Torture Prevention in Latin America:
Rights of Persons Deprived of Liberty and the Role of National Preventive Mechanisms

Dr Par Engstrom and Dr Tom Pegram
University College London

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Edited by Clara Burbano Herrera and Yves Haeck, Ghent University

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Abstract: This chapter assesses implementation of the United Nations Optional Protocol to the Convention against Torture (OPCAT), and National Preventive Mechanism (NPM) designation processes and outcomes specifically, in Latin America. It shows that NPM designation processes have varied considerably in the region between countries depending on two sets of factors: (i) the degree of official and institutional resistance to designation of effective monitoring; and (ii) pre-existing capacity on the part of domestic structures tasked with monitoring duties. The empirical analysis of four country case studies (Argentina, Costa Rica, Peru and Mexico) demonstrate that even in situations of high levels of state resistance high-capacity candidate agencies can have a powerful, even decisive, impact. Interestingly, strong capacity can co-exist with resistance and can mitigate the pernicious effects of resistance to designation of potentially effective NPMs. These findings are important for any assessment of the potential of NPMs and monitoring of detention facilities more generally. Not only do they highlight key factors that shape domestic processes of treaty implementation during the post-ratification phase, but they also put the spotlight on the central political and institutional conditions that determine the effectiveness of monitoring institutions to protect the rights of persons deprived of liberty.

Introduction

Significant hope has been invested in the potential of independent monitoring of places of detention to uphold international human rights standards pertaining to the treatment of persons deprived of liberty. The most notable institutional development in this regard is the Optional Protocol to the Convention Against Torture (OPCAT). OPCAT obliges individual states parties to designate a "national preventive mechanism" (NPM). NPMs are designed to "regularly examine the treatment of persons deprived of their liberty in places of detention" (OPCAT Art. 19(a)). While the OPCAT lays down rules governing NPM structural form and mandate (OPCAT Art 18(1)), states parties are entrusted with designating NPMs through enacting domestic legislation and appointment procedures. This domestic process of treaty implementation is critical for the translation of OPCAT commitments, and NPM designation specifically, into effective tools for the protection of the rights of persons deprived of liberty. But under what conditions does domestic OPCAT implementation lead to the designation of credible and potentially effective NPMs? How can the willingness and capacity of states to

convert formal OPCAT commitments into concrete monitoring institutions and practices be assessed?

This chapter seeks to answer these questions through an examination of OPCAT implementation in Latin America. The region is a particularly instructive part of the world given a unique combination of high OPCAT ratification rates, high density of state human rights agencies, and persistently high incidents of torture and ill-treatment violations in the region's places of detention, even in formally democratic countries. The rights of persons deprived of liberty in Latin America are systematically abused, including violations that regularly amount to torture and ill-treatment. There are generally widespread social acceptance of state violence, particularly in contexts of both real and perceived high levels of violent crime. Public perceptions of insecurity are high and there is often a lack of trust in the ability of authorities to provide efficient responses to citizen concerns. Law enforcement suffers from a lack of credibility and legitimacy, and rights are regularly violated in the region's dysfunctional criminal justice systems. The combination of these pressures have contributed to Latin America's deep crisis of prison systems with severe overcrowding and abusive conditions, serving primarily to perpetuate violence and crime.

It is against this highly challenging background that we assess OPCAT implementation, and NPM designation processes and outcomes specifically, in Latin America. In this chapter we show that NPM designation processes have varied considerably in the region between countries depending on two sets of factors: (i) the degree of official and institutional resistance to designation of effective monitoring; and (ii) pre-existing capacity on the part of domestic structures tasked with monitoring duties. Given the intrusive character of OPCAT and the quite exacting demand on states to designate an independent monitoring agency - the NPM – we can expect state resistance and foot-dragging when it comes to treaty implementation. However, even in situations of high levels of state resistance, we document how high-capacity candidate agencies can have a powerful, even decisive, impact. Interestingly, strong capacity can co-exist with resistance and can mitigate the pernicious effects of resistance to designation of potentially effective NPMs. These findings are important for any assessment of the potential of NPMs and monitoring of detention facilities more generally. Not only do they highlight key factors that shape domestic processes of treaty implementation during the post-ratification phase, but they also put the spotlight on the central political and institutional conditions that determine the effectiveness of monitoring institutions to protect the rights of persons deprived of liberty.

The chapter is divided into two main sections. In the first section, after a brief overview of the key provisions of OPCAT, we map the status of OPCAT implementation and NPM designation processes in Latin America. We also explain the obstacles to the effective implementation of domestic institutional mechanisms to give effect to international treaty commitments. In the second main section of the chapter we empirically examine NPM designation in the region. We develop a typological theory of NPM designation based on two dimensions: (i) the existence and degree of state resistance to effective domestic implementation of OPCAT obligations; and (ii) the proven capacity of pre-existing candidate agencies to fulfill an OPCAT monitoring function. We also assess our typological theory for explaining NPM designation with regards to four country case studies: Argentina, Costa Rica, Peru, and Mexico. The conclusion assesses the chapter's main findings in light of the ongoing COVID-19 pandemic in Latin America.

1. Preventing Torture: OPCAT Implementation and NPM Designation

Over the decades of efforts in the fight against torture and other forms of ill-treatment, important insights have been gained as to what make these violations possible, when they occur, and why. Torture is a specific form of abuse of power targeting those in positions of vulnerability. The relationship of unequal power is particularly acute in detention, which has been a long-standing area of work for torture prevention advocates. For Nigel Rodley, torture is a crime of opportunity.[1] To avoid torture, therefore, it is necessary to diminish the opportunities for state agents to use it, for example, through the implementation of legal and procedural safeguards. Rodley notes: "The longer [detainees] [are] denied access to and from the outside world (i.e. to family, lawyers, doctors, courts), the more they [are] vulnerable to abuse by those wishing to obtain information or confessions from them."[2] On the other hand, where torture is more or less consistently investigated, prosecuted and punished, the risk of torture falls. Monitoring places of detention through regular visits is also proven to be important. Independent complaint mechanisms also have significant impact where they feed directly into prosecution processes.[3]

Recent research also shows that there is a need to go beyond a dominant focus on formal law and legal procedures and pay closer attention to the informal practices as well as structural conditions that enable torture and ill-treatment. Although advocating for the adoption of robust legal protections is important, such safeguards are not sufficient to reduce the incidence of torture. A concern with practice and informality does not mean, however, that institutions are irrelevant. On the contrary: advancing effective implementation of the torture prohibition highlights the importance of taking state capacity[4] as well as state willingness[5] seriously.

1.1 Innovation in the Global Torture Prohibition Regime: OPCAT

It is precisely in the light of the recognition of the importance of strengthening domestic state capacity that the Optional Protocol to the Convention Against Torture (OPCAT) is critical. The OPCAT entered into force in 2006,[6] and as of June 2021, it has 91 states parties, 13 signatories, and 93 non-signatories. The OPCAT obliges individual state parties to recognize the monitoring jurisdiction of a Geneva-based UN treaty body, the Subcommittee for the Prevention of Torture (SPT). The SPT is empowered to visit all places of detention in State Parties, making it unique among treaty bodies in being able to directly access local sites of detention.

But it is the OPCAT's emphasis on the creation of domestic monitoring institutions, NPMs, which is especially indicative of a growing intrusiveness and penetration of global norms and structures into domestic political systems. The NPM is directed to "regularly examine the treatment of persons deprived of their liberty in places of detention" (OPCAT Art. 19(a)). The core function of the NPM in this two-level monitoring arrangement is to follow-up on recommendations by the CAT and institute a system of regular visits to places of detention.

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[1] (Rodley 2009)

[2] (Rodley 2009, p. 15)

[3] (Carver and Handley 2016)

[4] (Risse-Kappen et al. 2013)

[5] (Anaya-Muñoz 2019)

[6] OPCAT was adopted by the United Nations General Assembly in December 2002.

The OPCAT further lays down rules governing NPM structural form and mandate (OPCAT Art 18(1)). OPCAT requires State Parties to designate an NPM within one year of ratification of the Protocol.[7] As of June 2021 there are 69 designated NPMs under OPCAT with a further 21 pending designations.[8]

The OPCAT pays particular attention to the formal independence, composition, jurisdiction and capacity of NPMs.[9] Beyond the minimum guarantees and powers to be invested in NPMs, State Parties are also obligated to examine the recommendations of NPMs and enter into a dialogue on possible implementation measures (Article 22). The Protocol prescribes NPM independence safeguards (personnel, functional and institutional), alongside monitoring capabilities to access without prior notice all places of detention, examine detainees, review legislation, and request any relevant information (OPCAT Arts. 4; 18). It is the role of the SPT to advise NPMs on ways to strengthen safeguards relating to detention and reinforce their powers and independence. Article 18 of OPCAT obliges states to guarantee the 'functional independence' of NPMs. OPCAT also obliges a series of NPM operational features, including provisions on unrestricted access to all places of detention, subpoena powers, and engagement with the SPT.[10] Their role in receiving individual complaints, monitoring domestic torture prevention and follow up with SPT recommendations is of particular note.[11] Article 21 of OPCAT pointedly obliges that no authority or official shall "order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism." However, and crucially, state parties are entrusted with designating the NPM through enacting legislation, introducing important vulnerabilities to state capture at that point in the delegation chain; a central issue that we will return to below.

1.2. OPCAT in Latin America

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[7] OPCAT, Articles 17 and 24.

[8] See: http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx. The information on designation provided by the OHCHR needs to be critically assessed against local realities. The OHCHR lists designated NPMs on the basis of the notifications by State parties to the SPT, which may give rise to some discrepancies.

[9] This includes the 'functional' and 'personal' independence of the mechanism (Art. 17; 18(1)), jurisdiction over 'all places of detention, to all persons deprived of their liberty, and to all relevant information' (Art. 20), the ability to make recommendations to the relevant authorities, submit proposals and observations concerning existing or draft legislation (Art. 19), a plural and adequately professional and expert membership (Art. 18(2)), the dissemination and publication of an annual report (Art. 21(1)), as well as specific requirements regarding private interviews, regular visitation and witness protection. Significantly, the NPM also has the right to follow-up on their recommendations and State Parties are required to enter into dialogue with the NPM regarding implementation.
Including:
Art. 17; 18(1): guarantees of 'functional' and 'personnel' independence
Art 18(2): a plural and adequately professional and expert membership
Art. 19(a): powers to regularly examine the treatment of persons deprived of their liberty in places of detention
Art. 19(b-c): the ability to make recommendations to the relevant authorities, submit proposals and observations concerning existing or draft legislation
Art. 20: jurisdiction over all places of detention, to all persons deprived of their liberty, and to all relevant information
Art. 21(1): the dissemination and publication of an annual report

[10] Article 20, OPCAT

[11] OPCAT directs the SPT to communicate its recommendations to the NPM without prior state consultation or consent. Article 16, OPCAT

Compared to other regions of the world, Latin America displays a robust record of ratification of relevant international instruments in the area of torture prevention. As demonstrated in Table 1 all seventeen countries in the region have ratified the CAT. The vast majority have also ratified the Inter-American Convention to Prevent and Punish Torture (IACPPT), with the exception of Honduras, and fourteen of the seventeen countries have ratified OPCAT.

Table 1. OPCAT ratification and NPM status (2021)

Country	CAT ratified	OPCAT ratified	NPM designated	NHRI active	NHRI status	NPM-NHRI
Argentina	1986	2004	2012	1994	A	No
Bolivia	1999	2006	2013	1998	A	No
Brazil	1989	2007	2013	No	NA	No
Chile	1988	2008	2017	2010	A	Yes
Colombia	1987	NA	NA	1991	A	NA
Costa Rica	1993	2005	2005	1993	A	Yes
Ecuador	1988	2010	2010	1998	A	Yes
El Salvador	1996	NA	NA	1991	A	NA
Guatemala	1990	2008	2010	1987	A	No
Honduras	1996	2006	2006	1992	A	No
Mexico	1986	2005	2007	1990	A	Yes
Nicaragua	2005	2009	2009	1999	B	Yes
Panama	1987	2011	2017	1998	A	Yes
Paraguay	1990	2005	2011	2001	B	No
Peru	1988	2006	2015	1996	A	Yes
Uruguay	1986	2005	2005	2012	A	Yes
Venezuela	1991	NA (*signed 2011*)	NA	1999	B	NA

OPCAT has been ratified by nearly all countries in the region under different conditions, while several key variables, such as comparable political, institutional, and socio-legal factors, have remained broadly constant. In terms of OPCAT implementation, a significant number of countries have designated NPMs (14 countries). Because of background similarities, we might expect designation outcomes to also be similar. In particular all countries in the region possess candidate structures for NPM designation. Since the mid-1990s National Human Rights Institutions (NHRIs) – most commonly, human rights ombudsmen offices – have been established throughout the region, with most offices accredited “A status” by the UN-affiliated GANHRI Sub-Committee on Accreditation.[12] Nonetheless, Table 1 shows that designation outcomes have varied. While a majority of

[12] https://ganhri.org/. UN accreditation indicates full compliance with the Paris Principles (design safeguards for NHRIs), not performance assessment. Similarly, A status does not ensure compliance with Article 18 under OPCAT.

countries in Latin America have designated NHRIs as NPMs (eight out of 14 countries), alternative structures have also been designated as NPMs. Notably, the prior existence of an A-status NHRI is no guarantee of an NHRI-NPM (for example, in Argentina, Bolivia and Guatemala). It should also be noted that in some States that have not ratified the OPCAT, NHRIs are actively working on torture prevention (for example in Colombia and El Salvador).

1.3. Explaining OPCAT Implementation

In a significant number of countries in Latin America state commitments under OPCAT have been translated into an infrastructure dedicated to the task of preventing torture, including through the monitoring of detention facilities. The strengthening of formal institutions and policy implementation matters. There is still a need, however, to calibrate expectations in light of the structural and political realities in Latin American societies. In particular, there are several obstacles to the effective implementation of domestic institutional mechanisms to give effect to international treaty commitments. The human rights literature tends to identify two sets of obstacles to effective treaty implementation: (i) lack of political will of ratifying states to turn their formal international commitments into effective domestic change, and (ii) limited domestic capacity to bring about the required domestic reforms (legal, institutional) as stipulated by the international instruments ratified.[13]

First, human rights implementation is highly vulnerable to state resistance. The implementation of human rights treaties is characterized by high sovereignty costs[14], with often entrenched conflicts of interest combined with few obvious material benefits to state parties. In contrast to other international regimes, such as trade and security, human rights are generally not enforced by interstate action, and traditional compliance mechanisms such as reciprocity and retaliation do not apply.[15] As Anaya-Munoz argues: "The political benefits of abusing human rights are appealing and the costs of meaningful improvements are high. Some governments may rely on either widespread or selective repression or more subtle violations of human rights to control dissidents and maintain power. Changing incentive structures, entrenched practices, or long-standing institutional trends may prove highly costly and troublesome for some governments."[16] These dynamics of state resistance are particularly acute in regards to torture prevention, including the treatment of persons deprived of liberty. As Creamer and Simmons note, "[g]overnment practices falling under the CAT's jurisdiction are intimately linked with a country's internal security or stability."[17] Moreover, there is a growing body of evidence that torture prevention works. Empirical research has found that the presence of monitoring bodies is significantly correlated both with a decrease in the incidence of torture,[18] and higher quality state reporting to UN procedures.[19] As such, OPACT implementation, and specifically, effective NPM designation is likely not to be "virtually costless" for ratifying states.[20]

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[13] (Risse-Kappen et al. 2013; Anaya-Muñoz 2019)
[14] (Hafner-Burton et al. 2015)
[15] (Guzman 2008)
[16] (Anaya-Muñoz 2019, p. 446)
[17] (Creamer and Simmons 2015, p. 581)
[18] (Carver and Handley 2016, p. 95)
[19] (Creamer and Simmons 2015, p. 607)
[20] (Hathaway 2002, p. 2013)

Indeed, given the political sensitivity associated with the torture prohibition regime, it is not surprising that the OPCAT may provoke strong sovereignty concerns. NPM designation in particular is likely to be subject to state resistance. The majority of designations have proven to be protracted affairs, even in high performing rule of law settings. Notably, Holmes puts Canada's failure to ratify the OPCAT down to malign electoral calculations.[21] Australia has also been reluctant to grant a standing invitation to the SPT.[22] While some governments may be sincerely committed to OPCAT implementation, others will be motivated by cynical intent, responding to international pressure or worse; a desire to justify authorities' abuses and deflect attention away from human rights abuses. This will likely translate into efforts by governments to create artificial information asymmetries in order to shift blame, dodge political responsibility, and avoid the costs of non-compliance.[23] Where the state party is motivated to resist effective monitoring of possible human rights abuses, NPMs may be "set up to fail".[24] This raises the problem of institutional capture and is equivalent to what Simmons refers to as 'false positives'; individual state parties that commit to human rights treaties without sincere intent to comply.[25] Conflicting goals of the ratifying states pose a threat to the independent and/or effective conduct of NPMs.[26] As such, even if formal design features have been convincingly shown to be connected to organizational performance,[27] design safeguards are no guarantee of effective function. To capture this set of obstacles to human rights implementation we identify different dimensions of political resistance to effective OPCAT implementation, above all, by assessing whether torture prevention policies are supported or resisted by government and other powerful actors, as well as whether evidence exists to suggest a strategic rationale for supporting violating practices.[28]

The second set of obstacles to effective human rights implementation concerns limited state capacity. Even where a state has no strategic incentive to oppose effective monitoring, state capacity deficits may thwart good intentions. Hence, problems can also arise where governments genuinely wish to comply, but find that they cannot due to insufficient capacity.[29] There is a need, therefore, to consider state capacity for effective human rights implementation.[30] Following Anaya-Muñoz we understand state capacity as the "concrete set of material and human resources that governments have to implement norms, rules, or policies. State capacity is not a dichotomous or all-or-nothing variable, but rather one that is a matter of degree.[31] The explanatory typology outlined in the next section builds upon recent studies highlighting the importance of institutional capacity for rights compliance.[32] It also

[21] (Holmes 2013, p. 134)

[22] (Association for the Prevention of Torture n.d.)

[23] (Döhler 2018)

[24] (Moe and Wilson 1994, p. 6)

[25] (Simmons 2009)

[26] (Döhler 2018)

[27] (Carpenter 2001; Linos and Pegram 2017)

[28] (Mitchell 2012). This is in line with recent human rights research that include the concept of 'willingness' "as a factor in efforts to explain the lack of compliance [to] be explored empirically in a direct and systematic fashion" (Anaya-Muñoz 2019, p. 444).

[29] (Chayes and Chayes 1993)

[30] (Englehart 2009; Risse-Kappen et al. 2013; Cole 2015)

[31] (Anaya-Muñoz 2019, p. 447)

[32] (Creamer and Simmons 2015)

sheds new light on the role of networked bureaucratic agents in locking in international human rights obligations.[33]

With regards to OPCAT implementation specifically, what guides NPM designation when a domestic candidate agency exists? There has been a discernable growth of human rights state bureaucracies across the world in recent decades.[34] NHRIs have proliferated, particularly since the early 1990s.[35] This means that in many OPCAT ratifying states there are domestic candidate agencies that might take on the role as NPM. The decision may be informed by a functional assessment of formal compatibility between new duties and the candidate agency's existing mandate. The specter of state resistance, however, raises the possibility of existing agents being denied the formal powers to carry out their monitoring tasks. In turn, scholars point out that robust design does not guarantee robust actual performance.[36] Political support for agent activities is highly significant. As Carver and Handley observe, "the strongest predictor of an effective monitoring mechanism…is the ability of monitors to do their work without threats or sanctions against them."[37] However, it is frequently observed that public agencies have established significant *de facto* independence and authority, even under adverse conditions.[38] In sum, the capacity of existing candidate agencies, both in terms of formal safeguards and actual performance, must be factored into the process of designation and human rights treaty implementation more broadly.

We assess state capacity by examining the capacity of existing candidate agencies using a composite of formal capability assessment and actual performance. Formal capability refers to alignment between agent structure and prescriptions on NPM form and function contained in Article 18 of the OPCAT. Performance requires a contextual analysis of past conduct of the pre-existing candidate agency to observe if it has "the necessary critical mass of human talent and supporting resources to perform [its] assigned functions well".[39] In our empirical analysis of NPM designation below we establish the plausibility of performance claims through within-case process tracing. This involves investigating a series of logically interconnected propositions on the candidate agency's use of formal powers and how governmental and non-state actors view agency activities, with a view to causally linking outcomes to agency performance, and not to background conditions.
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2. NPM Designation in Latin America

There is a burgeoning literature on human rights treaty implementation that seeks to assess the complex series of steps which separate formal adoption of international standards and their domestic political effects.[40] In this chapter, we evaluate the implementation process and outcomes of a specific set of human rights treaty obligations under OPCAT, namely the designation of NPMs, designed to monitor places of detention and to uphold the rights of

[33] (Lupu 2015)
[34] (Cardenas 2014)
[35] (Pegram 2010)
[36] (Cole and Ramirez 2013)
[37] (Carver and Handley 2016, p. 95)
[38] (Newman 2008; Pegram 2008)
[39] (Hyman and Kovacic 2013, p. 1474)
[40] (Dancy and Fariss 2017)

people deprived of liberty. Following from the discussion in the previous section, we argue that effective NPM designation is conditional upon: (i) the degree of resistance to monitoring by state authorities, and (ii) existing agent capacity to fulfil their monitoring duties. Each cell in Figure 1 presents the logic determining the ideal-type of designation, the designation process, and the expected designation outcome.[41]

Figure 1. Agent designation matrix: logic, process and outcome

AGENT CAPACITY	STATE RESISTANCE: Low	STATE RESISTANCE: High
Low	*Experimental designation* Deliberation New agency or candidate agency adjustment	*Sham designation* Hierarchy Window-dressing agency established or designated
High	*Cooperative designation* Administration Designation of candidate agency	*Political designation* Conflict and/or bargaining Political contest over candidate agency designation

The left side of the figure corresponds to settings characterized by low levels of state resistance to treaty implementation and where there is no clearly identifiable strategic rationale for supporting violating practices (such as torture). The upper left corner combines low levels of state resistance with low capacity by existing state institutions, producing a situation of what we refer to as *experimental* designation. In the absence of an appropriate existing agency, a sincerely committed government confronts some major questions. Is there an existing institution which could be reformed? Or is it necessary to create a new agency, in which case what will be its remit and capabilities?

Such a situation is more likely in settings where international commitments diverge from the domestic status quo, producing a mismatch between obligations and the means available to achieve them. Nevertheless, goal agreement among policy stakeholders may allow for "participatory, deliberative, locally informed and adaptive problem solving," familiar to theories of experimental governance.[42] Experimental designation is therefore characterized by extensive deliberation over agency form and function to achieve agreed policy objectives.

[41] Cell designation does not preclude the possibility of overlap and interaction among logics of designation in practice.
[42] (De Búrca et al. 2014, p. 480)

While the goals may be agreed, the means of achieving them are often less readily-apparent. This study spotlights an unusually prescriptive international instrument in the form of the OPCAT and its rules governing NPM designation. Notwithstanding, a government genuinely committed to collective action also opens-up the potential for consultation with relevant stakeholders and deliberation supported by a shared perception of a common policy problem.

This designation logic has important implications. Meaningful participation by policy stakeholders can lay the foundations for regime legitimation, with transference to the designated agency. The novelty of the task often results in open-ended goals, reinforcing agency autonomy in realizing its mandate. The non-hierarchical nature of experimental designation allows for better adaptation to context. Contingent on review of existing structures, administrative norms, finite resources, and wider public values, such a process may prove protracted. Notwithstanding, the outcome is also likely to be more stable and enduring.

The lower left corner of figure 1, which combines low levels of state resistance with high agent capacity, corresponds to what we call *cooperative* designation. This cell corresponds most closely to a functionalist explanation for designation, with the government attaching at least some value to the task, combined with a high-performing candidate structure willing (capability) and able (performance) to fulfil the mandate. Low levels of state resistance may be a function of sincere commitment or the absence of a strategic rationale for violating practices. It may also be a function of government or legislative factions viewing international obligations as compatible with their own domestic goals.[43]

Cooperation designation is principally shaped by existing state capacity – in particular bureaucratic efficacy regarding policy coordination, resource allocation, and technical expertise.[44] The designation process is guided by a shared objective to implement an international obligation. Form and function are premised on broadly agreed means-end instrumentality, with existing candidate agency assessed against the international standards. The designation processes is likely to involve participation of various stakeholders, including civil society, who will support official policy and may be involved in a monitoring and/or consultative capacity.

The outcome in this instance will be designation of an existing agency. It may involve major or minor adjustments to its formal policy scope. However, the agency will already display a proven track record in the substantive area, stemming from explicit authorization or *ex officio* action. Where implementation entails only modest changes to pre-existing state practice, the result will be essentially continuity.

On the right side of figure 1 we find high levels of state resistance to effective implementation. Such resistance may be motivated by a range of factors, including contexts of pervasive rights violations, impunity for such practices, lack of incentives to reform or control repressive security forces, and/or public support for rights-violating policies, for instance, in response to high levels of criminal violence. The lower right corner combines high levels of state resistance with high agent capacity, producing what we have termed *political* designation. High levels of state resistance reflect the potential for independent agents to place significant constraints on government. As Barkow notes, “one of the most

[43] (Lupu 2015)
[44] (Cole 2015)

powerful weapons policy-makers can give agencies is the ability to generate…information that is politically powerful."[45]

Veto players may be well-placed to sabotage designation processes that they oppose.[46] Subversion to ensure that agent form and function is responsive to official political interests is particularly likely where state-civil society relations are conflictual. Nevertheless, such an outcome is not a forgone conclusion. NGOs and international organizations can counter political opposition where elected officials are responsive to external influence.[47] A crucial factor will be the political support enjoyed by the candidate agency, reflecting how well it has represented those with a stake in its policy domain. Its ability to mobilize supportive coalitions (including opposition politicians) may even be sufficient to impose its will on government. In instances where agreement on legal form and procedure is sufficient, bargaining may prevail. Bureaucrats can in effect become engines of their own designation.

The outcome of political designation will be determined by the relative power of supporters and opponents of the candidate agent. A high capacity agent will be designated where it can leverage reputation and support networks to compel politicians to structure the agency as it wishes. Veto players may be highly motivated to resist designation of an agent with a history of challenging core regime interests, particularly in settings where there is a strategic rationale for violating practices. Of course, politicians also have other levers to exert agency control at later stages, such as dubious appointments. Nevertheless, the enabling properties of formal structures should not be underestimated, as well as the difficulties of changing them once formalized in statute.

Finally, the upper right corner, which combines high levels of state resistance and low agent capacity, corresponds to what we coin *sham* designation. The risk of this outcome is severe, often undoing efforts to improve policy performance where compliance is most problematic.[48] Failure results from a state party with no intention of faithfully executing its obligations, coupled with a captured agent serving particularistic interests. In the worst case, an agent with a record of undermining human rights protections is designated. This scenario poses an obvious empirical challenge; candidate agent suitability for designation should not be based upon formal capability assessment divorced from assessment of performance.

A sham outcome is most likely in local settings which display high power asymmetries in favor of coalitions opposed to designation and few credible checks and balances.[49] In such settings, removing designation from executive oversight may do little to avoid failure where the legislature is also effectively captured. Sham designation is also likely in political contexts where violating practices are prevalent and/or underpinned by a putative strategic rationale, such as, for example, in the execution of a "war on drugs" or "war on terror." In turn, low-performing agents, potentially actively undermining protections, will be reflected in vocal criticism by independent civil society. Civil society will have few, if any, meaningful points of access to affect policy outcomes and may themselves be subject to official repression.

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45 (Barkow 2010, p. 59)
46 (Lupu 2015)
47 (Kim 2013)
48 (Krasner 2001)
49 (Linz 1990)

The outcome of sham designation is a window-dressing agency, intended to deflect international criticism. The mechanism may not be formally "designed to fail," but the designation outcome will effectively secure the same fate. In this instance, the benefits of designating a sham institution are considered to outweigh the costs by the designating authority. This may reflect a cynical calculation: with formal compliance secured, the sham mechanism will mobilize to mask deficits in actual practice, complicating the work of third-party monitors, obfuscating attribution of responsibility, and thwarting efforts to exact a cost on the principal for implementation failure.

To empirically examine this typology, we select four case studies from Latin America (Argentina, Costa Rica, Mexico, and Peru), emblematic of each of the four types, for further analysis. A structured comparative research design guides our study of four cases which vary significantly on the independent values: state resistance and candidate agent capacity. Where choosing among multiple cases, we have selected cases displaying extreme values (high or low) on either one of the independent values. This is based on the logic that causality ought to be clearest in cases where variables take on their extreme values.[50]

Figure 2. Agent designation matrix: OPCAT implementation in Latin America

AGENT CAPACITY \ STATE RESISTANCE	Low	High
Low	*Experimental designation* **Argentina** New agency (mixed model)	*Sham designation* **Mexico** Window-dressing agency (NHRI)
High	*Cooperative designation* **Costa Rica** Candidate agency designated (NHRI)	*Political designation* **Peru** Candidate agency designated (NHRI)

2.1. Experimental Designation in Argentina

The case of Argentina confirms our expectations of experimental designation. An innovative institutional NPM structure has been designed, responding to Argentina's federal state structure. Argentina's designation process and outcome is explained by a combination of low

[50] (Elman 2005)

levels of state resistance with limited evidence of resistance to effective designation, and low institutional capacity of existing candidate structures.

In 2004 Argentina became the first state in Latin America to ratify the OPCAT, but NPM designation was protracted. The Argentinean Senate finally approved the law in 2013 formally establishing a multi-agency NPM, composed of multiple tiers of monitoring institutions largely bypassing existing regulatory agencies. It took the Argentine Congress until December 2017 to appoint the members of the federal NPM.

A history of systematic human rights violations, including extensive use of torture, particularly during the civil-military dictatorship (1976-1983), weighs heavily on the Argentinean experience.[51] Formal commitment to international human rights has consistently been viewed positively by governing elites since democratic transition, with repeated recognition of the importance of eradicating the practice of torture.[52] Pressured by formidable civil society mobilization, governments have also made halting steps towards accounting for historical crimes, including official acknowledgement of torture as a human rights violation.[53] Moreover, Argentina's security apparatus has lost political influence, although the country's police forces have resisted substantive institutional reforms since the transition to democracy.[54]

Reflecting these political dynamics, Argentina's protracted designation process has been characterized by extensive consultation with local stakeholders. Under the governments of Cristina Fernández de Kirchner (2007-2015), there was evidence of official support for the NPM. The government appointed Enrique Font, former SPT member, as head of a unit on torture prevention in the Human Rights Secretariat of the Ministry of Justice, who worked closely with civil society and international agencies to advance NPM designation. Indeed, the extent of consultation on NPM designation has been hailed by the Association for the Prevention of Torture (APT), a Geneva-based NGO, as "a global example of best practice."[55] In 2008, a coalition of twenty-two NGOs ("Collective Against Torture") submitted a draft law to Congress. Spearheaded by the Centre for Legal and Social Studies (CELS), the law as eventually adopted by Congress in 2012 was virtually written by this NGO coalition.[56]

The assembly of a sophisticated multi-agency NPM, the first in Latin America, is indicative of extensive efforts to ensure NPM form and function reflects Argentina's federal political system. The core organizing logic of the mechanism involves a system of "local preventive mechanisms" (LPMs) conducting visits to detention facilities under a Federal Council of Local Preventive Mechanisms mandated to oversee and coordinate local mechanisms in each of Argentina's 24 provinces. Seven LPMs are currently active at the provincial level. A National Committee for the Prevention of Torture to coordinate NPM activities was also established in 2017. Importantly, the National Committee is directed to collaborate with the National Penitentiary Prosecutor's Office (PPN) and its local offices at the provincial level.

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[51] (Engstrom and Pereira 2012)

[52] (CAT 2004)

[53] (MPD 2012)

[54] (Eaton 2008)

[55] APT Information Note, p. 1.

[56] Anonymous interview with authors [NGO representative], 2017.

However, low levels of state resistance do not necessarily imply consistent governmental resourcing of torture prevention policies. Successive governments have been criticized for failing to address systematic police violence, including torture.[57] Government itself has recognized that "the practice of torture is…routine within the State security forces".[58] The SPT has also highlighted serious structural deficiencies, spotlighting judicial dysfunction as particularly problematic.[59] Compliance failure is indicative of a lack of political prioritization, as a result of lack of public support as with all matters perceived to be mainly concerned with prisoners' welfare. Argentina's federal political system presents an obstacle to effectively designing oversight of places of detention, creating jurisdictional tensions between national and autonomous provincial authorities, dilution of central authority, and coordination challenges.[60]

The slow passage of enabling NPM legislation is attributed by observers to a combination of low political prioritization, especially by the Senate, and distributive conflicts within Argentina's political system. Specifically, administrative appointments in Argentina are often contentious, frequently provoking disagreement over resource allocation.[61] Such compliance failure reflects historical capacity deficits in terms of "a set of reasonably effective bureaucracies and of the effectiveness of properly sanctioned legality".[62] This is, however, most evident in relation to *ex post* NPM appointments. The late addition of a Ministry of Justice and Human Rights representative to the National Committee for the Prevention of Torture raised concerns over NPM independence. As a result, and indicative of political conflict in Congress, the enabling legislation was extensively negotiated in a Congressional Bicameral Commission (APT). In May 2017, 18 candidates were put forward for the Committee's three civil society positions.[63] In December 2017, following concerted international pressure Congress nominated and appointed its six members, thereby concluding the appointment process of Committee members.

Argentina did not have an obvious candidate agency prior to OPCAT ratification to assume the role as NPM. The country's NHRI has highly limited human rights mandate and no prior record in torture prevention. The National Prisoners' Ombudsman Office (PPN) could be considered an institutional candidate as Argentina's NPM, but it only has federal jurisdiction. The eventual NPM therefore poses a novel addition to existing regulatory mechanisms in Argentina.

Exclusion of Argentina's NHRI from the country's NPM mechanism is explained by both formal design and performance deficits. Civil society was not consulted in the creation of the NHRI in 1993, viewing the resulting structure as oriented towards oversight of maladministration and the protection of consumer rights.[64] The NHRI has done little to change this perception over time.[65] Embryonic efforts in the late 2000s to mobilize alongside civil society actors to advance environmental rights, have been impeded by politicization of

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[57] (Stanley 2005; CELS 2018a, b)

[58] (CAT 2004, para. 6a)

[59] (SPT 2013, para. 110)

[60] Anonymous interview with authors [official at Prison Attorney Office], 2017.

[61] Anonymous interview with authors [official at Prison Attorney Office], 2017.

[62] (O'Donnell 1993, p. 1359)

[63] Anonymous interview with authors [NGO representative], 2017.

[64] Anonymous interview with authors [NGO representative], 2008.

[65] Anonymous interview with authors [NGO representative], 2008.

the office.[66] Formally, the NHRI falls significantly short of OPCAT design requirements and compliance with the Paris Principles is also in doubt.[67] It is the only NHRI in the region explicitly prohibited from supervising activities linked to defense and security (including the police). It is also not permitted to receive confidential information and, possibly most consequentially, its jurisdiction is restricted to the federal level.

In contrast to the NHRI, the PPN has conducted torture prevention activities since its creation in 1993. The PPN is well-resourced with around 200 dedicated staff, and an unrestrictive mandate to protect the human rights of prisoners.[68] It has emerged as a credible and occasionally critical official voice, monitoring torture and abusive practices in Argentina's federal prisons.[69] There was a concern by stakeholders that the creation of the NPM would lead to the dissolution of the PPN, the only federal state institution with a mandate to supervise prison conditions[70] However, the law creating the NPM includes the PPN as an *ex officio* member. Still, the PPN, despite a credible track-record at the federal level, has no jurisdiction at the provincial level. Moreover, the PPN has occasionally come into conflict with provincial authorities, highlighting problems of agency coordination within Argentina's federal system.

In sum, at the point of NPM designation, formal multi-level jurisdiction and autonomy/powers commensurate with OPCAT requirements was lacking among possible candidate agencies in Argentina. This points to one central experimentalist condition: the novelty of the regulatory task. This set the stage for deliberation leading towards consensus on the limitations of existing agencies in light of OPCAT requirements. There is significant evidence of policy stakeholders engaged in locally-informed and adaptive problem-solving that resulted in a novel NPM framework.

2.2. Cooperative Designation in Costa Rica

The Costa Rican experience comes closest to a functionalist explanation for designation. Official support reflects the country's leading diplomatic role in securing OPCAT ratification at the UN, as well as a relatively robust domestic tradition of rights protection. In turn, an existing candidate agency with a proven track record in this policy domain has been designated as the NPM.

Costa Rica ratified the OPCAT in late 2005 and designation of a single-agency NPM swiftly followed one year later, with the NHRI (Human Rights Ombudsman-*Defensoría de los Habitantes*) appointed by executive decree in December 2006. In 2014, the NPM was granted additional powers and independence safeguards as a fully decentralized agency attached to the Ombudsman.

OPCAT adoption in 2002 was viewed as a major diplomatic triumph for Costa Rica and the speed of NPM designation in the country reflects a symbolic *pro forma* approach towards compliance with human rights commitments.[71] Ombudsmen personnel drafted a legal

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[66] (Pegram 2012a, p. 219)

[67] (GANHRI 2017, pp. 37–39)

[68] Anonymous interview with authors [former official at Prison Attorney Office], 2017. (PPN)

[69] Anonymous interview with authors [NGO representative], 2017.

[70] Anonymous interview with authors [official at Prison Attorney Office], 2017.

[71] (Odio Benito 2002; Brysk 2009)

proposal for NPM designation that was incorporated wholesale into the 2006 executive decree.[72] Cross-party congressional debate on the 2014 legislative project, drawing on detailed analysis of the OPCAT, strengthening the NPM's legal standing, also proved consensual. This legal project was drafted by NPM personnel and stewarded by the legal aides of its congressional sponsor, Senator Carlos Góngora.[73]

This cooperative domestic dynamic is shaped by Costa Rica's enduringly stable democracy, functional administrative state, and high values on rights-based and human development indicators.[74] Sincere commitment among a significant segment of the political elite towards human rights principles is acknowledged by NGO observers.[75] Efforts to address prison conditions, despite strident popular criticism, were notable under the administration of President Solís Rivera (2014-2018).[76] Less auspiciously, in a context of low levels of state resistance, NPM designation became a largely technical in-house exercise, with limited consultation with civil society.[77] The lack of formal civil society participation in the resulting NPM is a source of disquiet, indicative for some of official intentions to expedite the most "cost-effective" solution.[78] However, NPM officials claim that the lack of debate reflects the absence of organized civil society in this rights area.[79]

Notwithstanding low official resistance, NPM designation must be placed in the context of a deteriorating civil and political rights panorama. The country's "intermediate-state capacity" is being overwhelmed by adverse economic conditions.[80] Costa Rica's state capacity deficit is evident in the parlous state of the nations' prisons. This situation has been exacerbated by regressive legislation, above all the introduction of "Flagrancy Tribunals" in 2008, as well as government inaction.[81] The NHRI has repeatedly criticized the government for delaying overdue reports to the CAT.

Swift designation also reflects a prevalent – and mistaken – perception that torture is a "non-issue" in Costa Rica.[82] High profile cases of torture have occurred in recent years. Violations constituting cruel, unusual and inhuman treatment, especially against vulnerable groups, have been a small, but persistent, percentage of the Ombudsman's caseload since 1995. However, this widely-held sentiment may have helped shield the designation process from populist politicians and a tabloid media wedded to draconian "law and order" reforms in response to criminal violence. If the 2014 legislative project had been explicitly tied to protection of prisoners, it is unlikely to have got off the ground, let alone passed unhindered through Congress.[83] However, others lament this lack of media coverage as a lost opportunity to spotlight appalling prison conditions.[84]

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[72] Anonymous interview with authors [NPM official], 2018.

[73] Anonymous interview with authors [NPM official], 2018.

[74] (O'Donnell et al. 2004; Lehoucq 2005)

[75] Anonymous interview with authors [NGO representative], 2008.

[76] Anonymous interview with authors [Court Justice], 2018.

[77] Anonymous interview with authors [Court Justice], 2018.

[78] Anonymous interview with authors [NGO representative], 2018.

[79] Anonymous interview with authors [NPM official], 2018.

[80] (Morrissey 2017)

[81] (NPM 2015:40)

[82] Anonymous interview with authors [UN official], 2018.

[83] Anonymous interview with authors [NGO representative], 2018.

[84] Anonymous interview with authors [Professor of Public International Law], 2018.

The Costa Rican NHRI presented an obvious candidate agency for NPM designation. Upon OPCAT ratification, the office made representations to the executive branch recommending auto-designation, and proceeded to draft the text subsequently endorsed by executive decree. Exhibiting formal attributes aligned with Article 18 of the OPCAT, as well as sustained activity in this rights area, Costa Rican designation required only modest adjustment to the regulatory status quo.

The Costa Rican NHRI has A-status at the UN and displays a relatively robust legal framework. Investigative faculties include unrestrictive inspection of public facilities, access to documents (except state secrets), and the enforceable summoning of public officials. While lacking enforcement powers, it does enjoy significant legal prerogatives, including recourse to *habeas corpus*, and constitutional review powers. Ombudsmen personnel successfully inserted adjustments to NPM powers into the 2014 legislation to bring it into alignment with OPCAT. For example, formal access without prior notification was expanded to psychiatric facilities.

It should be noted, however, that the NHRI is only partially compliant with OPCAT independence requirements. It is notably the only NHRI in Latin America without constitutional status. Of more concern, it lacks designation by qualified majority, which has, at times, facilitated partisan appointments.[85] As such, the office is not always viewed as sufficiently independent of government.[86] To remedy this potential compliance gap, the 2014 legislation enhances NPM autonomy as a "fully decentralized agency attached administratively" to the Ombudsman. Critics question whether this arrangement affords the NPM sufficient functional independence,[87] but NPM officials point to explicit SPT guidance in justifying their legal status within, but separate to, the NHRI.[88]

In terms of performance, the Ombudsman's office has maintained a high level of public approval since its establishment.[89] It has sporadically intervened on issues of alleged violence, and even torture by public officials, and its principal caseload has included regular inspection of prison conditions. Ombudsman reports consistently, if unsystematically, provide data on violations of women's rights, the right to health, work and personal integrity within places of detention. In 1995, the Ombudsman conducted its first fact-finding missions to specific prison facilities, documenting the "total impunity" of state agents.[90] Years later, the office continues to denounce the lack of effective investigation and sanction of public officials accused of torture and mistreatment.[91]

In recent years, the NHRI has increased its torture monitoring activity in anticipation of NPM designation, especially with regard to prison over-crowding. The NHRI has criticized the courts for miscategorizing crimes of torture as "abuse of authority", and it has

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[85] (Pegram 2012b, p. 30)

[86] Anonymous interview with authors [Professor of Public International Law], 2018.

[87] Anonymous interview with authors [Court Justice], 2018.

[88] Anonymous interview with authors [NPM official], 2018.

[89] (Pegram 2012b, p. 36)

[90] (CHRO 1996: 206)

[91] Case data drawn from annual reports, available here: http://www.dhr.go.cr/transparencia/informes_institucionales/informes_anuales.aspx (accessed February 15, 2019).

constitutionally challenging the penal code for permitting the use of evidence obtained under torture.[92] However, relations have also been defined by cooperation, with an interinstitutional commission established to coordinate with the Ministry of Justice. Ombudsman activities have also been hampered, nonetheless, by chronic under-resourcing – a problem inherited by the NPM which has failed repeatedly to secure core operational funding.[93]

Civil society stakeholders generally support the designation outcome, albeit with reservations. A few dissenting voices reject the designation outright, disputing the ability of a human rights ombudsman to undertake this mandate, given a lack of enforcement power.[94] More generally, lukewarm support reflects the absence of any meaningful consultation with civil society on optimal NPM structures. That said, critics acknowledge that civil society organizations in this policy space, as compared to women's or environmental rights, for instance, are conspicuously absent.[95] Reservations also relate to a perception that successive NHRI leadership has declined to prioritize this issue-area.[96] The NPM acknowledges that insufficient funding has prevented systematic monitoring of detention facilities. There is no regular coordination with other in-country international actors, such as the UN Office on Drugs and Crime.[97] NHRI personnel are further accused of being overly cautious, rarely intervening in public forum. NPM officials are unapologetic, however, in seeking to wield their status as "magistrate of persuasion" behind the scenes.[98]

In sum, principled engagement by regime and policy elites in Costa Rica, coupled with the existence of a candidate agency broadly compliant with OPCAT and operational in this policy space, have combined to produce a cooperative designation outcome. The proven capacity of the Ombudsman was broadly confirmed by civil society observers, resulting in only minor adjustment to its mandate and, more generally, to pre-existing state practice.

2.3. Political Designation in Peru

Peru offers a window onto the indeterminacy which can result when international standards meet domestic configurations of power.[99] Torture remains pervasive in Peru, casting a controversial shadow over NPM designation. Nevertheless, powerful veto players have found themselves confronted by an organized coalition intent on securing designation of a high-performing candidate agency.

Peru ratified the OPCAT in July 2006, but the country's NHRI (Human Rights Ombudsman-*Defensoría del Pueblo*) was not designated as NPM until December 2015. While the Peruvian state confront significant capacity challenges, resistance by powerful veto players offers the more compelling explanation for a protracted NPM designation process. Official failings on torture prevention are explained by a host of factors including both state resistance (civil and military sensitivity over historical abuses, hostility towards human rights policy and the NGO sector, institutional corruption and impunity), and capacity deficits (acute prison

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[92] (CHRO 2017: 268)

[93] Anonymous interview with authors [Ombudsman official], 2007.

[94] Anonymous interview with authors [Professor of Public International Law], 2018.

[95] Anonymous interview with authors [Professor of Public International Law], 2018.

[96] Anonymous interview with authors [NGO representative], 2018.

[97] Anonymous interview with authors [UN official], 2018.

[98] Anonymous interview with authors [NPM official], 2018.

[99] (Shaffer 2012, p. 225)

overcrowding, lack of training within the judicial and prosecutorial sector, and the highly clandestine nature of the violation).[100]

Torture remains "the most serious widespread violation of human rights in the country".[101] Yet it received no mention in the civil and political rights section of the 2014-2016 National Action Plan on Human Rights. OPCAT ratification coincided with a marked deterioration in the human rights situation under President Alan Garcia (2006-2011), with international observers reporting increased incidents of police torture and the Ombudsman reporting 702 cases of torture between 2003 and 2011. However, Ombudsman officials readily admit that "these numbers do not reflect the real magnitude of the problem."[102] Of 343 allegations of torture received by the Public Prosecutor between 2003 and 2011, only 35 resulted in conviction.[103] Under Garcia's successor, Ollanta Humala (2011-2016), torture remained pervasive in the penitentiary system.[104]

Reluctant and halting efforts at plural consultation do feature in the Peruvian designation experience. However, in the face of official silence, it has been left to other actors to galvanize action. In June 2007, on International Day in Support of Victims of Torture, an NGO umbrella group – the NGO Working Group against Torture – launched a national campaign to promote their proposal to designate the Ombudsman as the NPM, with some form of NGO participation. A few months later, the APT organized a high-level mission to Peru with the objective of promoting NPM designation. In 2010 the National Human Rights Council (NHRC, an office of the Ministry of Justice and Human Rights) convened a working group of state and civil society representatives, resulting in a consensus to designate the Ombudsman as the NPM.

This burst of activity however did not translate into policy action, with the NHRC proposal finding little support within the Garcia administration. The process was reactivated in October 2012, with Congresswoman María Soledad Pérez Tello submitting a draft NPM law to the Congressional Commission for Justice and Human Rights (CCJHR). Efforts to keep the project on track were subsequently bolstered by diverse policy stakeholders, with interventions in support of NHRI designation made by diverse domestic and international actors. In September 2013, an international conference on torture prevention was held in Lima, attended by the SPT and the European Delegation to Peru. Congresswoman Pérez Tello, alongside the SPT Vice-President, used the occasion to press government to designate the NHRI as NPM.[105] However, the project confronted stiff opposition within the CCJHR.[106] The law was eventually approved in December 2013, but with a significant number of abstentions.[107]

Congress finally approved the law officially designating the NHRI as Peru's NPM in December 2014.[108] However, in a highly unusual move, the President intervened in February

[100] Anonymous interview with authors [NGO representative], 2014.
[101] (Pegram and Herrera 2016, p. 299)
[102] Anonymous interview with authors, 2008.
[103] (Pegram and Herrera 2016, p. 25)
[104] Anonymous interview with authors [NGO representative], 2014.
[105] (La República 2013)
[106] (CCJHR 2013)
[107] (CCJHR 2013, pp. 16–19)
[108] (CNDDHH 2014)

2015 to annul the law. The official pretext for this was that necessary funds were not available in the public sector budget and that congress had exceeded its constitutional prerogative on budgetary allocation. This was refuted by human rights observers, with $925,000 already allocated.[109] Once again, it seemed that political sensitivities intervened; with observers pointing to government hostility towards the Ombudsman, as well as military resistance to elevating its powers of access over all security facilities.[110] Nonetheless, in December 2015, congress confirmed the Ombudsman's designation.

While consultation among stakeholders in Peru was not extensive, the consultation that did occur was largely consensual that a strong NPM candidate agency already existed in Peru: the Ombudsman. Indeed, the Congressional Commission President explicitly noted that "the proposal is to establish a mechanism inside the Ombudsman, with the objective of not creating a parallel institution…in countries such as Argentina and Chile, they have had to create entities to fulfil this function. In this proposal, the objective is to optimize an already existing agency".[111]

The Peruvian Ombudsman is one of the most robustly designed NHRIs globally, largely in conformity with Article 18-20 of OPCAT. It is an autonomous body, acting upon complaint or on its own motion, without instruction. The head of the office enjoys immunity. Public authorities and officials are obliged to cooperate with its work. The office can subpoena information, conduct confidential interviews, as well as make unannounced visits to all public facilities. It can issue reports, make recommendations, advise on legislation, and engage in promotional activities. Nevertheless, NPM legislation entailed significant changes to the Ombudsman's statutory basis, including expansion of jurisdiction to private institutions and detailed enumeration of legal obligations to assist the NPM in its work.

In terms of performance, designation of the Peruvian Ombudsman was actively pursued by the National Network of Human Rights NGOs. Upon activation in 1996, the Ombudsman office immediately began monitoring detention facilities, in the face of significant official efforts to suppress information on the situation of detainees.[112] NHRI action on torture is evident in a series of detailed investigations, dating from 1996, on prison conditions, military conscription, juvenile detention, police violations, mental health installations, and reparations for historical violations.[113] It has worked with NGOs to build legal cases on behalf of torture victims,[114] as well as submitted *amicus curiae* briefs before the Inter-American Human Rights System.[115] The NHRI has also pursued preventive strategies, including the training of public officials.

The NHRI confronts a range of challenges, from lack of official cooperation to personal attack.[116] Despite such challenges, the profile of the NHRI in combatting torture was well established by 2006 having done much to expose this persistent practice. With legislators on the CCJHR opposing "a new bureaucracy", Congresswoman Rosa Mavila was able to

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[109] Anonymous interview with authors, 2015.

[110] Anonymous interview with authors, 2008.

[111] (CCJHR 2013:10-11)

[112] Anonymous interview with authors [Ombudsman official], 2014.

[113] (Defensoria del Pueblo)

[114] Anonymous interview with authors [NGO representative], 2005.

[115] (IACHR 1997)

[116] (Pegram and Herrera 2016)

respond that "the institution with the highest public approval at the national level is the [Ombudsman], as such we already have an institution with legitimacy and professionals with sufficient experience to fulfil this function".[117] NGOs also acknowledge the credibility of the NHRI in the field of torture prevention.[118] By the 2000s its reputation was such that State agencies even requested its assistance when they received allegations of torture.[119] Notwithstanding the CCJHR decision to reject formal integration of civil society into the NPM, there is broad satisfaction among civil society observers with the designation outcome.

Notwithstanding concerted resistance to credible NPM designation by the executive, a constellation of domestic and international compliance constituencies ultimately prevailed in this political contest, assisted by the proactive efforts of the Ombudsman itself to secure NPM designation. As our model predicts, political designation highlights the possibility of official resistance ultimately capitulating to the combined efforts of supportive constituencies.

2.4. Sham Designation in Mexico

The case of Mexico conforms to our sham designation category, with the imposition of an existing agency widely criticized for its lack of independence and poor track-record. The designation process took place against a backdrop of widespread torture in the country and significant resistance to the establishment of an effective monitoring and accountability mechanism.

Mexico ratified OPCAT in 2005. NPM designation quickly followed, with the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos-CNDH*) appointed via an inter-ministerial agreement in June 2007. The NPM was eventually granted legislative standing in June 2017 with the adoption of a General Law to Prevent and Sanction Torture. However, the parallels with Costa Rica end there. The Mexican designation process was informed by conflict among policy stakeholders, with high levels of state resistance informing the outcome.

While formal democracy has persisted since Mexico's transition from authoritarian one-party rule in 2000, a lack of accounting for historical rights violations deeply informs Mexican society. Grave human rights violations continued under the government of Vicente Fox (2000-2006), including pervasive use of torture to obtain confessions.[120] Efforts to curb this practice, as part of a major overhaul of the judicial system, were blocked by powerful opponents. The situation has since worsened dramatically, with the country engulfed in a major human rights crisis, initiated by President Felipe Calderón's (2006-2012) "war on drugs".[121] Independent observers charge government with facilitating the systematic practice of torture, not addressing torture allegations, and resisting efforts to ensure accountability.[122]

NPM designation occurred in a context of spiraling rights violations, generalized impunity, and permissive state structures. However, reflecting official sensitivity to international

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[117] (CCJHR 2013:9)

[118] Anonymous interview with authors [NGO representative], 2014.

[119] Anonymous interview with authors [Court Justice], 2014.

[120] (Human Rights Watch 2008, p. 85)

[121] (Beittel 2018)

[122] (SRT 2014)

criticism, a plural consultation process on NPM designation was immediately launched following OPCAT ratification in 2005, led by the UN Office of the High Commissioner in Mexico, in collaboration with the Ministry of Foreign Affairs and the APT. Reporting in 2007, participants recommended that a multi-agency federalized mechanism be established to reflect Mexico's complex political system, comprising the NHRI, state human rights commissions, and civil society organizations. The National NGO Network 'All Rights for All' subsequently drafted an NPM bill for consideration, including a coordination mechanism to liaise directly with the SPT.[123]

However, this consensus was not shared by the newly-installed Calderón government. In early 2007, the Ministry of Foreign Affairs undertook an internal consultation among relevant ministries and the CNDH. The CNDH was promptly designated as NPM in June 2007 through an inter-ministerial agreement, without input from a legislature which in any case had "few champions of human rights."[124] This arbitrary act prompted fierce criticism from civil society and international observers. Miguel Sarre, the Mexican SPT Member, was emphatic:

> It is unacceptable that the CNDH monopolizes the NPM function, when it should only form a part of the mechanism which already constitutes the national human rights protection system, formed of 32 local human rights commissions and the CNDH.[125]

Objections focused on CNDH formal deficits, but concerns principally centered on CNDH independence and a CNDH President, José Luis Soberanes, who was reportedly lobbying behind-the-scenes for designation as a unitary NPM.[126] In effect, Mexico's NPM designation is emblematic of the working practices of a hyper-presidential system, coupled with an entrenched culture of political patronage. Soberanes is widely regarded as having been a political partisan appointee to the CNDH.[127]

Efforts by domestic and international actors to publicly challenge the inter-ministerial agreement had little impact. Political expedience, budgetary pressures, coupled with bureaucratic infighting, also contributed, with institutional rivalries between the Foreign Ministry and Ministry of Interior further confounding the designation process.[128] However, this sham designation outcome also corresponded to official sensitivity to independent reporting of an escalating human rights crisis with government denials of impunity commonplace, and UN reporting mechanisms being refused access to the country.[129] In a context of high levels of state resistance, neither civil society nor international actors were capable of meaningfully influencing the designation outcome.

The Mexican NHRI displays a number of formal design deficits which make it ill-suited to serve as a unitary NPM. Established by executive decree in 1990, the CNDH was originally located within the Interior Ministry. CNDH leadership throughout the 1990s were viewed as

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[123] (NGO Coalition)

[124] Anonymous interview with authors [NGO representative], 2018.

[125] (Sarre 2009, p. 113)

[126] Anonymous interview with authors [NGO representative], 2018.

[127] (Lachenal et al. 2009, p. 121)

[128] Anonymous interview with authors [NGO representative], 2018.

[129] (Proceso 2010; Tuckman 2015; García Otero 2016)

“first and foremost” presidential loyalists.[130] Constitutional reform in 1999 granted the office independence from the executive. However, this afforded little protection.[131] Finkel attributes NHRI failure to a Senate appointment procedure mired in political patronage.[132] Politicization reached its nadir with Soberanes (1999-2009) and Raúl Plascencia Villanueva (2009-2014), who both enjoyed partisan support in the Senate.[133] However, amid allegations of shielding security forces from scrutiny, dereliction of duty, as well as organizational dysfunction, in 2014 civil society mounted an ultimately successful campaign to unseat Plascencia.[134] The appointment of Luis Raul González Pérez, a politically unaffiliated human rights lawyer, as CNDH President constituted a significant break with precedent.

The CNDH possesses limited jurisdictional reach into Mexico’s federal system, with no jurisdiction over state-level places of detention. Oversight of private facilities, such as psychiatric centers, also falls outside CNDH jurisdiction. Visits to detention facilities must be announced in advance and can be limited for reasons of public security and national defense. Notably, the 2017 General Law to Prevent, Investigate and Sanction Torture does grant the NPM enhanced autonomy (although chaired by the CNDH President), alongside other significant powers, including the creation of a Technical Committee. The caliber of appointees to this Committee signals the fragile, but growing, credibility of new CNDH leadership.[135] However, no formal integration of civil society or state human rights commissions remains a source of concern.

In terms of institutional performance, the CNDH has a long-checkered history of inaction and worse on torture. Data produced by the CNDH on torture incidence has been widely reported. It has, on occasion, collaborated productively with civil society and international agencies on torture prevention. However, while civil society has a long history of advocacy on torture abolition, the CNDH has historically remained closed to civil society input.[136] CNDH action on torture has been criticized for failing to act upon victims’ complaints,[137] as well as accusations of misclassifying torture violations as “injuries” or downgrading them to “ill-treatment”.[138] The CNDH’s aversion to recommending criminal prosecution or pursuing legal action, contrasts to frequent litigation by human rights organizations on torture.[139] The Commission has been repeatedly criticized by the UN Special Rapporteur on Torture.

The causes of CNDH failure are multiple. Political capture looms large, with Soberanes serving as a textbook example “of how Presidential nominations to Human Rights Public Agencies respond to political interests”.[140] Other international observers claim that the CNDH has lacked political support, as well as faced official obstruction.[141] The CNDH has long struggled to square an impossible “dual role of defending victims of violations and

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[130] (Finkel 2012)

[131] (ICHR 2000, p. 37)

[132] (Finkel 2012)

[133] (Lachenal et al. 2009)

[134] (Iriarte and Yaniz 2014)

[135] (Reforma 2018)

[136] Anonymous interview with authors [NGO representative], 2017.

[137] (Human Rights Watch 2008)

[138] (ICHR 2000, pp. 40–41)

[139] Anonymous interview with authors [NGO representative], 2017.

[140] (Lachenal et al. 2009, p. 120)

[141] Anonymous interview with authors [UN representative], 2013.

deflecting criticism of the Mexican authorities".[142] The scale of the human rights challenge in Mexico should not be underestimated. Nevertheless, with one of the largest budgets of any NHRI in the world (US$88 million in 2017), the CNDH cannot claim to be under-resourced.[143]

NPM designation in Mexico occurred amidst a major rights crisis, with the government accused of systematic violations, including torture. A consultation exercise was subsequently ignored with the appointment of a partisan NHRI, which enjoyed no support within independent civil society. High levels of state resistance and low candidate agent capacity combine in this case to produce sham designation, offering little hope for effective OPCAT monitoring moving forward.

Conclusion

This chapter started with a basic recognition of the formidable political and social obstacles to the protection of the rights of people deprived of liberty in Latin America. There are strong political pressures against any human rights oriented criminal justice and prison reforms. The ongoing militarisation of public security across the region exacerbates these pressures. Prison systems in Latin America are facing a human rights crisis. There is resistance to effective safeguarding and independent monitoring of places of detention, and there are efforts to dismantle existing accountability and monitoring institutions, most recently in the case of Brazil's national preventive mechanism.[144]

It is precisely against this background that the potential of OPCAT and NPMs in upholding the rights of persons deprived of liberty is assessed in this chapter. The OPCAT represents a new generation of international human rights law, with the Protocol obliging state parties to establish national monitoring mechanisms. But creating effective NPMs is challenging, especially as they are institutionally designed to monitor governments that are responsible to establish them. While this political paradox is inherent throughout the international human rights regime, NPMs constitute a particularly intrusive form of human rights monitoring and supervision. Of particular concern is the risk of the creation of "sham" NPMs. However, as this chapter highlights, state capture is not a foregone conclusion. Our explanation for agent designation flags two key factors: (i) the degree of official resistance to treaty monitoring; and (ii) the capacity on the part of domestic structures tasked with monitoring duties. Our case studies highlight the importance of power asymmetries among domestic policy actors, and specifically the ability of credible domestic agencies to 'lock-in' international human rights obligations. Even in situations of high levels of state resistance to effective NPM designation, we document how high-capacity candidate agencies can have a powerful, even decisive, impact. It is important to caution that credible designation, not effective torture prevention, is our outcome of interest. In Peru for example, we advance a modest claim; the designation outcome is as credible as could be hoped, given the high level of official resistance. That is, strong capacity can co-exist with resistance and can mitigate the pernicious effects of resistance to effective implementation and monitoring of places of detention. Of course, positive or negative feedback loops may intervene over time to shift the politics of torture prevention onto a different track.

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142 (Amnesty International 1999, p. 2)

143 (The Economist 2008; Arena Pública 2017)

144 (Association for the Prevention of Torture 2019)

The chapter offers insights into the potential of NPMs to monitor detention facilities and through monitoring improve protections and uphold international human rights standards pertaining to the treatment of persons deprived of their liberty. NPMs represent a significant institutional innovation and the development of new institutional procedures, working methods and practices for the scrutiny of ratifying states. Evidence shows that effective monitoring of places of detention reduce the risks of abusive treatment, including torture and ill-treatment, of detainees. Investing in robust torture prevention institutions and practices is particularly crucial given the ongoing – at the time of writing – COVID-19 pandemic, whose impact in Latin America continues to be particularly devastating. As the APT notes, "COVID-19 has fundamentally changed the dynamics of criminal justice and prison systems" in the region.[145] In detention facilities across Latin America the pandemic has led to an acute public health emergency. Measures such as isolation and social distancing, adopted by most governments (with some notable exceptions) are simply not feasible in the region's already overcrowded and unsanitary detention facilities. Prevention has become more necessary than ever in light of how COVID-19 has impacted on closed facilities in Latin America and on the effectiveness of existing safeguards and institutional monitoring mechanisms to ensure access to justice, prevention of ill-treatment and protection of health rights of people deprived of liberty in the region.

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