



**Al-Haq's Comments on the Draft Law by Decree on
the Creation of the National Preventive Mechanism
for the Prevention of Torture in Palestine**

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January 2020

Executive Summary

On 28 December 2017, the State of Palestine acceded to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT or 'the Protocol'), which does not allow States to formulate any reservations. The State of Palestine has been a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or 'the Convention') since it acceded to the Convention on 1 April 2014, also without reservations. The Convention requires States parties to define and criminalise torture and impose deterrent criminal penalties proportionate with its grave nature, while it also requires States to conduct serious investigations, to ensure effective accountability and redress for victims, and to reform their criminal justice systems.

Within a year following the entry into force of the Protocol in the occupied Palestinian territory, effective as of the 30th day of accession, it became imperative for the State of Palestine to establish a National Preventive Mechanism (hereinafter 'NPM') for the prevention of torture and other ill-treatment in the occupied West Bank and Gaza Strip. Distinct from other international protocols, the executive nature of the OPCAT makes it one of a kind in preventing and ensuring protection from all forms of torture and other ill-treatment throughout all detention centres.

The OPCAT provides for the design and implementation of a system of effective regular and unannounced visits to detention centres, whether legal or illegal facilities, and regardless whether the detention was carried out lawfully, through a judicial order, or unlawfully. These visits are conducted by international experts representing the United Nations (UN) Subcommittee on Prevention of Torture and other Cruel, Inhumane or Degrading Treatment of Punishment (hereinafter 'SPT') and their local counterparts representing the NPM for the prevention of torture and other ill-treatment, who operate in a harmonious and unrestricted rhythm, day and night, without the presence of law enforcement officials during the visits. It is a global system par excellence, effective in the prevention and protection from torture and other ill-treatment.

This system seeks to enhance the protection of persons deprived of their liberty, de jure or de facto, from all forms of torture and other ill-treatment, within the State's territorial jurisdiction, through a detailed programme of visits. The system aims at comprehensively analysing the country's detention system and identifying the causes that lead, or may lead in the future, to the commission of torture or other forms of ill-treatment, including dire detention conditions, which are below the required international standards. The system further intends to engage in a constructive dialogue with the relevant authorities, delivering recommendations on how to tackle such causes both in practice and at a normative level. Finally, the NPM puts forward suggestions on existing or draft laws, towards ensuring the prevention and protection from torture and other ill-treatment on the basis of a comprehensive prohibition, which involves accountability for perpetrators, effective remedies for victims, and penal reform.

Regardless of its structural form, the NPM requires administrative, financial, personal, and institutional independence, as well as specialised and varied expertise, which play a crucial role in the NPM's success or failure in preventing torture and other forms of ill-treatment and in achieving its goals and objectives, as outlined in the Protocol. In the Palestinian context, and in light of the internal Palestinian political division and its consequences, including the mutual lack of trust, the NPM is highly relevant and plays an important role. Accordingly, complete independence and

professional performance of the NPM are necessary to guarantee trust in its experts, to allow them to design and effectively implement regular and unannounced visits to detention centres in both the West Bank and Gaza Strip and to engage in a constructive dialogue with the relevant authorities following the visits, in order to improve detention conditions in the West Bank and Gaza Strip. In addition, the NPM will be able to submit annual and periodic reports to the relevant authorities on the outcome of these visits, and publish them, in a transparent, credible, and professional manner, to enhance public oversight on performance.

The experts of the SPT and NPM enjoy UN privileges and immunities, as provided under the Protocol and in line with international standards. These privileges also include immunity for whistle-blowers of the crimes of torture and other ill-treatment, whether they are the detainees themselves, or law enforcement officials, or others, regardless of whether the information they provided to the NPM is correct or not, as its evaluation and follow-up is the responsibility of the NPM experts, provided that the information is not deliberately presented with the aim of misleading. Further, the NPM does not publish personal data, to ensure the public's trust in the NPM and the immunity, independence, credibility, and expertise of its members.

The independent NPM is organised at the constitutional level or by law, as stipulated by international guidelines. A wide-range of national consultations is required to ensure the transparency, independence, and effectiveness of both the mechanism and the sustainable system of visits to detention centres, whether they are regular or unannounced. All entities working in this field, which is multi-disciplinary, should participate in these consultations, including official bodies, political parties, including allies and opponents, civil society organisations, professionals and experts in the field, institutions visiting detention centres, and all concerned parties, in the West Bank and Gaza Strip. As such, the consultations shall reach a "national consensus" on the law of the NPM for the prevention of torture and other ill-treatment in Palestine, consistent with the Protocol and the relevant international standards.

The consultations, which were recently held in the West Bank regarding the 2019 Draft Law by Decree on the creation of the NPM for the prevention of torture in Palestine (hereinafter 'Draft Law by Decree'), need to be expanded to include the Gaza Strip. The Draft Law by Decree further needs substantive amendments, to be fully aligned with the Protocol, international standards, and best practices.

The Palestinian Legislative Council (PLC) should contribute to establishing and defining the NPM. Notably, a distinction should be made between the absence of the PLC and its deliberate absence from legal texts. This paper presents fundamental comments on the draft law and the role of the PLC, as it highlights the importance of issuing a decree calling for simultaneous presidential and legislative elections, to put an end to the crisis plaguing the Palestinian political system and fulfil human rights. The presented comments are further necessary to provide a free and transparent environment, which enables Palestinian citizens to practice their constitutional and legal right to freely choose their representatives, including respect for the results of elections and to preserve the continuity and regularity of elections, as mandated by the Basic Law and the constitutional legislator's will.

Provided that the NPM draft succeeds in the independence assessment, the NPM experts and their counterparts at the SPT will be able to construct and implement an effective and coherent system

of visits to detention centres in the West Bank and Gaza Strip, which will ensure the prevention of, and protection from, torture and other ill-treatment. The assessment of independence is carried out at the administrative and financial levels, as well as at the level of its members, both on a personal and institutional level, who will be transparently chosen, after setting a clear and specific basis and standards for the required type of experience, expertise, and specialisation, while also taking gender dimensions into consideration, as well as an equitable geographical distribution of members and immunity, as required by the Protocol. As such, the independence of NPM experts is crucial for the effectiveness of the NPM's performance, so that the mechanism can be fully enabled to exercise its functions and powers in the West Bank and Gaza Strip. The NPM experts must provide hope for victims, their families, and the public in combatting torture and other ill-treatment, preserve effective justice, respect human rights and dignity in detention centres, and build a legacy for the future.

However, if the NPM draft fails in the tests of independence and professionalism as well as the aforementioned standards, and fall short of the requirements set by the Protocol and international standards and best practices stipulated in the Draft Law by Decree, then the NPM will inevitably become an additional bureaucratic burden at the expense of the suffering of victims of torture and other ill-treatment and their families. Such a failure will further lead to the erosion the public's trust in the NPM. Thus, the manner in which the NPM is created will be the determining factor of its fate and future prospects.

Considering the NPM's official nature, the State of Palestine should officially announce its formation, and immediately inform the SPT of the committee designated as the NPM.

While NPM experts will face many questions in the course of their professional work, the answers of which may or may not be found within the OPCAT or international standards, it is upon them to contemplate this distinguished executive Protocol in depth, looking for answers. The universality and indivisibility of human rights along with their professional experience and expertise must further inform them whilst carrying out this task.

Introduction

The Palestinian Ministry of the Interior (hereinafter 'MoI') and the Independent Commission for Human Rights (hereinafter 'ICHR') invited civil society organisations, in writing, to participate in the national consultations on the Draft Law by Decree, which took place on 13 November 2019. The written invitation read the following: "this Draft [Law by Decree] was developed upon the accession of the State of Palestine to the OPCAT, after the Palestinian President Mahmoud Abbas signed it on 28 December 2017, which required the State's commitment to establish the NPM to prevent torture."

The invitation clarified that "in light of this, the Council of Ministers formed the governmental team to follow up with the establishment of the [NPM] on 26 October 2018. On 19 August 2019, the mechanism was adopted as an independent entity." The invitation further stated that "the governmental team has completed a draft law by decree on the establishment of the mechanism, which is presented to civil society for consultations and observations, to attain a joint collective work among all concerned parties for the prevention of torture in the State of Palestine. As an observer member in the team, the ICHR will lead the national consultations, in cooperation with the Palestinian government."

In paragraph 131 of its initial report to the UN Committee against Torture, the State of Palestine affirmed that its accession to the Protocol is an expression of the Palestinian government's commitment to establish an independent NPM, in accordance with the requirements stipulated by the Protocol and in coordination with the SPT.

The NPM is a system of regular and unannounced visits to all detention centres. According to the Protocol, the visits are carried out by "independent" expert entities to prevent all forms of torture and other cruel, inhuman or degrading treatment or punishment. This is the primary objective of the Protocol, to which the State of Palestine acceded on 28 December 2017. Article 1 of the Protocol affirms that "[t]he objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."

The Draft Law by Decree, which consists of 18 Articles, includes the following sections: definitions, the establishment of the NPM, its goals, competencies and powers, its formation, the confidentiality of collected information, the national committee responsible for selecting the members of NPM and its functions, the criteria for selecting the members of the NPM, membership requirements and loss of membership, immunity of members, and the administrative and financial system of the NPM.

Comments on the Draft Law by Decree

Having thoroughly examined the Draft Law by Decree, and in accordance with the OPCAT, international standards, and fundamental rules for establishing and defining NPMs, Al-Haq's key substantive comments on the Draft Law by Decree are as follows:

1. It is necessary to expand the geographic scope of national consultations on the Draft Law by Decree, to include the West Bank and Gaza Strip, as the mandate of the NPM should include both the West Bank and Gaza Strip. The national consultations should further be held in a manner that ensures the involvement of the various segments, sectors, and persons concerned in this field, including technical and specialised experts, who expertise in the work of the NPM, representatives of political parties, both allies and opponents of the authorities in the West Bank and Gaza Strip, academics, and human rights defenders. As such, all concerned entities will participate in a national constructive dialogue, which will aim to achieve "national consensus" on a law for the creation of an effective national mechanism to prevent all forms of torture and other ill-treatment.¹
2. The Draft Law by Decree is not annexed with an explanatory memorandum,² which clarifies the philosophy, goals, and objectives the Draft Law by Decree must encompass, in light of the State's accession to the Protocol and other relevant international standards. The explanatory memorandum further highlights the features of the Draft Law by Decree, specifically the methodology used, and everything that is associated with the independence and professionalism of the NPM, including: methods adopted to build an effective NPM system of visits, the standards and criteria used to select the members of the NPM, the immunities, detention centres, the funding of the NPM, and its relationship with the SPT in light of the Protocol and relevant international standards. It is further necessary to include an assessment of the Draft Law by Decree's social, political, and financial impact in the explanatory memorandum.³ Notably, the absence of an annexed explanatory memorandum to the Draft Law by Decree violates the government's legislative plan, which stipulates that, "[l]egislations shall be annexed with the explanatory memorandum for the draft and the reports related to meetings and workshops undertaken by the party submitting the draft."⁴
3. The Draft Law by Decree cites Article 69(a) of the amended Basic Law as a legal basis for the issuance of the Draft Law by Decree. The aforementioned Article provides that "[t]he Council of Ministers is competent to create or repeal bodies, institutions, authorities or similar units of the administrative apparatus, that are included in the executive apparatus of the government, provided that each is regulated by a law." Referring to the aforementioned constitutional text in the establishment of the NPM makes the NPM subordinate to the government. This further provides the government with the authority

¹ See APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 8 et seq.

² Legislative Plan of the Government, Executive Summary, Item Eight of the Guarantees for Good Execution of the Plan, p. 11.

³ Legislative Plan of the Government, Chapter Two, Guide to the Legislative Plan of the Government, Article 4, p. 17.

⁴ Legislative Plan of the Government, Executive Summary, Item Eight of the Guarantees for Good Execution of the Plan, p. 11.

and power to establish and repeal the NPM, in contravention of Articles 1 and 18 of the Protocol, which affirm the independence of the NPM. Accordingly, referencing Article 69(a) of the Basic Law to establish the NPM is in violation of the OPCAT.

In the Palestinian context, the establishment of the NPM and its independence from the executive authority, similar to the requirements for independence of the Palestinian national human rights institution, ICHR, and the Central Elections Committee. The guidelines developed by the SPT on the establishment of NPMs affirm that “[t]he operational independence of the NPM should be guaranteed.”⁵

4. Article 1 of the Draft Law by Decree, titled “[NPM] for the Prevention of Torture in Palestine,” defines the NPM as “[NPM] for the prevention of torture.” Article 2(1), under “the Establishment of the [NPM],” states the following: “[a]ccording to the provisions of this Draft Law by Decree, a national body called the National Preventive Mechanism, for the prevention of torture is established.” Notably, both the name of the Draft Law by Decree and its provided definition deal only with torture, failing to mention practices amounting to other forms of ill-treatment. This is despite the fact that both torture and other cruel, inhuman or degrading treatment or punishment are equally prohibited, and highlighted both in the name and content of the Convention and the Protocol, to which the State of Palestine has acceded. It is worth noting here that the SPT includes in its designation, as mandated under Article 2 of the Protocol, both torture and other cruel, inhuman or degrading treatment or punishment. As such, when referring to the SPT as ‘the Subcommittee on Prevention of Torture,’ this is only meant for brevity, as evidenced by Article 2 of the Protocol.

Accordingly, the title of the Draft Decree by Law should be amended to “[NPM] for the prevention of torture and other ill-treatment in Palestine,” to avoid the confusion that the functions of the NPM are limited to torture practiced in detention centres, rather than also including other forms of ill-treatment, for both torture and other ill-treatment are prohibited and fall under the jurisdiction of the NPM.

5. Article 1 of the Draft Law by Decree defines places of deprivation of liberty as “all official places in which a person is detained and deprived of their liberty, including correctional and rehabilitation centres, detention centres, shelter facilities, psychiatric hospitals, and means of transportation of detainees, that are located in within the jurisdiction of State of Palestine or under its effective control.” Yet, the Article seems to limit places of deprivation of liberty to official places.

Restricting places of deprivation of liberty to “official” detention places in the definition is insufficient and is on violation to the Protocol. The Guide developed by the Association for the Prevention of Torture (APT) for the Establishment and Designation of NPMs stresses that: “[i]t is not enough that the NPM be given the right to visit places that the government has officially designated as a prison, police station, or other publicly recognized institution where people are ordinarily deprived of liberty under a lawful order. The NPM must also have access to unofficial places of detention, i.e. any place where a

⁵ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 8.

person may be being held for reasons connected with public authority, even if no public official actually formally ordered the detention.”⁶

6. Article 2(3) of the Draft Law by Decree states that “the [NPM] shall have an independent financial status within the public budget.” The lack of clarity in the Article weakens the NPM and may even lead to paralyzing its functions. If the intention of the Article is to limit the financial resources of the NPM to financial allocations in the public budget only, to control the NPM through these financial allocations, whether by reducing its financial budget or slowing the processes of financial transfers and payment orders by the Ministry of Finance, this may jeopardise and imperil the functions of the NPM, especially the effective and sustainable system of visits in the West Bank and Gaza Strip. This concern is compounded by former experiences in practices, throughout the previous years, which distinctly indicate the irregularity of the implementation of the Palestinian public budget, payment orders, and financial transfers from the Ministry of Finance to many entities listed on the public budget.

The SPT guidelines on NPMs affirm that “[t]he necessary resources should be provided to permit the effective operation of the NPM in accordance with the requirements of the Optional Protocol.”⁷ It further provides that “[t]he NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol.”⁸ Therefore, it is necessary for the Draft Law by Decree to ensure the availability of financial resources and to secure the financial and administrative independence of the NPM.

For example, Article 12 of Law by Decree No. 1 of 2007 on General Elections, under the section on “Independence of the Committee,” stipulates that:

- “1. The [Central Elections] Committee has legal personality and administrative and financial independence;
2. The Committee has an allocated budget presented as an independent financial status within the public budget.”

Nevertheless, and noting that the Central Elections Committee receives unconditional funding to fully carry out its functions, it still suffers greatly from delayed financial transfers allocated in the public budget by the Palestinian Ministry of Finance at the stage of budget implementation.

Article 2(3) of the Draft Law by Decree should consider the financial independence of the NPM in the public budget. It should further enable the NPM to acquire “unconditional” funding, external from the public budget framework, to efficiently, effectively, and independently implement its functions, programmes, and activities, without influence from the executive authority as a result of its financial allocation in the public budget.

⁶ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 21.

⁷ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 11.

⁸ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 12.

Article 5(4) of Law by Decree No. 37 of 2018, regarding the amendment of the Anti-Corruption Law No. 1 of 2005 and its amendments, states that: “the financial resources of the [Anti-Corruption] Commission consists of the annual sums allocated for it within the public budget, based on the recommendation of the Commission’s chairman and upon the approval of the Council of Ministers, and the unconditional aid and donations provided to the Commission.” As such, Al-Haq suggests for the Draft Law by Decree to be amended to resemble the aforementioned provision. Accordingly, the recommendation, in the Draft Law by Decree, shall be made by the NPM, in order to preserve the institutionalisation and effectiveness of the NPM’s work.

Further, the SPT guidelines on NPMs emphasise that “[t]he NPM should establish a work plan/programme which, over time, encompasses visits to all, or any, suspected, places of deprivation of liberty... which are within the jurisdiction of the State.”⁹ While the mandate of the NPM includes all places of deprivation of liberty in the West Bank and Gaza Strip, it should further possess the necessary resources to fully carry out its functions.

7. Article 2(4) of the Draft Law by Decree states that the NPM “shall be subjected to the supervisory authorities of the State Audit and Administrative Control Bureau and the Anti-Corruption Commission.” As such, the Article disregards the Protocol, which accords the NPM UN privileges and immunities, according to Article 35 of the Protocol, which states that “[m]embers of the Subcommittee on Prevention and of the [NPMs] shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.” In line with its immunities mandate, “permission” is required prior to any intrusion of any matters of the NPM. Similarly, no entity, except for the NPM, can acquire or deal with sensitive personal or professional data collected from detainees or official and civil society employees, which will be available to the NPM as a result of the system of visits. As such, this Article would imperil trust in the NPM and its performance.¹⁰

⁹ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 33.

¹⁰ Article 35 of the Protocol requires Palestinian national legislation to provide “UN privileges and immunities” for the SPT and NPM, enabling them to perform their functions independently and effectively. Sections 22 and 23 of the UN *Convention on the Privileges and Immunities of the United Nations* applies to the SPT to enable it to perform its functions within the State of Palestine under the Protocol. These provisions of the *Convention on the Privileges and Immunities of the United Nations* should be used as a model for the privileges and immunities of members of the NPM during and after their mandate as NPM experts, in relation to NPM functions. Section 22 of the *Convention on the Privileges and Immunities of the United Nations*, which is applicable to the SPT and the NPM, states the following: “[e]xperts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded: (a) immunity from personal arrest or detention and from seizure of their personal baggage; (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations; (c) inviolability for all papers and documents; (d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags; (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions; (f) the same

Sections 22 and 23 of the Convention on the Privileges and Immunities of the United Nations, which was adopted by the UN General Assembly on 13 February 1946 and entered into force on 17 February 1949, apply to the SPT, allowing it to carry out its duties within the State of Palestine, as mandated by the Protocol. The aforementioned sections “should serve as a model for similar privileges and immunities for the members of each NPM,” including during the period of membership of the NPM and in connection with their NPM work, as well as after the period of membership.¹¹ The guidelines developed by the SPT further emphasise that “[t]he State should ensure that both the members of the NPM and its staff enjoy such privileges and immunities as are necessary for the independent exercise of their functions.”¹²

8. As required by the Protocol, immunity for whistle-blowers of the crimes of torture and other ill-treatment should be provided in the Draft Law by Decree, regardless of whether the information they provide to the NPM is correct or not, as its examination, evaluation, and follow-up is the responsibility of NPM experts.

Article 21(1) of the Protocol provides that “[n]o authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the [NPM] any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.”

The SPT guidelines on NPMs further stress that “[t]he State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.”¹³

Confidentiality, independence, and the non-governmental nature of the NPM are fundamental requirements for the mechanisms’ work, as provided by the Protocol. These are intended to create an atmosphere of openness with detainees and officials working in detention centres, allowing them to willingly volunteer to disclose information on circumstances within detention centres, as specified by Articles 20(d)¹⁴ and 21 of the

immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.” Section 23 of the *Convention on the Privileges and Immunities of the United Nations*, which is mentioned in Article 35 of the Protocol, stipulates that: “[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.” Further, the APT’s Guide on *Establishment and Designation of National Preventive Mechanisms* explicitly states that “[t]hese privileges and immunities must apply personally to each member of the NPM. However, as they are intended to secure the independence of the NPM and not for the personal benefit of the member, the full NPM membership, on a clear majority vote (for instance, 2/3 or 3/4), could be given the ability to waive the immunity in individual cases under defined circumstances.” See APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 43.

¹¹ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 43.

¹² SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 26.

¹³ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 27.

¹⁴ To enable the NPMs to fulfill their mandate, Article 20(d) of the OPCAT requires States to grant NPMs “[t]he opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally

OPCAT, which guarantee the NPM's competence to privately interview detainees.¹⁵ To ensure the effectiveness of the system of visits and redress for victims, the right of NPM experts to interview detainees and others who need to be interviewed, at any time, day or night, must be upheld and protected. Notably, confidential information includes personal data or details that the person communicating with the NPM wishes to remain classified, whereas reports, letters, and information issued by the NPM should be made available to the public, as required by the Protocol,¹⁶ and in line of individuals' right to access to information, as protected under the International Covenant on Civil and Political Rights (ICCPR), which will be further highlighted in the following points.

9. Article 3 of the Draft Law by Decree states that “[t]he mechanism aims to realise the following goals:
 1. Achieve legislative harmony, to ensure the prohibition and criminalisation of torture other forms of ill-treatment, or cruel, inhuman or degrading punishment;
 2. Ensure the prevention and prohibition of torture other forms of ill-treatment, or cruel, inhuman or degrading punishment;
 3. Adopt means and measures to prevent torture and ill-treatment.”

It is further necessary to add other fundamental goals of the NPM, which are specified by the Protocol, including to:

1. Design and implement an effective and sustainable system of visits to places of deprivation of liberty, to prevent torture and other ill-treatment, enhance the protection of those deprived of their liberty and ensure their access to effective remedies.
 2. Engage in a constructive dialogue with the relevant authorities, to improve the conditions and treatment of those deprived of their liberty, and to thoroughly prevent all forms of torture and other ill-treatment.
 3. Ensure the independence of the NPM and its compliance with the Protocol and international standards.
10. Article 4 of the Draft Law by Decree reads: “the NPM shall undertake the following functions and powers:
 1. Conduct periodic regular or unannounced visits to places of deprivation of liberty;
 2. Enjoy unimpeded and comprehensive access to all facilities of places of deprivation of liberty;

or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information.”

¹⁵ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 86.

¹⁶ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 58 et seq.

3. Enjoy unrestricted access to all information, data, documents, and reports concerning the number and names of persons deprived of their liberty, their detention conditions, and places of deprivation of liberty, their number and locations;
4. Conduct interviews with persons deprived of their liberty, in an individual or collective capacity, in the presence of a sworn interpreter, if necessary, and without the direct or indirect presence of law enforcement officials or other authorities that the inmate has no desire to meet;
5. Conduct interviews with anyone that can provide information relevant to the NPM's mandate;
6. Enjoy unrestricted access to all information related to gathering inferences, preliminary investigations, conducted by the Public Prosecution, and trial procedures;
7. Submit recommendations based on the conducted visits to the relevant official authorities to prevent torture, and follow up on their implementation;
8. Submit an annual report to the President, the Prime Minister, the President of the PLC, the President of the High Judicial Council, and the Attorney General;
9. Provide suggestions and observations on existing legislation or draft laws concerned with the prevention of torture;
10. Contribute to awareness-raising on the crime of torture and ill-treatment, or cruel, inhuman or degrading punishment;
11. Conduct agreements and arrangements with the competent authorities and coordinate and cooperate with all formal and informal institutions, at the national and international levels;
12. Prepare the annual budget of the NPM;
13. Prepare the organisational structure for the NPM's work;
14. Contract experts and technical personnel;
15. Issue internal decisions and regulations necessary to implement the provisions of this law by decree.”

To guarantee the transparency and effectiveness of the work of the NPM, this provision should be modified, adding a clause which aims at clearly affirming the NPM's responsibility to publish annual and periodic reports, containing all information considered necessary in its field of work. This amendment will further preserve the right to access information, as required by Article 19 of the ICCPR and General Comment No. 34 of the

UN Human Rights Committee on freedom of opinion and expression, which encompasses the right of access to information, as a fundamental and natural right.

The APT Guide on Establishment and Designation of NPMs clearly provides that “[i]n order to ensure sustained improvement of the treatment of persons deprived of their liberty and conditions of detention, the [NPMs] must be able to report upon and disseminate their findings.”¹⁷ Article 23 of the Protocol provides that the protection of this right is not limited to the NPM alone, but that it is also incumbent upon the State to ensure that the NPM is enabled to do so.

The SPT guidelines on NPMs stress that “[t]he State should publish and widely disseminate the Annual Reports of the NPM. It should also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament. The Annual Reports of the NPM should also be transmitted to the SPT which will arrange for their publication on its website.”¹⁸ The guidelines further highlight the importance of the NPM’s right to organise hearing, and to invite concerned parties and anyone the NPM deems beneficial to listen in on these sessions.

Paragraphs 1 and 2 of Article 4 of the Draft Law by Decree examine the NPM’s competence to conduct regular and unannounced visits, without prior notification, to places of deprivation of liberty, with unrestricted access to all facilities of places of detention without exceptions. These provisions must be amended to include “unrestricted access at any time.” Articles 14 and 19 of the Protocol accord the SPT and the NPM “unrestricted” access to all places of deprivation of liberty and facilities, day or night. This power of the SPT should further be specified in the Draft Law by Decree.

The SPT guidelines on NPMs confirm that “[t]he State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out unannounced visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol.”¹⁹ At the same time, the APT Guide on Establishment and Designation of NPMs affirms the NPM’s power to access to all places of detention, within the broad sense, as provided by the Protocol. In line with Article 14 of the Protocol, the APT Guide stresses that “no circumstances permit even a temporary objection by the government to any visit by the NPM; it is entitled to access at any time of day or night.”²⁰ In 2006, the Joint Committee on Human Rights of the Parliament of the United Kingdom considered that “a power of unannounced inspection is important to the effectiveness of such a monitoring mechanism” in line with the Protocol.²¹

Paragraph 4 of Article 4 of the Draft Law by Decree, which specifies the power of the NPM to conduct interviews with persons deprived of their liberty without the presence of law

¹⁷ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 67.

¹⁸ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 29.

¹⁹ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 25.

²⁰ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 56.

²¹ UK Parliament, Joint Committee on Human Rights, 19th Report of Session 2005-2006, 18 May 2006, para. 37, available at: <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>.

enforcement officials, if the inmate has no desire to meet them, must be amended, by removing “the inmate” from the aforementioned clause to read: “if there is no desire to meet them.” As such, the clause will include both the persons deprived of their liberty and members of the NPM. Such an amendment is necessary because law enforcement officials may, for example, pressure inmates to express desire for the presence of law enforcement officials during the interview with the NPM inside detention centres. Should this be the case, the mere purpose of the visit, which is to reveal the truth of situations in detention, would be undermined. In addition, law enforcement officials should be prohibited to listen in on or to monitor the visits by the NPM.

Furthermore, the mandate of the NPM includes all civilian and military detention centres, as stressed by the Protocol. Therefore, it is necessary to include the military prosecution and the military judiciary in paragraphs 6 and 8 of Article 4 of the Draft Law by Decree, which address the NPM's power of unrestricted access to all information related to gathering inferences, preliminary investigations, trial procedures, and submitting the annual report. The requirement of periodic reports of the NPM should also be provided for in paragraph 8 of Article 4, as the reporting obligation should not be limited to the submission of annual reports.

Following its visit to the Republic of Tunisia on 4 April 2016, the SPT highlighted, in its report on the Tunisian NPM, “[t]he fact that places of detention under the jurisdiction or control of the Ministry of the Interior and the Ministry of National Defence, particularly police stations and military prisons, are not explicitly mentioned in article 2 of [Organic Act No. 2013-43 of 23 October 2013], which may give rise to restrictive interpretations of the powers of the mechanism and may directly undermine its mandate and its work.”²² As such, and in line with the view of the SPT, Palestinian military prisons must be included in the Draft Law by Decree, as they are under the jurisdiction of the NPM, and thus NPM experts must be allowed to exercise their mandate there through regular and unannounced visits.

11. It is necessary to set a short period of time for the competent authorities in the government to answer the correspondences and recommendations of the NPM. The NPM must also be granted the necessary powers in this regard. At the same time, any delay in answering the correspondence and reports of the NPM must be prevented, considering the grave nature of the crime of torture.²³

The APT Guide on Establishment and Designation of NPMs confirms that “[t]he receiving authority should have a correlating duty under national law, to respond to the recommendations, or if it is not itself competent to implement the recommendations in question, to identify and refer the recommendations to another competent authority which

²² SPT, Visit to Tunisia undertaken from 11 to 14 April 2016: observations and recommendations addressed to the national preventive mechanism, Report of the Subcommittee, UN Doc. CAT/OP/TUN/2, 11 August 2017, para. 8(a).

²³ Article 2(1) of the Convention provides that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 4(2) of the Convention states that “[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

would have the duty to respond.”²⁴ The Guide further affirms: “[t]he legislation empowering the NPM should allow the NPM to set a defined period within which it expects a response and dialogue with the competent officials.”²⁵ Consequently, the Draft Law by Decree must include a defined and short period of time to respond to the NPM. Further, the NPM should be granted broad powers, enabling it to determine the period of time necessary to respond to its observations and recommendations, due to the grave nature of the crime of torture, pursuant to its absolute prohibition, and to enable the NPM to effectively, professionally, and thoroughly perform its functions and responsibilities.

12. The Draft Law by Decree must include the criminalisation of any hindering or obstruction, by the competent authorities of the functions of the NPM, to ensure respect for its mandate, functions, and powers, and to guarantee their implementation on the ground. The absence of legal provisions, which ensure accountability if competent authorities hinder, obstruct, or otherwise undermine the functions and powers of the NPM, regarding torture and other ill-treatment within places of deprivation of liberty, significantly weakens the effectiveness of the system of visits and the implementation of NPM’s recommendations and observations. This would further have a negative impact on the prevention and protection from torture and other ill-treatment and the protection of those deprived of their liberty, as well as possibilities of redress in the State of Palestine.

13. Article 5 of the Draft Law by Decree, which is included under the section “Forming the NPM,” provides the following:

“1. The NPM comprises 13 members with the following competencies and experiences:

- a. Persons with experience in the legal field;
- b. Activists from human rights organisations, specialised in combating torture, the rights of women, children, or persons with disabilities and special needs;
- c. Physicians specialised in anatomy and psychiatry or other relevant doctors; and
- d. Experienced social workers.

2. The membership term mentioned in paragraph 1 of this Article, is three years, renewable once only.

3. The members choose the President and Vice-President from within the NPM.

4. A presidential decree is issued with the names of the members, based on the placement of the Council of Ministers and a recommendation of the National Committee.”

²⁴ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 68.

²⁵ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 68.

Due to the absence of clear foundations, criteria, and conditions in the selection process for the members of the NPM in this Article, the formation of the NPM and its ability to effectively and professionally assume its duties are weakened. The selection process is referred to in general terms in this provision, which may negatively impact transparency and professionalism. Further, the independence of the NPM is greatly weakened as the procedure for appointing the members of the NPM is controlled by the executive authority. As the executive authority controls the “decision of appointment and substantial placement,” the role of the National Committee, which will subsequently be examined in detail, is limited to “recommendations.” As such, implementing the recommendations of the National Committee is “non-mandatory.” Therefore, the executive authority (the President and the government) would fully control the procedures of appointment of NPM members, in violation of the Protocol.

Accordingly, the conditions and expertise required to select the “experts” of the NPM must be clearly defined rather than being generalised and indistinct, to ensure transparency and professionalism in the selection process and the nomination and appointment of members under the law. The selection process should further occur without influence from the executive authority, ensuring the full independence of the NPM and its ability to effectively and professionally implement its functions in the West Bank and Gaza Strip.

The SPT guidelines on NPMs emphasise that “[t]he NPM should be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society. This should also apply to the process for the selection and appointment of members of the NPM, which should be in accordance with published criteria.”²⁶ The guidelines further affirm that “[m]embers of the NPM should collectively have the expertise and experience necessary for its effective functioning.”²⁷ They further stipulate that “[t]he State should ensure the independence of the NPM by not appointing to it members who hold positions which could raise questions of conflicts of interest.”²⁸ Similarly, they also state that “[m]embers of NPMs should likewise ensure that they do not hold or acquire positions which raise questions of conflicts of interest.”²⁹

Independence³⁰ in selecting and appointing members of the NPM is crucial for the NPM to achieve its goals and objectives and for its communication with the SPT. Independence is also a critical criterion for forming an orderly, coherent, and effective “system” of visits,³¹ based on transparency and inclusiveness, to enhance the protection of persons deprived of their liberty, from the perspective of the OPCAT, which is an executive Protocol and differs in this regard from other protocols supplementing core human rights treaties to which the State of Palestine has acceded.

While the Protocol provides States Parties with the flexibility to set up the NPM, neither the Protocol nor the SPT allow for the criterion of independence to be compromised in the

²⁶ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 16.

²⁷ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 17.

²⁸ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 18.

²⁹ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 19.

³⁰ Articles 1 and 18 of the Protocol clearly affirm the administrative and financial independence of NPMs.

³¹ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 16 et seq.

establishment and functioning of the NPM. As such, Article 1 of the Protocol, under Part I on “general principles,” emphasises that the objective of the Protocol is to establish a system of regular visits by independent international and national bodies.

If the executive authority has the power to dissolve, replace, amend, and establish the NPM’s mandate, the NPM’s independence is at stake. Notably, even if the executive never intended to exercise such powers, the independence of the NPM is still endangered, as the possibility itself negates the independence of the NPM.³² Accordingly, the NPM must be formed in accordance with a constitutional or legislative text that provides key elements, including recruitment procedures, terms of employment, jurisdiction, powers, financing, and responsibility and accountability systems and standards.³³

In this regard, the APT Guide on Establishment and Designation of NPMs confirms that “the law creating the NPM should not place the institution or its members under the institutional control of a ministry or minister of government, cabinet or executive council, President or Prime Minister. The only authority with the ability to alter the existence, mandate or powers of the NPM should be the legislature itself. The law should expressly provide that ministers and other public officials may not issue instructions, directly or indirectly, to the NPM.”³⁴

The independence of the NPM from the executive authority and other official authorities and bodies, allows the NPM experts to thoroughly implement their functions and apply an effective system of visits to all places of detention, within the broad sense enshrined in the Protocol throughout the West Bank and Gaza Strip. Accordingly, the independence of the NPM is crucial for its system of visits, which includes detailed regular visits as well as complementary unannounced visits, and entails intensifying visits in specific places, determined by the nature and needs of the programme, as the core of the NPM’s work. The independence of the NPM is also necessary for the financing of all programmes and functions of the NPM, including a constructive dialogue with the other concerned parties in the West Bank and Gaza Strip. It is also pivotal for conducting the required training, capacity building, and educational programmes, engaging in an open communication with the SPT, exchanging experiences with States that have long-standing and significant experiences in the field, and ensuring the effectiveness, stability, and sustainability of the system in all places of deprivation of liberty.

The International Council for Human Rights Policy and the Office of the UN High Commissioner for Human Rights (OHCHR) have suggested that the mandate of national human rights institutions should be for a period of five years for “[it] is a reasonable period within which members can be effective but not too influenced by concerns about future job prospects.”³⁵ The SPT guidelines on NPMs deal with this question by stressing that

³² APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 39.

³³ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 39.

³⁴ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 39.

³⁵ International Council on Human Rights Policy and OHCHR, *Assessing the Effectiveness of National Human Rights Institutions*, Geneva, 2005, p. 12. See also APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 42.

“[p]eriods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM.”³⁶

Notably, paragraph 2 of Article 5 of the Draft Law by Decree, regarding the NPM membership period, suggests that the formation of the NPM ends with the end of the membership period set forth in the aforementioned provision, for the paragraph, not the Draft Law by Decree, does not refer to the process of selecting new members of the NPM, after the expiry of the stated membership period.

14. Article 6 of the Draft Law by Decree states the following:

- “1. The collected information by the NPM is confidential.
2. It is prohibited to publish any personal data, except in one of the following cases:
 - a. Explicitly approved by the individual in question; and
 - b. Commanded by a judicial order.”

In violation of the Protocol and the right of individuals to access information, this Article strips the Convention and the NPM of their essence. Materials such as reports conducted by NPM experts, as well as recommendations, studies, and other research carried out should be made available to the public, to allow for oversight over the mechanism’s transparency and professionalism, and the effectiveness of its performance. Achieving public oversight over the performance of the NPM also requires enhancing confidence in the mechanism’s performance in preventing torture and other ill-treatment, protecting individuals deprived of their liberty, and realising penal reform.

Publishing personal data of persons deprived of their liberty should only require their consent. There is no basis or justification for requiring a judicial order, which was specified in the Draft Law by Decree. This would mean that if the victim agrees to publish personal data, and the judiciary opposes it, it may not be published because the condition was not met. Consequently, this requirement will negatively affect victims’ trust in the experts of the NPM, since it would exceed the will of the victim and the NPM, and is contrary to the Protocol.

The APT Guide on Establishment and Designation of NPMs confirms that “[t]he NPM must also have the ability to submit proposals and observations concerning existing or draft legislation, whether in its annual report, in individual visit reports, or in a separate special submission or report.”³⁷ The Guide also affirms that “[n]othing in the OPCAT precludes the NPM from deciding to make other reports, and especially individual visit reports, public. For example, issues that arise across a number of institutions could lead the NPM to publish a thematic report. Such reports cannot contain personal data without the express

³⁶ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 9.

³⁷ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 67.

consent of the person involved [the victim], but the NPM could include aggregate or otherwise fully anonymous information derived from personal data.”³⁸

As confirmed by Article 21(2) of the Protocol, “[c]onfidential information collected by the [NPM] shall be privileged. No personal data shall be published without the express consent of the person concerned.” Similarly, the APT Guide explicitly affirms “[p]ersonal data held by the NPM should be protected against disclosure without consent of the person involved; however, the law should also permit the NPM an unrestricted ability to publish aggregate information derived from personal data, and other information that otherwise renders personal data truly anonymous.”³⁹ The Guide further stipulates that “the legislation should also be sure to permit the NPM to disclose or publish data about individuals where the individual gives express consent. The government should not be permitted to hide behind rhetoric about ‘personal privacy rights’ in order to block release of data that both the NPM and the person concerned would otherwise make public.”⁴⁰

As such, this clarifies how the NPM should deal with personal data in its work. Regarding the NPM’s mandate to issue reports, recommendations, studies, and research, it has been previously emphasised that such materials must be published in accordance with the requirements of the Protocol, the SPT guidelines on NPMs, and requirements underpinning the right of access to information in accordance with the ICCPR. Further, the APT Guide confirms that “[i]n order to ensure sustained improvement of the treatment of persons deprived of their liberty and conditions of detention, the [NPMs] must be able to report upon and disseminate their findings.”⁴¹

15. Article 7 of the Draft Law by Decree states: “[b]ased on the Council of Minister’s decision, a National Committee shall be formed to select the members of the NPM, as follows:

1. Two government employees with professional experience and expertise in the field of human rights, provided that their actual period of service is not less than ten years;
2. Three representatives of civil society organisations with jurisdiction in the field of human rights;
3. A representative of the Bar Association;
4. A representative of the Physicians Syndicate; and
5. A representative of the Independent Commission for Human Rights, as an observer.”

The Article stipulates that the National Committee, which selects the experts of the NPM, should be formed by a decision issued by the government. In addition, as previously

³⁸ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 67.

³⁹ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 62.

⁴⁰ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 59.

⁴¹ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 67.

highlighted in relation to Article 5(4) of the Draft Law by Decree, which provides that the NPM is formed by a presidential decree with the names of members based on the placement of the Council of Ministers and a non-binding recommendation from the National Committee, clearly indicate the executive authority's control over the NPM, including control over its formation, in violation of the provisions and requirements set by the Protocol.

Similar to the issues encountered with the formation of the NPM, the formation of the National Committee, which is unclear as to whether it is a permanent or temporary committee, lacks coherent and specific foundations, criteria, and conditions for the selection of its members. The Article further depends on generalisation, which create challenges in upholding transparency in practice. Since the executive authority controls the mechanism for appointing the members of the National Committee and the NPM, such an approach, as is prevalent in the Palestinian context, may turn into a process of distribution of membership (quotas) both in the National Committee and the NPM. It may, therefore, lead to stripping the NPM and the OPCAT of their functions and effectiveness.

The SPT guidelines on NPMs confirm that “[t]he State should ensure the independence of the NPM by not appointing to it members who hold positions which could raise questions of conflicts of interest.”⁴² The guidelines further emphasise that “the NPM should ensure that its staff have between them the diversity of background, capabilities and professional knowledge necessary to enable it to properly fulfil its NPM mandate. This should include, *inter alia*, relevant legal and health-care expertise.”⁴³

Forming an independent mechanism, regardless of its name, to select the experts of the NPM, through wide-ranging consultations in the West Bank and Gaza Strip, is necessary and crucial. It is further important for the independent mechanism to maintain full confidence in the national consultations in the West Bank and Gaza Strip. Further, clear and specific criteria, standards, and conditions for selecting each member of the independent mechanism, who will then select the experts of the NPM, must be established. Once the experts of the NPM are chosen by the mechanism and have taken on their responsibilities, the mission of the mechanism should end, in accordance with the provisions of the Protocol, for its mission is limited to the selection of experts of the NPM. To avoid control by the executive authority and to end the approach of distributing positions and creating quotas, which is prevalent in the Palestinian context, clear and coherent foundations, criteria, and conditions for selecting the experts of the NPM should be specified and provided in the Draft Law by Decree. Transparency, values, and a clear methodology are needed to ensure the prevention and protection from torture and other ill-treatment and to guarantee effective remedies for victims, ensure constructive dialogue with the concerned authorities in the West Bank and Gaza Strip, improve the treatment of those deprived of their liberty and conditions of detention, achieve penal reform, enhance the human rights situation and respect for human dignity, and implement the treaties to which the state of Palestine has acceded without reservations.

⁴² SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 18.

⁴³ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 20.

The guarantee of independence in the formation of the NPM plays a pivotal role in its effectiveness and professional performance, as well as enhancing people's trust of in its good performance, and ensuring the prevention and protection from torture and other ill-treatment of those deprived of their liberty. It also plays a critical role in the Palestinian context, in light of the internal political division, its disastrous effects on the human rights situation, and the continued commission of torture and other ill-treatment in the West Bank and Gaza Strip. Further, the impact of the division and its consequences, including the lack of confidence and the state of polarisation, creates great challenges that put the future of the NPM to the test, even before it begins its functions in the West Bank and Gaza Strip. Therefore, any complacency in the independence, formation, professional performance, and effectiveness of the NPM will undermine the public's confidence in the NPM and impede its progress. As such, the NPM may turn into yet another body that does not enjoy the confidence of the people, and therefore, undermining the hope of those deprived of their liberty, their families, and individuals to realise an ambitious and effective system, which aims at preventing and protecting from torture and other ill-treatment and achieving the reform of the criminal justice system.

16. The role of the PLC, the legislature, at the level of legal texts, was not addressed in the Draft Law by Decree, especially with regard to the selection of experts of the NPM. Notably, such an approach has been prevalent in laws by decrees issued by the presidency since the start of the Palestinian political division in 2007.

A distinction should be made between the absence of the PLC on the ground, and its absence in legal texts, as its absence in legal texts will seriously affect the role of the Parliament after the return to parliamentary life. Therefore, the Draft Law by Decree can state, for example, the establishment and formation of the NPM, temporarily, taking into account observations thereof, until the PLC, that is delegated by the people, the source of powers, by legislation and constitutional oversight, assumes its constitutional duties, for it has the right to choose the permanent NPM. This approach is different from the traditional approach that involves presenting the laws by decree, after their promulgation and publication in the Official Gazette, to the PLC in the first session convened after the Parliament is reconvened.

The aforementioned approach is similar to the methodology used in Article 2(5) of the Draft Law by Decree, which stipulates that the headquarters of the "permanent" NPM will be in Jerusalem, whereas they are stationed "temporarily" in Ramallah and Gaza, as appropriate. Thus, the role of the legislature is guaranteed in the law, with an emphasis on the importance and necessity of holding free and fair general elections, while respecting their results and ensuring regularity, as soon as possible, for that is a constitutional entitlement and a right of citizens.

In December 2019, all Palestinian political factions and parties in the West Bank and Gaza Strip, including Fatah and Hamas, agreed, in writing, to hold general legislative and presidential elections. They further agreed that the elections will be held within four months of the date of a presidential decree calling for conducting general elections, in accordance with the Law by Decree of 2007 on General Elections. The independent Central Elections Committee announced that it was fully prepared to carry out the electoral process

in the West Bank and Gaza Strip. That said, the presidential decree has not yet been issued. Therefore, issuing a presidential decree calling for simultaneous general legislative and presidential elections, as stipulated in the Law by Decree on General Elections, is required, without delay.

The APT Guide on Establishment and Designation of NPMs confirms that “[t]he only authority with the ability to alter the existence, mandate or powers of the NPM should be the legislature itself. The law should expressly provide that ministers and other public officials may not issue instructions, directly or indirectly, to the NPM.”⁴⁴ The SPT guidelines on NPMs further stipulate that States should ensure that Parliaments are informed of the NPM’s annual reports and have the opportunity to discuss these reports.⁴⁵

17. Article 8 of the Draft Law by Decree states the following: “[t]he tasks of the National Committee shall be as follows:

1. The official announcement of opening the doors for membership of the NPM via at least two local newspapers and advertising through the official audio-visual media;
2. Receiving applications for candidacy for a period of no less than thirty days;
3. Reviewing all applications for the selection of members, according to the criteria specified in this Law by Decree;
4. Re-announcing the opening for membership, if the number of persons nominated does not reach twice the number of members of the NPM; and
5. The Committee will be content with the applications submitted, whatever their number after re-announcement referred to in paragraph 4 of this article.”

The Article does not refer to the fate of the National Committee once it has completed its task of selecting the experts of the NPM. Will the National Committee then cease to exist? In the case of its continuation, what will the Committee’s role be, noting that the Committee’s mission ends once the selection of NPM experts is complete, in accordance with the relevant conditions and criteria which need to be determined?

The Article further provides that the National Committee will review the applications to select the members of the NPM “according to the criteria specified in this Law by Decree.” That said, the Draft Law by Decree fails to provide specific standards for NPM experts, as they were referred to in a generic and generalised manner, providing that the experts should be individuals with experience, specialists, relevant actors, and working in specialised institutions. Similarly, the criteria that one should adhere to whilst selecting member of the National Committee was presented in a generalised manner in the Draft Law by Decree. Only one specification, in regards to the requirement of an employment period of ten years for the two government employees, was identified regarding the selection of the members of National Committee, upon a decision from the Council of Ministers. The role of national

⁴⁴ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 39.

⁴⁵ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 29.

consultations, which are supposed to be held in the West Bank and Gaza Strip, in regard to selecting the experts of NPM through national consensus has not been indicated. These result in shortcomings in the mechanism's methodology and independence.

18. Article 9 of the Draft Law by Decree states “[w]hen selecting the members of the NPM, the National Committee must adhere to the following criteria:

1. The guidelines on establishing NPMs;
2. The Paris Principles for National Human Rights Institutions;
3. The number of persons nominated must not be less than twice the number of members of the NPM, in accordance with Article 8 of this Law by Decree;
4. Balanced gender representation;
5. Representing different segments of society; and
6. Ensuring equitable geographical representation as far as possible.”

This Article fails to establish, develop, or specify the “defined” foundations, criteria, and conditions used to select NPM experts, including with regard to their expertise, competencies, and experience. The process to select the NPM experts is crucial for they will be tasked with designing and implementing an effective system of visits, write reports and recommendations, and conduct open conversations with the SPT to prevent torture and other ill-treatment, protect those deprived of their liberty, provide avenues of redress, improve detention conditions, and guarantee penal reform. Notably, the guidelines on establishing NPMs and the Paris Principles do not include “defined” criteria and conditions that would be duplicated into the standards and criteria for selecting NPM experts. Therefore, Article 9 of the Draft Law by Decree fails to present defined and specific criteria necessary for the selection of NPM members.

19. Article 10 of the Draft Law by Decree states the following:

“1. The candidate for membership in the NPM must fulfil the following conditions:

- a. Hold Palestinian nationality;
- b. Have full legal capacity;
- c. Not occupy any official position, public consultative position, or be a member of a political party;
- d. Not be convicted of a felony or misdemeanour involving moral turpitude or dishonesty by a competent court or by a professional disciplinary board, related to abuse of public funds or misuse of position; and
- e. Be known for his/her morals and integrity as a reputable person.

2. Candidates from a civil society organisation must commit not to undertake any activities related to combating torture for the benefit of their organisation during their membership in the NPM.”

In reference to Article 10(1)(d) of the Draft Law by Decree, the rulings issued by the competent court and the disciplinary board should be final rulings, meaning that all judicial appeals must have been exhausted, and the truth has been revealed. This is pursuant to the constitutional rule stipulated in Article 14 of the amended Palestinian Basic Law, which states: “the accused is innocent until proven guilty in a legal trial in which he/she has guarantees to defend himself/herself.”

It is difficult to use the condition stipulated in Article 10(1)(e) of the Draft Law by Decree regarding good conduct as a criterion. In the Palestinian context, such a condition means that the candidate must obtain prior approval from the security services, which is, according to Al-Haq’s documentation, an ongoing practice when assuming governmental and non-governmental employment. This practice violates the Basic Law and international human rights standards. It is further contrary to the decision of the Palestinian Council of Ministers, as provided in the minutes of the Council of Ministers’ Meeting No. 133 of 24 April 2014, which requires the cancellation, under any name, of the security approval condition. To date, however, the decision has not been adhered to. Consequently, the law must be upheld and the Council of Ministers’ condition abolished. Instead, the criteria should exclude candidates who have served a sentence.

In reference to Article 10(2) of the Draft Law by Decree, which requires the expert of a civil society organisation not to undertake any activity related to combating torture for the benefit of the institution with which they are affiliated during their membership in the NPM, Al-Haq believes that it important for the selected members of the NPM to resign from the civil society organisations they work with immediately after assuming their duties in the NPM. Accordingly, the independence of the NPM is preserved, as it is also important to fully dedicate oneself to the new position, without allowing any overlap of the work of the NPM with the plans and programmes of civil society organisation and the national institutions that work in combatting torture and other ill-treatment, but rather to ensure the integration of roles.

It should be noted, in this regard, that the APT Guide on Establishment and Designation of NPMs confirms that “[t]he members of the NPM must be experts that are personally and institutionally independent from the State authorities. NPMs generally should not include individuals who are presently occupying (or on short-term leave from) active positions in the criminal justice system.”⁴⁶

It further states that “members of NPMs should also be personally independent from the executive government in the sense that they should have no personal connections with leading political figures in the executive government, or with law enforcement personnel, such as political allegiances, close friendships, or pre-existing professional relationships. Even if the proposed member would in fact act in an impartial manner, if she or he could

⁴⁶ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 39.

reasonably be *perceived* as being biased, this could seriously compromise the work of the NPM.⁴⁷

20. Article 12 of the Draft Law by Decree states that “when a member position becomes vacant before the end of his/her membership period, a new member is named, in accordance with Article 11 of this Law by Decree.” Notably, Article 11 is concerned with the loss of membership, whereas Article 10 of the Draft Law by Decree handles the conditions of membership. As such, there is an issue with the referral of the Articles in Article 12.

21. Article 13 of the Draft Law by Decree states the following:

“1. The members of the NPM shall enjoy immunity for all actions they carry out related to the implementation of their duties;

2. No member or administrative employee of the NPM may be held criminally or civilly liable for the work related to the functions of the NPM, except if a permission from the NPM was granted within two weeks of the date of notification;

3. The NPM will be notified again if it does not issue its decision to grant permission within the period referred to in paragraph 3 of this Article. If a response is not received within a week, the member of the NPM will be contacted directly;

4. It is not permissible to search the NPM’s offices or take any judicial or administrative procedures in this regard, except after notifying the head of the NPM;

5. A decision may not be issued to suspend or stop the operations of the NPM in any circumstance, including during states of emergency and wars.”

This Article is in clear violation of the requirement for immunity of NPM members, which is explicitly affirmed in Article 35 of the Protocol. First, the Article fails to explicitly state that the members of the NPM and the SPT enjoy the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the United Nations. The Article should, therefore, be entirely reformulated on this basis. Second, the immunities should cover all work carried out by members of the NPM in the performance of their duties or as a result of their duties under the NPM mandate, during and after the period of their mandate. Third, paragraph 3 of the aforementioned Article suggests the possibility of direct communication with a member of the NPM regarding immunities. It should be noted, however, that the immunity enjoyed by NPM members is not a personal privilege. Therefore, a member of the NPM cannot be contacted for such purpose, as no action may be taken prior to obtaining a decision from the NPM with a clear majority. Additionally, there is an error with the referral in paragraph 3, for it refers to itself while it should be referring to paragraph 2 of the same Article.

Article 13(4) of the Draft Law by Decree, which states that it is not permissible to inspect the offices of the NPM or to take any judicial or administrative procedures in this regard, except after informing the head of the NPM, is in complete violation of the immunities of

⁴⁷ APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 40.

NPM members. The paragraph refers to “judicial procedures,” which is the third stage of public right proceedings (penal cases). As such, the paragraph allows for measures to be taken in the course of the evidence and investigation stages that precede the trial stage. Instead, the paragraph should state that no “criminal, civil or administrative” action may be taken in this regard and that these immunities are established for the public good and are linked to public order.

The nature of the dangerous acts that require a request to lift the immunity of a member of the NPM should be clearly stated. This paragraph provides the possibility of lifting immunity and acting against a member of the NPM simply by “notifying the head of the NPM,” in contravention of the provisions of the Protocol. Therefore, it is necessary to stipulate that no measures can be taken in this regard until after obtaining a decision from the NPM and by a clear majority.

Article 13(5) of the Draft Law by Decree provides that a decision to suspend the operation of the NPM may not be made under any circumstances, including states of emergency and/or wars. The word “decision” should be omitted from the provision, since the suspension should not only be conducted through a decision. Instead, Article 13(5) would read “the operation of the NPM may not be suspended, paused, or stopped in all circumstances, including during states of emergency and wars.” In line with the above, Article 13 of the Draft Law by Decree on immunities should be revised.

As specified by Article 21(1) of the Protocol, whistle-blowers of acts of torture and other ill-treatment, regardless of whether the information they provide is correct or incorrect, should benefit from the immunities enjoyed by members of the NPM. Because, and as previously highlighted, its examination, evaluation, and follow-up is the responsibility of the NPM experts.

According to the revised SPT policy on reprisals in relation to its visiting mandate “[t]he Subcommittee rapporteur on reprisals should be notified as soon as possible of all allegations of intimidation or reprisals against individuals, groups or [NPMs] seeking to cooperate or cooperating with the Subcommittee or the national preventive mechanisms themselves. The Subcommittee and [NPMs] should take steps to ensure that they are provided with all relevant information relating to those allegations. The Chair of the Subcommittee should be notified of the allegations by the rapporteur or the country visit focal point on reprisals through the secretariat as soon as possible.”⁴⁸

In such circumstances, the SPT rapporteur on reprisals will assess the allegation, as soon as possible, and refer to a variety of sources of information. These sources will include the State party (the State of Palestine), concerned individuals, the Secretariat, OHCHR, including its field presences, other UN agencies, national human rights institutions, NPMs, and civil society organisations.⁴⁹

⁴⁸ SPT, Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate, UN Doc. CAT/OP/6/Rev.1, 31 May 2016, para. 10.

⁴⁹ SPT, Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate, UN Doc. CAT/OP/6/Rev.1, 31 May 2016, para. 12.

22. Article 14 of the Draft Law by Decree states that “the NPM may communicate with the SPT directly, and for this purpose, it will:
1. Receive technical advice and counsel;
 2. Meet with the SPT periodically or whenever the need arises;
 3. Receive technical training;
 4. Exchange assistance.”

It is important to emphasise that the NPM’s open and free communication with the SPT constitutes a fundamental right under the Protocol. The system of visits to places of deprivation of liberty is based on two main pillars: the NPM and the SPT. To implement an effective system of visits in the West Bank and Gaza Strip, these two have to work together in an organised and coordinated manner. The right of the NPM to communicate freely with its counterparts in different countries, in order to enhance effectiveness and exchange experiences, must also be affirmed.

The SPT guidelines on NPMs emphasise that “[t]he NPM should seek to establish and maintain contacts with other NPMs with a view to sharing experience and reinforcing its effectiveness.”⁵⁰ They also stress that “[t]he NPM should seek to establish and maintain contact with the SPT, as provided for and for the purposes set out in the Optional Protocol.”⁵¹

23. Article 15 of the Draft Law by Decree states that “[t]he Council of Ministers issues administrative and financial regulations for the NPM, based on a recommendation from the NPM.” This Article violates the independence of the NPM and violates the Protocol, which explicitly affirms, in Articles 1 and 18, the centrality of independence in the formation and functioning of the NPM.

The APT Guide on Establishment and Designation of NPMs explicitly affirms that “the law creating the NPM should not place the institution or its members under the institutional control of a ministry or minister of government, cabinet or executive council, President or Prime Minister... The law should expressly provide that ministers and other public officials may not issue instructions, directly or indirectly, to the NPM.”⁵² The independence of the NPM is further affirmed in the Protocol. Accordingly, issuing financial and administrative regulations by the Council of Ministers (the government), as stipulated by Article 15 of the Draft Law by Decree, for an independent mechanism aimed at monitoring detention centres of the executive authority is not justified.

The Article should instead state that the NPM establishes its internal regulations that regulate its financial and administrative affairs, which is in line with Article 70 of the amended Palestinian Basic Law, which vests the government with the authority to take

⁵⁰ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 39.

⁵¹ SPT, Guidelines on national preventive mechanisms, UN Doc. CAT/OP/12/5, 9 December 2010, para. 40.

⁵² APT, *Establishment and Designation of National Preventive Mechanisms*, 2006, p. 39.

necessary actions to implement laws, involving internal regulations which would govern the financial and administrative affairs of the NPM, rather than complementary subsidiary legislation that would supplement the law. This conflicts with the independence of the NPM, within the meaning provided by the OPCAT, which further stresses the importance of the independence of the NPM in Palestine.

24. Al-Haq proposes the inclusion of an article in the Draft Law by Decree, which clearly provides:

“Nothing in this Law by Decree may be interpreted or elaborated in any manner contrary to the OPCAT, the instruments to which the State of Palestine has acceded, and relevant international principles and standards.”

As such, the full compatibility and harmonisation of the Draft Law by Decree with the provisions of the Protocol and relevant international instruments and standards would be guaranteed.