' models (e.g. Slovenia), where the NPM mandate is carried out by the Ombudsman office and non-guvernmental organisations. Involving civil society organisations may also help to legitimise both an NPM mandate and its credibility as an institution, not least because civil society organisations are often structurally independent of the government.[54]

- new visiting body (e.g. France and Germany).

In order to reach a conclusion regarding the designation of a NPM, several aspects must be taken into consideration:

a) *The institutional framework*, namely: the necessary number of members and employees of the mechanism; how can one become a member, the minimum professional requirements and what are the neccesary professions that have to be present in the mechanism; costs needed to set up the mechanism; the necessary budget as to ensure its proper functioning.

b) *Jurisdiction*: what types of institutions will be controlled; how is regulated the access to all facilities subject to inspection; access to classified information; what is the subject of the controlling visits; the procedure to be followed when acess is prohibited for the experts.

c) *Composition of the visiting team*: the criteria needed to choose the members for the visiting team; the number of persons taking part in a visit; the participation of other experts to the visits, together with the permanent members of the NPM.

d) *Working method*: announced and unannounced visits; planned or *ad hoc* visits; the estimated number of controls per year, duration, frequency and the criteria needed to select the places of detention that will be visited; the right to obtain information and conduct interviews in private with the persons deprived of their liberty.

e) *Consequences of the visits*: best practices; the possibility to make recommendations; whether or not subsequent visits can or must be carried out in order to verify whether or not the recommendations were implemented; the documents prepared as a result of the visit and publication of such documents; the publishing of an annual report toghether with the communicated position of the authorities and with the recommendations issued as a result of the visits.

In evaluating the conditions needed to be respected when implementing the provisions of Part IV of the Optional Protocol, one has to look at the Guidelines on national preventive mechanisms

[54] APT and IIHR, *op. cit.*, p.215.

issued by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In the area of basic principles[55], it must be noted that the future NPM should be established at constitutional or legislative level, fully respecting the provisions of the OPCAT as to the mandate and powers of the mechanism. Also, the future mechanism must have complete financial and operational autonomy when carrying out its functions, thus permitting the effective operation of the institution.

The NPM should have the right to visit all places of detention as analysed above in Section I of the paper and the state authorities should cooperate with the Mechanism in order to ensure the proper implementation of the recommendations issued, as mentioned in article 22 of OPCAT, with a view to strengthening the protection of the persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

In the Guidelines, the Subcommittee on Prevention stressed out the possibility for the experts within the NMP to conduct private interviews with those deprived of liberty, the right to carry out visits in the manner and with the frequency that the NPM itself decides, including unannounced visits at all times to all places of deprivation of liberty. Also, the NPM must be able to make proposals or observations on any existing or draft policy or legislation relevant to its mandate.[56]

In accordance to article 23 of OPCAT, the State should publish and widely disseminate the Annual Reports of the NPM.

When pursuing a functional and independent national mechanism, some principles must be observed as to the NPM itself and its members. Firstly, the NPM should carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest and any confidential information acquired in the course of its work should be protected and, in accordance with the proivisions of article 21 of OPCAT, no personal data shall be published without the express consent of the person concerned. Moreover, the NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment. When appropriate, the visit reports or the annual reports should contain recommendations addressed to the relevant authorities.

The liason with other NPMs and with the Subcommittee on Prevention is of great importance in ensuring a proper functioning of the Mechanism, by sharing the experience in reaching the aim set out in the Optional Protocol, eventually, with the adoption of a set of good practices available to all national mechanisms.

It should be stressed out that all the aspects mentioned above must be fulfilled by the NPM, disregarding if it will be a new institution or the competences of an already existing institution will be enlarged (the Ombudsman in the case of Romania).

In the process of designating an institution as NPM, due attention must be given to the background, capabilities and professional knowledge of the personnel, necessary to enable it to properly fulfill its mandate. This should include, *inter alia*, relevant legal and health-care expertise. In other words, members of the NPM should collectively have the expertise and experience necessary for its effective functioning.[57]

Today, when evaluating the implementation of a NPM in Romania, one should bear in mind the economic resources as well as the human resources needed to achieve a functional

[55] *Guidelines on national preventive mechanisms*, *op. cit.*, para.5-15.

[56] See Basic issues regarding the operation of an NPM in *Guidelines on national preventive mechanisms*, *op. cit.*, para.24-40.

[57] *Guidelines on national preventive mechanisms*, *op. cit.*, para.17-20.

implementation from the two possible solutions: new body or enlarging the competences of the Ombudsman. In this sense, it goes without saying that the designation of an existing body is the most economic solution, both as to the budgetary impact and as to the human resources and logistic effort.

In establishing a proper support for setting up an efficient National Preventive Mechanism, the Ministry of Justice of Romania coordinated a twinning project[58], in which were involved all the stakeholders from Romania, representatives of the non-guvernmental organisations and experts from Austria, Czech Republic, France, Germany, Poland and Slovenia, with the sole purpose of assisting the Romanian Government in implementing its obligations under the Optional Protocol and establishing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

In evaluating the possibilities mentioned above (designation of an existing visiting body or creating a new visiting body), there can be found both advantages and disadvantages on the part of either one of these solutions[59]:

a. Establishment of a new body as a NPM in Romania. *Arguments and criticism.* In the current economic circumstances, not only in Romania, but in all Europe, a new institution will be met with great reluctance especially when the national policy regarding the budgetary expenses is aiming to reduce bureaucratic structures and public expenses. Also, this new established NPM would have to be granted legal guarantees of independence at legislative level. Establishing a new body is not however without its own particular challenges. A new body will need time to demonstrate its independence and establish its legitimacy and credibility.[60] Also, it will have to ensure a tight trusty relation with all the public authorities in order to provide the NPM with the support necessary to exercise its powers, as it is the case with the Ombudsman.

On the other hand, it was said that the establishment of a new body presents the opportunity to properly implement all requirements of OPCAT learning form the potential shortcomings of the existing institutions such as the Ombudsman office.

b. Designation of the Ombudsman office as NPM in Romania. Arguments and criticism. The Ombudsman, under the current conditions mentioned above in Romania, is most suitable to be the proper institution for taking over monitoring of human rights due to its previous expertise and experience in dealing with complaints of human rights violations. Moreover, the designation of the Ombudsman as NPM will ensure the much needed speediness and cost effectiveness of the implementation process, bearing in mind the fact that it will be able to use the existing structures. Also, the cut-costing policy will be evidentiated as the 14 regional offices of the Ombudsman can be used for the infrastructure and logistic support for the mechanism.

This institution has a strong legal basis in the Romanian Constitution and is explicitly provided with autonomy and independence from any public authority, with a separate budget at its disposal, thus complying with the criteria of independence purported by OPCAT and *the Paris Principles*.

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[58] For the findings in this Twinning project, see Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania*.

[59] For an in-depth analisys of these solutions, see Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *op. cit.*, p.36–40.

[60] Debra Long, *Report on the current state of play and possible solutions to assist the process of designating or establishing a National Preventive Mechanism in Romania*, Human Rights Implementation Centre, University of Bristol, August 2011, p.19, accessed February 1, 2012, http://www.bristol.ac.uk/law/research/centres-themes/hric/hricdocs/romaniavist.doc.

The designation of the Ombudsman as a NPM must be substantiated by enlarging its structure with an additional number of positions in order to recrute experts in this field and its budget will be supplemented, thus ensuaring its proper functioning.[61]

It cannot be disputed that valuable *synergies* between the current functions of the Ombudsman and the preventive mandate of a NPM could develop if the NPM was installed within the existing Ombudsman's structures.

Of course, one could argue that when integrating the NPM into the Ombudsman, it risks taking over any of its potential problems and shortcomings in terms of competences, independence, composition and overall effectiveness.

2. As to ***the possible solutions***, after analysing all the requirements of the OPCAT, the Guidelines set out by the Subcommittee on Prevention and the advantages and disadvantages when designating a NPM in Romania, the optimal solution in implementing the OPCAT in the national legislation could be the designation of the Ombudsman office as NPM, in opposition to the creation of a new body. In this sense, it is necessary to ammend the Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People. Of course, the designation of the NPM has to be endorsed by an open and transparent process that involves besides the Ombudsman itself, all the stakeholders and the representatives of the civil society.

This designation is likely to strengthen the role of Ombudsman in defending rights and freedoms of individuals in their relations with public authorities in the context of a very broad definition of places of detention, which includes not only traditional detention centers (penitentiaries, hospital-penitentieries, penitentiaries for the minors, detention centers), but also other places that require careful consideration of the rights of persons deprived of their liberty *de jure* or *de facto* (e.g. psychiatric hospitals, elderly homes, children's homes, refugee centers, centers for foreigners etc.).

The designation of Ombudsman offices as NPM (as it was done in countries like the Czech Republic, Slovenia or Poland) is understandable as it has been observed that Ombudsman offices normally enjoy considerable guarantees of independence and their mandate is often grounded in the national constitution.[62]

In ensuring its financial independence, the NPM must have its budgetary independence. Of course, the experts should recive an adequate honorarium and training on human rights monitoring in places of detention, possibly with the consultation of international experts, ensuring a highly qualified personnel for the visits.

When designating the Ombudsman as NPM, a different structure within the Ombudsman institution must be created, comprising in a Pool of Experts (acting as the core of the NPM) and administrative staff, in full respect to the Subcommittee on Prevention Guidelines stating that where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget. The Commission of Experts will have a tripartite composition:

- experts working within the NPM (weather they are currently working with the Ombudsman office or they will be recruted in the future)
- representatives of non-guvernmental organizations with relevant experience in this area;
- representatives of institutions involved.

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[61] According to the Government Decision no. 5/2002 regarding the organisation and functioning of the Ombudsman office, republished in the *Official Journal of Romania*, Part I, no. 758 of October 27, 2011, the maximum numbers of the persons working within the Ombudsman can not excede 99.

[62] Elina Steinerte, Institutions of Ombudspersons as National Preventive Mechanisms: Some Preliminary Observations, presentation at the Opening Plenary of the Conference OPCAT in the OSCE region: What it means and how to make it work?, held on 25-26 November 2008 in Prague, University of Bristol, 2009, p.1, accessed February 1, 2012, http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationsteinerte1.pdf.

This solution will ensure a balance of the NPM core, as the representatives of the institutions involved and of the non-guvernmental organizations will bring the much needed know-how both from the point of view of the state authorities and of the civil society.

Also, the law on implementing the national mechanism should specify in what manner the experts are choosen (an objective, open competition, announced in the media and over the internet, organized through a highly transparent process by a selection commission, the minimum requirements regarding the necessary qualification, the professional expertise in one of the required disciplines, the minimum working years of experience, the experience in human rights, the prior experience in monitoring places of detention, the good reputation, the absence of a criminal record, being desirable). The experts will have different backgrounds necessary to fulfill the NPM mandate: lawyers, medical doctors, psychologists, psychiatrists, social workers and others.

The NPM personnel shall have such privileges and immunities as they are necessary for the independent exercise of their functions. Also, the State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.[63]

The experts will have to be independent in exercising their competences, appointed in office by the Ombudsman for a determinated mandate. Also, besides the permanent experts, short-term experts should be incorporated in the mechanism, which will participate to the visits when the permanent experts do not posess the necessary qualification, are not able to participate themselves or when it is more economical to engage in the visiting team a local short-term expert.

The experts will have the right to visit all places of detention as defined by OPCAT, will have access to all the buldings, facilities and installations of such venues. They will have the right to enter such place immediately. If they are prevented from entering the premises, the law must provide for a speedy procedure, permitting the experts to address to the superior authority and to inform the Subcommittee on Prevention. If the denial still persists, the NPM can take an action in court against the act of the authority by which the access of the visiting team is denied. The denial of acces can arise only in strictly limited situations, when there is a clear and immediate danger for the national safety, public health or there is a disaster risk.

The experts will have the right to make both announced and unannounced visits, planned or *ad hoc*. In planning the visits, experts will analyse the types of places of detention falling under its competence of the NPM, their number, the geographical disposal, the complaints received from the persons deprived of their liberty, prior reports of the mechanism, a certain vulnerability of some venues etc. The visiting team can, if the situation arises, take along interpreters, payed from its own budget.

The visiting team will have the right to conduct private interviews with all persons, in particular with inmates. Also, the visited institutions are obliged to forward to the experts all the information or data requested.

The experts will draw up a report in short time, preferably 30 days or, as soon as possible, for urgent matters, when the situation requires immediate remedy, describing the visit and underlining any recommendations needed to be made. Of course, the administration responsible for the visited place can respond to the content of the report, stating their opinion. The state institution will have to respect and implement the reccommendations, the NPM having to engage in a close dialog with the stakeholders in order to ensure the proper implementation of these acts. A procedure is to be set up if a certain institution refuses to comply with the recommendations. If this situation arises, the NPM should have the possibility to address to the superior authorities, to inform about this fact the Subcommittee on Prevention and to make public the refusal.

[63] *Guidelines on national preventive mechanisms*, *op. cit.*, para.27.

Given the nature of its work, it is almost inevitable that a NPM will face challenges such as a reluctance within bureaucracies to change structures and practices, a lack of resources to implement recommendations etc., and sometimes negative public opinion.[64] In this sense, it is of paramount importance for the functioning of the NPM that its members will engage, open and sustain all channels of communication with the places of detention, superior authorities, non-guvernmental organizations and civil society as a whole, thus ensuring a permanent dialogue which will facilitate a rapid implementation of the recommendations.

Also, the NPM will adopt an annual activity report which will be published on the internet page of the institution and will be disseminated to all the stakeholders. The annual report will be communicated to the Subcommittee on Prevention as well.

Conclusions

With the implementation of Part IV of the Optional Protocol concerning the establishement of national preventive mechanisms a step forward will be taken in preserving the rights of the persons deprived of their liberty in order to prevent torture and other cruel, inhuman and degrading treatment or punishment.

The creation of national preventive mechanisms will aim to ensure a strong bond with all the relevant stakeholders, with the places of detention and with the civil society, as the mechanism has a preventive purpose.

As to the implementation of the OPCAT provisions in Romania, the optimal solution could be the enlargement of the competences of the Ombudsman, endorsed by open and extensive consultation with all the actors involved in order to assess the difficulties which the implementation poses, the shortcomings of such an endeavour, with a view to the understanding of the minimum pre-requisites for an effective functioning of such a national body, thus reaching a common position and ensuring the full respect of the Optional Protocol requirements, the *Paris Principles* and the Guidelines elaborated by the Subcommittee on Prevention.

References

1. Legislation

A. National Legislation

- Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People.
- Government Decision no. 5/2002 regarding organisation and functioning of the Ombudsman office.
- Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings.
- Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings and other minister orders regarding the execution of prison penalties.

[64] *Guidelines on national preventive mechanisms*, *op. cit.*, para.4.

- Order no. 2003/C/2008 of the minister of justice on approving the Regulation for organization of the National Administration of Penitentiaries.
- Government Decision no. 11/2009 regarding organisation and functioning of the Ministry of Labour, Family and Social Protection.
- Government Decision no. 652/2009 regarding organisation and functioning of the Ministry of Justice.
- Government Decision no. 1424/2009 regarding organisation and functioning of the National Centre for Mental Health.
- Order no. 47/2010 of the minister of foreign affairs regarding the entering into force of certain treaties.
- Government Decision no. 144/2010 regarding organisation and functioning of the Ministry of Health.
- Order no. 120/C/2011 of the minister of justice on approving the Regulation for organization of the Ministry of Justice.
- Order no. 118/2011 of the minister of administration and interior regarding the organization and execution of internal controls within the Ministry of Administration and Interior.

B. International Legislation and Documents Adopted by International Bodies

- Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13, ratified by Romania through Law no. 30/1994.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984, entered into force 26 June 1987 and was ratified by Romania through Law no. 19/1990.
- Principles relating to the Status of National Institutions (*The Paris Principles*) adopted on 20 December 1993.
- The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 18 December 2002, entered into force on 22 June 2006 and was ratified by Romania through Law no. 109/2009.
- Guidelines on national preventive mechanisms adopted by the United Nations' Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 15–19 November 2010.

2. Doctrine. Treaties, courses, monographs, studies published in specialized magazines

- Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the UN Convention against Torture: Implementation Manual*, revised edition, 2010.
- Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), *Torture in International Law. A guide to jurisprudence*, 2008.
- Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii (Romanian Constitution revized – comments and explanations)*, All Beck Publishing House, Bucharest, 2004.
- Jean-Paul Céré, *Le système pénitentiaire français* in *Les systèmes pénitentiaires dans le monde*, sous la direction de Jean-Paul Céré, Carlos Eduardo A. Japiassù, 2nd edition, Dalloz Publishing House, Paris, 2011.
- Jim Murdoch, *The treatment of prisoners. European standards*, Council of Europe Publishing, Strasbourg, 2004.

- Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania*, 2010.

3. Papers presented at a meeting or conference

- Debra Long, *Report on the current state of play and possible solutions to assist the process of designating or establishing a National Preventive Mechanism in Romania*, Human Rights Implementation Centre, University of Bristol, 2011.
- Elina Steinerte, *Institutions of Ombudspersons as National Preventive Mechanisms: Some Preliminary Observations*, presentation at the Opening Plenary of the Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, University of Bristol, 2009
- Filip Glotzmann and Petra Zdrazilova – *Presentation on the National Preventive Mechanism in the Czech Republic*, Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague.
- Manfred Nowak, *Civil and political rights, including the questions of torture and detention. Torture and other cruel, inhuman or degrading treatment. Report of the Special Rapporteur on the question of torture, Manfred Nowak*, 23 December 2005.
- Manfred Nowak, *Interim report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment*, 14 August 2006.
- Rachel Murray, Malcolm Evans, Elina Steinerte, Antenor Hallo de Wolf, *Summary and Recommendations* from the Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, University of Bristol, 2009.

4. Documents in relation with the national prevention mechanisms

- Czech Republic. Act no. 349/1999 on the Public Defender of Rights.
- Czech Republic. Public Defender of Rights Report on Visits to Remand Prisons, April 2010.
- France. Law no. 2007-1545 of 30 October establishing a *Contrôleur général des lieux de privation de liberté.*.
- France. Opinion of of the *Contrôleur général des lieux de privation de liberté* from 10 January 2011, published in the Official Journal of 23 January 2011, regarding the telephone use in places of detention.
- Germany. Administrative Order of 20 November 2008
- Germany. The State Treaty of 25 June 2009.
- Germany. Printed paper of the Bundestag No. 16/8249, commentary to Article 4 OPCAT, 2008.
- Germany. Committee against Torture, the Forty-seventh session, 31 October–25 November 2011, *Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Germany*, 2011
- Slovenia. *Report on the National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the year 2010*.
- Poland. Act of 15 July 1987 on the Human Rights Defender (Ombudsman Act).
- Poland. *The role of the National Preventive Mechanism and its activities in practice* in Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009, Warsaw, 2010.
- Poland. *Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2010,* Warsaw, 2011.