
**ADVANCED UNEDITED
VERSION**

**Subcommittee on Prevention of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment**

**Views of the Subcommittee on Prevention of Torture
on the compatibility, with the Optional Protocol to the
Convention against Torture, of presidential decree No.
9.831/2019, relating to the national preventive
mechanism of Brazil*,****

* Disclaimer: This intervention is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, which include the members of the Subcommittee on Prevention of Torture, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

** At its 39th session, in November 2019, the Subcommittee decided, in accordance with its mandate under article 11 b) of the Optional protocol, to issue these views as a public document.

I. Introduction

1. On 3 September 2019 the *Mecanismo Nacional de Prevenção e Combate à Tortura* (hereafter the MNPCT), the National Preventive Mechanism of Brazil, sent a request to the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment for a legal opinion on the compatibility of Presidential Decree n° 9.831 of 10 June 2019, which modifies the Presidential Decree n° 8.154 of 16 December 2013, with the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
2. The United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment (hereafter SPT), established under article 2 of the OPCAT, is an independent treaty body with the mandate and functions laid down in the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter OPCAT or Optional Protocol), adopted on 18 December 2002 by the General Assembly of the United Nations by resolution A/RES/57/199 and entered into force on 22 June 2006.
3. The objective of the Protocol is to “establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment” (article 1 of the OPCAT). The SPT has a preventive mandate focused on an innovative, sustained and proactive approach to the prevention of torture and ill treatment, as well as an advisory mandate to assist States Parties and national preventive mechanisms (hereafter the NPM) to comply with their obligations under the Optional Protocol.
4. Pursuant to Article 11 of the Optional Protocol, the SPT has a threefold mandate: to visit places of deprivation of liberty in States Parties; to advise and assist both States Parties and National Preventive Mechanisms concerning the establishment and functioning of NPMs; and to co-operate with other international, regional and national organisations and institutions to strengthen protection against torture and ill-treatment.
5. The SPT monitors the implementation of the Optional Protocol by States which are a party to it. This includes overseeing the implementation of the obligation of States to set up independent and functional NPM to examine the treatment of persons deprived of their liberty and making recommendations to government authorities to strengthen protection against torture and commenting on existing or proposed legislation. As such, the SPT is the guardian of the OPCAT.
6. The views expressed by the SPT in the present document are its own and do not necessarily reflect those of, or bind, the High Commissioner for Human Rights, the Office of the High Commissioner for Human Rights, the United Nations or any of its bodies or officials. They do, however, represent the views of the body expressly mandated by the Optional Protocol to ensure the integrity of the system of preventive oversight that the Optional Protocol establishes.

II. Context

7. Brazil ratified the Convention against Torture on 28 September 1989 and the Optional Protocol on 12 January 2007. In accordance with article 17 of the Optional Protocol, Brazil should have established a National Preventive Mechanism at the latest one year after its ratification. A National System to Prevent and Combat Torture (the *Sistema Nacional de Prevenção e Combate à Tortura*, hereafter

SNPCT) was established by the State party by Law 12.847, of 2 August 2013, which directly refers to Article 3 of the Optional Protocol.¹

8. In December 2013, the Presidential Decree n° 8.154 was published to regulate the functioning of the SNPCT, the composition and functioning of the National Committee for the Prevention and Combat Torture (*Comitê Nacional de Prevenção e Combate à Tortura*, hereafter the CNPCT), and to establish provisions regarding the *Mecanismo Nacional de Prevenção e Combate à Tortura* (hereafter the MNPCT or NPM).

9. In September 2014,² the Human Rights Secretariat of the Presidency of the Republic launched a public call for the positions of the CNPCT assigned to representatives from civil society organisations and professional associations. The National Preventive Mechanism was finally established in 2015.³

10. On 10 June 2019, Presidential Decree n° 9.831 brought substantive changes to the whole torture preventive system of the country, the SNPCT. The Decree appears to indicate a change in the policy of the State Party towards prevention of torture in general, as well as, in particular, towards the NPM model appropriate to fulfil its international obligations under the Protocol. A new model has been introduced, the main differentiating feature of which is that the members/experts of the MNPCT would cease to be remunerated and would exercise their functions on a voluntary basis (Article 4 of the Decree n. 9.831 that modifies article 10 of Decree 8.154).⁴ The June 2019 Decree also removes the requirement for its membership to be diverse in terms of gender, race and regional representation⁵ and, in ways that remain somewhat unclear, dismantles the NPM's administrative support structure.

11. As clarified by the letter dated 2 August 2019 (attached, ref n. 2020/2019/GAB.SNPG/SNPG/MNFDH) addressed to the NPM, the Ministry of Women, Family and Human Rights will in future support the members of the NPM, inter alia, in the following ways:

(a) The access and use of the electronic system of information of the Ministry (SEI) will be provided to the NPM members, but only as **external users** (bold in the original);

(b) The financial support for the transportation of the members of the NPM will be provided by staff of the Ministry, yet to be designated;

(c) Entry to the Ministry will only be available on request;

(d) The use of offices for the members of the NPM will only be available on advance request;

¹ Article 8: "The National Mechanism for the Prevention and Combat of Torture (NMPCT) is created, as part of the structure of the Secretariat of Human Rights of the Presidency of the Republic, responsible for preventing and combating torture and other cruel, inhuman or degrading treatment or punishment, pursuant to article 3 of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, promulgated by Decree no. 6.085, of 19 April 2007". (unofficial translation)

² <https://www.mdh.gov.br/informacao-ao-cidadao/participacao-social/comite-nacional-de-prevencao-e-combate-a-tortura/representantes/editais-do-sistema-nacional-de-combate-a-tortura>.

³ For more information about the SPT on the NPM, see CAT/OP/BRA/3 and CAT/OP/BRA/1 available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Chronological.

⁴ "Participating to the NMPCT will be considered as a provision of unpaid relevant public service." (unofficial translation)

⁵ Paragraph 2 of article 10 of the decree n° 8.154, of 16 December 2013.

(e) The current supporting staff of the NPM (its Secretariat) will be “redistributed” to other units within the Ministry, to be defined;

(f) The members of the NPM will have to return their badges and access cards to the Ministry buildings and parking, their official mobile telephones and any other public equipment that had been provided to them.

12. According to these new measures, the 11 members/experts of the NPM have not only lost their remuneration but have also lost their previous levels of administrative support and dedicated staffing, these staff members being redeployed to other roles. It is now quite unclear how the Ministry will provide this support, which is essential for the effective functioning of the NPM. Taken as a whole, this represents a major change in the way the State Party has decided to organize the functioning of the NPM, and hence its torture prevention policy.

13. On 12 August 2019, an injunction of the Federal Court (ACP 5039174-92.2019.4.02.5101) ordered the suspension of the effects of the Decree 9.831 and that the Ministry of Women, Family and Human Rights return the 11 members/experts to their pre-existing functions, on a remunerated basis. On 13 August 2019, the Government challenged this decision but the Court rejected its arguments. A final decision on the case is pending. Meanwhile, the order suspending the effects of the Decree and returning the 11 members/experts to their previous position remains valid. In a letter dated of 29 August 2019 to the United Nations (attached), the NPM indicated that the Government was not complying with the judicial order and, therefore, the NPM members/experts remain without remuneration and unable to undertake their functions in the manner required by the Court Order.

III. NPMs under the OPCAT system

14. The SPT has not set out a specific model for National Preventive Mechanisms. 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.⁶ However, the Protocol clearly sets out the elements that are necessary for a body to constitute an NPM for the purpose of the OPCAT; these elements are enumerated in OPACT articles 17 to 23, and these have been authoritatively interpreted by the SPT in its guidelines,⁷ reports⁸ and advices⁹ variously addressed to State Parties and NPMs. Only those NPMs, which reflect these elements, can be considered to be ‘OPCAT compliant’.

15. The provisions of the Optional Protocol clearly stipulate that States Parties shall ensure the structural and functional independence of National Preventive Mechanisms, as well as of their personnel (secretariat), and shall also guarantee that the necessary resources are allocated to them in order to enable the NPM to carry

⁶ See the “Practical Guide: Preventing Torture, the role of the National Preventive Mechanisms”, page 8, available at:

https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf.

⁷ See the guidelines of the SPT on the establishment of National Preventive Mechanisms:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en.

⁸ See the public SPT reports available on its website at:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Chronological.

⁹ See the ninth annual report of the SPT on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/57/4) dated 22 March 2016, accessible at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f57%2f4&Lang=en.

out effectively their mandates as provided for in articles 19 and 20 of the Optional Protocol.¹⁰ Article 18 of the OPCAT reads as follows:

“1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

2. The States Parties shall 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.

3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.

4. 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.”

16. The SPT has clarified these elements through its Guidelines on National Preventive Mechanisms (CAT/OP/12/5, attached). For the purposes of assessing the current changes in the legislation of Brazil those in bold seem to be of particular relevance:

- (a) **§8. The operational independence of the NPM should be guaranteed;**
- (b) §9. 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;
- (c) §10. 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;
- (d) **§11. The necessary resources should be provided to permit the effective operation of the NPM in accordance with the requirements of the Optional Protocol;**
- (e) **§12. The NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol;**
- (f) **§13. 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;**
- (g) §14. 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 disability as result of having done so;
- (h) **§15. 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;**

¹⁰ Article 19 of the Optional Protocol reads : The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

- (i) §16. The NPM should be identified by an open, transparent and inclusive process, which involves a wide range of stakeholders, including civil society. This should also apply to the process for the selection and appointment of members of the NPM, which should be in accordance with published criteria;
- (j) §17. Bearing in mind the requirements of Article 18 (1) and (2) of the Optional Protocol, members of the NPM should collectively have the expertise and experience necessary for its effective functioning;
- (k) §18. The State should ensure the independence of the NPM by not appointing to it members who hold positions which could raise questions of conflicts of interest;
- (l) §19. Members of NPMs should likewise ensure that they do not hold or acquire positions, which raise questions of conflicts of interest;
- (m) §20. Recalling the requirements of Articles 18 (1) and (2) of the Optional Protocol, the NPM should ensure that its staff have between them the diversity of background, capabilities and professional knowledge necessary to enable it to properly fulfil its NPM mandate. This should include, inter alia, relevant legal and health-care expertise;**
- (n) §21. The NPM should be established within one year of the entry into force of the Optional Protocol for the State concerned, unless at the time of ratification a declaration has been made in accordance with Article 24 of the Optional Protocol;
- (o) §24. The State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control;**
- (p) §25. The State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out unannounced visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol;**
- (q) §26. 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;**
- (r) §27. The State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way;
- (s) §28. The State should inform the NPM of any draft legislation that may be under consideration which is relevant to its mandate and allow the NPM to make proposals or observations on any existing or draft policy or legislation. The State should take into consideration any proposals or observations on such legislation received from the NPM;**
- (t) §29. The State should publish and widely disseminate the Annual Reports of the NPM. It should also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament. The Annual Reports of the NPM should also be transmitted to the SPT, which will arrange for their publication on its website;
- (u) §31. The NPM, its members and its staff should be required to regularly review their working methods and undertake training in**

order to enhance their ability to exercise their responsibilities under the Optional Protocol;

- (v) §32. Where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget;**
- (w) §33. The NPM should establish a work plan/programme which, over time, encompasses visits to all, or any, suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within the jurisdiction of the State. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control;**
- (x) §34. The NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment;**
- (y) §35. The NPM should make proposals and observations to the relevant State authorities regarding existing and draft policy or legislation which it considers to be relevant to its mandate;**
- (z) §37. The NPM should ensure that any confidential information acquired in the course of its work is fully protected;**
- (aa) §38. The NPM should ensure that it has the capacity to and does engage in a meaningful process of dialogue with the State concerning the implementation of its recommendations. It should also actively seek to follow-up on the implementation of any recommendations which the SPT has made in relation to the country in question, liaising with the SPT when doing so.”**

17. For an NPM to be compliant with the provisions of the OPCAT, it must reflect these elements in its mandate, structure and operational practice.

18. In the light of the OPCAT and its Guidelines, the SPT considers that Decree n° 9.831 of 2019, means that the NPM cannot be considered to be OPCAT compliant for a number of reasons, including (but not limited to), the following:

(a) The members/experts of the MNPCT have been unduly restricted in their ability to exercise their functions in a sufficiently focussed, independent and dedicated manner by the change in their status to unremunerated office holders;¹¹

(b) The members/experts of the MNPCT will no longer be supported by dedicated, expert and independent staff, chosen by the NPM, funded from the NPMs dedicated budget and reporting directly to them;

(c) The proposed changes are not the result of a process of consultation or engagement with the MNCPT (nor the SPT) designed to enhance the effectiveness of the torture prevention policies of the State Party.

19. These shortcomings in both substance and process appear to undermine the capacity of the NPM to function effectively in the manner envisaged by the OPCAT.

¹¹ See page 17 of the professional training series manual n°21 of the Office of the High Commissioner for Human Rights, indicating that the position of the experts of the NPM should be adequately remunerated.

IV. The Presidential Decree n° 9.831 and the OPCAT

A. Implications for members/experts of the NPM

20. The result of the Decree is that members/experts of the *Mecanismo Nacional de Prevenção e Combate à Tortura* cease to be remunerated and no longer receive independent administrative support in the execution of their tasks. *De facto*, and in combination, this means that the members/experts of the NPM will not be able to continue to effectively exercise their mandate, considering the volume of work to be undertaken by an NPM in Brazil. It is implausible to believe that a small group of unpaid, part-time and unsupported persons could effectively undertake preventive visits to all places within the scope for their mandate in manner compatible with the OPCAT, considering the situation of the country.

21. In countries such as Brazil, which have, *inter alia*, a very large number of persons deprived of liberty, substandard conditions of detention, overcrowding, violence, including numerous cases of death in detention and inter-prisoner violence, mutinies, *de facto* absence of non-custodial measures, significant numbers of complaints, concerns regarding impunity for instances of alleged torture or ill-treatment, weak monitoring mechanisms, there is a particular need for an active, robust and respected NPM. The totality of the circumstances outlined above support the clear need for NPM members/experts to be working on a full-time basis, and for this to be their primary professional occupation, and thus a properly remunerated full-time activity. Voluntary part-time unremunerated members/experts cannot effectively fulfil such a task given the context in question.

22. Given this context, it seems clear that the objectives of the Optional Protocol require full-time (hence remunerated) MNP members/experts supported by an appropriately sized and properly funded secretariat having the requisite, experience and independence, organised in an independent and autonomous operational entity.

23. In addition, revocation of the need for adequate representation of gender, ethnicity and the geographical diversity within the MNPCT contravenes directly article 18 of the OPCAT.

B. Implications for the NPM secretariat

24. The entry into force of the Decree n° 9.831 would also change completely the situation of the administrative support and staff for the NPM (the secretariat). The *Secretaria Nacional de Proteção Global*, in its communication n° 2020/2019/GAB.SNPG/SNPG/MMFDH, removes the access of the NPM members/experts to their physical workspace, meeting rooms, as well as access to their confidential files stored on the Electronic Information System (SEI). Prior authorization or approval by the *Secretaria Nacional de Proteção Global* is thereafter needed for the exercise of almost all of the tasks of the MNPCT, including travel and field visits to the places of deprivation of liberty in the country, which is the essence of the mandate of National Preventive Mechanisms. Without prior approval or authorization, these activities cannot take place and so, in effect, would be at the discretion of the Ministry. This is, of course, incompatible with the OPCAT.

25. The proposed changes also mean that the work plan and programme of visits to places of deprivation of liberty can only be conducted following requests made by the NPM to other government departments or appropriate practical and logistical support, including access to offices, meetings rooms, computers, IT services, phones, transportation and, of course, staffing. This seems incompatible with the obligation to establish an independent NPM capable of determining its own visiting programme and conducting visits to places of detention, which are unannounced.

26. Moreover, the requirement to seek prior governmental authorization or approval violates the core principle of confidentiality since the programme of visits

would have to be divulged to others. To the extent that it becomes dependent on others for permission or for the practical assistance necessary to undertake its visits, the NPM could be considered to have lost its functional independence, which the OPCAT requires. This has unfortunately already been the case, amongst others, with the refusal to finance the travel of members of the MNPCT to visits places of detention in the State of Ceará.

27. In addition, the confidentiality of the information gathered, including that arising from confidential interviews (detainees, officials, medical staff, etc.) cannot be assured if this data is not kept confidential, as required by the optional protocol, by an independent dedicated secretariat supporting the NPM.

28. The lack of a clearly defined independent, properly resourced, remunerated and professional secretariat reporting directly to the NPM and accountable to it poses clear impediments to the functioning of an NPM and its members/experts, and it would seem difficult if not impossible for an NPM to be OPCAT compliant under such circumstances.

C. Absence of consultative process

29. The SPT Guidelines stress the importance of consultation in the establishment and operation of a successful NPM. Any significant alteration to the structural arrangements concerning an established NPM should be informed by a process of consultation aimed at determining how the work of an NPM can be strengthened in accordance with the OPCAT criteria. The effectiveness of all NPMs should be subject to regular appraisal by both the State and the NPM itself, taking into account the views of the SPT, in order to reinforce and strengthen its work, as and when necessary.¹²

30. The current Decree does not appear to have been decided upon following any process of review and consultation and it appears evident from the response of the MNPCT that it does not consider the proposed changes as enhancing its effectiveness as an NPM; indeed, it considers them to impede its ability to function as such.¹³

V. Compliance of the Decree n° 9.831/2019 with the OPCAT and SPT recommendations

31. It therefore appears that the reforms brought about by the Presidential Decree n° 9.831 fail to respect the OPCAT in terms of both process and substance. As such, they seem to weaken rather than strengthen the torture prevention policy of Brazil and the work of the NPM. It means that the NPM of Brazil cannot operate in an OPCAT compliant fashion and so, in consequence, these changes are not in accord with the obligations of Brazil under the Optional Protocol.

32. These changes in the State Party's approach towards torture prevention and the *Mecanismo Nacional de Prevenção e Combate à Tortura* are difficult to understand, run counter to progress previously made towards the implementation of its obligations under the OPCAT and are a setback to the OPCAT system in Brazil. Following the establishment of the NPM, the SPT made the following recommendations subsequent to its visit to Brazil in 2015:¹⁴

“84. The Subcommittee welcomes the completion of the lengthy legislative process involved in creating the National Mechanism to Prevent

¹² Para 13 and 15 of CAT/OP/12/5.

¹³ See the public release of the MNPCT n° 02/2019.

¹⁴ See CAT/OP/BRA/3 at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical.

and Combat Torture in 2015. The Subcommittee reminds the State party that the provision of adequate financial and human resources constitutes a legal obligation under article 18 (3) of the Optional Protocol, and wishes to be informed, as a matter of priority, about the steps the State party intends to take to provide the national preventive mechanism with adequate financial and human resources to ensure that it has complete financial and operational autonomy.

85. The Subcommittee recalls that, in accordance with its guidelines on national preventive mechanisms, the State party should ensure that the national preventive mechanism enjoys operational autonomy and independence, and that it should refrain from appointing members to the mechanism who hold positions that could raise questions of conflict of interest (see CAT/OP/12/5, paras. 12 and 18).

86. The Subcommittee recommends that the Federal Government provide both the necessary human resources and adequate funding for the effective functioning of the national preventive mechanism through a specific budget line, in addition to granting the mechanism the institutional autonomy to use its resources. The necessary resources should be provided to permit the effective operation of the mechanism, which should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol. Resources should be assured through a separate line in the annual budget and should be predictable, to allow the national preventive mechanism to develop its annual work plan and visits and to plan its cooperation with other partners.

87. The Subcommittee emphasizes that the national preventive mechanism should complement rather than replace existing systems of oversight in Brazil, and its functioning should take into account effective cooperation and coordination between preventive mechanisms in the country. The Subcommittee recommends that the budgets of the National Committee and the National Mechanism be separated. The National Mechanism, in cooperation with the National Committee, should clearly separate their respective mandates so that they can carry out all aspects of their respective mandates in a manner that avoids actual or perceived conflicts of interest.”

33. In light of these recommendations, which also draw on those made following its first visit to Brazil in 2011, the SPT considers that the current reforms run counter to the OPCAT and fail to reinforce the National Preventive System of the State party, as claimed by the national authorities; on the contrary, they weaken the role of the National Preventive Mechanism to a point that it runs the risk of becoming practically inoperable due to the many obstacles it now faces. Prior to the reform, the torture prevention policy was unsatisfactory in the sense that the system of NPMs had not been established in all parts of the country, something that should have been achieved by 2008. Furthermore, the current changes mean that the NPMs still to be established in many of the States of Brazil may follow a model – that proposed by the current reform - which would make them incapable of operating in accordance with the OPCAT, thus rendering Brazil in serious violation of its international obligations.

34. Finally, it should be recalled that reports following two visits conducted by the SPT in 2011¹⁵ and 2015¹⁶ respectively, two visits conducted by United Nations

¹⁵ Accessible at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fBRA%2f1&Lang=en.

¹⁶ Accessible at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fBRA%2f3&Lang=en.

Special Rapporteur on Torture in 2001 and 2015,¹⁷ as well as the inquiry carried out by the Committee against Torture in 2005¹⁸ point out the need for a strong, independent and efficient “System for Prevention of Torture” in line with principles set out by the Optional Protocol. Some of these issues have also been raised by the Committee against Torture to Brazil in its “list of issues prior to reporting” in 2009, which are still unanswered until today.¹⁹ These concerns have also been echoed by different bodies inside Brazil, such as the decision by the Federal Supreme Court in *Arguição de Descumprimento de Preceito Fundamental 347*, in September 2015, finding that the Brazilian prison system is unconstitutional due to serious chronic and structural dysfunctions that threaten prisoners fundamental rights.

VI. Conclusion

35. The adoption and entry into force of Presidential Decree n° 9.831 has severely weakened the torture prevention policy of Brazil by rendering it difficult for the MNPCT to operate in an OPCAT compliant fashion. In view of all of the above, the SPT takes the view that Presidential Decree n° 9.831 should be revoked in order to better ensure that Brazil’s system of prevention of torture functions efficiently and independently, with financial and structural autonomy and adequate resources, in accordance with Brazil’s international obligations under the OPCAT.

36. Finally, in light of OPCAT articles 17 to 23 and the SPT Guidelines on NPMs (CAT/OP/12/5), paragraph 15, the SPT recommends that the Brazilian authorities engage with the MNPCT concerning how best to strengthen the effectiveness of its system of torture prevention, including any proposed reforms to reinforce its National Preventive Mechanism.

¹⁷ Both reports (A/HRC/31/57/Add.4 and)are accessible at:
http://ap.ohchr.org/documents/dpage_e.aspx?m=103.

¹⁸ Article 20 of the Convention against torture is triggered if well founded indications are received indicating that torture is being systematically practised in the territory of a State Party. The full report (CAT/C/39/2) is accessible at:
https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f39%2f2&Lang=en.

¹⁹ CAT/C/BRA/Q/2, dated 6 July 2009.