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The Optional Protocol to the United Nations Convention against Torture and Federal States: Challenges and Possible Solutions

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Some Challenges to the Implementation of Human Rights Treaties in Federal States

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A. Introduction

It is a truism to state that one of – if not the – major developments pertaining to the post-1945 international legal order has been the rise of the individual human being to a (partial) subject of international law, a development which some authors led to talk about the *humanization of international law* as an essential aspect of the *constitutionalization of international law*. Be that as it may be: Human rights law as enshrined in a plethora of universal and regional, general and specific human rights treaties, has become a characteristic feature of present international law. It is also a truism to state that the practical relevance of human rights treaties depends, to a very large extent, on the monitoring mechanism provided for by the very treaties themselves, or, in other words, whether and to what extent such treaties foresee institutions which are vested with the power to control compliance by states parties with their obligations resulting from their membership in such treaties. Again, there is a large variety including treaties without any such monitoring system, treaties obliging member states to periodically report to a monitoring body entitled to formulate legally non-binding opinions, treaties which, in addition to obligations to submit periodic state reports, allow for individuals to submit communications to a supervisory organ which, as a rule, is entitled to formulate (only) legally non-binding views, and, finally, treaties which provide for the existence of (human rights) courts which can be accessed by states parties and individuals and are given the power to hand down legally binding judgments. As we all know, the latter – and strongest – variety can only be found on the regional level, i.e. under the European, the Inter-American and African human rights conventions.

The effect of all such monitoring systems is, primarily, repressive (or retro-active), i.e. the control extends to the past or, to put it differently, the monitoring bodies examine whether there have been violations of such human rights treaties. Admittedly, such systems do also have some preventive effect insofar as it is expected, or at least hoped, that states parties will refrain, henceforth, from actions which have been considered to constitute violations of their human rights treaties obligations.

There is, however, one human right the utmost importance of which has prompted international legislators to devise a specific monitoring mechanism which is of a primarily preventive character: This is the freedom from torture and mechanisms which allow members of an international treaty body to visit all kinds of places of detention in order to ensure that

detained persons are not victims to measures amounting to torture and other cruel, inhuman or degrading treatment or punishment. This model was first implemented by the 1987 Council of Europe Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT) which was followed by the 2002 (Second) Optional Protocol to the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

OPCAT, and its implementation in federal states, is the general subject of this conference. I have been entrusted by the organizers to speak tonight, more generally, on challenges to the implementation of human rights treaties in federal states. This implies that the implementation of human rights treaty obligations in federal states raises specific, additional problems which are not encountered in the context of implementing such obligations in non-federal states, be they unitary or regional states. In order to fulfil this task I shall start by introducing some general aspects of the relationship between international law and federal states before I shall address the specific challenges to the implementation of human rights treaties in federal states.

However, before doing so, I find it necessary to address the notion of a federal state while bearing in mind *Roberto Ago's* correct *dictum* that a uniform type of federal state with a fixed physiognomy does not exist. Usually, a federal state is defined as a union of states (constituent states or entities) in which both the federation and the constituent states embody the constitutive elements of statehood, i.e. territory, citizens, and legislative, executive and judicial powers; state authority is divided between the federation, on the one side, and the constituent states, on the other, both of which possess certain constitutionally assigned competences and functions. In some federations, each side is strictly limited to its own sphere of legislation, administration and adjudication without any institutionalized cooperation; this is the system used, e.g, in Australia, Canada, and the United States. It is, however, also possible that the competences of the federation and the constituent states are intertwined in such a way that, e.g., the constituent states are responsible for executing not only their own laws but also those of the federation; this is the system followed, more or less, by continental European federal states. Finally, constituent states are, as a rule, no subjects of international law – international personality is reserved to the federal state.

Federal states have to be distinguished from confederations (or unions of states including international organisations), on the one hand, and unitary (including regional) states, on the other. Whereas a federal state can be defined as a union under constitutional law in which the competences of each side are determined by the federal constitution, a confederation can be described as a union of states governed by international law, namely an international treaty. Whereas a federal state is, as a state, a subject of international law, a confederation consists of member states which all are subjects of international law in their own right notwithstanding that the confederation might have international personality without being a state. Admittedly, the latter statement is controversial. Presently, the Commonwealth of Nations and the Commonwealth of Independent States (CIS) might be qualified as confederations.

In unitary states, there is usually no division of state authority between the (central) state and its subdivisions. Nevertheless, there is an increasing tendency in many unitary states to devolve functions and powers from central to regional or local authorities and to decentralize competences from the central state to self-governing bodies. In my view, this process of regionalisation might eventually result in a federal structure (as in Belgium), but not necessarily so notwithstanding the existence of some regions or provinces in Europe which have been granted far-reaching autonomy: The decisive difference remains, i.e. that the legal

bases of such autonomies (often called statutes) are issued and modified by the central state (or, at least, changes have to be approved by central state organs) whereas constituent states in a federation have the power to enact and amend their own constitutions, admittedly within the framework of the federal constitution. This means that, e.g., Spain cannot (yet) be considered a (truly) federal state notwithstanding the extensive powers held by some of her *Comunidades Autónomas*.

From a historical point of view, the first federation in the modern sense was established by the United States Constitution in 1787. In the 19th century, federal states were founded in Central Europe (Austria, Germany, and Switzerland), Latin America (Argentina, Brazil, Colombia, Mexico, and Venezuela) and Canada. Later on followed Australia, the Soviet Union (to be succeeded by the Russian Federation), and South Africa. Some federations, such as India, Malaysia, Nigeria, and Tanzania, were established in the context of decolonization; recently, some federations, such as Czechoslovakia and Yugoslavia, were dissolved into two or more independent states. Presently, the following states are generally considered to constitute federal states notwithstanding that they all have their unique features and differing constitutional systems: Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Russian Federation, South Africa, Switzerland, Tanzania, United Arab Emirates, USA and Venezuela. Among these states, only Argentina, Brazil and Mexico have ratified OPCAT and Austria, Belgium, Bosnia and Herzegovina, Germany, South Africa and Switzerland have signed it (Germany is expected to deposit its document of ratification during this autumn's General Assembly session).

B. Federal States and International Law: General Aspects

When addressing the (specific) relationship between federal states and international law, it is essential to be aware of the very considerable differences resulting from the different ways of looking at this relationship: It does make quite a difference if one looks at it from the point of view of international law as opposed to looking at it from the point of view of national (municipal, domestic) law.

I. From the outside looking in: The international law point of view

At the risk of somewhat simplifying the point, I think it is justified to state that, from an international law point of view, the situation is relatively simple: International law is not concerned as to the means by which a state party to a treaty fulfils its treaty (or for that matter: also customary law) obligations as long as it does fulfil them – thus, one might speak of an *obligation of result*. To give an example concerning the European Convention on Human Rights (ECHR): Whereas most continental states parties had made, from the very beginning, the ECHR directly applicable before domestic administrative bodies and, in particular, courts and tribunals, the Scandinavian countries and the United Kingdom did not enact such legislation until the 1990s. However, as long as the actual application of the domestic laws of these countries was in conformity with their obligations flowing from the ECHR, the institutions vested with the power to monitor the implementation of the ECHR had no reason whatsoever to complain. Notwithstanding this situation, the non-applicability of the ECHR before domestic courts resulted in such an increase of judgments in which the European Court of Human Rights (ECtHR) ruled that there was a violation of the provisions of the ECHR, that the domestic legislators enacted legislation making the ECHR directly applicable by domestic administrative authorities and courts.

To some extent, this situation is similar to the one concerning international law and federal states: From an international law point of view, the internal structure of a state, including constitutional provisions attributing exclusive legislative and other state powers in certain subject matters to constituent entities, was and still is considered to be irrelevant as concerns the obligation to fulfil international treaty obligations. This predominant position can be traced back to the umpire's view in the 1875 case of *The Montijo* (opposing the USA and Colombia) in which it was held that "… for treaty purposes the separate States are nonexistent … the federal or general government … it, and it alone, is responsible to foreign nations".

Over the years, this view developed into a norm having the rank of customary law which was eventually embodied (or is at least reflected) in Article 27 of the 1969 Vienna Convention on the Law of Treaties (VCLT) according to which a state "party may not invoke the provisions of the internal law as justification for its failure to perform a treaty." This being so, it is important to note that general international law does not prevent (federal) states from attributing to their constituent entities (limited) treaty-making powers in specific subject-matters, usually those for which such constituent entities have exclusive legislative powers under the constitutional system of distribution of competences, and, thus, confer to them (limited) international personality. However, it should also be mentioned that Draft Article 5 (b) VCLT, which sought to codify such a right to enter into treaties if this was permissible within the domestic (federal) constitution, was ultimately repressed.

Furthermore, it is interesting to note that, at least for a certain period of time and for certain subject matters, international treaty law sought better to accommodate the needs of federal states by providing for so-called "federal clauses". They reflect the situation in which, under domestic constitutional law, the federal government and/or parliament do not have the necessary powers to ensure the implementation of a treaty throughout the whole territory of the state concerned but need the cooperation of the governments and, in particular, the legislative bodies of the constituent entities. Here, the federal clause allows for the ratification of a treaty by a state even if it will be implemented only in a part of that state without such a situation resulting in a breach of that state's treaty obligations. Prominent examples of such federal clauses are Article 19 (9) of the 1919 Constitution of the International labour Organisation (ILO), Article 41 of the 1951 Convention relating to the Status of Refugees (and Article VI of the pertinent 1967 Protocol), Article 37 of the 1954 Convention relating to the Status of Stateless Persons, and - most interesting in our context - Article 28 of the 1969 Inter-American Convention on Human Rights (IACHR) – to the best of my knowledge one of the very few modern human rights instruments with such a federal clause. In this context, I should like, however, to mention the judgment of the Inter-American Court of Human Rights (IACtHR) of 27 August 1998 in *Garrido y Baigorria vs Argentina* in which it held that Argentina had always behaved in such a way as if the federal state held complete competences in the field of human rights; for this reason it would amount to a violation of the principle of *estoppel* if Argentina would refuse to take up the international responsibility for human rights violations attributable to one of her provinces. Moreover, the IACtHR held, relying, *inter alia*, on the above *Montijo* arbitration "que el Estado no puede alegrar su estructura federal para dejar de cumplir una obligación internacional"; so, since Argentina had not invoked the *federal clause* in Article 28 IACHR upon its ratification, it was barred to do so at a later stage.

In contrast thereto, there seems to be a more recent tendency to include, in human rights instruments, provisions - which might be referred to as "reverse federal clauses" - which reflect the above-mentioned rule that a state party cannot invoke its federal system as

justification not to perform a treaty by explicitly stating that the provisions of the treaty concerned "shall extend to all parts of federal States without any limitations or exceptions". Such clauses are to be found in a number of universally applicable human rights instruments such as Article 50 of the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 10 of the 1966 Optional Protocol to the ICCPR, Article 9 of the Second Optional Protocol to the ICCPR, Article 28 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) - and, of particular relevance in our context - in Article 29 OPCAT (interestingly enough, there is no such clause in the 1984 Convention against Torture) - a fact which might be explained by the articles providing for the establishment of national preventive mechanisms.

To sum up: In my understanding, it is clear that international treaty law does not allow, unless specifically provided, a federal state to rely on its internal distribution of legislative and other powers in order to justify non-performance of a treaty to which it is a party. A failure to comply with such obligations results in the international responsibility (accountability) of that state even if the act, or the omission, is attributable to the organs of a constituent entity. This situation might, indeed, result in some reluctance among federal states to ratify (human rights) treaties.

II. From the inside looking out: The national law points of view

In contrast to the situation under international law, there is no such single point of view among national legal systems; instead, we are faced with a variety of options, partly depending on whether a national legal system follows a monist or dualist approach as regards the relationship between international and municipal law, partly depending on its system of distribution of powers.

First, I think we can leave aside the pertinent issues connected with the monist approach since, to the best of my knowledge, no federal state (and, for that matter, hardly any state at all) has opted for that solution. When it comes to dualist approaches, we know that there are a number of variants most of which, however, have in common that the simple fact, that a state becomes a party to a treaty, does not make the pertinent treaty provisions domestically applicable notwithstanding that they can be characterised as self-executing. What is generally needed is a specific act of the legislator (or any other competent state organ) which either transposes (or incorporates) the international treaty into national law or has the effect of obliging the competent national authorities to henceforth apply those treaty provisions which are self-executing. In the former case, the treaty provisions acquire the status of municipal law and are, henceforth, subject to interpretation and application according to the criteria used in the respective municipal legal order. In the latter case, the treaty provisions maintain their status of international law, and national authorities have to use international law standards when applying and interpreting them; moreover, such national authorities are obliged to apply and interpret, on the domestic level, the respective treaty provisions in conformity with the contents given to them by the competent international monitoring bodies – which ensures that the dynamic element so important and characteristic for human rights treaties is fully respected which might not necessarily be the case in the former alternative.

Second, we have the specific problems of federal states the constitutions of which attribute exclusive legislative powers to the competent organs of their constituent entities. Insofar, we are faced with two major problems: The first one concerns the pertinent treaty-making power – or, in other words, is the federal state, as the sole subject of international law, entitled, under national constitutional law, to conclude treaties on subject-matters for which it has no

legislative power on the domestic level? The second problem concerns the issue whether the federal state organs are entitled, under national constitutional law, to enact legislation which might be necessary to fully implement the treaty in question; this problem arises, e.g., if the legislation in force in some constituent entities is clearly not in conformity with, say, the provisions of a human rights treaty, or, if the treaty foresees the creation of some national supervisory body – as is the case with OPCAT.

The specific consequences, in federal states, of this variant of the dualist approach which implies the necessity of an express legislative act of incorporation have become particularly controversial in the context of violations, by officials of U.S.A. states, of consular access rights as laid down in Article 36 of the 1963 Vienna Convention on the Law of Consular Relations (VCCR), a controversy which culminated in several rulings of the International Court of Justice (ICJ) and in the U.S. Supreme Court decision of 25 March 2008 in *Medellin v Texas*. In the framework of this contribution I am not in a position to elaborate on this string of cases, but have to limit myself to some rather cursory remarks; on the other hand, I am convinced that this audience is, anyway, fully familiar with the issues raised so I feel justified being brief.

It is common knowledge that U.S. states officials have, in a very large number of cases, failed to inform detained persons of their right to have access to consular staff of their country of nationality, as laid down in Article 36 VCCR. Paraguay (*Convention on Consular Relations*, 1998 ICJ 248), Germany (*La Grand*, 2001 ICJ 466) and Mexico (*Avena and others*, 2004 ICJ 12) brought suits against the US in the ICJ, under the provisions of the 1963 Optional Protocol to the VCCR (it is a sad, but telling result of the pertinent judgments, in particular in *Avena*, that the U.S., on 7 March 2005, declared their withdrawal from this Protocol thereby effectively closing the way to the ICJ …). Before the ICJ, the question was not whether the U.S. had violated their obligations under the VCCR, but whether Article 36 VCCR conferred individual rights on the persons or only entitled states parties to resort to diplomatic protection; the ICJ subscribed to the former view but, in contrast to the IACtHR in its Advisory Opinion of 1 October 1999, did refuse the argument put forward by Mexico that Article 36 VCCR conferred human rights. Therefore, the ICJ rejected the claim for blanket nullification of convictions and determined that the U.S. must provide review and reconsideration, to be carried out by the judicial branch, of all convictions of foreigners represented in the litigation to determine whether defendants had suffered actual prejudice and whether the violations of the VCCR had led to convictions and severe penalties.

In quite an unexpected move, President Bush issued on 28 February 2005, after the ICJ judgment in *Avena*, a memorandum telling the states that they must comply with the *Avena* decision (as was done by the Oklahoma Court of Criminal Appeals in *Torres v Oklahoma*). Texas replied that the President had no power to interfere with the running of the state's criminal courts and argued that complying with the memorandum would infringe upon the role of the Supreme Court in interpreting treaties, contradict the Senate's understanding of the VCCR, and intrude on the sovereignty of the states. The Supreme Court ultimately refused to enforce the ICJ's *Avena* decision either as a result of treaty obligations or in compliance with the presidential memorandum. In effect, the states remain free to comply with the ICJ decision. Although the Supreme Court seems to imply that the Senate has the power to make clear that treaties are self-executing (what had not happened as regards the VCCR) and that Congress is free to pass implementation legislation (as first held in the 1920 landmark decision in *Missouri v Holland*) which had not happened either, it must be stressed that this decision implies that the U.S. constitution, as interpreted by the Supreme Court, does not lend itself to strengthen respect for U.S. obligations under international treaty law: The supremacy

clause of the constitution does not presumptively make treaties, ratified by the U.S., self-executing as most commentators had assumed and, without explicit treaty language referring to the enforceability of the treaty as U.S. law, treaties will remain only an obligation at the international level which, from a constitutional law point of view, the U.S. may, or may not, act upon; moreover, the states remain free to comply with treaties that require their implementation, as they see fit.

Obviously, I cannot embark upon a truly comparative study of the constitutional law situation in all federal states mentioned in the beginning. It seems, however, that most countries follow in practice the principle which is laid down in, e.g., Article 253 of the Constitution of India according to which the federation has the power to enact any law to implement treaties; quite frequently, there are provisions or unwritten constitutional principles which oblige constituent entities not only to respect, within their respective spheres of competences, obligations resulting from treaties entered into by the federal state, but also to take the necessary legislative and other steps to ensure the full implementation of the treaty obligation (see, e.g., Article 16 of the Austrian Federal Constitution). Since I am by no means an expert on the constitutional situation here in Argentina, or for that matter in other Latin-American federal states, it would be interesting to know how the Argentinian authorities, both on the federal and the provincial level, reacted to the above-mentioned IACtHR judgement in *Garrido y Baigorria vs Argentina* which basically meant that Argentina was internationally responsible for human rights violations attributable to one of her provinces.

I should like, however, briefly point to the case of Australia and share some information with you on the situation in Germany. Under section 51 (xxix) of the Australian Constitution, the Commonwealth Parliament is vested with law-making power with respect to external affairs. In so far as this provision authorized laws implementing treaties, there was a controversy as to whether this section 51 (xxix) was extensive or more limited than the plenary federal power to conclude treaties. In 1982, in *Koowarta v Bjelke Peterson*, the Australian High Court held that the federal law in dispute was authorized under the external affairs power but did not give a final answer as to the extent of federal power to implement treaties throughout Australia. However, in 1983, in *Commonwealth v Tasmania*, the High Court finally found that the federation can implement all genuine treaty obligations and benefits.

The situation in Germany is still similar to that in Australia before the decision in *Commonwealth v Tasmania*: Without the consent and co-operation of the constituent states, the *Länder*, the federation is not able internally to implement treaties on subject-matters under the legislative competences of the *Länder* because it lacks the constitutional power to do so and, according to the German Federal Constitutional Court (BVerfGE 6, 309), there is no written or unwritten right of the federation to force the *Länder* to pass the necessary implementing legislation. Thus, the federal treaty-making power on subject-matters under the legislative powers of the *Länder* is virtually meaningless unless the *Länder* cooperate with the federation. In actual state practice, however, this dilemma has been solved by the so-called *Lindau Agreement* of 1956, a kind of *gentlemens' agreement* concluded between the federation and the *Länder*. Under its provisions, the *Länder* not only agreed that the federation may negotiate and sign a treaty in areas under their competences, but also give their consent to ratification, usually by an approval, by the *Bundesrat*, the second chamber of the German parliament composed of representatives of *Länder* governments, of the federal act which both makes the provisions of the respective treaty internally applicable and allows the federal executive to deposit Germany's instrument of ratification. After such consent, failure by the *Länder* to pass the necessary implementation legislation or to establish specific institutions required by the treaty would be considered as a breach of their obligations under

the principle of *federal loyalty* (*Bundestreue*) which constitutes, under German doctrine, an essential aspect of federalism as this principle obliges the *Länder*, *inter alia*, not to act in such a way as to intentionally creating a case of international responsibility of the federation. In a worst case scenario, the federation would have the possibility to initiate proceedings before the Federal Constitutional Court with a view to achieve a judgement stating that there had been a violation of the principle of *federal loyalty* – in an extreme case, it might be argued that the federation might even pass legislation of its own which would substitute the necessary but missing *Länder* legislation. This power is, however, not explicitly foreseen (as in Austria) but predominantly considered to be encompassed by the principle of *federal loyalty*. In actual state practice, the federation when negotiating treaties involving subject-matters under the legislative competence of the *Länder*, seeks to regularly inform *Länder* officials (who might even be members of the delegation negotiating the treaty) and seeks to obtain the unofficial consent of the *Länder* before signing the respective treaty.

To sum up: It seems that most federal states, which attribute, in their constitutions, exclusive legislative powers on certain subject-matters to their constituent entities, find effective ways to prevent cases of international responsibility which would result from the non-observance of treaty obligations attributable to their constituent entities. Either there are express provisions in the constitutions which allow the federation, if need be, to pass the necessary legislation, or there are provisions which might - and have been - interpreted in such a way. In such situations, problems arise if the federation does not pass the necessary acts - as was the situation eventually resulting in U.S. Supreme Court decision in *Medellin v Texas*. There are, however, a few federal states where the federation does not have such a compelling power; here, the federation has to rely on what might be called measures of *cooperative federalism* which implies that the constituent entities are fully integrated into the treaty negotiation and implementation process. From a German perspective, it must be stressed that such a solution might appear as cumbersome - but it works in practice.

C. Federal States and the Implementation of Human Rights Treaties: Specific Challenges (including OPCAT)

In this section, I should like briefly to address, based on the results of the foregoing section, two sets of issues: First, I shall look into problems related to the domestic application of human rights treaties, including OPCAT; and, second, I shall discuss some problems related to the international monitoring of domestic compliance with human rights treaties, including OPCAT.

I. Domestic application of human rights treaties

As to the domestic application of the provisions of human rights treaties, one has to differentiate between the administration and the judiciary. Moreover, it is most important to note that very much depends on whether the internal law provides for the direct applicability of the respective human rights treaty provisions.

a) Administration

If the respective human rights treaty has been made directly applicable, either by a federal act obliging both federal and states authorities, or by a federal act and corresponding states' legislation, the provisions of such treaties should, provided the competent officials have been duly informed, in principle be fully observed and applied. Ideally, such officials would be

regularly informed as to developments on the international level as concerns the interpretation of the treaty by the competent international supervisory organs in order to ensure, to the greatest extent possible, the correct application of such treaty provisions on the national plane, both at federal and states level. The control of the relevant administrative decisions will, as a rule, be vested in the domestic courts, again both on a federal and states level. Finally, there is the issue as to the rank of the international treaty law within the municipal legal order: Do they have supremacy over statute law? Or are they subject to the *lex posterior*-principle? Or are there principles in existence which oblige officials to interpret more recent national legislation in such a way as to ensure conformity with pertinent treaty obligations? All these issues, however, are not specific to federal states but are relevant in every state.

Problems arise, however, if the human rights treaty provisions have not been made directly applicable, neither on the federal level nor on the states level. From a national law point of view, there is no legal obligation to apply, in such a situation, the provisions of the respective human rights treaties unless the legal order concerned encompasses a general obligation of all state authorities not to act in such a way as to give rise to the international responsibility of that state. It must be stressed, however, that this is not a specific problem for federal states.

Specific problems for federal states arise, however, if the legislation necessary to make treaty provisions has been enacted on the federal level but not on (all) states level. In countries which do not vest the federation with the powers to enact, in such a situation, legislation substituting the absent state legislation, it all depends on the legal order of the respective constituent entity (state) whether it allows its officials to apply a federal law which has no equivalent in the pertinent state legislation. Usually, such a situation will result in the human rights treaty not being applied which, in turn, establishes the international responsibility of the federation.

b) Judiciary

In principle, there are no specific federalism related problems for the judiciary. If the treaty provisions have been made directly applicable, by whatever means, it is the task of the judiciary, federal and states judiciary, to ensure that the individual decisions of the administration are in conformity with the human rights treaty obligations. If the treaty provisions have not been made directly applicable, it all depends on the pertinent solution of the respective legal order, i.e. whether it allows (or even obliges) courts to rule in such a way as to prevent the international responsibility of the state concerned. As in the case of the administration, specific federal state problems arise if the treaty provisions have not been made directly applicable on the states level: In principle, states courts will then be barred from applying the international treaty and might, thus, establish the international responsibility of the state concerned.

c) OPCAT

Since, during this conference, we shall discuss in detail the specific problems connected with the application and implementation of OPCAT by federal states, I shall not go into these details right now. I should like to mentions, however, three points:

Unlike most other human rights treaties (and comparable only to its European predecessor, the CPT), OPCAT does not provide for substantive human rights provisions; this means that no legislative action, be it on federal or states level, is needed as concerns substantive rights of detained persons unless one considers that the below rights of Subcommittee members to

have private interviews with persons deprived of their liberty encompasses a pertinent right of such persons to have such interviews with Subcommittee members.

As just mentioned, OPCAT does provide, however, for wide-ranging rights of the Subcommittee on Prevention and its members. States parties will have to see whether the actual implementation of such rights necessitates the enactment of relevant legislation, either on the federal level or the states level or on both levels, and, if so, will have to ensure that such legislation be passed. Moreover, officials will have to be fully and regularly informed on the rights of Subcommittee members under OPCAT and the officials' obligations resulting therefrom. In federal states, the appointment of officials responsible for the correct implementation of OPCAT and the establishment of a working-group composed of such responsible persons both from the federal and the state level seems to be useful.

Finally, unlike CPT, OPCAT also obliges states parties to establish National Preventive Mechanisms (NPMs). In federal states, there are several options such as, e.g., one NPM for all detention facilities, be they run by the federation or the states, or two NPMs, one for the federal and one for the states level, or several NPMs, one for the federation and one for each state. In addition to the establishment of such NPMs, states parties will have to see whether the actual implementation of the rights of the members of such NPMs necessitates the enactment of relevant legislation, on federal and/or states level, and, if so, will have to ensure that such legislation be passed. Finally, officials will have to be fully and regularly informed on the rights of NPM members and the officials' obligations resulting from the corresponding provisions of OPCAT.

2. International monitoring of domestic compliance with human rights treaties

At the outset, I should like to remind you of the various *modi* of international monitoring of the domestic compliance with international human rights treaties: They range from an obligation periodically to submit state reports which, together with information gathered from other sources, will serve as the basis for the formulation of legally non-binding opinions of the respective monitoring body; over systems based on periodic state reports leading to (legally non-binding) opinions of the respective monitoring body coupled with the right of individuals to file communications with that body which will then adopt a (legally non-binding) view (as under most UN human rights treaties); to a system in which individuals can access a human rights court which is entitled to hand down legally binding judgments. For all these *modi* of international compliance control, the internal structure of the respective states is fully irrelevant: It is the legal obligation of the federal authorities to ensure that states authorities submit all the information necessary to enable the monitoring body to fulfil its task to adopt opinions on the basis of full information or to ensure that binding judgments are scrupulously respected by all state authorities, be they federal or states authorities.

In the context of this contribution, I shall not go into the details of the monitoring system provided for under OPCAT but only refer to its Article 16 (confidential recommendations and observations, publishing of the Subcommittee's report, publication of its annual report, eventual seizure of the Committee against Torture) and its Article 11 (b) which foresees a kind of indirect international monitoring of states parties compliance with their obligations towards NPMs.

D. Concluding Remarks

The task of this contribution was to present and discuss the specific challenges connected with the implementation of human rights treaties in federal states. And, it must be stressed, that, taking into account the limited possibilities of international law to enforce its rules against states which do not honour their treaty obligations, much depends on the willingness of states to respect such obligations. In federal states the situation might be even more complex since a number of them do not empower the federation to ensure the correct implementation of human rights treaty obligations on the states level. So, there might be situations when a federal state is internationally responsible for human rights violations attributable to its constituent entities but is, due to its constitutional law system, unable to terminate such violations. Therefore, federal states where the federation lacks the powers to enforce, on their constituent entities, respect for that state's international obligations are advised to establish mechanisms of cooperative federalism ensuring that constituent states will fully comply with the legal obligations entered into by the federal state as their international representative. This might indeed postpone the actual ratification of human rights treaties, such as OPCAT, by federal states but, I suggest, it is highly preferable that such ratification is based on the full consent of all actors potentially involved in the domestic implementation of the treaty.