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Localising global norms: An examination of Nigeria's implementation of Part IV of the Optional Protocol to the Convention against Torture

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Summary: *Nigeria ratified the Optional Protocol to the Convention against Torture (OPCAT) on 27 July 2009, signalling its intention to establish and operate a national preventive mechanism that aligns with OPCAT. In its 2021 Concluding Observations, the CAT Committee determined that Nigeria's NPM – National Committee Against Torture (NCAT) – had not met this requirement. This article examines Nigeria's compliance in light of four requirements of NPMs drawn from a review of OPCAT and the literature on NPMs, namely, transparency and inclusivity; independence of the institution and its personnel; the right to visit places of deprivation of liberty; and collaboration with the United Nations Sub-Committee on the Prevention of Torture (UN SPT). The article argues that Nigeria has taken some positive steps to redress gaps the CAT Committee identified. Although the most recent incarnation premises the NPM on a presidential order which references a legislative text, namely, the National Human Rights Commission (Establishment) Act, 2010, it does not fully address the concerns about anchoring the NPM on a constitutional or*

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legislative text, nor does it guarantee the independence of the institution and its personnel. To become more compliant, this article recommends the amendment of the NHRC Act to embed the NPM, insulating the staff and operations of the NPM from government interference, making the NPM's funds a direct line charge on the consolidated revenue fund, and strengthening its capacity to periodically visit detention centres and make appropriate recommendations.

Key words: *compliance; detention; preventive; torture*

1 Introduction

Nigeria witnessed spontaneous protests decrying police abuse under the rubric of #EndSARS in October 2020.¹ The protests turned global attention to police use of torture, extrajudicial killings and enforced disappearance as tools for solving crimes. Nigeria had ratified the Optional Protocol to the Convention against Torture (OPCAT) and designated a national preventive mechanism (NPM) – the National Committee Against Torture (NCAT) – more than ten years before the protests. Yet, the NPM played a limited role in preventing the torture crises that led to these protests. It has done little since then.

Since its inception in September 2009, NCAT has struggled with functional and operational independence. Its members are not independent of the appointing authority, and the institution lacks guaranteed funding. Although Nigeria launched a new NCAT in 2022 and designated the National Human Rights Commission (NHRC) as the NPM in 2024² to address these concerns, the NPM is only marginally better – with more civil society representatives, a slightly stronger legal basis and greater access to places of detention. However, it is led by the executive secretary of NHRC, who is a supervisee of the Attorney-General. It remains unclear what measures the NHRC has taken to ensure the operational independence of the NPM. This situation violates Nigeria's obligations under part IV

1 SARS was the Special Anti-Robbery Squad of the Nigerian police force. Established in the 1990s, SARS became notorious for torturing, maiming and killing crime suspects. For a brief review of one case arising from the #EndSARS protests, see S Ibe 'ECOWAS Court overlooked Nigeria's due diligence obligations in the #EndSARS decision' Oxford Human Rights Hub 9 September 2024, <https://ohrh.law.ox.ac.uk/ecowas-court-overlooked-nigerias-due-diligence-obligations-in-endsars-decision/> (accessed 17 March 2025).

2 See Designation of the National Human Rights Commission as Nigeria's National Preventive Mechanism Order 2024, Government Notice 22 21 May 2024, <https://www.apt.ch/sites/default/files/2024-09/NHRC%20NPM%20GAZETTE.pdf> (accessed 29 November 2024).

of OPCAT³ and compromises the rights of arrested and detained persons, particularly the right not to be subjected to torture.

This article examines the referenced obligations and the role of the NPM in bringing these obligations to fruition. It proceeds on the assumption that an NPM that is neither independent nor accountable is unlikely to contribute to the elimination of torture because it would struggle to perform its duties with the credibility and objectivity required.

The article responds to two research questions: (i) In what way(s) has Nigeria failed to fulfil its obligations under Part IV of OPCAT? and (ii) What can the state do to improve its current standing?

2 International standards on torture

This part highlights some international torture-prohibiting standards Nigeria has ratified and the obligations arising therefrom. It also reflects on relevant torture-prohibiting mechanisms and attempts to combat torture.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) creates three main obligations for ratifying states. First, states must establish and exercise jurisdiction over three connected offences – torture, attempt to commit torture and complicity in torture.⁴ Second, states must have laws that punish torture (and related offences) in their territories. The laws must also extend to their nationals – as victims or perpetrators – even when the offence is committed outside their territories. This obligation also includes detaining perpetrators of the crime of torture elsewhere who come within the territory of a ratifying state.⁵ For this category of individuals, ratifying states must either submit them to prosecuting authorities or extradite them to states that can prosecute them.⁶ The obligation to extradite incorporates a supplementary obligation to refrain from transferring persons to places where they could be at risk of torture.⁷ Finally, CAT creates an obligation on states to prevent torture through different

3 Two of the more fundamental of these obligations are the obligation to establish an independent NPM that visits detention centres and cooperates with the UN SPT and the obligation to allow independent experts of the UN SPT access to detention centres. See part 2.1.2 below.

4 Art 4 CAT.

5 Art 5(1) CAT.

6 Arts 6 & 7 CAT.

7 Art 3 CAT.

mechanisms⁸ and to enable victims of torture to submit complaints and access appropriate remedies.⁹

OPCAT establishes a system of 'regular visits' to places of detention to prevent torture and other cruel, inhuman and degrading treatment or punishment.¹⁰ OPCAT also establishes two mechanisms to undertake these visits – the United Nations (UN) Sub-Committee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SPT) and the NPM. OPCAT creates two key obligations for ratifying states:¹¹ an obligation to establish an NPM to visit detention centres and cooperate with the SPT;¹² and another obligation to allow independent experts at the SPT access to detention centres to protect detainees from torture and other cruel, inhuman and degrading treatment or punishment.¹³

The International Covenant on Civil and Political Rights (ICCPR) expressly prohibits torture. Indeed, article 7 of ICCPR provides that 'no one shall be subjected to torture or cruel, inhuman and degrading treatment or punishment'. Complementing article 7, article 10(1) requires state parties to treat all persons deprived of liberty with 'humanity and respect for the inherent dignity of the human person'. Article 4(2) does not permit any derogation for the crime of torture.¹⁴ In summary, ICCPR creates obligations on ratifying states¹⁵ to prohibit torture, to treat all persons deprived of their liberty with humanity and respect, and to ensure no derogation for the offence of torture.

Article 5 of the African Charter on Human and Peoples' Rights (African Charter) promotes respect for the dignity of the human person and encourages ratifying states¹⁶ to prohibit all forms of exploitation and degradation, particularly torture, inhuman or degrading treatment or punishment. To elaborate on the extent of state obligations under article 5, the African Commission on Human and Peoples' Rights (African Commission)¹⁷ adopted the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa (Robben Island Guidelines) in 2002 with three key obligations

8 Art s 2, 11 & 16 CAT.

9 Arts 13 & 14 CAT.

10 Art 1 OPCAT.

11 Nigeria ratified OPCAT on 27 July 2009.

12 Art 11(b) OPCAT.

13 Art 11(a) OPCAT.

14 HRC General Comment 20 on art 7 para.3.

15 Nigeria ratified ICCPR on 29 July 1993.

16 Nigeria ratified the African Charter on Human and Peoples' Rights on 22 July 1983.

17 Under art 45(1) the Commission can formulate principles and rules to address problems associated with human and peoples' rights and fundamental freedoms.

for state parties – prohibit torture, prevent torture and respond to the needs of torture victims.

2.1 Mechanisms for upholding the prohibition on torture

By its ratification of the standards highlighted in part 2, Nigeria is subject to supervisory mechanisms such as the UN Committee against Torture (CAT Committee), the UN Human Rights Committee, the UN SPT, the African Commission on Human and Peoples' Rights and its Committee for the Prevention of Torture in Africa (CPTA). In this part I highlight the most recent engagements of these mechanisms with Nigeria.

2.1.1 *United Nations Committee against Torture*

Article 19(1) of CAT requires states to submit their initial report within one year of the Convention's entry into force in their states. By this provision, Nigeria's initial report was due on 28 June 2002. Regrettably, it failed to submit the initial report and subsequent reports that should follow every four years.

In its Concluding Observations in the absence of the initial report, the CAT Committee¹⁸ regretted Nigeria's failure to meet its obligations despite its inclusion on the list of states with overdue reports for 19 years. The Committee also acknowledged the combined effect of the provisions of the Evidence Act of 2011, the Administration of Criminal Justice Act of 2015 and the Anti-Torture Act of 2017 which renders confessions obtained by torture inadmissible. However, it expressed concern that Nigeria's security services continued to use torture.¹⁹

2.1.2 *United Nations Human Rights Committee*

The UN Human Rights Committee (HRC) has the mandate of monitoring the implementation of ICCPR. Its General Comment 20 elaborates the obligations set in article 7 of ICCPR relating to the prevention of and prohibition on torture. Those obligations extend to informing the HRC of legislative, administrative, judicial and other

¹⁸ CAT/C/NGA/COAR/1 of 21 December 2021, <https://www.ohchr.org/en/documents/concluding-observations/catcngacoar1-concluding-observations-absence-initial-report> (accessed 16 August 2024).

¹⁹ CAT Committee (n 18) 5 para 15.

measures taken to prevent and punish acts of torture and cruel, inhuman and degrading treatment or punishment.²⁰

The HRC adopted its most recent Concluding Observation on Nigeria on 29 August 2019. The document lamented Nigeria's failure to submit its second periodic report due almost two decades earlier – on 28 October 1999.²¹ It acknowledged Nigeria's adoption of the Anti-Torture Act and the ratification of CAT and OPCAT, but regretted that these frameworks existed contemporaneously with allegations of frequent use of torture by law enforcement agents, including for the purpose of the extraction of confessions. The document also deprecated the lack of rehabilitation for victims.²²

The Concluding Observations recommended the prompt, thorough and effective investigation of allegations of torture as well as the prosecution and punishment of perpetrators. It also recommended that confessions obtained by coercion should not be admissible in court, and that, for the purpose and the broader goal of preventing torture, the state should take steps to strengthen the education of judges, prosecutors, police, military and security forces.²³

2.1.3 United Nations Sub-Committee on the Prevention of Torture

The UN SPT performs two main functions, namely, to visit places of detention and to advise states on the establishment of national preventive mechanisms.²⁴ The SPT has undertaken a special 'optional protocol advisory visit' to Nigeria. One objective of the visit was to facilitate the full implementation of OPCAT. Although about a decade old,²⁵ the visit has not yielded the desired result.²⁶

2.1.4 African Commission on Human and Peoples' Rights

State parties to the African Charter owe the obligation to submit periodic reports to the African Commission on measures taken to give

²⁰ UN HRC General Comment 20 para. 8.

²¹ Human Rights Committee 'Concluding Observations on Nigeria in the absence of its second periodic report' CCPR/C/NGA/CO/02 1 para 3, <https://www.ohchr.org/en/documents/concluding-observations/ccprcngaco2-human-rights-committee-concluding-observations> (accessed 16 August 2024).

²² Human Rights Committee (n 21) 7 para 32.

²³ Human Rights Committee (n 21) 7 para 33.

²⁴ Art 11 of OPCAT lists three functions. The third is cooperation with the UN, international, regional and national bodies for the prevention of ill-treatment.

²⁵ 1-3 April 2014.

²⁶ Nigeria has appeared on the list of states with substantial non-compliance with art 17 since 2015.

effect to the rights and freedoms recognised and guaranteed under the African Charter.²⁷ Nigeria submitted its sixth periodic report to the Commission covering the period 2015 to 2016 in 2017.

In its Concluding Observations on this report,²⁸ the African Commission acknowledged the enactment of the Anti-Torture Act of 2017 and raised several concerns, including the absence of information on the remedies available to individuals convicted based on confessions allegedly obtained through torture;²⁹ the absence of information about the prevalence of torture allegations against personnel of the Special Anti-Robbery Squad (SARS);³⁰ the absence of information about allegations of torture against the military in the framework of the counter-insurgency operations;³¹ and the absence of a detailed report on the work of NCAT since its establishment in 2009.³² Nigeria has not submitted another report, with the result that these concerns remain unaddressed.

2.1.5 Committee for the Prevention of Torture in Africa

The African Commission established the Committee for the Prevention of Torture in Africa (CPTA) in 2004 to foster the implementation of the Robben Island Guidelines. The African Commission adopted these Guidelines in 2002 by a resolution.³³

The Guidelines have three parts. The first urges states to ratify and domesticate existing instruments. The second part highlights preventive measures, including safeguards, mechanisms of oversight, awareness raising and human rights training. The final part seeks to respond to the needs of victims – treatment, support and reparations. Unlike the SPT, the CPTA does not have the mandate to regularly visit places of detention, partly because the African Commission has another mechanism focused specifically on that.³⁴ Given this

²⁷ Art 62.

²⁸ 'Concluding Observations and recommendations: Nigeria 6th periodic report, 2015-2019' 10 November 2019, <https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-nigeria-6th-periodic-report-2015> (accessed 17 August 2024).

²⁹ Para 40(i).

³⁰ Para 40(viii).

³¹ Para 40(v).

³² Para 40(vii).

³³ The Guidelines give effect to art 5 of the African Charter, which prohibits all forms of degradation of man, including torture, cruel, inhuman and degrading punishment.

³⁴ The Special Rapporteur on Prisons and Conditions of Detention in Africa.

background, the CPTA has not conducted any visit, but it reports to the African Commission.³⁵

The Committee's most recent report³⁶ references Nigeria only concerning its inclusion on the SPT list of nine African states that have not complied with the provisions of article 17 of OPCAT.³⁷

2.2 Reflections on Nigeria's anti-torture efforts

Before December 2017, Nigeria had no legislation criminalising torture. It is worth noting, however, that section 394(1)(a) of the Criminal Law of Lagos State, 2011 provides that '[a]ny person who cruelly beats, kicks, ill-treats, over-rides, over-drives, over-loads, tortures, infuriates or terrifies any animal, or causes or procures, or, being the owner, permits any animal to be so used ... is guilty of an offence'. Under this law, it is a crime to torture animals, but not human beings.

However, there were legislations protecting the right to be free from torture without necessarily criminalising it. The principal federal laws are the 1999 Constitution of Nigeria,³⁸ the Evidence Act of 2011³⁹ and the Administration of Criminal Justice Act of 2015.⁴⁰ This part reviews these legislations and the Anti-Torture Act of 2017 to ascertain the extent to which they go to dissuade law enforcement personnel from routinely using torture.

2.2.1 1999 Constitution

Section 34 of the 1999 Constitution preserves the right to dignity of all individuals and specifically proclaims that 'no one shall be subjected to torture or inhuman and degrading treatment'. However, it fails to define torture and inhuman and degrading treatment. It also neither

35 Rules 25(3) & 64 of the Commission's Rules of Procedure require special mechanisms such as CPTA to report on its activities at every ordinary session of the Commission.

36 Intersession Activity Report to the 77th ordinary session, 20 October-9 November 2023, <https://achpr.au.int/ar/node/3868> (accessed 18 August 2024).

37 Intersession Activity Report (n 36) para 41.

38 See the Constitution of the Federal Republic of Nigeria, 1999 (updated with 1st-5th alteration, 2023), <https://placng.org/i/wp-content/uploads/2023/05/Constitution-of-the-Federal-Republic-of-Nigeria-2023.pdf> (accessed 18 August 2024).

39 See Evidence Act, 2011, <https://www.refworld.org/legal/legislation/natlegbod/2011/en/104226> (accessed 18 August 2024).

40 See Administration of Criminal Justice Act, 2015, https://www.policinglaw.info/assets/downloads/2015_Administration_of_Criminal_Justice_Act.pdf (accessed 18 August 2024).

stipulates any punishment – typical of any modern constitution – nor points to the need for separate legislation on that.

2.2.2 *Evidence Act 2011*

The Evidence Act of 2011 provides an important safeguard against confessional statements extracted in the context of law enforcement activities. Section 29(2) provides circumstances in which such statements will be inadmissible in court:⁴¹ primarily, where oppression played a role in obtaining the statement (oppression in this context includes torture, inhuman and degrading treatment);⁴² second, where a defendant makes a statement in furtherance of anything said or done which could render it unreliable.

This safeguard reflects an understanding and appreciation of the endemic use of torture in law enforcement practice and, therefore, places the burden on law enforcement personnel to demonstrate that confessional statements presented in support of any case meet minimum thresholds. In practice, where the defendant alleges that law enforcement officers extracted the statement in violation of the law, the court must conduct a trial within a trial.⁴³

A trial within a trial reverses the order of proceedings by making the prosecutor the defendant and *vice versa*. In this circumstance, the defendant is at liberty to ask questions to establish that the statement failed the due process test. If they succeed, the case collapses.⁴⁴

2.2.3 *Administration of Criminal Justice Act 2015*

The Administration of Criminal Justice Act (ACJA) is a revolutionary legislation in many ways. ACJA establishes an Administration of Criminal Justice Monitoring Committee (ACJMC)⁴⁵ to address one of the more significant challenges of criminal justice administration – the lack of coordination among institutions on account of Nigeria's faulty federal structure. The law also introduces monthly visits by

41 The general rule is that relevant evidence is admissible regardless of the mode of collection. See *Musa Abubakar v El Chuks* (2007) 18 NWLR Pt 1066, 386.

42 Sec 29(5) Evidence Act (n 39).

43 There is no legal or legislative basis for a trial within a trial. It is one of the practices Nigeria inherited by virtue of its connection with the United Kingdom, whose jury system introduced the concept.

44 In *Eke v State* (2011) 3 NWLR Part 1235 59, the Court hinted that successfully demonstrating the voluntariness of the confessional statement makes it admissible in evidence.

45 Sec 469 establishes the ACJMC and saddles it with the responsibility to 'ensure efficient and effective application of this Act by the relevant agencies'.

chief magistrates to detention facilities,⁴⁶ requires mandatory records of arrests⁴⁷ and stipulates time limits for pre-trial detention⁴⁸ as a way of reducing the incidence of prolonged pre-trial detention and consequential acts of torture, and so forth.

As laudable as these provisions are, they have not translated into tangible outcomes for ordinary citizens and users of the criminal justice system. For one, there is no concerted effort to track implementation. Second, the government has demonstrated limited political will to make implementation happen. In its most recent annual report, the ACJMC found that only 19 per cent of 43 police divisions in Nigeria's federal capital, Abuja, complied with the reporting obligations set out in ACJA;⁴⁹ 34,3 per cent failed to comply with these obligations because they did not receive the necessary instructions from their supervisors within the police institution.⁵⁰ One way in which to track the government's commitment to improving criminal justice outcomes is to institutionalise an annual review of implementation efforts involving all stakeholders. The review report would be publicly available and open to scrutiny.

2.2.4 *Anti-Torture Act 2017*

The Anti-Torture Act (ATA) took effect in December 2017. Although it attempted to mirror CAT in its definition of torture, the CAT Committee found three fundamental omissions – the non-recognition of an attempt to commit torture as an offence; the absence of provisions excluding amnesties, pardons and statutes of limitation for the offence of torture; and the exclusion of acts of torture carried out for a purpose based on discrimination alone.⁵¹ In line with CAT, the Act does not justify torture.⁵² It excludes evidence extracted using torture⁵³ and offers victims a right to complain⁵⁴ as well as remedies, including up to 25 years' imprisonment for perpetrators.⁵⁵

46 Sec 34. The visits serve three purposes – to inspect records of arrests; direct arraignment of suspects; and grant bail to deserving suspects.

47 Sec 15 mandatorily requires record keeping in respect of arrests and detention.

48 Sec 296(1)(2) mandates a maximum of 42 days divided into three 14-day detention periods. The magistrate is required to review after every 14-day cycle and release at the end of 42 days unless there is a compelling reason not to do so.

49 Sec 33 requires officers in charge of police stations to report all arrests without warrants to the nearest magistrate every month.

50 Administration of Criminal Justice Monitoring Committee Annual Report 2020 (Abuja 2021) 54, <https://acjmcng.org/2022/06/06/acjmc-annual-report-2020/> (accessed 19 August 2024).

51 CAT Committee (n 18) 3 para 9.

52 Sec 3(1) Anti-Torture Act, 2017.

53 Sec 3(2) Anti-Torture Act.

54 Sec 4(1) Anti-Torture Act.

55 Sec 8(1) Anti-Torture Act.

Regrettably, the Act also includes a possible death penalty for torture leading to the victim's death.⁵⁶

Section 9 invests in the Attorney-General the power to designate a regulatory agency to oversee the implementation of the Act.

Seven years after its enactment, the ATA has scarcely been subjected to judicial review. Indeed, this author found only one case in which an applicant challenged the violation of the Act before a domestic court in Nigeria.⁵⁷ Regrettably, the High Court of Nigeria's federal capital, Abuja, held that no claim of damage was established because the applicant's nine month-long detention and torture by police officers was 'within the ambit of law'.⁵⁸ It is unclear why the judge reached this decision. Nigeria's supreme law – the 1999 Constitution (as amended) – does not permit detention in police facilities beyond 48 hours⁵⁹ and the ATA criminalises torture. Regrettably, the case did not proceed on appeal to the next court in the judicial hierarchy – the Court of Appeal – for a review. Although it is beyond the remit of this article, further study on the reason(s) for the paucity of cases on the ATA is worth undertaking. One theory is that victims fear reprisals by law enforcement personnel.

3 Does the National Human Rights Commission as national preventive mechanism have the potential to ensure Nigeria's compliance?

This part reflects on the expectations of OPCAT and the CAT Committee concerning a NPM against the reality that is Nigeria's NCAT/NHRC. It examines NCAT's establishment and operations, highlights some challenges it confronted, and offers an opinion on whether – as presently constituted – the NPM-NHRC since May 2024 has the potential to progressively reduce the prevalence of torture in Nigeria.

⁵⁶ Sec 8(2). Where torture results in death, the law presumes that a murder has been committed. Murder attracts the death penalty.

⁵⁷ *Shedrach John v Inspector General of Police & 3 Others* Suit FCT/HC/CY/3568/2021, <https://www.fcthighcourt.gov.ng/download/main-judgment/2022-Judgments/1st-Quarter/COURT-07-HON.-JUSTICE-O.A-MUSA/SHEDRACH-JOHN-VS.-IGP-3-ORS-ENFORCEMENT-OF-FUNDAMENTAL-RIGHTS.pdf> (accessed 20 August 2024).

⁵⁸ *Shedrach John* (n 57) 18.

⁵⁹ Sec 35(4) of the 1999 Constitution prescribes that anyone arrested and detained must be brought before a court within a reasonable time. Sec 35(5) defines a reasonable time as 24 hours if there is a court within a 40km radius; otherwise, 48 hours.

3.1 Expectations on the establishment/operations of national preventive mechanisms

Article 17 of OPCAT mandates state parties to establish, designate or maintain one or more NPMs for the prevention of torture at the domestic level. This provision offers ample latitude to establish a new NPM or designate an existing institution as an NPM. It also provides the opportunity to designate one or more entities as NPMs.

Nigeria is one of a few federal states to designate a single institution as its NPM. Other federal states such as Australia, New Zealand⁶⁰ and even quasi-federal South Africa⁶¹ tend to designate multiple institutions as their NPMs. It is instructive to note that the provisions of OPCAT apply in every part of a federal state without exceptions or limitations.⁶²

A review of OPCAT and the literature on NPMs reveal specific requirements for establishing and running NPMs.⁶³ In this article I focus on four of the more essential requirements for two main reasons. These requirements apply regardless of the structure of the state looking to establish NPMs and they are foundational to maintaining the character and integrity of NPMs. The chosen requirements are transparency and inclusiveness of the consultative process leading to its identification,⁶⁴ functional independence of the institution and

60 E Steinerte 'The jewel in the crown and its three guardians: Independence of national preventive mechanisms under the Optional Protocol to the UN Torture Convention' (2014) 14 *Human Rights Law Review* 1, <https://academic.oup.com/hrlr/article/14/1/1/667044?login=true> (accessed 21 August 2024).

61 South African National Preventive Mechanism 'Submission to the United Nations Sub-Committee on Prevention of Torture on Draft General Comment on article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' 20 April 2023 2 para 6, <https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/cfis/gc1-art4/submission-spt-gc-article4-NPM-SouthAfrica.pdf> (accessed 21 August 2024).

62 Art 29.

63 Transparency, inclusion and information about the process of designation; diversity of membership; enabling legislation/constitutional provision; regular preventive visits; unfettered access to all places of detention; independence of the institution and its members; collaboration with UN SPT; and implementation of recommendations of the institution.

64 Association for the Prevention of Torture *Establishment and designation of national preventive mechanisms* (2006) 8, <https://biblioteca.corteidh.or.cr/tablas/25431.pdf> (accessed 22 August 2024); B Buckland & A Olivier-Muralt 'OPCAT in federal states: Towards a better understanding of NPM models and challenges' (2019) 25 *Australian Journal of Human Rights* 23, 30, <https://www.tandfonline.com/doi/full/10.1080/1323238X.2019.1588061> (accessed 21 August 2024).

its personnel,⁶⁵ the right to visit places of deprivation of liberty⁶⁶ and collaboration with the UN SPT.

Regarding the first requirement, the process of designating an NPM as well as identifying its members should be transparent and inclusive of key stakeholders including civil society. This is critical in building the trust and confidence every NPM requires to function optimally.

Concerning the second requirement, article 18(1) of OPCAT demands 'functional independence' of an NPM⁶⁷ and independence of its personnel⁶⁸ as a condition precedent to establishing and maintaining an NPM that meets OPCAT standards. Krisper describes functional independence with reference to autonomy from state authorities whether executive, legislative or judicial.⁶⁹ She also identifies three indicators of functional independence, namely, a clear constitutional or legislative framework for the NPM; financial independence; and the appointment of members and staff of the NPM for a secure term.⁷⁰ Regarding independence of personnel, the UN SPT recommends that both the identification of the NPM and the process of selecting its members should be done through an 'open, transparent, and inclusive process'.⁷¹

For the third requirement, article 20(c) enjoins states to grant NPMs unfettered access to all places where persons deprived of their

65 Steinerte (n 60) 1; Buckland & Olivier-Muralt (n 64) 24; J McGregor 'The challenges and limitations of OPCAT national preventive mechanisms: Lessons from New Zealand' (2017) 23 *Australian Journal of Human Rights* 351, 358, <https://www.tandfonline.com/doi/full/10.1080/1323238X.2017.1392477> (accessed 21 August 2024).

66 Art 4 OPCAT; Buckland & Olivier-Muralt (n 64); McGregor (n 65); Steinerte (n 60) 5.

67 OPCAT encourages states to refrain from supervising NPMs. See UN SPT 'Analytical assessment tool for national preventive mechanisms' UN Doc CAT/OP/1/Rev. 1 (25 January 2016) para 3, https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf (accessed 21 August 2024).

68 NPM experts are required to have the requisite capabilities and professional knowledge. The composition of NPMs should reflect gender balance and 'adequate representation of ethnic and minority groups in the country' (art 18(2) OPCAT).

69 S Krisper 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part IV National Prevention Mechanisms art 18 independence, pluralism and efficiency of national preventive mechanisms' in M Nowak, M Birk & G Monina (eds) *The United Nations Convention against Torture and its Optional Protocol: A commentary* (2019) 890.

70 As above.

71 SPT *Guidelines on National Preventive Mechanisms* CAT/OP/12/5 9 December 2010 para 16, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolNo=CAT/OP/12/5&Lang=en (accessed 21 August 2024).

liberty are detained.⁷² These places extend beyond the traditional police cells and prisons. They include military bases, immigration detention centres, closed psychiatric institutions, and so forth.⁷³ Even unofficial detention places and 'irregular detention' are within the contemplation of article 20(c).⁷⁴

The visits should be regular and preventive.⁷⁵ Regarding its preventative nature, the UN Special Rapporteur on Torture pointed to the potential of unannounced visits, access to registers, interviews with detainees and medical investigations of torture victims to deter future acts of torture as well as create the atmosphere for constructive dialogue between the visitors (SPT or NPM) and the state to resolve identified problems.⁷⁶

In addition to allowing unfettered access to places of detention, states should also accord the necessary privileges and immunities to members and staff of the NPM required to undertake their assignment without interference.⁷⁷ The power to visit these places of detention also includes the authority to investigate the treatment of detained persons.⁷⁸ To perform this function effectively, states are required to provide adequate resources to NPMs,⁷⁹ review the recommendations of the NPMs to implement them,⁸⁰ and publish/disseminate the annual reports of NPMs.⁸¹ The distribution list for annual reports must include the national parliament and the UN SPT.⁸²

Fourth, article 20(f) creates an obligation on state parties to grant NPMs the authority to stay in touch with the UN SPT.

Although every state party to OPCAT may choose the NPM model it finds most appropriate and in consonance with its peculiar circumstances – administrative, financial, and geographic – the UN

72 SPT (n 71) para 10.

73 Buckland & Olivier-Muralty (n 64) 24.

74 Report of the UN Working Group to Draft an Optional Protocol to the UN Convention against Torture UN Doc. E/CN.4/1993/28 2 December 1992 paras 38-40, <https://documents.un.org/doc/undoc/gen/g92/148/10/pdf/g9214810.pdf?token=yHpoywpt2cVRLtVP8A&fe=true> (accessed 21 August 2024).

75 Art 1 OPCAT.

76 2006 Report to the UN General Assembly, UN Doc A/61/259 14 August 2006 para 72.

77 SPT (n 71) para 26.

78 Art 19 OPCAT.

79 Art 18(3) OPCAT. In his 2010 interim report, the UN Special Rapporteur on Torture hinted that the 'most independent NPM with the strongest mandate cannot function without sufficient resources'. See UN Doc A/65/273 10 August 2010 83.

80 Art 22 OPCAT.

81 Art 23 OPCAT.

82 SPT (n 71) para 29.

SPT recommends that states should identify NPMs by an 'open, transparent and inclusive process'⁸³ involving a range of stakeholders, including civil society.

3.2 Establishment of Nigeria's NPM-NCAT (NHRC since May 2024)

In this part I review the establishment and operations of Nigeria's NPM – the NCAT (NHRC since May 2024) – against the four essential requirements highlighted in part 3.1 – transparency and inclusiveness of the process leading to NCAT's establishment; independence of the institution and its personnel; unfettered access to detention centres; and collaboration with UN SPT. Before delving into these requirements, it is necessary to introduce NCAT.

3.2.1 *Introducing the National Committee Against Torture*

Nigeria inaugurated two NCATs from the day it ratified OPCAT on 27 July 2009 to the presidential order of May 2024 designating the NHRC as the NPM. The Attorney-General of Nigeria inaugurated the first NCAT on 28 September 2009⁸⁴ and the second on 11 September 2022. It is important to note that two separate Attorneys-General conducted the inauguration ceremonies.⁸⁵ The second NCAT became necessary because the first performed below expectations. Both had terms of reference as founding documents rather than the SPT-prescribed constitutional or legislative framework.⁸⁶

The first NCAT had seven items on its terms of reference⁸⁷ while the second had eight items.⁸⁸ In terms of similarities, both terms of reference mandated NCAT to receive and consider torture-related complaints, provide information and education on torture

83 SPT (n 71) para16.

84 The Committee had Dr SS Ameh, a retired academic and senior lawyer, as Chairperson, and Mr Olawale Fapohunda, a lawyer and civil society activist, as Co-Chairperson.

85 Michael Aoadookaa conducted the 2009 inauguration while Abubakar Malami conducted the 2022 inauguration.

86 The UN SPT has identified having a legal basis for an NPM as a 'prerequisite for its institutional stability and functional independence'. SPT 'Report on the visit to Honduras' UN Doc CAT/OP/HND/1 10 February 2010 para 262, <https://digitallibrary.un.org/record/678917?v=pdf> (accessed 22 August 2024).

87 Federal Ministry of Justice 'Mandate of the National Torture Committee', <https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf> (accessed 22 August 2024).

88 A Oluwafemi 'FG sets up committee to monitor compliance with laws against torture' *The Cable* (Nigeria) 11 September 2022, <https://www.thecable.ng/fg-sets-up-committee-to-monitor-compliance-with-laws-against-torture> (accessed 22 August 2024).

prohibition, report quarterly to the Attorney-General, and propose enactment or review of anti-torture law as well as the development of anti-torture policy.

Concerning differences, the 2009 terms of reference required NCAT to visit places of detention, while the 2022 terms of reference did not expressly mention that. Also missing from the 2022 terms of reference is the requirement to review interrogation rules, methods, practices and arrangements.

For its part, the 2022 terms of reference invites the NCAT to engage with the CAT Committee and regional human rights mechanisms on reporting dialogue, and facilitation of country visits, facilitate the preparation of country reports, including the consultation and data collection required as well as consultations and follow-up necessary before and after the submission of reports. The 2022 terms of reference appears to lean heavily on meeting Nigeria's obligations to the UN CAT ostensibly because Attorney-General, Abubakar Malami, submitted in his inauguration speech that the 2009 NCAT was 'unable to establish proper official communication or engagement' with the CAT Committee. This was a misstatement of facts as that committee did submit at least one report to the UN SPT.⁸⁹ However, it is fair to say that the 2009 NCAT struggled to perform its functions. Indeed, 56 months after its establishment in May 2014, Amnesty International reported that NCAT had not 'received its funding or been able to carry out its work'.⁹⁰ The most recent NPM is the NHRC.

3.2.2 *Transparency and inclusiveness of process leading to the establishment of NCAT/NHRC*

The process leading to the establishment of NCAT was neither transparent nor inclusive. Neither the process of determining the type of NPM nor the composition of the NPM was open to public consultation. The Attorney-General designated the NPM and appointed the 2009 and 2022 committees without broad stakeholders' consultations involving civil society. This is consistent with the government's style of appointing committees. However, in the framework of developing Nigeria's official UN Universal Periodic Review (UPR) report, the government tends to consult civil society

89 DD Ameh '4th quarterly report of the National Committee against Torture for the period ending 31 December 2014 to the UN Sub-Committee on Torture', <https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf> (accessed 22 August 2024).

90 Amnesty International 'Stop torture: Nigeria' (2014) AFR 44/005/2014 3, <https://www.amnesty.org/en/wp-content/uploads/2021/07/afr440052014en.pdf> (accessed 22 August 2023).

and other stakeholders as mandated by the UPR process.⁹¹ This demonstrates that it is possible to be more consultative and inclusive. The process of designating the NHRC as the new NPM similarly was non-transparent and non-inclusive.

Regarding civil society participation in NCAT, the state ought to make its decision about the choice of representatives in consultation with civil society or allow civil society to make the choice. Unfortunately, this was not the case with the first and second NCATs. The Attorney-General's office simply identified some non-governmental organisations (NGOs) and appointed these to the committee. Although some of these NGOs have torture prevention projects, they did not emerge from a consultative process. Concerning the NHRC, the establishment Act reserves five slots of a 16-member governing council for civil society – three representatives of human rights organisations and two representatives of the Nigerian Bar Association. Apart from the Bar Association, which has the prerogative to choose its representatives, civil society was not consulted about the choice of its representatives.

3.2.3 *Independence of NCAT/NHRC and its personnel*

The 2022 NCAT is similar to the previous one. It runs on a set of terms of reference rather than a legislative or constitutional framework. This is contrary to SPT's recommendation that requires the mandate of NPMs to be set out in a 'constitutional or legislative text'.⁹²

Recognising this shortcoming in its December 2022 response to the CAT Committee's Concluding Observations⁹³ of November 2021, Nigeria claimed that the establishment of NCAT based on terms of reference is backed by the Anti-Torture Act of 2017 – specifically sections 10 and 12, which give the Attorney-General powers to make regulations for the implementation of the Act.⁹⁴ However, that

91 Nigeria's National Report submitted pursuant to United Nations Human Rights Council Resolutions 5/1 and 16/21, A/HRC/WG.6/45/NGA/1 15 December 2023 2, part II, <https://www.ohchr.org/en/hr-bodies/upr/ng-index> (accessed 23 August 2024).

92 United Nations High Commissioner for Human Rights *Preventing torture: The role of national preventive mechanisms* (2018), https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf (accessed 23 August 2024).

93 See CAT Committee 'Information received from Nigeria on follow-up to the Concluding Observations in the absence of its initial report' CAT/C/NGA/FCOAR/1 4 January 2023, <https://digitallibrary.un.org/record/4003818> (accessed 23 August 2024).

94 CAT Committee (n 93) para 35.

explanation does not change the fact that the mandate and powers of NCAT are not set out in a constitutional or legislative text.

The terms of reference are neither a constitutional nor a legislative text. Therefore, there is no formal legal basis for NCAT. Furthermore, the NCAT terms of reference do not set out the powers, appointment criteria and membership processes,⁹⁵ terms of office and grounds for dismissal,⁹⁶ funding sources and lines of accountability, as one might expect a legislative text to do. Although NHRC is founded on a legislative text, its designation as an NPM is founded on a presidential order, which did not go through a formal legislative process.

For its composition, Nigeria submitted that the 2022 NCAT is more diverse in its membership and more inclusive of civil society.⁹⁷ Compared to the previous committee, this is true. The prior committee had two civil society organisations – the Human Rights Agenda Network⁹⁸ and the Nigeria Bar Association. The 2022 NCAT has four more – Access to Justice; *Avocats Sans Frontières* (ASF France); International Federation of Women Lawyers (FIDA); and Prisoners Rehabilitation and Welfare Action (PRAWA) joining the initial two. However, all 21 committee members are appointees of the Attorney-General and they report to him. Indeed, the committee Chairperson and alternate Chairperson⁹⁹ report directly to the Attorney-General. Six other members represent institutions that report to the Attorney-General.¹⁰⁰ The final seven members represent six law enforcement institutions often accused of committing acts of torture,¹⁰¹ and one independent expert.¹⁰² Regrettably, the mode of appointment of these individuals – particularly civil society representatives – was not

95 SPT 'Report on the visit by SPT for providing advisory assistance to the NPM of Malta: Report to state party' UN Doc CAT/OP/MLT/1 1 February 2016 para 26, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FMLT%2F1&Lang=en (accessed 23 August 2024).

96 Guidelines on NPMs (n 71) para. 9.

97 Guidelines on NPMs (n 71) para 34.

98 HRAN is a coalition of civil society organisations committed to promoting human rights in Nigeria.

99 The co-Chairpersons are Beatrice Jedy Agba (Solicitor-General of the Federation) who is next in line to the Attorney-General, and Tony Ojukwu (Executive Secretary, National Human Rights Commission) whose institution reports directly to the Attorney-General.

100 These are two senior staff members of the Ministry of Justice, namely, the Director of Citizens Rights Department and Director of Public Prosecutions; representatives of four direct reports of the Attorney-General, namely, Directors General, Legal Aid Council, and Nigerian Institute of Advanced Legal Studies, Director Academics, Nigerian Law School and Director, Monitoring NHRC.

101 Nigerian Police Force, Nigeria Correctional Service, National Security and Civil Defence Corps, Department of State Services, Nigerian Army, and Economic and Financial Crimes Commission. It is unclear why the Attorney-General excluded the Nigerian navy, air force and National Drug Law Enforcement Agency which also arrests and detains suspects, and has been accused of torturing suspects.

102 Ambassador Christy Ezim.

open, inclusive and transparent. For its part, the NHRC Governing Council has five of 16 members representing civil society. This is a fair representation. However, apart from the bar representatives, the other civil society representatives do not necessarily report back to their constituencies

Regarding funding, Nigeria pledged to have 'separate appropriation in the budget of FMOJ and NHRC from 2023 financial year'.¹⁰³ This intervention was supposed to address the concerns about the financial independence of NCAT. However, separate appropriation in the budget of the justice ministry or that of the NHRC does not guarantee financial independence because NCAT will have to rely on either or both institutions to receive its funding. Interestingly, the committee is led by heads of both institutions who report to the Attorney-General. In summary, there was neither operational nor financial independence with the two NCATs. Although the NHRC has its funding as a direct charge to the consolidated revenue fund, it is unclear whether acting as an NPM, it will ringfence funds for the operation of the NPM in view of other pressing priorities.

It is worth noting that designating the NHRC as NPM means that it stands a better chance of accessing places of detention than the two previous NCATs because the Commission has legally guaranteed right of access to detention facilities. Nonetheless, there is a question about the extent to which the NHRC utilises this mandate in practice.

3.2.4 *Unfettered access to detention centres*

As suggested in part 3.2.3, the 2009 Committee struggled with accessing detention centres partly because it did not have the full support of the government to do so, but also because the committee was comatose for most of its 13-year history.¹⁰⁴

There is no record of the Committee producing any annual report. Apart from its report to the UN SPT in December 2014,¹⁰⁵ there is no record of any other submission to the UN SPT. In the 2014 report, NCAT Chairperson, DD Ameh, alleged that the Committee was

¹⁰³ CAT Committee (n 93) para 34.

¹⁰⁴ Committee Chairperson, DD Ameh, publicly hinted that his committee could not 'meet, investigate properly, and even send periodic reports to the United Nations because of lack of funding'. S Ogunlowo 'We are suffering from lack of funding – FG's Anti-Torture Committee' *Premium Times* (Nigeria) 21 June 2022, <https://www.premiumtimesng.com/news/more-news/538425-we-are-suffering-from-lack-of-funding-fgs-anti-torture-committee.html?tztc=1> (accessed 23 August 2024).

¹⁰⁵ Ameh (n 89).

short of funds and operating 'out of the personal intervention of the chairman'.¹⁰⁶ Although the report suggested that more than one member of the Committed conducted the visit to one prison and 'a number of police stations',¹⁰⁷ the pictures demonstrate that Mr Ameh was the only member of the Committee on that trip. Furthermore, Mr Ameh signed off on the report with his private office address, telephone, email and website.¹⁰⁸

Given this background, it is fair to ask why the government of Nigeria set up this Committee. Was it to tick the box on compliance with article 17, which requires the establishment of an NPM? In its latest annual report, the UN SPT unsurprisingly lists Nigeria as one of 14 states that have made little or no progress towards fulfilling their obligations regarding the establishment of NPMs under OPCAT.¹⁰⁹ The designation of NHRC as NPM unlocks access to detention centres for reasons highlighted in part 3.2.3, but some of the initial challenges remain.

3.2.5 *Collaboration with UN SPT*

The UN SPT paid an 'optional protocol advisory visit'¹¹⁰ to Nigeria for the first time in April 2014. One objective of this visit was to 'hold discussions on the role, achievements and challenges' of NCAT.¹¹¹ Another objective was to help the UN SPT understand the situation in the country.¹¹²

Following this visit, the SPT issued a confidential report to Nigeria on 9 July 2014.¹¹³ Regrettably, that visit did not appear to change NCAT's collaboration with the SPT because there is no record of subsequent dealings by the first NCAT with the SPT. In its 2021

¹⁰⁶ Ameh (n 89) 16.

¹⁰⁷ Ameh (n 89) 15.

¹⁰⁸ Ameh (n 89) 19.

¹⁰⁹ SPT '16th annual report of the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' CAT/C/76 adopted at 76th session, 17 April-12 May 2023 para 33, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F76%2F2&Lang=en (accessed 23 August 2024).

¹¹⁰ SPT '8th annual report of the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' CAT/C/54/2 adopted at 54th session, 20 April-15 May 2015 para 15, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F54%2F2&Lang=en (accessed 23 August 2024).

¹¹¹ SPT 'Nigeria: UN torture prevention body to visit from 1-3 April' Press release 27 March 2014, <https://www.ohchr.org/en/press-releases/2014/03/nigeria-un-torture-prevention-body-visit-1-3-april> (accessed 23 August 2024).

¹¹² SPT (n 111) 47.

¹¹³ UN Treaty Body Database for OPCAT, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Chronological (accessed 23 August 2024).

Concluding Observations, the CAT Committee noted that Nigeria had neither notified the SPT of its designation of an NPM, nor allowed an official visit by the SPT.¹¹⁴ Given its existing relationship between the NHRC and the UN SPT and other UN human rights organs, I expect that collaboration with the SPT will improve under the new dispensation, that is, with the NHRC as NPM.

3.3 Can the recently designated NPM-NHRC ensure Nigeria's compliance?

As presently constituted, the NHRC has a greater incentive to perform its functions as an NPM than the 2009/2022 Committees – it has more secure funding – at least in principle, better access to detention facilities, and greater diversity in its membership. Indeed, Ayo-Ojo argues that it is 'arguably the best model for the Nigerian NPM'.¹¹⁵ However, some of the main concerns remain – independence of personnel, reference to a legislative text and functional independence of the institution itself.

Although the NHRC – in principle – is independent, its administrative/operational head reports to the Attorney-General of Nigeria. This is problematic to the extent that the Attorney-General can wield some influence on the Commission's decisions.

Regarding its right to visit places of deprivation of liberty, the Commission has made the effort to visit prisons but paid less attention to other places, including police stations and detention centres maintained by other security institutions such as the military, department of state services (DSS) and other paramilitary institutions.

The fact that the administrative leadership team at the Commission consists of career civil servants without security of tenure – but for the executive secretary – makes it less likely that the Commission will do well with torture prevention because their careers could be negatively impacted by reports perceived unfavourably by the government. This does not align with the spirit of the CAT Committee requirement that states should refrain from supervising the NPM.

It is crucial to underscore that the designation of the NHRC as Nigeria's NPM is both beneficial and burdensome. It is beneficial to the extent that it improves access to places of detention. However, it is

¹¹⁴ CAT Committee (n 18) para 21.

¹¹⁵ BS Ayo-Ojo 'A critical appraisal of the national institutional mechanism for the prevention of torture in Nigeria' (2024) 8 *African Human Rights Yearbook* 118, <https://www.ahry.up.ac.za/ay-ojo-bs> (accessed 17 March 2025).

also a burden because the executive secretary as operational head of the NHRC has the primary responsibility for delivering on its 18-point mandate.¹¹⁶ Although the prevention of torture is connected to the mandate of the Commission,¹¹⁷ adding it as a specific function to the already saturated portfolio of the NHRC reduces the attention they can pay to other pressing human rights issues across the country.

Although the NHRC owes its existence to a legislative text, the instrument designating the NHRC as an NPM is an executive order that does not qualify as a legislative text. To the extent that it references an existing legislative text, the executive order serves a useful purpose. However, it might have been better to amend the NHRC Establishment Act to include a provision designating the NHRC as an NPM. This would have put an end to the argument about whether or not the NPM is founded on a constitutional or legislative text. Regardless, the executive order carries more legal weight than the terms of reference upon which the 2009 and 2022 NCATs were based.

Beyond designating the NHRC as an NPM, it would be interesting to see how this pans out in real terms. Would the department serving as the secretariat for the NPM be adequately resourced to perform its functions without inhibitions? This is still unclear. If the presidential order is anything to go by, there are concerns about how seriously the government takes the functional and operational independence of the NPM. Article 2(2) of the order places the responsibility for ensuring 'operational independence' and 'appropriate resourcing' on the NHRC. This is rather curious as the NHRC is not self-financing. The government ought to have taken a more proactive approach by inserting clauses that guarantee independence and adequate resourcing of the NPM. One proposal would have been to indicate that the department will have direct line funding and its activities will not be subject to interference by the leadership of the NHRC or the Ministry of Justice. That said, the budget of the department for 2025 could provide a hint about the future of the NHRC as NPM because it should demonstrate how much of a priority an NPM is in the scheme of things.

116 Including monitoring and investigating complaints of human rights violations; assisting victims to seek appropriate remedies for violations; publishing annual reports on the state of human rights in Nigeria; and undertaking studies for the formulation of government policies on human rights. For a full list, see NHRC mandate, <https://www.nigeriarights.gov.ng/about/nhrc-mandate.html> (accessed 23 August 2024).

117 Its first mandate is to 'deal with all matters relating to the promotion and protection of human rights' as guaranteed under the Constitution of Nigeria and international instruments to which Nigeria has subscribed.

4 What more can Nigeria do to get closer to the goal?

In this part I identify what Nigeria needs to do to get closer to the goal of an OPCAT-compliant NPM.

4.1 Back to the basics – Constitutional or legislative Act?

The government of Nigeria took a positive and commendable step in designating the NHRC as the new NPM. That step changed the dynamic for the NPM to the extent that it stopped being anchored on a set of terms of reference and tilted a little towards the requirement of a constitutional or legislative text. As previously indicated, the act of designating via a presidential order strengthens the legal basis for the NPM, but the order itself is not a constitutional or legislative act.¹¹⁸ Having done this, the government should take a further step by amending the NHRC Act to specifically include the department responsible for performing NPM functions – incorporating themes such as its operational and financial independence. It might also be helpful to indicate how the civil society representatives on the governing council of the NHRC will play a role in the work of this department.

Embedding the NPM directly in the NHRC legislation has dual benefits. One is that it makes the institution OPCAT-compliant but, more importantly, it provides an opportunity, through the law review process, for stakeholders to debate what form and/or shape the institution should take. The current presidential order did not benefit from such debate.

Embedding the NPM in legislation may not address all the challenges it confronts, but would place it on a firmer footing to overcome these. Taking the question of the independence of the institution and its personnel, for instance, inserting a section that creates a fixed term of office for members/staff and insulates them from politics would help focus members' attention on getting the job done without looking over their shoulders.

One caveat is necessary at this point. Nigeria has a reputation for crafting decent laws but often struggles with implementing

¹¹⁸ Ayo-Ojo (n 115) suggests that by designating the NHRC as an NPM via a presidential order, the government of Nigeria has 'incorporated those mandates into an Act of Parliament' (121) This could be interpreted to imply that presidential orders can amend laws enacted by Parliament. The author has difficulty in finding a legal basis for this practice.

them. For example, section 9(3) of the Administration of Criminal Justice Law of Lagos State 2011 requires that law enforcement officers interrogate crime suspects on video or in the presence of a lawyer of their choice as a safeguard to prevent or minimise torture. Regrettably, only a handful of mostly donor-funded police stations have recording facilities. For their part, police officers scarcely invite lawyers to their interrogation rooms.¹¹⁹ Therefore, it will take more than just revising the NHRC Establishment Act to get more traction on the NPM. The government must demonstrate commitment to making greater efforts to ensure compliance.¹²⁰

4.2 Independence of the institution and its personnel

The Nigerian government can make a simple commitment to strengthening the financial independence of the NPM by charging its budget, as a department of the NHRC, to the consolidated revenue fund (CRF) – a special fund from which recipients can directly draw resources without relying on other parts of the government. In practice, the funds of the NHRC are on the CRF. However, there is no indication that the department responsible for performing NPM functions will have access to whatever funds are allocated to it as and when due. In addition, it is unclear how much of a priority that department will have in terms of flexibility to perform its functions. This needs to be addressed either in the amendment to the NHRC or by a policy decision.

Under the presidential order, it seems clear that the staff of NHRC will manage the department responsible for NPM functions. While this makes sense, it might help to indicate that they will be required to inspect detention centres and to annually report on this assignment. This is critical because the NHRC has not been consistent in publishing annual reports on its detention centres visit mandate. In addition, the law or policy needs to make it clear that the mandate extends to all places of detention – not only prisons and police stations. This responsibility has financial implications and, therefore, the budget of the NPM needs to take cognisance of this. Furthermore, hiring external consultants might help to improve the perception of independence and strengthen the capacity of the department to deliver on its mandate.

119 Access to Justice A report on the implementation of the administration of criminal justice law 2011 of Lagos State (2020) 23, <https://www.accesstojustice-ng.org/Research%20Report%20-%20Implementation%20of%20the%20ACJ%20Law.docx> (accessed 23 August 2024).

120 Ayo-Ojo (n115) uses the popular Nigerian phrase ‘political will’ to describe this commitment (121).

4.3 Visiting rights and documentation

One of the more outstanding features of the NPM is the possibility to make unscheduled visits. Unscheduled visits provide a rare opportunity for visitors to see detention facilities in their most vulnerable state and, therefore, get a more accurate picture of what goes on behind the walls. Although the NHRC as NPM has a right of unscheduled visits to detention centres, it often informs prisons before conducting its prison audits.

Nigeria's security services often cite the current security crises as the reason why they require prior notification before official visits. However, the security crises make the argument for unscheduled visits more compelling because the lower the risk of torture in detention, the less likely it is that detainees will resort to violence or jailbreak, and the more likely it is that evidence produced will pass the test of credibility before local and international audiences. Addressing this tendency to push back on unscheduled visits will require a firm resolve by the government to sanction uncooperative security personnel and by the NPM to perform its statutory function in the best way possible.

It is important to note that police officers prevented a magistrate from accessing police detention cells in Lagos State¹²¹ despite a provision of the Administration of Criminal Justice Law, 2021 mandating magistrates to visit monthly to decongest the cells.¹²² Regrettably, there was no consequence for that action, partly because the magistrate in question was unwilling to cooperate with the investigations into that violation of the law.

Beyond visiting, systematic documentation is critical to outlining what challenges trigger the use of torture and to tracking progress on torture prevention in places of deprivation of liberty. To be helpful, the reports of these visits should be publicly available so that groups and individuals working in torture prevention can follow developments and contribute to the process of progressively rolling back on the use of torture in detention facilities.

121 S Oyeleke 'Controversy as Lagos magistrate, assistant commissioner clash' *Punch* (Nigeria) 3 June 2022, <https://punchng.com/controversy-as-lagos-magistrate-assistant-police-commissioner-clash/> (accessed 23 August 2024).

122 Sec. 283(1) Lagos State Administration of Criminal Justice (Amendment) Law 2021.

4.4 Improving collaboration with UN SPT

In part 2 I provided evidence that NCAT's collaboration with the UN SPT and the UN system has improved marginally. NCAT's response to the CAT Committee's Concluding Observations in the absence of an initial report demonstrates a commitment to collaboration. Although the NHRC has a record of working well with UN human rights treaty-monitoring bodies, I suggest two ways in which it can build on its collaboration with the UN SPT. One, NHRC as NPM can play a role in persuading Nigeria to deposit a standing invitation to the CAT Committee to visit the country. Second, the NHRC should produce and submit periodic reports to the UN SPT as and when due.

5 Conclusion

This article examined Nigeria's compliance with OPCAT requirements for the establishment and operation of its NPM. Against the backdrop of four essential requirements for an NPM, it reviewed Nigeria's compliance level and identified a few gaps. The article also offered some suggestions to address the gaps, including amending the NHRC Act to expressly embed its role as the NPM. Other proposals include NHRC providing the CAT Committee with a standing invitation to visit Nigeria, and insulating the department of NHRC responsible for performing NPM functions from direct executive control by charging its funds to the consolidated revenue fund, ensuring its operations are unimpeded by civil service bureaucracy, and enabling the infusion of external consultants to strengthen its independence and capacity to deliver. I also recommended that civil society representatives on the NHRC Governing Council should play a more visible and proactive role in preserving the independence and integrity of the NPM.

Taken together, these proposals have the potential to bring Nigeria closer to fully complying with its obligations under OPCAT and safeguarding the rights of citizens and residents from wanton abuse by law enforcement and military personnel.