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THE NATIONAL GUARANTOR FOR THE RIGHTS OF PERSONS DETAINED OR DEPRIVED OF LIBERTY

ESTABLISHMENT, OPERATIONS AND EVOLUTION OF THE ITALIAN NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

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Acronyms

AMIF: Asylum, Migration and Integration Fund

APT: Association for the Prevention of Torture

ASL: Local Health Authority

CAT: Committee against Torture

CPRs: Immigration Removal Centres

CSOs: Civil Society Organisations

CPT: European Committee for the Prevention of Torture

DAP: Prison Administration Department

Ddl: Draft-Law

D.L.: Decree-Law

D.lgs: Legislative-decree

D.M: Ministerial Decree

D.P.R: Decree of the President of the Republic

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ICCPR: International Covenant on Civil and Political Rights

ICJ: International Commission of Jurists

ICJ: International Court of Justice

ICRC: International Committee of the Red Cross

R.L: Regional-Law

NHRIs: National Human Rights Institutions

NPM: National Preventive Mechanism

OPCAT: Optional Protocol to the Convention against Torture

REMS: Residence for the Execution of Security Measures

SCT: Swiss Committee against Torture

SPT: Subcommittee on Prevention of Torture

TSO: Compulsory Health Treatments

UNCAT: United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

UNCHR: United Nations Commission on Human Rights

Introduction

In 2013, after many years of waiting, Italy finally established a national independent Authority for the rights of persons deprived of liberty. A few months later, the new Institution, along with territorial Guarantors operating in the field of liberty deprivation, was officially designated as the Italian National Preventive Mechanism (NPM), in compliance with the Optional Protocol to the UN Convention against Torture.

The creation of a system composed of territorial Guarantors and centrally coordinated by the national one, was precisely the original intent of Italy. However, due to the heterogeneity of the large number of territorial guarantee Institutions, the Network is still a work in progress and the NPM role is currently played exclusively by the national Authority.

Two years after the beginning of its actual operation, this work seeks to provide an early comprehensive picture of the newly established *National Guarantor for the Rights of Persons Detained or Deprived of Liberty*. By doing that, particular attention has been paid to the national Guarantor role as NPM and, specifically, to the possible establishment of the Network of Guarantors originally envisaged by Italy.

While territorial Guarantors could represent a powerful instrument to increase the NPM effectiveness, the absence of a clear regulation harmonising their structures and functions may eventually jeopardize the whole system of prevention. The final aim of this work is therefore to analyse the current status of the NPM in order to better understand its possible evolution, wondering whether the inclusion of territorial Guarantors could strengthen or weaken the role of the preventive mechanism.

Before specifically addressing the establishment of the Italian NPM, the first part of the thesis provides a general framework of the international system against torture. It is in fact through the development of such a system that the idea of preventive mechanisms to fight torture, like the national Guarantor, arose.

In 1976 Jean Jacques Gautier spoke for the first time about "*a new weapon against torture"*. Inspired by the activity conducted by the International Committee of the Red Cross, the founder of the then Swiss Committee against Torture stressed the importance of a new mechanism able to prevent, rather than react to, torture and other ill-treatments from happening.

Considered by many as unrealistic and too optimistic, after several years of advocacy, the *"Gautier proposal"* was finally realised by the Council of Europe through the establishment of the European Committee for the Prevention of Torture (CPT).

The creation of the CPT represented a real revolution. It was the first international mechanism provided with a preventive and proactive function in the field of human rights. The CPT is a non-judicial independent mechanism, operating on the premise of dialogue with States and guided by the principles of cooperation and confidentiality. Its work consists in monitoring places of detention under the jurisdiction of the Council of Europe's Member States and in reporting to their governments its observations.

On the CPT model, in the early 2000s the UN General Assembly finally adopted the Optional Protocol to the Convention against Torture. Following a long and tortuous negotiations process, by entering into force in 2006 the OPCAT created a broad international system to prevent torture based on the complementary work of a central institution, the Subcommittee on Prevention of Torture (SPT), and of domestic institutions established by Member States, the so called National Preventive Mechanisms (NPMs). The inclusion of NPMs represented the real novelty of the system, ensuring a consistent and regular, and therefore more effective, preventive action.

The establishment of the Italian NPM was the result of a long process, started in the late 1990s and ended in 2016 with the effective beginning of its operational activities. The second part of the thesis is aimed at describing the main proposals for the creation of the new Institution, at analysing its eventual establishment and its practical operations.

In Italy, since the early 2000s, several territorial Authorities have appointed guarantee Institutions for the rights of persons deprived of liberty. Despite the establishment of such organisms both at the regional and at the local level, until a few years ago Italy still lacked a central institution with a national jurisdiction and a coordinating role.

After many legislative proposals, in the light of the *Torreggiani Judgement* of the Court of Strasbourg, Italy finally set up the *National Guarantor for the Rights of Persons Detained or Deprived of Liberty* by the decree-law No. 146 of 23 December 2013.

As soon as the new Authority was established, it was designated as the Italian NPM and, in this capacity, as the monitoring mechanism of forced returns, in compliance with the European Directive 2008/115/EC. The national Guarantor's mandate therefore stems

from three legal sources of different origins: its national founding law, the UN Optional Protocol and the European "Return Directive". The competences of the new Institution are significantly extended, consisting both of reactive functions, as receiving complaints from detainees and internees, and proactive functions, carrying out its preventive monitoring activities and reporting its findings to relevant Administrations. The national Guarantor operations are specifically described in its annual Report to Parliament. The last paragraph of the second chapter analyses the main aspects contained in the Report of 2018.

The third and final part of the thesis is dedicated to the possible evolution of the Italian NPM. According to the *Note Verbale* sent to the SPT, Italy designated the "whole system" of Guarantors, composed by the national Guarantor and the territorial ones, as NPM. Such a design was aimed at creating an efficient and effective network of guarantee Institutions operating across the country and centrally coordinated by the national Guarantor. However, since their heterogeneity and the lack of some characteristics required by the OPCAT, territorial Guarantors are still not part of the NPM system. The absence of a clear and linear regulation on territorial Guarantors' structure and functions is hindering the creation of the Network.

Despite the difficulties, since its establishment, the national Guarantor is actively working for the realisation of Italy's original design. For this purpose, some first steps have been made towards the inclusion of regional Guarantors which, compared to the local ones, are closer to the OPCAT minimum requirements. Recently, the United Nations expressed some doubts on their actual "operational" conformity, but urged, at the same time, the national Guarantor to continue along this path by pursuing efforts to the establishment of an effective NPM system.

Chapter I

The International System Against Torture

1. The struggle against torture

The horrors of the Second World War stressed the urgent need for a stronger universal commitment to human rights protection. Within the new United Nations framework, the right not to be tortured has been considered by the whole international community as one of the fundamental right demanding a special and absolute protection. Since then, the prohibition of torture has been enshrined in the main human rights treaties, both of international and regional nature. In 1984, the UN General Assembly adopted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Specifically, the UNCAT, provides a definition of torture, recommends Member States to incorporate the crime of torture into their domestic law and establishes a Committee to monitor the implementation of the Convention.

1.1 The prohibition of torture

Since the aftermath of World War II, the prohibition of torture and other cruel, inhuman or degrading ill-treatments has been a crucial part of the new human rights system[1].

From the outset, the United Nations condemned torture as one of the most brutal violation of human dignity and, as such, as a main target to fight in the reconstruction of the post-war world[2].

Thenceforth, the prohibition of torture and other ill-treatments has been enshrined in several international and regional human rights' instruments, gradually acquiring the *jus cogens* status, i.e. binding for every member of the international community and non-derogable under any circumstances[3].

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[1]W. Kälin, *The struggle against torture*, International Review of the Red Cross, No. 324, 30-09-1998, https://www.icrc.org/eng/resources/documents/article/other/57jpg5.htm.

[2]Office of the High Commissioner for Human Rights, Human Rights Fact Sheet No. 4, *Combating Torture*, published by the OHCHR, United Nations Office at Geneva, May 2002.

[3]S. Valenti, University of Padua Interdepartmental Centre on Human Rights and the Rights of People, debriefing of the workshop *"Rights of persons deprived of their liberty: the role of national human rights*

Indeed, nowadays there is a widespread consensus on the peremptory nature of the prohibition of torture, since its strong correlation to the safeguard of human dignity and the wide participation of the international community in every document dealing with the issue, in fulfilment of the *opinion juris* requirement[4].

The *jus cogens* status of the prohibition of torture has also been confirmed on several occasions by the international jurisprudence. In 1998, in the *Prosecutor v. Anto Furundzija* case, the International Criminal Tribunal for the former Yugoslavia sustained the customary nature of the norm, expressly stating that the "prohibition of torture is a peremptory norm or *jus cogens*" and therefore that it has effects both "at the inter-State and individual levels"[5]. The same conclusion was shared by the International Court of Justice (ICJ) in the *Belgium v. Senegal* case in 2012 during which the ICJ clearly stressed the peremptory nature of the prohibition of torture since it is "grounded in a widespread international practice and on the *opinio juris* of States" and because it "appears in numerous international instruments of universal application and it has been introduced into the domestic law of almost all States"[6].

Within the new human rights system, the first international legal text explicitly prohibiting torture is the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, milestone of the new system of rights and mother of all the following international and regional human rights instruments. Within the Declaration, among a long list of rights conceived as demanding special protection, Article 5 provides for the absolute prohibition of torture, claiming that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[7].

The same words have been utilised in Article 3 of the European Convention on Human Rights, the first treaty prohibiting torture, adopted in 1950 by the new-born Council of Europe[8].

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structures which are OPCAT mechanisms and of those which are not", held in Padua on 9-10 April 2008 in the context of the "Peer-to-Peer Project" co-financed by the Council of Europe and the European Union, p. 11.

[4]T. Surlan, *Prohibition of torture: absolute or relative?*, Constitutional Court of Serbia, Belgrade, 2017, pp. 10-11.

[5]International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundzija,*10 December 1998, at para 155-157.

[6]International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement of 20 July 2012, at para 99.

[7] United Nations, *Universal Declaration of Human Rights,* Article 5, Paris, 1948.

[8] Council of Europe, *Convention on the Protection of Human Rights and Fundamental Freedoms*, Article 3, Rome, 1950.

Since the 1960s, in the newly adopted human rights instruments, the general negative prohibition of torture started to be accompanied by the positive right to be treated humanely with respect for the inherent dignity of human person. Such formulation was adopted for the first time in 1966 by the International Covenant on Civil and Political Rights (ICCPR) which conferred to the prohibition of torture enshrined in the Universal Declaration a legally binding status at the international level. Besides providing for the negative right not to be tortured enshrined in Article 7, the ICCPR introduced the positive right of all persons deprived of liberty to be treated with humanity in Article 10[9].

The same approach was adopted at the regional level by the American Convention on Human Rights of 1969 and by the African Charter on Human and Peoples' Rights of 1981 which include, both in Article 5, the negative and the positive rights[10].

Under the International Humanitarian Law, the prohibition of torture and inhuman treatment is included in the four Geneva Conventions of 1949 and in the Additional Protocols of 1977. For example, Article 3, common to the Geneva Conventions, includes the prohibition of torture and other cruel treatment in the list of minimum standards that any part involved in an armed control, even of a non-international character, has to respect[11]. The Third Geneva Convention obliges States Parties to treat prisoners of war of international armed conflicts humanely and the Fourth Convention prohibits torture of civilians in wartime[12]. Finally, Article 75 of Protocol I prohibits "torture of all kinds, whether physical or mental" [..] "at any time and in any place whatsoever, whether committed by civilian or by military agents"[13].

[9] United Nations, *International Covenant on Civil and Political Rights*, Articles 7 and 10, New York, 1966.

[10]Organization of American State, *American Convention on Human Rights*, Article 5, San José, 22 November 1969; Organisation of African Unity, *African Charter on Human and Peoples' Rights*, Article 5, Nairobi, 27 June 1981.

[11] Common Article 3 to the Geneva Conventions of 12 August 1949.

[12] Articles 13 and 14 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; Articles 27 and 32 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

[13]Article 75, para. 2(a)(ii) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I).

1.2 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

Since the second half of the 1970s, the growing concern about the widespread use of torture and other ill-treatments started to inspire the creation of specific instruments exclusively dedicated to prohibit and prevent such abuses[14].

Within the United Nations, on 9 December 1975, the General Assembly adopted the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, conceived as a starting point towards the creation of a greater international convention on the issue. The same day, the General Assembly adopted another resolution requiring the Commission on Human Rights (UNCHR) "to study the question of torture and any necessary step for ensuring the effective observance of the Declaration"[15].

The UN Declaration was essentially based on the criminalization of torture, stressing the necessity to consider acts of torture as criminal offences under domestic law, to initiate investigations whenever there are reasonable grounds to believe that torture occurred and to initiate criminal proceedings when appropriate[16].

Two years later, in December 1977, the General Assembly instructed the Commission on Human Rights to draft a convention in light of the principles enshrined in the Declaration[17]. At the beginning of 1978, the UNCHR appointed a Working Group to examine the different proposals aimed at designing the international convention.

After six years of negotiations, on 10 December 1984 the General Assembly finally adopted and opened to signature the *United Nations Convention against Torture and*

[14]Concerned about the increasing number of reported cases of torture, in addition to the UNCAT, the UN Commission on Human Rights appointed a Special Rapporteur to examine questions relevant to torture (resolution 1985/33). The mandate of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment covers all countries, regardless of whether a State ratified the Convention or not. For more information on the Special Rapporteur on Torture visit the OHCHR website (https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx).

[15]UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX), and A/RES/34523(XXX) available at: http://www.refworld.org/docid/3b00f1c030.html.

[16]UN GA Declaration on Torture, Articles 7-9-10.

[17]United Nations General Assembly Resolution A/RES/32/62, 8 December 1977.

Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[18], entered into force on 26 June 1987 following the twentieth ratification[19].

1.3 The UNCAT system

Consisting of 33 articles, the Convention against Torture follows a linear scheme initially providing a definition of the forms of torture and other ill-treatments that need to be faced and then illustrating all the obligations that States Parties undertake to respect in order to punish and prevent such abuses.

Based on the guidelines established by the Declaration, the UNCAT further expands the criminalizing approach by introducing the exercise of the universal jurisdiction over torture offences and thereby acknowledging the international nature of the crime and the absolute necessity to combat impunity[20].

Article 1 opens the Convention with a new internationally agreed legal definition of torture. Specifically, torture "means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"[21].

As emerges from Article 1, the UNCAT definition of torture is focused on three main elements: 1) the intentional infliction of severe physical or mental pain or suffering, 2)

[18]United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/39/46, 10 December 1984.

[19]Hans Danelius, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations Audio-visual Library of International Law, 2008, available at: http://legal.un.org/avl/ha/catcidtp/catcidtp.html; Italy ratified the UNCAT in 1988 (Law No. 498 of 3 November 1988).

[20]R. Murray, E. Steinerte, M. Evans, A. Hallo de Wolf, *The Optional Protocol to the UN Convention against Torture*, Oxford University Press, 2011, pp 1-2.

[21]*UNCAT*, Article 1.

committed for specific purposes, 3) by public officials or people acting in an official capacity[22].

According to the second Paragraph of Article 1, this definition is without prejudice to any wider provision enshrined in other international, regional or national legal instruments[23]. States Parties are therefore free to decide the specific definition of torture to introduce in their domestic law that, however, should include at least the three elements enshrined in Article 1. Indeed, the main aim of the Convention is not to impose a single definition of torture but, rather, to urge all Member States towards the adoption of the necessary instruments to fight abuses within their national system[24].

Following Article 1, the first part of the Convention consists of a list of obligations that States have to fulfil. First of all, Article 2 asks States Parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Paragraph 2 of Article 2, explicitly stresses the absolute character of the prohibition of torture that cannot be suspended even in exceptional circumstances, such as wartime. Article 3 provides for the principle of *non-refoulement* which prohibits to "expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". Article 4 requires each State Party to include the crime of torture in their legal system and to provide for appropriate penalties to punish the perpetrators of such offences[25].

With regard to jurisdiction, Article 5 states that these measures can be adopted not only by a State with a territorial or national link with the torture committed, but also by any other State where the alleged offender is present. As already mentioned, the UNCAT introduces in this way the universal jurisdiction over the crime of torture, conceived as a serious threat to the whole international community and thereby prosecutable by all its members. For this purpose, according to Article 6, any State Party where a person

[22]Association for the Prevention of Torture, *A legal definition of torture*, available at: https://www.apt.ch/en/what-is-torture/.

[23]For example, the *Inter-American Convention to Prevent and Punish Torture* gives in its Article 2 a broader definition of torture than the one of the UNCAT. First of all, it does not require the severity of the pain or suffering inflicted; then, in relation to the ends of torture, it concludes the specific list of purposes with the more inclusive "for any other purpose"; finally, it includes the reference to methods "intended to obliterate the personality of the victim or diminish his physical or mental capacities", regardless of their capacity to cause pain or suffering.

[24]T. Surlan, *Prohibition of torture: absolute or relative?*, p. 9.

[25] UNCAT, Articles 2-4.

alleged to have committed torture or other ill-treatment is present shall first of all take the person into custody and make a preliminary inquiry. According to the principle *aut dedere aut judicare* - i.e. extradite or prosecute – enshrined in Article 7, the State Party where the person suspected to have committed torture is found must then decide whether to submit the case to its competent authorities or to extradite the person to another State willing to do so. The obligation to extradite or persecute is therefore based on States Parties' cooperation and common interest in preventing any act of torture from going unpunished. In conclusion, Article 8 provides for all the rules in case of extradition and Article 9 recalls the necessity of measure of assistance in connection with criminal proceedings among States Parties[26].

Article 10 suggests the establishment of informational and educational training on torture prohibition for any person who may be involved in the custody, interrogation or treatment of any individual subjected to any form of deprivation of liberty. Articles 11 and 12 stress the urgency to every State Party to supervise interrogation methods and custody conditions of detained persons and to ensure that its authorities conduct prompt and impartial investigation. Articles 13 and 14 provide for the right of any individual to complain to competent authorities in case of alleged torture and the right to be redressed and obtain an adequate compensation whenever demonstrated that the crime has occurred. The list of States' obligations ends with Articles 15 and 16. The former states that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. The latter urges Member States to prevent the occurrence of any other cruel, inhuman or degrading treatment or punishment which do not amount to torture[27].

The second part of the Convention is entirely dedicated to its monitoring system. According to Article 17, the implementation of the Convention is supervised by the Committee against Torture (CAT), a body made up of ten independent experts elected for a term of four years by States Parties, for their high moral character and competence in the field of human rights.

The Committee's mandate includes four main competences enshrined in Articles 19, 20, 21 and 22, respectively. First of all, the CAT examines the periodic reports on the

[26]UNCAT, Articles 5-9; R. Murray, E. Steinerte, M.Evans, A.Hallo de Wolf, *The OPCAT*, p. 2.
[27]UNCAT, Articles 10-16.

measures taken to implement the Convention that each Member State have to submit every four years through the Secretary General of the United Nations[28]. The reporting procedure is designed as a dialogue between the delegation of the State under exam and the Committee's members at the end of which the country rapporteurs draft their concluding observation to be sent to the State concerned[29]. Secondly, in light of reliable information on the systematic use of torture in a Member State, the Committee can undertake confidential inquiries in cooperation with the State concerned which may include a visit to its territory[30]. However, each Member State has the faculty to "opt out" and declare that it does not recognize the Committee's competence to initiate investigations[31]. Furthermore, the Committee can receive and consider communications against a Member State submitted by another State Party claiming that the State concerned is not fulfilling its obligations under the Convention[32]. At the same way, the Committee can receive and consider communications against Member States submitted by individuals who claim to be victims of a violation of the Convention[33]. However, these two last options are possible only if the State concerned has previously accepted the competence of the Committee to receive inter-States or individual complaints related to its implementation or violation of the Convention[34].

The Committee met for the first time in April 1988 in Geneva and started immediately its intensive work. Every year the Committee holds regular sessions and, whenever required by the majority of its members or by a State Party to the Convention, special sessions[35]. Until 2015, the Committee normally held two annual regular sessions during which it examined approximately eight to ten States' reports[36]. Nowadays, the Committee meets regularly three times per year examining up to six countries per

[28]UNCAT, Article 19.
[29]Office of the High Commissioner for Human Rights, *Committee Against Torture, Overview of the WorkingMethods*,availableat: https://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx#3
[30]UNCAT, Article 20.
[31]Ivi, Article 28.
[32]Ivi, Article 21.
[33]Ivi, Article 22.
[34]Ivi, Articles 21-22.
[35]Rule of Procedure, Rule 2 and 3, Adopted by the Committee against Torture at its first and second sessions and amended at its thirteenth, fifteenth, twenty-eighth, forty-fifth and fiftieth sessions.
[36]International Justice Research Centre, *Committee Against Torture - Working Methods*, available at: https://ijrcenter.org/un-treaty-bodies/committee-against-torture/#State_Reporting.

session[37]. According to Article 24, once a year the Committee submits a report on its activities to the General Assembly and to the States Parties to the Convention[38].
The third and conclusive part of the Convention is finally dedicated to all the practical aspects of its application, such as signature, accession, entry into force, arbitration to resolve interpretational disputes between Member States and the denouncing procedure[39].

2. A new system to prevent torture

Preventive mechanisms are particularly needed in the fight against torture. There is evidence that victims of torture tend not to report the violence experienced for fear of retaliation, poor information or because of a lack of adequate legal assistance. A constant monitoring activity able to identify the dysfunctional elements and the possible causes of ill-treatments is thereby essential in order to avoid their reiteration[40].
In addition to judicial measures, aimed at reacting to violations once they have already occurred, ill-treatments' cases need proactive actions, aimed at preventing abuses from happening in the first place.
Based on this assumption, a new approach towards the struggle against torture began to take shape in the 1970s, opening the way for the establishment of preventive monitoring systems capable of reducing the risk of torture and other ill-treatments.

2.1 The "Gautier Proposal"

Despite the important role of the Committee against Torture, according to some experts the new mechanism designed by the United Nations was not enough. Since the early 1970s, the growing concern about the widespread use of torture throughout the world

[37]Office of the High Commissioner for Human Rights, Committee against Torture, available at: https://www.ohchr.org/en/hrbodies/cat/pages/catintro.aspx.
[38]UNCAT, Article 24.
[39]UNCAT, Part III, Articles 25 – 33.
[40]M. Palma, *Considerazioni a margine*, in S. Buzzelli (edited by), *I giorni scontati. Appunti sul carcere*, Sandro Teti Editore, Rome, 2012.

led several international organisations to think about the creation of a more effective system, working to prevent, instead to react to, the use of torture[41].

The idea of such a mechanism was firstly developed by the Swiss banker and philanthropist Mr. Jean Jacques Gautier who, having decided to dedicate his retirement to the struggle against torture, started to examine all the effective measures used at the time to combat torture and other inhuman treatment. Among them, Gautier was particularly impressed by the effectiveness of the work conducted by the International Committee of the Red Cross (ICRC)[42], consisting mainly in monitoring visits to prisoners of war camps of detention in pursuance of its humanitarian mandate[43].

Specifically, since the outbreak of the Great War, ICRC delegates started to obtain authorization from several States involved in the conflict to visit their prisoners of war camps. The ICRC began in this way to inspect internments camps of all main belligerents, dispatching a total of 54 missions to visit 524 detention camps in Europe, North Africa and Asia. The Red Cross delegates were required to check the treatment and living conditions of the prisoners of war and then to report their findings to the authorities in charge of detention camps, in the hope of some improvements[44].

The ICRC approach demonstrated its efficacy in preventing torture especially in the rare occasions when its delegates have been permitted to visit all places of detention, including interrogation centres and police stations, such in the cases of Greece in 1971 and Iran in 1977/78[45].

Inspired by the ICRC monitoring methods, Gautier started to imagine an international committee entitled to regularly visit any place of detention around the world. The so called *"Gautier Proposal"* appeared for the first time in October 1976 in an article called "*A new weapon against torture*", published in Geneva by the weekly journal "*La Vie Protestante*". The article described the idea of a new international convention

[41]Association for the Prevention of Torture (APT), Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the UN Convention against Torture: Implementation Manual*, 2010, pp. 15-18.

[42]The four Geneva Conventions of 1949 and Additional Protocol I of 1977 conferred the ICRC the right to visit prisoners of war in international armed conflicts.

[43]Association for the Prevention of Torture (APT), Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention*, 2005, pp. 38-39.

[44]D. Palmieri, *The International Committee of the Red Cross in the First World War*, 10 September 2010, available at: https://www.icrc.org/en/document/international-committee-red-cross-first-world-war-0; *ICRC in WWI: overview of activities*, 11-01-2005, available at: https://www.icrc.org/eng/resources/documents/misc/57jqgq.htm.

[45]APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention*, p. 38.

establishing a system of periodic visits to any place of deprivation of liberty, based on the assumption that torture occurs at any time, both in war time and peace time, and in any place, in the less advanced and as in the most advanced societies. Gautier indeed strongly believed that an effective struggle against torture could be conducted only by opening the doors of places of detention to unannounced visits conducted by independent experts, ensuring in this way a strong deterrence to commit violations and abuses[46].

To carry forward his project, in 1977 Gautier founded the Swiss Committee against Torture (SCT), which later became the Association for the Prevention of Torture (APT), a forum to sustain the adoption of a convention based on a universal preventive monitoring system. The Committee soon drew the attention of several international non-governmental organisations, as Amnesty International and the International Commission of Jurists (ICJ), and States such as Switzerland, Sweden and Costa Rica[47].

During the drafting of the Convention against Torture, the proponents of the Gautier proposal were conscious of the difficulty to include the international visiting mechanism within the Convention apparatus, considering the majority of States' reluctance to open their prisons to foreign commissioners. In order to create the torture preventive system but without hindering the CAT adoption, Niall McDermot, Secretary General of the ICJ, proposed not to include the visiting mechanism directly into the Convention but rather in an Optional Protocol to the Convention[48].

In March 1980, Costa Rica formally submitted to the United Nations a draft Optional Protocol to the Convention against Torture as designed by the SCT and the ICJ[49]. The idea was not to create another set of legal provisions but rather to complement the international system against torture with a new preventive mechanism based on the respect and implementation of the norms enshrined in the Convention against Torture[50].

[46]Association for the Prevention of Torture (APT), *The "Gautier Proposal",* available at: https://www.apt.ch/en/the-gautier-proposal/.
[47]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual,* p.16.
[48]N. McDermot, *How to enforce the Torture Convention*, in the Swiss Committee against Torture and International Commission of Jurists, *Torture: How to Make the International Convention Effective*, pp. 18-26, Geneva, 1980.
[49]*Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment,* UN Doc. E/CN.4/1409, 8 March 1980.
[50]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual,* p. 41.

Nevertheless, in the attempt to avoid any further delay in the UNCAT conclusion, the Costa Rican government asked the Commission on Human Rights to examine the Protocol only once the Convention was adopted[51].

2.2 The Council of Europe's system to prevent torture

Despite the postponement of the project aimed at establishing a visiting mechanism at the international level, the efforts of the Swiss Committee against Torture were not in vain. In 1987, one year after Gautier's death, his proposal was finally realized at the regional level by the Council of Europe.

In the attempt to strengthen the legal prohibition of torture enshrined in Article 3 of the ECHR, the Council of Europe decided to establish a preventive mechanism, aimed at complementing the reactive judicial work of the European Court of Human Rights.

To this purpose, in 1983 the Consultative Assembly of the Council of Europe adopted the Recommendation 971 on the *"Protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment"*[52]. In this document, the Assembly asked the Committee of Ministers of the Council of Europe to adopt the draft convention appended to the Recommendation, elaborated by the ICJ and the SCT aimed at establishing a European visiting mechanism of all places of detention. The Committee of Experts for the Extension of the Rights Embodied in the European Convention on Human Rights (DH-EX), a subordinate body of the Steering Committee for Human Rights (CDDH), was commissioned to implement the convention contained in Recommendation 971. In June 1987, the Committee of Ministers adopted the final version of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, which entered into force in February 1989 and has been, over time, ratified by all the 47 members of the Council of Europe[53].

In 1987, a few months before the Convention's adoption, the Council of Europe officially enacted the *"European Prison Rules",* a set of good principles and practices

[51]Drat of the OPCAT, Note by the Secretariat, UN Doc. E/CN.4/1409.

[52]Consultative Assembly of the Council of Europe, Recommendation 971 on the *"Protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment",* available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804cd927 .

[53]European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Text of the Convention and Explanatory Report*, 2002. p. 15 – 17.

intended to provide non legally binding standards in detainees' treatment and detention facilities' management[54]. As it concerns preventive monitoring, Rule number 4 stressed the need for "regular inspections of penal institutions and services by qualified and experienced inspectors appointed by a competent authority". Such a need has been subsequently reaffirmed by the updated version of the Prison Rules adopted in 2006[55] which, in rule number 9, stated that "all prisons shall be subject to regular government inspection and independent monitoring".

2.3 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The European Convention established the *Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),* entitled to visit any place of detention under the jurisdiction of its Member States.

The creation of the CPT was a real revolution in the struggle against torture. For the first time, States decided to open their places of detention to outside eyes, enabling foreign commissioners to "examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment"[56].

The CPT was designed by the Council of Europe as an innovative mechanism equipped with unique tasks, unprecedented in the history of international and regional organisations. Indeed, it is the first international organism provided with a preventive and proactive function in the field of human rights[57].

Specifically, the Committee is a non-judicial mechanism of a preventive character which complements, and does not overlap with, the jurisprudential work of the European Court of Human Rights. In fact, its mandate does not include any right to judge over the violations of specific conventional documents but rather to prevent those

[54]*European Prison Rules – 1987*, Recommendation No. R(87) 3, adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 at the 404th meeting of the Ministers' Deputies. Available at: https://rm.coe.int/16804f856c.

[55]*European Prisons Rules - 2006*, Recommendation Rec (2006)2, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies. Available at: https://pjp-eu.coe.int/documents/3983922/6970334/CMRec+(2006)+2+on+the+European+Prison+Rules.pdf/e0c900b9-92cd-4dbc-b23e-d662a94f3a96.

[56]Article 1 of the European Convention for the Prevention of torture and Inhuman or Degrading Treatment or Punishment.

[57]A. Cassese, *I Diritti Umani oggi*, Editori Laterza, 2009, p. 189.

violations from happening by reducing risk factors[58]. According to Article 2 of the Convention, the CPT has the right to visit "any place [within Member States' jurisdiction] where persons are deprived of their liberty by a public authority". The Committee thus has access not only to prisons but also to juvenile detention facilities, police stations, psychiatric hospitals, migrants' centres and in general to any other place where people are held in conditions of deprivation of liberty.

The CPT is composed by an independent and impartial expert for each Member State to the Convention. They are elected for a term of four years by the Committee of Ministers in relation to their expertise in the field of human rights and in the areas covered by the Convention[59].

Visits are carried out by delegations, made up of at least two members of the Committee usually accompanied by other staff of the Committee and, if necessary, by experts and interpreters. Apart from the periodic visits that take place in each Member State usually every four years, the Committee can conduct ad hoc visits when required by particular circumstances[60]. In order to enable the CPT delegation to inspect a large number of places of detention, periodic visits last several days. Ad hoc visits are instead very short, usually no more than a couple of days, as aimed at monitoring specific facilities or as follow-up inspections[61].

According to Article 8, before its arrival, the Committee has to notify the Government of the States under exam of its intention to carry out the visit. After that notification, the delegation has free access at any time to any place referred to in Article 2 and has the power to conduct private interview with any person deprived of liberty or communicate with any subject capable of providing relevant information.

Following the visit, the Committee has to draft a report on all the facts found during the monitoring activities and all the recommendations considered necessary. The report is then sent to the State concerned that can decide whether make it public or not. Since the CPT establishment, States Parties have gradually accepted to easily give their consent to

[58]K. Ginther, *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, European Journal of International Law, available at: http://www.ejil.org/pdfs/2/1/2030.pdf.

[59]Articles 4 and 5 of the European Convention for the Prevention of torture.

[60]Article 7 of the European Convention for the Prevention of torture; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT in brief*, Council of Europe, available at: https://rm.coe.int/16806dbbf1.

[61]A. Cassese, *I Diritti Umani oggi*, p. 189.

reports' publication, enabling the public opinion as well as other States to know how places of detention work in their territories[62]. Finally, if the State does not cooperate with the Committee or refuses to implement its recommendations, the CPT may decide to make a public statement on the issue[63].

The whole visiting process is based on the principles of cooperation and confidentiality. States have to cooperate with the Committee in order to facilitate every aspect of its work, providing the delegation with all the necessary information and guaranteeing an easy access to any place of deprivation of liberty. Cooperation with national authorities is underpinning the Committee's work, since its main scope is to protect detained persons rather than condemn States[64].

Furthermore, according to Articles 11 and 13 of the Convention, confidentiality is another main characteristic of the activities conducted by the CPT. All the members of the delegations are required to maintain confidentiality on all the information acquired during the visit. Reports remain confidential until States explicitly authorise their publication.

In 1990, the CPT conducted its first visits to Austria, Malta, United Kingdom, Turkey and Denmark[65]. Since then, the European Committee visits every year several Members of the Council of Europe, acceding and assessing the conditions of their places of liberty deprivation. Overtime, the CPT has demonstrated the effectiveness of the preventive approach and the strong impact that visiting procedures have on improving detention conditions and on reducing abuses[66].

[62]A. Cassese, *I Diritti Umani oggi*, p. 189.

[63]Article 10 of the European Convention for the Prevention of torture; Until today, the CPT made eight public statements: two against Turkey (in 1992 and 1996), three against the Russian Federation (in 2001, 2003 and 2007); one against Greece (2011); one against Bulgaria (2015) and one against Belgium (2017). More information about CPT public statements are available at: https://www.coe.int/et/web/cpt/public-statements.

[64]CPT, *The CPT in brief.*

[65]CPT Visits, available at: https://www.coe.int/en/web/cpt/visits.

[66] APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention,* p. 40.

3. The United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

The establishment of a European monitoring mechanism of places of detention had a strong impact on the creation of a similar system at the international level, giving more precise indications on how to design it and on its actual work[67].

The CPT served as a model not only for a similar international committee, but also for the establishment of preventive mechanisms at the national level which, indeed, represented the real novelty of the new United Nation system against torture.

3.1 Negotiation Process

A few years after the entry into force of the Convention against Torture, the time was ripe for resume the work on its Optional Protocol. In November 1990, the SCT and the ICJ organised a meeting of experts in Geneva to produce an updated and expanded version of the first draft proposed in 1980. Costa Rica played again the leading role submitting, in January 1991, the new draft to the United Nations Commission on Human Rights[68]. On 3 March 1992, the UNCHR adopted a resolution establishing an open-ended Working Group to draft the Optional Protocol[69].

It began, in this way, the long and complex negotiation process that will end, after several delays, ten years later with the adoption of the Optional Protocol to the Convention against Torture by the General Assembly in December 2002.

The discussions of the Working Group were open to all United Nations' Member States, to several international organisations, to human rights' NGOs and to experts in the field. For the entire duration of the negotiations, Costa Rica maintained a prominent role being the Chair and the Rapporteur of the Working Group. In order to support its activities and to expedite the whole process, in 1993 it was established an informal Drafting Group, chaired initially by Poland and then by Sweden, as a forum for unofficial discussions to be reported to the Plenary of the Working Group[70].

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[67]R. Murray, E. Steinerte, M.Evans, A.Hallo de Wolf, *The OPCAT,* p. 10.

[68]Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, *Original Text proposed by Costa Rica*, 22 January 1991, E/CN.4/1991/66.

[69]United Nations Commission on Human Rights, Resolution 1992/43, 3 March 1992.

[70]APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention*, p. 43.

Despite the efforts of a great number of actors, the negotiation process was long and arduous due to a persistent polarization between the States in favour of the Optional Protocol and those aimed at reducing its scope or at entirely impeding its adoption. The contrasts among the different positions, led to a long stalemate which protracted the Working-Group activities for an entire decade[71].

Specifically, during the several negotiation sessions, some particular issues emerged as the most difficult to agree upon. First of all, the opponents of the Optional Protocol stressed the uselessness of establishing a new body against torture, conceived as a mere repetition of the work undertaken by pre-existing human rights mechanisms already dealing with the same issues. Some States reported the examples of the Committee against Torture visiting mandate provided by Article 20 of the UNCAT, the visits conducted by the International Committee of the Red Cross and the ones carried out by the CPT within the Council of Europe's countries. On the contrary, the OPCAT supporters stressed the novelty of the new mechanism at the international level which, instead of acting after violations have occurred, it operates in advance to prevent them. The system established by the Optional Protocol was in fact designed as an independent mechanism established to fulfil its own mandate complementing, but not overlapping with, the work conducted by the Committee against Torture at the United Nation level. The overabundance of bodies operating against torture raised in addition concerns related to the financial aspects of establishing a new mechanism in a system that already had to struggle with limited resources such as the human rights' one[72].

Another factor of division was the possibility of making reservations to the Optional Protocol. A group of States supported such possibility referring to its adoption in other optional protocols[73] and, in general, pointing out the beneficial effect of reservations in view of a wider participation to the OPCAT. Nevertheless, the majority of States rejected the proposal considering the tendency not to allow reservations to important human rights treaties recently introduced by the Statue of the International Criminal Court of 1998 and by the 1999 Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In addition, the opponents stressed the necessity to prohibit reservations since their adoption would have only

[71]APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention*, p. 44.
[72]Ivi, pp. 45-48.
[73]As the two optional protocols to the United Nations Convention on the Rights of the Child.

undermine the actual operation of the visiting system, thus hindering the object and the scope of the whole treaty[74].

Besides these technical considerations, the main point of discussion regarded the powers granted to the new monitoring system of visits provided by the Optional Protocol. Several States were reluctant to give free access to international experts to all places of detention under their jurisdiction, considering it as a strong interference in their national sovereignty. Moreover, another problem concerned the compatibility of the visiting mechanism with domestic legislation of State Parties and therefore the question whether explicitly refer to it in the national law or not. For all these reasons, at the end of the century, the negotiation process was paralysed[75].

3.2 The Mexican Proposal

Since the inability to reach an agreement over the original draft submitted by Costa Rica, in the early 2000s it looked evident that new proposals were needed in order to unblock the situation. In February 2001, during the Working-Group's ninth session, the Mexican delegation submitted an innovative proposal finally capable of breaking the long impasse. The new proposal, sustained by the Latin American and Caribbean United Nations' Regional Group (GRULAC), was based on the establishment of national visiting mechanisms as part of a broader and more functional system to prevent torture. According to the Mexican project, along with a central international organism, the visiting system of places of detention should have been complemented by National Preventive Mechanisms (NPMs) established by each Member State[76].

The NPMs proposal was able to break the negotiation stalemate and to overcome a significant limit of the visiting system as designed by the original draft. The Working-Group was particularly concerned about the capacity of an international body to conduct visits to all Member States at a frequency sufficient to constitute an effective tool of prevention. By establishing a national mechanism in each State, the international

[74]Reports of the UN Working Group to Draft an Optional Protocol to UNCAT, UN Doc. E/CN.4/1993/28, § 111. Reservations; Reports of the UN Working Group to Draft an Optional Protocol to UNCAT, E/CN.4/2000/58, § 20 -21. General Discussion.

[75] APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention,* pp. 45-48.

[76]*Alternative Preliminary Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading treatment or Punishment submitted by the delegation of Mexico with the support of GRULAC,* available in the 9th Report of the Working Group at Annex I, E/CN.4/2001/67.

committee's operations would have been complemented by bodies permanently situated within States and therefore able to conduct a continuous work of prevention and to easily initiated a dialogue with domestic authorities[77].

The introduction of NPMs was also seen as a vehicle to bring back to the national level States' responsibility to prevent torture and other ill-treatments from happening. In this way, the OPCAT became a sort of "complementary" model in which States are the first subject entitled to protect people under their jurisdiction and the international bodies are a second mechanism of control[78].

The Mexican proposal provoked mixed reactions. Considered by some States as an important tool to further expand the visiting system effectiveness, the introduction of national mechanisms was viewed with suspicion by the supporters of a strong international body as designed by the original Costa Rica draft.

In reaction to the Mexican motion, Sweden submitted an alternative proposal on behalf of the EU United Nations Group which, albeit leaving some space for the introduction of national mechanisms, put the focus back on the international body. In general, the European proposal was not against the introduction of NPMs as long as they were not conceived as an alternative to the international committee and were designed to respect some minimum guarantees of independence[79].

In the attempt to finally close the drafting process and in response to the persistent pressure of the UN bodies to adopt a final draft[80], in 2002 Ms. Elizabeth Odio-Benito, Chairperson of the Working-Group, presented another text. The new draft was conceived as a compromise between the main outcomes reached during the long years of negotiations and the innovative element contained in both the new proposals, creating

[77]M. Nowak and E. McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford Commentaries on International Law, Oxford University Press, Oxford, 2008, p. 923.

[78]S. Valenti, University of Padua Interdepartmental Centre on Human Rights and the Rights of People, *"Rights of persons deprived of their liberty",* p. 15.

[79]*Proposal of new and revised articles to be included in the original draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by the delegation of Sweden on behalf of the European Union,* available in the 9th Report of the Working Group at Annex II, E/CN.4/2001/67.

[80]Resolution of the UN Commission on Human Rights of 23 April 2001, UN.Doc. E/CN.4/RES/2001/44.

a broad visiting system based on a strong international body and on the Members States' obligations to establish national mechanisms to prevent torture[81].

Despite the objections of some members of the Working Group which asked for the continuation of the negotiation process, the majority considered the new draft as the best compromise and effective way to establish a system of preventing visits[82].

In March 2002, Costa Rica submitted the final text to the Commission on Human Rights which, after several debates, approved the Optional Protocol as designed by the Working Group's Chairperson[83]. In July, it was the turn of the United Nation Economic and Social Council's (ECOSOC) that, in the same way, following some initial oppositions, approved the text[84]. In conclusion, the draft was submitted to the vote of the General Assembly which, on 18 December 2002, adopted the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)* by a majority of 127 votes in favour, with only 4 against and 42 abstentions[85].

Following the twentieth ratification, the OPCAT entered into force on 22 June 2006, thirty years after the first appearance of the *"Gautier Proposal".* Conceived in the mid 1970s almost as a utopian project, after three decades of work, the international community finally agreed on the establishment of a preventive mechanism against torture based on dialogue and cooperation, realizing the revolutionary idea of Jean Jacque Gautier.

3.3 The OPCAT system

Consisting of 37 articles, the Optional Protocol to the Convention against Torture is divided into seven parts. The first one is dedicated to the "General Principles" that set the conceptual framework of the OPCAT and introduce its main objectives and subjects. The second and the third parts describe the structure and the mandate of the Subcommittee on Prevention of Torture (SPT), the international body of the visiting

[81] *Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading treatment or Punishment*, Proposal by the Chairperson-Rapporteur, available at Annex I of the 10th Report of the Working-Group E/CN.4/2002/78.
[82] R. Murray, E. Steinerte, M. Evans, A. Hallo de Wolf, *The OPCAT,* p. 26.
[83] UN Commission on Human Rights, 22/24 April 2002, UN.Doc. Res.2002/33.
[84] Resolution of the ECOSOC, 24 July 2002, UN.Doc. Res. 2002/27.
[85] Resolution of the UN General Assembly Resolution, 18 December 2002, UN. Doc. A/RES/57/199.

system. The fourth part focuses on National Preventive Mechanisms, established by each State Party to complement the preventive work of the SPT. Finally, the last three parts deal with the main technical issue of the legal instrument such as "Declaration" (Part V), "Financial Provisions" (Part VI) and "Final Provisions" (Part VII).

General Principles [86]

According to Article 1, the Optional Protocol creates a "system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment".

The objective of the OPCAT is therefore the establishment of an innovative system based on the complementary mandate of international and national bodies which together work to prevent torture and ill-treatments from happening. Their task consists mainly in conducting regular visits to places of liberty deprivation in order to contribute to the reduction of abuses by acting as deterrent against their perpetration. The effectiveness of such a tool is strictly linked to the capability to conduct unannounced visits.

In order for such a mechanism to properly work, the whole OPCAT system has to count on the deep collaboration and mutual cooperation of all its subjects. Specifically, the Optional Protocol establishes a triangular relationship among three categories of actors, namely States Parties, the international body and the national mechanisms, providing powers and obligations for all of them[87].

The Optional Protocol's system against torture is intrinsically based on the dialogue among these three actors which together create a broad and multi-levels net of subjects operating against torture and other inhuman ill-treatments, each one with its specific duties and responsibilities[88].

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[86]*Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* Part I: General Principles (Articles 1-4), available at: https://treaties.un.org/ .

[87]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual,* p.14.

[88]M. Birk, G. Zach, D. Long, R. Murray, W. Suntinger, *Enhancing impact of national preventive mechanisms Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward*, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre of the University of Bristol, May 2015, p. 10.

At the international level, Article 2 establishes the *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT),* made up initially of ten independent experts and, since the fiftieth ratification, increased to twenty-five members, elected for a term of four years by States Parties [89]. According to the third paragraph of Article 2, the SPT has to carry out its functions following the principles of confidentiality, impartiality, non-selectivity, objectivity and universality. These fundamental guidelines are strictly linked to the requirement of independence and equity that the Subcommittee has to guarantee throughout its work. Furthermore, the last paragraph stresses the need for cooperation, considered as a core principle of the entire system and as a fundamental guideline at any stage of the SPT operations.

In addition to the SPT, at the national level, Article 3 introduces the innovative organisms designed by the Mexican proposal, stating that "Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment", known as *National Preventive Mechanisms (NPMs).*

Finally, according to Article 4, each Member State has to allow both the SPT and its NPM to conduct visits "to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence" in the attempt to prevent torture and other type of abuses. Such article explicitly provides the right of the SPT and NPMs to access without prior authorization to any place of detention which are described, in a very broad way, as any public or private place where people are de jure or de facto detained and they are not permitted to leave by order of any judicial, administrative or other authority. Visits by national and international experts are therefore not only limited to prisons and police stations, but include places such as pre-trial detention facilities, centres for juveniles, detention centres for migrants, transit zones in airports as well as medical and psychiatric institutions. The visiting mandate extends also to unofficial places of detention where people can be victims of ill-treatments[90].

[89]OPCAT, Part II – Articles 5-10.

[90] APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention,* p. 127; Association for the Prevention of Torture (APT), *Establishment and Designation of National Preventive Mechanisms,* Geneva, 2006, pp. 18-24.

The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (SPT)[91]

As it concerns the Subcommittee's mandate, according to Article 11, it has two main competences. First of all, the SPT has an "operational function", consisting in visiting places of detention and making recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other ill-treatments. Secondly, the SPT has an "advisory function" related to National Preventive Mechanisms which consists in advising and assisting States Parties in NPMs establishment and, once created, in advising and assisting them in the performance of their duties. Finally, the article states that the Subcommittee has to cooperate with all the relevant institutions or organisations working towards the strengthening of the protection of all persons against torture and other ill-treatments.

As regards the operational function, the SPT has the duty to visit places of liberty deprivation as described by Article 4. In order to do that, the SPT shall establish a program of regular in-country mission for a particular year and notify the concerned governments with the established schedule to let them prepare for the upcoming visits[92]. Each State Party has to be notified of the SPT visit's dates at least three months earlier but without being informed of the places that will be visited. The unannounced nature of the visits is essential to have a real picture of the conditions of the visited places and therefore to preserve the preventive aim of the monitoring mechanism[93].

The OPCAT states that each visit has to be conducted by at least two members of the SPT, accompanied, if needed, by other experts in the field of torture[94]. However, the experience developed by the Subcommittee suggested that each visit delegation requires more than two SPT members, including at least two external experts and two members of the Subcommittee's Secretariat[95].

In the initial phase of each in-country mission, the SPT delegation meets with several actors. First of all, it holds meeting with representatives of all the relevant authorities in charge of places of detention to inform them on its methodology and to raise the first

[91]OPCAT, Part III: Mandate of the Subcommittee on Prevention of Torture, Articles 11 – 16.
[92]OPCAT, Article 13 (1) - (2).
[93]APT, *Establishment and Designation of NPMs*, pp. 55-57.
[94]OPCAT, Article 13(3).
[95] SPT, *First annual report of the SPT,* §51.

issues. The SPT then meets with NPMs' representatives and other monitoring bodies to collect all the information needed to properly conduct the visit, to better understand the main criticalities and to identify particular places to visit. Finally, the SPT meets with National Human Rights Institutions, non-governmental organisations and in general with all the actors having information[96].

At the end of the visit, the SPT communicates its recommendations and observations to the State under exam. The dialogue between the Subcommittee and States Parties is strictly confidential. The report drafted by the SPT on the visit conducted, as well as States' answers, can be published only when explicitly requested by the State in question. Nevertheless, there are two circumstances in which publication may occur even without the consent of the concerned government. First of all, whenever a State Party makes public a part of the report, the SPT is authorised to publish the report in its entirety or in part. This provision was conceived to safeguard the SPT against States Parties providing false representation of its findings. Therefore, by publishing a part of the report, States Parties refuse to the principle of confidentiality otherwise provided by the OPCAT[97]. Secondly, whenever a State Party refuses to cooperate or implement its recommendations, the SPT can turn to the Committee against Torture (CAT) which can make a public statement on the issue or decide to publish the SPT's report after consultations with the State concerned. These two measures are the only sanctions available whenever a Member State seriously fails to meet an obligations provided by the OPCAT[98].

Besides its operational mandate, the Subcommittee has an "advisory function". As first thing, the SPT must provide assistance and advice to States Parties to establish or designate their National Preventive Mechanisms. For this purpose, the SPT has developed a list of detailed Guidelines on NPMs in order to better clarify its expectations relating to their establishment and operations. Specifically, the Guidelines lay down the basic principles that should inspire all aspects of NPMs' work, the basic issues addressed to States Parties regarding NPMs establishment and the basic issues concerning their operation and therefore addressed both States Parties and to NPMs[99].

[96]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual*, pp. 156 – 157.
[97]OPCAT, Article 16 (2).
[98]OPCAT, Article 16 (4); APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention*, p. 96.
[99]SPT, *Guidelines on National Preventive Mechanisms*, 9 December 2010, UN Doc. CAT/OP/12/5.

Furthermore, in fulfilment of its advisory function, as soon as a State begins to consider ratifying the OPCAT, the SPT may take part to national consultations on NPM options as well as provide comments and observation about the proposed NPM suitability with the OPCAT requirements. Once the NPM is established, the SPT must initiate a dialogue and maintain direct contacts with the new institution. In particular, the SPT advises and assists NPMs offering them training and technical assistance, supporting them in the evaluation of their needs and of all the necessary means to enhance the protection of detained persons and, finally, making recommendations and observations to States Parties to strengthen the capacity of their NPMs[100]. In order to self-evaluate their functioning, the SPT has furthermore developed an analytical assessment tool for NPMs to encourage the systematic and periodic monitoring of their activities[101].

In conclusion, Article 11 requires the Subcommittee to cooperate for the prevention of torture with all the relevant United Nations bodies and mechanisms as well as with the international, regional and national institutions or organisations operating against torture. In particular, having being established by an Optional Protocol to the Convention against Torture (UNCAT), the SPT naturally entails a strong relationship with the Committee against Torture[102]. The OPCAT explicitly includes several provisions describing how the SPT and the CAT should interact. For example, according to Article 10, the two bodies have to hold their "sessions simultaneously at least once a year". Furthermore, in order to strengthen the cooperation among each other, the Optional Protocol demands the SPT to present a public annual report to the CAT to share information on its activities and working methods[103].

At the regional level, the OPCAT states that the SPT and the bodies established by any regional convention instituting a visiting system of places of detention "are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol"[104]. Despite the absence in the text of specific forms of interaction among the OPCAT and other regional mechanisms, since its

[100]Office of the United Nations High Commissioner for Human Rights (OHCHR), *Preventing Torture: The Role of National Preventive Mechanisms*, New York and Geneva, 2018, p. 11.
[101]UN Subcommittee on Prevention of Torture, *Analytical self-assessment tool for National Preventive Mechanisms*, 2012 (CAT/OP/1).
[102]R. Murray, E. Steinerte, M. Evans, A. Hallo de Wolf, *The OPCAT*, pp. 139 – 143.
[103]OPCAT, Article 16 (3).
[104]OPCAT, Article 31.

establishment the SPT initiated a constructive dialogue with all the main preventive mechanisms against torture. In particular, the OPCAT bodies developed a strong relationship with the CPT based on meetings, information sharing, exchange of best practices and on the fruitful cooperation and consultations among the Committee and NPMs during its monitoring visits[105]. Beyond Europe, at the regional level the Subcommittee cooperates with the main mechanisms to prevent torture operating in the African and in the American continents. In particular, the SPT collaborates with the *Committee for the Prevention of Torture in Africa*, established in 2004 to monitor the implementation of the Robben Island Guidelines[106], with the *Special Rapporteur on Prisons, Conditions of Detention and Policing* in Africa and with the *Rapporteur on the Rights of Persons Deprived of Liberty in Americas* established by the Inter-American Commission on Human Rights[107].

As regards States Parties' duties towards the SPT, Article 12 provides that each State has to receive the SPT and allow it a free access to any place of detention. Moreover, they have to provide the SPT with all the requested information and facilitate the contacts between the SPT and NPMs. Finally, they have to examine its recommendations and initiate a dialogue on their implementation.

In conclusion, according to Article 14, States Parties have to grant the SPT unrestricted access to all information concerning the number of persons deprived of their liberty, all information related to the number and location of places of detention and all information referring to the treatment and detention conditions of those persons in those places. In addition, States have to guarantee the SPT an unrestricted access to all places of detention and their installations and facilities and the opportunity to have private interviews with the persons deprived of their liberty without witnesses and with any

[105]SPT, *First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* February 2007 to March 2008, UN Doc. CAT/C/40/2, 14 May 2008, § 37; SPT, *Second annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* February 2008 to March 2009, UN Doc. CAT/C/42/2, 7 April 2009, § 54; SPT, *Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* April 2009 to March 2010, UN Doc. CAT/C/44/2, 25 March 2010, § 68.

[106]*Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa,* adopted by the African Commission on Human and Peoples' Rights in 2002, available at: http://www.achpr.org/mechanisms/cpta/robben-island-guidelines/.

[107]R. Murray, E. Steinerte, M. Evans, A. Hallo de Wolf, *The OPCAT,* pp. 146 – 155.

other person conceived as bearer of relevant information. Finally, the SPT has to enjoy full liberty to choose the places it wants to "visit and the persons it wants to interview".
The second paragraph of Article 14 provides for the possibility to object to the visit of a particular place of detention for "urgent or compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such visit". Therefore, the postponement of a visit must be exceptional and considered case by case[108].

National Preventive Mechanisms (NPMs)[109]

Part IV provides for the obligation of States Parties to have in place one or several mechanisms to prevent torture at the domestic level and it establishes the powers and the guarantees that have to be granted to each mechanism, in order to enable them to effectively conduct their works.
Specifically, Article 17 elaborates on Article 3 by stating that each State Party has to "maintain, designate or establish" one or more mechanisms at the latest one year after the entry into force of the Optional Protocol, for the first twenty members and within one year from the date of ratification or accession for all the other members. The OPCAT hence does not prescribe a single form of NPM, leaving a wide margin of discretion to States Parties to design their mechanisms in relation to their specific country context. States Parties may establish new bodies as NPMs or designate already existing ones, as long as they satisfy the OPCAT requirements. Furthermore, they can decide whether to have one or several bodies acting as NPMs based for example on geographic or thematic criteria[110].
Article 18 sets up the necessary guarantees to ensure NPMs' complete independence from States' intervention, conceived as a fundamental requirement to prevent torture and other ill-treatment. In particular, States have to grant NPMs three types of independence: a functional, a personnel and a financial independence[111].

[108]Nowak and McArthur, *The UNCAT,* p. 1045.
[109]OPCAT, Part IV: National Preventive Mechanisms Articles 17 – 23.
[110]Apt, *Establishment and Designation of NPMs,* p. 78; APT/IIHR, *OPCAT: A Manual for Prevention*, pp. 73-75.
[111]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual*, pp. 195 – 196.

The functional independence is connected to the role and mandate of the national mechanism which, in order to effectively work, has to be free from the interferences of any other authority. NPMs should therefore operate outside the traditional administrative structures, far from the control of any executive branch such as a ministry, cabinet, president or prime minister. For this purpose, NPMs should be settled by a constitutional or legislative norm which clearly specifies their mandate, powers, appointment process, terms of office and lines of accountability and which explicitly prohibits any governmental intervention which, if allowed, could jeopardize the NPMs' independence by, for example, dissolving or altering their mandate at will. The only authority able to deal with NPMs' mandate and functioning should be therefore the legislature. Furthermore, NPMs should be entitled to draft their own rules and procedures without the intervention of any other authorities[112].

Secondly, NPMs should be provided with a personnel independence, namely the one characterizing their members and staff. In order to avoid any kind of conflict of interests, NPMs' membership should be made up of highly qualified experts, personally and institutionally independent from the State's authorities. Therefore, it should be excluded any person holding working positions or having close personal relationships that would constitute a real or a perceived obstacle to the complete independence of the preventive mechanism. For instance, people working in the criminal justice system, members of the executive political forces or individuals personally connected to leading governmental or law enforcement figures should be inconsistent with the independence's requirement. In addition, each NPM should be free to choose its own staff giving consideration to gender and ethnic balances and striving for a multidisciplinary composition, consisting of lawyers, doctors, NGOs' representatives and experts in the field of penitentiary system, human rights, health-care and any other sector relevant in the deprivation of liberty[113]. NPMs' membership should be selected by an open, transparent and inclusive process involving a wide range of actors including civil society[114].

[112]OPCAT, Article 18 (1); APT/IIHR, *OPCAT: A Manual for Prevention*, pp. 136 – 137.
[113]OPCAT, Article 18 (1), 18 (2); APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention*, pp.137 – 139; Apt, *Establishment and Designation of NPMs,* pp. 39 – 41; OHCHR, *Preventing Torture*, pp. 17 – 18.
[114]SPT, *Guidelines on NPM,* § 16.

Finally, States Parties are obliged to provide the necessary resources and adequate funding able to guarantee the NPMs' functioning. Financial independence is a fundamental requirement to ensure the NPMs' capability to exercise their mandate in full autonomy and their decision-making independence. For this purpose, NPMs have to be entitled to draft their own annual budgets and to decide how to allocate their resources autonomously. Moreover, in order to further preserve NPMs' independence, the source and nature of their funding should be specified in their establishing law[115].

In conclusion, the last paragraph of Article 18 refers to the Principles relating to the status of national institutions for the promotion and protection of human rights, the so called *'Paris Principles'*[116], as further guidelines in the fulfilment of the NPMs' independence requirement[117].

As it concerns NPMs' mandate, Article 19 provides for two main competences, namely the visiting and the advisory functions[118]. The first paragraph of Article 19, based on the General Principles enshrined in Article 4, establishes the NPMs' power to "regularly examine the treatment of the persons deprived of their liberty in places of detention". Such examination is undertaken through monitoring inspections which, in order to be truly effective, need to be conducted regularly. Indeed, the NPMs introduction in the OPCAT visiting system was designed in relation to their territorial proximity and consequent better capacity to carry out a constant and regular monitoring work. The article does not specify how frequently NPMs have to conduct their visits, leaving them the power to determine their own agenda[119].

The second and the third paragraphs of Article 19 describe the NPMs' advisory function. As the Subcommittee, each NPM can make recommendations to the relevant authorities stressing the necessary improvements in treatment and living conditions of detained persons and in order to prevent torture and other ill-treatments. To strengthen such provision, the OPCAT asks States' authorities to examine NPMs'

[115]OPCAT, Article 18 (3); Apt, *Establishment and Designation of NPMs,* pp. 46 – 47.
[116]The Paris Principles, related to the establishment of national institutions for the protection and promotion of human rights (NIHR), were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7–9 October 1991. They were adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992 and by the UN General Assembly in its Resolution 48/134 of 1993.
[117]OPCAT, Article 18 (4).
[118]OHCHR, *Preventing Torture*, p. 6.
[119]OPCAT, Article 19 (a); APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual,* p. 92 / p. 242; APT/IIHR, *Optional Protocol to the UNCAT: A Manual for Prevention,* pp. 135 – 136.

recommendations and to enter into a dialogue with NPMs on their effective implementation[120].

In addition, the NPMs' advisory function consists in the power to make proposals and observations on existing or draft legislation concerning places of detention and detained people. For this purpose, governments should send draft legislation to NPMs within a sufficient time to let them express their opinions and receive their proposals for new legislation or amendments to existing legislation[121].

In order to ensure the fulfilment of their mandate, States Parties have to provide NPMs with several guarantees as enshrined in Article 20, reflecting the ones outlined by Article 14 concerning the Subcommittee's mandate. As the SPT, NPMs should be free to decide when and where conduct their visits and whether announce them or not, counting on an unrestricted access to all the places of detention, to all the information concerning the number and the treatment of detainees and to all people they wish to privately interview[122].

In compliance with the principle of cooperation, the last paragraph of Article 20 claims that States Parties have to guarantee the contacts and the exchange of information among NPMs and the SPT[123]. For example, most NPMs usually submit their annual reports to the Subcommittee in order to keep it inform on their activities[124]. Cooperation needs to be pursued not only with the SPT but also among different NPMs in order to sharing experience and good practices.

As for the SPT, the information collected by the NPMs are confidential and no personal data can be published without the express consent of the people concerned[125]. However, provided that the information does not include personal data, the confidentiality principle does not prohibit NPMs to make their work public and accessible to other actors such as the SPT and civil society groups. According to Article 23, States Parties must in fact publish and disseminate the annual reports of NPMs.

[120]OPCAT, Article 19 (b) and Article 22.
[121] OPCAT, Article 19 (c); Apt, *Establishment and Designation of NPMs*, pp. 25 – 26.
[122] OPCAT, Article 20 (a), (b), (c), (d), (e).
[123] OPCAT, Article 20 (f).
[124]Annual reports received by the SPT from National Preventive Mechanisms, available at: https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/AnnualreportsreceivedfromNPM.aspx .
[125] OPCAT, Article 21.

Final Parts

Part V consists of a single article allowing a certain degree of flexibility in Member States' initial compliance and implementation of the Optional Protocol visiting system. In particular, Article 24 enshrines the possibility for States Parties to make a declaration in order to temporarily postpone their obligation under Part III, concerning the SPT, or under Part IV, concerning NPMs, but not both. The postponement can last three years and, under specific circumstance, may be further extended by the Committee against Torture for an additional two-years period[126].

Part VI contains two articles dedicated to financial provisions, specifically to the SPT's funding and to the establishment of a Special Fund to financially support States Parties' implementation of the recommendations made by the Subcommittee and NPMs' educational programmes[127].

In conclusion, Part VII comprises eleven articles containing the Optional Protocol's final provisions. The main ones concern OPCAT ratification and accession rules, its entry into force, the prohibition to make reservations, the process to withdrew or amend the instrument and the privileges and immunities for the members of the SPT and of NPMs[128].

4. Types of NPMs

According to the Optional Protocol, States Parties are free to design their National Preventive Mechanisms in line with their specific country context as long as they meet the OPCAT requirements enshrined in Chapter IV[129].

For the selection of their NPMs, States should initiate a transparent, inclusive and participative process, including civil society and all the relevant stakeholders[130]. The NPM choice should be taken after a broad consultation process aimed at properly

[126]OPCAT, Part V: Declaration, Article 24.
[127]OPCAT, Part VI: Financial Provisions, Articles 25 – 26.
[128]OPCAT, Part VII: Final Provisions, Articles 27 – 37.
[129]Such as mandate to carry out preventive visits, adequate financial resources, access to all information, access to all places of detention, right to conduct private interview, independence, expertise, right to make recommendations and to receive responses.
[130]SPT, *Guidelines on NPMs,* § 16.

addressing all possible options and at providing a solid legitimacy to the future institution[131]. According to the SPT, States Parties must opt for the NPM model they find the most appropriate for their specific context, "taking into account the complexity of the country, its administrative and financial structure and its geography"[132].

Bearing in mind these factors, States Parties may decide to establish a new institution or to designate an existing one as well as opt for a mechanism constituted by a single body or by several bodies acting together as NPM. There is no a single model of NPM that may fit all States in the same way. Only by considering each country specific characteristics, States are able to identify which type of NPM is the most suitable[133]. Until today, States Parties have followed four main path to set up their NPMs.

4.1 National Human Rights Institutions

Among the OPCAT members, the majority of States chose to designate as NPMs their already existing National Human Rights Institutions (NHRIs)[134].

According to the definition provided by the United Nations, a NHRI is a "body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights"[135]. In practice, NHRIs are organisations founded by States but independent from them, designed as a link between civil society and governments to implement human rights[136].

NHRIs are usually divided into two groups: Ombudspersons office and National Human Rights Commissions. Ombudspersons offices derive from the Scandinavian tradition and are generally identifiable as institutions aimed at addressing maladministration and at protecting people against violation of rights, errors, abuse of powers and unfair decisions. Most Ombudspersons Offices are characterised by a single decision-maker

[131]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual*, pp. 206 – 208.
[132]SPT, *Third Annual Report of the Subcommittee on Prevention of Torture*, § 49.
[133]R. Murray, *Challenges and Good Practices of NPMs operating in different organizational structures*, Briefing Paper, Human Rights Implementation Centre, University of Bristol, p. 1.
[134]Association for the Prevention of Torture (APT), *List of Designated NPM by Type*, National Human Rights Commissions – Ombuds Institutions, available at: https://www.apt.ch/en/by-type/.
[135]United Nations, National Human Rights Institutions. *A handbook on the establishment and strengthening of national institutions for the promotions and protection of human rights*, Professional Training Series No 4, 1995, §39.
[136]Their status and functioning have been laid down by the Paris Principles, adopted by the United Nations Commission on Human Rights resolution 1992/54 of 1992 and by the UN General Assembly resolution 48/134 of 20 December 1993.

assisted by a staff made up mainly of legal experts. Usually, Ombuds Institutions are entrusted with a broad mandate while, in some countries, there are one or more specialised Ombudspersons[137].

National Human Rights Commissions are instead institutions established with a mandate specifically and exclusively based on the protection and promotion of human rights. Contrary to the Ombudspersons, they are headed by several decision-makers, usually with a more varied professional backgrounds but always made up by a majority of legal experts[138]. Many NHRIs, of both types, are in fact characterised by a quasi-judicial function having the power to receive, consider and resolve individual complaints alleging human rights violations[139].

Since the OPCAT adoption, many States decided to designate their existing NHRIs as NPMs. This decision entails several advantages as well as several challenges. Usually, whenever there is an existing institution with great expertise in monitoring places of detention it would be more convenient and efficient to designate it as NPM rather than establish a new one with no experience. The mere fact that NPMs functions are performed by already operational institutions implies that they can count on pre-existing methodologies, infrastructures, institutional contacts and expertise in working within the human rights international system. In addition, existing NHRIs have usually built a strong reputation and credibility which contribute to make the NPM mandate known to the public[140].

Furthermore, even if the OPCAT does not explicitly provide for any specific type of legal act to establish NPMs, the SPT recommends that their mandate is laid down by a constitutional or legislative text[141]. The Paris Principles provide for the same thing as it concerns NHRIs' establishment[142]. Therefore, when NPMs are within NHRIs their mandates are automatically enshrined in law, in pursuance of a higher degree of independence. Finally, since several NHRIs have experience in detention monitoring,

[137]Association for the Prevention of Torture (APT), *National Human Rights Institutions as National Preventive Mechanisms: Opportunities and Challenges,* December 2013, pp. 15 – 16.
[138] Ivi, p. 17.
[139] ICC Working Group on General Observations, *Development of a new general observation on the quasi-judicial competency of National Human Rights Institutions (complaints-handling).*
[140]APT, *NHRIs as NPMs: Opportunities and Challenges*, pp. 5 – 6.
[141] SPT, *First annual report of the SPT,* §28.
[142] Paris Principles, Competence and Responsibilities (2).

some States may decide to designate them as NPMs rather than establish a new one in order to avoid the duplication of bodies conducting overlapping activities[143].

Despite all these positive aspects, the designation of existing NHRIs as NPMs often entails few challenges. Even if an already operational institution may constitute an important advantage, at the same time it can implies several criticalities. In almost all cases, whenever a State appoints an existing body as NPM, some changes will be necessary to conform its mandate to the OPCAT requirements[144].

As first thing, many States usually consider this option as the most "cost-saving" since it does not provide for the establishment of a new institution from scratch. Nevertheless, conferring an additional mandate to existing NHRIs should always imply additional financial, logistical and human resources to ensure their effective functioning[145]. One of the most important NPMs' requirements established by the OPCAT is in fact the functional and financial independence that each State must guarantee. For this purpose, the Subcommittee stated that whenever an institution "designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget"[146]. However, in the majority of cases, NPMs' resources are considered part of the resources generally conferred to the NHRIs. A lack of resources is therefore a main challenge for many NHRIs with NPMs' functions[147].

A further difficulty linked to the scarcity of resources is the expertise gap that the majority on NHRIs institutions have to fill whenever designated as NPMs. Both the OPCAT and the Subcommittee explicitly require a multidisciplinary composition of NPMs, which have to be made up of people with different professional backgrounds[148]. However, considering their judicial nature, the majority of NHRIs, especially the Ombudspersons type, are mainly composed by lawyers, lacking completely or in part of experts in other fundamental fields. In this respect, National Human Rights

[143] APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual,* p. 211.
[144]Association for the Prevention of Torture (APT), *National Human Rights Commissions and Ombudspersons' Offices/ Ombudsman as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture*, January 2008, p. 2.
[145]Ivi, pp. 6 – 7.
[146]SPT, *Guidelines on NPM,* § 32.
[147]APT, *NHRIs as NPMs: Opportunities and Challenges*, pp. 11 – 13.
[148] OPCAT, Article 18 (2); SPT, *Guidelines on NPM,* § 17.

Commissions are usually in a better position since their specific human rights mandate and therefore their more varied membership[149].

Finally, a further challenge in the performance of NPMs mandate may arise from the intrinsic nature of NHRIs. Their reactive approach adopted in receiving and responding to individual complaints may collide with the more proactive preventive mandate required by the Optional Protocol[150]. Since the OPCAT provides for a constructive dialogue with national authorities and not for litigious confrontations, the quasi-judicial mandates of NHRIs may create conflicts with NPMs' functions[151].

4.2 National Human Rights Institutions plus Civil Society Organisations

In the attempt to overcome the main difficulties faced by the NHRIs to fulfil the OPCAT requirements, some States have decided to designate their Ombuds Institutions to carry out the NPM functions but in collaboration with Civil Society Organisations (CSOs), especially in relation to the preventive monitoring functions. The relationship among NHRIs and CSOs is in most cases established by an agreement which provides for their formal involvement in NPMs' tasks[152].

This model, commonly known as "Ombuds Plus Institutions", has been until today adopted by six States, namely by Denmark, Moldova, Serbia, Ukraine, Slovenia and Kazakhstan[153]. For example, in Slovenia the NPM duties are performed by the Human Rights Ombudsperson's Office in formal cooperation with five national non-governmental organisations registered in the Republic of Slovenia[154].

There are several advantages in including CSOs as formal participants of NPMs. First of all, their involvement often implies an important source of additional expertise especially in the field of human rights that the majority of NHRIs usually lack. The CSOs selected to become part of NPMs are normally characterised by a great expertise

[149] E. Steinerte, Rachel Murray, *Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention against Torture*, 6(1) Essex Human Rights Review (2009), pp. 61 - 64.
[150]APT, *NHRIs as NPMs: Opportunities and Challenges*, p. 16.
[151]E. Steinerte, Rachel Murray, *Same but Different?*, p. 69.
[152]APT, *NHRIs as NPMs: Opportunities and Challenges*, p. 18.
[153]APT, *List of Designated NPM by Type,* Ombuds Plus Institutions.
[154]APT, Slovenia – OPCAT Situation, available at: https://apt.ch/en/opcat_pages/opcat-situation-66/.

in visiting different places of detention. Furthermore, their participation ensures a better and wider coverage of visited places of detention in the whole national territory[155].

A further advantage consists in the additional information, contacts and relationships with other authorities that the involvement of other organisations naturally entails. In addition, because of their structural independence from the governments, CSOs' inclusion may also help to expand the legitimacy and the credibility of NPMs[156].

However, the "Ombuds plus Institutions" model may also imply several challenges. For example, when an organisation with expertise in monitoring places of detention has a conflictual relationship with governmental authorities it could be hard to restore a peaceful dialogue as prescribed by the OPCAT. For this reason, whenever becoming part of an NPM, CSOs need to consider a change in their former freedom to critique the government or the NHRI itself[157].

Furthermore, once several organisations become parts of an NPM, their different monitoring methodologies need to be smoothed out in order to properly conduct the NPM mandate and to ensure coherence in the performance of its functions. In addition, it is necessary to clearly identify the competences of civil society organisations in relation to their NPMs tasks and to ensure that the powers and immunities provided by the OPCAT are guaranteed also to CSOs' members[158].

4.3 New Specialised Institutions

Several States decided to follow a completely different approach by creating a new institution exclusively dedicated to perform NPMs' functions[159]. This option has been chosen both by States without NHRIs, like Italy, and by States that despite having a NHRI decided to delegate the NPMs' functions to a new institution, such as France[160].

This NPM model is the complete opposite of the previous ones. All the challenges of the NHRIs models are the strengths of new specialised institutions and, vice versa, all its advantages are their weaknesses.

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[155]APT, *NHRIs as NPMs: Opportunities and Challenges*, p. 18.
[156]Ibidem; and R. Murray, *Challenges and Good Practices*, p. 3.
[157]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual*, p. 216.
[158]APT, *NHRIs as NPMs: Opportunities and Challenges*, pp. 18 – 19.
[159]ATP, *List of Designated NPM by Type*, New Specialised Institutions.
[160] In France despite the existence of the *Commission Nationale Consultative des Droits de l'Homme* acting as NHRI, in 2007 it was established the *Contrôleur général des lieux de privation de liberté* as NPM.

First of all, new specialised institutions are entirely focused on torture prevention and in conducting monitoring visits in places of detention. Thereby, they may have a more effective impact than existing institutions with broader mandates. Furthermore, States find usually easier to adopt new legislation than to amend existing ones. In addition, the adoption of new laws gives the opportunity to create institutions more OPCAT-compliant in terms of NPMs' requirements than existing bodies. Contrary to NHRIs, new and specialised NPMs are commonly composed by experts with different professional backgrounds in the field of deprivation of liberty and enjoy a budget entirely dedicated to the performance of NPMs tasks[161].

However, new specialised institutions have to face several challenges that existing NHRIs have not. First of all, new institutions have the need to be known by national authorities, civil society and by the general public, to create their legitimacy and credibility and to build confidence in their activities. To overcome these difficulties, a new specialised institution must be furnished with adequate financial, logistical and human resources aimed at promoting awareness and informative activities with a long-term perspective[162].

Furthermore, when new institutions are designed as NPMs in countries where other existing bodies already conduct similar functions, there could be the risk of duplicating mechanisms performing overlapping tasks. According to Ms. Renate Kicker, former Vice-President of the European Committee for the Prevention of Torture, if there are too many inspections conducted by too many bodies, detained persons will lose their confidence in these institutions, undermining therefore the NPM's aim[163].

4.4 Multiple Institutions

In conclusion, some States Parties have decided to designate several institutions to perform together the NPMs' functions. This option is explicitly provided by Article 17 and is usually taken by federal or decentralised States. Until today, collective NPMs have been established in Malta, United Kingdom, New Zealand and in the Netherlands[164].

[161]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual*, p. 209.
[162]Ivi, p. 210.
[163]S. Valenti, *"Rights of persons deprived of their liberty"*, p. 26.
[164]ATP, *List of Designated NPM by Type*, Multiple Institutions.

In practice, States may decide whether designate several already existing institutions, whether establish new ones or whether opt for a combination of the two possibilities creating an NPMs made up of old and new institutions[165].

Specifically, States Parties have designed their multiple NPMs in relation to their specific country context, following different lines of internal diversification.

Especially in large and decentralised States, multiple NPMs have been established according to geographic divisions. In federal States, the designation of multiple bodies is instead usually the result of jurisdictional divisions.

In Germany, for example, the responsibility on places of detention falls under two different jurisdictions, namely under the Federal Agency for the Prevention of Torture (*Bundesstelle zur Verhütung von Folter*), which is in charge of federal facilities, and under the Joint-Commission of the Länder (*Kommission zur Verhütung von Folter*), which is instead responsible for all the places of detention falling under the Länders' jurisdiction. Since the two bodies have been finally merged in one institution, the National Agency for the Prevention of Torture, Germany is today catalogued as a new specialised institution, while maintaining its internal jurisdictional division[166].

Furthermore, some States decide to designate as NPMs multiple institutions with different and specific expertise, following therefore thematic divisions. This option is usually taken by those States that already have well-functioning mechanisms with high qualifications and monitoring expertise in a specific area, such as psychiatric institutions, juveniles' facilities or migrants' centres. Once established as NPMs, each mechanism will be in charge of monitoring only the places under their specific thematic field. An example of a thematically-based NPM is the one of New Zealand which is composed by four existing institutions, coordinated by the New Zealand Human Rights Commission. Specifically, it is made up by the Office of the Children's Commissioner, which monitors children and juveniles' facilities, the Inspector of Service Penal Establishments, in charge of Defence Force's facilities, the Independent Police Conduct Authority for police stations, and the Office of the Ombudsman which is responsible for all the others places of detention, such as prisons, psychiatric structures and immigration detention facilities[167].

[165]APT/IIHR, *Optional Protocol to the UNCAT: Implementation Manual*, p. 217.
[166]APT, *Germany – OPCAT Situation*, available at: https://apt.ch/en/opcat_pages/opcat-situation-1/.
[167]APT, *New Zealand – OPCAT Situation*, available at: https://apt.ch/en/opcat_pages/opcat-situation-52/.

Finally, some other States opt for multiple bodies for both geographic, jurisdictional and thematic considerations. The United Kingdom NPM, for instance, is currently composed of twenty-one institutions, under the coordination of Her Majesty's Inspectorate of Prisons. Each member of the NPM has a different mandate, powers and geographical jurisdiction[168].

The main advantage in designating several bodies as NPMs is therefore the better management of specific country issues, especially in territory with geographic and jurisdictional divisions. However, when several bodies are designated as NPMs, States Parties must pay particular attention to some key aspects. First of all, they have to guarantee that all the NPM sub-units meet the OPCAT requirements and that every place of detention is monitored at least by one of them, ensuring a total coverage of the national territory. Furthermore, some challenges may arise from the difficulty of maintaining a clear consistency in recommendations and findings among several bodies, especially when few of them visit the same places of liberty deprivation. Finally, multiple NPMs need to ensure a nation-wide coordination to avoid gaps, duplications of efforts and methods coherence. For this purpose, in each multiple NPM, at least one body must have a coordinating role to make recommendations to central Authorities, publish the annual report and to maintain relations with the Subcommittee on behalf of all the NPM members[169].

[168]APT, *United Kingdom – OPCAT Situation*, available at: https://apt.ch/en/opcat_pages/opcat-situation-33/.
[169]APT, *Establishment and Designation of NPMs*, pp. 89- 93.

Chapter II

The Italian Independent Authority for the rights of persons deprived of liberty

1. The long path towards the creation of the Italian NPM

The establishment of a National Preventive Mechanism in Italy was the final outcome of a long and tortuous path, started in the late 1990s and ended at the beginning of 2016 with the effective start of its operational activities.

Due to the unstable political situation and to the consequent early termination of several parliamentary terms, until few years ago Italy indeed lacked a national independent mechanism, able to protect the rights of people deprived of their personal liberty and to prevent any act of torture or ill-treatment against them.

1.1 The Surveillance Magistracy as guarantee mechanism of detained persons' rights

Until the NPM establishment, the guarantee functions of detained people's rights were an almost exclusive competence of the surveillance magistracy ("magistratura di sorveglianza"), a distinct branch of the Italian judiciary with specialised competences on the enforcement of the sentence in its entirety. The surveillance magistracy was introduced in the Italian Prison Act by Law 26 July 1975 n. 354[170] in fulfilment of Article 27 of the Constitution[171].

The surveillance magistracy consists of two different judiciary bodies: the surveillance court and the Surveillance judge.

The surveillance court is a collective body acting, within a specific territorial, area both as first and second instance court for the surveillance judge. It rules through a college of four members, made up of two regular magistrates and two experts in the field of psychology, social services, psychiatry, pedagogy and criminology.

The surveillance judge is instead a monocratic judicial body, characterised by a strong degree of autonomy, whose decisions are appealable only before the relevant

[170]Prison Act 26 July 1975, n. 354, *"Norme sull'ordinamento penitenziario e sull'esecuzione delle misure privative e limitative della libertà".*

[171]Constitution of the Italian Republic, Article 27 paragraph 3: *"Punishments may not be inhuman and shall aim at re-educating the convicted".*

surveillance court. Specifically, the surveillance judge is one of the few individuals empowered by Article 35 of the Prison Act to receive requests and oral or written complaints from detainees or internees[172]. Until 2013, such procedure, called "generic complaint", was the only way that detained persons had to appeal against a violation of their rights.

Furthermore, the surveillance judge has wide supervisory inspection duties, such as monitoring the organisation and the management of each single detention facility and referring to the Minister of Justice their eventual needs. In addition, the surveillance judge ensures that the enforcement of the sentence is carried out in accordance with law and regulations; it oversees specific security measures; it reviews the social danger; it approves the personalised treatments program; it provides for the complaints of detainees and internees; it grants and manages temporary releases and alternative measures to detention; it provides for early releases and debt reliefs; and, finally, it gives reasoned opinion on pardon proposals[173].

The surveillance judge, along with the regional administrator ("Provveditore Regionale") and the director of the prison Institution, has the duty to regularly visit prisons, providing all detainees and internees with the opportunity to directly get in contact with it. The frequency of the visits is aimed at improving the performance of periodic individual interviews with detainees or internees and the submission of eventual requests or oral complaints, in accordance with Article 35 of the Prison Act[174].

Despite the existence of the surveillance judge as a central guarantee body for the protection of detained persons' rights, several actors of both national and international nature tried to put pressure on Italy to create a further guarantee institution with no judicial tasks, completely independent from any state powers and with a broader inspection mandate, aimed at complementing the work conducted by surveillance judges[175].

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[172]Prison Act, Law No. 354 of 26 July 1975, Article 35.

[173]Ivi, Article 69.

[174]Decree of the President of the Republic (DPR), 30 June 2000, n.230, *"Regolamento recante norme sull'ordinamento penitenziario e sulle misure private e limitative di libertà"*, published on the Official Journal n.195 of the 22 August 2000, Article 75.

[175]The Italian Constitutional Court, through the sentence n.26 of February 1999, raised the issue of the insufficient legal safeguard of detainees' rights. The Court sustained that the Italian Prison Act did not provide, at the time, for guarantee mechanisms enforceable by people deprived of liberty against prison administration's acts violating their rights. The Court declared such lack as unconstitutional.

One of the main supporter of a stronger protecting and preventing mechanism was the European Committee for the Prevention of Torture. Indeed, since its first visits to Italy, the CPT highlighted the limited effectiveness of the work conducted by the surveillance judge, especially in their inspection and complaints receiving functions. On several occasions, the Committee pointed out the insufficient number of visits conducted by judges and, above all, the limited purpose of their activities as only addressed to the detained people explicitly requesting their intervention[176].

Furthermore, the CPT sustained that even the inspections conducted by other organisms, such as those of regional administrators, limited the extent of their visits to a mere budgetary and administrative control[177].

For all these reasons, the CPT stressed the necessity of a more effective and proactive inspective authority, visible and accessible not only to the prisons' direction and personnel but to all the detainees, regardless of their explicit request of meeting them[178].

In conclusion, according to the CPT, the monitoring activities should have been conducted by an independent organism not only to prisons, but also to psychiatric facilities as well as to reception and care centres for foreigners[179].

1.2 First draft laws for the establishment of an Italian national mechanism to prevent torture

The first efforts towards the establishment of an Italian guarantee system for persons deprived of liberty were made in the late 1990s by civil society organisations and the academic community which, even before the OPCAT adoption, started to address the issue of torture prevention.

Indeed, between 14 and 15 November 1997, an International Conference, promoted by Associazione Antigone[180] and Associazione Diritti Umani-Sviluppo Umano[181], on the

[176]*Rapport au Gouvernment de l'Italie relative à la visite effectuée par le Comité européen pour la prevention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Italie du 22 octobre au 6 novembre 1995*, Strasbourg, 4 décembre 1997, par. 155; *Rapport au Gouvernment de l'Italie relative à la visite effectuée par le Comité européen pour la prevention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Italie du 13 au 25 février 2000*, Strasbourg, 29 janvier 2003, par. 128. For more information on the CPT visit of 2000 see L.Astarita, S.Marietti, P.Gonnella, Il collasso delle carceri italiane. Sotto la lente degli ispettori europei, Antigone e Sapere 2000, 2003.

[177]*Rapport au Gouvernment de l'Italie relative à la visite effectuée par le CPT en Italie du 13 au 25 février 2000,* par. 128.

[178]Ivi, par. 129.

[179]Ivi, par. 183 and par. 62.

establishment of an Ombudsperson for the safeguard of persons deprived of liberty was held at the University of Padua[182].

The conference's main goal was to encourage the development of a new debate on the necessary improvement of detention conditions, on legality's forms of control in places of detention and, in this respect, on the establishment of a national guarantee institution for the safeguard of detained people[183].

All the speakers attending the event stressed the urgency of a new independent, strong and authoritative institution, with broad inspection and monitoring powers and free access to every place of detention, including not only prisons but all the facilities where people are deprived of their personal liberty even in absence of a legal sentence[184].

At the conference, it was repeatedly emphasised the importance of an institution appointed by the Parliament and acting as spokesperson of detained people's interests, able to draw the public attention and to urge the intervention of the judicial and legislative authorities on detention's related issues, often forgotten or rarely addressed. In addition, the guarantee institution was pictured as a fundamental channel between international tendencies and domestic issues, capable of cooperating with supranational institutions, especially with the recently established CPT [185]. A strong cooperation between the national Ombudsperson and the European Committee was conceived as an essential way to increment the information exchange among the two institutions, in order to increase the efficiency at both levels[186].

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[180]*Associazione Antigone – Per i diritti e le garanzie nel sistema penale* is an Italian NGO founded in the late eighties which operates in the field of detention, prisoners' rights and guarantees in the penal system. For more information: http://www.antigone.it/index.php.

[181]*Associazione Diritti Umani – Sviluppo Umano* is an association established in 1996 by a group of human rights experts from the University of Padua to enhance human rights promotion, democratic participation and sustainable human development in institutions as well as in civil society policies. For more information: http://www.associazionedirittiumani.it/.

[182]"*L'Ombudsman e la tutela dei diritti umani nei luoghi di detenzione*", international conference promoted by Associazione Dirtti umani-Sviluppo Umano and Associazione Antigone, University of Padua, 14-15 November 1997.

[183]P.Gonnella, *L'ombudsman per i diritti dei detenuti,* in *Diritti in carcere: il difensore civico nella tutela dei diritti dei detenuti,* edited by A. Cogliano, Quaderni di Antigone, vol. I, 1° ed. 1997, pp.29 – 38.

[184]M.Palma, *L'Ombudsman per un ruolo di indirizzo e di promozione dei diritti,* pp. 143 – 152, and G.Pisapia, "*Le carceri italiane sono le più civili del Terzo mondo",* pp.159 - 167, both in *Diritti in carcere.*

[185]G.Mosconi, *Per un superamento delle ambivalenze della legislazione penitenziaria*, p. 115 ss in *Diritti in Carcere.*

[186]R. Kicker, *Il CPT e l'Ombudsman penitenziario,* pp.39 – 43, in *Diritti in carcere*.

Following the Padua's Conference, Antigone decided to promote the first draft law for the establishment of a national Ombudsperson for people deprived of liberty ("Difensore Civico"). The bill was publicly announced in occasion of the Fiftieth anniversary of the Universal Declaration of Human Rights and submitted to both the parliamentary chambers between December 1998 and January 1999[187].

The organism designed by Antigone is a collective body made up of four members appointed by the Parliament[188] for a four-year term, because of their competence in the field of detainees' rights and their total professional independence[189]. The ombudsperson is conceived as a completely independent institution with a broad autonomy of action and wide powers of monitoring and inspection. Specifically, it is provided with the right of access, even without permission, to every place of deprivation of liberty. In addition, it is entitled to meet everyone without any restriction, to consult any personal file or medical chart without the authorization of the judicial authority and to obtain any kind of information from the people in charge of detention facilities and from the local or the central administrations[190].

The figure described by Antigone has the power to make pressing recommendations, to report serious circumstances to the judiciary authorities, to cooperate with the NGOs operating in the territory and to submit an annual report to the Parliament, aimed at providing legislative indications[191]. Furthermore, in carrying out its functions, it may establish specific agreements with other Ombuds institutions for people deprived of liberty operating at the territorial level[192].

Therefore, the hypothetical final outcome of this first legislative proposal was a strong institution, with significant powers, well structured and completely autonomous, resembling the future design of the Optional Protocol NPMs.

In order to improve the organism's effectiveness, the authors of the draft decided to design a detached guarantee Institution exclusively dedicated to the rights of people deprived of liberty rather than incorporate its functions within a broader national

[187]Associazione Antigone's draft law: Camera dei Deputati, Atto Camera n. 5509, 14 December 1998; Senato della Repubblica, Atto Senato n. 3744, 14 January 1999.

[188]Specifically, Article 2 of Antigone draft law, provides that two members are elected by the Chamber of Deputies and two by the Senate. Once appointed, the four members select among themselves a President of the institution whose vote prevails in the event of a tie.

[189]Associzione Antigone draft law, (Atto Senato n.3744), Articles 2; 11; 12; 13.

[190]Ivi, Article 4.

[191]Ivi, Articles 7; 9; 10.

[192]Ivi, Article 3.

institution in charge of a general human rights mandate. According to Antigone, establishing a specialised institution could be an effective way to avoid the risk of marginalization that often affects the rights of people deprived of liberty when included as a part of an Ombuds institutions with a broader purpose[193]. Despite the relevance of the proposal, the bill promoted by Antigone has never been examined by the Italian parliamentary assembly[194].

In the early 2000s, at the beginning of the new parliamentary term, other three draft laws on the establishment of an Ombudsperson for people deprived of personal liberty were submitted to the Chamber of Deputies[195].

Considering the exact same subject of the three proposals, they have been unified in a single document discussed by the Chamber of Deputies on October 2005[196]. The content of the new legislative proposal was basically the same of the one promoted by Antigone, except for the number of the Ombudsperson's members which increased from 4 to 5 people[197]. Nevertheless, because of the early ending of the XIV legislature, the Chamber of Deputies' discussion over the unified draft law was suddenly interrupted[198].

For the same reason, a few years later another draft law on the establishment of a national Ombudsperson for detained people suffered the same fate. The document was the final result of four draft laws unified in a single text entitled *"Establishment of the National Commission for the Promotion and Protection of Human Rights and the Safeguard of Persons Detained or Deprived of Personal Liberty* "[199].

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[193]M. Palma, *L'Ombudsman per un ruolo di indirizzo e di promozione dei diritti*, in *Diritti in carcere: il difensore civico nella tutela dei diritti dei detenuti,* edited by A. Cogliano, Quaderni di Antigone, vol. I, 1° ed. 1997, p. 151.

[194]Atto Camera 5509, iter: assigned-examination not yet begun; Atto Senato 3744, iter: Under consideration by the commission.

[195] Camera dei Deputati, XIV legislature, Ddl n. 411, 1 June 2001; Camera dei Deputati, XIV legislature, DDl n. 3229, 4 October 2002; Camera dei Deputati, XIV legislature, DDl n. 3344, 4 November 2002.

[196]Discussione del testo unificato delle proposte di legge: Pisapia ed altri; Mazzoni; Finocchiaro ed altri: *Istituzione del garante dei diritti delle persone detenute o private della libertà personale* (A.C. 411-3229-3344), 27 October 2005.

[197]According to Article 1 of the unified text, the new mechanism is made up of a President, elected by mutual agreement of the Presidents of the two parliamentary bodies, and by other four members, two of which elected by the Senate and the other two by the Chamber of Deputies.

[198]XIV Legislature: 30 May 2001 – 27 April 2006.

[199]Senato della Repubblica, XV legislature, Ddl n. 1463, approved by the Chamber of Deputies on 4 April 2007 and transmitted to the Senate on 5 April 2007. The document was the result of four different legislative proposals unified in a single text: Ddl n. 626, 10 May 2006; Ddl n. 1090, 12 June 2006; Ddl n. 1441, 21 July 2006; Ddl n. 2018, 1 December 2006.

This time, however, the early interruption of the parliamentary proceedings occurred when the legislative proposal had already been accepted by the Chamber of Deputies and just transmitted to the Senate for its approval[200].

Unlike the specialised organism designed by Antigone and included in the draft laws of the early 2000s, in this new proposal the guarantee institution for people deprived of personal liberty was framed within a wide independent national human rights institution. Specifically, the first chapter of the draft law was dedicated to the composition and functions of the Commission, whereas the second chapter focused on the role of the Commission as *Guarantor of the Rights of Persons Detained or Deprived of their Personal Liberty*[201].

According to article 9 of the draft law, the President of the Commission confers to one of the other four members, the role of coordination of all the Guarantor's functions. Among them, the Commission must first of all cooperate with all the guarantors of people deprived of personal liberty or with similar figures wherever established at the regional or local level[202].

Article 11 lays down all the specific functions and powers granted to the Commission in its role of guarantor. According to paragraph 1, the Commission verifies the conformity of any form of deprivation of liberty with the local and national law, with the constitutional provisions and the international human rights standards. Moreover, it can receive, along as the surveillance judge, requests and complaints by detained and interned people. As in the previous draft laws, the guarantee Institution is characterized by a wide inspection and monitoring power. Paragraph 2 indeed provides the Commission a wide right to access, without any notice nor authorisation, to any place of deprivation of liberty. In addition, it has the right to consult personal files and to request all the necessary information to the administration in charge of the concerned facility.

Finally, the main innovation of the draft law is the so called verification procedures. According to Article 13, whenever the Commission verifies that the administration of a place of detention acts against the national or international laws or that the complaints

[200]Camera dei Deputati Ddl n. 626 (unified with Atto Camera 1090, Atto Camera 1441, Atto Camera 2018), iter: Approved as unified text); Senato dell Repubblica, Ddl n. 1463, iter: Assigned – examination not yet begun.

[201]Senato delle Repubblica, Ddl n.1463, Chapter I: National Commission for the Promotion and Protection of Human Rights (Articles 1 – 8); Chapter II: Functions of the Guarantor of Rights of Persons Detained or Deprived of their Personal Liberty (Articles 9 – 13).

[202]Senato della Repubblica, Ddl n.1463, Article 10.

submitted by detainees are legitimate, it must demand the concerned administration to act accordingly, promoting a conciliation attempt or, when an agreement is not reached, making specific recommendations.

The draft law on the establishment of the Commission was never examined by the Senate[203]. The early conclusion of the XV parliamentary term interrupted the analysis of the legislative proposal that was getting closer to its realisation more then any other ever did, causing huge disappointment and discourage among its promoters and among all the supporters of a new independent guarantee institution.

1.3 Territorial Guarantors of people deprived of personal liberty

Despite the difficulties experienced in establishing an Ombudsperson at the national level, since spring 2003, several regional and local Authorities decided to undertake an innovative project by designing guarantee Institutions operating at the territorial level. The first institution established was the Guarantor for the Municipality of Rome[204], immediately followed by the Guarantor for Region Lazio[205]. Over time, several regional and local realities followed their lead establishing a plurality of mechanisms that today constitute a dense network of territorial figures.

Each guarantor laid down its specific functions in its founding law. Generally, their main activities consist in receiving warnings on cases of non-compliance with prison laws, on violation or partial implementation of detained people's rights and in addressing the competent authorities to obtain explanations, encouraging the necessary measures.

Territorial Guarantor for detainees' rights were formally introduced in the Italian Prison Act by Article 12-bis of the decree law No. 207 of 30 December 2008, converted with modifications into law No. 14 of 27 February 2009. The new legislation provided Guarantors', howsoever named[206], with the right to visit prison facilities without

[203]Senato della Repubblica, Ddl n. 1463, iter: Assigned – examination not yet begun.

[204]"Garante dei diritti delle persone private della libertà personale di Roma Capitale", City Council's decision No.90 of 14 May 2003.

[205]Regional Law No.31of 6 ottobre 2003.

[206]According to paragraph 3 of the Ministerial Circular No. 3651/6101 of 7 November 2013, a Guarantor is a "public body established through legal act", issued by the State or by public territorial Authorities. https://www.giustizia.it/giustizia/it/mg_1_8_1.wp?facetNode_1=0_2&facetNode_3=0_2_6_4&facetNode_2=0_2_6&previsiousPage=mg_1_8&contentId=SDC964264.

authorisation, subsequently expanded to police forces detention cells[207] and to detention centres for foreigners without regular residence permit[208]. Furthermore, it allowed territorial guarantors to interview detainees and internees[209].

In order to coordinate the regional Guarantors' activities, in 2008 it was established the National Conference of regional Guarantors of Detainees, an organism in charge of planning initiatives of national relevance aimed at addressing the issues connected with the safeguard of detained people, the execution of the sentence and their social reintegration[210]. The Conference was chaired alternately by a regional Guarantor, while its organisation is entrusted to a General Secretary.

Since their establishment, on several occasions regional and local Guarantors stressed the need of a specific guarantee and monitoring institution for the protection of people deprived of liberty with a national territorial mandate. For this purpose, the Coordination of territorial Guarantors[211], a forum opened to all the regional and local guarantors for the rights of persons deprived of liberty, promoted a new draft law for the establishment of a national guarantee mechanism.

Besides the elements already outlined in the previous proposals, such as the collegial composition, the parliamentary appointment procedure or the strong independence requirement, the real innovation of the new draft law is the widespread cooperation with territorial Guarantors. While continuing to preserve their autonomy of action on the territory, Guarantors are in this way conceived as parts of a new federal system according to which, at least once a year, the national Guarantor had to meet with the territorial ones in a joint assembly[212].

The Coordination of Territorial Guarantors' draft law on the establishment of a national guarantee Institution was just one of the several submitted between 2008 and 2009. By looking at the work done by the last parliamentary terms, some proposals represented

[207]Article 2bis, paragraph 1 (b), D.L. No. 211 of 22 December 2011, converted into law No. 9 of 17 February 2012.

[208]Article 19, paragraph 3, D.L. No.13 of 17 February 2017, converted into law No.46 of 13 April 2017.

[209]The territorial Guarantors' interviews and unannounced visits have been introduced, respectively, amending Article 18 (1) and to Article 67 (1) of the Prison Act, through Article 12-bis a), b) of decree law 207/2008.

[210]Ministero della Giustizia, Scheda Pratica, *Garante nazionale e garanti territoriali*, https://www.giustizia.it/giustizia/it/mg_3_8_16.wp.

[211]Today known as *Conference of territorial Guarantors for the rights of persons deprived of liberty.*

[212] Ddl of the Coordination of the Guarantors, "Istituzione del Garante nazionale delle persone private della libertà personale ". Available at:
http://www.ristretti.it/commenti/2010/marzo/pdf3/ddl_garante_detenuti.pdf.

faithfully the contents of the previous ones while other slightly modified them with different formal features.

Among them, the draft law submitted to the Senate on May 2008 entitled "*National Guarantor for the Safeguard of Fundamental Rights of Detainees and for their Social Reintegration*"[213] deserves a brief mention. The interesting aspect of this proposal is the decision to design the guarantee Institution as a monocratic body in order to avoid the establishment of a complex and expensive institution, considering the difficult financial situation of the country. The national guarantee Institution is composed of a Guarantor and a Vice Guarantor who replaces him/her in case of absence or impediment[214].

During the whole XVI legislature and the beginning of the XVII, despite the proliferation of legislative proposals, none of them succeeded in being examined by the Parliament.

2. The National Guarantor for the Rights of Persons Detained or Deprived of Liberty.

2013 was a turning point for the Italian justice and prison system, as the year started in January with the pilot judgement *Torreggiani and Others v. Italy* of the European Court of Human Rights (ECtHR) and ended in December with the establishment of the *National Guarantor for the Rights of People Detained or Deprived of Personal Liberty.*

In order to implement the ECtHR sentence, Italy developed a wide *Action Plan*, adopting several measures aimed at reducing prison overcrowding and generally at ensuring the respect of detained persons' rights. Among these measures, Italy finally established an independent Authority for persons deprived of liberty, provided with extensive powers and with a coordination role of the guarantee Institutions operating at the territorial level. In 2014, the Authority has been designated as the Italian NPM, in compliance with the Optional Protocol to the Convention against Torture.

[213] Senato della Repubblica, XVI Legislature, Ddl n. 343, 6 May 2008.
[214] Ivi, Article 1(2).

2.1 The Torreggiani judgement and the Italian "Action Plan"

On 8 of January 2013, Italy was condemned by the ECtHR for the violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the Court of Strasburg, the Italian prisons' serious condition of overcrowding violated the prohibition to inflict torture and other inhuman or degrading treatment[215].

Considering the «structural and systematic nature of the prisons' overcrowding in Italy» and the «hundreds of complaints submitted [..] related to prisons' overcrowding in several Italian detention facilities», the Court of Strasbourg decided to adopt a pilot judgment[216].

Such procedure, introduced by the ECtHR to its "Rules of Court" in February 2011, is used whenever the Court receives a relevant number of complaints regarding the same violation, clear sign of a structural and systematic dysfunction in the country concerned[217]. Through a pilot judgement, the Court selects one or more of the several complaints and, by deciding on their specific resolution, it addresses their underlying causes and gives the Government indications on the necessary remedial measures that should be adopted to resolve the problem at the base of the multitude of violations. Once identified the general measures, the Court may ask the Contracting State to adopt them within a certain amount of time, ensuring the rapid and effective resolution of the systematic dysfunction[218].

Specifically, in the *Torreggiani judgement*, the ECtHR highlighted the lack of mechanisms allowing an effective protection of detainees' rights in case of violations and urged Italy to introduce such instruments or to reinforce the existing ones[219]. The ECtHR considered the measure enshrined in Article 35 of the Prison Act insufficient to

[215]This was not the first time Italy was condemned by the ECtHR for violating Article 3. The Torreggiani judgement arrived in fact four years later the Sulejmanovic case (2009) according to which the evident lack of personal space within prison cells constitutes an inhuman and degrading treatment.

[216]European Court of Human Rights, *Torreggiani and Others v. Italy*, Judgment, Paragraphs 87 – 90, Strasbourg, 8 January 2013.

[217]European Court of Human Rights, *Rule 61 of the Rules of Court: Pilot-judgment procedure, Strasbourg,* 21 February 2011.

[218]M.Bocchi, *In (non) Claris fir interpretation: gli effetti delle sentenze pilota sul diritto a un equo processo, tra revision del giudicato e rideterminazione della pena*, Archivio Penale 2017, n. 1, pp. 2 – 3.

[219]ECtHR, Torreggiani and Others v. Italy, par. 98; R.Montaldo, *Emergenza carceri: a tre anni dalla sentenza Torreggiani, gli esiti e l'effettività delle riforme,* in Forum di Quaderni Costituzionali, 3 February 2016.

effectively protect their rights. Indeed, the Court claimed that the generic complaint was not enough, since it does not imply a quick end of the imprisonment carried out in conditions incompatible with Article 3 of the ECHR[220]. To this end, Italy was asked to set up, within one year from the date on which the judgement became definitive[221], an effective domestic solution or a combination of such remedies with both preventive and compensatory effects in order to guarantee a real effective reparation of the violations deriving from prisons overcrowding[222].

In order to comply with the ECtHR's sentence, Italy developed a broad *Action Plan* to resolve the structural shortcomings of its detention system[223].

First of all, Italy adopted some specific measures to directly reduce the overcrowding emergency. In July 2013, the Italian Government enacted a decree-law providing for several dispositions aimed at activating an effective mechanism for the release of the individuals considered not highly dangerous[224]. In addition, a few days later, the Prison Administration Department (Dipartimento dell'Amministrazione Penitenziaria - DAP) of the Ministry of Justice issued a circular establishing the so called "dynamic surveillance". The main goal of the circular was to identify new operational strategies aimed not only at reducing the overcrowding problem, but primarily intended to make the enforcement of the sentence fairer and more dignified, emphasising in particular the rehabilitation activities[225].

Besides for these measures, meant to improve detention conditions, Italy worked hard to introduce faster and more effective mechanisms to repair violations of detainees' rights. For this purpose, the Italian Government strengthened the whole system of protection both by reinforcing existing mechanisms and by introducing new ones.

As it concerns the guarantee functions of the surveillance judge, the generic complaint procedure enshrined in Article 35 of the Prison Act was integrated by two new

[220]ECtHR, Torreggiani and Others v. Italy, par. 97.
[221]The judgment became final on 28th May 2013, however during a meeting of the Committee of Ministers of the Council of Europe it has been decided to postpone the final examination of the results achieved by Italy on June 2015.
[222]ECtHR, Torreggiani and Others v. Italy, par. 99.
[223]Action Plan presented by the Italian Government to the Department for the Execution of Judgments of the ECtHR, 27 November 2013, available at: https://rm.coe.int/090000168063cc54.
[224]D.L. No. 78 of 1 July 2013, "Disposizioni urgenti in materia di esecuzione della pena", converted with amendments into Law No.94 of 9 August 2013.
[225]Dipartimento dell'Amministrazione Penistenziaria (DAP), Linee guida sulla "sorveglianza dinamica", circolare GDAP-0251644-2013, 13 July 2013.

instruments, respectively established by Article 35-bis and Article 35-ter. The first is the "judicial complaint", a preventive measure aimed at avoiding or at immediately ending a current and serious violation of fundamental rights resulting from a provision or an unlawful conduct of the prison administration[226]. The second one is the "compensatory remedy" which instead has a reparatory nature, as it aims to redress the victim of an already occurred violation of Article 3 of the European Convention. According to this measure, depending on the duration of the violation, the reparation of the harm suffered may consist in reducing the length of the sentence that still has to be served or in receiving an economic compensation[227].

2.2 Establishment of the National Guarantor for the Rights of Persons Detained or Deprived of Liberty

In addition to the expansion of the already existing measures, following the Torreggiani judgement Italy decided to introduce a new guarantee Institution. Indeed, in this context of international pressure, the Italian Government finally managed to create a national guarantee Institution for people deprived of liberty, as a further measure to both fulfil the Court of Strasbourg's reprimands and to align with the United Nations institutional system against torture.

At the time of the Torreggiani judgment Italy was still not part of the Optional Protocol to the Convention Against Torture (OPCAT), signed in August 2003 but still not ratified. Almost ten years later, in the heat of the overcrowding crisis, Italy finally ratified the OPCAT[228], depositing the instrument of ratification on 3 April 2013. One month later, the Optional Protocol entered into force for Italy which, since then, officially became part of the United Nations monitoring system to prevent torture and other ill-treatments.

As required by Articles 3 and 17 of the Optional Protocol, within one year after its ratification Italy had to set up a National Preventive Mechanism (NPM). On 23

[226]The judicial complaint was established by Article 3 of the D.L. No. 146 of 23 December 2013, "Disposizioni urgenti in materia di esecuzione della pena", converted into Law No. 10 of 21 February 2014

[227]The compensatory remedy was established by Article 1 of the decree-law 26 June 2014. No. 92, converted into Law No. 117 of 11 August 2014.

[228]Law 9 November 2012 No.195. "Ratifica ed esecuzione del Protocollo opzionale alla Convenzione delle Nazioni Unite contro la tortura e altri trattamenti o pene crudeli, inumani o degradanti, fatto a New York il 18 dicembre 2002".

December 2013, the Italian government enacted the decree-law number 146, converted with amendments into Law No. 10 of 21 February 2014 which established, at the Ministry of Justice, the *National Guarantor for the Rights of Persons Detained or Deprived of Liberty*[229].

Specifically, among several provisions, the decree-law 146/2013 amended the Prison Act introducing, as already mentioned, the judicial complaint procedure and adding the national Guarantor in the list of figures entitled to receive requests and complaints by detainees and internees[230].

The new Institution is entirely regulated by Article 7 of the decree-law which, in its five paragraphs, lays down the main characteristics of the guarantee Authority.

According to the first paragraph, the Institution is designed as a collective body made up of a President and two members, who remain in charge for a period of five years which may not be extended. They are selected among people independent from public administrations and with a deep knowledge in the field of human rights. The three members are appointed, following a Council of Ministers' deliberation, by decree of the President of the Republic, after hearing the competent parliamentary commissions[231].

This appointment procedure was designed during the decree's conversion into law, in order to ensure the new institution's complete independence. Initially, the members of the institution were thought to be elected by decree of the Prime Minister. However, in order to avoid a close connection between the Executive and the independent Authority's appointment, it was eventually decided for the Presidential decree, one of the highest level of guarantee for a non-elective public appointment[232].

Moreover, to further fit the independence requirements, the national Guarantors' members can not hold institutional offices, not even elective ones, or any position in a political party. They get immediately replaced in case of resignation, death, supervening incompatibility, ascertained physical or psychological disability, guiltiness of serious professional misconduct or in case of final criminal judgement for a crime committed without fault.

[229]D.L. No. 146 of 23 December 2013, Article 7 (1).
[230]Ivi, Article 3.
[231]Ivi, Article 7 (2).
[232]L. Scomparin, *Dai garanti "locali" al nuovo Garante nazionale dei diritti delle persone detenute*, Il Piemonte delle Autonomie Anno I, n.3 – 2014, pp. 2 – 3.

As it concerns their economic remuneration, originally the decree-law stated that they were not entitled to receive indemnities or payments for the service provided. However, shortly afterwards, the provision was amended. Today it states that, beyond the reimbursement of expenses, the Guarantor's members are entitled to receive an annual fixed allowance, equivalent to 40% of the annual parliamentary allowance for the President and to the 30% for the other members of the Board[233].

The decree-law initially stated that "under the national Guarantor, which performs its functions through facilities and resources made available by Minister of Justice, is established a bureau staffed with personnel of the same Ministry, chosen according to knowledge acquired in the matters of Guarantor's competence". Such provision was recently modified by the 2018 budget law which further specifies the composition of the Guarantor's staff members. In particular, it is now stated that, in the employ of the national Guarantor, it is established an Office of twenty-five persons. Among them, twenty are from the Ministry of Justice, not more than two, in a leadership position, should be units of the Ministry of the Interior and not more than three of the National Health Service's system[234]. This composition has been the result of the Guarantor's request for a more multidisciplinary membership, considering the several different competences assigned to the institution.

All the staff members continue to receive their regular economic remuneration from their institutions of origin, while the additional expenses are charged to the Ministry of Justice budget. The personnel is chosen according to the knowledge acquired within the areas of competence of the Guarantor. The structure and the composition of the Office are determined by decree of the President of the Council of Ministers, in conjunction with the Minister of Justice, the Minister of the Interior and the Minister of Economy and Finance[235].

The last paragraph of Article 7 lays down the specific functions of the national Guarantor. In addition to promoting and favouring the collaborative relationships with territorial Authorities or with other similar bodies, the national Guarantor makes sure that any form of deprivation of liberty takes place in accordance with the territorial and

[233]Dl No. 146 of 23 December 2013, Article 7 (3), amended by Law No. 208 of 28 December 2015, Paragraph 317, a).
[234]Dl No.146 23 of 23 December 2013, Article 7 (4), amended by Law No. 205 of 27 December 2017, Par. 476 (a).
[235] D.L. 146/2013, Article 7 (4), amended by Law No. 205 of 27 December 2017, Par. 476 (a).

the national law, with the constitutional provisions and the international human rights standards[236]. The Guarantor can visits, without authorization, prisons centres; judicial psychiatric hospitals and healthcare establishments designed to receive people subject to detention safety measures; therapeutic and reception communities; any other public and private structures where people are subject to alternative measures or precautionary measures of house arrest; juvenile penitentiary centres and reception communities for young people subject to judicial authorities' measures; lastly, with prior notice and without prejudice for the investigative activities in progress, it has the right to visit the security rooms of Police Forces and to access any place designed to or used for restrictive and security purposes[237].

Furthermore, subject to the consent of the people concerned, the national Guarantor has access to the documents contained in the case-file of persons detained or deprived of liberty and to any document related to the detention or freedom deprivation conditions[238].

The national Guarantor requires to the responsible administration any necessary information or documents. In the case the administration fails to respond within thirty days, the Guarantor informs the relevant surveillance judge and may require an order of the submission of documents[239].

In addition, the Guarantor verifies the fulfilment of specific obligations[240]of the *Regulations on the enforcement of the Consolidated Act of Provisions concerning immigration and the condition of third country nationals,* by visiting, without any preventive communication or restriction, the identification and expulsion centres (CIEs) and similar facilities where identification and registration of foreigners with irregular permanence or admission to the national territory might be undertaken[241].

Moreover, the national Guarantor makes specific recommendations to the concerned administration whenever it comes across any violation of the rules of national law or the validity of complaints and claims forwarded in accordance with Article 35 of Law 254

[236] D.L. 146/2013, Article 7 (5) a.
[237] Ivi, Article 7 (5) b.
[238]Ivi, Article 7 (5) c.
[239] Ivi, Article 7 (5) d.
[240]Articles 20, 21, 22 and 23 of the "*Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286"*, approved by the D.P.R. 394 of 31 August 1999, and following amendments and integrations.
[241] D.L. 146/2013, Article 7 (5) e.

of July 1975. In case of denial, the administration concerned must communicate the reasoned dissent within thirty days[242].

Furthermore, the national Guarantor submits an annual report on the activities carried out to the Presidents of the Senate and of the Chamber of Deputies as well as to the Minister of the Interior and to the Minister of Justice[243].

In conclusion, in order to ensure the good functioning of the institution, the national Guarantor's founding law now authorises the annual expense of 200.000 euros, for 2016 and 2017, and of 300.000 euros since 2018[244]. The economic resources are explicitly allocated by the annual national budget to the Ministry of Justice exclusively for the functioning of the national Guarantor and not available for any other use. In so doing, it is therefore ensured the financial independence of the Institution.

A few months after the decree-law conversion, in April 2014, Italy officially designated the national Guarantor, along with regional and local Guarantors, as the Italian NPM. Specifically, in the *Note Verbale* sent to the SPT, it was stated that the national Guarantor, "will coordinate the net of local Guarantors, formed by institutions already in place or to be set up at regional and city levels [..] The whole system will constitute the National Preventive Mechanism to the Optional Protocol of CAT"[245].

Therefore, in addition to the extensive powers established by the decree-law, the national Guarantor's mandate is further expanded by its designation as NPM. As a matter of fact, the Optional Protocol provides NPMs with a full "liberty to choose the places they want to visit" which implies that the national Guarantor may decide to include in its mandate areas of deprivation of liberty that are not explicitly enshrined in its founding law. Furthermore, the OPCAT enables NPMs to have private interviews with persons deprived of liberty without witnesses, being free to choose who they want to interview[246].

Therefore, the national Guarantor results to be a strong and independent mechanism, provided with a reactive power, as it concerns examining complaints, and with a

[242]Ivi, Article 7 (5) f.
[243]Ivi, Article 7 (5) g.
[244]Article 7 (5-bis), introduced by Law No. 208 of 28 December 2015, Paragraph b) and then amended by Law No. 205 of 27 December 2017, Paragraph, 476 b).
[245]Official Correspondence from the Permanent Mission of Italy to the International Organisations in Geneva, *Note Verbale*, 25 April 2014.
[246]OPCAT, Article 20.

significant proactive power, consisting in its preventive monitoring mandate, on the example of the European Committee for the Prevention of Torture.

2.3. The National Guarantor as forced-returns monitoring mechanism

Besides being regulated by domestic and international sources, the national Guarantor mandate has been further expanded by the European legislation. As a matter of fact, once established, the new independent Authority has been welcomed as the right opportunity to make up for the wrong transposition of the "European Return Directive". Specifically, in October 2014, the European Commission launched an infringement procedure against Italy[247], sending a letter of "formal notice under Article 258 TFEU" to the Foreign Minister on various issues, including the incorrect transposition of Directive 2008/115/EC[248]. In particular, the European Commission stressed the inadequacy of the forced-return monitoring system that, according to Article 8 (6) of the Directive, each State should have established[249]. The European Commission sustained that the monitoring system established by Italy was not sufficiently independent from the Executive and, therefore, ineffective.

Indeed, in the first place, Italy designated as forced-return monitoring mechanism the Coordination and Monitoring Committee (Comitato per il coordinamento e monitoraggio)[250], within the Minister of Interior. Precisely because of the Committee's collocation, the European Commission considered the Italian proposal as inappropriate.

Therefore, as the infringement procedure was launched, the representatives of the Department for European Policies and of the Ministry of Interior proposed the recently established national Guarantor for the Rights of Persons Detained or Deprived of Liberty as the forced returns' monitoring body, meeting the requirements of effectiveness and independence requested by the European Commission.

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[247]European Commission, Infringement number: 2014/2235, "*Non corretto recepimento della direttiva 2008/115/CE recante norme e procedure comuni applicabili negli Stati membri al rimpatrio di cittadini di paesi terzi il cui soggiorno è irregolare (direttiva rimpatri) e presunta violazione della direttiva 2003/9/CE recante norme minime relative all'accoglienza dei richiedenti asilo negli Stati membri (direttiva accoglienza)"*, Formal notice: 16/10/2014.

[248] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *On common standards and procedures in Member States for returning illegally staying third-country nationals*, commonly known as "Return Directive".

[249]Ivi, Article 8, paragraph 6: "Member States shall provide for an effective forced-return monitoring system".

[250]Established by Article 2-bis of Legislative Decree No. 286 of 25 July 1998.

On 9 December 2014, the Office of Legislative Affairs and Parliamentary Relations at the Ministry of Interior officially assigned to the national Guarantor the new power[251], entrusting the decisions on the practical modalities for the monitoring implementation to the Guarantor's Self- Regulation Code. Subsequently, on 15 December 2015[252], the Legislative Office of the Ministry of Justice supported the decision of the Ministry of Interior to appoint the national Guarantor. Considering the independent nature of the new institution, the European Commission welcomed the designation of the national Guarantor.

Nevertheless, the appointment of the Guarantor did not immediately end the European infringement procedure. In order to do that, the Schengen Committee[253], a monitoring mechanism established in 2013 to verify the application of the Schengen *acquis*, had to verify the actual independence of the new Institution and the efficacy of its operational activity. The national Guarantor had to prove its effectiveness, by monitoring several return flights to Tunisia and Nigeria.

The Committee's evaluation was successfully concluded at the beginning of 2017 and, in July of the same year, the European Commission definitively closed the infringement procedure against Italy[254].

2.4 Composition and organisation of the Office of the National Guarantor

In march 2015, the Italian Minister of Justice adopted a decree on the structure and composition of the national Guarantor's Office[255].

According to the ministerial decree, the national Guarantor determines the orientation and the general criteria at the basis of the Office's activities and sets the goals to be achieved. The Institution should adopt a Code of self-regulation of the Office's activities, in accordance with the principles set out in part IV of the OPCAT. In particular, the Code of self-regulation is aimed at laying down the rules regulating the

[251] Letter 5007-2/A2014-001564/IX, dated 9 December 2014.
[252] In communication 6.1.6-9 AI.
[253] Council Regulation (EU) No 1053/2013 of 7 October 2013, *Establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.*
[254] Closing of the case: 13/07/2017.
[255] Decree of the Minister of Justice No. 36 of 11 March 2015, "Regolamento recante la struttura e la composizione dell'ufficio del Garante nazionale dei diritti delle persone detenute o private della libertà personale".

work of the body, the guiding principles of its conduct, of the conduct of Office's members and of all the other persons cooperating with the Institution.

The Guarantor has furthermore the duty to draft an annual report on the activities carried out to be transmitted to the Presidents of the Parliamentary Chambers, to the Minister of the Interior and to the Minister of Justice[256]. In addition, the annual report is forwarded to the President of the republic, the President of the Constitutional Court, the Prime Minister and the Ministers of Defence and Health.

The Office of the Guarantor is located in Rome, at the premises made available by the Ministry of Justice which, in addition, has to provide the Guarantor with all the assets and organisational and logistical resources necessary for the pursuance of its tasks[257].

The decree states that the Minister of Justice has to assign to the Office twenty-five staff members, however, as already mentioned, since the 2018 budget law, the personnel composition has slightly changed. The members of the Office are dedicated professionals exclusively employed by the national Guarantor, thereby responding and reporting only to it. Unless decided by the President, they cannot be displaced to other offices[258]. This provision is the basis for the financial independence of the Office's members.

The ministerial decree then claims that the Office's organisation has to follow the principles of efficiency, efficacy and transparency of the administrative action. Moreover, the Guarantor, with its own deliberation, has to determine the organisational methods and the internal articulation of the Office[259].

In conclusion, the last article of the decree states that the Guarantor is entitled to receive the reimbursement of expenses for the performance of its functions from the Ministry of Justice[260], as stated by decree-law 146/2013 and its following modifications.

Almost a year after the adoption of the rules on the structure and the composition of the national Guarantor's Office, the President of the Republic appointed the three members of the Board. On 1 February 2016, Professor Mauro Palma[261] and Mrs. Emilia Rossi[262] have been nominated, for five years, respectively as President and Board member of the

[256]Ivi, Article 2.
[257]Ivi, Article 3.
[258]Ivi, Article 4.
[259]Ivi, Article 5.
[260]Ivi, Article 6.
[261]Founder and honorary president of Associazione Antigone, member and then President of the CPT.
[262]Criminal lawyer.

National Guarantor. The appointment of Mr. Francesco D'Agostino[263], proposed by the Government as third member, was not approved by the Senate Justice Commission (Commissione Giustizia del Senato) as he had no specific expertise. The rejection of the first name proposed by the Government proved the effective and not merely formal role played by the Parliament's committees in the choice of the Guarantor, ensuring the independence of the new Institution. Instead of D'Agostino, the Government then proposed Mrs. Daniela De Robert[264], whose appointment was approved. On 3 March 2016, she officially became the last member of the national Guarantor's Board[265].

2.5 The National Guarantor' Self-Regulatory Code

As soon as the national Guarantor was set up, the President appointed a legal adviser with the task of elaborating the Self-Regulatory Code to be transmitted to the Board for the final examination[266]. On 31 May 2016, the three members of the national Guarantor unanimously agreed to adopt the text, composed of nine articles setting the principal organisational and functional aspects of the new Authority[267].

The Self-Regulatory Code contains the main elements enshrined both in Article 7 of the decree-law 146/2013 and in the Ministry of Justice's decree 36/2015. Furthermore, due to the Guarantor role as NPM, the Self-Regulatory Code refers on several occasions to OPCAT provisions as well as to the principles underlying the Optional Protocol itself.

In addition to the Operational Aspects enshrined in Article 2 of the ministerial decree, the Self-Regulatory Code states that the Guarantor regularly examines the condition of the persons deprived of freedom who are restricted, also temporary, in the places described in Article 4 of the OPCAT. Moreover, it claims that the Guarantor works in order to improve the treatment and conditions of persons deprived of liberty and to prevent tortures and other ill-treatment or punishment. For this purpose, if necessary, it may propose the empowerment of measures of protection, identified also through

[263]University lecturer in bioethics.

[264]Journalist and president of "Associazione VIC – Volontari In Carcere onlus", a Catholic volunteer association operating in prison,

[265]Decrees of the President of the Republic, Sergio Mattarella, 1 February and 3 March 2016.

[266]On 12 May 2016 the national Guarantor's President appointed Alessandro Monti, lawyer and Professor at the University of Camerino, as non-paid legal consultant.

[267]The Italian and the English versions of the Self-Regulatory Code (adopted on 31 May 2016 and updated on 6 December 2017) are available at the web-site of the national Guarantor: http://www.garantenazionaleprivatiliberta.it/gnpl/it/codice_autoregolamentazione.page .

information exchanges and mutual collaboration with the SPT and the NPMs of other States[268].

As it concerns the national Guarantor's tasks, besides the ones listed by Article 7 of decree-law 146/2013, the Self-Regulatory Code states that the Guarantor visits any site, aircrafts and other modes of transport, where persons are deprived of freedom by order of an administrative or judicial authority. Furthermore, it monitors the modalities enacted in the enforcement of forced returns and removals by air or ship of third-country nationals, in compliance with article 8 paragraph 6 of Directive 2008/115/CE[269].

In conclusion, the Self-Regulatory Code claims that when, during a visit, the Guarantor establishes that the observed situations violates Article 3 of the ECHR[270], it has the duty to immediately inform the competent authority in order to stop the ongoing infringement. At the same time, it has to communicate the appropriate interventions to the judicial authority and to the relevant Minister[271].

The Self-Regulatory Code then lists the guiding principles that the national Guarantor, the Office, the staff members and all individuals who collaborate with the institution shall follow. In particular, they have to behave in full independence; to protect all the confidential information collected by the national Guarantor; to guarantee the secrecy of investigative activity, information and documentation acquired during the institutional visits and in the performance of other national Guarantor's duties; to guarantee the secrecy concerning the outcomes of the visits; to suddenly communicate to the judicial authority the notifications of charges to persons deprived of liberty which it comes across while carrying out its institutional tasks[272].

Thereafter, the Self-Regulatory Code describes the functions related to the role of the President. First of all, the President represents the guarantee Institution in any public occasions and makes proposals to the national Guarantor, in team meetings, concerning the approval of the guidelines and general principles underlying the Office's activities and defines the main objectives and priorities to be achieved. The President calls for the national Guarantor meetings and drafts the agenda to be transmitted to the Board's

[268]Self-Regulatory Code, Article 2.
[269]Ivi, Article 3 i), j).
[270]"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[271]Self-Regulatory Code, Article 3, paragraph 3.
[272]Self-Regulatory Code, Article 4 (1).

members two days before their meetings at the latest. Deliberations are taken with the President's and at least one member's approval. Furthermore, the President, once obtained the consent of the concerned person, can assign to members of the Board individual operational and representative tasks. In case of necessity, the President can take urgent decisions that have to be communicated promptly to the other members for the collegial approval. Moreover, it drafts the national Guarantor's ethic code[273] and, for the performance of institutional tasks, it may appoint study commissions or call external consultants with high expertise. In addition, the President authorises the implementation of the Office staff members' missions and determines modalities, time and number of the Office staff members during the national Guarantor institutional tasks. In case of prolonged or temporary absence, the President may delegate its tasks to the other members of the Board, even separately. Finally, the President appoints the person Responsible for Preventing Corruption and Promoting Transparency[274].

Articles 6 and 7 of the Self-Regulatory Code, are respectively dedicated to the Office's premises and assets and to the staff composition and management. The provisions enshrined in these two articles are the same laid down by Decree 36/2015 of the Minister of Justice. The only new aspects are the ones regarding the possibility of the national Guarantor to apply for further staff members, whenever needed, by signing agreements with other public administrations involved in the field of competence of the Institution[275].

The following article set up the Office organisation and layout. Specifically, the national Guarantor's Office is composed of several units, each of which deals with specific aspects of the mandate. The units are: *General affairs* - the secretary of the Office; *Information systems* – the unit for IT functions and for the collection and organisation of the data arriving from different Administrations; *Deprivation of liberty in the criminal justice system* – the unit in charge of monitoring adults and juveniles custodial facilities and structures for the implementation of community orders; *Deprivation of liberty by law enforcement officials* – the unit responsible for the monitoring of Police Forces'

[273]On 31 October 2017, the President adopted the "Codice etico del Garante nazionale dei diritti delle persone detenute o private della libertà personale", available on the national Guarantor web-site: http://www.garantenazionaleprivatiliberta.it/gnpl/it/codice_etico.page.
[274]Self-Regulatory Code, Article 5.
[275]Self-Regulatory Code, Article 7 (2).

premises; *Deprivation of liberty and migrants* – the unit aimed at monitoring facilities for liberty deprivation of migrants and forced returns and at coordinating the supplementary units for the management of the Asylum, Migration and Integration Fund (AMIF); *National and international relations, filed studies* – the unit in charge of maintaining relations with territorial Guarantors, with International Organisations and other bodies working to protect persons deprived of liberty; *Deprivation of liberty and health protection* – the unit responsible for monitoring and visiting people under Compulsory Health Treatments out of the penal environment, monitoring and visiting social care homes for disabled or elders undergoing a factual deprivation of liberty[276].

At the direct disposal of the Board, it is established the *Board Support Organisational Unit*. The eighth unit has several duties, such as managing the Board's agendas, organising the Board's meetings minutes and resolutions, dealing public relations, establishing the examination procedure on complaints ex Article 35 of Prison Act and administering documents relative to the deliberative Commission and, finally, coordinating the delivery of the annual Report.

The units are coordinated by an official in charge of directing all the activities, in pursuance of the Board's directives. Through team decisions, with the prior consent of the persons concerned, the Guarantor assigns to the different organisational units the available staff, defining their functions and competences and, whenever needed, appointing one or more coordinators. Among the professional responsible for the Organisational Units, the President appoints the person Responsible for Preventing Corruption and Promoting Transparency and prepares a Three- yearly Plan for the Prevention of Corruption[277].

In conclusion, the last article of the Self-Regulatory Code provides for the financial, administrative and cost-related resources. In this respect, within the extent of the resources made available for the Guarantor's institutional tasks, the President states and authorises the missions' costs, purchase of assets and service supply. The Guarantor's financial resources are assigned by the national budget law and goes into a specific budget chapter, used in full autonomy and independence by the Guarantor. The cash functions are conducted by personnel of the Ministry of Justice in fulfilment of the

[276] Ivi, Article 8 (2).
[277] Self-Regulatory Code, Article 8.

Guarantors' directions. The Ministry of Economy and Finance is instead responsible for the controls on the administrative and accounting regularity of the expenditure incurred by the Guarantor. A brief review of the annual expenses shall be included in a specific section of the Annual Report on the national Guarantor's activities[278].

3. The National Guarantor's operational activities

The national Guarantor became operational in the early 2016, following the appointment of its third member on 3 March. Only few days later, on 7 March, the new institution started its monitoring work by visiting the first place of deprivation of liberty[279].

The national Guarantor's monitoring activity is carried out by means of five types of visits: regional visits, concerning a variety of establishments of an entire Region or part of it; ad hoc visits, conducted when requested by specific circumstances; thematic visits, aimed at monitoring places of the same area of deprivation of liberty; follow-up visits, aimed at checking the implementation of recommendations made in the previous visits; and supervisions of forced returns. At the end of each monitoring operation, the national Guarantor drafts a specific report containing its observations and recommendations to be transmitted to the concerned Administration.

Specifically, during its second year of activity, the national Guarantor's monitoring work focused on four main areas of liberty deprivation, namely criminal detention, security measures, irregular or illegal immigration and healthcare. The 2018 Report to Parliament[280] on the national Guarantor's activities dedicated a specific chapter to each of them.

3.1 Healthcare and Freedom[281]

In addition to the places explicitly enshrined in its founding decree-law, considering its NPM role, the national Guarantor's mandate has been subsequently further expanded in

[278]Self-Regulatory Code, Article 9.
[279]On 7 March 2016 the National Guarantor carried out its first visit to hotspot of Trapani.
[280]National Guarantor for the Rights of Persons Detained or Deprived of Liberty, Report on the activities carried out from March 2017 to March 2018, submitted to the Parliament on 15 June 2018.
[281]Ivi, pp. 152- 171.

order to extend its monitoring activity also to healthcare facilities. Healthcare is a sector completely unrelated to any legal or administrative measure where, however, people could, in some circumstances, undergo factual situation of deprivation of liberty.

Specifically, the Guarantor mandate includes the monitoring of social and healthcare home for disabled and elderly persons as well as Psychiatric diagnosis and treatment facilities (Servizi Psichiatrici di Diagnosi e Cura - Spdc) where Compulsory Health Treatments (Trattamenti Sanitari Obbligatori - Tso) are administered.

Following the recommendations of the UN Committee for the rights of persons with disabilities, considering its NPM role, Italy decided to assign to the national Guarantor the task of monitoring social and healthcare home for persons with disabilities, particularly persons with intellectual or psychosocial disabilities, as well as those for elderly people[282].

According to the national Guarantor's 2018 Report, facilities for vulnerable persons are places where care and control can easily blend together, at the expenses of people who are often unable to autonomously ensure the respect of their own rights. The Guarantor task is therefore to avoid that vulnerable persons could in any way suffer forms of segregation or forms of improper reduction of freedom as well as of inhuman or degrading treatments.

The national Guarantor has therefore the task of preventing that persons with disabilities are "deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law"[283].

As it concerns elderly persons, the national Guarantor main task is to prevent that people, who probably voluntary entered the social care home in the first place, are then victim of liberty deprivation. This situation may occur when people are de facto obliged to remain within the facility against their will because of lacking, for any reason, the opportunity to leave. The Guarantor's main goal is therefore to prevent any limitation of the individuals' right to self-determination.

Considering the novelty and the extent of the healthcare area, in its first year, the national Guarantor dedicated to facilities for vulnerable persons mainly studying and researching activities. The national Guarantor decided to realise a mapping and a

[282]Committee on the Rights of Persons with Disabilities, *List of issues in relation to the initial report of Italy*, 29 April 2016, par. 16; *Replies of Italy to the List of issues*, 14 June 2016, par. 33.
[283]Convention on the Rights of Persons with Disabilities, Article 14(b).

National Register of the health and social care homes for persons with disabilities present in the territory[284]. A similar project is scheduled also to identify all the care homes for the elderly, since the lack of updated reliable data on their actual number.

Once identified the concerned social and healthcare facilities, since the end of 2017, the national Guarantor initiated its monitoring activity, consisting of preventive and unannounced visits. Specifically, the Guarantor verifies the living conditions, the effective room for people's self-determination, the implementation of projects aimed at promoting an independent life and an active inclusion in the external society. In addition, it monitors the organisation and the access of places, the use of coercive measures not dictated by any extreme necessity and the use of non-regulatory measures, their extent and frequency. Visits are conducted by a delegation of the national Guarantor usually in daily time. They take place through observations following a specific check-list based on the one used by the European CPT and through interviews with the facilities' management and operational personnel and, privately, with the facilities' guests or with their relatives.

The beginning of monitoring activities in social and health care home has been welcomed as a fundamental step towards a more effective protection of vulnerable persons. Before the national Guarantor's establishment, these places were seldom visited by law enforcement, almost exclusively in relation to criminal complaints or to blatant violations of rights.

Within the health sector, the national Guarantor's mandate also concerns Compulsory Health Treatments (Tso) [285], namely forced psychiatric measures undertaken without the consent of the person concerned and thereby automatically implying a deprivation of liberty. According to the Guarantor, the lack of clear data on Tso's procedures and functioning, makes their monitoring activities particularly complicated, significantly reducing the capacity to prevent potential rights' violations.

In order to monitor the use of restraint, the Guarantor stresses the necessity of an accurate and complete compilation of restraints' registers, indicating the treatment's start and end time, the medical checks carried out by the personnel and all the records of

[284]On 1 June 2017, the national Guarantor has signed a memorandum of understanding with *L'Altro Diritto – Inter-University Research Centre on prison, deviance, marginalisation and migration government* (Florence) and *CeRc- Centre for Governmentality and Disability Studies "Robert Castel"* (Naples) to create the mapping and the National Register.

[285]Ruled by Law No. 833 of 23 December 1978, Articles 33, 34 and 35.

the patient's vital parameters. In addition, according to the Guarantor, there is the need to create specific national guidelines capable of making more homogenous the use of Tso across the country.

From a preventive perspective, the Guarantor calls for the draft of a Tso's National Record and for a normative provision enabling its Office to directly receive notifications on all the Tso ordered and on their eventual renewals. These measures would allow the Guarantor to better monitor Tso's adoption and to identify the Psychiatric diagnosis and treatment facilities that need to be visited. The Guarantor's unannounced visits, based on specific information, are a fundamental transparency tool with a strong deterrent effect, per se able to prevent violations.

The Guarantor has thereby the duty to monitor the respect of some basic rights which are, in addition to the strictly medical ones, for example the right to privacy of the patient and the effective informative activity. Its monitoring work is supported by the Indications drafted by the National Bioethics Committee in April 2015, used by the Guarantor as guidelines[286]. Among them, there is the scrupulous monitoring of the protocols' implementing procedures and the absolute prohibition of measures not in line with the respect of the patient's dignity.

3.2 Sanctions and Freedom[287]

The second thematic area addressed in 2018 report is deprivation of liberty, of both adults and minors, in virtue of criminal measures. This sector is probably the most known and the most monitored, given the work conducted by surveillance judges, the access of several institutional actors, such as Parliament's members and territorial Guarantors, and the significant presence of the voluntary sector.

Since 2016, the national Guarantor joined this group of actors, initiating a wide monitoring activity of prison Institutions across the country[288]. Some facilities were visited in the context of regional visits dedicated to a wide variety of places of liberty deprivation in the same territory while other were the object of ad hoc visits, due to particular circumstances or specific complaints. Through the access to the data made

[286]Presidency of the Council of Ministers, National Bioethics Committee, *La contenzione: problemi bioetici*, 23 April 2015.
[287]National Guarantor, 2018 report, Pp. 174-224.
[288]As 30 April 2018, the national Guarantor has visited 71 prison institutions.

available by the Ministry of Justice and by the Prison Administration Department, the national Guarantor conducts its visits having already in mind the official parameters of each Institution. In addition, the data access enables the Guarantor to keep a constant eye on at least the numeric information concerning prisons Institutions, ensuring in this way a more continuous monitoring. Visits are conducted through inspections structured in accordance with some specific indicators, such as facilities' material and hygiene conditions, living conditions and the prevention and management of critical situations. Furthermore, specific attention is paid on the respect of detained persons' rights as well as of the people working within prison facilities. Besides for these specific aspects, the Guarantor's visits are aimed at monitoring the overall situation pursuing a holistic approach.

Following each visit, the Guarantor draft a report describing the status of the Institution and containing the recommendations addressed to the concerned Administration in order to improve the safeguard of people deprived of liberty. Even if not legally binding, the Guarantor's recommendations constitute an important instrument of soft law with the power of exercising moral suasion on public Institutions. Through its recommendations, the Guarantor's goal is to define a set of basic national standards of prison Institutions, along with the international and regional sets of norms as the European Prison Rules[289], the Nelson Mandela Rules[290] and the CPT standards. For the realization of this project, the Guarantor has collected all the recommendations made after the visits conducted in prison Institutions for adults during its first and a half year of activity. The recommendations are enshrined in a volume entitled "Norms and Normality" (*Norme e Normalità*)[291].

Within the criminal detention framework, throughout the year, the national Guarantor has paid particular attention to some specific areas concerning the most vulnerable categories of detained persons. The Guarantor has, for example, focused on the conditions of LGBTI individuals who are often victim of additional discrimination and

[289]Adopted by the Council of Europe Committee of Ministers in 1973 (Resolution 73.5), amended in 1987 and in 2006.

[290]The United Nations Standard Minimum Rules for the Treatment of Prisoners were initially adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the UN ECOSOC in 1957. On 17 December 2015 a revised version of the Standard Minimum Rules was adopted by the 70th session of the UN General Assembly in Resolution A/RES/70/175. The revised Rules are known as the Nelson Mandela Rules.

[291]National Guarantor, *Norme e normalità, Standard per l'esecuzione penale detentiva degli adulti*, January 2018.

marginalisation. For this reason, the national Guarantor, in conjunction with the APT and other associations, is currently working to design some specific shared Guidelines for monitoring the rights' of LGBTI individuals in any place of detention. In general, the Guarantor calls for the development of a culture of respect of every individual's rights in the prison sector, especially through specific training programmes and awareness-raising activities.

Moreover, among the particularly vulnerable categories, the Guarantor focused on the conditions of people detained under the special prison regime regulated by Article 41-bis of the Prison Act[292] for offences related to organised crime and terrorism. The Guarantor has visited all the 41-bis sections and plans to draft a specific report on this regime. Its power to visit these sections and to carry out private interviews, without prior authorization or announcement, arises both from its founding law and from its NPM mandate. As a matter of fact, according to Article 20 of the OPCAT[293], NPMs have "the opportunity to have private interviews with the persons deprived of their liberty without witnesses". The article makes no distinctions on the category of persons deprived of liberty, therefore including also those detained under the 41-bis special regime.

In its second year, the national Guarantor has furthermore intensified its monitoring activity on the conditions of persons with mental illness, through regular visits to the recently established REMS (Residence for the Execution of Security Measures) which, since 2015, replaced all the Judicial Psychiatric Hospitals (OPGs) present on the territory[294]. The work of the Guarantor was additionally supported by the Information System for the monitoring of the OPGs overcoming (Smop). Since 1 February 2018, the Guarantor has access to all the data entered in the System by the Regions that participate to the project[295].

As it concerns healthcare in prison Institutions, through its visits, the Guarantor activity reinforced the necessity to transform the health safeguard into health promotion, passing

[292]Article 41-bis was introduced in the Italian Prison Act by Article 10 of Law No. 663 of 10 October 1986, providing for the power of the Minister of Justice to suspend certain prisons regulations aimed at restoring order and security. Following the Mafia's murders of the early 1990s, it was introduced the so called "hard prison regime" for Mafia involvement by Article 19 of Decree 306/1992 converted in law No. 356 of 7 August 1992.

[293] OPCAT, Article 20 d).

[294]Law No. 11 of 17 February 2009 and Law No.81 of 30 May 2014

[295]At the time of the 2018 Report to Parliament, the Regions parties of the Informative System are 16. The Guarantor calls for all Regions to take part in the Smop.

from a reactive to a proactive approach. It stressed the urgency of preventive measures, of health education and of a general improvement of hygiene and environmental standards. These factors constitute the Guarantor's main standards of analysis adopted throughout its visits.

Still in the area of health and prevention, in consideration of the large number of suicides committed in places of detention, the national Guarantor decided to contribute to improve the Suicide Prevention System drafted in 2016 by the Minister of Justice[296]. As bearer of the safeguard of detained persons' rights, the Guarantor decided to participate as injured party in the investigation of all prison suicides cases. Since 2017, in each suicide case, the Guarantor submit to the public prosecutor's office an information request on the procedure status.

As it concerns communities, both for adults and minors, the Guarantor's monitoring activity focuses mainly on the effective activation of projects aimed at promoting the social and the educational or professional reintegration. The national Guarantor, along with the territorial ones, has to support the communities in the identification of the main criticalities and cooperate with them for their resolutions.

Besides the monitoring activity, another fundamental function performed by the Guarantor within prison Institutions is receiving the so called "generic complaints". As already mentioned, according to Article 35 of the Prison Act, the national Guarantor is one of the authority entitled to receive complaints presented by detainees and internees.

Even in the absence of a specific scheme for the handling of complaints, the national Guarantor has developed a procedure of taking charge and assessing the complaints aimed at responding in a short time and at taking the appropriate action. The Office's resources do not allow the immediate analysis of each complaint yet. However, more than a half of the received complaints have already been handled, and the majority of the remaining ones are under scrutiny. Generic complaints have proven to be an effective tool both as instruments for the resolution of specific issues and as unique indicators of the overall situation of prison Institutions.

Because of this instrument, the national Authority can therefore promote the improvement of the rights protection standards not only through monitoring visits and recommendations, but also through the direct dialogue with the concerned

[296]Directive from the Minister of Justice related to prison suicides, issued on 3 May 2016.

Administration on the information obtained from complaints. In addition, the confidential manner of the complaint that can be submitted in a sealed envelope, not subjected to any control, contributes to obtaining more detailed information. The picture that emerges from the large number of complaints received in the two years of activity shows the main needs of the detained population. Among them, two aspects emerge as the prevalent ones, namely transfer requests from one prison to another and health protection.

3.3 Migration and Freedom[297]

The third thematic area is deprivation of liberty in the context of irregular or illegal immigration. Specifically, it regards deprivation of liberty in Immigration Removal Centres (CPRs, Centri di Permanenza per il Rimpatrio)[298], hotspots[299], airport and port facilities and forced-returns flights.

Contrary to the previous two types of liberty deprivation, respectively deriving from a factual situation in the case of healthcare and from a penal measure in the case of criminal detention, in the field of migration liberty deprivation usually results from administrative dispositions. These are in fact cases of administrative detention, ordered by the administrative Authority for the violation of an entry or residence norm committed by a foreign citizen. The judicial Authority intervenes only in the subsequent phase of validation.

As in the recent past the use of deprivation of liberty to counteract immigration has strongly escalated so has the Guarantor activity in the field. As already mentioned, the national Guarantor's mandate on migration issues has been established by its founding law, by its NPM role and by the implementation of the European Return Directive.

[297]Report to Parliament - 2018, pp. 226 - 248

[298]The Immigration Removal Centres (Centri di Permanenza per il Rimpatrio, CPRs) have been recently established by the Decree Law No. 13 of 17 February 2017 converted into Law No. 46 of 13 April 2017. They are detention facilities where third-country national without a regular residence permit are held, previously known as Identification and Expulsion Centres (Centri di Identificazione ed espulsione CIEs). have been established in order to replace the Identification and Expulsion Centres (CIEs).

[299]Centres on the EU outer borders for the purposes of registration, photo-identification and fingerprinting of the disembarked migrants within 48 hours (72 hours maximum) of arrival. They have been established by the European Agenda on Migration in 2015.

In addition, the decree-law No.13 of 17 February 2017 converted with amendments into Law No. 46 of 13 April 2017[300] has recently confirmed and emphasised the role of the national Guarantor in the field of migration. Specifically, without expanding the role of the Guarantor, Article 19 of the decree-law generally drew the attention to human rights as fundamental key in the management of migration issues and, to this end, it stressed the importance of the work conducted by the independent Authority. The national Guarantor welcomed the declared central role given to fundamental rights and started its second year of activity by monitoring the new CPRs of Bari and Potenza and conducting follow-up visits to the CPRs of Roma, Brindisi and Torino.

Nevertheless, the national Guarantor claimed that, after one year since the decree-law entered into force, the Government's commitment on the maximum respect of rights unfortunately remained hollow phrases. As a matter of fact, no improvement on living conditions or on organisational aspects has been observed following the decree adoption. Furthermore, the Guarantor stressed the complete lack of feedbacks from the Ministry of Interior regarding the concerns raised in the Guarantor's thematic Report[301] on CIEs (now CPRs) and hotspot, as well as the failure to implement the recommendations made after its visits.

In order to encourage the necessary improvements and to bring some clarity to the wide and confusing migration issue, the national Guarantor worked to develop some support instruments. First of all, from the outcomes of its monitoring activity, it initiated the systematisation of fundamental rights' standards and principles aimed at contributing to an actual improvement of the overall system. Furthermore, the Guarantor is currently working on the draft of a document gathering the main international standards in the field of migration, developing them according to the Italian law specificities and identifying concrete ways for their effective implementation[302].

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[300] Decree-Law No.13 of 17 February 2017, converted into law No. 46 of 13 April 2017 "Conversione in legge, con modificazioni, del decreto-legge 17 febbraio 2017, n. 13, recante disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale", Article 19.

[301] National Guarantor for the Rights of Persons Detained or Deprived of Liberty, Report on the visits to Identification and Expulsion Centres and to hotspots in Italy (2016/2017: first year of activity). http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/6f1e672a7da965c06482090d4dca4f9c.pdf .

[302] For this standards' systematisation project, the national Guarantor followed the lead of the work conducted by the Council of Europe's Committee of Experts in charge of developing a platform of European rules on administrative detention. The Council of Europe's project, to which the national Guarantor has directly participated, should be completed within 2019.

Throughout its second year, the national Guarantor paid again particular attention to monitor the Italian hotspots. Following the end of the first monitoring cycle, the Guarantor conducted two follow-up visits in the hotspots of Taranto and Lampedusa.

Despite the recent regulation of the hotspots which, through the Decree Law No. 13/2017, have been officially introduced into the Consolidated Immigration Act[303], they still are places characterised by an uncertain legal nature. The hotspots respond to several functions each of which is adopted by a different authority. The follow-up visits showed therefore the persistent lack of a clear legal basis and the absence of a coordination system among the large number of institutions. The Guarantor stressed how this confusing situation may further contribute to the occurrence of potential rights violations, affecting the personal liberty of people[304].

The national Guarantor focused also on temporary reception facilities which, even if not formally defined as places of deprivation of liberty, since the reduced self-determination of persons, can sometimes become places of de facto informal segregation.

Besides for monitoring places of legally or factual deprivation of liberty, as repeatedly stressed, the national Guarantor is responsible for forced returns' monitoring.

In the second year of activity, the national Guarantor increased the number of supervised forced returns, in pursuance of Article 8(6) of Directive 115/EC of 2008. The Guarantor monitoring activity concerns the protection of the rights of all third-country nationals subject to a coercively enforced removal order, regardless of the nature of the order. The Guarantor's monitoring strategy takes into account the methodology already adopted by other European Ombuds Institutions.

Specifically, a forced return operation is divided in different phases[305] each involving different risk factors and different potential rights violation. The national Guarantor can decide whether to monitor one or more phases of the procedure. By a methodological point of view, the monitoring activity implies some sample checks of forced return and it focuses on one or more phases of the whole procedure[306].

[303]Article 17 of Decree Law 13/2017 introduced Article 10-ter to the Decree Law No. 286 of 25 July 1998, "Consolidated Act of Provisions concerning immigration and the condition of third-country national".

[304]Also the CPT, in its report on the visit conducted in Italy from the 7 to the 13 June 2013, asked the Italian Authorities to provide by law the cases where third-nationals may be deprived of personal liberty within hotspots.

[305]The phases are: Detention phase; Pre-return phase; Pre-departure phase; and Transport phase.

[306]Report to Parliament – 2017 pp. 110-114.

Since 2 May 2016, the Direction for Immigration and Border Police of the Department of Public Security sends telegrams to the national Guarantor on the forced return operations occurring over the next few days. Such practice has been welcomed by the Guarantor as an effective support to carry out its monitoring activity and to evaluate and decide on time which forced return to supervise[307].

In conclusion, on 30 December 2016, the management Authority of the national Program "Asylum, Migration and Integration Fund – AMIF" 2014-2020 (Fondo Asilo, Migrazione, integrazione – FAMI), co-financed by the European Commission and managed by the Ministry of Interior, Department of civil freedom and immigration, approved the project "Realisation of a monitoring system of forced returns" ("Realizzazione di un sistema di monitoraggio dei rimpatri forzati") presented by the national Guarantor on 14 October 2016. The project has a duration of thirty months and is aimed at improving the national monitoring capacity of return operations. Thanks to the disposal of additional economic resources, the projects consists of several activities which go beyond the monitoring itself. For example, it provides for information collection and for the development of an IT platform for the registration, management, analysis and exchange of information related to returns; for technical and linguistic training of the national Guarantor's monitoring teams; for the selection of a pool of experts in all the fields concerning the monitoring activity; for support multimedia tools for immigrants; and for the development of national guidelines for forced-returns monitoring. The grant agreement among the Guarantor and the Ministry of Interior was signed on 22 March 2017 and the project has officially started on 5 April 2017. The end of the project is scheduled for 30 September 2019.

3.4. Security and Freedom[308]

The fourth and last thematic area is deprivation of liberty deriving from law enforcement security measures. Specifically, it concerns monitoring of facilities where people are held under preventive detention orders or arrest.

The work started by the Guarantor on its first year of activity was further expanded during its second one, adding to the monitoring of State Police and Carabinieri corps'

[307]Ivi, p. 118.
[308]National Guarantor, Report to Parliament – 2018, pp. 250 – 260.

activities, the ones carried out by the Guardia di Finanza (tax and border police) and by local police forces[309].

Even if the stay in a security cell should be as short as possible, in some circumstances it happens that detention lasts longer, including one or more nights. In this regard, there are several international standards that should be respected for the entire duration of the detention period and to which the Guarantor refers during its monitoring activity[310].

For example, persons held in security cells have to sleep in an individual room and due regard has to be paid, for example, to climatic conditions, minimum floor, lighting, heating and ventilation[311]. According to the CPT, persons obliged to stay overnight in security cells should be provided with clean mattress and clean blankets and have with access to a proper toilet facility and be offered adequate means to wash themselves[312].

These are only some of the material conditions that the national Guarantor has to monitor during its visits to security cells. More generally, it verifies the respect of few specific standards ensuring the minimum requirements in terms of space, sanitary facilities, food, drinkable water and time in the open air.

In addition, the Guarantor pays specific attention to the adequate conditions adopted in cases of particularly vulnerable people held in custody, such as persons with disabilities, pregnant women, homeless or drug addicts. Whenever necessary, the Guarantor recommend the renovation or the creation of new detention areas.

Furthermore, during its visits the Guarantor has to verify the effective adoption of procedural rights, such as the right to a lawyer, the right to inform a relative or another person of the deprivation of liberty situation and the right to be visited by a doctor.

In conclusion, the national Guarantor stressed the importance of Police Forces training on ethical standards, both of national and international origin, promoting professional behaviour and individual accountability. To this end, the Guarantor recommends the

[309]Throughout 2017, the national Guarantor has first informed the different municipal Police commands about its role and functions. Subsequently, it started the monitoring of security cells and of the local Police's places where registration and interrogation are carried out.

[310]Such as the Nelson Mandela Rules.

[311]Nelson Mandela Rules number 12 – 13.

[312]European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 12th General Report on the CPT's activities, covering the period 1 January to 31 December 2001, Paragraph 47.

adoption of a law enforcement's national code of conduct for the management of situations of temporary deprivation.

3.5. The role of the national Guarantor in the Draft legislation

In addition to the work carried out in the four areas of deprivation of liberty, during its two years of activity, the national Guarantor has played an important role also as it concerns draft legislation in the fields covered by its mandate. Specifically, the national Guarantor has worked for the adoption of a law on the crime of torture and on the Prison Act's reform process.

First of all, since its establishment, the national Guarantor actively worked to raise awareness on the importance of introducing the crime of torture into the Italian Penal Code. For this purpose, the national Guarantor encountered the President of the Chamber of Deputies and the President of the Senate of the Republic as well as the Chief of State Police and the Commanding General of Carabinieri Corps[313]. During these meetings, the national Guarantor urged the Italian authorities to fully comply with Article 4 of the UNCAT and Article 3 of the ECHR, asking for the adoption of a specific provision sanctioning the crime of torture. Over the years, the absence of such provision was repeatedly stressed by the Committee against Torture[314] as well as by the European court of Human Rights[315] and the European Committee for the Prevention of Torture[316].

Almost thirty years after the ratification of the Convention against Torture[317], the Italian Parliament finally approved Law No. 110 of 14 July 2017 which, by introducing in the

[313] *Info from NPM*, document submitted by the national Guarantor to the CAT in November 2017, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fINP%2fITA%2f29320&Lang=en.

[314]CAT, Conclusions and recommendations of the Committee against Torture – ITALY, 16 July 2007, p. 3, Paragraph 5. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fITA%2fCO%2f4&Lang=en.

[315]The ECtHR interpreted the prohibition of torture enshrined in Article 3 of the ECHR as implying not only the negative prohibition to commit torture but also the positive obligation to sanction it. Since the lack of the offence, on several occasions the Court condemned Italy not only for violations of the "material" aspect of Article 3 but also for violations of the "procedural" one.

[316] CPT, Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 8 to 21 April 2016, p. 12. Available at: https://rm.coe.int/pdf/16807412c2.

[317] Law No. 498 of 3 November 1988 "Ratifica e esecuzione della Convenzione della contro la Tortura ed alter Pene o Trattamenti Creudeli, Disumani o Degradanti, fermata a New Tork il 10 dicembre 1984".

Penal Code Article 613-bis and 613-bis, addressed the lack of a crime of torture within the Italian set of rules[318]. The adoption of the Law 110/2017 was the result of a long political debate, initiated in 1989 with the first draft law for the introduction of the crime of torture and, apparently, still far from the end.

While welcoming the adoption of the new law as an important step forward, the national Guarantor, along with many other experts in the field of human rights, expressed some dissatisfaction on the final outcome of the text. The wording of the offence provided by the law has been strongly criticised also by the CAT, as "significantly narrower than the definition contained in the Convention". In particular, the Committee stressed the lack of some important specifications relating to the purposes and to the perpetrators of the crime[319].

Secondly, the national Guarantor participated actively to the long process aimed at reforming the Prison Act, initiated before its appointment by a broad consultation launched by the Italian Government in 2015[320].

After six months of work, the final outcomes of the consultation served as the basis for the Commissions' development of the reform. Before the submission to the Council of Ministers for the continuation of the legislative process, the Commissions' drafts have been transmitted to the national Guarantor for its opinion, as provided by the OPCAT in relation to the NPMs' power "to submit proposals and observations concerning existing or draft legislation"[321].

In December 2017, the national Guarantor transmitted its opinions to the Minister of Justice[322]. A large part of them, has been incorporated in the final text of the reform as submitted to the Parliamentary Commissions, eventually becoming an integral part of the reform[323].

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[318] Law No. 110 of 14 July 2017 "Introduzione del delitto di tortura nell'ordinamento italiano". Available at: http://www.astrid-online.it/static/upload/legg/legge-14-luglio-2017--n.pdf.

[319] CAT, Concluding Observations on the combined fifth and sixth periodic reports of Italy, 18 December 2017, p. 2. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fITA%2fCO%2f5-6&Lang=en.

[320] The so called "Stati Generali dell'esecuzione penale".

[321] OPCAT, Article 19 letter c).

[322] National Guarantor's Opinion on the draft legislative decree in the field of alternative measures to prison detention, implementing the delegated law No. 103 of 23 June 2017 on the Prison Act' reform.

[323] National Guarantor, Report to Parliament-2018, p. 37.

However, since the lack of a final approval by the then Parliament, the reform has been passed to the new Parliamentary Commissions which rejected the original text. In September 2018, the Council of Minsters has finally approved the Prison Act's amendments, consisting only of three legislative decrees, significantly reducing the original scope of the reform[324].

[324]Council of Ministers, 27 September 2018; D.lgs No. 121 of 2 October 2018; D.lgs No. 123 of 2 October 2018; D.lgs No. 124 of 2 October 2018.

Chapter III

The Evolution of the Italian NPM

1. Regions and Local Authorities in the field of deprivation of liberty

Regions and local Authorities play a fundamental role in the enforcement of sentences and deprivation of liberty, especially since the reform process started in the late 1990s and further developed in the early 2000s.

As already mentioned in the previous chapter, the experimental establishment of mechanisms dedicated to the rights of persons deprived of liberty initially took place in Regions and local Authorities. Over time, a large number of Guarantors have been appointed in force of regional laws and local decisions, creating a fragmented regulatory framework of institutions.

The establishment of the national Guarantor stressed the need to reconsider the role played by territorial guarantee Institutions, in the attempt to create a more consistent and homogeneous system for the rights of persons deprived of liberty.

1.1 Competences of Regions and Local Authorities on the enforcement of sentence and deprivation of liberty

On 3 and 4 May 2018, it was held in Rome a conference organised by the Regional Council of Lazio and by the Guarantor for the rights of persons deprived of liberty of Region Lazio entitled "*Regions and local authorities in the enforcement of sentence, in deprivation of liberty and in social inclusion*"[325].

One of the first speech opening the initial day of the conference was dedicated to provide a general framework on the role and competences of Regions and local Authorities in the penitentiary system. The author of the speech, Patrizio Gonnella[326], efficiently outlined the main aspects of the current and potential work carried out by territorial Authorities in the field of detention.

[325]The video record of the conference is available at the web site of Radio Radicale: https://www.radioradicale.it/scheda/539443/regioni-e-comuni-nellesecuzione-penale-nella-privazione-della-liberta-e-nellinclusione.

[326]Current President of Associazione Antigone and CILD - Italian Coalition for Civil Liberties and Rights.

According to Gonnella, Article 27[327] of the Italian Constitution, by providing in the third paragraph the principle of human dignity and the rehabilitation function of the sentence, sets out clear indications to all public administrations operating in the justice system, regardless of their national or territorial nature. The constitutional mention to dignity refers to a concept of punishment based on fundamental rights, clarifying the tasks of all the public authorities. Furthermore, the rehabilitation function, aimed at providing new opportunities to detained persons, obviously entails the direct involvement of sub-national actors since their territorial proximity.

In line with the principle of non-discrimination enshrined in Article 3 of the Italian Constitution[328], personal liberty requires equal treatment and, for this reason, rights and duties of the detention system are regulated by a state law. According to Article 117, as amended by the Constitutional Reform of Chapter V in 2001, the State has an exclusive legislative power in the field of public order and security as well as in jurisdiction and procedural law, civil and criminal law and administrative judicial system[329].

Within the State framework, however, there is a wide margin of action for Regions and local Authorities in pursuing constitutional goals. Deprivation of liberty, on whatever grounds, is subject to cooperation of state, regional and local Administrations, without which detention would be reduced only to its custodial dimension, thereby violating the constitutional principles.

Among all the policies assigned to territorial actors, Gonnella makes a clear distinction between the so called "due policies", expressly conferred by law to Regions and local Authorities in the field of deprivation of liberty, and "necessary policies", which instead derive from general competences assigned to territorial Authorities with a universal scope, addressed to the whole population and therefore also to persons deprived of liberty.

[327]Constitution of the Italian Republic, Article 27 paragraph 3: "Punishments may not be inhuman and shall aim at re-educating the convicted".

[328]Constitution of the Italian Republic, Article 3 paragraph 1; "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".

[329]Constitution of the Italian Republic, Article 117, paragraph 2, letter h) and l).

As it concerns "due policies", the first and main territorial competence in prison system regards healthcare. Until 2008, medical competences in prisons facilities, labour relations and economic and material resources related to the healthcare sector, were under the jurisdiction of the Ministry of Justice. Through the Decree of the President of the Council of Ministers (D.P.C.M) number 126 of 30 May 2008, all the aspects related to prison healthcare were transferred to the National Health System and therefore to Regions and any Local Health Authority (Azienda Sanitaria Locale – ASL), completing the prison healthcare's reorganisation started in the late 1990s, with the Legislative Decree No. 230/1999[330].

By transferring the health functions, the National Health System has today a direct and full accountability, prioritising the right to health over security needs through the functional and hierarchical independence of doctors from prisons' directors. The reform started in the late 1990s has anticipated what later will be reaffirmed by the constitutional legislator in 2001 by assigning to Regions legislative power in the field of health protection[331], without making any distinction among free or detained persons. This include also migrants' centres where some ASL and Regions have assured, through ad hoc protocols, the presence of services for the protection of health in the former CIEs, nowadays known as CPRs.

Among the "due policies", Regions and ASL are furthermore in charge of the management of persons with mental illnesses. As a matter of fact, since the 2014 reform[332], which provided for the closure of all the Judicial Psychiatric Hospitals (Ospedali Psichiatrici Giudiziari-OPG), Regions and ASL are responsible for the REMS management and for a general revision of the internment model. This entails the employment in prison of several professional figures, such as psychologists, psychiatrists, educators, etno-psychiatrists as ASL personnel.

In the same way, Regions and ASL have to provide for policies for the treatment and therapy of additions. This role has been assigned to territorial actors by the same legal sources providing for the transfer of healthcare to the National Health System. In this

[330]D.lgs No. 230 of 22 June 1999, "Riordino della medicina penitenziaria a norma dell'articolo 5, della legge 30 novembre 1998, n. 419".
[331]Constitution of the Italian Republic, Article 117, paragraph 3.
[332]Law No. 81 of 30 May 2014, "Conversione in legge, con modificazioni, del decreto-legge 31 marzo 2014, n. 52, recante disposizioni urgenti in materia di superamento degli ospedali psichiatrici giudiziari".

case, however, since 1999 Regions have implemented this part of the reform, outlining the role of the Services for Drugs Addictions (Servizi per le Tossicodipendenze –SerT) within prisons.

Other important "due policies" of Regions and local Authorities are related to work, above all in relation to professional training. The Prison Act itself specifically provides for the role of Regions relating to work activity of detainees, namely in everything related to professional training courses[333], to the management of work activities carried out within prison Institutions[334] and to active occupational policies[335]. Also the Constitutional text recognises to Regions shared competence on job protection and occupational safety and on active policies in the field of labour[336].

As it concerns the rights of detained persons, the Prison Act provides supervision and control duties to Regions. Specifically, Article 35 of the Prison Act provides detainees and internees the opportunity to present a generic complaint to the President of the Regional Government (Giunta regionale) and entrusts members of the Regional Council (Consigli Regionali) with the right to access and visit prison Institutions, within their districts.

Furthermore, Regions and local Authorities are in charge of "due policies" in relation to social inclusion, since welfare is mainly managed and supervised at the closest possible level to the people. This concerns especially the management of communities and other alternative measures to detention.

In conclusion, since 2000[337], in addition to healthcare professionals, also cultural-linguistic mediators are hierarchically and functionally independent from prison directors. The norm states that it must be promoted the employment of cultural mediation operators, also through agreements with local entities and voluntary organisations.

In addition to the "due policies", Regions and local Authorities must ensure that persons deprived of liberty enjoy all the rights laid down by the policies generally addressed to the whole population and not explicitly excluding detained persons from their scope.

[333]Prison Act, Law No. 354 of 26 July 1975, Article 20.
[334]Ivi, Article 20-bis and Article 25-bis.
[335]Ivi, Article 21 and Article 4-ter.
[336]Italian Constitution, Article 117, paragraph 3.
[337]D.P.R. No. 230 of 30 June 2000, "Regolamento recante norme sull'ordinamento penitenziario e sulle misure privative e limitative della libertà", Article 35 (2), published on the Official Journal No. 195 of 22 August 2000.

These policies, described as "necessary policies", refer for example to issues related to the civil registry, which have significant impact on the right to vote for Italian citizens and on the recognition of civil unions for migrants. Furthermore, it is up to Regions and local Authorities to take account of prison establishments while doing urban planning and considering transports-related issues, in order not to affect detainees' right to defence and to maintain relationships with loved ones. In conclusion, Regions and local Authorities have to guarantee the right to education to everyone, detainees included. It is in fact their task to promote university enrolment, cultural initiatives and sport activities.

According to Gonnella, through strategic and complementary policies, not merely supplementary to the State's shortcomings, Regions and local Authorities may overcome the custodial dimension of detention, in defence of Article 27 of the Italian Constitution.

1.2 Different types of territorial Guarantors

It is precisely because of the several and significant competences assigned to Regions and local Authorities in the management of persons deprived of liberty that, since the early 2000s, the first territorial Guarantors have been established, paving the way for the future creation of the national Guarantor.

Since then, different types of territorial Guarantors were appointed as institutions aimed at supervising and stimulating Regions and local Authorities in the performance of their duties. As already mentioned, the first one was the authority for the municipality of Rome in 2003[338], immediately followed by the Authority of Region Lazio[339]. To date, seventeen Regions and Autonomous Provinces, nine Provinces and Metropolitan Areas and fifty Municipalities have established their territorial Guarantors for the rights of detainees or of persons deprived of liberty or conferred their functions to other guarantee Institutions with broader mandates[340].

[338]City Council's decision No.90 of 14 May 2003.

[339]"Garante delle persone sottoposte a misure restrittive della libertà personale", established by R.L. No. 31of 6 October 2003.

[340]Conferenza dei Garanti Territoriali delle Persone Private della Libertà, Preambolo, available at: http://www.garantedetenutilazio.it/garante-detenuti-lazio/il-garante/la-struttura/10-sito-web/376-conferenza-dei-garanti-territoriali-delle-persone-private-della-liberta.

Despite the proliferation of authorities, there are still five Regions missing their own one. Three of which, namely Abruzzi, Sardinia and Calabria, have the relevant laws but have not appointed the Authority yet. The other two, Basilicata and Liguria, as well as the Autonomous Province of Bolzano, instead still lack the establishment law[341].

Due to the absence of specific, clear and unique legal standards, the heterogeneity of founding norms has resulted in a proliferation of different institutions.

The national Guarantor's 2018 Report to Parliament, in its last chapter, briefly outlines the different characteristic of regional Guarantors, analysing the main dissimilarities and stressing the need for a harmonisation process. The first divergence outlined in the Report concerns five regions, namely Lombardy[342], Marche[343], Molise[344], Valle d'Aosta[345] e Veneto[346], which have designed as Guarantors of detained persons Ombuds Institutions, in charge of a broad mandate not specifically dedicated to deprivation of liberty. Such type of institutions, are generally aimed at defending people's rights against public Administrations. Some of them, in addition to the role of detainees' Guarantor, have been also designated as independent authorities for the protection of other specific categories of rights. For example, the Ombuds Institutions of Marche, Veneto and Molise play at the same time the role of Guarantors for the rights of detainees and of Guarantors for the rights of children and adolescents, carrying out in addition the general Ombuds Office's duties related to public administrations. The Lombardy Ombuds Institution is instead Guarantor of detainees and Guarantor of the

[341]The Network of Guarantors, available at the web site of the Guarantor of Lazio: http://www.garantedetenutilazio.it/garante-detenuti-lazio/la-rete-dei-garanti.

[342]"Difensore Regionale della Lombardia", established by Article 61 of the Autonomous Statute for Lombardy and regulated by R.L. No. 18 of 6 December 2010.More information available at: http://www.difensoreregionale.lombardia.it/.

[343]"Ombudsman delle Marche- Autorità di garanzia per il rispetto dei diritti di adulti e bambini", established by R.L. No. 23 of 28 July 2008. More information available at: http://www.ombudsman.marche.it/.

[344] "Garante dei Diritti della Persona", established by R.L. No. 17 of 9 December 2015. More information available at: http://garantedeidiritti.regione.molise.it/.

[345]"Difensore Civico", established by Article 2(ter) R.L. No. 17 of 28 August 2001. More information available at: http://www.consiglio.vda.it/app/difensorecivico.

[346] "Garante regionale dei diritti della persona – attività di promozione, protezione e pubblica tutela dei minori di età", established by R.L. No. 37 of 24 December 2013. More information available at: http://garantedirittipersonaminori.consiglioveneto.it/home/home.asp.

regional taxpayer, ensuring fairness and transparency in the relations among citizens and the tax authority of Lombardy Region[347].

On several occasions, the national Guarantor has expressed reservations on the supervising activity carried out by Ombuds Offices in the complex and sensitive field of deprivation of liberty. Since the 1997 Conference of Padua, where for the first time the issue of a national independent Authority for people deprived of liberty was officially addressed, Mauro Palma, today President of the national Guarantor and at that time President of Associazione Antigone, voiced his doubts about institutions with such broad and diversified competences and with an intrinsic reactive mandate. As a matter of fact, in that occasion, Mauro Palma stressed the importance of a mechanism exclusively dedicated to the rights of persons deprived of liberty in order to avoid their marginalisation. Furthermore, Ombuds Institutions are characterised by a "case by case" approach, which means that they usually take action only in response to specific complaints. Also the national Guarantor is in charge of receiving and reacting to complaints but, in virtue of its NPM role, its main functions are preventive and proactive activities, consisting in monitoring operations aimed at reducing the risk of violations and in making recommendations to stimulate the relevant administrations.

The national Guarantor thus calls on the Regions that still lack an Authority for deprivation of liberty to do not follow the Ombuds Office model and the Regions that have already established this type of institution to re-design them[348].

Other main divergences among territorial Guarantors are related to their appointment procedures. First of all, if regional Guarantors of persons deprived of liberty are generally elected by the regional parliamentary Assembly (Consiglio Regionale), in Sicily[349] the Guarantor is appointed by the President of the Region, i.e. the chief of the regional government, thereby not ensuring a sufficient independence from the Executive. At the city-level, this appointment procedure has been chosen for the

[347]The Ombuds Office role and functions as Guarantor of the regional taxpayer are laid down in Articles 22-25 of regional law No. 10 of 14 July 2003 "Reorganisation of regional legislative provisions in taxation matters – Consolidated Text on regional tax regulation".

[348]National Guarantor, Report to Parliament – 2018, p. 262.

[349] "Ufficio del Garante dei Diritti dei Detenuti", established by Article 33 of R.L. No. 5 of 19 May 2005, appointment procedure: Article 33 (2). More information available at: http://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_PresidenzadellaRegione/PIR_UffGarantedetenuti.

Guarantors of Rome and Turin[350], two important realities and among the first to establish a guarantee Institution for detainees, who are appointed directly by the relative mayor.

Furthermore, the term of office varies considerably from Region to Region. From Veneto where the mandate lasts three years with the possibility of being re-elected, to Sicily where the mandate lasts seven years but does not provide for a second re-election. In other Regions, such in Abruzzi, Marche, Piedmont[351] and the autonomous province of Trento, the term of office coincides with the duration of the regional legislature. As it concerns the removal of territorial Guarantors, in some Regions it is planned for non-compliance or violation of the duties related to the guarantors' mandate. In others, the removal is instead the result of a Regional Council's motion or of "serious reasons" not specifically defined, as in Tuscany[352].

Moreover, a further divergence among independent Authorities is the scope of their mandate. Some of them have jurisdiction only over prison facilities, while others have broader competences including other places of liberty deprivation such as centres for migrants and Psychiatric diagnosis and treatment facilities (Spdc) where Compulsory Health Treatments (Tso) are administered. These territorial Authorities are in fact generally denominated "Guarantor for people subject to measures restricting personal liberty[353]" and not merely "Guarantor for detainees"[354].

1.3. Relations between territorial Guarantors and the national Guarantor

The establishment of the national Guarantor was strongly supported by the territorial guarantee Institutions already operating across the country for the protection of rights of persons deprived of liberty. As already mentioned, territorial Guarantors actively worked to encourage the creation of a central institution by promoting a draft law for its establishment. The proposal, submitted by the Coordination of territorial Guarantors,

[350]"Garante dei diritti delle persone private della libertà personale" - Comune di Torino, established by City Council's decision on 7 June 2004, appointment procedure at Article 2.

[351] "Garante dei Detenuti", established by R.L. No. 28 of 2 December 2009, appointment procedure Article 2. More information available at: http://www.cr.piemonte.it/web/assemblea/organi-istituzionali/garante-dei-detenuti.

[352]"Garante dei diritti dei detenuti", established by R.L. No. 69 of 19 November 2009, removal: Article 6 (2). More information available at: http://www.consiglio.regione.toscana.it/garante-detenuti/default.aspx.

[353]Such broader mandate Authorities have been established for example by Lazio, Umbria, Piedmont, Tuscany, Emilia-Romagna, Campania, Puglia, Friuli-Venezia Giulia

[354]Lombardy, Marche, Sicily, Valle d'Aosta, Veneto.

was aimed at creating a strong mechanism of prevention with national jurisdiction, operating in constant cooperation with regional and local guarantee Institutions[355].

Once the national Guarantor was eventually appointed in 2016, particular attention has been paid to reconsider the role played by territorial Guarantors, with the view of creating a new guarantee system now complemented by a central independent Authority[356].

To this end, the Coordination of territorial Guarantors has been transformed in the *Conference of territorial Guarantors for the right of persons deprived of liberty*, a body aimed at representing the Guarantors established at any sub-national level and at promoting cooperation and discussion among them and with other Institutions[357].

In July 2018, it was approved the new founding Regulation of the Conference, laying down its main characteristics and functions[358]. Specifically, the Conference represents territorial Guarantors in the institutional relations with the relevant Authorities; it collaborates with the national Guarantor; it elaborates guidelines for the regulation, operations and organisations of territorial Guarantors' offices; it monitors the status of the legislation and it coordinates information gathering in the field of deprivation of liberty; it conducts studies and researches; it promotes trainings and debates; it drafts joint documents for the unity of territorial Guarantors; and it supports the establishment of new Guarantors at any territorial level[359].

All the Guarantors, however named, established by Regions, Provinces, Metropolitan Areas and Municipalities are ex officio member of the Conference. A standing invitation is extended to the national Guarantor which, therefore, is not an official member but participates to all the plenary meetings of the Conference[360].

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[355]Draft law of the Coordination of territorial Guarantors, "Istituzione del Garante nazionale delle persone private della libertà personale ". Available at:
http://www.ristretti.it/commenti/2010/marzo/pdf3/ddl_garante_detenuti.pdf.

[356]S.Anastasia (Guarantor of Lazio and current spokesman of the Conference of territorial Guarantors), *"The role of territorial Guarantors in the protection of persons deprived of liberty*", speech held during the conference "Regions and local authorities in the enforcement of sentence, in deprivation of liberty and in social inclusion", 3 May 2018.

[357]Conference of territorial Guarantors for the persons deprived of liberty.

[358]Regulation of the Conference of territorial Guarantors for the persons deprived of liberty, http://www.garantedetenutilazio.it/garante-detenuti-lazio/le-carceri-nel-lazio/10-sito-web/376-conferenza-dei-garanti-territoriali-delle-persone-private-della-liberta.

[359] Ivi, Article 2.

[360] Ivi, Article 1 and Article 4.

In addition to the Conference' Assemblies, the national Guarantor meets with the territorial ones during periodic Coordination Meetings held in Rome. The national Guarantor may decide whether to convene meeting open only to regional Guarantors or to all territorial guarantee Institutions. These are important opportunities aimed at strengthening the relations among the several organisms, at addressing specific thematic issues and at establishing an effective and consistent network throughout the country[361].

1.4 Guidelines of the National Guarantor for the establishment of the Regional Guarantor for the rights of persons detained or deprived of personal liberty

Within this coordination framework, the national Guarantor undertakes to promote the establishment of an effective and consistent guarantee system in the different Regions.
In the attempt to harmonise the fragmented regulatory framework, the national Guarantor worked on the development of a set of guidelines enshrining the main characteristics which each guarantee Institution for the rights of persons deprived of liberty should comply with[362].
On 2 November 2016, the national Guarantor sent a letter containing the guidelines to the Assemblies of the few Regions that still lacked a Guarantor. The national Guarantor guidelines are based on the main standards of independence and autonomy required by the OPCAT as it concerns National Preventive Mechanisms[363].
Specifically, the guidelines regard the Guarantor's appointment procedure and term of office, the relation among the prohibition to perform other professional activity and the Guarantor's remuneration, the inclusion in its mandate of every places of liberty deprivation and the respect of the principles of collaboration and confidentiality.
First of all, according to the guidelines, the main guarantee of the regional Guarantor's independence and autonomy comes from its appointment procedures. First of all, it must be elected by the Regional Council (Consiglio Regionale), since a governmental

[361] The first coordination meeting with regional Guarantors was held on 14 March 2016, a few weeks after the national Guarantor appointment. On 14 December 2016 has been held the first meeting of municipal, provincial and regional Guarantors. Since then, coordination meetings are periodically taking place. For more information, see the sections "During a year of activity" both of the 2017 and the 2018 reports to Parliament.
[362]National Guarantor, Report to Parliament – 2018, p. 270.
[363]National Guarantor for the Rights of Persons Detained or Deprived of Personal Liberty, *Linee guida del Garante nazionale per l'istituzione del Garante regionale dei diritti delle persone detenute o private della libertà personale*, Rome, 2 November 2016.

appointment would make the institution inevitably linked, at least in the form, to the politic power of the Executive (Giunta) in charge. Secondly, the appointment system has to ensure that the designation is agreed as much as possible but, at the same time, it has to prevent the creation of veto powers in charge of the parties or political forces represented in the Council. In this perspective, it can be envisaged the election by qualified majority for a limited number of consultations and the subsequent eventual passage to absolute majority for the same number of consultations which could be followed by a simple majority vote.

As it concerns the term of office, in order to make the Guarantor free from the political body which designate it, any temporal link among them has to be removed. Therefore, the Guarantor's mandate should have a different duration compared to the regional legislature, preferably a longer one.

For several reasons, the role of the Guarantor may be considered incompatible with the performance of other professional activities. In these circumstances, shall be taken into account an adequate remuneration.

Moreover, as the national Guarantor, the regional one has to perform its duties not only in detention facilities but in any places where occurs a de facto or de jure deprivation of personal liberty, including for example, security cells of every Police Forces, detention centres for migrants, hotspots, Psychiatric diagnosis and treatment facilities or any other places where Tso are administered, social and healthcare homes, facilities for people subject to measures alternative to detention or to supervision measures. The Regional Guarantor founding law has to provide for such a wide mandate which, in addition, has to be clearly expressed in the name of the institution, generally referring to the rights of persons deprived of liberty and not only to detainees.

As the national Authority, regional Guarantors have to operate in accordance with the principles of cooperation and confidentiality. Regional Guarantor have to cooperate with the relevant administrative Authority, making specific recommendations on rights' violations or on the validity of detainees and internees' complaints. Furthermore, Guarantors have to safeguard the confidentiality of the information obtained, both because public condemnation is motivated only by the persistent inertia of the relevant Administration and because the opportunity to conduct private interviews implies the protection of the data obtained as of the people who supplied them.

2. The Networks of Guarantors

The national Guarantor's guidelines were aimed not only at establishing new regional Institutions but also, when necessary, at encouraging the already existing ones to comply with the OPCAT requirements. Indeed, the efforts for more independent Guarantors seek to promote the establishment of a Network of guarantee Institution, in accordance with the original design of the Italian NPM. Due to the persistent dissimilarities among territorial Guarantors, the creation of such system is still at a very early stage.

The so called "AMIF Network", based on the involvement of some regional Guarantors in forced returns monitoring procedures, is instead already operational and started to show its first significant results.

In order to further investigate the Networks' issue, this paragraph, as the next one, include some information supplied by Alessandro Albano, Head of the *National and International Relations, Field Studies Unit* at the Office of the national Guarantor.

2.1 The NPM Network

According to the *Note Verbale* submitted to the SPT in 2014, Italy designated as NPM the "whole system" of Guarantors, composed by the national Authority and territorial guarantee Institutions[364]. On this occasion, the national Guarantor was explicitly entrusted with the task of coordinating all the guarantee Institutions already in place or to be set up both at the regional and at the local level. However, due to the heterogeneity of the large number of territorial Guarantors, the network is still a work in progress and the NPM role is currently played exclusively by the national Authority.

Since its establishment, the national Guarantor is actively working in order to realise the original intent of Italy by promoting the inclusion of territorial Guarantors within the NPM system. Given the large number of places subject to the national Guarantor's monitoring activity, the creation of an efficient network would enable the NPM to increase its effectiveness.

[364]Official Correspondence from the Permanent Mission of Italy to the International Organisations in Geneva, *Note Verbale*, 25 April 2014.

Territorial Authorities would be able to conduct a great number of visits, more frequent follow-up and, at the same time, to quickly address detainees and internees' complaints, due to their territorial proximity and reduced geographical area of competence[365].

In a so designed Network, the national Guarantor would play a role of central coordination. Indeed, while is true that the Optional Protocol allows for the establishment of one or several mechanisms to prevent torture at the domestic level, it is also true that local organisms with a limited territorial jurisdiction need a central institution in order to perform the preventive function across the country. Moreover, while territorial Guarantors submit their recommendations to the relevant local Administrations, the national Guarantor transmits its recommendations to national Administrations, as the Ministry of Justice and the Ministry of Interior.

The national Guarantor, as coordinator of the NPM, would bring together the different segments of the network, first of all by coordinating all the activities carried out by the territorial branches of the system. Its central role would avoid the duplication of work, especially as regards the matters falling within regional competences such as health, work and education[366]. Furthermore, it would serve as a reference point for territorial Guarantors, supporting and guiding them through their transition to national preventive mechanisms. In addition, the national Guarantor would be the channel both with national Administrations and with international organisms as well as NPMs of other States parties to the OPCAT. In this respect, the role of the national Guarantor should not be seen under a hierarchical logic, but rather as a part of the whole system[367].

Being the central core of the network, it is up to the national Guarantor to propose to the United Nations which territorial Guarantors should become part of the NPM network in relation to their OPCAT compliance[368].

The national Guarantor is currently working in this direction, first of all by supporting the inclusion of regional Guarantors within the NPM system. The decision to start with

[365]Interview with Alessandro Albano, Head of the *National and International Relations, Field Studies Unit* at the Office of the national Guarantor.

[366]D.Bruno, D. Bertaccini, *"I Garanti (dalla parte) dei detenuti – le istituzioni di garanzia per i privati di libertà, tra riflessione internazionale ed esperienza italiana",* p. 128, Bononia University Press, Bologna, March 2018.

[367]Interview with Alessandro Albano.

[368]A. Albano, *The Italian NPM System,* speech held at a Seminary organised by the Guarantor of Emilia-Romagna on 27 June 2018, p. 8. Text available at:
http://garantedetenuti.consiglio.puglia.it/dettaglio/contenuto/60369/Il-sistema-NPM-italiano-di--Alessandro-Albano---Responsabile-Relazioni-nazionali--internazionali-e-Studi-del-Garante-nazionale

regional Institutions is not aimed at marginalising the local ones but stems, rather, from the will to protect and to strengthen the Italian NPM. Indeed, the latter institutions are on average still a long way from meeting the OPCAT requirements compered to the former ones. By introducing such a variety of Institutions, often characterised by a questionable independence, the whole NPM system could be strongly weakened.
In order to safeguard the whole NPM system, the national Guarantor decided therefore to support first the inclusion of some regional Guarantors, namely those characterised by the greatest conformity with the OPCAT requirements.

2.2 The Accreditation process

Since its designation, particular attention has been paid to the expansion of the NPM system, both by the national Guarantor itself and by the United Nations monitoring bodies. On 12 and 13 June 2017, a delegation of the national Guarantor went to Geneva at the request of the SPT. During the hearing, which was generally aimed at assessing the actual functioning and independence of the new Institution, the Subcommittee focused on the coordinating role assigned in the *Note Verbale* to the national Guarantor. In particular, the SPT requested information about the founding laws of territorial Guarantors, the extent of their mandates and about the effective possibility to delegate them powers and duties established by the OPCAT[369]. The delegation of the national Guarantor undertook to continue the debate with territorial Guarantors and, by the end of the year, to report back to the United Nations the latest developments and the possible sub-national Institutions selected to become part of the NPM system[370].
The following day, on 14 June, the national Guarantor called a meeting of regional Guarantors in order to discuss the next steps towards the launch of the NPM Network[371].
A few months later, in September 2017, the national Guarantor sent a letter to all regional Guarantors containing a "declaration of intent" aimed at formalising the NPM Network project. By signing the declaration, regional Guarantors stated their intention

[369]Interview with Alessandro Albano.
[370]National Guarantor for the Rights of Persons Detained or Deprived of Personal Liberty, Press Release: *Hearing of the national Guarantor at the United Nations in Geneva as Italian torture preventive Mechanism.*
[371]Report to Parliament – 2018, During a Year of Activity: 12-13 June 2017, Delegation of the national Guarantor in Geneva; 14 June 2017: Coordination meeting with regional Guarantors, pp. 12 -13.

to adhere to the NPM Network, committing themselves to the principles enshrined in the OPCAT and in the Self-Regulatory Code of the national Guarantor[372]. Specifically, the document laid down the main points enshrined in the national Guarantor's guidelines, requiring regional Guarantors to comply with the principles of independence and autonomy, cooperation, confidentiality and to extend the extent of their mandate in order to include all places of liberty deprivation[373].

In November 2017, the issue of a possible enlargement of the Italian NPM was brought again to the United Nations. During the CAT examination of the fifth and the sixth Italian periodic report on the UNCAT implementation, the national Guarantor, in its role of NPM, had a private interview with the Committee[374]. Among other things, the national Guarantor discussed the inclusion within the Italian NPM system of some regional Guarantors, selected in accordance to their "normative" conformity to the OPCAT requirements. Being considered as the most independent ones, the national Guarantor chose the territorial Authorities appointed by Regional Councils, not removable except for serious non-compliance reasons, whose terms of office do not coincide with the the Regional Councils' ones and, above all, those in charge of any place of deprivation of liberty and not only of prisons[375].

Despite their normative conformity, the UN Committee rejected the national Guarantor's proposal claiming that, in order to become part of the NPM, an "operational" conformity is also required. This means that Guarantors have to operate as preventive mechanisms in every aspect of their work and thus carrying out monitoring activity in full compliance with the typical proactive *modus operandi*[376].

Specifically, Guarantors have to adopt working methods such as in-depth preparation of visits, preparation of notes on the visits, drafting and publication of reports and specific, measurable, achievable, results-oriented and solution- suggestive recommendations to be transmitted to the relevant Administrations[377]. These methods have to be adopted not only in regards to prisons facilities, but to any type of deprivation of liberty including

[372]OPCAT, Articles 17-23; Self-Regulatory Code Article 4.
[373]Declaration of intent, 6 September 2017. For more information: D. Bruno, D. Bertaccini, *"I Garanti (dalla parte) dei detenuti"*, pp. 123 – 124.
[374]National Guarantor, Report to Parliament, p. 264.
[375]*Info from NPM*, document submitted by the national Guarantor to the CAT in November 2017.
[376]National Guarantor, Report to Parliament – 2018, p. 146.
[377] Association for the Prevention of Torture (APT), *Making Effective Recommendations*, November 2008.

therefore those related to migrants' detention, law enforcement's measures and the healthcare sector[378].

While considering regional Guarantors as still not ready to become part of the Italian NPM, the CAT encouraged Italy to continue along this path, pursuing the efforts to establish of an effective NPM system[379].

2.3 The AMIF Network

Nowadays, the most consolidated network among independent Authorities for persons deprived of liberty is the one established in the framework of the "Asylum, Migration and Integration Fund – AMIF" project, thereby known as "AMIF Network"[380].

As already mentioned in the previous chapter, Italy designated the newly established NPM as independent mechanism in charge of forced return monitoring operations, containing the infringement procedure launched by the European Commission in October 2014. Being the only institution so far recognised as the Italian NPM, the national Guarantor is therefore the only authority officially responsible for forced return monitoring. However, in order to increase its effectiveness, the national Guarantor decided to use the support of some regional Guarantors, especially to monitor the preliminary phases of return procedures, namely those preceding the flight itself.

For this purpose, the national Guarantor has signed several bilateral agreements with regional Guarantors aimed at constituting a national monitoring system composed of different authorities operating across the country and cooperating among each other. So far, eight Regions, namely Campania, Emilia-Romagna, Lazio, Marche, Piedmont, Puglia, Sicily and Tuscany, have joined the initiative. By virtue of a specific collaboration agreement with the regional Guarantor of Piedmont, also the Guarantor of Turin took part to the project[381].

The territorial guarantee Institutions included in the Network are provided with specific trainings as well with the opportunity to participate to workshops and seminaries

[378]National Guarantor, Report to Parliament – 2018, p. 146.
[379]Ibidem; Committee against Torture, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, adopted by the Committee at its sixty-second session (6 November – 6 December 2017), paragraph 14.
[380]A. Albano, *The Italian NPM System*, p. 11.
[381]National Guarantor's website, Fami, *"Realisation of a monitoring system of forced return",* available at: http://www.garantenazionaleprivatiliberta.it/gnpl/it/dettaglio_contenuto.page?contentId=CNG3465.

organised by the national Guarantor on the issues concerning forced returns. The territorial Guarantors that chose to adhere to the Network, in turn, shall be bound by the duty of confidentiality and to behave according the rule of conduct.

In late October 2017, it was organised in Rome the first multi-disciplinary training seminary on forced return monitoring, attended by personnel of regional Guarantors as well as those of the national one[382]. On December, it took place a workshop on the "Protection of rights in the forced return procedures" with the participation of regional Guarantors and the Department of Public Security and the Department for civil freedoms and immigration of the Ministry of Interior[383]. Finally, in January 2018, it was held another seminary on the new legal norms for the protection of unaccompanied foreign minors which was attended also by the Italian independent Authority for Children and Adolescents and its staff[384]. Other training activities have been carried out by the national Guarantor directly in the headquarters of certain regional Guarantors members of the Network, such in Palermo at the end of January 2018, for the Sicilian Guarantor, and in Turin for the Piedmontese Guarantor in February 2018[385].

The national Guarantor may instruct territorial Guarantors to monitor the whole forced return operation or only a single phase of the procedure. For example, they may monitor the preliminary phases, such as the pre-return or the pre-departure phases, as well as the flight to the countries of origin. Given their territorial proximity, regional Guarantors are currently mostly in charge of the preliminary phases' monitoring activity[386].

Specifically, taking a return flight to Nigeria[387] as example, if some of the returnees came from different CPRs (Rome, Turin, Bari, Brindisi, Potenza, Trapani) it is easy to see how useful territorial Guarantors could be in monitoring the initial phases while personnel of the national Guarantor supervise the subsequent phases of pre-departure, boarding and departure, usually conducted in Rome[388]. This synergy allows to cover all the forced return phases, thus ensuring a more effective monitoring system.

[382] National Guarantor, Report to Parliament – 2018, "During a year of activity", p. 18.
[383] Ivi, p. 20.
[384] Ivi, p. 21.
[385] Ivi, pp. 22-23.
[386] Interview with Alessandro Albano.
[387] A State with which Italy has signed readmission agreements.
[388] Interview with Alessandro Albano.

The "AMIF Network" has proved to be a valuable collaboration for the national Guarantor. Through regional Guarantors' support, forced return monitoring activities have been significantly implemented throughout the year[389].

3. A state law for the Italian NPM system

The role of the national and territorial Guarantors as the Italian NPM is currently enshrined only in the diplomatic correspondence sent to the SPT. The lack of a clear regulation, aimed at providing specific standards for territorial Guarantors, is probably one of the main element hindering the establishment of the NPM Network.
The absence of a law clarifying their status, structure and functions, caused confusion on their role and on the differences between them and the national Guarantor.
An example of this unclear situation is the one provided by the recent dispute about the right of territorial Guarantors to conduct private interviews with detainees under the special regime enshrined in Article 41-bis of the Italian Prison Act, as provided for the national Guarantor.

3.1 Lack of a clear regulation

The main obstacles to the realisation of the NPM Network stem from the deep dissimilarities among territorial Guarantors' founding laws, each establishing institutions with different characteristics and powers, whose independence is not always ensured.
There are territorial Guarantors whose mandate concerns only detainees' rights, other Guarantors whose term of office coincides with the territorial legislature. Moreover, some Guarantors can be removed by a reasoned opinion while others for unspecified "serious reasons". There are Guarantors who are generic Ombuds Office, dealing with deprivation of liberty among other areas of competence. Some others, do not receive any economic remuneration for the performance of their functions or do not chose their

[389]National Guarantor, Report to Parliament – 2018, p. 264.

staff which is directly assigned by the territorial Authority. Finally, several Guarantors are not provided with adequate financial and human resources[390].

The path towards the creation of a Network of Guarantors is therefore hindered by the absence of a coordinating law, able to clarify the role and the competences of territorial Authorities, especially regarding their role within the NPM system[391].

So far the structure and composition of the Italian NPM is contained only in a diplomatic correspondence, i.e. the *Note Verbale* transmitted to the SPT in April 2014[392]. The national Guarantor thus recommends the adoption of a state law, capable of both recognising its NPM role and bringing some clarity as it concerns territorial Guarantors within the system described in the *Note Verbale*[393].

Such new regulation should explicitly lay down the functions and powers of territorial Authorities within the Italian NPM system, providing them additionally with the adequate resources for expand their operational activities to all the areas of deprivation of liberty[394].

A state law could therefore significantly contribute to systemise their regulations by creating a real system while combining the need related to their local autonomy with the national and international requests. In order to facilitate and encourage this project, the national Guarantor initiated an institutional dialogue with the *Coordinator of the Conference of the Presidents of the legislative Assemblies of Regions and Autonomous Provinces* (Conferenza dei Presidenti delle Assemblee legislative delle Regioni e delle Province autonome). The dialogue urged a greater harmonisation of the system aimed at aligning the structural and functional aspects of regional Guarantors as well as their appointment procedures. Moreover, it was stressed the need for adequate resources in order to enable the Guarantors to fully carry out their mandate, in accordance with the OPCAT standards[395].

[390]Interview with Alessandro Albano.
[391]National Guarantor, Report to Parliament – 2018, p. 270.
[392]Official Correspondence from the Permanent Mission of Italy to the International Organisations in Geneva, *Note Verbale*, 25 April 2014.
[393]National Guarantor, Report to Parliament – 2018, p. 136.
[394] Ivi, p. 270.
[395] Interview with Alessandro Albano.

3.2 The judicial system's call for a state law

The necessity of a clear state regulation has been stressed also by part of the Italian jurisprudence. In the last few years, a great debate about the competences of territorial Guarantors and their differences compered to those of the national Guarantor arose in the courtroom[396].

In particular, the dispute emerged from whether interviews between territorial Guarantors and detainees under the special prison regime provided by Article 41-bis of the Prison Act should be assimilated to the ones with family members or not, like the private interviews carried out by the national Guarantor.

Specifically, article 41-bis states that people detained under the special prison regime are entitled to one interview per month with family members and, exceptionally, with third persons, in this case following the prison Director's authorisation. Such interviews are carried out in specific premises, in order to avoid the exchange of objects and are subject, upon authorisation of the judicial authorities, to auditory control and recording[397].

However, by virtue of its role of NPM, interviews with the national Guarantor may be carried out privately, without witnesses and without any type of recording. This power is clearly enshrined in Article 20 of the OPCAT[398] and has been subsequently confirmed by the Prison Administration Department. Specifically, the DAP circular No. 3676/6126, given the NPM role of the national Guarantor, makes a clear distinction among its competences and those provided for territorial Guarantors in relation to interviews with detainees under the 41-bis special regime. The circular states that the national Guarantor, as "independent monitoring organism", has access without any limitations within 41-bis sections and is entitled to carry out private and without time limits interviews with detainees. As regards territorial Guarantors, the circular provides them with the access to any facilities and the opportunity to meet detainees under 41-bis regime, but only in function of the visit conducted and not as specific interviews[399].

[396] A. Albano, *The Italian NPM System*, p. 10.
[397] Prison Act, Article 41-bis, paragraph 2-quater b).
[398] OPCAT, Article 20 d): NPMs have "the opportunity to have private interviews with the persons deprived of their liberty without witnesses".
[399] Prison Administration Department (DAP), Circular No.3676/6126, "Organizzazione del circuito detentivo speciale previsto dall'art. 41-bis O.P.", Article 16.6, p. 26.

Moreover, even before the establishment of the national Guarantor, the DAP sustained that territorial Guarantors' interviews do not affect the regular standards related to the duration and the maximum number of interviews. Therefore, as it regards persons detained under the 41-bis regime, the one interview for month limit remained unchanged, forcing them to decide whether have an interview with their families or with territorial Guarantors[400].

Since regional and local Guarantors can receive complaints according to Article 35 of the Prison Act, such forced decision could inevitably result in a violation of the detainees' right to communicate with family or, in alternative, of their right to complaint[401].

In the recent years, such controversial situation has been interpreted in different ways by the Surveillance Magistracy. In particular, some Courts ruled in favour while others against the distinction among interviews carried out by the national Guarantor and those by territorial Guarantors, both regarding their procedures and their impact on the total interviews' number.

Against such distinction, in June 2017, the surveillance judge of Viterbo rejected a complaint lodged by a detainee under 41-bis regime who questioned the prison Administration's decision to consider his interview with the territorial Guarantor as alternative to the one with his family members[402]. According to the applicant, the two types on interview could not be treated as equivalent, since their completely different purposes. He therefore appealed to the Surveillance Court of Rome which, on 20 April 2018, confirmed the surveillance judge's decision, thereby rejecting the complaint. Whilst recognising the distinct nature of the two types of interviews, the Court agreed with the judge's opinion based on the difference between territorial Guarantors and the national Guarantor, stressing the state origin of the latter and the absence of any linear regulation of the formers[403].

[400] Ministry of Justice, Prison Administration Department (DAP), Circular No. 3618/6068 of 2 April 2009, Object: "Law No. 14 of 27 February 2009", letter B), p. 3.
[401]National Guarantor, Report to Parliament – 2018, p. 189.
[402]Surveillance magistrate of Viterbo. Available at: https://www.penalecontemporaneo.it/upload/6615-ordinanzasorveglianzacolloquigaranteviterbo.pdf.
[403]Surveillance Court of Rome. Available at: http://www.giurisprudenzapenale.com/wp-content/uploads/2018/05/41bis.Reclamo.35bis.MADONIA.rig_.20.4.18-1.pdf.

Specifically, the Court claimed that, according to Article 117[404] of the Italian Constitution, State has an exclusive legislative power in the field of detention. The establishment of guarantee Authorities for the rights of detained persons, however, took place first in territorial realities, in force of non-state legislation. Such circumstance has resulted inevitably in a non-linear regulation of all these different Institutions.

In general, the Court stressed the lack of a clear regulation of territorial Guarantors, claiming that the legislator did not make informed decisions and did not have an overall view of the issues. Contrary to the national Guarantor, there is not a specific state law providing for the minimum requirements, guarantees and fundamental principles regarding territorial Guarantors' appointment. Accordingly, the Court stated that, in this circumstances, any local Authority may nominate a Guarantor for detainees at its discretion, providing him/her with the powers related to the Guarantor role, but without necessarily assessing their expertise, independence and reliability. Bearing in mind the special nature of the 41-bis prison regime, the Surveillance Court of Rome rejected the applicant's complaint, distinguishing among the interviews of territorial Guarantors and those of the national Guarantor, due to the intrinsic differences of the guarantee Institutions.

In the same period, another similar case has been brought before the Surveillance Court of Perugia[405]. This time, however, the Court reached a completely different decision compared to the one of the Court of Rome. Specifically, the case concerned a detainee under the 41-bis regime questioning the restrictions imposed by the prison's Administration to his interview with the regional Guarantor. The applicant complained about the impossibility of carrying out private interviews with the Guarantor, since the prison officers' visual and auditory supervision. In addition, he claimed that the only alternative proposed by the Administration was an individual interview with the Guarantor, given the exceptional possibility to carry out interviews with third persons. In such case, however, the interview with the Guarantor would have replaced the one with his family members and, even so, it would not have been completely private.

Unlike the case of Viterbo, this time the surveillance judge accepted the complaint. His decision was based on the idea that equating detainees' interviews with the Guarantors

[404]Italian Constitution, Article 117, paragraph 2, letter l).

[405]Surveillance judge of Spoleto, available at: https://www.penalecontemporaneo.it/upload/9548-msspoletoreclamocolloquio41bisgaranteregionale.pdf.

with interviews whit third persons, which can be exceptionally granted and only by prisons' Directors, was an unreasonable, if not completely paradoxical, behaviour. Moreover, the judge claimed that the alternative among interviews with family members or with the Guarantor was a complete contradiction. As a matter of fact, the right to family relations can not be limited by the introduction of a guarantee institution aimed at protecting detainees' rights. Moreover, according to the surveillance judge, by affecting the humanity of the treatment inflicted on detainees, the alternative among the different types of interviews would be in conflict with Article 27 of the Italian Constitution. For these reasons, he accepted the complaint, recognising the right of the applicant to carry out private interviews with the regional Guarantor, without affecting the ones with his family members. Following the appeal of the Ministry of Justice, the judge's decision was confirmed by the Surveillance Court of Perugia which thus considered territorial Guarantors as the same of the national one[406].

Nevertheless, a few months later, the Court of Perugia's order has been set aside by the Court of Cassation which rejected the possibility for people detained under the 41-bis regime to carry out private interviews with territorial Guarantors[407].

The same conclusion was recently reached by the Court of Cassation in relation to another similar case[408]. When rejecting the order of the Surveillance Court of Sassari, issued in favour of private interviews with territorial Guarantors, the Court of Cassation stressed the difference among the national and the territorial guarantee Institutions for detained persons. By doing so, like the Surveillance Court of Viterbo, it emphasised the NPM role of the national Guarantor and its consequent power to conduct private interviews, in compliance with Article 20 of the OPCAT. Territorial Guarantors, as lacking this status, according to the Court of Cassation are therefore not entitled to carry out private interviews[409].

[406]Surveillance Court of Perugia. Available at: file:///Users/mkg/Downloads/Tds-Pg-su-colloqui-Garanti%20(4).pdf.

[407]On 14 July 2018, the First Criminal Chamber of the Court of Cassation, chaired by Ms. Monica Boni, annulled the ordered issued by the Surveillance Court of Perugia.

[408]Complaint accepted by the Surveillance judge of Sassari and confirmed by the Surveillance Court. Available at: https://www.penalecontemporaneo.it/upload/4711-ordinanzasassaricolloquigarante.pdf.

[409]Court of Cassation, First Criminal Chamber, Sentence No. 46169, 27 June 2018. Available at: http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20181011/snpen@s10@a2018@n46169@tS.clean.pdf.

Conclusion

More than forty years after the publication of the *"Gautier proposal",* the idea of un-announced visits as effective measures to prevent torture is nowadays a widely accepted reality. Over the years, a large number of States has opened their places of deprivation of liberty to national as well as international monitoring controls.

In the late 1980s, with the establishment of the European Committee for the Prevention of Torture, the Council of Europe paved the way for the creation of monitoring mechanisms aimed at preventing torture from happening.

A few years later, the establishment of an international preventive organism was accompanied by the introduction of similar preventive mechanisms operating at the national level. The NPMs' idea was aimed at ensuring a larger number of monitoring visits and a more consistent control than the one that Subcommittee on Prevention of Torture could have performed by itself. Of course, the more regular and frequent visits to places of liberty deprivation are, the more effective and functional the preventive system will be.

The same logic applies to the establishment of the Italian NPM Network. Given the extent of the mandate so far carried out only by the national Guarantor, the inclusion of other guarantee Institutions could strongly reinforce the effectiveness of the preventive mechanism. Considering the four areas of deprivation of liberty subject to the preventive monitoring activity, a huge number of facilities and situations spread all over Italy fall within the national Guarantors' competence.

In the field of criminal detention, there are almost two hundred prison institutions for adults, sixty-five facilities for minors and more than two thousand law enforcement's security cells. As it concerns administrative detention, there are about ten structures for irregular migrants and a high number of forced returns involving thousands of people every year. Finally, as regards factual deprivation of liberty in the healthcare sector, the number of places within the Guarantor's field of competence significantly increases, given the thousands of social care homes and of the Compulsory Health Treatments (Tso) administrated.

The extent of the national Guarantor's mandate makes the network of Guarantors essential. Due to their territorial proximity, regional and local Authorities may perform

a more continuous and accurate monitoring work. At the same time, people could more easily approach territorial Institutions which, since a jurisdiction over a limited geographical area, could more promptly address their needs and work for the protection of their rights. Moreover, the physical proximity of territorial Guarantors could ensure a higher level of information and awareness about their powers and functions. The perception of an organism carrying out frequent and regular controls over a smaller number of facilities, could have a significant impact on the reduction of the risk of ill-treatments. A stronger presence on the territory may thereby generate a deterrent effect by itself.

Despite the large contribution that territorial Guarantors could bring in order to increase the effectiveness of the preventive mechanism, there are several obstacles to their inclusion within the NPM system. First of all, the establishment of a network of Guarantors is hindered by the deep dissimilarities among their founding laws, each establishing institutions with different characteristics and powers, whose independence is not always ensured. The majority of them fails to comply with the requirements laid down by the Optional Protocol to the Convention against Torture as it concerns NPMs.

Article 18 of the OPCAT clearly stresses that NPMs should be characterised by a functional, a personnel and a financial independence. While the national Guarantor has proved to meet these three requirements, the same cannot be said of the majority of territorial Guarantors. As regards functional independence, the national Guarantor is provided with a broad independence and freedom of action, while a large part of territorial Guarantors is heavily dependent on their relevant Administrations, being appointed, in some cases, directly by mayors. Moreover, as concerns the personnel, the national Guarantor staff is recruited through an independent selection made by the Board from the permanent staff of Justice and Interior Ministries (about 80.000 people). At the territorial level, Guarantors often do not have enough staff. In addition, the personnel is not always directly selected by the Guarantor but, rather, put at its disposal by the relevant Administration. Such procedures do not ensure a sufficient level of independence nor the expertise required by the OPCAT. Finally, while the national Guarantor is provided with a specific budget exclusively dedicated to the performance of its functions, many territorial Guarantors lack adequate financial resources as well as logistic ones.

Furthermore, according to Article 20 e), NPMs should be ensured with "the liberty to choose the places they want to visit". Such formulation implies that their mandate cannot include only prison institutions, but also any other places of liberty deprivation.

Compared to local Guarantors, the regional ones are characterised by a greater "normative conformity" to the OPCAT, being more independent and having broader mandates. For this reason, the national Guarantor decided to promote first their accreditation within the NPM system, postponing the inclusion of the local ones.

Such decision was not aimed at marginalising local Guarantors but, rather, at protecting the functioning and the reputation of the whole system of prevention. By entrusting the NPM role to a heterogeneous group of institutions, the national mechanism could be seriously jeopardised. Rather than strengthening its effectiveness, the premature inclusion of different, and not fully independent, Guarantors could undermine the activity of the NPM.

Therefore, at the present moment, the national Guarantor should continue to work for the inclusion of regional Guarantors only, supporting their progresses in achieving an actual "operational conformity" in accordance with the OPCAT. At the same time, increased efforts to the adoption of a clear state law are required to systematise the fragmented framework of territorial Institutions. Only through a linear and consistent regulation, the Network of Guarantors could be established, thereby achieving the original NPM designed by Italy.

In conclusion, the involvement of territorial Guarantors would constitute a further enhancement of an already well-functioning system that, through their support, could function even better. However, this project may work only as long as they comply with some conditions. The current status of the majority of local Guarantors does not suggest their rapid inclusion within the system, while the inclusion of regional Guarantors, or at least of some of them, could be achieved in short time.

The very recent launch of the NPM Network project, and the large number of actors involved in it, makes any forecast about the future of the Italian NPM extremely difficult. Clearer conclusions will be probably drawn at the end of the first national Guarantor's mandate, thereby providing a better picture of the overall progress achieved towards the establishment of the Network.

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