

OPCAT Research Team, University of Bristol- individual UPR submission- Costa Rica- November 2009(6th session)

20 April, 2009

1. The present document is an individual submission of the Research Team for the Universal Period Review of Costa Rica and concerns specifically the obligations of the country under the Optional Protocol to the United Nations Convention against Torture (OPCAT).

2. The project on the implementation of the OPCAT is running in the Law School of the Bristol University, United Kingdom since June 2006. The project is headed by Prof Rachel Murray and Prof Malcolm Evans, with two researchers on the project: Mr Antenor Hallo de Wolf and Dr Elina Steinerte. This academic research project is funded by the Arts and Humanities Research Council in the United Kingdom. The aim of the project is to investigate the implementation process around the world and thus in the remit of the project we have visited over 20 countries around the world and engaged with stakeholder from even wider range¹. The present submission is based on the research conducted in respect to Costa Rica.

3. The central obligation of a state party under the provisions of OPCAT is the designation of a National Preventive Mechanism (NPM) which is to be done within one year after the ratification or of the entry into force of the instrument (see Article 17). Costa Rica ratified OPCAT on 01 December 2005, and since the instrument came into force on 22 June 2006, the deadline for establishment of its NPM for the concerned state party was 22 June 2007. The Presidential Decree designating the *Defensoría de los Habitantes* as an NPM for the country was officially published on 19 February 2007². The Decree states that this designation is a temporary measure, until legislation is passed to reinforce the designation. However up 20 April 2009 no such legislation has been adopted. This poses certain difficulties for Costa Rica's compliance with the provisions of OPCAT: Article 18 (1) requires the states to guarantee the functional independence of their respective NPMs. Designation of an NPM through an instrument, which is an act of executive, poses at least a theoretical threat to the independence of the NPM since such acts are entirely dependant upon the will of the executive and are not subjected to the

¹ For more details of the project, please visit: <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html>

² Executive Decree No 33568-RE-MSP-G-J

normal scrutiny of the legislature. The latter however provides guarantees of democratic and normally public review process, elements which are traditionally absent when acts of executive are reviewed.

4. Moreover, the Subcommittee on the Prevention of Torture (SPT) which is a treaty body established pursuant to the provisions of OPCAT, has expressly recommended in its Preliminary Guidelines for the on-going Development of NPMs³, that the mandate and powers of the NPM should be clearly and specifically established in the national legislation as a constitutional or legislative text.

5. Similarly, the *Defensoría de los Habitantes* as the NPM for the country has issued a recommendation to the same effect itself too⁴. Therefore the adoption of a legislative text on the designation of the NPM is necessary in order for the country to comply with the provisions of OPCAT.

4. Furthermore, Article 4 of the OPCAT obliges states parties to allow unimpeded access to all places of deprivation of liberty to its NPMs and the definition provided therein is rather wide. Thus the NPMs are to visit not only 'traditional' places of deprivation of liberty, like prisons and police cells, but also such less traditional ones, like refugee centres, psychiatric institutions, immigration centres, transit zones at international points etc.

5. The SPT in its Preliminary Guidelines for the on-going Development of NPMs⁵, has also expressly stated that the broad definition of the places of deprivation of liberty as per OPCAT must be reflected in the legislative text on the NPM.

6. However in Costa Rica the relevant Presidential Decree limits the mandate of the Costa Rican NPM to visit only those institutions that are under the authority of the Ministry of Justice and the Ministry of Public Security, Interior and the Police. While the *Defensoría de los Habitantes* itself argues that these stipulations in the Presidential Decree are overridden by the provisions of the OPCAT, which constitute a legal norm of a higher hierarchy in the domestic legal system as the Presidential Decree⁶, it notes that national legislation must provide for this clearly⁷. Thus the act establishing NPM in Costa Rica does not fully reflect the stipulations of OPCAT in respect of the notion of 'places of deprivation of liberty'. The compliance of the state party with its obligations under the provisions of the OPCAT should be clearly reflected in its legislation so as not to require complicated legal analysis of the country's legal system. The current situation in Costa

³ First Annual report of the Subcommittee on the Prevention of Torture; CAT/C/40/2 of 25th April 2008; para 28

⁴ First Annual Report of the *Defensoría de los Habitantes* as NPM on 4th November 2008; San Jose, Costa Rica; p. 9

⁵ First Annual report of the Subcommittee on the Prevention of Torture; CAT/C/40/2 of 25th April 2008; para 28

⁶ First Annual Report of the *Defensoría de los Habitantes* as NPM on 4th November 2008; San Jose, Costa Rica; p. 2

⁷ First Annual Report of the *Defensoría de los Habitantes* as NPM on 4th November 2008; San Jose, Costa Rica; p. 9

Rica creates unnecessary confusion and may impede the legitimacy as well as effectiveness of its NPM.

7. Finally, Article 18 (3) of the OPCAT obliges states parties to make available the necessary resources for the functioning of its NPM. The *Defensoría de los Habitantes* however obtained positive reply to its request for some additional funding for carrying out the NPM mandate only some one and a half years after its designation as NPM. This has allowed the *Defensoría de los Habitantes* to set up a specific unit within the institution to perform the duties of NPM, with three staff members at its disposal. This unit started to operate in 2009. Nonetheless, the institution itself has clearly indicated that it needs additional funds to carry out the NPM tasks effectively and it is the obligation of Costa Rica under the provisions of OPCAT to ensure that.

8. Consequently, the OPCAT Research Team of the Law School of the University of Bristol would like to raise the following three issues for the consideration by the UPR:

1. The lack of proper legislative basis for the designation of the *Defensoría de los Habitantes* as the NPM in Costa Rica under the provisions of OPCAT;
2. The failure to reflect the wide definition of ‘places of deprivation of liberty’ as per Article 4 of the OPCAT in the national legislation on the designation of the NPM;
3. Provide the NPM with sufficient funding to enable it to carry out its tasks under the provisions of OPCAT.

Sincerely yours,

The OPCAT Research Team

Prof Rachel Murray
Prof Malcolm Evans
Mr Antenor Hallo de Wolf
Dr Elina Steinerte