MONITORING PLACES OF DEPRIVATION OF LIBERTY IN SOUTH AFRICA: IS SOUTH AFRICA IN BREACH OF ITS OPCAT OBLIGATIONS TO ESTABLISH AND MAINTAIN AN EFFECTIVE NATIONAL PREVENTIVE MECHANISM?

By

ABDIRAHMAN MAALIM GOSSAR

STUDENT NUMBER:

GSSABD002

SUPERVISOR:

PROFESSOR PAMELA-JANE SCHWIKKARD

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Student number: GSSABD002

Signature: Signed by candidate

Date: 13 February 2023.

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ABSTRACT

The adoption of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is globally viewed as a watershed in the existing global efforts to prevent and combat torture and other forms of abuse and ill-treatment. Although the practice of monitoring places of detention, and independent oversight and accountability systems over the management of detention facilities, have long existed in many jurisdictions across the world, the OPCAT has introduced a unique, preventive system of regular and sustained visits to all places of deprivation of liberty. It requires state parties to designate and maintain a National Preventive Mechanism (NPM), mandated to, inter alia, conduct regularly and independently monitoring all places of deprivation of liberty, alongside the Subcommittee on Prevention of Torture (SPT). South Africa ratified the OPCAT in 2019. Following the ratification, the South African Human Rights Commission, which launched the NPM in July 2019, was designated to perform a coordinating and functional role, alongside other four existing oversight bodies. This study argues that existing conditions such as the absence of an independent statutory instrument applicable to the NPM, coupled with the designation of a multi body model consisting of five pre-existing oversight bodies that are not all fully compliant with the requirements of the OPCAT, as well as non-compliance with the NPM's recommendations, have vitiated the effectiveness of South Africa's NPM. It also observes that, more than three years since the NPM was launched, many issues remain unresolved, and that state intervention, including legislative intervention, and commitment to strengthen the mandate of the NPM is required to enhance the effectiveness of the NPM, and benefit from its transformative potential.

Table of Contents

Introduction

The research question addressed in this study is whether South Africa is in breach of its obligations, under the Optional Protocol to the UN Convention against Torture, to establish and maintain an effective National Preventive Mechanism.[1] The question is examined in the following context:

On 18 December 2002, the UN General Assembly adopted the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and or Degrading Treatment or Punishment (OPCAT), and introduced a new, binding legal framework to strengthen existing efforts to prevent and combat torture in all its forms.[2] The primary objective of this instrument, which entered into force in 2006, is to establish a unique framework for torture prevention, that is based on visits by specific national human rights organs, the National Preventive Mechanisms (NPMs), and the International Subcommittee, Subcommittee on Prevention of Torture (SPT), to all places of deprivation of liberty.[3] It envisages that these visits will, through proactive and sustained monitoring and reporting, strengthen the prevention of torture and other forms of abuse and ill-treatment in places of deprivation of liberty.[4]

Although the OPCAT establishes and delineates a complementary system of preventive visits to all places of deprivation of liberty, the execution of a substantial part of its objective will be done by the NPMs. This is mainly because, while the OPCAT has thus far been ratified by 92 states, the SPT is composed of only 25 independent experts, which poses a clear challenge of limited human resources. Budgetary and financial constraints is a further barrier to the ability of the SPT to execute regular and sustained in-country visits.[5] Since it began

[1] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 18 December 2002 by the 57th session of the General Assembly of the United Nations by resolution A/RES/57/199.
[2] Ibid preambular paragraphs.
[3] Ibid art 1. See also R Murray 'National Preventive Mechanism under the Optional Protocol to the Torture Convention: One size does not fit all' (2008) 26 *Netherlands Quarterly of Human Rights* 486. According to art 4.2 of the OPCAT, 'For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.
[4] Preambular paragraph of the OPCAT op cit n 1.
[5] E Steinerte 'The challenging nature of the relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms: In search of equilibrium' (2013) 31 *Netherlands Quarterly of Human Rights* 138.

operations in February 2007, for instance, it has successfully completed only 77 in-country visits.[6] It has also been observed that, even with adequate funding and resources, the SPT will not be able to match the frequency of visits that NPMs as domestic bodies could potentially undertake[7] In addition, on grounds of their intimate knowledge and understanding of the context, and proximity to, and regular interaction with, national authorities and duty bearers, NPMs have a critical role to play in combatting torture and supplementing the work and inputs of the SPT.[8] Furthermore, under international human rights systems, in accordance with the principle of subsidiarity, the primary duty to implement human rights obligations and safeguard fundamental human rights and freedoms resides with national legal systems.[9] For these reasons, to effectively fulfil obligations established by the OPCAT, it is imperative for state parties to ensure that NPMs, as institutional mechanisms of the OPCAT, are properly constituted, sufficiently funded and endowed with requisite powers to fulfil their mandate.[10]

South Africa ratified the OPCAT in 2019, and subsequently established an NPM. In a model that is commonly known as 'multiple body', the South African Human Rights Commission (SAHRC) has been designated to perform a coordinating and functional role, alongside other existing monitoring mechanisms. However, despite the existence of binding legal obligations, created by the OPCAT, that enjoin South Africa to establish and maintain an NPM that is fully supported and capacitated to effectively execute its preventive mandate, existing evidence indicate that South Africa's NPM is experiencing many challenges.[11] These include gaps and deficits in, inter alia, resourcing and overall independence, lack of a legislative mandate embodied in an independent legislative instrument that regulates its operations, and

[6] Subcommittee on Prevention of Torture, visits and reports, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical, accessed on 13 August 2022.
[7] Steinerte (2013) op cit n 5 at 136.
[8] United Nations Human Rights, Office of the High Commissioner *Preventing torture: The role of National Preventive Mechanisms, a Practical Guide* (2008) at iii.
[9] F Viljoen International Protection of Human Rights (2016) *Oxford University Press* 328.
[10] See Steinerte (2013) op cit n 5 at 136 in relation to the relationship between NPMs and the SPT.
[11] *Report of the South African Human Rights Commission The implementation of OPCAT in South Africa* (2019/20) at 4-6, 14, 15, 18, 20-25, & 45. See also UN Committee Against Torture 'Concluding observations on the second periodic report of South Africa' (2019) paras 24 & 25; *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* (2021) 3 BCLR 269 (CC) paras 92, 94, 95 &105 on the independence of the JICS, one of the bodies designated to serve as part of South Africa's NPM.

structural and systemic challenges inherent in the preferred model, challenges which have the effect of diminishing the utility and overall effectiveness of the NPM.[12]

It is within this context that this paper seeks to discuss whether South Africa is in breach of its obligations to establish and maintain an effective NPM, with the aim of contributing to existing commitments to ensure South Africa's NPM is independent, effective and fully functional. It contends that South Africa is in breach of its responsibilities to establish and maintain an effective NPM.

Structure of the paper

The first chapter of this paper sets out the context and background to the development and adoption of the OPCAT. Its main elements, significance and value, and the specific framework for implementation it establishes are also explored in this chapter. South Africa's domestic, regional and international human rights obligations to monitor all places of deprivation of liberty and prevent and combat torture and other forms of abuse and ill-treatment are also addressed in this chapter. The second chapter provides a historical context to the practice of torture and other forms of abuse and ill-treatment in South Africa.

Chapter three explores the OPCAT's core requirements and prescription for NPMs, including their constituent features and organisational form and structure. The extent to which South Africa's NPM-designated bodies comply with these requirements is also examined in this chapter. Chapter four embodies a critical analysis of South Africa's chosen NPM model, and its performance thus far. The final chapter examines the extent to which the state is implementing the NPM's post-monitoring recommendations. In line with emerging international trends, the need to include CSOs as part of the structure of the NPM of South Africa is also discussed in this chapter. In addition, the final chapter also includes targeted and impact-enhancing recommendations aimed at strengthening the effectiveness, and institutional and operational capacities of South Africa's NPM.

[12] Some of these challenges are highlighted in the *Report of the South African Human Rights Commission* op cit n 11.

Methodology

This paper is based on desktop research. It employs qualitative methods, and explores available literature on the OPCAT and NPMs, relevant legal frameworks, court cases, annual and activity reports of designated bodies, and other electronic publications. Primarily because it is a desktop research, no interviews have been conducted. The websites of a number of NPM designated bodies remained offline, a condition which has affected accessibility to some documents and information.

CHAPTER ONE:

THE CONTEXT: BACKGROUND TO THE OPCAT, ITS MAIN ELEMENTS, SIGNIFICANCE AND VALUE, AND ITS INSTITUTIONAL AND ENFORCEMENT MECHANISMS.

Introduction

The OPCAT is unlike any other human rights instrument within the UN treaty-based human rights system.[13] It is a ground-breaking and innovative tool, which also clears the way for, and sets the standard that should lead, the development of a new generation of international human rights documents.[14] This chapter explores background to the OPCAT, its unique features, the specific reasons and objectives that informed its development and adoption, and the framework of implementation it establishes. Additional, binding normative standards that establish South Africa's obligation to monitor and supervise places of deprivation of liberty are also examined in this chapter.

Background to the OPCAT

The OPCAT is regarded as a product of protracted commitment to realize a concrete torture prevention strategy at a global level.[15] The idea of a focused and specific preventive mechanism, that involves an international supervisory organ with the power to execute regular inspection of places of deprivation of liberty, was conceived long before the commencement of negotiations for the development of the UN Convention against Torture, an instrument which the OPCAT supplements.[16] However, this idea was not pursued during

[13] E Steinerte 'The Jewel in the crown and its three guardians: Independence of National Preventive Mechanisms under the Optional Protocol to the UN Torture Convention' (2014) 12 *Human Rights Law Review* 3.
[14] Ibid. See also M D Evans & C H Dale 'Preventing torture? The Development of the Optional Protocol to the UN Convention Against Torture' (2004) 4 *Human Rights Law Review* 20.
[15] S Egan 'the Optional Protocol to the Convention Against Torture: Paying the price for prevention' (2009) 44 *Irish Jurist* 183. S Egan, at note 4, argues that the original idea for the establishment of a preventive mechanism should be attributed to Swiss banker, Jean-Jaques Gautier who, in his retirement, instituted the Swiss Committee Against Torture, to support and campaign for the eradication of torture at the international level.
[16] Ibid.

negotiations that preceded the adoption of the UN Convention against Torture, primarily because it was felt that the existing international political climate at the time of the negotiations was too hostile to entertain what was perceived to be a radical intrusion into state sovereignty.[17]

The idea was, however, re-visited in 1991 following a number of encouraging developments, which included the adoption of the European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment.[18] This regional human rights instrument establishes a system of preventive, periodic visits – by a body of regional experts – to places where individuals are deprived of liberty by public authorities.[19] It is contended that the successful development of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment re-invigorated and gave new impetus to the campaign for the development and adoption of a similar instrument of international character and reach.[20]

It is against this backdrop that in 1991 a draft Optional Protocol was presented to the UN Human Rights Commission, a body which, in 2006, was replaced by the UN Human Rights Council.[21] This draft document, which was submitted by the government of Costa Rica, proposed a coordinated system of visits to detention facilities by a specific international supervisory organ.[22] In response, the UN Human Rights Commission appointed a working group whose mandate was to consider and agree on a conclusive draft text of the Optional Protocol, to be presented to the UN General Assembly for discussion and approval.[23] However, for almost a decade thereafter, there was a stalemate within the working group, which impeded progress towards the adoption of the Optional Protocol.[24] Key areas of disagreement included concerns around the cost and financial implications of a preventive mechanism, and the scope of the powers of an international monitoring organ.[25]

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[17] Ibid.
[18] Ibid. See also art 2 of the European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment.
[19] Article 2 of the European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment.
[20] Egan op cit n 15 at 184.
[21] Ibid.
[22] ibid at 184-185.
[23] Ibid at 185.
[24] Ibid
[25] Ibid.

A breakthrough in negotiations came in 2001 following a proposal by the government of Mexico for the inclusion of a provision which establishes a second layer of monitoring at the domestic level by mandating states to establish NPMs, to provide for a dual system of monitoring.[26] This proposition garnered broad support and forms the basis of the present dual system of preventive visits embodied in the OPCAT.[27]

The eventual introduction of NPMs as one of the OPCAT's two institutional mechanisms is reflective of a deliberate decision to yield to the notion of state sovereignty, and a clear manifestation of established international law principle of complementarity, in terms of which the primary responsibility to implement human rights obligations rests with national legal systems.[28] Following its extensive consideration by the UN human rights organs, the draft text was ultimately adopted by the UN General Assembly on 18 December 2002, and came into effect on 22 June 2006.[29]

The OPCAT in a nutshell: Objective, main elements and implementation framework

The OPCAT was adopted to serve as a supplementary instrument to the United Nations Convention Against Torture. The primary objective of this Optional Protocol is to establish a dual and complementary mechanism of regular visits to places of deprivation of liberty by NPMs and the SPT, for the purpose of preventing torture and other forms of abuse and ill-treatment.[30] Together, these two bodies are regarded, and referred to, as the OPCAT mechanisms. [31]

The SPT, which is comprised of 25 independent experts with diverse qualifications, and from different regions of the world, was established by virtue of art 2 of the OPCAT.[32] Its mandate

[26] Ibid.
[27] Ibid.
[28] Steinerte (2014) op cit n 13 at 4.
[29] Murray (2008) op cit n 3 at 486. See also Evans & Dale op cit n 14 at 19.
[30] Article 1 of the OPCAT op cit n 1.
[31] Global Forum on the OPCAT (2012), 'Preventing torture, upholding dignity: From pledges to actions, outcome report' (2012) at 10. See also A Edwards 'Optional Protocol to the Convention Against Torture and the detention of refugees' (2008) 57 *International and Comparative Law Quarterly* 794.
[32] United Nations, Subcommittee On Prevention of Torture: 'Introduction to the Committee' available at: https://www.ohchr.org/en/treaty-bodies/spt/introduction-committee, accessed on 17 August 2022. See also art 2 of the OPCAT op cit n 1.

is set out in art 11 of the OPCAT and include visiting places of deprivation of liberty; advising and assisting state parties to the OPCAT and NPMs on their establishment and workings and; cooperating with the relevant UN human rights organs and other regional and international institutions, for purposes of torture prevention in general.[33] It is enjoined to execute its mandate 'within the framework of the Charter of the United Nations', and draw guidance from its purposes and principles as well as other UN normative standards that regulate the rights of individuals deprived of liberty.[34]

In relation to the SPT's visiting obligations, state parties are mandated to facilitate visits by the SPT to places of deprivation of liberty.[35] The outcome of an in-country visit by the SPT is the development of a set of recommendations directed at state parties, regarding the protection of individuals deprived of liberty from torture and other forms of ill-treatment.[36] The SPT is required to communicate, confidentially, these recommendations to the state party and, where necessary, the NPM.[37]

The OPCAT also requires states parties 'to set up, designate or maintain' at the national level one or more domestic bodies for the prevention of torture and other ill-treatment, NPMs, which serve as the second institutional mechanism of the OPCAT.[38] In addition to allowing the SPT to visit places of deprivation of liberty, state parties are required to facilitate regular and independent visits by their NPMs. The mandate of NPMs is embodied in art 19 of the OPCAT and extends beyond the conduct of preventive visits to places of deprivation of liberty. This mandate includes regular examination of the treatment of individuals deprived of liberty; making recommendations with a view to improving the treatment of individuals deprived of liberty and; making input and comments on existing or draft legislations.[39] In fulfilling their mandates, NPM are entitled to unhindered announced and unannounced visits to places of deprivation of liberty, to relevant information, to freedom to choose the place they want to visit, and to private interviews with detainees.[40] Significantly, the OPCAT

[33] Article 11 of the OPCAT op cit n 1.
[34] Ibid art 2(2).
[35] Ibid art 4.
[36] Ibid art 11.
[37] Ibid art16
[38] Ibid art 3.
[39] Ibid art 19.
[40] Ibid art 20

obliges state parties to examine post-monitoring recommendations advanced by NPMs, and concomitantly initiate a dialogue on their implementation.[41]

In relation to the constituent features of NPMs, the OPCAT sets out a number of broad requirements that should guide state parties in their selection of NPMs. Article18 requires state parties, when establishing NPMs, to 'give due consideration' to the principles relating to national human rights institutions. It also enjoins state parties to safeguard the functional independence of NPMs – in addition to the independence of their personnel, guarantee them adequate resources to effectively execute their functions, ensure adequate representation of minority groups and develop measures to ensure that experts on NPMs have the necessary knowledge and expertise.[42]

Distinctively, art 18 does not prescribe any predetermined structural or organisational form for NPMs. Rather, it leaves this decision to state parties. This approach has found broad support in academic literature. For instance, Elina Steinerte contends that 'every NPM must suit geo-political, social cultural and legal intricacies of its state party and therefore no-blue-print of an ideal NPM is appropriate'.[43]

Consequently, across the world, there is great diversity in the types of institutions designated to serve as NPMs. Four broad categories are in operation:[44] National Human Rights Institutions (NHRIs); NHRIs or ombudsperson offices in conjunction with Civil society Organisations or independent experts; a combination of constitutional or statutory entities and; newly established bodies.[45]

As regards the places the SPT and NPMs should be able to visit and monitor, these are articulated broadly in art 4. In terms of art 4(1), each state party is required to permit and facilitate visits by its NPM and the SPT to any place under its jurisdictions and management and at which individuals are detained by a public official or with its consent or acquiescence. It is submitted that the broad and non-specific nature of this requirement should be construed to mean that places of deprivation of liberty, for purposes of the OPCAT, not only include

[41] Ibid art 22.
[42] Ibid art 18.
[43] Steinerte (2014) op cit n 13 at 4 & 5.
[44] Ibid at 5.
[45] Ibid.

institutions controlled or managed by state organs, but also private custodial environments where individuals are detained by non-state actors, either with the consent or acquiescence of the state.[46]

Consequently, places of deprivation of liberty, for purposes of the OPCAT, clearly extends beyond traditional custodial institutions and environments such as police custody facilities, correctional facilities, military barracks and immigration detention facilities to include other non-traditional facilities such as psychiatric centers, private hospitals or nursing homes, refugee camps, and other places of deprivation of liberty which a state may have contracted out to a private entity.[47]

Significance and value of the OPCAT in existing efforts to strengthen prevention of torture in places of deprivation of liberty

It is generally recognised that persons deprived of liberty experience increased risk of torture, mainly because of the imbalance of power engendered by deprivation of liberty.[48] Therefore, individuals deprived of their liberty are a particularly vulnerable group.[49] They are entirely reliant on public authorities for the provision of their basic needs, including food, shelter, medical support and care, and physical and psychological wellbeing.[50] Within the special procedures of the UN human rights system, it has been established that 'the powerlessness of the victim is the defining prerequisite of torture'.[51] Detention facilities, where detainees are almost exclusively reliant on those who supervise them, 'are one of the most extreme examples of human powerlessness'.[52]

For these reasons, the practice of monitoring places of deprivation of liberty, and independent oversight and accountability arrangements over the management of places of detention, have

[46] Egan op cit n 15 at 187.
[47] Ibid.
[48] Association for the Prevention of Torture 'Torture and ill-treatment: key elements' available at: https://www.apt.ch/en/knowledge-hub/detention-focus-database/treatment/torture-and-ill-treatment, accessed on 1 September 2022.
[49] *Sonke* supra n 11 para 30.
[50] Ibid.
[51] Report of the UN Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment (2020), para 39.
[52] *Sonke* supra n 11 para 64.

long existed in various parts of the world.[53] However, despite this express recognition of the utility of mechanisms for independent oversight and scrutiny over the treatment of individuals deprived of their liberty, before the adoption of the OPCAT, there was no 'comprehensive mechanism or recognized approach to how such mechanisms might be established and operate'.[54] In addition, the mandates and authority of many of the mechanisms that were in operation were restricted and amenable to change.[55] Thus, when analysed as a universal system of torture prevention, they were 'partial, fragmented and weak'.[56]

The adoption of the OPCAT has transformed and changed this.[57] It has established innovative normative standards, and unique preventive systems and methods that intensify existing global interventions to prevent and combat torture and other forms of ill-treatment. This can be seen in its overall design, as well as specific objectives. First, it is the only treaty instrument within the UN human rights system that is exclusively aimed at prevention – rather than retrospective actions and measures that form the basis of the other UN human rights documents– with preventive mechanisms uniquely built into it.[58]

Secondly, it establishes a mechanism for pre-empting and forestalling incidents of torture and other form of abuse and ill-treatment through preventive visits to places of deprivation of liberty executed regularly by a complementary mechanism of independent national and international institutions.[59] The obligation to establish an NPM, the national body within this complementary mechanism of visits, has been described as the 'most significant single thing which a State can do to prevent torture and ill-treatment occurring over time'.[60] It has also 'fundamentally changed how torture is challenged and addressed'.[61] The specific role that the OPCAT creates for NPMs also represents the first time that an international human rights instrument explicitly obliges domestic human rights mechanisms to implement international human rights norms and standard, namely torture prevention.[62] NPMs, if properly established

[53] This role is primarily played by constitutional bodies such as National Human Rights Institutions, among others.
[54] United Nations Human Rights op cit n 8 at iv.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] F Ledwidge 'The Optional Protocol to the Convention Against Torture (OPCAT): A major step forward in the global prevention of torture' (2006) 17 *Helsinki Monitor* 73. See also E Steinerte (2013) op cit n 5 at 133.
[59] E Steinerte (2013) op cit n 5 at133.
[60] Ibid at 136 & 137.
[61] United Nations Human Rights op cit n 8 at iv.
[62] Steinerte(2013) op cit n 5 at134.

and capacitated, can significantly strengthen the broader imperative of torture prevention through the exercise of its monitoring authority and actions.[63]

Thirdly, practical experience has underlined that coordinated interventions that are based on a regime of visits to places of deprivation of liberty are effective torture prevention methods and strategies, and have deterrent effect and outcomes.[64] Fourthly, by mandating NPMs and the SPT to develop targeted recommendations following successful visits to places of deprivation of liberty, the OPCAT may have the impact of directly improving conditions of detentions, and ensuring they comply with human rights standards.[65]

Finally, art 23 of the OPCAT requires each state to publish and disseminate annual reports of its NPM.[66] NPMs can utilise these reports as mediums for publicising their findings, observations and position, to place greater emphasis on the challenge, and enhance public knowledge and awareness of the prevalence and impact of torture in places of deprivation of liberty. They may also use these reports to advocate for the development and implementation of rights-affirming, prioritised and long-term measures in the control and management of places of deprivation of liberty, and potential reform of applicable normative and policy framework.

Additional normative standards and framework that establish South Africa's obligation to monitor and supervise places of deprivation of liberty.

Although the OPCAT establishes a unique preventive mechanism that is based on a regime of inspection, and envisages torture prevention methods that are both proactive and sustained, it is not the only human rights instrument that establishes the obligation to monitor and prevent incidents of torture in places of deprivation of liberty. Its adoption bolsters and strengthens existing monitoring and oversight mechanisms, established in terms of existing international, regional and domestic legal and human rights framework. This section of the chapter explores the full and complete range of sources of South Africa's domestic, regional and international

[63] Egan op cit n 15 at191.
[64] Ledwidge op cit n 58 at 72.
[65] Ibid at 72 & 73.
[66] Article 23 of the OPCAT op cit n 1.

human rights obligations to monitor places of deprivation of liberty, and prevent torture in all its form.

International human rights framework

At the global, UN level, there are a number of human rights instruments that place binding obligation on South Africa to adopt effective measures and prevent the occurrence of torture and other forms of abuse and ill-treatment. Within the UN charter-based human rights mechanism, South Africa is obliged, by virtue of its membership of the UN, to take actions that are designed to promote 'universal respect for, and observance of, human rights and fundamental freedom of all.'[67]

In addition to obligations that stem from membership of the UN, various global-level human rights treaties have been developed which provide, inter alia, normative articulation of binding human rights standards, and set out substantive obligations of states that have ratified them. Generally, there are nine core human rights instruments within the UN treaty-based human rights mechanism.[68] Within this framework, South Africa's obligation to prevent and combat torture in places of deprivation of liberty emanates, principally, from its acceptance of obligations under the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT). The UNCAT is the principal global torture prevention instrument. It is also the document which the OPCAT was adopted to supplement and strengthen. It contains a number of provisions that create general and specific obligations for state parties, aimed at strengthening the prevention of torture in all its forms. Explicit in these obligations is the duty imposed on South Africa, as a state party, to develop and implement effective legislative, policy and other measures to prevent incidents of torture and other forms of ill-treatment.[69] South Africa is also required to train and capacitate public officials – that work in custodial environments – regarding the prohibition against torture, to ensure they operationalise a rights-based approach to the use of arrest, detention and imprisonment.[70]

[67] Articles 55 & 56 of Charter of the United Nations, signed 26 June 1945 and come into force 24 October 1945.
[68] United Nations 'The Core International Human Rights Instruments and their monitoring bodies' available at https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies, accessed on 14 September 2022.
[69] Article 2(1) of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984 by General Assembly of the United Nations Resolution 39/46.
[70] Ibid art 10(1).

Additionally, the UNCAT obligates South Africa to establish procedures for systemic and regular review of existing arrangements for the detention and treatment of individuals that are subjected to any form of detention, with the aim of preventing incidents of torture.[71] By virtue of its incorporation into a national legislative framework through the Prevention and Combatting of Torture of Persons Act 13 of 2013, in terms of section 231(4) of the Constitution, the UNCAT is law in South Africa, and is its provisions are directly enforceable.[72]

South Africa's obligation to combat torture in places of deprivation of liberty is further embodied in the International Covenant on Civil and Political Rights (ICCPR), to which it is a state party. Articles 2 and 7 of the ICCPR enjoin it to design and implement measures and programmes that give practical effect to the prohibition against torture and forms of ill-treatment and abuse.[73] South Africa's obligations also arise from the prohibition of torture in customary international law.[74] As regards the normative force and binding effect of customary international law in South Africa, the Constitution stipulates that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament'.[75]

African, continental human rights system

Within the regional African human rights architecture, South Africa's obligations to prevent, identify and address incidents of torture in places of deprivation of liberty flow from its ratification of the African Charter, the normative foundation upon which the African Union Human Rights system is based.[76] Article 5 of the African Charter prohibits torture and other forms of abuse and ill-treatment, and places a clear obligation on state parties to take effective actions and prevent the occurrence of torture and other forms of abuse.[77] To facilitate the effective implementation of the requirements of art 5 by state parties, in 2002, the African

[71] Ibid art 11.
[72] Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
[73] Articles 2(2) & 7 of the International Covenant on Civil and Political Rights, adopted 16 December 1966 by General Assembly of the United Nations Resolution 2200A (XXI).
[74] Richard Carver & Lisa Handley (eds) *Does Torture Prevention Work* (2016) 13.
[75] Section 232 of the Constitution op cit n 72.
[76] The African Charter on Human and Peoples' Rights, adopted 27 June 1981 by the Organization of African Unity and come into force 21 October 1986 (hereafter the African Charter).
[77] Ibid art 5.

Commission, the premier human rights organ within the African human rights system, adopted Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.[78] This soft law instrument delineates and gives practical interpretation to the obligations of states under art 5 of the African Charter. Article 41 requires South Africa to establish, strengthen and maintain effective and independent national institutions, in the form of an oversight system, and invest them with the mandate to conduct preventive visits to all places of detention, with a view to preventing incidents of torture.[79]

Domestic legal framework

Domestically, South Africa's human rights obligations to prevent torture emerge, primarily, from the Constitution. Section 12 of the Constitution enshrines safeguards and protections against torture, and guarantees the right of everyone to be free from torture and other forms of mistreatment. Further, the state is mandated to respect, protect, promote and fulfil the rights and freedoms enshrined in the Bill of Rights, which include norms and protections against torture.[80]

In addition, South Africa has a specific national legislative tool on torture prevention, the Prevention and Combatting of Torture of Persons Act.[81] This Act was developed to, inter alia, give full effect to South Africa's duties and obligations in terms of the UNCAT, and provide for measures designed to prevent and combat torture.[82] The Act also places a general duty on the state to promote awareness of the prohibition against torture.[83]

[78] The African Commission on Human and Peoples' Rights; Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted on 23 October 2002 by the African Commission on Human and Peoples' Rights.
[79] Ibid art 41.
[80] Section 7(2) of the Constitution op cit n 72.
[81] 13 of 2013.
[82] Ibid s 2.
[83] Ibid s 9.

CHAPTER TWO

THE PRACTICE OF TORTURE IN SOUTH AFRICA: HISTORICAL CONTEXT

Introduction

The practice of torture in South Africa has a long history that dates as far back to the period of the apartheid regime and its machinery of laws and institutions. For a full and clear understanding of the history of the practice of torture in South Africa and why preventive mechanisms are necessary to safeguard the rights and freedoms of detainees, this section sketches the context and sets out the various historical, interlocking conditions that perpetuated or sustained the practice of torture before the transition to democracy. It is hoped that this will contribute to the strengthening of existing commitments to prevent the occurrence of torture in contemporary, democratic South Africa through preventive measures, underpinned by a system of external oversight and accountability over the administration of places of deprivation of liberty in the country.

Detention laws 1948 until new constitutional dispensation

To sketch the historical context within which the practice of torture took place, it is relevant to consider a number of statutory instruments which, together with their strict and regular enforcement, played a key role in facilitating and sustaining the practice of torture and other forms of abuse and ill-treatment under the system of apartheid, particularly in the context of detention.

From around 1948, when the National Party took political power, a number of draconian statutes, commonly known as security laws, were developed and adopted to combat what was then considered radical political dissent aimed at the creation of a democratic South Africa.[84] Their enforcement was entrusted to the security police, while the regular police force was tasked with the investigation and maintenance of public order.[85] These security Acts, inter alia,

[84] J Dugard *Confronting Apartheid* (2018) 97.
[85] Ibid.

authorised detention without trial, imposed extraordinary custody time limits, excluded the right to have access to legal assistance, and limited or suspended judicial oversight over the treatment of detainees and the management of detention facilities.[86] These factors, combined with the absence of effective and independent investigations of complaints by an impartial organ, favored and fostered conditions in which torture was frequently utilised, particularly to extract information and confessions. Torture and other forms of abuse were therefore systemic, and an essential feature in the implementation of the policy of apartheid.[87] The problematic provisions of some of these laws, and their respective roles in advancing the practice of torture, are explored below. A brief description of the substantive contents of the laws is offered first, to illustrate their form and content, before an analysis of their operation is provided.

The 90-days detention law.

In 1963, Parliament enacted s 17 of General Law Amendment Act 37 of 1963, known as the 90-day detention law. In terms of this section, a commissioned police officer was authorised to arrest without warrant and detain for interrogation any person whom he suspected, upon reasonable grounds, of having committed, or of having intended to commit, the offence of sabotage, or a crime under the Suppression of Communism Act 44 of 1950, or the Unlawful Organizations Act 34 of 1960, or having possession of information about the commission of these offences.[88] An arrested person could be kept in custody until he had, in the opinion of Commissioner of the South African Police, 'replied satisfactorily to all questions or for ninety days on any particular occasion'.[89] The section also prohibited anyone from having access to the detainee, except with the express consent of the Minister of Justice or a commissioned officer, and also excluded the jurisdiction of a court to order the release of a detainee.[90] A detainee was, however, entitled to a weekly visit by a magistrate. Although its operation was suspended in January 1965, between the time of its promulgation and withdrawal, a total of 1095 persons were detained under the 90-days detention law.[91]

[86] See below analysis of the substantive provisions of the laws.
[87] Truth and Reconciliation Commission of South Africa report vol 2 (1998) 220.
[88] Section 17 of the General Law Amendment Act 37 of 1963.
[89] Ibid.
[90] Ibid s 17(2).
[91] D Foster, D Davis & De Sandler *Detention and Torture in South Africa: Psychological, Legal and Historical studies* (1987) 24.

180-day detention law

Four months following the suspension of the 90-day detention law, the government enacted 'the 180-day detention law', by inserting section 215*bis* into the Criminal Procedure Act 56 of 1955. Similar to its predecessor, the 180-day detention law authorised solitary confinement of detainees.[92] The jurisdiction of the courts to order the release from custody of any detainee was also explicitly excluded. However, there were a number of key differences between the two enactments.[93] First, although detentions under the 90-day law could be renewed at the will of public authorities, the initial period of detention was doubled to 180 days.[94] Secondly, while in terms of 90-day detention law the detainee was a person suspected of having committed an offence, the detainee under the 180-day detention law was 'any person likely to give material evidence for the state in any criminal proceedings, and therefore the 'detainee was a potential state witness, not a potential accused'.[95] Finally, while the 90-day detention law was adopted as a transient provision with temporary effect, the 180-day detention law was developed and adopted as a permanent provision with indefinite existence and effect.[96] It therefore had the undesired impact of transforming the practice of solitary confinement of detainees into a permanent feature of South African legal system.[97] The 180-day detention law was extensively invoked between 1965 and 1967, and about 400 persons are known to have been detained in terms of its provisions.[98]

14-day detention law

In 1966, the first legislative instrument that was ostensibly designed to combat and prevent acts of terror was enacted by the government.[99] Section 22 of the General Law Amendment Act 62 of 1966 empowered a commissioned police officer to arrest, without warrant, any individual

[92] H Rudolph *Security, Terrorism and Torture: Detainee's Rights in South Africa and Israel: A Comparative Study* (1984) 12.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid at 13
[97] Ibid.
[98] Foster, Davis & Sandler op cit n 91 at 24.
[99] Ibid.

whom he had reason to believe was a terrorist, or had committed, or intended to commit, a crime under the Suppression of Communism Act 1950 or the General Law Amendment Act 76 of 1962 (the Sabotage Act).[100] The suspect was to be detained for 14 days for interrogation, or for such further intervals as the Supreme Court was to determine on application by the Commissioner of Police.[101] Neither the detainee nor his legal representative, where he had resources to afford one, was allowed to be present at the application for the continuation of the detention.[102] In addition, the legal definition of 'a terrorist' was distinctively broad and encompassed 'any person who favours terrorist activities'.[103] This led to the arrest, detention and interrogation of persons on the basis of their suspected beliefs, not conduct.[104] However, this provision had a limited time-span and application, because in 1967 it was replaced by a new, comprehensive and holistic instrument, the Terrorism Act 83 of 1967.

Indefinite detention without trial

Adopted in 1967, the Terrorism Act 83 of 1967 was the first legislative tool that established the concept of, and made provision for, indefinite detention without trial.[105] Section 6 empowered a commissioned police officer, of or above the rank of lieutenant colonel, to arrest without warrant, and detain for interrogation, any individual whom 'he had reason to believe is a terrorist or is withholding from the police any information relating to terrorists' or to offences under the Act.[106] No time limit was determined for the detention, which could endure until the commissioner of police ordered his release when of the opinion that that the detainee answered all questions satisfactorily or that no useful purpose would be served by their continued detention, or until their release was directed by the Minister of Justice.[107] The authority of the courts to call for the release of a detainee, or determine the validity of actions taken on the basis of this provision was explicitly excluded.[108] Furthermore, only 'if circumstances so permit[ted]', would the detainee be visited by a magistrate once a fortnight.[109]

[100] Ibid.
[101] Ibid.
[102] Ibid at 14.
[103] Ibid.
[104] Ibid.
[105] Foster, Davis & Sandler op cit n 91 at 25.
[106] Rudolph op cit n 92 at 14.
[107] Ibid.
[108] Ibid.
[109] Ibid.

Detention under Public Safety Act 3 of 1953

In 1953, the 'principle of peace-time detention without trial' was introduced into the South African legal system for the first time, through enactment of the Public Safety Act 3 of 1953.[110] Section 2(1) of the Act empowered the Governor-General (state President) to declare a state of emergency in the whole or part of South Africa, if in his view 'there was a serious threat to the safety of the public or the maintenance of public order and the ordinary law of the land was inadequate to enable the situation to be contained'.[111] During proclaimed emergencies, regulations could be made to, inter alia, to make provision for public safety or the maintenance of public order, or the lifting of the state of emergency.[112] The provisions of this Act were utilised for the first time in March 1960, when a proclamation placed 113 magisterial districts under emergency conditions, following demonstrations in Sharpeville against the mandatory carrying of passes.[113] Eight more magisterial districts were placed under emergency conditions in April of the same year.[114] Though this state of emergency was eventually lifted in August 1960, during the period of emergency, a total of 11503 people were detained.[115] Significantly, it is this declaration and enforcement of the state of emergency which instigated a diminished level of confidence in the South African economy, a factor that compelled the government to prefer the use of security laws as a mechanism for dealing with dissent.[116] Consequently, no state of emergency was declared again until 1985.[117]

Operation and implementation of security laws

Security laws and legislations did not explicitly sanction or endorse torture. In practice, however, they were used to inflict both physical and psychological torture on detainees.[118] A

[110] Rudolph op cit n 92 at 3.
[111] Ibid.
[112] Ibid.
[113] ibid at 4.
[114] Ibid.
[115] Ibid.
[116] Dugard op cit n 84 at 100.
[117] Ibid.
[118] Ibid at 98.

common feature and denominator in all of them was the extensive, discretionary power and authority that was granted to public officials, particularly security police, to arrest, detain and interrogate individuals. With no access to family or legal representatives, combined with limited judicial oversight or influence over their treatment and the conditions in which they were kept, a detainee's right to be free from torture and all forms of abuse and ill-treatment was grossly undermined. Detainees were at the mercy of unaccountable police.[119]

The 90-day law was, for instance, problematic for a range of reasons. First, although it set the time limit of detention to 90 days, it enabled the government to detain individuals indefinitely by rearresting and re-detaining them for successive 90-day periods.[120] Secondly, soon after it was promulgated, serious allegations of torture and assault were made against public authorities by persons who were victims of enforcement measures.[121] The nature of reported abuse ranged from being punched and kicked to the application of electric shock to being tied up in a sitting position.[122] Thirdly, the practice of solitary confinement was frequently utilised as an enforcement mechanism.[123] This had a severe psychological impact. Several persons that had been subjected to solitary confinement had to receive medical and psychiatric treatment.[124] As a result, in December 1963, about 60 medical experts, psychiatrists and psychologists sent an appeal to the Minister of Justice requesting the eradication of solitary confinement.[125]

A common form of torture and abuse under the 90-day detention law was the use of electric shock.[126] Many of those detained on the basis of this law made serious and similar allegations that they were subjected to electric shock. In a squatting position, they were handcuffed and a stick inserted between their knees and elbows, and a plastic bag placed over their heads.[127] Clips were then placed over their thumbs, toes and genitals, and electric shock was administered.[128]

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[119] Ibid.
[120] Report of the UN Special Committee on Apartheid 'Maltreatment and Torture of Prisoners in South Africa' (1972) at 6.
[121] Ibid at 7.
[122] L Fernandez *Police Abuse of Non-political Criminal Suspects: A Survey of Practices in the Cape peninsula Area* (1991) at 10.
[123] Report of the UN Special Committee on Apartheid op cit n 120 at 12.
[124] Ibid.
[125] Ibid.
[126] Ibid at 14.
[127] Ibid.
[128] Ibid.

The impact of the 90-day detention law on the rights and welfare of detainees was further exacerbated by rigid and formalistic judicial interpretation of its content and purpose. Harold Rudolph observes that the combined effect of judicial pronouncements on the section placed 'the 90-day detainee into a truly desperate situation'.[129] Judicial level decisions expressly affirmed the power of authorities to hold a detainee, under the section, incommunicado for successive periods of 90 days, renewable at the will of public authorities, and interrogate them in a climate of complete isolation and solitude.[130] Following widespread protests and condemnation, the operation of the 90-day detention law was suspended in January 1965.

Although the 180-day detention law was developed to detain potential state witnesses, and prevent them from absconding, in practice, this provision was utilised by the security police to inflict torture and other forms of abuse.[131] As a result, some detainees ended up as accused rather than state witnesses, and were charged on the strength of information and evidence extracted from them, while many others were eventually released without even being called as state witnesses.[132] This provision also provided the police with unbridled powers to obtain state evidence through coercive techniques and psychological pressure applied through solitary confinement and threats of prolonged and elongated detention.[133]

The treatment of persons detained under these laws was governed by special regulations developed by the Minister of Justice.[134] In practice, the government tried to shield public attention from conditions of detention and the treatment of detainees. It refused to disclose even the names or number of people that were detained under the Terrorism Act, citing public interest concerns.[135] In some cases, people were held in detention under the authority of these laws for up to two years.[136]

These conditions, together with the imbalance of power that is associated with deprivation of liberty, served as an open invitation to the police to resort to whatever means they deemed necessary to extract information from detainees.[137] As a result, there were alarming reports of

[129] Rudolph op cit n 92 at 12.
[130] Ibid.
[131] Report of the UN Special Committee on Apartheid op cit n 120 at 7.
[132] Ibid.
[133] Ibid.
[134] Ibid at 11.
[135] Ibid at 10.
[136] Ibid.
[137] Fernandez op cit note 122 at 63.

torture and other forms of abuse, including electric shock, sleep deprivation for prolonged periods, and coercion of detainees to stand for inordinate periods of time.[138]

The laws that provided for indefinite detention were designed to empower the police to extract information by duress, and to intimidate and coerce individuals into becoming state witnesses.[139] The police, who were infamous for their brutality, and who were shielded by legislative provisions from judicial oversight and scrutiny, and by the government from the demands for public investigations, accountability and justice, were placed in a position of impunity. [140] In addition, since visits by family members or private physicians were expressly prohibited, there was no one to whom a detainee could complain or display his injuries.[141] Although the law established weekly visits by a magistrate as a safeguard against abuse of detainees, in practice this was ineffective as the magistrates were part of the same state machine.[142] Furthermore, as is also evident in the provisions of these laws, access to legal representation and services were also limited, and visitations by a Magistrate were also limited.

Visits by the magistrates, where they happened, were also not regular.[143] In addition, for fear of reprisal by the security police, most detainees were extremely hesitant to complain to the magistrates about incidents of abuse and ill-treatment.[144] Furthermore, even where complaints of abuse were successfully made to the magistrates, they had no investigative or disciplinary powers, and could only pass on the complaints to police leadership and management.[145] Only in rare and limited cases did successful intercessions by magistrates result in the improvement of conditions of detention and the treatment of detainees.[146] This provision, therefore, did not achieve the desired impact, and provided only limited protection to the detainees. Assault, torture and other forms of abuse became the principal mode of operation, not only against those suspected of engaging in the commission of offences, but also against those only thought to be in possession of information about such offences.[147]

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[138] Ibid at 17.
[139] Report of the UN Special Committee on Apartheid op cit note 120 at 10.
[140] Ibid.
[141] Dugard op cit n 84 at 98.
[142] Ibid.
[143] Report of the UN Special Committee on Apartheid op cit note 120 at 10.
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.

In an empirical study, conducted in 1984 on 176 persons who were detained under the security laws between 1974 and 1984 and which drew a bitter and acerbic response from the government, 83 per cent of the respondents indicated that they had been subjected to physical torture, while all of them pointed out that they had been victims of psychological torture and abuse.[148] Forms of physical abuse included, inter alia, sustaining abnormal body postures, enforced standing for long periods, strangulation, enforced consumption of salt water, burning of fingernails, electric shock and food deprivation.[149] Psychological abuse included solitary confinement, verbal abuse and threats of violence against immediate family members of the detainees, among others.[150]

In its final report, the Truth and Reconciliation Commission, which was established by the Government of National Unity as a fact-finding organ, concluded that 'torture was used by the security branch, junior and senior, and in all parts of the country'.[151] The Commission also established that:

'The use of torture in the form of the infliction of severe physical and/or mental pain and suffering for the purposes of punishment, intimidation and the extracting of information and/or confessions, was practised systematically particularly, but not exclusively, by the security branch of the SAP throughout the commission's mandate period.'[152]

Deaths in detention, or as a result of police action, were frequent and took place in the most suspicious conditions and circumstances.[153] Explanations proffered by the police for such deaths included: 'slipping on soap in the shower', 'falling down stairs', and 'falling on a chair'.[154] A considerable number of deaths in detention took place as a direct outcome of torture 'or as a consequence of a situation in which the circumstances were such that detainees were induced to commit suicide.'[155]

No appropriate measures were taken to ensure criminal accountability of the security police for these deaths, or for allegations of torture and ill-treatment. The lengthy duration of detention

[148] Fernandez op cit n 122 at 16-17.
[149] Ibid at 17.
[150] Ibid.
[151] Truth and Reconciliation Commission of South Africa op cit n 87 at 220.
[152] Ibid.
[153] Dugard op cit n 84 at 98.
[154] Ibid.
[155] Truth and Reconciliation Commission of South Africa op cit n 87 at 220.

under security laws also amplified the difficulty of victims of torture and abuse to substantiate their claims in court.[156] Bodily inflammations and bruises suffered during incidents of torture and abuse were susceptible to disappearance by the time the suspects were presented in court.[157] Other indicators and markers of abuse, such as psychological torture and harm which is less transient and more enduring and indelible, were difficult to substantiate in the absence of expert witnesses.[158]

Furthermore, if an accused person had been injured in an assault incident by the police, they could, legally, be kept from the court until their recovery. This was the case because, in 1979, the government amended s 50 of the Criminal Procedure Act 51 of 1977 by the addition of a provision which empowered the state to keep a detainee away from the courts, by lodging an application in which it informed the court that the accused was physically ill and could not appear in court for an order for their further detention beyond the 48 hours envisaged by the section.[159] The court would then order that the accused be detained at a specific place until they recovered. Although the amendment required the state to, in its application, 'set out the circumstances relating to the illness' and support these with a medical certificate, it was not required to articulate the specific reasons that actuated the physical illness, nor allow the detainee's private physician to verify its claims.[160]

The need to ensure accountability, prevent and combat torture, and deter the commission of further incidents of torture was further hampered by the attitude of the courts to the rights and freedom of detainees. This is because even in cases where physical injuries and harm were visible and capable of proof, it was still very difficult to satisfy the courts. The courts were also disinclined to query interrogation techniques employed by the police, and their approach to the admissibility of evidence and confessions made by detainees was regarded as unsatisfactory and disappointing.[161] Further, in the majority of cases, the courts, in the face of serious allegations of police torture, 'appeared to accept police denials of torture at face value and to give insufficient consideration to the problems detainees faced'.[162]

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[156] Fernandez op cit n 122 at 63.
[157] Ibid.
[158] Ibid.
[159] Section 50 (1)(*d*) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 56 of 1979.
[160] Ibid.
[161] Foster, Davis & Sandler op cit n 91 at 55.
[162] Amnesty International *Torture in the Eighties* (1984) 128.

The South African ruling class was also not prepared to actively and overtly question the impact of the enforcement of security laws. While public safety and security was viewed by some as paramount, the overall effect of the string of security laws developed in the 1960s was a diminished level of resistance and opposition throughout the decade.[163]

On 21 July 1985, a state of emergency was declared in 36 magisterial districts, which was fleetingly lifted and then re-imposed for the whole country from 1986-1990.[164] This was the first such declaration since 1960.[165] This hiatus was nurtured and inspired by the governments deliberate desire to deal with political dissent and opposition through strict implementation of security laws, rather than the declaration of public emergencies, which had the unintended effect of unsettling foreign investors and instigation of a loss of confidence in the economy.[166] In the first 8 months of the emergency, a total 7992 persons were detained under emergency measures, with some being kept in detention for up to five months.[167] Serious allegations of torture and abuse of detainees, including children, were made against the security police.[168] In 1987, a group of medical doctors who examined freed detainees released a report in which they observed that 97 per cent of those they has assessed exhibited signs of abuse.[169]

The government's position and response to allegations of torture and ill-treatment was based on denial, disavowal and disapproval of torture and abuse of detainees.[170] Denial by successive Ministers of Law and Order and Justice was not only reflective of ministerial attitudes towards the plight of victims of torture, but also further undermined calls for accountability. The government also tried, in the 1960s, to prevent and obstruct public disclosure of conditions in the prison system, and forestall the development of public sentiment and opinion against its policies, through the Prisons Amendment Act 75 of 1965.[171] This legislation penalised the publication, by a newspaper, of any inaccurate statement about prison conditions.[172] In 1982, the Minister of Law and Order issued Directions for the treatment of persons held under the

[163] Foster, Davis & Sandler op cit n 91 at 26.
[164] Ibid at 181, see also Dugard op cit n 84 at 101.
[165] Dugard op cit n 84 at 100.
[166] Ibid.
[167] Foster, Davis & Sandler op cit n 91 at 183.
[168] Ibid.
[169] Fernandez op cit n 122 at 18.
[170] Rudolph op cit n 92 at 207.
[171] Report of the UN Special Committee on Apartheid op cit n 120 at 18.
[172] Ibid.

Internal security Act of 1982, which provided for a rights-based approach to the handling and treatment of detainees.[173] However, according to the Truth and Reconciliation Commission, 'the use of torture was condoned by the South African government as official practice'.[174] The Commission also found that many of the police officers against whom there was clear and credible evidence of torture, or against whom substantial allegation of torture had been made, were promoted to higher positions.[175]

Torture and ill-treatment of non-political criminal suspects pre and post 1994

The above analysis and account of torture and ill-treatment of detainees is based on the assessment of the implementation of security laws, adopted under the apartheid regime. However, throughout that period, there were a significant number of individuals who were in prisons and police custody facilities for violations of common law and statutory prohibitions of non-political nature.[176] Although they constituted the majority of pre-trial detainees, there was very limited public information and knowledge about what happened to them following their arrest.[177] They did not enjoy the same level of public attention, interest and sympathy as did political detainees. There were, however, a worrying number of allegations of torture and abuse of ordinary criminal suspects by police officers.[178] There were also high levels of deaths in police custody.[179] High levels of death in police custody may be an indicator of police violence and brutality against detainees. In addition, compensatory payout by the government to the victims of injuries and harm inflicted by the police was a further indicator of police abuse of ordinary criminal suspects.[180]

Incidents of torture and other ill-treatment post 1994

[173] Rudolph op cit note 92 at 207.
[174] Truth and Reconciliation Commission of South Africa op cit n 87 at 220.
[175] Ibid.
[176] Fernandez op cit n 122 at 19.
[177] Ibid.
[178] Ibid at 20.
[179] Ibid.
[180] Ibid.

As discussed above, in pre-1994 South Africa, before the advent of a new constitutional dispensation, apartheid-era detention laws and regulations created and preserved conditions that facilitated the practice of torture and other forms of ill-treatment. In 1994, South Africa become a democratic country, anchored on respect for human rights.[181] The two post-1994 constitutions, the interim Constitution which took effect in 1994, and the 'final' Constitution, the Constitution of the Republic in South Africa, 1996, are regarded as having engendered a 'constitutional revolution' in the country.[182] Together, they have brought about a complete political and constitutional reformation of South Africa. Established as the supreme law of the country, the 1996 'final' Constitution aims to, inter alia, heal the division of the past and develop a society that is guided by fundamental human rights and freedom.[183] Chapter 2 of the Constitution contains a Bill of Rights, with a comprehensive list of human rights standards, from some which no derogation is permitted under any circumstances. Section 12 of the Constitution, which has been given effect to by the adoption of the Prevention and Combatting of Torture Act of 2013, protects the right of everyone to 'freedom and security of the person', which include guarantees against torture and other forms of abuse. In addition, binding regional and international human rights laws have developed to provide further protection against torture, and place specific obligations on South Africa to design and implement measures that are aimed at strengthening the prevention of torture.

However, despite the existence of constitutional and human rights obligations to prevent torture and other forms of abuse, and the concomitant post-1994 progressive change in the country's policy and legislative environments, the practice of torture and ill-treatment still persists. For instance, between 2012 and 2021, the Independent Police Investigative Directorate (IPID), the statutory oversight body over the provision of policing services in South Africa, documented a total of 1742 incidents of torture and 38045 cases of assault by police officers.[184] Similarly, between 2016 and 2018, the Judicial Inspectorate for Correctional Services (JICS), the national oversight organ over the provision of correctional services, reported 399 cases of assault, 22 incidents of ill-treatment and 5 cases of torture.[185] In addition, between 2020 and 2021, the JICS documented 142 incidents of assault in correctional facilities.[186] Thus, while substantive

[181] PJ Schwikkard 'Death in democracy' (2013) 25 *Singapore Academy of Law Journal* at 736.
[182] I Currie & J De Waal *The Bill of Rights Handbook* (2013) 6 ed 2.
[183] Preambular paragraph of the Constitution op cit n 72.
[184] *Annual Reports of the Independent Police Investigative Directorate* 2012- 2021.
[185] *Annual Reports of the Judicial Inspectorate for Correctional Services* 2016- 2018.
[186] *Annual Reports of the Judicial Inspectorate for Correctional Service* 2020/21 & 2021/22.

progress has been made since the advent of democracy and the promulgation of a constitution, whose 'restraints on state power are a response to the atrocities of the past', incidents of torture and other forms of abuse, particularly of individuals deprived of liberty, continue to take place in South Africa.[187] As regards criminal accountability for acts of torture and other forms of abuse, there was limited public interest in accountability processes, particularly in the early 1990s. During a significant part of that decade, despite political changes established as part of the transition to a democratic order and the concomitant new constitutional dispensation, heightened levels of public crime and violence induced public and political sentiment to become less tolerant to procedural safeguards and protections that suspects and prisoners enjoy under the democratic constitution.[188] As a result, reports and findings by oversight and accountability organs attracted limited public interest and attention.[189] Only exceptional accounts and narratives concerning torture and abuse of suspects and prisoners attracted public empathy.[190]

[187] Schwikkard op cit n 181 at 748.
[188] L Fernandez and L Muntingh 'The criminalization of torture in South Africa' (2016) 60 *J Afr L* 84.
[189] Ibid.
[190] Ibid.

CHAPTER THREE

THE OPCAT'S CORE REQUIREMENTS FOR NPMs, AND THE EXTENT TO WHICH SOUTH AFRICA'S NPM DESIGNATED BODIES COMPLY WITH THEM

Introduction

The establishment of an NPM is the sole responsibility of a state party to the OPCAT, and is foundational to the preventive system envisaged by the instrument. Without prescribing the precise blue-print for an ideal NPM, the OPCAT provides state parties with some normative guidance in the execution of their treaty obligations to set up, designate or maintain an NPM. Although they are broadly formulated, art 18 of the OPCAT sets out the core criteria which are aimed at shaping the constituent features of NPMs and their core characteristics. Only those bodies which fully comply with these requirements can be designated as NPMs.[191]

To fully utilise the absence of a preordained institutional format and structure for NPMs, and ensure the preferred preventive mechanism is responsive to specific national contexts, state parties, across the world, have designated diverse types of institutions to serve as NPMs. In South Africa, following the ratification of the OPCAT in 2019, a multiple-body preventive mechanism was designated to serve as the NPM. In this system, the SAHRC, which launched the NPM in July 2019, was designated to perform a coordinating and functional role, alongside other existing monitoring bodies. These include the Judicial Inspectorate for Correctional Service (JICS), the statutory oversight and accountability organ over the provision of correctional services in the country; the Independent Police Investigative Directorate (IPID), the police oversight and complaints body; the Office of the Military Ombud, established to facilitate the investigation and resolution of complaints regarding 'official conduct' of a member of the Defence Force or conditions of service and; Office of the Health Ombud, established to 'consider, investigate and dispose of complaints relating to non-compliance with prescribed norms and standards' in the provision of health services.[192] Together, these five oversight institutions form South Africa's NPM.

[191] Evans & Dale op cit n 14 at 50.
[192] Section 4 of the Military Ombud Act 4 of 2012. See also https://ohsc.org.za/who-we-are/#main-areas-of-work.

While conscious of the flexible strategy assumed by the drafter of the OPCAT – which does not prescribe any preferred organisational form for NPMs – this chapter examines the core requirements of the OPCAT regarding the establishment and constituent features of NPMs, and the extent to which South Africa's NPM designated bodies comply with them.

Part IV of the OPCAT regulates, inter alia, the establishment and mandate of NPMs, and sets forth the minimum operational powers with which NPMs should be vested. Article 18 articulates the core attributes, and minimum qualities, which NPMs should possess. The provisions of art 18 support the observation that there is no ideal-type NPM, and that NPMs should be structured in a manner that is sensitive to contextual peculiarities and national-specific nuances. Without expressly prescribing a predetermined institutional format for NPMs, it sets out a number of key factors and conditions which govern the establishment and operation of NPMs. These include broad requirements for functional independence of NPMs and the independence of their personnel, the need for NPM members to have the necessary level of professional knowledge and competence, the need to ensure selection criteria for membership of NPMs support gender balance and representation of minority groups, and the necessity for NPMs to be provided with resources to execute their mandates.[193] It also requires state parties, when establishing NPMs, to 'give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights' (the Paris Principles).[194]

Amongst the conditions set by art 18, the requirement of independence has emerged as one of the main defining features of NPMs. The need to guarantee and safeguard the independence of NPMs was one of the core issues during the drafting of the OPCAT.[195] The centrality of the principle of independence to the effective functioning of a national torture preventive mechanism is manifested in its emphasis across the substantive text of the OPCAT.[196] In addition, the Paris Principles, to which state parties are required to give due consideration when establishing an NPM, contain clear provisions that underpin the significance of establishing and safeguarding the independence of a national human rights mechanism.[197] For

[193] Article 18 of the OPCAT op cit n 1.
[194] Ibid.
[195] Steinert op cit n 13 at 6.
[196] Articles 1, 17, 18 & 35 of the OPCAT op cit n 1.
[197] Principles relating to the Status of National Institutions, adopted 20 December 1993 by General Assembly Resolution 48/134.

these reasons, and because independence is 'often singled out as the key to a national body's effectiveness', this chapter examines the extent to which South Africa's NPM designated bodies are independent.[198] As mentioned earlier, the text of the OPCAT makes reference to two aspects of independence: functional independence of NPMs and the independence of their personnel. The extent to which South Africa's NPM designated bodies comply with these requirements is explored in turn below.

Functional independence

Although independence is a complex concept, and may not be amenable to easy evaluation on the basis of a set of specific, concrete measures or indicators, the extent to which NPMs are functionally independent – which is regarded as the extent to which NPMs enjoy independence from state authorities, particularly the executive arm of government – can be evaluated by assessing three interrelated and mutually reinforcing conditions.[199] These include an examination of whether the NPM has a legislative mandate, and whether it enjoys financial and operational autonomy.[200]

Legislative mandate

An NPM needs to have its mandate embodied in a legislative or constitutional text which regulates, inter alia, its existence, activities and operations.[201] The necessity of developing and safeguarding a clear legislative or statutory basis for an NPM, and the weakness that underpins preventive systems without such a basis, has been recognised by the SPT. The SPT has described the absence of a separate, specific legislative tool that governs the mandate and functions of an NPM as a 'striking weakness which limits the effectiveness of the mechanism'.[202] Furthermore, the Paris Principles emphasise that: 'A national institution shall

[198] Murray (2008) op cit n 3 at 501.
[199] Steinert (2014) op cit n 13 at 9.
[200] United Nations Human Rights op cit n 8 at 15.
[201] Ibid.
[202] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing Advisory Assistance to the National Preventive Mechanism of Turkey* (2019) para 19.

be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.'[203]

South Africa's NPM does not have its own specific statutory instrument that defines its mandate, and facilitates the effective and integrated regulation of its existence and operation. Individually, of the five designated bodies, only the SAHRC, the IPID and the Office of the Military Ombud have their mandate regulated by an independent statutory tool. The mandate of the JICS and the Office of the Health Ombud are set out in legislative tools that govern the operations of the government departments they are meant to oversee. The setting out of the mandates of the JICS and that of the Office of the Health Ombud within the broader regulatory frameworks that govern the operation of departments they are designed to oversee has had the undesired impact of undermining the need to ensure their mandates and operations are regulated in a comprehensive, holistic and non-fragmented manner. The mandate, existence and operations of the JICS, for instance, are regulated by only one chapter that consists of 10 sections, Chapter IX, under the Correctional Services Act 111of 1998. The Office of the Health Ombuds, on the other hand, is, as discussed in greater detail below, located within the Office of Health Standards Compliance (OHSC), whose mandate is regulated by two sections of the National Health Act 61 of 2003.[204]

All NPM designated bodies, individually, have a statutory basis with a legislative mandate – set out either in independent instruments or as part of regulatory tools that govern the affairs of departments over which they exercise oversight roles – to enable them to perform their functions. However, with the exception of the SAHRC and the JICS, none of the other designated bodies has the mandate to regularly and independently monitor places of deprivation of liberty managed by the department they are meant to oversee. As South Africa's National Human Rights Institution, the SAHRC is uniquely positioned to execute its NPM mandate, without any legislative amendments to its principal Act. To fulfil the functional aspect of its NPM mandate, it can invoke its broad constitutional and legislative powers, including the power to 'monitor and assess the observance of human rights' and 'investigate and report on the observance of human rights', to monitor all places of deprivation of liberty.[205] As regards the JICS, it has a legislative mandate to inspect and

[203] Principles relating to the Status of National Institutions op cit n 197.
[204] Sections 78 & 79 of the Act
[205] Sections 184(1)(*c*) & 184(2)(*a*) of the Constitution op cit n 72.

report on the treatment of persons deprived of liberty and the conditions in which they are kept by the Department of Correctional Services.[206]

In addition, partly because they were adopted before the ratification of the OPCAT, existing regulatory instruments that govern the operations of designated oversight bodies were not developed with the OPCAT mandate in mind and, as a result, are not designed, in their current form, to facilitate the effective execution of NPM functions. This conclusion is guided and reinforced by the observation that, as oversight and accountability organs, apart from the SAHRC, which was not established to oversee any specific department, only the JICS has a statutory mandate to conduct preventive visits in a regular, proactive and sustained manner, as envisioned by the OPCAT.

Even in the context of the SAHRC, and its unique position and circumstances, it is significant to note that while it can invoke its existing constitutional and statutory mandate to conduct preventive visits to all places of deprivation of liberty, there are subtle differences and nuances between the mandates of the SAHRC and the NPM. First, while the SAHRC is mandated to promote respect for a broad range of fundamental human rights and freedoms, the mandate of the NPM is framed in significantly narrow and specific terms: the prevention of torture and other forms of abuse and ill-treatment.[207] Secondly, there is a glaring disparity in the nature of responsibilities accorded to these two human rights organs: While the South African Human Rights Commission Act 40 of 2013 requires the Commission to execute a diverse range of responsibilities in the fulfilment of its mandate, the OPCAT establishes specific, interrelated and interdependent responsibilities for the NPM.[208] These are the obligations to frequently asses the treatment of persons deprived of liberty, and develop post-monitoring reports with targeted recommendations to duty bearers, and make inputs on existing or draft legislations, to, arguably, influence national legal and policy outcomes and decisions.[209]

[206] Section 85(2) of Correctional Services Act 111 of 1998 .
[207] Section 184 of the Constitution op cit n 72. See also s 2 of South African Human Rights Commission Act 40 of 2013 .
[208] Sections 13 -16 of the South African Human Rights Act 40 of 2013.
[209] Article 19 of the OPCAT op cit n 1 .

In the case of the Office of the Military Ombud, it is empowered to investigate only complaints lodged in writing.[210] The office, therefore, does not have the mandate or legal authority to initiate investigations on its own volition. It has to wait for a formal, written complaint to be lodged to facilitate the exercise of its oversight and accountability functions. In addition, it does not have legislative mandate to conduct preventive visits to military detention facilities. This is inconsistent with the prescripts of the OPCAT, which requires NPMs to proactively and regularly examine the treatment of individuals deprived of their liberty through, inter alia, preventive monitoring and visits.

The Office of the Health Ombud, as another NPM designated body, was established in 2016 through a ministerial action, and on the basis of the National Health Act of 2003.[211] It has neither an independent statutory framework, nor a clear legislative mandate of its own. The National Health Act locates the Office of the Ombud within the OHSC, whose mandate is defined in s 78 of the Act, 'to consider, investigate and dispose of complaints relating to non-compliance with prescribed norms and standards'.[212] Of the five designated bodies, the Office of the Health Ombud seems to be the least developed, as it is regarded as a programme, division within the OHSC.[213] This has, left the Office of the Heath Ombud as an amorphous institution, without any clear, distinct and separate mandate. According to the Office of the Health Ombud, 'the current legislative framework that located the Health Ombud in the OHSC has proven to be a challenge and requires urgent intervention by processing the Health Ombud Bill'.[214] In the light of the OPCAT requirements, these observations raise concern about the desirability of designating the Office of the Heath Ombud to serve as part of the NPM of South Africa. They also raise questions about its readiness and capacity to serve as part of the NPM.

The IPID was established to, inter alia, enhance transparency and accountability over the provision of policing services by the South African Police Service and Municipal Police Services.[215] Its mandate is embodied in s 28 of the Independent Police Investigative Directorate Act 1 of 2011, and includes the obligation to investigate, inter alia, incidents of

[210] Section 4 of Military Ombud Act 4 of 2012 .
[211] *Annual Report of the National Preventive Mechanism of South Africa* 2020/21 at 18.
[212] *Annual Report of Office of the Health Ombud of South Africa* 2018/19 at 8 (*Health Ombud Annual Report*) See also https://ohsc.org.za/who-we-are/#main-areas-of-work.
[213] Ibid at 8.
[214] Ibid at 17.
[215] Section 2(*g*) of the Independent Police Investigative Directorate Act 1 of 2011.

deaths in police custody or as a result of police actions, rape by a police officer, and complaint of torture or assault against a police officer. The IPID relies, partly, on police officers to report the occurrence of these incidents. To facilitate effective police cooperation and assistance, the Act establishes specific reporting obligations for police officers. Therefore, through the investigation of abuse and misuse of policing powers – in what the Act envisages as a reactive rather than proactive system, the mandate of the IPID, as police oversight and complaints organ, is designed to foster police accountability and the provision of rights-compliant policing services in the country. Distinctively, as presently formulated, the IPID does not have the mandate to conduct preventive visits to police custody facilities and strengthen the prevention of torture and other forms of abuse and ill-treatment in police custody facilities. The designation of the IPID as NPM now requires it to monitor all police custody facilities without any legislative basis. As indicated earlier, the OPCAT envisages the establishment of a torture prevention system that is based on preventive visits to all places of deprivation of liberty, that is also proactive and sustained.

In addition, existing oversight mechanisms do not cover all facilities that fall within the mandate of the NPM in terms of the OPCAT. This include immigration-related detention facilities, over which there is no specific statutory oversight mechanisms. Furthermore, the applicable oversight system of the management of Child and Youth Care Centres in the country does not prescribe, or envisage, regular and sustained monitoring of all Child and Youth Care Centres. Section 31 of the Child Care Act 74 of 1983, which establishes an independent oversight system, uses permissive phrase ‘may enter’, in making provision for preventive visits. Therefore, to give full effect to the requirements of the OPCAT, and ensure a holistic and coordinated approach to the prevention of torture in the country, legislative intervention is required to establish new mechanisms, under the NPM system, to fill existing monitoring and oversight gaps in respect of these institutions.

Furthermore, there are concerns about the extent to which some of the existing statutory instruments that regulate the affairs of designated bodies are constitutionally compliant. The Constitutional Court has, for instance, declared some provisions of the IPID Act of 2011, which provide for the statutory framework that governs the establishment, mandate and operation of the IPID, unconstitutional. It established this on the basis that the provisions, inter alia, fail to guarantee and safeguard the IPID’s independence and insulate it from

executive and political control.[216] It is important to note that parliament has, to give effect to the Constitutional Court judgment, ordered remedial amendments to the principal Act, to be operationalized on a date 'to be determined by the President by proclamation in the *Gazette*'.[217] However, although the Amendment Act was gazetted on 3 June 2020, the President is yet, at the time of writing this study, to operationalise the Amendment Act. This is despite the existence of a constitutional provision that requires all constitutional obligations to be executed diligently and without delay.[218]

The Constitutional Court has also declared some provisions of the Correctional Services Act of 1998 unconstitutional because they fail to protect the JICS from political influence and interference.[219] Parliament was given 24 months to remedy the defects giving rise to the constitutional invalidity.[220] However, although parliament is expected to amend the Act in accordance with the Constitutional Court order, at the time of writing this study, it had not corrected the defects identified by the court.

It is critical to underscore that, in these two separate judgments, the Constitutional Court did not examine and make a finding on the overall institutional suitability of either the IPID or the JICS to serve as part of the NPM, in accordance with the OPCAT requirements. The legal question before the court was, in both instances, limited to the issue of the independence of these oversight institutions from the control and influence of the department they were established to oversee, not whether, or the extent to which, they are institutionally-compliant with the OPCAT requirements. Although it is one of the defining features of an NPM under the OPCAT system, the independence of designated bodies is only one of the requirements of the OPCAT. As a result, in the light of the mandate-relevant legislative flaws and shortcomings highlighted in the preceding discussions, it seems likely that, should the court be called upon to determine the overall suitability of designated bodies to serve as the NPM in terms of the OPCAT requirements, it will point out existing legislative gaps that undermine the effective operation of the NPM.

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[216] *McBride V Minister of Police & Another* 2016 (2) SACR 585 (CC) para 44.
[217] Section 3 of Independent Police Investigative Directorate Amendment Act 27 of 2019.
[218] Section 237 of the Constitution places an express obligation on duty bearers to ensure that all constitutional obligations are fulfilled diligently and without delay.
[219] *Sonke* supra n 11 at 130.
[220] Ibid 133.

In conclusion, in the absence of an independent legislative tool that regulates the operation of the NPM, legislative amendments may be necessary to align the overall and specific objectives, the mandate and functions of all NPM designated bodies, as set out in existing legislative frameworks that govern their operations, with the requirements of the OPCAT. Legislative intervention, as will be discussed later in this study, is also required to clearly articulate other important aspects, such as sources of funding and selection and appointment processes.

Operational and financial autonomy

In addition to the need for an independent legislative framework, the other elements of functional independence in the context of an NPM, have been identified as operational and financial independence. An NPM should be operationally independent. It should not be subjected to the institutional control of the executive arm of government.[221] The law should also explicitly prohibit the executive arm of government from interfering with the mandate and functions of an NPM.[222]

As highlighted briefly in the preceding discussion about the necessity and significance of legislative autonomy and independence, the Constitutional Court has already established that the JICS and the IPID, in their current formulation, do not have the requisite independence from political influence and interference. Although the court ordered remedial actions in both cases and, in one instance, underlined that '[i]ndependence is an inherent characteristic of a successful oversight, or watchdog, entity and is crucial in ensuring effective oversight', legislative amendments to facilitate and sustain the operational and structural independence of these two organs have yet to be effected, in the case of the JICS, or operationalised – in relation to the IPID.[223]

Notably, in the context of the IPID, the Constitutional Court was concerned, inter alia, that s 6 of the IPID Act confers the Minister of Police extensive political power over the Executive Director of the IPID, including the power to discharge him from his office without parliamentary oversight and scrutiny.[224] This, the court reiterated, is incompatible with the

[221] United Nations Human Rights op cit n 8 at 15.
[222] Ibid.
[223] *Sonke* supra n 11 para 52.
[224] *McBride* supra n 216 para 38.

constitutional concept and vision of the independence of a national oversight body, and amounts to inappropriate political management of the IPID.[225] Regrettably, s 5(7) of the Military Ombud Act of 2012 empowers the President to remove the Ombud or the deputy Ombud from office, without parliamentary oversight. In addition, the section does not envisage, or make provision, for parliamentary involvement or consultation in the selection and appointment of the Ombud by the President. These conditions, in line with the concern of the Constitutional Court in the relation to procedure for the removal from office of the Executive Director of the IPID, arguably, create room for the President to invoke partisan political considerations and influence and appoint a candidate, or remove an incumbent, without parliamentary oversight, and the concomitant safeguard it offers from abuse and misuse of public power.

As regards the Office of the Health Ombud, the fact that it is located within the OHSC, as its division, has significantly diminished its independence and overall effectiveness. Existing reports indicate that its lack of independent existence has created 'a non-coherent day to day operations and governance dilemmas'.[226] It is observed that the Office must be separated from the OHSC to strengthen its structural and operational autonomy and improve its role and functioning.[227]

In discussing the concept of independence it should be noted that, although the OPCAT does not explicitly allude to it, perception of independence is key to the effective execution of the mandate of a national institution. In particular, public confidence and trust in the independence of a national torture prevention mechanism is critical to its effective functioning. This is partly because the mechanism relies on key role players, such as civil society, the media and public for complaints and other information, support and cooperation to execute the core of its mandate. It is also important to note that, in examining the extent to which a national oversight and preventive mechanism is independent, operational independence and the imperative of ensuring that it is insulated from political control and governmental influence do not mean that the mechanism should be insulated from political accountability.[228] Accountability is one of the important norms embodied in the

[225] Ibid.
[226] *Annual Report of the Health Ombud* op cit n 212 at 8.
[227] Ibid at 3 & 13.
[228] This point was generally made by the Constitutional Court in the context of the IPID in *McBride* supra n 216 para 28.

Constitution.[229] Furthermore, as a quasi-state organ that was established and is funded by the state – and which does not clearly fall within the traditional distinction between state and non-state institutions – it is imperative for the NPM, while maintaining a clear distance between itself and the state, to establish and sustain a relationship of cooperation and trust with government.[230] This is important to, inter alia, strengthen the extent to which the state effectively implements its recommendations and address its observations. Moreover, art 22 of the OPCAT requires NPMs to 'enter into a dialogue' with duty bearers, to facilitate the implementation of their recommendations.

An NPM should also be financially independent.[231] Like all national human rights and accountability organs, it should have a budgetary framework, and be provided with the resources necessary to facilitate the effective execution of its mandate. Financial autonomy is foundational to the effective and independent discharge of an NPM's mandate. The significance of safeguarding the financial autonomy of a national institution is further articulated by the Paris Principles, which reiterates that:

'National institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.'[232]

Since it was launched in July 2019, the NPM has developed and published two annual reports. The reports indicate that the NPM is facing financial and human resource challenges.[233] This challenge is reinforced by the large number of places of deprivation of liberty in the country – 1901 in total – which the OPCAT requires the NPM to regularly visit, to strengthen torture prevention, and promote a rights-based approach to the use of detention.[234] For instance, as the coordinating organ, and to support the execution of its NPM coordination – not functional – role, the SAHRC reports that, for the three fiscal years ending

[229] *McBride* supra n 216 para 28.
[230] R Murray op cit n 3 at 500.
[231] United Nations Human Rights op cit n 8 at 16.
[232] Principles relating to the Status of National Institutions op cit n 197.
[233] *Report of the South African Human Rights Commission* op cit n 11 at 15.
[234] *Annual Report of the National Preventive Mechanism* op cit n 211 at 11.

in March 2022, it received 'a nominal, ring-fenced' budget of R1.6 million; R2.4 million and R2.6 million.[235]

No financial resources have been provided to the designated organs to carry out their functional roles. This absence of additional resources to support the fulfilment of new, NPM-related functional obligations, beyond what designated bodies are receiving in terms of their pre-designation budgetary framework, has placed designated institutions in a scenario in which they have to utilise their existing, pre-designation allocations to fulfil additional, NPM-induced responsibilities. While justificatory arguments can be made in favour of designating a multiple body NPM made up of pre-existing bodies, including the observation that it creates room for individual designated bodies to utilise their existing financial, logistical, administrative and human resources to execute their NPM-related functions with limited – or no – additional public funding, this approach raises at least two challenges:

First, it assumes, without due regard to national-specific complexities and challenges and without any focused, experimental or data-based assessment of the relevant institutions, that designated bodies, operating within a framework of a pre-designation mandate, strategic framework and operational priorities are capable of effectively carrying out additional NPM-inspired obligations, without supplementary human and financial resources.

Secondly, the broad nature of places of deprivation of liberty that fall within the preventive mandate of the NPM, as envisaged by art 4 of the OPCAT, means that existing oversight mechanisms do not cover all places of deprivation of liberty. This means that there are monitoring gaps within the existing oversight and accountability arrangement, particularly in relation to immigration detention facilities, over which there is no specific, regular monitoring and oversight system in place. Requiring designated bodies to utilise their pre-designation frameworks and arrangements to execute the NPM mandate, places detention facilities such as immigration-related detention facilities beyond the regular, preventive visits and protections envisaged by the OPCAT.

In addition, within the current architecture, the IPID and the Office of the Military Ombud, as discussed earlier, are not vested with the power to conduct preventive visits to police custody

[235] Ibid 15.

facilities and military detention facilities, respectively. It is not surprising, therefore, that the NPM continues to emphasise that it needs to be allocated resources to support the fulfilment of its core but basic obligations. This includes resources required to, inter alia, recruit, train and capacitate new personnel, procure expert services, cover monitoring-related travel costs across the nine provinces, and develop and disseminate advocacy-related materials.[236]

This apparent lack of financial and human resources has attracted the attention of international oversight bodies, including treaty organs within the UN human rights system. For example, the Committee Against Torture has expressed concerns about the SAHRC's lack of adequate financial and human resources to fulfil its obligations, including NPM-related responsibilities.[237] In particular, it has noted that it is 'concerned about the limitations currently faced by oversight bodies in terms of mandates, budgets and institutional independence from the government departments that are supervised', and called upon South Africa to ensure that it enacts 'legislative amendments for bodies that will form part of the national preventive mechanism under the Optional Protocol'.[238]

It is significant to note that the absence of financial resources to support the effective implementation of the OPCAT is inextricably linked to the absence of an independent legislative framework that would define not only the mandate of the NPM, but also its sources of financial resources.

Independence of Personnel

Independence of an NPM's personnel is established in the text of the OPCAT as the other distinct independence requirement with which a state party must comply in the establishment and capacitation of an NPM, in addition to functional independence. In particular, the selection and appointment process of NPM members and staff should be guided by principles of openness, inclusivity and transparency, and be consistent with an established criteria. As a national institution, the appropriate appointing authority for NPM members, should be the legislature. Although the involvement of legislative organs in the appointment of NPM members is not a panacea, partly because the process will not necessarily be free of political

[236] *Report of the South African Human Rights Commission* op cit n 11 at 15.
[237] Committee Against Torture op cit n 11 para 26.
[238] Ibid paras 24 & 25.

manipulation and heightens the risk that the eventual outcome is simply a reflection of the party political make-up of the legislature, appointment by legislative organs has the benefit of creating greater appearance and assurance of a more transparent and independent process.[239]

As regards the appointment of NPM personnel, it is imperative to ensure that key appointment-related aspects such as membership criteria are clearly articulated in a public document, preferably a relevant regulatory instrument, such as the statutory tool on the NPM.[240] The statutory instrument should, according to the SPT, clearly 'specify the period of office of the members of the NPM and any grounds for their dismissal'.[241] The periods of incumbency, which may be subject to renewal, should be sufficient to facilitate the independent operation of the NPM.[242]

In the context of the NPM of South Africa, the designation of a multiple body NPM made up of pre-existing oversight bodies, makes it difficult to comply with some of the requirements explained above. As will be discussed in the next chapter, this challenge, together with other factors and characteristics associated with a multiple body NPM, illustrate that greater reflection and consideration need to be paid to the question of whether a multiple body system is ideal for South Africa. In addition, the absence of an independent regulatory tool that governs the operation of the NPM including, inter alia, applicable selection and appointment criteria, arguably undermines the OPCAT requirement of personnel independence.

[239] R Murray 'National Human Rights Institutions. Criteria and factors assessing their effectiveness' (2007) 25 *Netherlands Quarterly of Human Rights* 197.
[240] Steinert (2014) op cit n 13 at 18.
[241] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 'Guidelines on National Preventive Mechanisms' (2010) Basic Principle 9.
[242] Ibid.

CHAPTER FOUR

SOUTH AFRICA'S PREFERRED NPM MODEL: A CRITICAL ANALYSIS

Introduction

In the previous chapter, this study explored the extent to which South Africa's NPM designated bodies comply with the OPCAT requirements of functional independence and independence of personnel. It has emerged that statutory intervention is required to address apparent legislative gaps and shortcomings that undermine the independence of the NPM, as envisioned by the OPCAT. With a view to strengthening the effective implementation of the OPCAT and its objectives, this chapter examines the suitability of South Africa's chosen NPM model and the complexity that underpins it. At the outset, it is important to reiterate that, apart from articulating normative guidance about the core constituent features of NPMs, the OPCAT does not prescribe any preferred model. It is, therefore, the prerogative of state parties, at least one year after ratification or accession, to adopt models that are suitable to their national needs and contexts. Across the world, there are four broad models in operation: National Human Rights Institutions or Offices of Ombudsperson; NHRIs or Offices of Ombudsperson together with civil society or individual experts; a number of existing constitutional or statutory organs and; newly developed bodies.[243]

Complexity and suitability of South Africa's chosen model

As has already been highlighted, a multi-body mechanism consisting of five pre-existing oversight bodies has been designated to serve as South Africa's NPM, with the SAHRC performing both functional and coordinating roles. While it is difficult to postulate and interrogate the key factors that motivated the government's decision to prefer a multi-body system, this model is not unique to South Africa, and ultimately has its strengths and challenges. Among the core benefits attributable to this model is that, if effectively

[243] Steinert (2014) op cit n 13 at 5.

coordinated under conditions in which all designated bodies have incorporated the OPCAT requirements and responsibilities into their working methods, it could allow designated bodies to utilise their existing human, logistical and administrative resources to facilitate the fulfilment of their NPM mandate, with minimum additional public resources. In the context of South Africa, however, as discussed in the previous chapter in relation to the need for financial autonomy, there are places of deprivation of liberty in the country over which there are no existing, specific statutory oversight mechanisms. Currently, for instance, it is the SAHRC that invokes its broad constitutional and statutory powers to monitor Immigration-related detention facilities in the country, to ensure their management complies with South Africa's domestic and international human rights obligations. These monitoring gaps need to be addressed under the auspices of the NPM, if a multi-body model is to actualise this benefit. Another benefit associated with a multiple-body system is manifested in the broad powers of the SAHRC to conduct preventive visits to all places of deprivation of liberty. The practical impact of the Commission's unique powers is that one place of deprivation of liberty could potentially be visited by at least two separate entities. This can minimize gaps in protection from torture, and further strengthen the overall prevention of torture in places of deprivation of liberty.

Inevitably, however, there are clear and discernible factors that militate against the designation of a multiple body NPM and which have, one could argue – partly by reflecting on the performance of the NPM thus far – undermined the effectiveness of South Africa's NPM and its transformative potential. First, primarily because of the pioneering character of the OPCAT and its objectives, the designation of a multi-body NPM that is made up of pre-existing bodies requires 'profound changes in the work of pre-existing entities to ensure that NPM work becomes an integral part of their activities'.[244] This requires legislative amendments to regulatory instruments that govern the establishment, activities and operation of designated entities, with the inclusion of, inter alia, express references to the OPCAT and NPM obligations. It is also necessary to revise relevant soft-law documents, such as strategic frameworks, legal guidelines and regulations, and other operational documents, to ensure NPM work is effectively translated into the programmes and operational areas of the entities.

[244] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Visit to the United Kingdom of Great Britain and Northern Ireland undertaken from 9 to 18 September 2019: recommendations and observations addressed to the National Preventive Mechanism* (2020) at 11.

This focused and targeted intervention to ensure the legal mandates and operational areas of all designated bodies reflect new, NPM-related obligations has not happened, following the designation, in 2019, of five separate oversight bodies to serve as South Africa's NPM. All designated bodies continue to operate in terms of their pre-designation arrangements. And, as highlighted in the previous chapter, as presently formulated, the IPID and the Office of Military Ombud do not have monitoring mandates embodied in their current legislative frameworks, while the Office of the Heath Ombuds is a division within the OSHC and does not have a separate legal identity or a clear mandate. This has significantly diminished the effective functioning of the system, and undermined South Africa's full compliance with its obligations under the OPCAT. Its full impact is exemplified by the 'business as usual' pattern in which designated bodies continue to operate, more than three years after designation and launch. For instance, with the exception of the SAHRC – and the JICS and the Office of the Health Ombud to some extent, none of the other designated statutory bodies, in their formal annual and activity reports, make any references to their NPM work and mandates.[245] In addition, only the JICS reflects on the number of preventive visits it has conducted in fulfilment of its NPM-related obligations, although it does not explicitly state this.[246]

Even in the context of the JICS, however, it is important to emphasise that the development of oversight reports with statistical data and analysis of the number of inspections it has conducted in respect of correctional facilities in the country within a specific reporting period pre-dates the ratification of the OPCAT and its concomitant designation to serve as part of the NPM.

One must reflect, however, on the question of whether it is not the responsibility of the SAHRC, the coordinating organ within this multi-body system, to receive and collate relevant data and statistical information and publish it in the NPM's annual reports. Thus far, the NPM has developed two annual reports. Surprisingly, however, the two annual reports do not contain any statistical data or information about the number of preventive visits

[245] I must observe that a very limited number of the annual reports of the JICS, Office of the Health Ombud and Office of the Military Ombud are publicly accessible. This is partly because, at the time of developing this and the previous chapters, the websites of these three oversight and accountability bodies were not functioning. I have been monitoring the websites from the first week of December 2022. For instance, in one of its quarterly performance report of 1 July to 30 September 2022, the JICS notes that its website 'has been offline for several weeks and this has been an intermittent problem for the past year'.
[246] See, for instance, *Second Quarterly Performance Report of Judicial Inspectorate for Correctional Services* 1 July – 30 September 2022 at 9.

conducted by designated bodies in the execution of their preventive mandate in terms of the OPCAT. Beyond analysis based on visits conducted by a 'small NPM unit', located within the Office of the Chief Executive Officer of the SAHRC, and which operates both as the 'NPMs secretariat and a national monitoring team', and information provided by the SAHRC's nine provincial offices, that 'support' the execution of the NPM's preventive visits, no concrete information about the inputs and contributions of the other designated bodies is contained in the reports.[247]

This absence of core, prevention-related information could be due to either a significant shortcoming in the existing coordination and reporting systems and methods, or a dearth of reportable data and information, primarily because designated bodies have not incorporated NPM responsibilities in their working methods, and therefore have no information to report. Available information supports the latter observation and scenario. For instance, the 2019/20 annual report of the NPM explicitly indicates that all NPM-related preventive visits – referred to as 'baseline visits' in the report, since July 2019/20, when the NPM was launched up to at least the reporting date, have been conducted by a small NPM Unit, structured within the SAHRC, and which serves as a national monitoring team.[248]

In addition, in the 2020/21 annual report of the NPM, which substantially reflects informative notes embodied in the 2019/20 report, the NPM observes that, without providing any initial or primary information about the number of preventive visits conducted in the period under review, 'additional operational and performance information on individual NPM institutions can be found in their respective annual reports covering the period under review'.[249] There is no NPM-related information, or even references to NPM obligations, in the relevant annual report of the IPID, while available information about the activities of the Office of the Military Ombud during the relevant period, being an investigative organ, contains statistical information about the number of investigations it has conducted following formal complaints, and makes extremely limited refences to its NPM work.[250] The relevant annual report of the Office of the Health Ombuds is not publicly available for assessment, while the JICS, as

[247] *Annual Report of the National Preventive Mechanism* op cit n 211 at 15.
[248] *Report of the South African Human Rights Commission* op cit n 11 at 26.
[249] *Annual Report of the National Preventive Mechanism* op cit n 211 at 10.
[250] Parliamentary Monitoring group 'Office of the Military Ombud 2020 Annual activity Report and update on investigations conducted' available at: https://pmg.org.za/committee-meeting/33862/, accessed on 10 January 2023. See also *Annual Report of Independent Police Investigative Directorate* 2020/21.

discussed above, continues to report on oversight visits, as part of its pre-designation and pre-existing statutory obligations, not necessary as part of the NPM.

This absence of statistical information about the number of visits conducted by the NPM in the execution of its preventive mandate, and concrete analysis about conditions of detention and the treatment of persons deprived of liberty is antithetical to the preventive idea and system that underpins the OPCAT. It also has a significant impact on the nature, quality and number of post-monitoring recommendations that the NPM can develop and dialogues it can enter into with duty bearers about their possible implementation, as required by art 22 of the OPCAT. Further, it vitiates the extent to which key stakeholders such as civil society organisations and the media can engage in advocacy-related activities aimed at supporting the findings and observations of the NPM, at domestic, regional and international advocacy opportunities and processes.

Furthermore, a focused analysis of – the publicly accessible – annual reports of designated bodies, combined with the absence of consolidated information in the NPM annual reports about NPM-related activities of designated bodies, indicate that the OPCAT-mandated obligations and responsibilities have not been given the prominence they deserve, partly because designated bodies are working within pre-existing legislative mandates. The complexity and gaps that underpin this multi-body model, in the context of South Africa, has been expressly acknowledged by the NPM in its observation that compliance with the OPCAT requirements 'may not be achieved immediately'.[251] This phenomenon has negated the extent to which South Africa is fully compliant with its international human rights obligations under the OPCAT.

Secondly, there is an implicit requirement for the OPCAT state parties to conduct a consultative, pre-designation, and in respect of each body identified for potential designation, capacity and preparedness-evaluation exercise. This is aimed at establishing their individual ability to comply with the OPCAT requirements and effectively implement international human rights standards and obligations. Although this suitability evaluation exercise is not explicitly required by the OPCAT, art 17 of the OPCAT requires state parties to designate their NPMs at least one year after the entry into force of the OPCAT or 'of its ratification or

[251] *Annual Report of the National Preventive Mechanism* op cit n 211 at 20.

accession'.[252] By allowing state parties a period of up to year after ratification or accession, this research paper, envisages the need for state parties to, within a period of one year, develop the necessary structures and environment, including an applicable institutional framework, and conduct all relevant pre-designation assessments, where necessary.

In addition, art 11 of the OPCAT defines the mandate of the SPT to include advising and assisting state parties in the establishment and designation of NPMs.[253] The SPT has expertise and intricate knowledge and understanding of the OPCAT, its requirements and state obligations. Arguably, because of the SPT's unique position and knowledge, and perhaps having regard to the fact that the OPCAT does not prescribe any organisational format for NPMs, the advisory and assistance role envisaged by art 11, plays a key role in the establishment of NPMs. It strikes a balance between the imperative of allowing state parties to establish NPMs that are suitable to their national needs, on the one hand, and the need to ensure designated bodies comply with the OPCAT requirements upon their designation, on the other. This conclusion is guided by the observation that only those institutions that fully comply with the requirements of the OPCAT can be designated as NPMs.[254]

There is no evidence that South Africa conducted any pre-designation evaluative exercise and assessment of the designated bodies, to determine their suitability for designation and level of compliance with the OPCAT specifications. Moreover, although it is noted that 'the government's position was that consensus was required on the structure of its NPM before formal ratification', and although several pre-designation 'workshops were held involving the SAHRC, national and international NGOs and various government departments', there is no evidence that the government consulted the SPT to solicit its pre-designation advice and assistance, in accordance with the provisions of art 11 of the OPCAT.[255]

This has led to the adoption of a model in which a significant number of designated bodies do not comply with the OPCAT requirements, more than three years after designation and launch of the NPM. This is contrary to South Africa's binding international law obligations in terms of the OPCAT to establish and capacitate an effective NPM.

[252] Article 17 of of the OPCAT op cit n 1 .
[253] Ibid art 11.
[254] Evans & Dale op cit n 14 at 50.
[255] *Report of the South African Human Rights Commission* op cit n 11 at 6.

Thirdly, a further challenge associated with a multi-body organ consisting of pre-existing bodies is resource-related. The designation of bodies with pre-designation oversight mandates, and operational budgets to support their execution, can tempt duty bearers not to allocate the requisite additional financial and human resources to pre-existing bodies to support the execution of additional, the OPCAT-obligated tasks, perhaps on the supposition that existing resources are sufficient. This has the impact of negating the overall effectiveness of the NPM. As explained in the previous chapter, the SAHRC was allocated, to facilitate the fulfilment of its coordination role, 'a nominal, ring-fenced' budget of R1.6 million; R2.4 million and R2.6 million, for the three fiscal years ending in March 2022.[256] No financial resources have been provided to designated bodies to execute their functional obligations and tasks in terms of the OPCAT. This absence of a specific allocation to support the discharge of functional obligations is inconsistent with South Africa's responsibilities to provide the NPM with resources and safeguard its financial and operational independence, in accordance with art 18 of the OPCAT.

A further concern with a multi-body system lies in its potential to engender disparity in monitoring methodologies, and its ability to weaken the institutional visibility of the NPM, considerations that have been acknowledged by the NPM.[257] Mainly due to disparity in the history and working methods of the individual designated bodies, coupled with the absence of a formal legislative tool applicable to the NPM, the methodologies of monitoring activities and their outcomes may vary from one designated body to the other. As a result, the effective functioning of a multi-body NPM requires strong and effective coordination, and well-elaborated strategic direction.[258] Currently, partly because very few designated bodies are conducting preventive visits and monitoring, and because many issues are still unresolved, more than three years since the NPM was launched, it is not possible to assess the extent to which there is, in practice, disparity and variance in the methodologies of monitoring.

In addition, because a multi-model NPM made up of pre-existing bodies brings together institutions with different background and pre-designation statutory mandates, it may have

[256] *Annual Report of the National Preventive Mechanism* op cit n 211 at 15.
[257] *Report of the South African Human Rights Commission* op cit n 11 at 18.
[258] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Visit to the United Kingdom of Great Britain and Northern Ireland* op cit n 244 at 11.

the impact of weakening the institutional visibility of the NPM, as a cohesive and collegial organ. The designation of multiple bodies with pre-existing mandates inevitably requires them to continue executing their original mandates, and at the same time also fulfil new, additional OPCAT-mandated tasks. This heightens the risks that public familiarity – particularly key constituents such as detainees, civil society organisations and the media – with individual designated bodies and their work, including their respective pre-designation mandates, lessens and impairs the visibility of the NPM as a cohesive organ. In particular, there is a real risk that the public will continue to envisage designated bodies and their mandates and work in isolation, as they existed pre-designation. Institutional visibility of the NPM, and public awareness about its existence and work, are key to the fulfilment of its preventive mandate. While conscious that institutional visibility and reputation take time to build and may require inputs by various role players, the extent to which the NPM of South Africa is institutionally visible is not clear. Institutional measurement of the NPM's visibility is further made difficult by the limited overall institutional development of the NPM, partly actuated by the complexity that informs a multi-body system.

In conclusion, although, in the absence of the OPCAT prescription about organisational structures, it is the prerogative of state parties to adopt NPM models that reflect their needs and are suitable to their national contexts, the adoption of a multi-body system in South Africa has not produced an effective NPM. In particular, the absence of a formal legislative tool applicable to the NPM, and the failure thus far to expressly integrate NPM-related tasks into the statutory frameworks that govern the operations of designated bodies, coupled with limited resources, have affected the effective discharge of the NPM's preventive mandate. More than three years since the NPM was launched, it is important for duty bearers to reflect on its capacity and suitability for NPM purposes, and ways in which they could enhance its preventive impact and the overall execution of its mandate.

A single-body NPM as an alternative solution for South Africa

The NPM's current set up is not fully compliant with the requirements of the OPCAT. There is need for targeted interventions that are aimed at identifying and addressing the current challenges, including structural and systemic gaps and challenges, that underpin the NPM and act as barriers to its effective functioning. Apart from legislative interventions aimed at strengthening the functioning and effectiveness of the NPM as currently constituted, an alternative solution resides in the potential adoption of a single-body NPM. This suggestion for a consideration of a single-body NPM for South Africa is supported by, and partly based on, the observation that the NPM, from the gaps and flaws with which it is faced both at the legislative and institutional levels together with its limited activities, is still in the early stages of the institution-building phase of its development, more than three years after launch.

It is important to note that, while this approach will require South Africa to re-visit its original decision, there is no guarantee that the designation of a single-body organ will fully comply with the OPCAT stipulations. Irrespective of its structure or organisational format, the effective functioning of a national torture prevention mechanism and the extent to which it complies with international standards, being a quasi-state body, depends on, inter alia, the existence of effective, sustainable and results-oriented support by the state. However, the establishment, capacitation and coordination of a single body with, inter alia, its own legislative basis, strategic and budgetary frameworks, coupled with its own human, administrative and logistical resources, provides the ensuing body with an enhanced chance of effectively executing its mandate. The utility of a single-body organ, whose existence and operation is partly governed by the requirements of an international human rights instrument, is further evident in the observation that it is significantly easier for a single national body to comply with binding domestic and international requirements, than it is for multiple bodies, with distinctively different backgrounds and histories.

While conscious that the restructuring, or designation, of a national institution might involve a lengthy national political process, in the context of South Africa and its NPM, there is a suitable existing oversight and accountability organ, with monitoring experience, that can be – or one could argue should have been – designated as the NPM. That institution is the JICS.

Apart from the need to develop its own legislative instrument for, inter alia, stronger and more independent regulation of its affairs, the JICS is uniquely positioned to serve as the NPM of South Africa, within the framework of a single-body model. Consider the following factors and conditions that justify this reflection:

Of the five designated oversight bodies, it is the only organ with an express legislative mandate to conduct preventive monitoring in all correctional centres in South Africa, considered as one category of places of deprivation of liberty in terms of the OPCAT; it has, at present, a national presence with 279 employees and 32 vehicles in its fleet and therefore has an existing human, administrative, logistical capacity and resources, which can be reinforced to strengthen the effective execution of any additional mandate; it has experience in conducting preventive visits to correctional facilities and in developing post-monitoring reports and; it is one of two designated oversight bodies in favour of whom the Constitutional Court has ordered their insulation from political and executive control and influence.[259] However, irrespective of whether the JICS or another oversight institution is designated as the NPM within a single-body system, the NPM needs a separate legislative tool that will define, inter alia, its mandate, independence and sources of financial resources, to strengthen the fulfilment of its mandate in a sustainable and impact-oriented manner.

In the light of this proposition for the consideration of the designation of a single-body NPM, it is important to reflect on the question of how the state is to be convinced to re-consider its original decision. The answer resides, partly, within the coordinating role of the SAHRC. The SAHRC, in its capacity as the coordinating organ within the existing model, can approach the state with clear observations about the extant flows and shortcomings in the existing framework, and a proposal as to why a single body model offers the best framework for the purpose of fostering compliance with the OPCAT requirements.

It must be noted, in conclusion, that the proposal for South Africa to appraise its original decision and consider designating the JICS as the NPM of South Africa in a single-body system does not entail the replacement or substitution of an existing oversight and

[259] *Second Quarterly Performance Report of Judicial Inspectorate for Correctional Services* 1 July – 30 September 2022 at 60 & 63.

accountability body for the NPM. In accordance with the SPT guidance that NPMs should complement and not replace existing oversight mechanisms, the designation of the JICS as the NPM will broaden and strengthen its mandate, and institutionally align it with international standards, not replace or disband it.[260]

[260] *Guidelines on National Preventive Mechanism* op cit n 241 Basic Principle 5.

CHAPTER FIVE

FAILURE TO IMPLEMENT THE NPM'S RECOMMENDATIONS VITIATES ITS OVERALL EFFECTIVENESS

Introduction

In this final chapter, the study explores the extent to which duty bearers are implementing the NPM's post-monitoring recommendations. It observes that South Africa's failure to implement the NPM's recommendations is inconsistent with its OPCAT obligations, and negates the effective functioning of the NPM. In addition, partly by drawing on the work of the SPT, it argues that, to enhance the practical effectiveness of the NPM, there is need to include civil society organisations as part of the NPM structure. The chapter will conclude the study by making a number of targeted observations and recommendations, both to the state and the NPM.

Extent to which South Africa is implementing the NPM's recommendations

NPMs play a key role in implementing the objective of the OPCAT, the prevention of torture and other forms of abuse in places of deprivation of liberty. The OPCAT envisages a dual, complementary mechanism of regular and independent monitoring of places of deprivation of liberty – consisting of the SPT and NPMs. However, in practice, owing to, inter alia, their national presence and capacity to conduct regular visits in a sustainable manner, and their intimate knowledge and understanding of unique national contexts, the fulfilment of the objectives of the OPCAT, and the preventive idea that underpins it, is largely dependent on the effective functioning of NPMs and their processes. As a result, ensuring that their post-monitoring findings and recommendations are implemented is critical to the success of the OPCAT and its objectives. The significance of implementing the recommendations of NPMs to the OPCAT system is explicitly recognised in art 22 of the OPCAT, which enjoins states parties to 'examine' recommendations developed by their respective NPMs and 'enter into a dialogue' with them about implementation measures.[261]

[261] Article 22 of the OPCAT op cit n 1.

Partly because they are quasi-state organs with constitutional or statutory mandates, the recommendations of national human rights bodies carry a potent weight and stand a chance of finding favour and application. But this is not always the case, and the extent to which the recommendations of a national institution is implemented depends on various, national-specific conditions, including the legal effect of such recommendations, and whether they have a binding effect.

The NPM of South Africa has made a number of recommendations, in the two annual reports it has developed thus far. However, there is weak implementation, or uptake, of the recommendations by duty bearers. In its 2019/20 annual report, for instance, the NPM made various recommendations aimed at improving conditions of detention and the treatment of persons deprived of liberty.[262] However, in its 2020/21 annual report, the NPM restates and reflects on the findings and recommendations it made in its 2019/20 annual report, and emphasise that 'most of the recommendations remain unattended'.[263] This is incompatible with the prescripts of art 22 of the OPCAT, which requires South Africa to examine these recommendations and 'enter into a dialogue' with the NPM about their implementation.[264]

Non-implementation of the recommendations of the NPM also undermines the essence of establishing an NPM, strengthening the prevention of torture and other forms of ill-treatment in places of deprivation of liberty, and further vitiates its effectiveness. The ultimate purpose and objectives of establishing the NPM is defeated, and the institution is rendered ineffective, if its decisions and recommendations are not implemented. In addition, the power to develop targeted recommendations is one of three interrelated 'minimum powers' that the OPCAT explicitly vests in NPMs, together with the power to conduct preventive visits and the power to make inputs on draft or existing statutes.[265] Given the interrelated and mutually reinforcing characters of these three minimum powers, non-compliance with the recommendations of the NPM affects the effective execution of the core NPM mandate, and risks leaving the whole system ineffective.

[262] *Report of the South African Human Rights Commission* op cit n 11 at 26 – 44.
[263] *Annual Report of the National Preventive Mechanism* op cit n 211 at 24.
[264] Article 22 of the OPCAT op cit n 1.
[265] Ibid art 19.

In assessing compliance with the recommendations of the NPM, it is important to reflect on the legal effect of the recommendations of the NPM within South Africa's legal system. Currently, primarily because many issues remain undeveloped, the legal effect of the NPMs recommendations is still unclear. However, once a formal legislative instrument dealing with the NPM is adopted, it will be possible for judicial-level intervention, upon application, to establish, partly by interpreting the language, context and purpose of the provisions of the legislative tool, the extent to which the NPM's recommendations are binding on duty bearers. This observation is informed, and bolstered, by the presence of judicial precedent in this regard.[266] Furthermore, the Constitutional Court has already cautioned that, because our new constitutional order is guided by, inter alia, the rule of law, 'no decision grounded on the Constitution or law may be disregarded without recourse to a court of law'.[267]

Ideally, even without a statutory instrument that defines, inter alia, the legal effect of the recommendations of the NPM, public authorities cannot simply disregard the findings, decisions and recommendations of the NPM. This is because the rule of law, which is one of the foundational values on which South Africa is founded, requires that 'no decision or step sanctioned by law may be ignored based purely on a contrary view we hold'.[268] In addition, the Constitutional Court has observed that '[o]ur foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside'.[269]

As regards whether, in the absence of a legislative instrument applicable to the NPM, the OPCAT-mandated obligations can be classified as 'obligations sanctioned by law' or executed by those 'clothed with legal authority', South Africa is bound by International Human Rights obligations that emanate from treaties it has ratified, such as the OPCAT, or that stem from Customary International Law. Therefore, because South Africa has ratified it, obligations imposed by the OPCAT, under the UN treaty-based Human Rights system, are binding legal obligations 'sanctioned by law'. As a result, in line with the observations of the Constitutional Court, duty bearers cannot simply disregard the recommendations and

[266] The constitutional Court has, for instance, declared that remedial actions taken by the Office of the Public protector of South Africa are binding. For a more detailed discussion of the case, see *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly v Others* 2016 (5) BCLR 618 (CC).
[267] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly v Others* 2016 (5) BCLR 618 (CC) para 74.
[268] Ibid para 75.
[269] Ibid.

decisions of the NPM. Furthermore, Under Customary International Law, the prohibition against torture is a regarded as a peremptory norm from which no deviation or derogation are permitted, under any circumstances.[270] The Constitution provides that 'customary International Law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'[271] It also places peremptory obligations on 'a court, tribunal or forum', when interpreting the Bill of Rights, 'to consider international law'.[272]

Enhancing the effectiveness of the NPM: the need to involve civil society organisations as part of the NPM structure

Across the world, Civil Society Organisations (CSOs) play a key role in the prevention and combatting of incidents of torture, assisting victims and strengthening state compliance with binding human rights commitments.[273] Although the OPCAT does not explicitly mandate it, in accordance with the guidance of the SPT, there is increasing evidence that collaborative partnerships and communication between CSOs and NPMs have been critical in existing efforts to prevent and combat torture in many countries.[274] Drawing from examples of the structure and operation of NPMs in different jurisdictions across the world, the nature of cooperation and support can either be formal or informal.[275] Formal involvement entails the direct participation of CSOs in conducting preventive visits, or a performance advisory role, while informal cooperation involves supporting the NPM with a broad range of issues, including the provision of research findings and information on torture and other forms of abuse in detention facilities.[276]

The involvement of CSOs as part of NPM structures is partly based on the absence, in the OPCAT, of a predetermined organisational form or structure for NPMs, and an explicit effort to utilise the specific skills and expertise that is domestically available to enhance the skilled monitoring of specialised institutions and settings.[277] In addition, involving CSOs in NPM

[270] KM Smith 'Treaty bodies: Choreographing the Customary Prohibition against Torture' (2019) 21 *International community Law Review* 352.
[271] Section 232 of the Constitution op cit n 72.
[272] Ibid s 39(1)(*b*).
[273] United Nations Human Rights op cit n 8 at 16.
[274] Ibid.
[275] Association for the Prevention of Torture *Civil Society and National Preventive Mechanism under the Optional protocol to the Convention against Torture* (2008) at 12 - 19.
[276] Ibid.
[277] E Steinert (2014) op cit n 13 at 18.

work may have the benefit of strengthening the perceived independence of the NPM, as the 'entity may benefit from the reputation of the NGOs'.[278] CSOs can utilise their specific skills and experience and their reputation in intensifying commitments to human rights obligations to bolster and strengthen the effectiveness of an NPM.

South Africa has a robust and assertive civil society which has played an active role in establishing and sustaining the country's vibrant democratic culture.[279] In particular, civil society organisations have played a key role in strengthening accountable governance through, inter alia, targeted interventions aimed at influencing governmental policy practices and actions, strategic litigation designed to vindicate fundamental human rights and freedoms, and other advocacy-related programmes and campaigns.[280]

Apart from developing an independent statutory instrument on the NPM and strengthening its independence, there is a need for South Africa, in line with emerging international trends and as part of implementing the guidance of the SPT aimed at enhancing the effectiveness of NPMs, to include CSOs as part of the NPM structure. Given the experience and expertise, that is available within South Africa's civil society, it is important for CSOs to be involved in the work and structure of the NPM, to bolster and enhance its effectiveness.

Significantly, there are already examples in which existing oversight and accountability organs have partnered with CSOs to monitor and oversee state compliance with human rights commitments, as exemplified in the recent institution of a CSO-based structure, by the SAHRC, to partake in observing the implementation of COVID-19 regulations, developed to manage and contain the outbreak of the novel coronavirus.[281]

However, irrespective of the nature of cooperation, the process of involving CSOs in the work of the NPM must be guided by principles of transparency and openness.[282] It is also critical that the NPM itself is given a significant, or exclusive, part in selecting which CSOs to involve, in order to obviate any semblance or suspicion of governmental influence and

[278] Ibid.
[279] W Gumede 'How civil society has strengthened SA's democracy' (2018) Available at: https://www.corruptionwatch.org.za/civil-society-strengthened-democracy-south-africa, accessed on 21 January 2023.
[280] A Gossar 'Promoting the effectiveness of South Africa's NPM: the case for civil society collaboration' (2020) *APCOF research paper 28* at 9.
[281] Ibid at 5.
[282] Steinert (2008) op cit n 13 at 18.

interference.[283] In addition, the NPM must ensure there is a clear division of work and a specific definition of roles and responsibilities between itself and the CSOs, as there is a real possibility of erosion of independence, particularly perceived independence, for both.[284] Further, the NPM should also be cautious and ensure that it is not being regarded by the state as an organ that is running the agenda of CSOs, which could be detrimental to the effective execution of its mandate.[285]

Recommendations

On the basis of the findings of this study, the following recommendations are provided, with a view to enhancing the effective functioning of the NPM of South Africa.

The state should:

- Fast-track the development and adoption of a specific, independent legislative instrument applicable to the NPM, which will define, inter alia, its mandate and sources of resources;
- Provide the NPM with sufficient resources to support the effective execution of its mandate, including resources necessary to facilitate the employment and training of staff ;
- Ensure all designated bodies are institutionally compliant with the requirements of the OPCAT;
- In the alternative, re-consider its initial decision of designating a multi-body NPM, and consider the designation of the JICS as the NPM of South Africa, in a single-body system.

The NPM should:

- Continuously engage the state on its obligations to develop an independent statutory instrument that regulate its affairs;
- Continue engaging the state on the possible implementation of its recommendations, to ensure improved implementation of post-monitoring recommendations;

[283] Ibid.
[284] Ibid at 22.
[285] Ibid.

- Develop strategies for increasing public awareness of its work and its institutional visibility;
- Include statistical data and information on the number of preventive visits conducted during the reporting period;
- Ensure increased dissemination of its annual reports;
- Ensure all designated bodies have working and functional websites to, inter alia, provide the public with accessible mediums and procedures for providing them with critical information.

Conclusion

This study set out to examine whether South Africa is in breach of its OPCAT obligations to establish and capacitate an effective NPM. It has argued that existing conditions such as the absence of an independent statutory instrument applicable to the NPM, coupled with the designation of a multi body model consisting of five pre-existing oversight bodies that are not all fully compliant with the requirements of the OPCAT, as well as non-compliance with the NPM's recommendations, have vitiated the effectiveness of South Africa's NPM. It has also observed that, more than three years since the NPM was launched, many issues remain undeveloped, and that state intervention and commitment to strengthen the mandate of the NPM is required to enhance the effectiveness of the NPM, and benefit from its transformative potential. The absence of a pre-ordained organisational structure for NPMs by the OPCAT has provided South Africa with an important opportunity to designate an NPM that is reflective of its national needs and context. However, the absence of a predetermined structure also provides the an opportunity to consider the inclusion of CSOs with the NPM structure, or the designation of a single-body NPM.

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