Human rights protections and monitoring immigration detention at Europe's Borders

Hindpal Bhui[1] and Mary Bosworth[2 3]

Abstract

This paper explores the extent to which human rights law, and particularly the Optional Protocol to the Convention Against Torture (OPCAT), can protect the rights of detained migrants and improve their treatment. The paper draws mainly on the authors' research on detention monitoring in Greece, Turkey and Hungary. There was substantial evidence in these countries that the treatment of detainees was below standards acceptable to national and international human rights bodies. The National Preventive Mechanisms (NPMs) designated under OPCAT had so far had minimal impact in helping to improve matters but were beginning to increase their activities. We discuss the relevance of human rights discourse and legislation to the experiences of detainees in this context. We consider the potential of NPMs and explore the argument that helping to improve conditions merely sustains fundamentally harmful detention practices.

Key words

Immigration detention; human rights; monitoring; national preventive mechanism

Introduction

This paper draws mainly on research in three countries – Greece, Turkey and Hungary[4] – which sought to explore the potential and limits of human rights-based monitoring of immigration detention (Bhui, Bosworth and Fili 2018; Bhui, Bosworth, Fili and Morris 2019). The paper extends to immigration detention the more developed critiques of human rights approaches to penal policy, which assert that a human rights framework strengthens penal power and legitimates penal expansion, without necessarily improving the treatment of detainees (Armstrong 2019; Flynn 2012).

We focus on National Preventive Mechanisms (NPMs), designated under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT was adopted in 2002 and entered into force in 2006. It led to states designating NPMs to monitor all forms of custody, including immigration detention, and to the creation of an international body, the UN Sub-committee on Prevention of Torture (SPT). The OPCAT bodies are intended to form a triangular cooperative relationship with national authorities, identifying gaps in laws and problems in detention policy and practices, in order to protect the rights and dignity of people deprived of their liberty.

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[1] Inspection Team Leader, HMI Prisons and Visiting Professor, Centre for Criminology, University of Oxford. This article is written in a personal capacity and does not necessarily reflect the view of HMI Prisons.
[2] Professor of Criminology, University of Oxford, Director of *Border Criminologies* and concurrently Professor to the School of Social Sciences, Monash University, Melbourne, Australia.
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[4] While we have also conducted research in Italy, we have not been granted access to detention or accompanied the NPMs during monitoring visits.

OPCAT diverges from the traditional basis of the international human rights system, which relies on state organs implementing the state's treaty obligations (Murray 2008). While states that ratify OPCAT are responsible for setting them up, NPMs are intended to be functionally independent bodies that can help states to meet their human rights obligations. They should achieve this objective through encouraging and cooperative means, but may reserve the right to assume a more critical posture, if it is needed, to expose shortcomings and promote change. This can lead to predictably complex and sometimes tense relationships between NPMs and the state authorities.

The preventive aspect of OPCAT is also worthy of note – it is the only treaty that sets up bodies tasked directly with preventing the occurrence of human rights violations. This feature also brings with it unique challenges. It is easier to investigate violations that have already occurred than it is to identify the many systemic and individual factors that may give rise to them; and then to ensure that concerns are accepted and acted upon by detention managers and by political leaders. Achieving these goals requires methodological sophistication and capable practitioners who are able and willing to challenge those in positions of power.

Independent, adequately resourced and capable NPMs are, in theory, a powerful means of protecting rights (Carver and Handley 2016[5]). But there is a danger that a weak NPM can be used by governments that wish to pay lip service to human rights without making any concessions in detention and deportation practices. What appears to be a human rights approach in this view could be no more than rhetoric providing the illusion of action rather than real protections. We explore this proposition with reference to our research, while attempting to move beyond well-trodden critiques of human rights frameworks that condemn their failures without considering their potential to prevent worse outcomes. There is surprisingly little published information on what NPMs do in practice, particularly in immigration detention, which is itself under-researched (although see, inter alia, Fili 2018; Bhui, 2017, 2018; Bhui, Bosworth and Fili 2018, 2019). We sought to address these twin issues by investigating conditions in detention and the role and activities of NPMs.

We begin with a discussion of human rights approaches to immigration detention, before a brief consideration of detention policy. We then describe key findings from our research. We conclude with a discussion of the nature of human rights-based monitoring, common challenges facing NPMs, and possible ways to achieve progress.

The promise and pitfalls of Human Rights

It seems obvious that a human rights frame should be used to explore immigration detention and much academic scholarship does precisely this. For example, Dutch legal scholar Galina Cornelisse (2010) argues that human rights protections disrupt assumptions about territorial sovereignty that inhere in border control. Whereas 'existing human rights adjudication proves inadequate … when the national state wishes to enforce its sovereign claims against those who have allegedly violated its territorial boundaries' (315), the universal protections of human rights legislation, she suggests, allow for a wider and more inclusive approach to belonging. Human rights in the immigration detention context can function as what she describes as 'destabilisation rights', ensuring that full legal scrutiny is applied to claims that the national state presents as predominantly based on its territorial sovereignty. Costello (2012) and Marin and Spena (2016) put forward similar viewpoints.

[5] See also 'Stories of change: How the OPCAT makes a difference, Association for the Prevention of Torture, 2016, available at http://opcat10.apt.ch/

However, Gyollai and Amatrudo (2018: 5) remind us of the fragility of human rights protections by pointing out that, 'In order to neutralise human rights claims, the state needs only to find a reason to deport', because the 'right to have rights' (Arendt, 1951) remains in the gift of states. Meanwhile, Snacken and van Zyl Smit (2009) who assert that human rights protections restrain the exercise of state power across Europe, focus on citizenship as a means of accessing these rights, which is clearly not an option for immigration detainees. While these authors all show that it is not always easy to mobilise human rights in support of migrant rights, none dismisses the potential of human rights law to achieve such an outcome. There is, in other words, an implicit acceptance of the value of the human rights framework in analysing, exposing and helping to challenge the treatment of irregular migrants and detainees.

Unlike these legal scholars, when border criminologists have considered human rights, they are usually more circumspect. For example, Bosworth and Vannier (2016) point to the difficulties that detainees face in exercising rights in detention and question the value of such protections if they cannot be accessed. Similarly, Majcher, Flynn and Grange (2020) argue that since the onset of the 'refugee crisis' in 2015, EU legislation has led to the adoption of laws and practices that may disregard fundamental rights and standards. These critiques place more emphasis on empirical evidence and lived experience of detainees, and less on putative legal protections. As a consequence – and faced with ample evidence of poor treatment of detained migrants (Bhui, Bosworth and Fili 2018, 2019) – they query the impact of human rights protections in practice.

Human rights protections are written into current systems of migration control, and are often cited in attempts at reform and harmonisation of practices across jurisdictions. However, the benefits they offer in practice are not always clear, and such activity can arguably even diminish protections. For example, alongside attempt to standardize practices of processing asylum-seekers across the continent, the EU and its member states have also invested heavily in border security infrastructure and technology which present significant barriers to people seeking asylum (Majcher, Flynn and Grange 2020). The EU-Turkey Agreement signed in March 2016, which allows for return of third country nationals to Turkey as a safe country (Council of Europe, 2016), has been an especially controversial part of this wider strategy. Notwithstanding the support given by Turkey to around four million refugees (UNHCR 2019; CPT 2017), international NGOs and other commentators have highlighted the strain on Turkey's asylum system and suggested that Turkey does not have sufficient capacity or safeguards in place to meet the needs of returned migrants to EU standards[6]. All of these developments have occurred within a human rights framework.

Legal and policy instruments at the EU level as well as national laws in member states govern the form and conditions of immigration detention (CPT 2017; Council of Europe, 2017; Achermann et al, 2013; GDP, 2018; 2017; 2016). In nearly all cases, these instruments make clear that deprivation of liberty for immigration or asylum matters should be a measure of last resort and should only occur after a careful and individual examination of each case. States have agreed too that the reason for detention must be kept under review, and non-custodial measures should be developed and used where possible (Council of Europe 2017; UNHCR 2015). Finally, other than in exceptional cases,

[6] E.g. see Migration Policy Institute, 'The Paradox of the EU-Turkey Deal', accessed 5.4.18: https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal
Also Amnesty International (2016) *No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey*. Available at: https://www.amnesty.org/download/Documents/EUR4438252016ENGLISH.pdf
And, *Orçun Ulusoy* (2016) 'Turkey as a safe country?' *Border Criminologies*. Accessed 4.6.18 and available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centrebordercriminologies/blog/2016/03/turkey-safe-third

asylum seekers should not be detained at all while their case is under consideration (Goodwin-Gill 1986; Hailbronner 2007; Cornelisse, 2017; Bosworth and Vannier 2020).

While these measures limit the power to detain, certain procedural safeguards should be in place within national sites of detention to protect people, regardless of their status. Every detainee should have access to legal advice and to medical care, as well as to information about their case in a language they understand. They should also be able to inform someone outside of their detention (CPT 2017). These conditions should all be monitored and documented, subject to scrutiny and ongoing assessment. All of the countries we visited, had signed up to these protections, yet, as we describe below, their value was far from obvious.

One of the main avenues that human rights legislation offers towards protection of detained migrants is the NPM and the powers bestowed upon it by OPCAT. The NPM is part of a concerted approach to preventing torture and ill treatment, alongside legislation prohibiting ill treatment and effective implementation of that legislation. The human rights framework thus provided can prevent ill treatment before it is inflicted; and, where it has taken place, it can deter future occurrences through prosecution and sanction.

While OPCAT requires NPMs to be functionally and legally independent, to have adequate resources and staff with sufficient expertise, it specifies no particular NPM model. NPMs are free to explore the best ways of achieving their purpose. Many states have designated existing institutions as their NPM: for example, in Hungary and Greece, the Ombudsman offices had assumed NPM functions, while in Turkey the National Human Rights Institution was originally designated as the NPM. In Italy, a new specialist institution had been created, while other states have larger multi-body NPMs; currently, the largest such group is in the UK, which incorporates a total of 21 bodies[7], most of which already had some involvement in detention oversight, and which is coordinated by HM Inspectorate of Prisons (Bhui 2018). Crucially, NPMs can also review and comment on laws, policies and practices relating to deprivation of liberty, identify root causes of torture and other forms of ill-treatment, and are encouraged to establish dialogue and cooperation with authorities on the implementation of their recommendations.

NPMs occupy a unique position between state and civil society. Although government-funded, they are designed to hold the state to account in terms of its human rights obligation to prevent ill treatment in places of detention. They have the potential to give voice to those held in detention and can, in theory, wield considerable influence in promoting positive change. States must grant them access to information necessary to perform their role, such as numbers of people detained and locations, local establishment data that can help to judge how detainees are being treated, and unhindered, private access to detainees.

If these criteria are fully adhered to, NPMs can provide a powerful safeguard. Indeed, even if they are only partially observed, they should still be able to make a positive difference. However, the success of NPMs depends on their ability to act with authority and confidence. Their ability to function can be limited by national governments, for example, through restricted resources or other forms of political pressure. Such limitation of NPM function is not unusual as we describe below.

Another closely linked limitation on NPM effectiveness is whether the state is not only willing but *able* to act on NPM recommendations. Technical or operational incompetence, a lack of strategic vision, or shortfalls in funding may all obstruct a genuine desire to improve matters. However, it can often be difficult to identify which of these applies or if there are other reasons for inaction. If it is to

[7] See UK NPM website, accessed 16.5.19 and available at: https://www.nationalpreventivemechanism.org.uk/monitoring/

understand the route to progress, the NPM must at least attempt to make a judgement on the causes for state non-compliance and this requires experience, capability and the ability to navigate the political sensitivities that may be provoked as a result of such judgements. We will return to these points below with reference to our research. First, we will briefly consider current detention policies relating to the research countries.

Immigration detention policy at Europe's southern borders

At the southern edges of Europe, reliable figures about immigration detention are hard to find. Broadly speaking, we know that large numbers of people have their liberty constrained, yet few are administratively detained. Instead, they are placed in reception centres or hotspots for the purpose of identification (Ansems de Vries et al, 2016; ECRE, 2016). In Greece, since the EU-Turkey Statement of March 2016, they are increasingly likely to be held while a return to Turkey is considered. In their most recent report on Greece, the Global Detention Project (2017a: 2) points out how this agreement has blurred the boundaries of detention and asylum processing:

> 'To implement the EU agreement with Turkey, Greece converted reception centres on five Aegean Islands into closed (or "secure") facilities and adopted a policy of "geographical restriction." […] They are obliged to remain on the island on which they are initially registered and undergo a fast-track border procedure to determine whether Turkey is a "safe country" for them. However, due to administrative delays, many migrants and asylum seekers find themselves stranded on the Aegean islands for months.'

Similarly, in Italy, while hotspots are not, in law, conceived as places of deprivation of liberty, some categories of foreign nationals are not permitted to leave them[8] and are, therefore, de facto detained. Yet legislation does not provide a legal basis for deprivation of liberty in the hotspots; this has led to recommendations by the Italian NPM (2017) and CPT (2018) that a legal framework be developed for holding people in these centres. The CPT (2018) identified specific problems with legal safeguards in the hotspots, including lack of judicial control over deprivation of liberty, lack of information about rights and procedures, poor access to lawyers and risk of refoulement (CPT 2018). There remains no legal provision that defines or regulates hotspots and their operation varies widely.

Just as the numbers in detention and reception centres remain unclear, the range and location of institutions in which they are placed is not always easy to discern. It is not just a matter of data, although that is a significant problem. But also that systems of immigration and asylum control are remarkably fluid. Over the past five years, Italy, for instance, has radically changed its approach to irregular migrants and was once again increasing its detention population before the COVID-19 crisis, which has temporarily led to reduced detained populations across much of Europe (Roman 2020; GDP 2018).

At the eastern edges, matters are even less clear. The two sites we visited in Hungary in 2016 were closed soon thereafter. The Hungarian government has since pursued deportation more enthusiastically, while preventing entry at the border and effectively ending detention in designated

[8] The CPT was told that the following categories could be prohibited from leaving the hotspots: new arrivals who had not yet been identified and fingerprinted; administrative detainees against whom a refusal of entry or forced return order had been issued; criminal suspects who required further investigation by the judicial police (e.g. terrorist suspects or suspected smugglers); and criminal offenders, e.g. those who had re-entered Italy despite an entry ban. Unaccompanied minors under the age of 14, foreign nationals who had been witnesses in smuggling cases and those who were about to be transferred to other facilities or structures also had to remain inside the compound of the hotspot (CPT 2018: 9).

removal centres. Instead asylum seekers are gathered and contained in transit 'processing centres', where the government claims that people are not detained, even though they are left with little choice but to remain (Bhui, Bosworth and Fili 2018). These places are almost entirely outside the purview of national or international scrutiny (HHC 2017; GDP 2016a). Numbers, detailed information about the populations in such sites, or about their treatment, are very hard to find. In these sites, tens of thousands of asylum seekers await entry, one person at a time, in violation not only of Hungarian Fundamental Law, but also of the European Convention on Human Rights (HHC 2017). The European Court of Human Rights ruled on 14 March 2017 in *Ilias and Ahmed v. Hungary*[9], that the placement of unaccompanied minors in the transit zone amounts to unlawful detention. Nonetheless the practice continues.

We have described here a picture of regular human rights violations and restrictions on civil society. In Italy, Greece and Hungary, such matters take place in the context of significant and growing evidence of intolerance towards migrants. Meanwhile, Turkey's initially welcoming stance towards Syrian refugees has also come under increasing strain, especially since an economic downturn since 2018 which has seen a greater politicization of refugee policy[10][11]. Authoritarian governments are growing stronger. At times of crisis and greater intolerance, human rights are in most peril. This backdrop creates obvious challenges for those charged with protecting the rights of detainees.

Immigration detention and monitoring

In order to understand the capability and potential of NPMs in the research countries, we explored detention policy, detention practice, and the impact of monitoring. We visited immigration detention sites in Hungary, Greece and Turkey, and observed NPM monitoring in the latter two countries. We also met with the NPM and NGOs in Italy (Bhui, Bosworth and Fili 2018; Bhui, Bosworth, Fili and Morris 2019). We will describe the conditions we found in immigration detention briefly here; our findings are covered extensively in our two reports (Bhui, Bosworth and Fili 2018, Bhui, Bosworth, Fili and Morris 2019).

Hungary

In Hungary, we visited asylum and police detention centres in Kiskunhalas, near the Serbian border, in 2016. We were granted access by the Hungarian government and these visits took place independently of the NPM. We were able to speak to detainees in the asylum centre, where just over 100 men were then held in a facility with a capacity for 500. Numbers in detention were much reduced from the year before as Hungary's border fence had prevented migrants from entering the country. In the asylum centre, detainees told us they had been assaulted and also mistreated in other ways. Managers made it clear to us that they did not take the allegations seriously and would not be investigating further. Self-harm was framed by officers and even social workers primarily as a form of protest, rather than a manifestation of deteriorating mental health. There was little psychiatric or psychological support.

[9] See ECtHR: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172091%22]}

[10] For example, unregistered Syrian migrants in Istanbul have been ordered to return to the provinces in which they are registered to reduce pressure on the city. As part of this process, there have been allegations of some Syrians being returned to unsafe areas in Syria after signing voluntary return documents they did not understand. See BBC News, 'Syrian migrants in Turkey face deadline to leave Istanbul', 20.8.19, last accessed 20.8.19 and available at: https://www.bbc.co.uk/news/world-europe-49404739

[11] Karasapan, O. (2019) 'Turkey's Syrian refugees—the welcome fades', Brookings blog, 25 November 2019. Last accessed 19.9.20 and available at: *https://www.brookings.edu/blog/future-development/2019/11/25/turkeys-syrian-refugees-the-welcome-fades/*

Hungary ratified OPCAT in 2012, and, three years later, designated the Office of the Commissioner for Fundamental Rights (OCFR) as its NPM, through amendments to the Ombudsperson's Act. Prior to the creation of the NPM, the Ombudsman had issued regular reports on immigration detention. Yet, since 2015, when irregular migration increased - precisely the time that human rights scrutiny was most needed - the NPM had made no visits to detention centres or to the transit zone at the Serbian border. The decision of the OCFR to absent itself from sites of potential human rights transgressions appears to have been a political decision made on the basis of the sensitive migration debate in Hungary (Bhui, Bosworth and Fili 2018). The NPM was therefore largely irrelevant to protecting detainees' rights during our visit.

Civil society organisations had tried to fill the gap left by the NPM, but their ability to do so had been constrained by the harsh political environment. For nearly 20 years, the Hungarian Helsinki Committee (HHC) had an arrangement with the border police to monitor conditions in detention and to provide legal advice to detainees. Since 2017, however, the HHC has been banned from entering places of confinement[12], as the increasingly intolerant Hungarian government has targeted civil society organisations while also ratcheting up public fears about foreigners (HHC 2017).

Greece

In Greece, we visited a total of five immigration detention centres during two separate visits, all in or around Athens[13]. Our first visits, undertaken without the NPM, were to the Petrou Ralli and Amygdaleza detention centres. At Petrou Ralli, as in Hungary, detainees made allegations of being beaten and abused, but managers were largely disinterested. At the Amygdaleza detention centre, which held men in rows of shipping containers, detainees complained about the cold, lack of hot water, poor access to their mobile phones and lack of information on their cases. Some looked very young and others were obviously mentally unwell. As in Hungary, the director described self-harm as a form of manipulation. A nearby children's unit on the same site held 20 boys, usually until they could be moved to a hostel run by the Greek Council for Refugees – some had been there for several weeks. The sleeping areas were dirty and unhygienic and children washed their clothes with cold water in sinks. They were rarely allowed outside. Some still appeared traumatised, having been rescued from a sinking ship[14]. These visits did not suggest that a human rights framework was respected by the detaining authorities, and our findings supported the already ample long-term evidence of inadequate and degrading conditions in Greek detention sites (CPT 2017; GDP 2017; Fili 2013).

On our second visit to Greece, in October 2018, we were guests of the Greek NPM, which sits within the Greek Ombudsman's office and, at the time, had 15 staff. We returned to Petrou Ralli and also visited the Athens airport detention facility. At Petrou Ralli, little had changed. The atmosphere in the centre was oppressive and frantic, and as the NPM staff walked onto a men's wing, they were quickly surrounded by frustrated detainees. They could not walk any further than a few metres or see past the detainees into the cells. Police officers listened to the discussions between detainees and the NPM staff. After about 15 minutes, the NPM staff left the wing. They raised with Petrou Ralli's director several cases about which they had prior information where mistreatment had been alleged. His responses gave little assurance that he was taking the concerns seriously and there was no evidence of any tangible outcome for detainees from the visit (Bhui, Bosworth, Fili and Morris 2019).

[12] See: 'National authorities terminated cooperation agreements with the Hungarian Helsinki Committee', last accessed 25.5.19: https://www.helsinki.hu/wp-content/uploads/termination-of-agreements-summary.pdf

[13] We have since conducted a further visit with the NPM, which did not significantly change our previous findings.

[14] This unit stopped routinely holding children in 2017, but is still being used on an occasional basis.

At the airport facility, detainees in the adult male section were locked up constantly and usually let out only to go to the toilet. They were not allowed to go into the open air and had no direct view of the outside. There was graffiti in every cell, some of it offensive and threatening; for example, one cell had a drawing of a large swastika. The cells were dirty and cramped, but less crowded than had previously been seen (CPT 2017; Fili 2013). The NGO Aitima[15], which used to visit the centre regularly with interpreters and legal advisers, no longer had any funding for this work. Men could be held for several weeks in these conditions.

Again, the NPM gathered limited evidence. In particular, the lack of private conversations and the short period of time spent on the units, meant it was not possible to obtain reliable information about how detainees were treated. While most of the men's concerns were about their cases and detention, there were a number of other complaints such as not being able to use the toilet or the phones, or not seeing a doctor when needed. The NPM gave some information about legal aid to detainees and looked at a few appeal decisions which were written in Greek, trying to explain what was written. It was unclear if the centre director was following up the cases handed over to him or what the outcomes were. In short, there was no evidence – either impressionistic or empirical – that monitoring visits were yet making any tangible difference to detainees or to the management approach.

Turkey

In Turkey, the CPT (2017) had noted some positive aspects of the care for detainees, such as the absence of allegations of abuse and improved healthcare and psychological support, but also highlighted concerns such as overcrowding and lack of access to natural light and outside exercise. At the time of our first visit in 2016, the NPM was in transition and inactive (Bhui, Bosworth and Fili 2018; OHCHR 2017). Since then, the new Human Rights and Equality Institution of Turkey (HREIT) had been established. The HREIT became legally operational on 24 November 2017 and the NPM, which sits within this body, had undertaken a total of 28 visits, of which four were to immigration removal centres and four to refugee camps[16].

While Greece held around 3,000 detainees at any one time, Turkey had over 16,000, with plans to increase detention capacity to over 21,000[17]. In addition to immigration detention, the Turkish NPM was responsible for monitoring hundreds of prisons and other facilities such as secure psychiatric hospitals. The task of monitoring such an estate was obviously considerable. However, while the HREIT as a whole had about 120 staff covering a range of activities, the NPM had only five staff, who undertook both detention monitoring and time-consuming complaints work[18]. Since the failed coup of 2016, civil society organisations, some of which had previously contributed to monitoring, had been largely excluded from Turkey's custodial institutions. Only one NGO - the Turkish Red Crescent

[15] See Aitima's website here: http://www.aitima.gr/index.php/en/

[16] Source: Merve Sisli (2019) 'Immigration detention and monitoring in Turkey', presentation by NPM Expert, 21.3.19, to conference in Athens.

[17] Asylum Information Database: *Turkey*. Available at: https://www.asylumineurope.org/reports/country/turkey/place-detention. Last accessed 8.5.19. AIDA reports that, according the Directorate General of Migration Management, in December 2018 there were 24 active removal centres in Turkey with a total detention capacity of 16,116 places, up from 18 centres with a total capacity of 8,276 places in February 2018.

[18] By March 2019, the number of NPM staff had risen to eight, which was still very few for the volume of work Source: Merve Sisli (2019) 'Immigration detention and monitoring in Turkey', presentation by HREIT NPM Expert, 21.3.19, to conference in Athens.

(TRC) – was now working in immigration detention. At the time of our visit, no reports had been published. In June 2019 the NPM confirmed publication of 10 reports on its website[19].

We visited both Adana Sariçam refugee camp, housing 27,000 refugees in pre-fabricated containers, and Gaziantep immigration removal centre, which held 800 detainees in a modern facility. In the camp, residents were not prevented from leaving or moving around and, as such, was not considered by the NPM to be a place of detention. However, the risk of such restrictions and abuses emerging in facilities housing vulnerable migrants meant that the NPM included such camps in their detention oversight. Few residents complained to the NPM, and none raised concerns about treatment by staff or the Directorate General of Migration Management (DGMM). The living conditions were basic but adequate as far as we saw.

Gaziantep immigration removal centre opened on 4 May 2016 and had been built with 75% EU funding. It was an entirely different proposition to the camp. The centre looked and felt very much like a modern prison. It held a varied population, including families with children and people suspected of links to terrorist organisations. A unit for people suspected of terrorist links held 159 people, many of them Syrians who would not normally be removable because of the risk of refoulement. In line with an amendment in October 2016 to Turkey's 2013 Law on Foreigners and International Protection, removal was now allowed on grounds including membership or support of a terrorist organisation[20]; it is unclear if individuals had actually been removed to unsafe countries for such reasons.

Detainees' rooms were identical. They were unlocked from 0800 to midnight and all rooms were locked overnight without exception, including those with children. The director said he was not aware of violence or bullying in the centre. However, during our visit we saw an incident that appeared to be an officer assaulting a male detainee. The NPM obtained CCTV evidence of the incident and the director undertook to investigate and report back to the NPM. In relation to two other alleged incidents, both involving women, the NPM located and interviewed witnesses, wrote down the details and provided them to the director for follow-up, requiring a response from him. Five currently detained men had attempted suicide.

The family unit held 12 families with 35 children. Children were largely confined to a landing, had very little activity and no toys. There was little attempt to soften what was a lamentably poor and unstimulating living environment for them. Parents and centre psychologists described behavioural and emotional disorders among the children. In the suspected terrorist unit, the men could go outside once or twice a day but had few other activities. Pencils and pens were not allowed in detainees' possession anywhere in the centre and there were no pastimes such as cards or games to play. Several men said they did not know why they were being held and that the DGMM was not keeping them up to date with their cases. All were paying for lawyers privately and many complained about the quality of representation.

The lead monitor and coordinator was a judge and the NPM as a whole appeared to be a technically proficient body with some authority. They spent a considerable amount of time meeting with residents and detainees, building a picture of their daily lives, and establishing concerns from first-hand accounts. The coordinator asked staff, including the directors, to leave rooms to ensure that

[19] Merve Sisli (2019) 'Immigration detention and monitoring in Turkey', presentation by NPM Expert, 21.3.19, to conference in Athens. All reports are in Turkish and we are currently unable to translate them; we are therefore unable to comment on their content or impact on the detention centres.

[20] 'Removal or refoulement', AIDA Turkey, accessed on 8.5.19 and available at: https://www.asylumineurope.org/reports/country/turkey/removal-and-refoulement

private conversations between detainees and monitors could take place. In a final meeting with the directors, the NPM coordinator systematically raised concerns emerging from the monitoring visits.

The NPM concluded that the refugee camp residents were not being mistreated and that their freedom of movement was not restricted. There have been some criticisms of the treatment of Syrian refugees in Turkey, mainly focusing on the evidence of refoulement and border pushbacks in contravention of the feted 'open door policy'[21], and problems of integration and rising tensions with host communities (UDA Consulting 2018). However, the NPM's positive conclusions were in line with the weight of evidence from NGOs and journalists, that Syrian refugees have been generally welcomed in Turkey (UNHCR 2019; UDA Consulting 2018) and reasonably well-treated in refugee camps that have been described by the UNHCR (2016) as among the best equipped in the world.

The lack of time to see the Gaziantep immigration removal centre was more problematic. While the visited units were well-selected as areas of greatest concern, a second day would have allowed the NPM to examine in more depth what had been seen and to obtain more documentation and facts necessary to a rounded assessment.

The Turkish NPM had progressed significantly since our first visit in 2016, when it was not functioning (Bhui, Bosworth and Fili 2018), and the rigorous nature of the monitoring practices was encouraging. However, we did not see the important next steps such as report writing, recommendations and institutional action. The small NPM was faced with a enormous challenge as a result of the virtual absence of civil society in detention, the sheer size of the detained population and a broader political culture that did not embrace human rights.

All of the NPMs in our study had been functioning for less than five years and were not yet well established. They were still developing their methodology and staffing and, clearly, had some distance to travel before they could provide the system of protections and oversight envisaged by OPCAT. We will now explore some of the common critiques of NPMs with reference to our research; and we explore routes towards progress.

Realising the potential of NPMs

One practical criticism that can be levelled at NPMs is that they point out to detention staff and managers what they already know, doing little to help the change process and returning months or years later to report the same failings. In the meantime, the detention authorities have not implemented recommended changes because of a lack of motivation, money, knowledge or capability. This state of affairs increases cynicism towards the NPM from government and civil society, and undermines its potential to be useful. In Greece, this unvirtuous circle was in full flow, and lent a depressing inevitability to our findings.

We suggest that a first step in addressing this problem is to see the full potential of OPCAT. NPMs are not regulators checking on technical implementation of institutional policies – their human rights basis gives them remarkable scope to comment, gather information and engage authorities in constructive and challenging dialogue (see Caruana 2017). The need for independence does not

[21] E.g. see Human Rights Watch, 'Mass Deportations of Syrians', 22.3.18, last accessed 5.9.18 and available at: https://www.hrw.org/news/2018/03/22/turkey-mass-deportations-syrians

require detachment. Indeed, a truly preventive mechanism demands regular dialogue with authorities at both institutional and government level, supported by the UN SPT where necessary[22].

Nor does independence mean that NPMs should work in isolation. In general, we found that NGOs played a limited role in providing them with intelligence, expertise and assistance, while there was no evident engagement at all from independent or academic researchers. In a discussion of prisoner grievance processes and rights awareness, Armstrong (2019: 412) laments the 'prison's organizational monopoly on technical knowledge and discourse of rules, laws and policies surrounding rights'. Long-term prisoners with a deep understanding of the carceral system can develop the necessary expertise to exercise their rights. This is not likely in generally short-term immigration detention, which is characterized by complex legislation and rapidly changing policies. The help of legal representatives and the NGOs that often facilitate legal support, becomes critical in this situation. Governments are well aware of this. In states such as Italy and the UK, the views of NGOs are accommodated and the support that they can provide is generally welcomed. Even if their campaigning against detention is not always enthusiastically received, their opposition to detention has not led to the intolerance seen in states such as Hungary. Hungary's expulsion of the Hungarian Helsinki Committee (HHC) from its support role is an example of a state rejecting the challenges, checks and balances inherent to a human rights approach and seeking more total control.

Collaborative working between NPMs and NGOs can create concerted pressure towards positive change. For example, in the UK, a series of detailed published reports by HMI Prisons about children's detention provided much of the evidence that was subsequently used by lawyers and NGOs to campaign for reform, leading to fundamental changes in the system and a steep reduction in the number of detained families (Bhui 2013). Civil society groups in general may have specialist knowledge that NPMs do not possess, for example in helping to identify and meet the diverse needs of LGBTI detainees (Minty 2019).

Another common challenge is to provide evidence of NPM effectiveness in protecting the rights of detainees. The challenge is currently largely unmet. To an extent, this is not surprising given that most NPMs are relatively new and still struggling with the prerequisites for effectiveness, such as technical proficiency and resources, both of which are important to a credible body. The ongoing collaboration established by the research team with the Greek NPM in particular has involved technical training and support which is intended to help fill this gap. Evaluation of NPM 'success' that goes beyond judgements of technical proficiency, is possible, if rather complex. Obvious metrics would be the degree to which custodial institutions have improved procedures and systems of accountability, and positive changes in detainees' perceptions after implementation of NPM recommendations. If the institution's data on, for example, assaults and use of force, are considered reliable, they could also be used as evidence to judge direction of travel. It should be possible to show if the 'health' of an establishment as indicated by such measures correlates with allegations or findings of inhuman or degrading treatment, and indeed with the technical proficiency of the NPM.

Broader research on effectiveness is currently very limited. There have been some studies on the impact of human rights treaties on state behaviours, but there is little agreement between them; some commentators find that such treaties have no positive or even a negative effect on state behavior, while others identify limited improvements (see Krommendijk 2015 for a summary). This research pays little attention specifically to NPMs; the one significant exception is a study commissioned by the Association for the Prevention of Torture (Carver and Handley 2016). The authors found that NPMs were operational in only two of the countries they considered but nevertheless reached positive conclusions about monitoring, as long as it is conducted well:

[22] See 'The SPT in Brief', UNOHCHR website. Last accessed 30.5.19 and available at: https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx

> *Monitoring bodies … have a direct effect in reducing torture … according to the study's statistical analysis … the protection of monitors from threats and sanctions and their ability to conduct unannounced visits and have interviews in private with detainees are the key factors for effectiveness (reducing the incidence of torture). (Carver and Handley 2016: XX.)*

Carver and Handley (2016) also point to the work that NPMs have done in putting human rights on the agenda where the use of torture and other ill-treatment is justified in the name of fighting terrorism and responding to states of emergency. However, while important, this evidence is limited and, overall, the international evidence on the impact of NPM monitoring on state behaviour and conditions in detention remains inconclusive at best (Iacopino 2018; Rogan 2019).

In his paper on the unintended consequences of promoting human rights in detention, Flynn (2012: 3) encapsulates a further strand of critique: he argues that attempts to reform immigration detention without also seeking to restrict use of detention, may lead to 'kinder and gentler' regimes, but ultimately extends the harmful outcomes created by immigration detention. He advises that any campaign aimed at reforming immigration detention 'must have as an integral component working to constrict that country's detention activities'.

However, when the pressure towards reform is being applied not by civil society, but by an NPM which is an arm of the same government that has created the detention infrastructure, a campaign to end the policy of detention is not a viable option. NPMs may therefore unintentionally legitimate poor or abusive detention regimes in two ways: first, they may enable governments to claim progress by achieving small but ultimately insignificant changes. Thus, they promote *better* treatment of detainees, but it does not reach the threshold of what could be considered acceptable against human rights-based standards such as those of the CPT[23]. Second, regardless of the NPM's competence or effectiveness, its very existence provides governments with a defence against criticism of its human rights record. Governments may even use a 'well controlled' NPM lacking independence as an excuse to exclude other, more effective and troublesome monitoring bodies from sites of detention, as was the case in Hungary.

Flynn (2012: 4) further notes that 'the most effective advocacy campaigns are those that have at their base reliable data'. NPMs have unique access to detention and in some countries they may be the only independent organisations that are allowed to enter these sites. They can provide critical data for use by any interested parties, including campaigners who want to see an end to detention. An NPM cannot become or be seen as a campaigning body if it is to retain its unique role, but it can be a champion of transparency and demand that the requirements of OPCAT are met, including the granting of access to detention and to data. One of the most valuable tasks of an NPM is to bring to life the experience of detention and the human stories that can promote reform, either of individual institutions or the detention system.

Kelly (2009: 777) outlines a more conceptual critique identifying human rights oversight with unintended consequences. He argues that such monitoring 'displaces the discussion of the causes and consequences of violence in favor of a focus on the systems that are supported to monitor cruelty', to the extent that 'measurements, monitoring, and prevention are in danger of becoming merged.' His concern was state reporting of compliance with the Convention Against Torture to the Committee Against Torture, rather than what was at the time a nascent OPCAT. However, his

[23] The CPT outlines its immigration detention standards in two publications: 'Safeguards for irregular migrants deprived of their liberty' (2009), last accessed on 4.9.19 and available at https://rm.coe.int/16806cce8e; and 'Immigration Detention: Factsheet' (March 2017), last accessed 4.9.19 and available at: https://rm.coe.int/16806fbf12

challenge is relevant to NPMs to the extent that the process of monitoring can depoliticize conceptions of violence: 'Human rights indicators become confused with human rights … [while] structural inequalities that produce torture are downplayed' (Kelly 2009: 779). This is a challenge to tackle the wider political and socio-economic circumstances that contribute to the conditions for ill-treatment and to acknowledge explicitly why it is that ill treatment is more likely to be identified and condemned in the world's poorer countries as unequal international power relations are played out. This analysis is compelling but does not, we believe, negate the value of NPMs; rather it shows why they must look beyond day-to-day monitoring, and understand wider political contexts and report on them, as far as necessary and possible. In this, alliances with NGOs, academics, legal representatives and faith groups become ever more important. Even more critical is the role of the UN SPT as supra-national body that can initiate dialogue with national governments and on the international stage[24].

Conclusion

According to Sonia Snacken (2015: 410), 'At the European level, forms of penal moderation such as the abolition of the death penalty and more 'humane' treatment of prisoners have been advocated by appealing to the protection of the inviolable dignity and human rights of all human beings, including offenders and prisoners, as a core 'European' value.' In our work, we sought to understand whether human rights could have the same impact on detention and specifically whether NPMs could give meaning to human rights commitments by making a difference to the experiences of irregular migrants – including by reducing the risk of detention.

The Hungarian NPM was unable to overcome the limitations placed on it by a political climate hostile to human rights. The situation there illustrates the challenges that face NPMs in countries where far-right intolerance is asserting a firmer grip on domestic politics. The shrill anti-Muslim rhetoric of the current Hungarian premier and its close identification with concerns about migration is a reminder that immigration detention is not just about controlling borders - it is not possible to comprehend its dynamics without also understanding debates about ethnicity and identity, and experiences of racism within and across national boundaries (Bhui 2016). The value of a human rights framework which constrains individual and state behaviours becomes more sharply defined in this view.

The NPMs' potential was in the early stages of being understood or realized in Turkey and Greece, but there were some positive signs that they were starting to develop capability and explore their powers. The NPM in Turkey was following strong monitoring practices and had challenged the immigration removal centre director on key issues relating to mistreatment. They were exploring the parameters of their authority and there was enough potential to give some cause for cautious optimism. Encouragingly, a central plank of their approach was listening to detainees. The Greek NPM was increasing the length of its monitoring visits and was trying give greater prominence to detainees' voices. They had recently created a detainee survey asking a series of questions about treatment and conditions in detention and were distributing it in prisons (see Bhui, Bosworth, Fili and Morris 2019). Whether any of this had yet had any tangible impact in terms of improving protections and conditions cannot be gauged from what we were able to see.

While human rights legislation should hold back the worst excesses of intolerant governments and mitigate human impact, we found that national legislation and policies supporting a hostile

[24] See 'The SPT in Brief', UNOHCHR website. Last accessed 30.5.19 and available at: https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx

approach towards migration and sometimes directly towards migrants, were working against the rights guarantees that international law offers in all of the research countries. It is unsurprising in this context that the mechanisms designed to protect rights and prevent ill treatment were struggling to obtain the resources they needed to be more impactful. In short, what the human rights framework represents is greater than what it currently delivers. Yet, the alternative to supporting NPMs is a counsel of despair that does nothing to protect vulnerable detainees. An internationally recognized human rights framework helps individuals to expose abusive practices and supports those trying to create change. It is worth noting that in all of the research countries, the existence of the NPM was viewed positively by NGOs and academics. NPMs provide an ever-present opportunity for positive changes to be realised when political context allows, and a bulwark against erosion of rights when it does not, albeit an often fragile one. Without an NPM, there is no obvious pathway towards progress.

Many of our findings are what one would expect in a globalizing world where increasing mobility has been challenged by attempts by states to reassert sovereignty; trends towards criminalization of migration, securitization of border control and expulsion tend to deprive migrants of fundamental rights. But, as Marin and Spena, put it, 'it is precisely on the basis of fundamental rights that we should find a way to approach a solution in order to reconcile the governance of migration, the fight against crime and the rule of law. In other words, the strength of law cannot be ignored …' (2016: 152). These authors give encouraging examples of both the Court of Justice of the European Union and the European Court of Human Rights rejecting developments not based in respect for fundamental rights (2016: 153). By the same token, the current shortcomings that we identified in NPM practice are not a reason to despair and should not be allowed to obscure the positive vision that led to their creation. Nor should they excuse insufficient state or international support for them to improve their capability, or undermine collaborative efforts between developing NPMs and NGOs and academics who may have valuable specialist knowledge. The fact that NPMs exist as part of the mechanisms that can prevent ill treatment of those in custody should be celebrated, and the struggle to help them achieve their purpose continued.

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