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From prohibition to prevention of torture: Ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Kenya

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Summary: *According to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), state parties are required to establish or designate national preventive mechanisms (NPMs) mandated to conduct regular, independent and unannounced visits to all places of deprivation of liberty and to issue recommendations aimed at preventing torture and ill-treatment. Despite having become a party to the Convention against Torture (CAT) in 1997 and adopting robust constitutional and statutory safeguards against torture, Kenya has not ratified OPCAT. Instead, torture prevention within Kenya's detention system is pursued through a network of oversight institutions, notably the Kenya National Commission on Human Rights (KNCHR) and the Independent Policing Oversight Authority (IPOA). However, these oversight mechanisms are*

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constrained by structural limitations. They are predominantly reactive, allow only restricted access to places of detention, rely on court orders or prior notification, have fragmented institutional mandates, and display limited political prioritisation of preventive monitoring. While Kenya's existing institutions possess significant investigative capacity and normative legitimacy, they fall short of OPCAT standards due to the absence of an independent, systematically preventive monitoring mandate. Ratification of OPCAT and the establishment of an NPM, therefore, would complement, rather than duplicate, Kenya's current accountability framework by embedding torture prevention as a core operational principle. In doing so, OPCAT ratification has the potential to strengthen transparency in detention settings, reduce the risk of torture and ill-treatment, and enhance alignment with Kenya's constitutional values and international human rights commitments. Ratification of OPCAT has been hampered as much by institutional and political dynamics as by legal considerations. The article concludes that overcoming these obstacles would require a multi-pronged phased approach entailing initial emphasis on legal initiation and consensus building, followed by careful institutional design, legislative entrenchment of the NPM and capacity building.

Key words: *preventive monitoring; torture prevention; OPCAT, national preventive mechanisms; national human rights institutions*

1 Introduction

Kenya acceded to the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1997 and has subsequently incorporated the absolute prohibition on torture into its constitutional and legislative framework. The 2010 Constitution of Kenya entrenches freedom from torture and cruel, inhuman or degrading treatment as a non-derogable right, while domestic legislation, such as the Prevention of Torture Act and the Persons Deprived of Liberty Act, provides for criminalisation, accountability and oversight in places of detention. In addition, several institutions, including the Kenya National Commission on Human Rights (KNCHR), the Independent Policing Oversight Authority (IPOA) and the judiciary are mandated to investigate allegations of abuse and provide remedies.

Despite this robust normative and institutional framework, Kenya has not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). As a result, torture prevention within the

country's detention system continues to rely primarily on investigative and post-violation accountability mechanisms. Persistent reports of torture, deaths in custody, excessive use of force and degrading detention conditions suggest a structural gap between Kenya's legal commitments and the practical realities in places of deprivation of liberty. This gap reflects a broader limitation of frameworks that are predominantly reactive, focusing on investigation and redress after violations have occurred, rather than on systematic prevention.

OPCAT was adopted precisely to address this limitation. By requiring state parties to establish or designate national preventive mechanisms (NPMs) with mandates to conduct regular, independent and unannounced visits to all places of detention and to issue preventive recommendations, OPCAT reorients torture prevention toward early risk identification, continuous oversight and constructive dialogue. Kenya's non-ratification of OPCAT, therefore, raises central analytical questions: To what extent can the country's existing legal and institutional architecture fulfil OPCAT's preventive mandate in the absence of formal ratification, and what factors have hindered the transition from reactive oversight to a preventive monitoring system?

This article examines that question through a doctrinal and comparative legal analysis. It argues that while Kenya has in place strong constitutional guarantees and multiple oversight bodies with investigative competence, these mechanisms are structurally ill-equipped to deliver the type of independent, systematic and preventive monitoring envisaged under OPCAT. Constraints relating to access to detention facilities, reliance on court orders or prior notification, fragmented institutional mandates and limited political prioritisation continue to undermine effective prevention.

The article is structured as follows: The first part outlines the normative foundations of OPCAT and the preventive logic underpinning NPMs. The second part analyses Kenya's constitutional, legislative and institutional framework on torture prevention, highlighting its strengths and structural limitations. The third part examines the historical, political and institutional barriers to OPCAT ratification by Kenya, alongside emerging opportunities for reform. The fourth part undertakes a comparative analysis of NPM models, drawing lessons relevant to Kenya's institutional context. The article concludes by demonstrating that ratification of OPCAT would not duplicate Kenya's existing safeguards, but would complement these by embedding torture prevention as a core operational principle and strengthening detention oversight in line with constitutional values and international commitments.

2 Overview of OPCAT and national preventive mechanisms

This part examines the development, objectives and core legal architecture of OPCAT, situating it within the broader evolution of international torture prevention. It analyses the preventive rationale underpinning OPCAT, the scope of its application to places of deprivation of liberty, and the institutional design of its two-pillar monitoring system at the international and domestic levels. The part further explores the legal obligations imposed on state parties, particularly with respect to the independence and functioning of NPMs, and highlights the international significance of OPCAT as a distinct compliance model that prioritises preventive monitoring, dialogue and norm internalisation over reactive enforcement.

2.1 Introduction to OPCAT: History, objectives, key provisions and international significance

OPCAT was adopted by the UN General Assembly on 18 December 2002 and entered into force on 22 June 2006 following its twentieth ratification.[1] OPCAT reflects the recognition that predominantly reactive approaches to torture focused on investigation, prosecution and redress after violations have occurred are insufficient to address abuse that typically takes place in closed and inaccessible environments.[2] Instead, the OPCAT institutionalises prevention through regular, independent monitoring of all places where persons are deprived of their liberty, embedding prevention as a legally binding strategy within international torture prevention. The preventive orientation of OPCAT is best understood in light of its drafting history. OPCAT emerged from dissatisfaction with the reporting-based and largely retrospective supervisory mechanisms under the CAT, which were ill-suited to detecting abuse occurring behind closed doors. Its central innovation lies in shifting emphasis from post-hoc assessment to first-hand inspection, grounded in the understanding that sustained, on-site engagement constitutes one of the most effective safeguards against torture and ill-treatment. Importantly, this model reinforces prevention at the national level,

1 UN Office of the High Commissioner for Human Rights Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel (accessed 4 July 2025).

2 MD Evans & C Haenni-Dale 'Preventing torture? The development of the Optional Protocol to the UN Convention against Torture' (2004) 4 *Human Rights Law Review* 19, 21-24.

with international oversight operating in a complementary rather than substitutive role.

Contemporary OPCAT practices confirm that the concept of 'places of deprivation of liberty' extends beyond traditional custodial settings such as prisons and police cells. Ouliaris and others emphasise that individuals detained for compulsory treatment in psychiatric hospitals and forensic mental health facilities are deprived of their liberty within the meaning of article 4 of OPCAT.[3] Such facilities are frequently closed to public scrutiny and, therefore, present heightened risks of ill-treatment in the absence of independent monitoring. This expansive interpretation underscores the breadth of OPCAT's preventive mandate and the necessity for monitoring mechanisms to have access to all detention settings, including health-based institutions.

Institutionally, OPCAT establishes a two-pillar system of preventive monitoring. At the international level, it creates the UN Subcommittee on Prevention of Torture (SPT); at the domestic level, it obliges state parties to establish or designate an NPM.[4] Articles 1 and 3 of the OPCAT articulate the overarching objective of preventing torture through regular visits to places of detention by independent bodies. The SPT undertakes country visits, provides guidance to NPMs, and engages in confidential dialogue with state authorities, while article 17 requires state parties to establish or designate NPMs within one year of ratification. Under article 19, NPMs are mandated to conduct regular visits, formulate recommendations and submit proposals concerning legislation and administrative practice.

The legal obligations imposed on state parties under OPCAT are extensive. Articles 18 to 23 require that NPMs enjoy functional, financial and institutional independence, together with adequate resources and unrestricted access to information, facilities and persons deprived of liberty. As Steinbrecher observes, independence shields NPMs from external interference, enabling them to expose detention conditions as they exist in practice, safeguard the rights of detainees, and promote transparency by reducing opportunities for concealment of abuse.[5] In practice, however, these conditions are

3 C Ouliaris and others 'OPCAT: How an international treaty regarding torture is relevant to the Australian mental health system' (2024) 58 *Australian and New Zealand Journal of Psychiatry* 388-389.

4 M Nowak, M Birk & G Monina (eds) *The United Nations Convention Against Torture and Its Optional Protocol: A commentary* (2019) 715.

5 L Steinbrecher 'The problem with independence in torture prevention' (2020), http://opiniojuris.org/2020/06/26/the-problem-with-independence-in-torture-prevention/ (accessed 6 July 2025).

unevenly realised, particularly in contexts where domestic institutions remain under-resourced or vulnerable to executive influence.

Beyond its operational dimensions, OPCAT represents a distinctive form of international legal design aimed at strengthening compliance and reinforcing the normativity of the prohibition of torture. As Steiger argues, the Protocol departs from traditional human rights treaties by institutionalising dialogue through a dual system of preventive visits conducted by both international and national bodies, embedding continuous interaction between international norms and domestic practice.[6] This dialogic model prioritises norm internalisation and institutional learning over adversarial enforcement.

A further defining feature of OPCAT is its deliberate rejection of a uniform institutional model for NPMs. Murray notes that by permitting states to 'establish, designate or maintain' one or several visiting bodies, the Protocol recognises the diversity of national legal systems and oversight traditions.[7] Rather than imposing a single institutional template, OPCAT allows states to tailor preventive mechanisms to their specific constitutional, administrative and political contexts, provided that core requirements relating to independence, access, and effectiveness are satisfied.

2.2 Mandate, roles and functions of national preventive mechanisms under OPCAT

NPMs are the cornerstone of the OPCAT's preventive architecture. They are conceived not as complaint-handling or enforcement bodies, but as independent domestic mechanisms mandated to prevent torture and ill-treatment through regular, systematic engagement with places of deprivation of liberty. In this sense, NPMs translate the abstract obligation of prevention under CAT into continuous, operational oversight grounded in first-hand observation and dialogue. Their responsibilities include conducting unannounced visits to places of detention, interviewing detainees and staff in private, and reviewing relevant documents kept in detention relevant to the treatment and detention conditions.[8] In this regard, NPMs play a crucial role as 'protectors on the ground', complementing the work of the SPT by conducting continuous national-level monitoring and

6 D Steiger 'Enhancing compliance and fostering normativity by institutionalising dialogue – The Optional Protocol to the United Nations Convention Against Torture: A comment' (2022) 14 *Journal of Human Rights Practice* 160-162.

7 R Murray 'National preventive mechanisms under the Optional Protocol to the Torture Convention: One size does not fit all' (2008) 26 *Netherlands Quarterly of Human Rights* 487-489.

8 Arts 19-20 OPCAT.

sustaining preventive engagement with authorities.[9] They must also publish periodic reports and provide actionable recommendations to authorities.[10]

The preventive nature of NPMs is reinforced through their engagement in public awareness campaigns, training of detention personnel and interaction with civil society organisations. Successful NPMs are those that integrate preventive visits with sustained follow-up and strategic engagement with government bodies, often influencing significant policy reforms.[11]

Article 18 of the Protocol establishes independence as a structural precondition for an effective NPM, reflecting the broader understanding that preventive monitoring cannot be credible or impactful where the detaining authorities retain influence over appointments, funding or operational decisions. Even though article 18 enshrines a high-level obligation of independence, it leaves the concrete modalities to national discretion. The flexibility allowed by article 18 has been criticised as giving leeway to some states to adopt weak or compromised NPM structures, often embedded within executive ministries, underfunded, or operationally constrained.[12]

Comparative experience from Africa illustrates the risks of formal compliance without functional autonomy. In his critical appraisal of Nigeria's NPM (the National Committee Against Torture), Ayo-Ojo demonstrates that institutions established through executive directives or administrative instruments, rather than Acts of Parliament, have consistently failed to meet OPCAT standards, even where they possessed broad human rights mandates and investigative powers.[13] Amnesty International has noted that the National Committee Against Torture has been 'largely inactive', has not conducted regular detention visits, and has never published annual reports or demonstrated meaningful follow-up on torture allegations failures directly linked to its dependence on the executive and its lack of functional autonomy.[14] Similarly, the UN Committee Against Torture (CAT Committee) has similarly expressed concern that National Committee Against Torture lacks the functional and

9 L González Pinto 'The United Nations Subcommittee on Prevention of Torture: The effects of preventive action' (2022) 14 *Journal of Human Rights Practice* 147-148.
10 Art 19 OPCAT.
11 R Carver & L Handley (eds) *Does torture prevention work?* (2016) 43.
12 Steinbrecher (n 5).
13 BS Ayo-Ojo 'A critical appraisal of the national institutional mechanisms for the prevention of torture in Nigeria' (2024) 8 *African Human Rights Yearbook* 96-101.
14 Amnesty International Nigeria 'Time to end impunity: Torture and other violations by the SARS (Index AFR 44/9505/2020) 26 June 2020.

financial independence necessary to discharge its mandate, citing the absence of evidence of regular inspections and insufficient resources.[15]

Ayo-Ojo's analysis of Nigeria demonstrates that the establishment of a national body through executive directive, rather than legislation, can significantly weaken preventive effectiveness. The National Committee Against Torture, created and reconstituted under the authority of the Ministry of Justice, lacked a legislative basis, autonomous funding and safeguards against ministerial influence. As a result, it failed to conduct regular visits or produce sustained preventive impact, prompting concerns from both civil society and the CAT Committee regarding its functional and financial independence.

To give effect to the intent of article 18, states must therefore adopt robust legal, financial and institutional safeguards. Guidance issued by the SPT and the Association for the Prevention of Torture (APT) consistently emphasises that genuine independence requires legislative entrenchment, ring-fenced budgets, transparent and depoliticised appointment processes, unrestricted access to all places of detention, and the authority to publish findings without executive interference. Without these safeguards, NPMs risk reproducing reactive oversight models that OPCAT was expressly designed to overcome.[16]

2.3 Global ratification status of OPCAT and regional trends in Africa

The global pattern of OPCAT ratification provides important insight into the evolving acceptance of preventive monitoring as a core strategy for addressing torture and ill-treatment. At the same time, disparities between ratification and implementation highlight the structural and political challenges inherent in translating international commitments into effective national practice.

As of December 2025, of the 175 state parties to CAT, 96 have become party to OPCAT. An additional 11 states have signed but not yet ratified OPCAT. Among the state parties to OPCAT, 79 states

15 UN Committee Against Torture Concluding Observations on the second periodic report of Nigeria (CAT/C/NGA/CO/2, 2017).

16 See, generally, UN Subcommittee on Prevention of Torture Guidelines on National Preventive Mechanisms (CAT/OP/12/5, 2010); and Association for the Prevention of Torture *Establishing and strengthening national preventive mechanisms: A practical guide* (2015).

have established NPMs as required under OPCAT.[17] In Africa, 25 countries have ratified OPCAT, and a further seven African states are state parties to OPCAT.[18] Regional trends reveal gradual but uneven progress, shaped by differing legal traditions, institutional capacities and levels of political commitment. While some states have established functioning NPMs with legislative entrenchment, others have ratified OPCAT without creating fully operational, independent or adequately resourced mechanisms.[19]

Despite these challenges, Africa has witnessed important developments aimed at strengthening regional capacity for OPCAT implementation. The CPTA has developed guidelines on the prevention of torture, particularly in relation to arrest, detention and conditions of detention, which complement OPCAT standards and provide region-specific interpretive guidance. [20] In addition, the African NPM Network, launched in 2023, has emerged as a platform for peer learning, joint training and the exchange of good practices among existing and prospective NPMs. Its 2024 conference in Cape Town underscored the value of harmonised approaches, common standards and sustained regional cooperation in addressing shared preventive challenges.[21]

Taken together, these trends suggest that while OPCAT has gained increasing normative traction globally and within Africa, its preventive promise depends on sustained political will, legal clarity and institutional investment at the national level. Regional mechanisms and networks play a crucial supporting role in bridging the gap between ratification and effective implementation, but they cannot substitute for domestic commitment to independence, resources and access. These dynamics provide an important contextual backdrop

17 Association for the Prevention of Torture (APT) *OPCAT Database* (2025), https://www.apt.ch/knowledge-hub/opcat (accessed 7 July 2025).

18 African Commission on Human and Peoples' Rights Committee for the Prevention of Torture in Africa, Intersession Activity Report to the 85th ordinary session of the African Commission on Human and Peoples' Rights (2024), https://achpr.au.int/en/intersession-activity-reports/committeepreventiontorture-85os (accessed 26 November 2025).

19 African Commission on Human and Peoples' Rights Committee for the Prevention of Torture in Africa, Intersession Activity Report to the 81st ordinary session of the African Commission on Human and Peoples' Rights (2024), https://achpr.au.int/en/intersession-activity-reports/committee-prevention-torture-africa-81os (accessed 27 November 2025).

20 African Commission on Human and Peoples' Rights *Robben Island Guidelines: Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa* (2015).

21 South African Human Rights Commission 'Media advisory: The South African Human Rights Commission hosts the Conference of the African National Preventive Mechanisms Network' 26 June 2024, https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/4045-media-advisory-the-south-african-human-rights-commission-hosts-the-conference-of-the-african-national-preventive-mechanisms-network (accessed 7 July 2025).

for assessing Kenya's position within the regional landscape of OPCAT ratification and implementation.

3 Kenya's legal and institutional framework on torture prevention

This part examines Kenya's domestic legal and institutional framework governing torture prevention, with a view to assessing its alignment with the preventive standards envisaged under OPCAT. It analyses the constitutional, legislative and institutional measures adopted to prohibit torture and protect persons deprived of their liberty, focusing on both their normative strengths and their structural limitations. The part considers the extent to which existing laws and oversight bodies contribute to torture prevention in practice, and interrogates whether this framework, largely oriented toward investigation and post-violation accountability, can fulfil OPCAT's requirement for systematic, independent and preventive monitoring of places of detention.

3.1 Legal framework on prevention of torture

This sub-part examines the domestic legal framework governing torture prevention in Kenya, focusing on the constitutional and legislative measures that give effect to the absolute prohibition on torture. It analyses how the Constitution of Kenya (2010) and subsequent statutory enactments articulate standards of protection for persons deprived of liberty, and assesses the extent to which these norms translate into effective preventive safeguards in practice. The sub-part further evaluates whether Kenya's legal framework, while normatively robust, provides a comprehensive preventive architecture consistent with the requirements of OPCAT.

3.1.1 Constitution of Kenya (2010)

The 2010 Constitution of Kenya establishes a strong normative foundation for the prohibition on and prevention of torture. Article 29 guarantees every person the right to freedom and security of the person, including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[22] This protection is reinforced by article 25, which expressly designates freedom from torture and cruel, inhuman or degrading treatment as non-

22 Arts 29(d) & (f) Constitution of Kenya, 2010.

derogable, rendering it absolute and incapable of limitation under any circumstances.[23] The absolute nature of the prohibition is preserved even in exceptional circumstances. Article 58, which regulates states of emergency, permits the temporary limitation of certain rights only to the extent permitted under international law, but expressly excludes freedom from torture from any such limitation.[24] Similarly, article 238 requires that national security be pursued in compliance with the Constitution, the rule of law, democracy, and respect for human rights and fundamental freedoms.[25] Taken together, these provisions reflect a constitutional commitment to ensuring that security governance does not override the prohibition of torture. Kenyan courts have affirmed the *jus cogens* nature of the prohibition on torture, interpreting article 25 as taking precedence over limitation clauses and aligning domestic constitutional interpretation with international human rights jurisprudence.[26]

The Constitution further incorporates international law into the domestic legal order. Article 2(6) provides that treaties ratified by Kenya form part of Kenyan law.[27] Kenya is a state party to the International Covenant on Civil and Political Rights (ICCPR), which absolutely prohibits torture,[28] and to the Convention against Torture, which obliges states to take effective legislative, administrative, judicial and other measures to prevent torture.[29] These obligations are directly enforceable within Kenya's constitutional framework.

While the Constitution and ratified treaties establish a clear legal prohibition on torture, they do not in themselves provide a comprehensive preventive architecture. OPCAT addresses this structural gap by operationalising the constitutional duty to prevent torture through regular, independent monitoring of places of deprivation of liberty. In this respect, OPCAT does not duplicate constitutional guarantees, but complements them by transforming normative commitments into systematic preventive practice.

23 Art 25(a) Constitution of Kenya, 2010.
24 Art 58(6)(a)(ii) Constitution of Kenya, 2010.
25 Art 238(2)(b) Constitution of Kenya, 2010.
26 *Musa Mbwagwa Mwanasi & 9 Others v Chief of the Kenya Defence Forces & Another* [2021] eKLR 55.
27 Art 2(6) Constitution of Kenya, 2010.
28 Arts 4 & 7 International Covenant on Civil and Political Rights (1966) UNTS 999 171 (ICCPR).
29 Art 2(2) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNTS 1465 85 (CAT).

3.1.2 National laws related to torture prevention

Kenya has enacted a range of domestic statutes that give effect to the constitutional prohibition on torture and regulate the treatment of persons deprived of their liberty. Collectively, these laws establish important safeguards through criminalisation, rights protection and oversight mechanisms. However, when examined through the lens of OPCAT's preventive logic, they reveal a framework that is predominantly reactive, relying on post-violation accountability rather than systematic prevention.

Prevention of Torture Act

The Prevention of Torture Act was enacted in 2017 to give effect to articles 25 and 29 of the Constitution and to Kenya's obligations under CAT. The Act defines torture broadly to include the intentional infliction of severe physical or mental pain or suffering for purposes such as obtaining information or a confession, punishment, intimidation or coercion.[30] It criminalises torture, prescribing penalties of up to 25 years' imprisonment, and life imprisonment where the victim dies. [31]

The Act reaffirms the principle of non-derogability by providing that no exceptional circumstances, including orders from a superior, may be invoked to justify torture, and that refusal to carry out such orders cannot give rise to disciplinary liability. [32] It further criminalises cruel, inhuman and degrading treatment as a distinct offence.[33] While these provisions strengthen accountability and deterrence, the Act is primarily oriented toward investigation and prosecution after violations have occurred, rather than toward continuous monitoring or early identification of risk factors in detention environments.

Persons Deprived of Liberty Act

The Persons Deprived of Liberty Act was enacted in 2015 to operationalise article 51 of the Constitution, which guarantees the rights of detained persons. The Act applies to individuals who have been arrested, lawfully held in custody, detained or imprisoned, and affirms their right to humane treatment and respect for dignity.[34]

30 Sec 4 Prevention of Torture Act.
31 Sec 5 Prevention of Torture Act.
32 Sec 6 Prevention of Torture Act.
33 Sec 7 Prevention of Torture Act.
34 Sec 2 Persons Deprived of Liberty Act.

Among the rights that these persons are accorded by the Act is the right to be treated in a humane manner and with respect to their dignity.[35] Violation of this right is an offence punishable by a fine not exceeding 5 000 Kenyan Shillings or imprisonment of two years, or both.[36] To ensure compliance with this, the Act accords every person deprived of liberty the right to receive visits at least once every seven days, whereby visitors allowed include human rights officers from recognised institutions who visit to assess and inspect the conditions under which the persons are held.[37]

National Police Service Act

The National Police Service Act incorporates the prohibition on torture in the policing context, adopting the definition of torture contained in CAT and the Prevention of Torture Act. It criminalises torture committed by police officers, prescribing penalties of up to 25 years' imprisonment, and distinguishes this offence from cruel, inhuman or degrading treatment, which carries a lower penalty. [38]

These provisions reinforce accountability in law enforcement and provide a legal basis for prosecution. However, like the other statutes, the Act operates primarily through complaint-driven investigation and criminal enforcement mechanisms. It does not provide for independent, regular and unannounced preventive visits to police detention facilities, nor does it establish institutional arrangements for continuous oversight of detention practices.

The analysis above indicates that Kenya's domestic laws establish a strong legal prohibition on torture and provide mechanisms for investigation, prosecution and redress. However, the laws do not constitute a comprehensive preventive system as envisaged under OPCAT. Access to detention facilities is often conditional, oversight is fragmented across institutions, and enforcement is triggered largely after violations have occurred. These structural features underscore the distinction between criminalisation and prevention and highlight the added value of OPCAT in operationalising the constitutional and statutory duty to prevent torture through independent, systematic monitoring of all places of deprivation of liberty.

35 Sec 5 Persons Deprived of Liberty Act.
36 Sec 5(2) Persons Deprived of Liberty Act.
37 Secs 24(1) & (5) Persons Deprived of Liberty Act.
38 Sec 95(2) National Police Service Act. A police officer found guilty of the latter is liable to imprisonment for a term not exceeding 15 years. See, generally, National Police Service Act sec 95(3).

3.2 Institutional mechanisms in Kenya dealing with torture prevention

Kenya's torture prevention framework is supported by a range of constitutional and statutory institutions tasked with oversight, investigation and accountability. This sub-part examines the institutional mechanisms through which torture prevention is pursued in Kenya, focusing on the mandates, functions and limitations of key oversight and accountability bodies. It analyses the roles played by constitutional and statutory institutions including the KNCHR, the IPOA, the National Coroners Service and the judiciary, in addressing torture and ill-treatment in places of deprivation of liberty. The sub-part assesses the extent to which these institutions, individually and collectively, contributes to torture prevention in practice, and interrogates whether a framework characterised by multiple, predominantly reactive bodies can fulfil the systematic and preventive monitoring requirements envisaged under OPCAT.

3.2.1 Kenya National Commission on Human Rights

The KNCHR occupies a central position in Kenya's human rights architecture. Established under article 59 of the Constitution and operationalised through the Kenya National Commission Act 14 of 2011, the Commission is mandated to promote, protect and monitor human rights, receive and investigate complaints and recommend appropriate remedies.[39]

The institutional positioning of the KNCHR must be understood within the broader doctrinal framework governing national human rights institutions (NHRIs). As Meuwissen explains, NHRIs occupy a distinct position as independent state institutions: Although established, funded and mandated by the state, their independence is assessed not by their formal separation from the state, but by the existence of robust legal and operational safeguards insulating them from executive control.[40] Independence, in this sense, is a functional and structural concept rather than an institutional detachment from public authority. When assessed against these criteria, the KNCHR's constitutional entrenchment under article 59, its statutory mandate and its ability to publish independent reports position it squarely within the category of independent state institutions capable, in principle, of exercising preventive oversight functions.

39 Art 59(2) Constitution of Kenya, 2010.
40 K Meuwissen 'NHRIs and the state: New and independent actors in the multi-layered human rights system?' (2015) 15 *Human Rights Law Review* 446-449.

With regard to torture, the KNCHR's mandate is exercised primarily through investigation, reporting and advocacy. Its investigative powers, reinforced by the Prevention of Torture Act, enable it to pursue accountability for alleged violations, including deaths in custody, such as the recent case involving Albert Ojwang.[41] The KNCHR is also authorised under section 26 of its enabling Act and the Persons Deprived of Liberty Act to conduct visits to places of detention, including prisons, police cells and remand facilities. However, such access may be subject to prior notification or, in some instances, judicial authorisation. These conditions constrain the KNCHR's ability to conduct unannounced and systematic preventive visits, limiting its capacity to identify risks before violations occur.

Empirical evidence from African practice illustrates the preventive potential of NHRI engagement. A continent-wide study conducted by the APT and the Network of African National Human Rights Institutions (NANHRI) documents how the KNCHR has engaged in detention monitoring, sensitisation of prison officers and follow-up visits in response to allegations of ill-treatment.[42] According to the study, KNCHR interventions contributed to improved relationships between detainees and prison officials and a reduction in reported instances of ill-treatment, particularly following investigations at Shikusa Farm Prison.[43] These findings illustrate the KNCHR's capacity to contribute to torture prevention in practice, even in the absence of a formal OPCAT mandate.

3.2.2 Independent Policing Oversight Authority

The IPOA, established under the Independent Policing Oversight Authority Act, is mandated to investigate criminal offences committed by members of the National Police Service, including torture and cruel, inhuman or degrading treatment in custody.[44] IPOA exercises its mandate through complaint-driven and own-motion investigations and, where allegations are substantiated, refers cases to the Director of Public Prosecutions for prosecution.[45] In 2024, for instance, the authority received three complaints of its members having

41 Kenya National Commission on Human Rights 'Statement on the investigations of Albert Omondi's death in police custody' 9 June 2025, https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1226/STATEMENT-ON-THE-INVESTIGATIONS-OF-ALBERT-OMONDI%E2%80%99S-DEATH-IN-POLICE-CUSTODY (accessed 9 July 2025).
42 APT & NANHRI 'Preventing torture in Africa: Lessons and experiences from national human rights institutions' (APT/NANHRI, 2015) 27-28.
43 APT & NANHRI (n 42) 28.
44 Sec 3 National Police Service Act (Cap 86).
45 Sec 26(1)(a) National Police Service Act (Cap 86).

committed torture, which after investigations proceeded to file cases in various courts.[46] While IPOA plays a vital role in strengthening police accountability, its institutional design is inherently reactive. Investigations are triggered by complaints or specific incidents, and the Authority's engagement with detention facilities is oriented toward evidence-gathering rather than continuous risk assessment. As such, IPOA's mandate complements, but cannot substitute for, the systematic preventive monitoring envisaged under OPCAT.

3.2.3 National Coroners Service

The National Coroners Service, established under the National Coroners Service Act, is responsible for investigating deaths occurring in Kenya, including deaths in custody.[47] Through inquests and forensic investigation, the Service contributes to accountability by identifying causes and circumstances of death and transmitting findings to relevant authorities, including IPOA.[48] In the context of torture, the mandate of the National Coroners Service is triggered only after a death has occurred and does not extend to ongoing monitoring of detention conditions or early identification of risks. While indispensable for accountability and truth seeking, it does not perform a preventive function within the meaning of OPCAT.

3.2.4 Judicial enforcement

Judicial enforcement constitutes a central pillar of torture prohibition in Kenya. The High Court, for instance, has the authority to hear and determine allegations of violation or infringement of the bill of rights and grant appropriate relief.[49] As illustrated in the case of *Kenneth Stanley Njindo Matiba v Attorney General*,[50] judicial oversight reinforces the constitutional status of freedom from torture and provides remedies for victims. Nevertheless, judicial remedies are inherently retrospective. Courts intervene after violations have occurred and rely on cases being brought before them, which is particularly challenging in detention contexts characterised by secrecy and power imbalances. As a result, while judicial enforcement is indispensable for accountability, it cannot on its own deliver the

46 Independent Policing Oversight Authority 'Performance report January-June 2024' Independent Policing Oversight Authority 2024 27.
47 Sec 20 National Coroners Service Act (cap 89).
48 Sec 25 National Coroners Service Act (cap 89).
49 Art 23 Constitution of Kenya (2010).
50 *Kenneth Stanley Njindo Matiba v Attorney General* [2017] eKLR Petition 94 of 2014.

continuous, independent prevention of torture required under OPCAT.

Comparative scholarship has cautioned that systems characterised by several institutions with overlapping or adjacent mandates may suffer from fragmentation, duplication of effort, and uncertainty among rights holders as to where to seek redress. As Carver observes, international and regional human rights standards offer little guidance on whether states should establish a single national human rights institution or multiple specialised bodies, leaving institutional design largely to national discretion.[51] In practice, the decisive criterion is not institutional multiplicity, but functional effectiveness in preventing violations and influencing state practice.[52] This insight is particularly relevant in the Kenyan context, where a range of institutions exercise partial oversight functions relating to torture prevention. While each body performs an important role, the absence of a unified preventive framework risks diluting institutional impact and complicating access for persons deprived of liberty. In the context of torture prevention, such fragmentation is particularly problematic, as it privileges investigation and redress after harm has occurred over early identification of structural risks within places of detention.

3.3 Limitations of Kenya's existing torture prevention framework

In the context of torture prevention, fragmented oversight arrangements are ill-suited to preventive monitoring. Carver notes that systems relying on multiple institutions with discrete mandates often struggle to adopt a systemic approach to human rights protection, as priorities are shaped by complaints and institutional boundaries rather than by patterns of structural risk.[53] By contrast, preventive models benefit from institutional coherence, consistent standards and the capacity to address multiple and intersecting violations within a single framework.[54] Murray cautions that the mere designation of an existing oversight body does not guarantee compliance with OPCAT's preventive requirements. While institutions such as ombudspersons or national human rights commissions may already possess investigative or complaints-handling mandates, these

51 R Carver 'One NHRI or many? How many institutions does it take to protect human rights? Lessons from the European experience' (2011) 3 *Journal of Human Rights Practice* 1-3.
52 Carver (n 51) 7-9.
53 Carver (n 51) 8-10.
54 Carver (n 51) 14-17.

functions do not necessarily translate into systematic, preventive visiting practices.[55] Without adequate resources, specialised expertise and a strategic focus on prevention, such bodies risk reproducing reactive oversight models that OPCAT was expressly designed to overcome.[56]

Despite the existence of a comprehensive constitutional and statutory framework, Kenya's torture prevention architecture remains characterised by structural limitations that constrain its preventive effectiveness. These limitations do not stem from the absence of legal prohibitions or accountability institutions, but from the design and operation of mechanisms that are primarily oriented toward investigation and redress after violations have occurred, rather than toward the systematic prevention of abuse within places of detention.

A central limitation lies in access to places of detention. Although the KNCHR is authorised under section 26 of its enabling Act to access premises for investigative purposes, such access may require prior notification or judicial authorisation. Similarly, visits conducted under the Persons Deprived of Liberty Act are episodic and often subject to advance notice. These conditions impede the ability of oversight bodies to conduct unannounced and risk-based visits, which are essential to identifying patterns of abuse before they crystallise into violations.

In the absence of an integrated preventive mandate, Kenya's existing mechanisms remain oriented toward investigation and redress after violations have occurred, rather than toward the identification and mitigation of risks within places of detention. This structural limitation underscores the added value of OPCAT's preventive architecture, which is designed to consolidate monitoring authority and enable regular, forward-looking engagement with detention practices.

Structural weakness is further compounded by incomplete institutional implementation. Key legislative instruments, such as the Prevention of Torture Act, have yet to be fully operationalised in practice,[57] and the National Coroners Service, despite being established in law, is not yet fully functional.[58] The absence of these institutions in practice reinforces reliance on *ad hoc* investigations

55 Murray (n 7) 489-491.
56 Murray (n 7) 501-503.
57 Kenya National Commission on Human Rights *The state of human rights in Kenya: Assessing the progress made and areas of concern (July 2023-November 2024*) (2024) 36.
58 Kenya National Commission on Human Rights (n 57) 37.

and post-incident accountability, rather than continuous oversight of detention environments.

OPCAT addresses these limitations by introducing a preventive architecture grounded in regular, independent and unrestricted access to all places of deprivation of liberty. Through the establishment of an NPM and engagement with the SPT, oversight is reoriented from episodic investigation to sustained risk assessment, dialogue and institutional learning. Findings and recommendations are derived from first-hand observation of detention conditions and are intended to support authorities in fulfilling their constitutional and statutory obligations.

These limitations help explain why OPCAT ratification, despite its normative appeal, has not been prioritised in Kenya. Addressing the limitations would require not only legal reform, but also political commitment, resource allocation and institutional reorientation. The following part examines the historical, political and institutional factors that have shaped Kenya's reluctance to ratify OPCAT, and the opportunities that may nonetheless exist for reform.

4 Barriers and opportunities to ratification of OPCAT by Kenya

Despite the legal and normative compatibility between OPCAT and Kenya's constitutional framework, ratification has remained pending. This part investigates the multifaceted challenges hindering OPCAT ratification, analysing historical, political, legislative, institutional and societal factors. It also identifies opportunities for leveraging reform processes to facilitate a successful adoption, domestication and implementation of OPCAT in the Kenyan context.

4.1 Historical and political context

To a large extent, Kenya's hesitation to become a party to OPCAT reflects a broader pattern of state anxiety inherent in preventive inspection frameworks, rather than a deficiency in domestic legal capacity. Kenya's contemporary approach to international oversight has been shaped significantly by the legacy of the 2007-2008 post-election violence and the subsequent engagement of the International Criminal Court (ICC). [59] The failure to establish a domestic special

59 Human Rights Watch 'Establishing a Special Tribunal for Kenya and the role of the International Criminal Court' 25 March 2009, https://www.hrw.org/

tribunal and the transfer of jurisdiction to the ICC generated enduring political sensitivities around external accountability mechanisms. In public and political discourse, international oversight came to be associated with loss of sovereignty and external intrusion, contributing to scepticism toward binding human rights instruments that entail sustained monitoring of state institutions. [60]

These apprehensions are not unique to Kenya. Historical analysis of the OPCAT negotiations shows how concerns over sovereignty, intrusiveness and the perceived erosion of state control delayed the adoption of the OPCAT for more than two decades.[61] The eventual breakthrough occurred only when the focus shifted decisively towards nationally embedded preventive mechanisms, which were perceived as less intrusive while still capable of delivering meaningful oversight.[62]

4.2 Institutional capacity and resource limitations

Implementing OPCAT requires the establishment of a multidisciplinary NPM with the capacity to conduct regular visits across a wide range of detention settings, including police custody, prisons, immigration facilities and health-based institutions. In Kenya, however, core justice and oversight bodies operate under persistent resource and staffing constraints.[63] Additionally, the absence of a legally entrenched preventive monitoring mandate characterised by advance notice requirements and procedural barriers to access weakens the capacity of existing institutions to fulfil a preventive function.

The limitations of predominantly reactive oversight mechanisms are underscored by empirical findings on torture prevention. Carver and Handley demonstrate that while the investigation and prosecution of torture are necessary components of accountability, they do not in themselves reduce the risk of torture unless accompanied by

news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court (accessed 18 July 2025).

60 International Criminal Court (nd) 'Criticism and opposition – African accusations of Western imperialism' *Wikipedia* https://en.wikipedia.org/wiki/International_Criminal_Court (accessed 18 July 2025).

61 Evans & Haenni-Dale (n 2) 38-41.

62 Evans & Haenni-Dale (n 2) 19.

63 'Budget constraints hindering IPOA's service delivery, tells Parliamentary Committee' Editorial staff, *TopNews Kenya* 27 April 2024; Independent Policing Oversight Authority reports staffing of 254 against an approved establishment of 1 377 and ongoing under-resourcing, https://topnewskenya.co.ke/2024/04/27/budget-constraints-hindering-our-service-delivery-ipoa-tells-parliamentary-committee (accessed 18 July 2025).

preventive safeguards at the point of detention.[64] Their research shows that independent monitoring bodies with powers to conduct unannounced visits and confidential interviews exert a preventive effect by disrupting opportunities for abuse and altering institutional behaviour.[65]

4.3 Political will and government priorities

Kenya's national policy agenda remains heavily oriented toward security, counter-terrorism and economic development. Budgetary and legislative priorities reflect this orientation, often leaving human rights oversight mechanisms under-resourced.[66] In such a context, OPCAT ratification may be perceived as introducing additional obligations without immediate political return, particularly where preventive benefits are incremental rather than immediately visible.

4.4 Opportunities for ratification and implementation

Despite these challenges, several developments present concrete opportunities for advancing OPCAT ratification by Kenya. First, Kenya's existing legislative framework on torture prevention provides a strong normative foundation upon which preventive mechanisms could be built, reducing the need for wholesale legal reform. Second, targeted capacity-building initiatives, supported by international partners, could address concerns about feasibility by strengthening inspection methodologies, training multidisciplinary monitors, and improving inter-institutional coordination. Ratification itself would likely catalyse such support by signalling political commitment to prevention rather than reaction. Finally, revitalising public and civil society engagement through integration of OPCAT awareness into constitutional literacy and governance programmes could help reframe preventive monitoring as a domestic accountability tool rather than an external imposition. Ensuring an enabling environment for such engagement is therefore integral to translating legal opportunity into political action.

64 R Carver & L Handley 'Evaluating national preventive mechanisms: A conceptual model' (2020) 12 *Journal of Human Rights Practice* 394-397.

65 Carver & Handley (n 64) 397-399, 54-56.

66 D Kabaara 'Security budget balloons while justice starves and protesters bleed' *TNX Africa/The Standard* 16 June 2025 – analysis of Kenya's 2025/26 national budget showing KES 450 billion for national security versus KES 43 billion allocated across justice and human-rights institutions including ODPP, IPOA, Judiciary, KNCHR, etc, https://www.tnx.africa/opinion/article/2001521827/security-budget-balloons-while-justice-starves-and-protesters-bleed (accessed 18 July 2025).

The barriers and opportunities discussed in this part demonstrate that OPCAT ratification in Kenya is shaped as much by institutional and political dynamics as by legal considerations. Understanding how these dynamics operate in practice requires closer examination of the specific actors and processes involved in treaty ratification. The following part, therefore, turns to the roles played by state institutions, oversight bodies, civil society and international partners in advancing or impeding OPCAT ratification in Kenya.

5 Actors and processes in OPCAT ratification in Kenya

This part examines the actors and procedural dynamics shaping the ratification of OPCAT in Kenya. It analyses the formal treaty-making process under Kenyan law and the respective roles played by executive and legislative authorities, independent oversight institutions, civil society organisations, and international and regional actors. The part explores how authority, discretion and influence are distributed across these actors, and assesses the extent to which their interactions have facilitated or constrained progress towards OPCAT ratification. In doing so, it situates advocacy initiatives within the broader legal and institutional processes through which ratification decisions are negotiated, contested and advanced.

5.1 Key national and international stakeholders in torture prevention in Kenya

The ratification of international treaties in Kenya is governed by a structured legal and institutional process that allocates distinct roles to executive, legislative, oversight and non-state actors. Under the Treaty-Making and Ratification Act, responsibility for initiating and negotiating treaty ratification lies with the relevant state department, acting under the authority of the Cabinet Secretary and the Attorney-General (AG).[67] The AG, who is the chief legal advisor for the government, is required to initiate the process of ratification of the treaty after taking all factors into consideration, including whether it meets a need.[68] OPCAT is a relevant addition to Kenya's laws, given the rising cases of torture, with cases as recent as the arrests made on the 'Sabasaba' protests on 7 July 2025.[69]

67 Secs 2 & 5 Treaty-making and Ratification Act (CAP 4D).
68 Sec 5(2) Treaty-making and Ratification Act (CAP 4D).
69 M Owino 'Family claims Julia Njoki died from blunt force injury' *The Kenya Times* 13 July 2025, https://thekenyatimes.com/latest-kenya-times-news/national/family-claims-julia-njoki-died-from-blunt-force-injury/ (accessed 14 July 2025).

The legislators should also play a significant role in facilitating the ratification of OPCAT. Once the department in charge of justice, in this case the AG, initiates the ratification process, they shall submit to the National Assembly a treaty memorandum for approval. The decisions of the National Assembly are influenced by the interests of the citizens, most of which are acquired through the public participation process.[70] Parliament is in charge of facilitating this process, and articulating the interests of their constituents through their decisions. Parliament oversaw the ratification of the CAT and the enactment of the Prevention of Torture Act and all other related legislation discussed earlier. Therefore, Parliament is in a position to understand the gravity of the need to ratify OPCAT, by understanding the gaps that are yet to be filled by the current law. Without the approval by Parliament of the treaty memorandum, ratification cannot take place.[71]

The KNCHR and other institutions such as the IPOA are independent bodies that are key actors in promoting the observance of human rights. The KNCHR, for instance, has included in its reports the observance levels of the prohibition against torture and has made recommendations that Kenya ought to ratify the protocol to promote the fundamental freedom and security of a person, as well as their protection from torture.[72]

Other key stakeholders include civil society organisations (CSOs) that investigate on the state of torture prevention in Kenya, write reports and make recommendations to the state and the CAT Committee on what should be done. When Kenya made its third periodic report to the CAT Committee as required by article 19 of the Convention regarding the measures taken to implement the provisions of the Convention, joint civil society organisations in Kenya worked together to write a shadow report of the same. In the report, they analysed the situation in Kenya, in terms of the domestic legislations enacted and their implementation, the investigated and reported cases of torture and even made recommendations to have OPCAT ratified.[73] The report further explained that ratification of the

70 Art 118(b) Constitution of Kenya, 2010.
71 Sec 9 Treaty-making and Ratification Act (CAP 4D).
72 Kenya National Commission on Human Rights 'Report to the Committee Against Torture on the review of Kenya's third periodic report on the implementation of the provisions of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and/or Punishment' 2020 72.
73 Independent Medico-Legal Unit 'Joint civil society organisations (CSO) shadow report in response to the third periodic report by Kenya to the Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2013-2022) submitted by Independent Medico-Legal Unit' 2022 17.

Protocol would lead to the establishment of an NPM that would have the authority to investigate and prevent torture.[74]

Although OPCAT does not explicitly require NPMs to incorporate civil society, the SPT has consistently encouraged structured cooperation with CSOs, including their participation in visits, reporting, training and dialogue with authorities.[75] Comparative African experience demonstrates that civil society engagement is central to the effective functioning of NPMs, rather than merely a supplementary advocacy strategy. In its analysis of South Africa's NPM, Gossar documents how collaboration with CSOs enhances the effectiveness, independence and legitimacy of preventive monitoring, particularly in contexts where state institutions face capacity and coverage constraints.[76] This practice reflects the recognition that CSOs often possess specialised expertise, field access and public trust that can strengthen preventive oversight.

International and regional actors, including the CAT Committee, the SPT, the African Commission on Human and Peoples' Rights (African Commission), technical partners such as the Danish Institute Against Torture (DIGNITY) and the NANHRI can also exert influence primarily through normative guidance, peer engagement and capacity building rather than direct decision making.[77] The African Commission, for example, in June 2025 made a statement about the Albert Ojwang case, urging Kenya to not only conduct investigation into the matter and ensure accountability is achieved, but also adopt measures that would prevent a recurrence of the any similar event.[78]

5.2 Current and past advocacy initiatives and their impact

Over the past decade, advocacy for the ratification of OPCAT in Kenya has been and is still being done. The APT, which collaborates with states to achieve a torture prevention global system, visited Kenya in 2007 to encourage the ratification of OPCAT.[79] During this

74 Independent Medico-Legal Unit (n 73) 17.
75 AM Gossar 'Promoting the effectiveness of South Africa's NPM: The case for civil society collaboration' APCOF Research Series 28, 2020 6-7.
76 Gossar (n 75) 5-7.
77 Network of African National Human Rights Institutions (NANHRI) *Annual Report 2024* (published 15 May 2025).
78 African Commission on Human and Peoples Rights 'The African Commission on Human and Peoples' Rights deplores the death in custody of Mr Albert Omondi Ojwang in the Republic of Kenya' 12 June 2025, https://achpr.au.int/en/news/press-releases/2025-06-12/achpr-deplores-death-custody-mr-albert-omondi-ojwang (accessed 14 July 2025).
79 Association for the Prevention of Torture 'Promoting the Optional Protocol in Kenya' 14 March 2007, https://www.apt.ch/news/promoting-optional-protocol-kenya (accessed 15 July 2025).

visit, the organisation representatives met with various institutions from Kenya, such as the KNCHR, civil society organisations such as the Independent Medico Legal Unit, the International Commission of Jurists (ICJ – Kenya) and the Attorney-General.[80] The visit was aimed at identifying how APT could help Kenyan national actors strengthen torture prevention in Kenya through advocating the ratification of OPCAT.[81] Similarly, in 2025, NANHRI and DIGNITY have implemented targeted, multi-layered interventions aimed at strengthening preventive monitoring and institutional readiness for OPCAT ratification. These include strategic partner engagements with the KNCHR including specialised training on preventive monitoring of prisons, multisectoral leadership and coordination workshops bringing together justice and oversight actors to develop a shared torture prevention roadmap. Collectively, these interventions have reinforced preventive monitoring practices, enhanced cross-institutional collaboration, and contributed to creating the technical and institutional foundations necessary for effective OPCAT ratification and implementation in Kenya.

The CAT Committee has also taken steps to encourage Kenya to consider the ratification of OPCAT.[82] In response to this, the state, in their third periodic report, noted that the Constitution of Kenya requires ratification of any instrument to be undertaken with considerable thoroughness, hence the delay.[83] However, the report also provided that stakeholder workshops were underway in a bid to sensitise on the provisions of the Protocol and the duties arising therein.[84] To this end, joint civil society organisations wrote a shadow report, sensitising on the need for the ratification of the Protocol, in particular in order for an NPM to be established in Kenya to investigate and enforce torture prevention.[85]

The KNCHR has also indicated in its report that OPCAT would complement the established legal framework on torture prevention in Kenya.[86] This recommendation was not the first, with the KNCHR having made a similar recommendation in its assessment of the

80 As above.
81 As above.
82 Committee against Torture 'List of issues prior to submission of the third periodic report of Kenya' CAT/C/KEN/QPR/3 (2016) 7.
83 Committee against Torture 'Third periodic report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017' (2018) 22.
84 As above.
85 Independent Medico-Legal Unit (n 73).
86 Kenya National Commission on Human Rights (n 72) 72, 73.

government's steps to implement the recommendations made during the Universal Periodic Review (UPR).[87]

5.3 Pathways for advancing OPCAT ratification

Before South Africa ratified OPCAT in 2019, it had received an advocacy visit from the APT in 2005. One year later, the state held roundtable discussions with various stakeholders, including the South African Human Rights Commission (SAHRC), the Parliament, CSOs, the judiciary and interested members of the public.[88] In this discussion, the importance of the ratification of OPCAT as well as the status of South Africa in the ratification process were discussed.[89] Following this, they made reflections of the future of the ratification of OPCAT, by assessing the role of all stakeholders present.[90]

Kenya can emulate this form of a roundtable discussion, where they involve various bodies such as the KNCHR, IPOA, civil society, Parliament, the National Police Service, the judiciary, and international organisations such as the African Commission, NANHRI, DIGNITY, APT and even the public, engaging them in discussions about the provisions of OPCAT and envisioning its ratification and working towards it.

Further, public engagement constitutes an important component of the OPCAT ratification process. Public awareness initiatives can enhance understanding of the prohibition of torture, the domestic and international legal frameworks governing its prevention, and the institutional avenues available for redress and oversight. Such engagement not only strengthens legal literacy, but also facilitates informed interaction between individuals and relevant domestic institutions, thereby reinforcing accountability and the effective use of existing protection mechanisms.

As indicated above, Kenya already has several institutions that contribute to torture prevention, with the KNCHR being a central institution. In comparative perspective, this institutional positioning renders the KNCHR a plausible candidate for designation as an NPM

87 Kenya UPR Stakeholders Coalition 'An assessment by stakeholders of government's performance in implementation of UPR Recommendations' Annual Progress Report 22nd September 2010-21st September 2011' (2011) 10.
88 South African Human Rights Commission and the Association for the Prevention of Torture 'Report: Roundtable discussion on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)' (2006) 1.
89 SAHRC & APT (n 88) 3.
90 SAHRC & APT (n 88) 6.

subsequent to OPCAT ratification. However, effective assumption of such a mandate would require targeted capacity building, and additional financial and human resources. The SPT, which has the mandate to collaborate with the NPMs and international and regional actors, can offer training and advice to them as well as the state on the various needs that Kenya has and the mechanisms through which they can be met.[91]

6 Comparative national preventive mechanisms models and their relevance to Kenya

OPCAT does not require any specific structure or form of NPM. Instead, it grants to state parties the discretion to 'maintain, designate or establish one or several preventive mechanisms for the prevention of torture at the domestic level'.[92] This means that states may choose to create entirely new bodies or assign the NPM mandate to existing institutions, including those with a decentralised structure. There is no universally preferred model. What matters is that the selected mechanism meets the OPCAT requirements, particularly related to its capacity to carry out independent visits and fulfil its other responsibilities effectively.[93] NPMs models include the ombudsman/institutional model; the human rights commission-led model; the specialised inspection body model; and the multi-agency collaborative model.[94] These models reflect varying institutional structures and approaches, depending on national context and pre-existing mechanisms.

The flexibility afforded to states in designing NPMs is a deliberate feature of OPCAT. OPCAT does not require the creation of a new institution, but permits states to maintain, designate or establish one or several preventive bodies, depending on existing oversight arrangements.[95] This design choice was intended to accommodate diverse constitutional and institutional systems while ensuring compliance with core preventive standards.[96] The critical determinant of compliance, therefore, is not the organisational form of the NPM, but whether designated mechanisms possess functional independence, adequate resources, and unrestricted access to all places of deprivation of liberty.[97]

91 SAHRC & APT (n 88) 9.
92 Art 17 OPCAT.
93 As above; United Nations Office of the High Commissioner for Human Rights *The role of national preventive mechanisms: A practical guide* (2020) 8.
94 UN OHCHR (n 93) 8.
95 Evans & Haenni-Dale (n 2) 50-51.
96 Evans & Haenni-Dale (n 2) 52-53.
97 González Pinto (n 9) 146-147.

Based on the above, this part undertakes a comparative analysis of the principal institutional models through which NPMs have been established and operated under OPCAT. By assessing these models against core OPCAT requirements, particularly independence, preventive orientation, access, resourcing and coordination, the part identifies the strengths and limitations of each approach and distils lessons relevant to Kenya's institutional context as it considers OPCAT ratification and NPM designation.

6.1 Ombudsman institutions as national preventive mechanisms

Under the ombudsman model, the mandate of the existing ombudsman institution, often constitutionally established, is expanded to include OPCAT responsibilities. The model is favoured in many jurisdictions due to the already-existing infrastructure, credibility and public trust associated with the ombudsman institution.[98] In New Zealand, for instance, the Ombudsman Office was designated as the NPM under the Crimes of Torture Act 1989 (as amended), with a mandate to inspect prisons, police cells and health and disability facilities.[99]

The ombudsman model has been criticised for potentially lacking the specialised preventive focus and multi-disciplinary expertise envisioned by OPCAT. As emphasised by the APT, the traditional complaint-handling focus of ombudsman offices may conflict with the proactive, preventive mandate required of NPMs.[100] In Africa, none of the states has designated the ombudsman office alone as NPM.

6.2 Human rights commission-led model

Under this model, NHRIs, particularly those that are Paris Principles-compliant, are designated as the NPM. This approach leverages the already broad human rights protection mandate of most NHRIs and allows integration of torture prevention into their framework.

Designating an NHRI as NPM under the OPCAT framework can offer several distinct benefits. First, since NHRIs are typically pre-

98 APT *NPM practical guide* (2020) 83.
99 New Zealand Government 'Notice of designation of national preventive mechanisms under the Crimes of Torture Act 1989' *New Zealand Gazette* 2676 21 June 2023, https://gazette.govt.nz/notice/id/2023-go2676 (accessed 15 July 2025).
100 ATP *NPM Toolkit: Handling complaints* (2018) 4-5.

existing bodies with mandates focused on human rights protection, they often bring valuable attributes to the role of NPM, such as institutional experience, specialised methodologies and established infrastructures.[101] Second, NHRIs are generally characterised by a degree of independence from government in line with the Paris Principles, an essential quality also required of NPMs.[102] Third, many NHRIs have cultivated strong reputations and credibility, which can enhance the NPM's ability to engage constructively with state authorities on issues related to the rights of persons deprived of liberty. A well-regarded public image can also support broader awareness of the NPM's role and foster partnerships with civil society at the national level.[103]

Designating NHRIs as NPMs may also pose challenges. The main difficulty faced by NHRIs when taking on the role of an NPM lies in shifting to a preventive mindset. Typically, NHRIs are tasked with receiving complaints, conducting investigations, documenting findings, and making recommendations on how to resolve human rights violations. This function is inherently reactive, as it addresses abuses only after they have occurred. By contrast, the NPM's mandate focuses on proactive and comprehensive strategies aimed at preventing torture and ill-treatment, often in the absence of any prior complaint.[104]

For example, the Nigerian experience cautions against assuming that the designation of an NHRI as an NPM automatically satisfies OPCAT requirements. Its effectiveness as an NPM remains contingent on the existence of a specialised department with secure funding, operational autonomy, and a clearly articulated mandate for unannounced preventive visits.[105] The Nigerian situation highlights the inherent tension faced by NHRIs transitioning from complaint-driven investigation to preventive monitoring, noting that without deliberate structural safeguards, dual mandates can dilute preventive focus and strain limited resources.[106]

However, the experience of Georgia provides a compelling example of how an NHRI-led NPM can produce sustained preventive

101 Association for the Prevention of Torture 'National Human Rights Institutions as National Preventive Mechanisms: Opportunities and Challenges' (December 2013) 5.
102 Association for the Prevention of Torture & Inter-American Institute for Human Rights *Optional Protocol to the UN Convention against Torture: Implementation manual* (2010) 211.
103 SPT *Analytical self-assessment tool for NPMs* (2012) 30, 32 & 33.
104 ATP (n 101) 6.
105 Ayo-Ojo (n 13) 109-113.
106 Ayo-Ojo (n 13) 118-121.

impact when appropriately structured. Georgia's designation of its Public Defender's Office as the NPM accompanied by legislative entrenchment, operational autonomy and a specialised preventive group contributed to significant reductions in torture and ill-treatment over a ten-year period.[107] The Georgian example illustrates that dual mandates need not dilute preventive effectiveness where clear institutional separation, adequate resourcing and political engagement are ensured.[108]

The human rights commission-based model can also be seen in South Africa, where the national Human Rights Commission has assumed the NPM mandate. South Africa designated the SAHRC as the coordinating body of its NPM in 2019, supported by a network of other stakeholders, including the Judicial Inspectorate for Correctional Services (JICS), Legal Aid South Africa and the Independent Police Investigative Directorate (IPID).[109] This structure aligns with the human rights commission-led model under OPCAT, characterised by a broad constitutional mandate, strong institutional legitimacy and a decentralised operational design. However, while the SAHRC brings legitimacy and a broad human rights mandate, it has faced significant capacity and resource constraints that hinder its ability to conduct regular preventive visits to all places of deprivation of liberty.[110] Moreover, tensions have emerged regarding the coordination and information-sharing between the SAHRC and other members of the NPM network, revealing the challenges of a fragmented architecture lacking a binding legal framework to harmonise operations.[111] Nonetheless, South Africa's model is instructive for its emphasis on multi-stakeholder coordination under a constitutionally entrenched NHRI. South Africa's NPM shows how an NHRI-coordinated mechanism can draw on existing statutory oversight bodies to address monitoring gaps, particularly in police custody and specialised detention settings.[112]

The experiences above offer important lessons for Kenya. They indicate that while the designation of an active NHRI such as the KNCHR as an NPM is not conceptually problematic, its effectiveness depends on the presence of robust structural safeguards. In the Kenyan context, this underscores the need for explicit legislative

107 Carver & Handley (n 64) 399-402.
108 Carver & Handley (n 64) 402-404.
109 South African Human Rights Commission 'Report of the South African Human Rights Commission: The implementation of the OPCAT in South Africa 2019/20' 14.
110 SAHRC (n 109) 15.
111 SAHRC (n 109) 18.
112 Gossar (n 75) 5-6.

provisions guaranteeing ring-fenced funding, dedicated preventive staff, and unrestricted authority to conduct unannounced visits and issue public recommendations. Without such safeguards, the preventive mandate risks being absorbed into existing reactive functions, whereas their presence would enable the KNCHR to exercise an effective and sustained preventive role under OPCAT.

6.3 Specialised body model

This model involves the creation of an entirely new body or the designation of an existing body solely focused on detention monitoring. These specialised institutions are designed from the ground up with OPCAT compliance in mind and are thus often best placed to embody the preventive mandate. A prime example of this model is the French *Contrôleur général des lieux de privation de liberté*, established by Law 2007-1545 of 30 October 2007.[113] It is an autonomous administrative authority tasked exclusively with visiting all places where people are deprived of liberty in France, including prisons, police custody facilities, psychiatric hospitals and immigration detention centres.[114] Similarly, in Germany, the Federal Agency for the Prevention of Torture and the Joint Commission of the Länder function as specialised bodies under this model.[115] In Africa, Tunisia established its NPM in 2013 by creating the *Instance Nationale pour la Prévention de la Torture* (INPT), a stand-alone specialised body endowed with the exclusive preventive mandate under OPCAT.[116]

This model is generally lauded for its singular preventive focus and high degree of independence. The SPT considers such bodies ideal prototypes of NPMs where resourcing and political will allow for their creation.[117] However, this model is also the most resource-intensive. Establishing a new institution requires sustained political commitment, legislative investment and financial resources. In contexts such as Kenya, where oversight institutions already face capacity constraints, the creation of a stand-alone NPM may present significant feasibility challenges, notwithstanding its conceptual appeal.

113 Art 1 Law 1545 of 30 October 2007 (France).
114 Art 8 Law 1545 of 30 October 2007 (France).
115 European Training and Research Centre for Human Rights and Democracy *Bringing home human rights standards: The role of national preventive mechanisms* (February 2016) 31.
116 Organic Law 2013-43 of 21 October 2013 on the National Authority for the Prevention of Torture (Tunisia), official Gazette of the Republic of Tunisia 84 of 22 October 2013, art 2.
117 UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment *Analytical assessment tool for National Preventive Mechanisms* (2015) 3.

6.4 Multi-institutional mechanisms

This model involves the collaboration of several existing bodies such as human rights commissions, ombudsman offices and CSOs within a coordinated NPM framework. This model seeks to combine various institutional strengths and widen the reach of monitoring across diverse types of detention facilities. In The Netherlands, the NPM is composed of four partners: the Inspectorate of Justice and Security; the Health and Youth Care Inspectorate; the Council for the Administration of Criminal Justice and Protection of Juveniles; and the Dutch National Ombudsman. [118] The structure is coordinated through formal protocols and reporting mechanisms.[119] This model allows for greater specialisation, improved geographical coverage and a broader monitoring spectrum. Moreover, it offers an avenue for civil society participation in detention oversight, as seen in some Latin American countries such as Argentina and Mexico, where academic institutions and non-governmental organisations (NGOs) are part of the NPM framework.[120]

6.5 Relevance to Kenya

Considering the possibilities discussed above, designating an existing national human rights institution as the NPM arguably is the most feasible option in contexts where creating a new specialised body would be resource intensive. In Kenya, the KNCHR emerges as a plausible candidate. It is constitutionally entrenched, is Paris Principles-compliant, and already engages in detention monitoring. However, any designation of the KNCHR as NPM would require additional legislative and administrative measures to secure functional independence, ring-fenced funding, specialised preventive staffing, and unrestricted access to all places of deprivation of liberty, in line with article 18 of OPCAT and relevant SPT guidance. Without these safeguards, the preventive mandate risks being absorbed into existing investigative functions, replicating the structural limitations identified earlier in the article.

7 Benefits and potential impacts of ratifying OPCAT

Ratification of OPCAT offers a range of legal, institutional and systemic benefits that extend beyond formal compliance with international

118 APT OPCAT Country Status, Netherlands, 2022.
119 As above.
120 APT and OHCHR *Preventing torture: The role of national preventive mechanisms in Latin America* (2018).

obligations. These benefits derive from OPCAT's preventive architecture, which reorients torture prevention from post-violation accountability toward continuous oversight, risk identification and institutional learning.[121]

At the legal level, OPCAT ratification would complement Kenya's existing constitutional and statutory framework by operationalising the duty to prevent torture through independent monitoring of places of deprivation of liberty. While domestic legislation criminalises torture and provides mechanisms for investigation and redress, OPCAT introduces legally guaranteed access, unannounced visits and preventive engagement, strengthening the implementation of existing norms rather than duplicating them.

Institutionally, the establishment of an NPM would consolidate preventive oversight functions that are currently dispersed across multiple bodies. By providing a clear mandate, defined powers and structured engagement with the SPT, OPCAT enhances coherence, accountability and consistency in detention oversight.

Within the international sphere, ratifying OPCAT will also offer Kenya a chance to become part of global and regional networks for experience sharing and learning. In 2023, the UN OHCHR organised a 'collaboration against torture' conference in Cameroon, where African states engaged by sharing the challenges encountered in ratification and implementation and jointly developing solutions.[122] The conference facilitated the south-south cooperation and exchange of ideas between the countries that attended, even for those that had not yet ratified OPCAT.[123] In such forums, Kenya can have the opportunity to share its ideas and experiences in torture prevention with other nations and participate in the global course against torture. Furthermore, by ratifying OPCAT and establishing an NPM, Kenya will join many other African countries in the African NPM network, an active network that promotes joint learning and sharing of experiences among African NPMs, with the support of international organisations.

On a systemic level, the core preventive impact of OPCAT lies in its system of regular visits conducted by independent bodies.

121 Art 1 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment GA Res 57/199, 18 December 2002.

122 Association for Prevention of Torture 'OPCAT regional conference: Carrying the torch of torture prevention in East and Central Africa' 2 November 2023, https://www.apt.ch/news/opcat-regional-conference-carrying-torch-torture-prevention-east-and-central-africa (accessed 16 July 2025).

123 As above.

Continuous and unannounced monitoring alters the incentive structure in detention facilities by increasing transparency and reducing opportunities for abuse. Preventive monitoring also exerts a deterrent effect. The knowledge that detention facilities may be visited at any time encourages compliance with legal standards and promotes professionalisation among detention personnel. Importantly, this deterrence operates without reliance on punitive enforcement, aligning with OPCAT's cooperative and dialogic approach. At the same time, preventive impact should be understood as cumulative rather than immediate. As Murray cautions, the effectiveness of NPMs is shaped by broader political, legal and institutional environments, and should not be assessed solely through short-term outcomes.[124] Beyond immediate operational effects, OPCAT ratification strengthens domestic accountability ecosystems. By embedding preventive oversight within national institutions, OPCAT will facilitate sustained dialogue between monitoring bodies and Kenyan state authorities, supporting incremental institutional reform and norm internalisation over time.

8 Conclusion and recommendations for way forward

Kenya's experience demonstrates that robust constitutional guarantees and post-violation accountability mechanisms, while essential, are insufficient to prevent torture and ill-treatment in places of detention. Despite the absolute prohibition of torture under articles 25 and 29 of the Constitution and the existence of multiple oversight institutions, persistent reports of abuse point to the structural limits of a framework that remains predominantly reactive.

This article demonstrates that OPCAT offers a complementary preventive architecture capable of addressing these limits. By enabling regular, independent and unrestricted monitoring of places of deprivation of liberty through an NPM, OPCAT reorients torture prevention toward early risk identification, sustained dialogue and institutional learning. Comparative experience demonstrates that such preventive engagement can strengthen detention governance, reduce opportunities for abuse, and support the effective implementation of existing legal norms.

The ratification of OPCAT, therefore, would enhance, rather than displace, Kenya's current accountability framework. It would embed

124 Murray (n 7) 505-507.

prevention as a core operational principle, improve coherence among oversight institutions, and reinforce transparency within detention settings. In doing so, OPCAT ratification would align Kenya's torture prevention efforts with its constitutional commitments and broader international human rights commitments. The analysis suggests that meaningful progress in torture prevention in Kenya depends not on the proliferation of new norms, but on the institutionalisation of preventive practice within domestic legal and institutional systems.

The principal obstacles to OPCAT ratification and effective torture prevention in Kenya are not legal incompatibility, but institutional design, political prioritisation and capacity constraints. Addressing these challenges requires a phased and analytically grounded approach that aligns legal reform with institutional feasibility and preventive effectiveness.

As a first step, OPCAT ratification would need to be formally initiated through the procedures set out in the Treaty-Making and Ratification Act. Early, structured stakeholder consultations bringing together executive actors, Parliament, oversight institutions and civil society can help clarify the preventive logic of OPCAT and address sovereignty-related concerns. Such consultations would serve not as advocacy campaigns, but as deliberative processes aimed at building institutional consensus.

Public engagement would also play an important role in the ratification process, consistent with constitutional requirements for participation in legislative decision making. Integrating OPCAT awareness into existing civic education and constitutional literacy programmes could help situate preventive monitoring within Kenya's own constitutional values, rather than framing it as an externally imposed obligation.

The effective implementation of OPCAT would also depend on sustained capacity building. Technical support from international partners could assist in developing inspection protocols, training preventive monitors and establishing follow-up mechanisms for the designated NPM.

The above measures suggest a phased roadmap for OPCAT ratification and implementation in Kenya. Initial emphasis on legal initiation and consensus building could be followed by careful institutional design and legislative entrenchment of the NPM, and accompanied by capacity building.