



**National Preventive Mechanism for the
Republic of Kazakhstan- the examination of
the existing mechanisms in the light of the
obligations arising from the Optional Protocol
to the UN Convention Against Torture**

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The nature of obligations contained in the OPCAT

- Traditional modes of supervision of the implementation of the international human rights treaties absent in the OPCAT;
- Main obligation by states parties: designation of a National Preventive Mechanism (NPM);
- What is an appropriate NPM?
 - Article 18 of the OPCAT:
 - Functional independence;
 - Independence of personnel;
 - The necessary expertise within the NPM;
 - The necessary resources;
 - ‘due regard’ given to the Principles Relating to the Status of National Institutions, the so-called ‘Paris Principles’.

Choices made by the states parties in respect of the NPMs

Three trends around the world:

- **Designation of existing** National Human Rights Institutions: Human Rights Commissions (like Mexico and Mauritius) or Ombudsman Offices (like Denmark, Armenia, Sweden and Costa Rica);
- **Designation of a number of institutions** that together carry out NPM functions: New Zealand (5 institutions: the Human Rights Commission (as a central body), Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces) or Slovenia and Moldova, where in both countries the mandate of the NPM is carried out by the respective Ombudsman Offices together with local NGOs;
- **Creation of an entirely new institution** for the purposes of an NPM: France- the general Inspector of Places of Deprivation of Liberty; Senegal- the office of the National Observer of Places of Deprivation of Liberty; the forthcoming National Committee for the Prevention of Torture in Paraguay.

Institutional characteristics of an NPM

- Obligation of a state party to 'establish', 'maintain' or 'designate'- the state party free to choose between these three options, but the NPM **must** be created.
- Reference to Paris Principles in Article 18 (4):
 - The quality of the designation process: inclusiveness, openness and transparency;
 - The national anti-torture group in Kazakhstan
 - Legal basis: anchored in the constitution (lends more legitimacy and provides extra guarantees of independence but more complicated to amend) or regular legislative instrument (easier to amend but no constitutional status):
 - The institution of Ombudsman established pursuant to the Decree of the President; the PMCs anchored in normal legislation, whilst the operational details- in the Decision of the Government.
 - Recommendations of the Venice Commission: 'anchoring' the Ombudsman in the Constitutional text with further details in normal legislative text.

Institutional characteristics of an NPM (continued)

- **Independence:**

- Functional independence:

- Budgetary provisions for the NPM: adequate funding *for the NPM work*; 'ring-fencing' NPM budget; freedom to operate and decide how the budget is spent.
 - Venice Commission recommendations towards the budgetary independence of the Ombudsman's Office in Kazakhstan;
 - Unimpeded operation- Paris Principles, Methods of Operation:
 - limitations of the ability of the Ombudsman to consider complaints and the restrictions on the operational freedom of the PMCs.
 - Privileges and immunities- Article 35 of the OPCAT.

Institutional characteristics of an NPM (continued)

- **Independence of personnel:**

- Appointment and dismissal procedures: fairness, openness, inclusiveness and transparency;
 - Article 8 of the Decree on the Ombudsman: Presidential appointment and removal; overall prominent involvement of the executive in the process.
 - Ability of the Ombudsman to decide on his/her staff.
 - Establishment of the PMCs: inclusive process but the formation of the bodies is unclear in the Decision.
- Composition: variety of expertise; gender and minority representation (Article 18 (2) of the OPCAT):
 - Restrictiveness of the wording in Article 7 of the Decree on Ombudsman;
 - The Decree on the Centre supporting the work of the Ombudsman- lack of diversity provisions.
 - Challenges in recruiting members faced by the PCMs while diversity appears to be present.

Functioning of an NPM

- Functions of the NPM described in Articles 19-23 of the OPCAT;
- Wide definition of 'deprivation of liberty' contained in Article 4 of the OPCAT- covers not only 'traditional' places like prisons and police cells, but also 'less traditional' ones, like psychiatric hospitals, transit zones in international airports etc;
 - Article 15 (5) of the Decree on Ombudsman: private institutions left out; powers of the Centre to visit- unclear;
 - PMCs: reported difficulties of access to military places of deprivation of liberty.
- Mandate to prevent:
 - Visits to places of deprivation of liberty:
 - Focus of the visit- prevention;
 - Regularity and system of visits;
 - Unannounced visits;
 - Recommendations and Follow-Up- the corresponding obligation upon states parties in Article 22.

Functioning of an NPM (continued)

- Mandate to prevent (continued):
 - Preamble to OPCAT (para 5): *'effective prevention (...) requires educational and a combination of various legislative, administrative, judicial and other measures'*;
 - Article 19 (c) of OPCAT- NPMs to have rights to submit proposals and observations concerning existing or draft legislation;
 - PCMs- no such rights and generally mandate limited to visiting only;
 - Ombudsman- may 'contribute' to the improvement of legislation (Article 19 of the Decree); has other powers, like to facilitate legal education in the field of human rights.
 - The Centre: Article 9 has wide powers.
 - The potential challenge: the traditional quasi-judicial mandate of the Ombudsmen offices and the proactive nature of the NPM mandate: the Ombudsman's Office in Kazakhstan would have to adapt and shift would be required in terms of its ethos, thinking and methodology.

Functioning of an NPM (continued)

- NPM Reports: Article 23 of the OPCAT requires NPM to make annual reports which states are obliged to publish and disseminate.
- Reports must be with the focus on the NPM mandate, reflecting its preventive nature and public.
 - In Kazakhstan, the Ombudsman submits report to the President; there is no submission to the legislature required and no obligation upon the state to disseminate the reports; focus of the report.
 - PMCs- no provisions on annual reports.
- Work with the SPT: Article 20 (f) gives the NPMs right to have contacts with the SPT, to send it information and to meet it with the SPT.

Challenges to be considered in the process of establishment of the NPM in Kazakhstan

- Creation of an NPM- not an easy task and many states parties to OPCAT struggle with it; adjustments may be needed later on after the NPM has become operational.
- The chosen NPM for Kazakhstan must reflect the specific geo-political, social and cultural as well as legal features of the country;
- The process of choosing an NPM must be inclusive and transparent to ensure that the best model is arrived at as well as to guarantee the legitimacy of the body.
- If Ombudsman's Office involved: careful balance between NPM work and complaints handling functions;
- Access to all places of deprivation of liberty as defined in OPCAT: thematic and geographic- the relevance of the work carried out in regions by the PMCs;
- Variety of expertise and gender and minority representation;
- System of regular visits;
- Other preventive activities;
- Need to consider the existing mechanisms as these have acquired considerable experience and expertise.