

A HUMAN RIGHTS ANALYSIS OF “DRAFT LAW ON THE ESTABLISHMENT OF NATIONAL COMMITTEE AGAINST TORTURE”

Prepared by the Office of the United Nations High Commissioner for Human Rights in Cambodia

Introduction

The present analysis is prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Cambodia as a contribution to National Committee Against Torture (NCAT) to support its drafting process and to assist them to ensure the draft law complies with international human rights norms and standards. The comments are primarily based on Cambodia’s international human rights obligations and other international human rights norms and standards related to the establishment and functioning of independent national preventive mechanisms. OHCHR offers these comments in the belief that the draft law will be instrumental to effectively establish a credible and independent national institution for addressing torture at both national and sub-national levels.

The comments refer to the provisions of the draft law received on 4 February 2020 from the National Committee against Torture (NCAT).

As a matter of established good practice, OHCHR recommends that a public consultation be organised to discuss this draft law. In this regard, OHCHR stands ready to provide assistance with the organisation of such consultation. OHCHR further stands ready to provide briefings to the members of the National Assembly and Senate on its analysis of the draft law from the perspective of Cambodia’s international human rights obligations.

General principles

The Sub-committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture has not set out a specific model for national preventive mechanisms (NPM). It is of the view that there is no “one size fits all” model that would be appropriate for all States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the elements that are necessary for a body to constitute a national preventive mechanism for the purposes of the Optional Protocol are clearly set out in articles 17 to 23 of the Protocol. They have been authoritatively interpreted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) in its guidelines (CAT/OP/12/5), reports and advice (CAT/C/57/4), which are variously addressed to States parties and national preventive mechanisms. Only those mechanisms that reflect those elements can be considered to be compliant with the Optional Protocol.

In this regard, OHCHR recommends the following basic principles set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), its Optional Protocol (OP-CAT) and comments and guidance issued by the Committee against Torture and the Sub-committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) as well as in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). In summary, the following legal principles can be considered during this legislation development process.

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Universal Declaration of Human Rights, Article 5).
2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation (International Covenant on Civil and Political Rights, Article 7; Convention on the Rights of Persons with Disabilities, Article 15 (1); All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, Article 10 (1)).
3. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Convention on the Rights of the Child, Article 37 (a)).

4. The purpose of establishing an independent NPM is to complement all existing mechanisms to prevent torture, and it will not replace existing systems of oversight. It should not preclude the creation or operation of other such complementary systems (OP-CAT, Articles 3 and 17; SPT guidelines on National Preventive Mechanisms (CAT/OP/12/5, paragraph 5).

5. The Optional Protocol should be used as a reference to elaborate clear mandate and powers of the NPM (OP-CAT, Articles 18 (4), 19, and 20).

6. The NPM is to be given a preventive mandate and powers in accordance with OP-CAT, which is to be clearly set forth in a new or existing constitutional or legislative text specifying the composition of the mechanism and its sphere of competence (CAT/OP/12/5, paragraph 7, and Paris Principles)

7. The operational independence of the NPM should be guaranteed (OP-CAT, Article 18 (1); CAT/OP/12/5, paragraph 5).

8. The relevant legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal. Periods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM (CAT/OP/12/5, paragraph 9).

9. The visiting mandate of the NPM should extend to all places of deprivation of liberty, as set out in Article 4 of the Optional Protocol (OP-CAT, Article 19; CAT/OP/12/5, paragraph 10).

10. The necessary resources should be provided to permit the effective operation of the NPM in accordance with the requirements of the Optional Protocol (OP-CAT, Article 18 (3); CAT/OP/12/5, paragraph 11)

11. The NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol (OP-CAT, Article 18 (3); CAT/OP/12/5, paragraph 12).

12. The State authorities and the NPM should enter into a follow-up process with the NPM with a view to the implementation of any recommendations which the NPM may make (OP-CAT, Articles 22 and 23; CAT/OP/12/5, paragraph 13).

13. Those who engage or with whom the NPM engages in the fulfilment of its functions under the Optional Protocol should not be subject to any form of sanction, reprisal or other disciplining as result of having done so (OP-CAT, Article 21; CAT/OP/12/5, paragraph 14).

14. The effective operation of the NPM is a continuing obligation. The effectiveness of the NPM should be subject to regular appraisal by both the State and the NPM itself, taking into account the views of the SPT, with a view to its being reinforced and strengthened as and when necessary. (CAT/OP/12/5, paragraph 15).

15. The development of NPM should be considered an ongoing obligation, with formal aspects reinforced and working methods refined and improved incrementally (CAT/C/40/2 and Corr.1, para. 28 (n)).

16. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of CAT. The NPM is not an investigative body. The mandate of an NPM differs from other bodies working against torture in its preventive approach. NPM seeks to identify patterns and detect systemic risks of torture, rather than investigating or adjudicating complaints concerning torture or ill-treatment.

Chapter 1 General Provisions

Article 1:

This law has its goal to ensure protection of people deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment through an establishment of regular visits to detention places and other places where people are or may be deprived of their liberty.

Comments: This is only the part in the entire draft legislation concerning NPM's roles/functions. The mandate of the NPM also includes advisory functions, cooperation functions, educational and communication functions. The draft law has its goal to ensure protection of people deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment through its visiting, advisory, cooperation and educational and communication mandate and powers¹. Pursuant to article 2, 10 and 16 of CAT, a State party is obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. In this framework States parties are obliged to ensure that education and information on the prohibition against torture is fully included in the training of all personnel who may be involved in depriving persons of their liberty. The same principles apply to other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture² (or ill-treatment in other word).

In accordance with the Practical Guide on the Role of National Preventive Mechanisms issued the SPT, the key function of NPMs is their visiting function, namely carrying out visits to places of detention.

NPMs should have unrestricted access to all places, including any suspected places where persons are or may be deprived of their liberty, either by virtue of an order given by public authorities or at their instigation or with their consent or acquiescence, within the jurisdiction of the State party.

OHCHR recommends that this Article 1 should state clearly about the torture and ill-treatment preventive goal and the primary functions of NPM.

Article 2:

This law has its objectives to:

- define the establishment of a National Committee against Torture;
- define the composition and jurisdiction of the National Committee against Torture;
- define the establishment of a General Secretariat of the National Committee against Torture.

Comments: It is the responsibility of the State party to ensure that it has in place a NPM that complies with the requirements of OP-CAT³. Preventive work should be carried out by that mechanism, with its main task to visit places of detention in order to prevent torture and other cruel,

¹ CAT, Articles 10 and 11; OP-CAT, Articles 19 and 20, and CAT/OP/1/Rev.1, para. 8-9

² CAT, Article 16

³ OP-CAT, Article 17; SPT's Guidelines on national preventive mechanisms (CAT/OP/12/5, para. 2)

inhuman or degrading treatment or punishment. The State party shall guarantee the organizational and functional independence of the mechanism and provide it with the resources necessary to enable it to carry out its functions in accordance with the requirements of the OP-CAT. The State shall, however, refrain from supervising the mechanism.

OHCHR recommends that a credible and independent mandate character of NPM should be added in accordance with the Paris Principles which include its composition, trends in philosophical or religious thought, expertise, and infrastructure and so on.

Article 3:

This law has its scope of implementation to all places where people are or may be deprived of their liberty in the Kingdom of Cambodia.

Comments: The SPT articulates in its Practical Guide on the Role of NPMs that the jurisdiction of State party extends to all places over which they exercise effective control. These include all places in the territories of the State party, as well as those not situated within their territories but still within their powers or effective controls. They also include those places in which persons are de facto detained, for example individuals who in practice are unable to leave of their own free will and over whom the State exercise a regulatory function. There might be occasions when States parties to OP-CAT (sending States) enter into arrangements under which those detained by the States are held in facilities located in other States (receiving States). In these cases, the SPT recognizes that sending States should ensure that such agreements provide for NPMs to have the legal and practical capacities to visit those detainees in accordance with the provisions of the OP-CAT and the SPT Guidelines on NPM. In addition, NPMs of the receiving States should also have the capacity to visit those in detention based on such agreements, as a natural consequence of fulfilling their mandates. After undertaking such visits, the NPMs of the sending States and/or the NPMs of the receiving States should be able to present their recommendations and enter into preventive dialogue with the authorities of both the sending and receiving States. Agreements entered into between the sending and receiving States should provide for the NPMs' collaboration and permit variations in the terms thereof, in the light of the recommendations made. The two NPMs should liaise on the conduct of such visits and consider making joint visits and recommendations.⁴

OP-CAT, Article 4, contains two paragraphs that must be read together and that place within the scope of the OP-CAT any public or private custodial setting under the jurisdiction and control of the State party, in which persons may be deprived of their liberty and are not permitted to leave, either by an order given by any judicial, administrative or other authority or at its instigation or with its consent or acquiescence. The preventive approach underpinning the OP-CAT means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the NPM. The SPT therefore takes the view⁵ that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the SPT considers that persons might be being deprived of their liberty, should fall within the scope of OP-CAT, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise, a regulatory function. In all situations, the NPM should also be mindful of the principle of proportionality when determining its priorities and the focus of its work.

OHCHR recommends that this Article 3 should be elaborated further in terms of places where people are deprived of liberty and territorial jurisdiction of the State.

⁴ Ninth annual report of the SPT (CAT/C/57/4); Annex: Compilation of advice provided by the SPT in response to the request of the National Preventive Mechanisms (Compilation of advice by SPT to NPMs), p. 22.

⁵ CAT/OP/C/57/4

Article 4:

Technical terminologies used in this law have its specific meanings as follows:

1. **Torture:** refers to any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by a public official or by other persons at the incitement of or with the consent or instigation of a public official or other persons acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.
2. **Deprivation of liberty:** refers to all forms of arrest, custody, detention, imprisonment or placement of any person in a place of detention where he is not allowed to leave the place following order issued by administrative or court authority or other authorities.
3. **Places of detention:** refer to prisons or correctional centers, juvenile detention centers, temporary detention or custody facilities of judicial police, psychiatric hospitals or centers, social affairs rehabilitation centers, drug treatment and rehabilitation centers or other educational centers throughout the country.

Comments: OHCHR welcomes the inclusion of some relevant international legal principles in the definition of torture in the draft legislation. Article 16 of CAT refers to acts of “cruel, inhuman or degrading treatment or punishment” (or ill-treatment in other word), which do not amount to torture as defined in Article 1 of CAT, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. As explained by the Committee against Torture in its General Comment No. 2⁶, “In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment... In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes.”

For the purposes of the OP-CAT, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

OP-CAT, Article 4, requires that each State party shall allow visits, in accordance with OP-CAT, by the mechanisms referred to in Articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention)⁷.

In line with these international legal standards, OHCHR recommends that the above paragraphs 2 and 3 should be revised as follows:

⁶ CAT/C/GC/2, para. 3 and 10.

⁷ Also, CAT/OP/12/5, para. 10

2. **Acts of cruel, inhuman or degrading treatment or punishment:** Any act which does not amount to torture, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
3. **Deprivation of liberty:** refers to all forms of arrest, custody, detention, imprisonment or placement of any person in a public or private custodial setting where the person is not allowed to leave the place at will following order issued by administrative or court authority or other authorities.
4. **Places of detention:** refer to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. Those places include prisons or correctional centers, juvenile detention centers, temporary detention or custody facilities of judicial police, psychiatric hospitals or centers, social affairs rehabilitation centers, drug treatment and rehabilitation centers or other educational centers throughout the country.

Chapter 2

National Committee against Torture

Article 5:

It shall be established a National Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment hereinafter referred to National Committee against Torture with an acronym of NCAT, which is an independent national institution.

Comments: Article 17 of OP-CAT does not prescribe that NPMs take any particular or specific form. Rather, it leaves it to each State party “to maintain, designate or establish one or several preventive mechanisms for the prevention of torture at the domestic level”. State can either establish new bodies or designate existing NPMs, including decentralized units. No preferred model exists as such; the key is that the mechanism shall comply with the requirements of the OP-CAT by allowing it to perform its independent visiting mandate and other functions. Entities designated as NPMs include, for example, national human rights institutions, including the Ombudsperson, the Ombudsman plus model, national human rights commissions, and consultative commissions. Similarly, a “one-size-fits-all” legislative approach does not exist, since such legislation should take into account the specificities of each national context. Article 18 (4) further articulates that when establishing national preventive mechanisms, States parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

Based on Principles relating to the Status of National Institutions (The Paris Principles), the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official

act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Article 6:

The composition of the National Committee against Torture shall have the following qualifications:

- Having Cambodian national by birth;
- Having good morality and clean reputation;
- Not having committed any misdemeanor or felony;
- Having more than 10 (ten) years of working experience;
- Holding degree from bachelor's degree;
- Having at least 35 (thirty five) years of age.

Comments:

Article 18 (2) of OP-CAT and SPT's guidelines on NPMs⁸ require States parties to take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country. Their teams should embody a diversity of professional backgrounds and experience, as well as take into account gender balance and representation of ethnic, minority and indigenous groups.

OHCHR recommends that this Article 6 should be added with diversity of background in respect to gender balance and representation of minorities to respond to the OP-CAT and SPT's Guidelines on NPMs. NPMs may choose their own staff without external interference.

Article 7:

The composition of National Committee against Torture shall be elites of both sexes possessing any professional competency and skills as follows:

- Experience of national or international human rights;
- Expertise in law, in particular the Criminal Code and the Code of Criminal Procedure of the Kingdom of Cambodia;
- Medical doctor specialized in forensic examination or in psychiatry or psychology;
- Professional experience in policies and prison administration;
- Professional experience in relation to visits to places of detention;
- Experience in social work and gender.

Comments:

Article 18 (2) of OP-CAT requires States Parties to take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. Relevant expertise includes legal, medical, psychological, child-related and gender expertise, and any other related expertise so as to allow NPMs to carry out their activities in accordance with the OP-CAT, in an informed and inter-disciplinary fashion.

⁸ CAT/OP/12/5, para. 20

OHCHR recommends that this Article should be added with additional sentence related to persons who have experience working as civil society members dedicated to working with vulnerable groups. By adding this requirement, the members of NPMs will collectively have the expertise and experience necessary for the effective functioning of such mechanisms. The NPM's staff should have relevant expertise and experience, including legal and health-care expertise, and the diversity of background, capability and professional knowledge necessary to enable NPMs to fulfil their mandates. In order to cover any shortages in human resources or gaps in expertise, NPMs should be able to engage external expertise, consider setting up internship programs, or partner with universities and civil society or similar institutions such as social care homes.

Article 8:

The composition of the National Committee against Torture consists of 9 (nine) members, including:

- 1 (one) elite is designated as a Chair;
- 2 (two) elites are designated as Vice-chairs;
- 6 (six) elites are designated as Members.

No comments

Article 9:

The Chair, Vice-Chairs and Members of the National Committee against Torture are incompatible with all kinds of commercial activities and with any roles as leaders, executives or board members of companies or enterprises, and with any roles in the public functions.

Comments: Members of NPM should be personally and institutionally independent of State authorities. They should not hold positions or have personal connections that would entail a real or perceived conflict of interest when undertaking the mandates of NPM. For example, prosecutors, prison professionals, persons with political affiliations or close personal relations with governments, as well as judges or defense attorneys, may run into such real or perceived conflicts of interest and would therefore be unsuitable for membership of NPM⁹.

OHCHR recommends that this Article should be added with another sentence related to the prohibition of actual and perceived conflicts of interest.

⁹ SPT Practical guide on the role of NPMs.

Article 10:

Within at least 3 (three) months prior to the termination of each mandate of the National Committee against Torture, the Minister of Interior shall announce the public, open and transparent recruitment of candidates for membership of the National Committee against Torture within the period of not more than 30 (thirty) days. Then, the Minister of Interior shall select and prepare a list of membership for the National Committee against Torture among all applicants based on qualifications set forth in Articles 6 and 7 of this law, and try to the utmost to maintain the balance of gender, ethnicity, minority and representative non-governmental organizations in the Kingdom of Cambodia.

Formalities and procedures for the recruitment of candidates for the membership of the National Committee against Torture shall be determined by a Ministerial Proclamation to be issued by the Minister of Interior. Following the recruitment process, the Minister of Interior shall prepare the membership list and submit it to the Standing Committee of the National Assembly.

Comments: The members of NPM should be selected through an open, transparent and inclusive process¹⁰. (~~SPT's guidelines on NPMs, CAT/OP/1/Rev.1, para. 13~~). NPM should have operational independence. It should not be placed under the institutional control of an executive branch of government, such as a ministry, cabinet or executive council, president or prime minister. The law should explicitly provide that the executive branch does not interfere with the mandate and operations of NPM. The selection process should involve consultations with a broad variety of civil society groups, such as non-governmental organizations, social and professional organizations, and universities, as well as other experts¹¹. The selection process may be led by special appointment bodies, parliamentary committees or independent judicial commissions or similar bodies.

OHCHR recommends that MoI should not be involved in the recruitment and selection process since it has oversight roles over prisons, drug centers, immigration centers and police custodial settings (i.e. places of detention). The National Assembly's General Secretariat should play the role in the recruitment process vis-à-vis its mandate as the legislative body.

Article 11:

The above submitted membership list shall be processed by the National Assembly's Standing Committee for a favor vote to be cast by the National Assembly with an absolute majority voice of all members of the National Assembly.

Formalities and procedures for the selection of membership of the National Committee against Torture shall be determined by the Standing Committee of the National Assembly.

No comment.

¹⁰ SPT's guidelines on NPMs (CAT/OP/1/Rev.1, para. 13).

¹¹ The Paris Principles.

Article 12:

The Chair, Vice-chairs and Members of the National Committee against Torture shall be appointed for the duration of 5 (five) years, and who can stand as candidates for one more term, by the Royal Decree following the proposal made by the President of the National Assembly.

The Chair, Vice-chairs and Members of the National Committee against Torture shall take an oath of office before taking up their positions.

In case the new membership of the National Committee against Torture have not been proposed, the existing membership of the National Committee against Torture shall continue performing their tasks.

Comments: OHCHR welcomes the contents of this Article. The terms of office, which may be renewable, should be sufficient to foster the independent functioning of NPM, including security of tenure and appropriate remuneration, to attract persons with accumulated experience in the field of prevention of torture, and to build up institutional knowledge. It is in line with the SPT's interpretation relating to the NPM legislation for the fact that it should specify its period of office, whether determined or open-ended, of the members of the national preventive mechanism and any grounds for their dismissal¹².

Article 13:

The Chair, Vice-chairs and Members of the National Committee against Torture shall be accountable to the National Assembly.

The decision to dismiss the Chair, Vice-chairs or Members of the National Committee against Torture is vested in the National Assembly.

See comments under Article 10 of this draft law.

Article 14:

The Chair, Vice-chairs and Members of the National Committee against Torture shall lose their positions in case one out of the following conditions is met:

- the concerned position holder passed away;
- the concerned position holder submitted written resignation;
- the concerned position holder lost professional capability which is certified by competent Ministry/Institution;
- the concerned position holder was convicted with imprisonment of any felony or misdemeanor.

¹² CAT/OP/12/5, para. 9; and CAT/OP/1/Rev.1, para. 11

Comments: Under the OP-CAT, Article 35, States are obliged to accord members and the staff of NPMs the privileges and immunities necessary for the independent exercise of their functions. These privileges and immunities protect the independent exercise of NPMs' mandates. SPT Guidelines on NPM¹³ provides that States ensure that both the members of the NPMs and their staff enjoy such privileges as are necessary for the independent exercise of their functions. While it is accepted that essential basic security measures are to be complied with for the benefit of all concerned, it is equally important that those working for NPMs not be in any way restricted in their work and that they not feel that they might be subject to any form of pressure, including potential judicial proceedings against them or any retaliation.

OHCHR recommends that the last sentence of this Article should read that "the concerned position holder was finally convicted with imprisonment of any felony or misdemeanor. Members of NPM should not get reprisals during and after their work performance, and if they have conflicts with the law, the regular enforcement of the law should be guaranteed in accordance with existing legislation."

Article 15:

In case the Chair, Vice-chairs or Members of the National Committee against Torture loses position in accordance with Articles 13 and 14 of this law for the duration of more than 6 (six) months prior to the termination of the term of the National Committee against Torture, the National Committee against Torture shall select and prepare new membership to replace the vacant post in an open and transparent manner within 5 (five) days based on the list of candidate applicants and the qualifications set forth in Articles 6 and 7 of this law, and in responding to the professional competency. The National Committee against Torture shall submit the new proposed membership to the Standing Committee of the National Assembly.

The above submitted membership shall be processed by the National Assembly's Standing Committee for a favor vote to be cast by the National Assembly with an absolute majority voice of all members of the National Assembly.

The Chair, Vice-chairs or Members of the National Committee against Torture who is appointed to replace the vacant post shall take an oath of office before taking up the position.

The Chair, Vice-chairs or Members of the National Committee against Torture who is appointed to replace the vacant post shall be entitled to receive only the remaining term of the National Committee against Torture.

See comments under Article 10 of this draft law.

OHCHR recommends that if the new list of candidates cannot be established, the duration of three months set forth in Article 10 should be based on. Furthermore, the new membership should be selected and prepared in both transparent and "inclusive" manner by the entity which is not part of the executive branch.

¹³ CAT/OP/12/5, para. 26.

Article 16:

The Chair, Vice-chairs and Members of the National Committee against Torture have the following ranks and privileges:

- The Chair has equivalent rank and privileges to Senior Minister of the Ministry/Institution;
- Vice-chairs have equivalent rank and privileges to Ministers of the Ministry/Institution;
- Members have equivalent rank and privileges to Secretaries of State of the Ministry/Institution.

No comments.

Article 17:

The Chair, Vice-chairs and Members of the National Committee against Torture shall not be sanctioned, arrested, detained or tried during taking or after completing their positions for any opinions and comments raised or any acts performed under their official functions except for flagrante delicto.

Comments: SPT articulates in its Guidelines¹⁴ on NPMs that the 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. The State should not order, apply, permit or tolerate any sanction, reprisal or other discipline to be suffered by any person or organization for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organization should be prejudiced in any way.

OHCHR recommends that this Article 17 needs to be developed in details so as to avoid arbitrary arrest/detention and any reprisals.

Article 18:

The Chair, Vice-chairs and Members of the National Committee against Torture as well as officials of the General Secretariat shall not be prohibited, prevented or interfered or their belongings used during the mission shall not be seized when they perform their functions and after they complete it.

No comment.

¹⁴ CAT/OP/12/5, paragraph 26-27.

Article 19:

The National Committee against Torture can get technical advisors as well as national and international experts as it deems necessary to help performing its functions.

National technical advisors of the National Committee against Torture have the equivalent rank and privileges to Secretaries of State of the Ministry/Institution.

Technical advisors of the National Committee against Torture shall get equivalent allowance to the functional allowance of the Secretaries of State of the Ministry/Institution.

International experts shall get equivalent allowance to the functional allowance of the Secretaries of State of the Ministry/Institution.

No comment.

Article 20:

The Chair, Vice-chairs and Members of the National Committee against Torture can get assistants in accordance with the laws in force, and who get equivalent rank and privileges to the assistants to the Senior Ministers, Ministers and Secretaries of State of the Ministry/Institution.

See comments under Article 17.

OHCHR recommends that this draft law should specify privileges and immunities of members and staff of NPM, which are necessary for the independent exercise of their functions; and protection against reprisals against members or staff, their families or any persons who have communicated with NPM.

Chapter 3
Roles, Duties and Rights of the National Committee against Torture

Article 21:

The National Committee against Torture shall have roles, duties and rights as follows:

- Making recommendations to the development of policies, strategic plans, action plans related to the prevention and combatting of torture in line with the spirit of the Convention against Torture and its optional protocol;
- Providing confidential counseling and making confidential recommendations and observations to the management of places where people are or may be deprived of liberty as well as the management of places of detention or of custody with the aim of preventing all forms of torture;

- Conducting prompt and impartial inquiry and data collection when there is any allegation of torture. When the torture is found, the Committee shall provide information for the competent authorities to pursue investigations in accordance with the procedures and legal principles in effect;
- Communicating with the United Nations Sub-committee on Prevention in accordance with Article 20 of the Optional Protocol with the aim of protecting persons who are deprived of their liberty;
- Conducting dissemination of and training in the current law as well as international law and the Optional Protocol to the Convention against Torture for the public and for each target;
- Encouraging and promotion of the enforcement of this law in cooperation with relevant Ministries, agencies, development partner and civil society;
- Developing reports on activities of the National Committee against Torture, and submitting it to the National Assembly and the Senate regularly within every 12 months;
- Making suggestions to the Royal Government to address the shortcomings in polices, laws and practices regarding to the prevention of torture and ill-treatment;
- Performing systematic reviews of interrogation rules, instructions, methods and practices and of arrangements for the detention and treatment of persons subjected to any form of detention with a view to preventing any cases of torture;
- Examining the curricula of education institutions to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of detention;
- Either contributing to the reports that Government are required to submit to United Nations bodies and committees and to regional institutions, pursuant to its treaty obligations, or presenting its own reports and, where necessary, expressing an opinion on the subject, in accordance with its independent status;
- Following up on the process of implementation of recommendations made by United Nations and regional bodies to the Government authorities with regard to torture and related issues, providing advice at the national level and providing the recommending bodies with information, as appropriate;
- Right to conduct regular and unannounced visits to monitor treatment of the persons who are or may be deprived of their liberty in all places of detention or of custody as well as all other places where those person are or may be deprived of their liberty, with a view to protecting and preventing them against torture and other cruel, inhuman or degrading treatment or punishment; Right to work in cooperation with public authorities or elected public officials and other entities of private sector in relation to the prevention of torture and the extradition of individuals implicated in the offense of torture and acts of cruelty, in complying with legal provisions in force; The NCAT should ensure that important concrete and contextual observations arising from its visits to institutions and stemming from other reliable sources, its recommendations and the responses from the authorities are categorized, filed and systematically processed for use in dialogue with the authorities, in the ongoing planning of work and in the further development of its strategies as well as its follow-up process.
- Right to share relevant information with international monitoring bodies about possible cases of reprisal;

- NCAT should produce Reports following their visits as well as produce an Annual Report and any other forms of Report which it deems necessary. When appropriate, Reports should contain recommendations addressed to the relevant authorities. The Recommendations of the NCAT should take account of the relevant norms of the United Nations in the field of the prevention of torture and other ill-treatment, including the comments and recommendations of the SPT.
- Right to nominate, transfer, and terminate the subordinate public officials in accordance with the Proclamation formality and procedures for those officials ranking under the level of the Directors of Departments. Right to recruit contract staff, as it deems necessary, following proposals made by the General Secretary of the National Committee against Torture;
- Right to propose the nomination, transfer, and termination of subordinate public officials in accordance with formalities and procedures in force for those officials ranking from the level of the Directors of Departments and other equivalent ranks. Right to recruit contract staff, as it deems necessary, following proposals made by the General Secretary of the National Committee against Torture;
- The NCAT should seek to establish and maintain contacts with other NPMs with a view to sharing experience and reinforcing its effectiveness.
- The NCAT should seek to establish and maintain contact with the SPT, as provided for and for the purposes set out in the Optional Protocol.
- Undertaking other necessary tasks assigned by the Chair of the National Committee against Torture.

Comments: OP-CAT, Articles 19 and 20, provides that the legislation should grant the NPM at minimum: (a) The power to freely select the places of deprivation of liberty in which visits are to be carried out; to regularly examine the treatment of persons deprived of their liberty in those places; to select the timing of such visits and determine whether they are to be announced or unannounced; and to choose the persons to be interviewed; (b) Access to all information, including personal and sensitive information, premises and persons necessary for pursuing its mandate; (c) The power to make recommendations to the relevant authorities; (d) The power to submit proposals and observations concerning existing or draft legislation; (e) The right to have contact with the Subcommittee. Article 4 of OP-CAT also articulates that the visiting mandate of NPMs must extend to all places where people are, or may be, deprived of their liberty, for example in the sense of their not being free to leave. The purpose of such visits is to regularly examine the treatment of persons deprived of their liberty.

NPMs also have an advisory function that includes providing recommendations to State authorities (opinions, proposals, reports); submitting legislative proposals; reviewing rules concerning both detention (interrogation rules, instructions, methods and practices) and personnel-related issues regarding those involved in the custody, interrogation and treatment of persons deprived of their liberty (including, for example, law enforcement; civil, military or medical personnel; and public officials); and contributing to States parties reports or presenting their own reports to human rights mechanisms and following up their recommendations. The educational function of NPMs includes participation in training and development of educational and awareness-raising programs in schools, universities and professional circles; and examination of the curricula of educational institutions to ensure that education and information on the prohibition of torture is included in the training of law

enforcement personnel, civil or military personnel, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of detention. The cooperation function embraces engagement through meaningful dialogue with the State party authorities and other relevant stakeholders concerning prevention of torture and ill-treatment. Further, NPMs establish and maintain contact both with other NPMs, with a view to sharing experiences and reinforcing effectiveness, and with the SPT, through regular meetings and the exchange of information¹⁵.

SPT also highlighted in its Practical Guide on the Role of NPMs that the investigation role as well as national reporting role should not be performed by NPM. NPM should consider monitoring and analyzing systematically the implementation of proceedings against suspected perpetrators of torture and ill-treatment and advocate for, or facilitate the establishment of, a national register of allegations of torture, any investigation or criminal proceedings undertaken and the outcome thereof. Likewise, the NPM should advocate for the establishment of an independent body with the capacity to assess allegations of torture and ill-treatment in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The NPM's mandate is preventive; NPMs do not undertake investigations or adjudicate on complaints concerning torture or ill-treatment, even if they encounter such cases while carrying out their visiting function. The legislation establishing NPMs should oblige the competent authorities and other stakeholders to examine recommendations of the NPMs, and to enter into dialogue with them regarding their implementation. The SPT also articulates¹⁶ that practices and tools should be developed to cross-check, test and assess observations and to ensure that recommendations are based on rigorous analysis and are factually well grounded.

OHCHR recommends that the following sentences should be added:

- "Making suggestions to the Royal Government to address the shortcomings in policies, laws and practices regarding to the prevention of torture and ill-treatment;
- Performing systematic reviews of interrogation rules, instructions, methods and practices and of arrangements for the detention and treatment of persons subjected to any form of detention with a view to preventing any cases of torture
- Examining the curricula of education institutions to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of detention;
- Either contributing to the reports that Government are required to submit to United Nations bodies and committees and to regional institutions, pursuant to its treaty obligations, or presenting its own reports and, where necessary, expressing an opinion on the subject, in accordance with its independent status;
- Following up on the process of implementation of recommendations made by United Nations and regional bodies to the Government authorities with regard to torture and related issues, providing advice at the national level and providing the recommending bodies with information, as appropriate;
- The NCAT should ensure that important concrete and contextual observations arising from its visits to institutions and stemming from other reliable sources, its recommendations and the responses from the authorities are categorized, filed and systematically processed for use in dialogue with the authorities, in the ongoing

¹⁵ SPT Practical Guide on the Role of NPMs

¹⁶ CAT/ OP/12/6, para. 5 (f)

planning of work and in the further development of its strategies as well as its follow-up process.

- Right to share relevant information with international monitoring bodies about possible cases of reprisal;
- NCAT should produce reports following their visits as well as produce an Annual report and any other forms of report which it deems necessary. When appropriate, reports should contain recommendations addressed to the relevant authorities. The recommendations of the NCAT should take account of the relevant norms of the United Nations in the field of the prevention of torture and other ill-treatment, including the comments and recommendations of the SPT.
- The NCAT should seek to establish and maintain contacts with other NPMs with a view to sharing experience and reinforcing its effectiveness.
- The NCAT should seek to establish and maintain contact with the SPT, as provided for and for the purposes set out in the Optional Protocol.”

Chapter 4

Work Performance Procedures

Article 22:

Using the authority of the National Committee against Torture shall not affect the judiciary power. Members of the National Committee against Torture have functional independence, and do not take any instructions from any authorities in carrying out its work.

The Chair of the National Committee against Torture shall be responsible to lead and give order for all activities of the National Committee against Torture, and its subordinated units within the framework set forth in this law.

Comments: SPT clarified in its Practical Guide on the Role of NPMs that NPMs should have exclusive authority to develop their own rules of procedure in order to ensure their operational autonomy in accordance with OP-CAT’s provisions. The rules of procedure should address budgets for all activities, decision-making processes, employment and dismissal of staff, prevention of conflict of interest, employment of external experts (establishing qualifications and terms of reference), information-sharing within NPMs, communication with other actors – national and international, including the SPT, communication with the press and media, and data protection and confidentiality.

OHCHR recommends that more detailed scope of work of NPM, including its rules of procedure should be added to this draft Article.

Article 23:

Any person wishing for the respect of fundamental rights may, as it deems necessary, provide information for the National Committee against Torture in relation to the place of incidents or the situation of detention or custody of persons who are deprived of their liberty.

Comments:

OP-CAT, Article 21, articulates 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 any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

OHCHR recommends adding NPM strategy with regard to the prevention of reprisals and threats by detention center staff, as well as by fellow detainees, against persons interviewed by NPM during visits and others who may provide sensitive or critical information before or after a visit conducted by the NPM. Such a strategy should also address threats of reprisal against members and staff of the mechanism¹⁷.

Article 24:

The working modalities of the National Committee against Torture shall be determined in its internal rules. The National Committee against Torture shall regularly convene its quarterly internal meetings, and, if necessary, the Chair may call for the extraordinary meetings.

Comments: The NPM should develop concrete long- and short-term strategies in order to achieve the maximum impact on problems and challenges relevant to its mandate in the local context. Activities and their outcomes should be monitored and assessed on an ongoing basis and the lessons learned should be used to develop the practices of the mechanism. Such an assessment could be based on a framework, starting with existing challenges, such as resourcing issues, and an assessment of activities currently being undertaken, moving through a range of additional factors and activities, such as: (a) Criteria for the selection of planned activities; (b) Criteria for the composition of working groups and visiting and outreach teams, among others, including the involvement of specific forms of professional expertise or other input from national/ international stakeholders; (c) Analysis of problems and challenges, and of good practices that have been identified; (d) Cooperation with other actors; (e) Resources budgeted; (f) Strategies and working methods to be adopted when implementing activities; (g) Recommendations submitted to authorities; (h) Follow-up action and an assessment of the implementation of recommendations, including dialogue with authorities; (i) Systematization of observations, recommendations issued and the responses received from authorities, including information on implementation, as well as analysis of how and why successes and failures in effective change have occurred; (j) A description

¹⁷ SPT Analytical Assessment Tool for National Preventive Mechanisms

of all other national preventive mechanism activities in addition to visiting, output and impact assessments; (k) Resources spent; (l) Consideration of the need to develop alternative strategies or approaches¹⁸.

OHCHR recommends that this draft Article should include more guiding principles highlighted in above comments.

Article 25:

The Chair of the National Committee against Torture has the right to issue relevant Decisions, Circulars and Guidelines under its jurisdiction.

Decisions, Circulars and Guidelines of the National Committee against Torture shall not prescribe any tasks which are not under its jurisdiction.

See comments under Article 24.

Article 26:

The Chair, Vice-chairs and Members of the National Committee against Torture and its subordinate officials shall abide by professional confidentiality for all situations, acts or information they obtain during the performance of their functions, with the exception of those for reports, recommendations as well as opinions expressed in accordance with the Convention against Torture and its Optional Protocol.

No comment.

Chapter 5
Logo, Seal and Uniform of NCAT

Article 27:

The National Committee against Torture has its own logo, seal and uniform. The logo, seal and uniform of the National Committee against Torture shall be determined by a Sub-decree.

No comment.

¹⁸ SPT Practical Guide on the Role of NPMs

Chapter 6
General Secretariat of the National Committee against Torture

Article 28:

The National Committee against Torture shall have a General Secretariat as an operational unit for its daily work.

No comment.

Article 29:

The staff of the General Secretariat includes public officials who are appointed officials, transfer, or assigned to work with the General Secretariat as well as officials who are recruited through exams. The above officials shall abide by provisions of the law and relevant regulations in force.

Comment: NPM should choose their own staff without external interference. Their staff should have relevant expertise and experience, including legal and health-care expertise, and the diversity of background, capability and professional knowledge necessary to enable NPM to fulfil their mandates. In order to cover any shortages in human resources or gaps in expertise, NPM should be able to engage external expertise, consider setting up internship programs, or partner with universities and civil society or similar institutions such as social care homes¹⁹.

OHCHR recommends that this draft Article should include more guiding principles highlighted in above comments.

Article 30:

The Organization and functioning of the General Secretariat of the National Committee against Torture shall be determined by a Sub-decree.

No comment.

¹⁹ SPT Practical Guide on the Role of NPMs.

Chapter 7

Financial Sources and Resources

Article 31:

The budget and resources for the operation of the National Committee against Torture are provided by the national budget and other development partners' funds.

The Chair of the National Committee against Torture is the delegated budget authorizer.

The Chair of the National Committee against Torture shall have transparency and be accountable to the National Assembly.

Comments: States party has a legal obligation to make a specific allocation of the resources necessary to allow NPM to function effectively and independently and carry out all OPCAT-related tasks. Financial autonomy is a fundamental prerequisite for independence. NPM can also do fund raising and get access to OP-CAT special fund²⁰.

OHCHR recommends that this draft law should also include provisions regarding the source and nature of NPM's funding, and specify the process for the allocation of annual funding to the NPM. OHCHR also recommends that another term of "OP-CAT special fund" should be added to the first paragraph of this Article.

Article 32:

The Chair of the National Committee against Torture has the right to receive, manage, administer and utilize funds deriving from the national budget, international cooperation financing, development partners and other sources in accordance with the legal procedures in force.

The National Committee against Torture shall administer and utilize the budget for its own work in a transparent, integrity, effective and efficient manner set forth in the Law on Public Finance.

OHCHR welcomes the inclusion of this Article. Bearing in mind the requirement for independence, NPM should also be free to raise funds from other sources such as private or foreign donor agencies. Such funds should not disqualify the institutions from receiving public funds; on the contrary, government that creates NPM have a continuing legal obligation to fund NPM²¹.

²⁰ OP-CAT, Article 18 (3); SPT's Guide on NPM (CAT/OP/12/5)

²¹ SPT Practical Guide on the Role of NPM.

Chapter 8

Penalty Provisions

Article 33:

In case the Chair, Vice-chairs, Members or officials of the General Secretariat act in contrast with Article 26 of this law, they shall get disciplinary action in accordance with the Law on Co-status of Civil Servants of the Kingdom of Cambodia. In case of recidivism, they shall be punished in line with the laws in force.

See comments under Article 17.

Article 34:

Any person who obstructs the performance of functions of the National Committee against Torture as set forth in Article 18 of this law shall be punished in accordance with the laws in force.

Any person who put pressure on informant of the National Committee against Torture shall be held responsible before the laws in force.

Any person, besides the Chair, Vice-chairs, Members and officials of the National Committee against Torture, who releases confidential information set forth in Article 26 of this law shall be held responsible before the laws in force.

Comments: All members and staff of NPM shall be protected against all types of retaliation²².

OHCHR recommends that the second paragraph of this Article should be revised as follows:

“Any person who put pressure on or did reprisals against informant or Member or staff of the National Committee against Torture shall be held responsible before the laws in force.”

Article 35:

Monetary compensation and other measures, including rehabilitation, shall be provided for victims of torture following the court orders and applicable laws.

OHCHR welcomes the inclusion of this Article, which supports the victims’ access to remedies.

²² OP-CAT, Article 21; CAT/OP/12/5, paragraph 14.

Chapter 9
Transitional Provisions

Article 36:

After this law is promulgated the Minister of Interior shall recruit (new) membership of the National Committee against Torture within the duration of 3 (three) months at the latest, and submit it to the National Assembly for the vote in favor.

Formalities and procedures for the recruitment of candidates for membership of the National Committee against Torture shall follow Article 10 of this law.

See comments under Article 10.

Article 37:

The (existing) National Committee against Torture shall be responsible to carry out its duties and to disseminate this law until the (new) National Committee against Torture is appointed. Then, the existing National Committee against Torture shall be dissolved.

No comment.

Chapter 10
Final Provisions

Article 38:

Any provisions whose contents are contrary to this law are deemed abrogated.

No comment.

Article 39:

This law shall be urgently promulgated.

No comment.

..... *Buddhist Era 2564*
Done in,..... 2020
Royal signature and seal

NORODOM Sihamoni

Forwarded to the King

For royal signature

Prime Minister

Signature

Samdech Akka Moha Sena Padei Techo HUN

Sen

Forwarded to

Samdech Akka Moha Sena Padei Techo HUN Sen, the Prime Minister

Deputy Prime Minister, Minister of Interior

Signature

Samdech Kralahom SAR Kheng