Background paper

*Inventory of Existing Mechanisms of Monitoring in Kazakhstan and their Compliance with OPCAT standards for National Preventive Mechanisms**

The Optional Protocol to the United Nations Convention of the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[1] is a rather different international human rights treaty in that it does not require a state party to submit reports on the domestic compliance with the provisions of the instrument, like, for example, International Covenant on Civil and Political Rights (ICCPR)[2]. Rather the central obligation of a state party to OPCAT is to set up, designate or maintain at the domestic level one or more visiting bodies, a national preventive mechanism (NPM)[3] and it is to do so within one year of its ratification of the instrument[4]. The OPCAT however contains no blue-print as to how these NPMs ought to look like, how they should be constituted or how should they be structured. Part IV of the instrument deals with the issue of NPMs and Article 18 only stipulates that the states parties are to guarantee the functional independence of NPMs and the independence of the personnel; ensure that NPMs' experts have the necessary capabilities, professional experience and strive towards adequate representation of ethnic and minority groups in the country; make available the necessary resources for the functioning of the NPM and give due regard to the Paris Principles[5] when establishing NPMs.

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[1] UN GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on 18 December 2003 by 127 votes to 4, with 42 abstentions.
The OPCAT came into force on 22 June 2006 and as of March 2009 has 46 states parties; See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (last accessed on 18 March 2009)

[2] See Article 40 of the ICCPR

[3] Article 3 of the OPCAT

[4] Article 17 of the OPCAT

[5] Principles Relating to the Status of National Institutions, General Assembly Resolution 48/134, 1993.

The Republic of Kazakhstan (Kazakhstan) signed the OPCAT on 25th September 2007 and ratified the instrument on 22 October 2008[6]. Thus the country is to designate its NPM by the 22nd October 2009[7], as prescribed by Article 17 of the OPCAT. The aim of this paper is to examine the obligations that OPCAT lays upon Kazakhstan in respect of the NPM and to assess the level to which various existing mechanism in the country comply with those. The report is based on the experience accumulated during the research project which is being carried out by the OPCAT research team of the Law School of the University of Bristol[8]. It is not aimed as a prescription on how an NPM in Kazakhstan ought to look like but rather as an analysis of the various options and issues that ought to be considered when choosing an NPM for the country. The Report is divided in two main sections: the first one will consider the institutional characteristics of an NPM and the second will deal with its functional aspects. Throughout the Report particular attention is paid to the existing mechanisms in Kazakhstan: the Office of the Commissioner for Human Rights (Ombudsman's Office) and its supporting entity, the National Centre for Human Rights (the Centre) and the so-called Public Monitoring Commissions (PMC) as these institutions are the only bodies in the country that currently exercise some activities that would fall within the remit of an NPM[9].

I. Institutional Characteristics of an NPM

Article 17 of the OPCAT gives states parties three options as to the creation of an NPM: to establish, maintain or designate. 'Establish' was aimed at those potential

[6] See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (last accessed on 18 March 2009)

[7] Please note that in its alternative report to the CAT, Amnesty International states that Kazakhstan entered a declaration under Article 24 of the OPCAT in respect of Part IV of the OPCAT, which means that the country can postpone its obligation to designate an NPM by three years: see Amnesty International *Kazakstan Summary of Concerns on Torture and Ill-Treatment. Briefing before the United Nations Committee Against Torture.* November 2008; AI Index: EUR 57/001/2008; p. 8. The relevant UN web page of the OPCAT ratifications however contains no such information: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (last accessed on 19 March 2009)

[8] The three year research project is funded by the Arts and Humanities Research Council (UK) and started in June 2006. The project director is Prof Rachel Murray and co-director is Prof Malcolm Evans. The two research associates on the project are Mr Antenor Hallo de Wolf and Dr Elina Steinerte. For more details about the project please visit: http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html

[9] See The Inventory Paper on the Places of Deprivation of Liberty in the Republic of Kazakhstan in the Light of the Optional Protocol to the United Nations Convention Against Torture (in Russian); Publication of the Legal Policy Research Centre (Kazakhstan) June 2009; Author: Saniya Ler, Independent Expert

states parties which did not have a body that would comply with NHRIs standards for the purpose of an NPM and thus would require creating an entirely new body with the requisite powers to fulfil the tasks of an NPM. The option of 'maintaining' was reserved for those states that already had national bodies with the necessary powers and thus would only require maintaining such entities. Finally, 'designation' was envisaged for those states which had several human rights or visiting bodies that could be designated as a 'bunch' to make up the NPM.

These three options are the only prescriptions in the OPCAT about the creation of NPMs. It is thus clear that the establishment is an obligation- an NPM must be designated and this cannot be left to a voluntary initiative of individuals. This however is the case with the PMCs which are to be established on a voluntary basis[10].

Moreover, Article 18(4) contains a direct reference to the Paris Principles which allows to 'import' some more, additional requirements that states must follow when choosing their NPM, the two most important ones being the legal basis and the quality of the process of establishment.

a. Process of Establishment

The Paris Principles call for a transparent and inclusive process in the composition and appointment of the members of NHRIs[11]. Certainly this is a very important aspect when creating an NPM, a body which will have to carry out a rather complex mandate. Features such as legitimacy, trustworthiness and reputation, perceived legitimacy perhaps being the most important characteristic here, are vital and will ultimately add to the potential effective operation of an NPM. The involvement of all the relevant stakeholders, such as various governmental departments, existing statutory visiting bodies, civil society and non-governmental organisations (NGOs) is thus paramount so as to ensure not only an inclusive and transparent process, the 'end product' of which is an NPM suited to the specifics of the country, but also to ensure that these stakeholders accept the outcome of the process, the NPM. Consequently the quality of the NPM establishment process has direct repercussions for the legitimacy and reputation of this body. An excellent example of such a transparent and inclusive

[10] See: Decision of the Government of the Republic f Kazakhstan on the approval of 'Regulations on the formation of the regional (cities and the capital) Public Monitoring Commissions' of 16th September 2005; No. 924 (Постановление Правительства Республики Казахстан об утверждении «Правил образования областных (города республиканского значения, столицы) общественных наблюдательных комиссий» от 16 сентября 2005 г. № 924).

[11] Supra note 5; Principle B

process could be observed in Paraguay[12], where in 2006 a Working Group was elected from a National Forum, which was charged with the duty of analysing the implementation of OPCAT and was composed of over 100 stakeholders from the government and civil society. This Working Group, composed of 13 individuals, acting in an individual capacity, represented state institutions and civil society and drafted an NPM proposal in open and inclusive meetings, where outsiders were also welcomed. This draft law is currently under the consideration by the legislature. It is clear that an NPM which is created through such an inclusive and transparent process will draw an outstanding legitimacy from such a process and is less likely face challenges to its mandate.

To this end, the roundtables of 20 November 2008 and of 26-27th February 2009 both in Astana must be remarked. Both of these events brought together a number of relevant stakeholders and provided a starting point for the discussions on the issue of appropriate NPM for Kazakhstan.

The creation of the so-called national anti-torture working group in Kazakhstan must also be noted here: the thirteen-person entity was established in 2008 under the auspices of the Ombudsman's Office to examine the use of torture and other forms of ill-treatment in the country and its mandate also includes the implementation of OPCAT[13]. The membership of this body is wide as it includes representatives from the Ministries of Justice and Interior, Prosecutor's Office, Committee of National Security, Commission for Human Rights, National Centre for Human Rights as well as three NGOs[14].

It is important that the process of the establishment of NPM in Kazakhstan continues to be an inclusive and transparent process and that the 'end product' of this process is not imposed by the state but rather outcome of inclusive discussions.

b. Legal Basis

The Paris Principles also require that an institution such as an NHRI has a legal basis, either in the constitutional or regular legislative instrument of the state in question[15]. It has been however argued that, in the case of the NHRIs having the

[12] APT '*National Preventive Mechanisms. Country-By-Country Status under the Optional Protocol to the UN Convention Against Torture (OPCAT*)'; Report of 09 March 2009; pp. 48-49
[13] Ibid; p. 92
[14] Ibid
[15] Supra note 5; Principle A (2)

constitution as a legal base for the entity can be very beneficial, especially in transitional societies[16]. The same can be said about the NPMs: a constitutional basis would lend more legitimacy to the body, add to the perceived independence and authority of such entity and generally such texts are more difficult to amend.

However, a constitutional basis is not a strict requirement and the downsides must be acknowledged: since constitutional texts are generally more difficult to amend, it may be counterproductive to include detailed NPM provisions in the constitutional provisions as any changes in the future may be difficult to achieve.

In any case, it is clear that for an effective functioning of an NPM, a clear legal basis is a must: being established through an act of legislature not only lends the body legitimacy but also acts as a certain guarantee of its independence since changes in legislation are more difficult to achieve than for example, amendments in the acts of executive. Indeed, in practice this has been generally followed by the countries that have designated NPMs so far. Thus, for example, in case of Denmark, the Parliamentary Commissioner for Civil and Military Administration (Danish Ombudsman) was designated as the Danish NPM in the national legislation on the ratification of OPCAT that was presented to the Parliament even though there were no amendments made in the basic law on the Danish Ombudsman[17].

The situation is rather different in Mali, however, where the National Human Rights Commission of Mali has been designated as NPM through a Presidential Decree and there is no specific NPM legislation or other instruments adopted to this end[18]. This of course raises concerns about the legitimacy of the NPM as well as its prospects of fulfilling its mandate effectively.

The Office of Ombudsman in Kazakhstan is established pursuant to the Decree of the President of the Kazakhstan No 947 of 19th September 2002[19]. The President, according to Article 40 of the Constitution of Kazakhstan, is the head of the government and according to Article 20 (1) of the Constitutional Law on the

[16] Richard Carver and Alexey Korotaev 'Assessing the Effectiveness of National Human Rights Institutions'; Report on the behalf of the UNDP Regional centre in Bratislava, October 2007; Part 2; p. 6

[17] Supra note 12; p.75-76

[18] Ibid; p. 17

[19] Order of the President of the Republic of Kazakhstan of 19the September 2002 No 947 *On the Appointment of the Ombudsman* (Указ Президента Республики Казахстан от 19 сентября 2002 года № 947 *Об учреждении должности Уполномоченного по правам человека).*

President[20] such Decrees have binding force in the territory of Kazakhstan. While pursuant to Article 1 of the Law on Legal Acts[21], the Presidential Decrees are considered to be legal acts in the country, nevertheless these are clearly acts of the executive and not of the legislative.

In addition, the work of the Ombudsman, as noted in Article 30, is supported by the Centre, the statute of which is also approved by the Presidential Decree[22].

Consequently the institution of Ombudsman and its supporting institution, the Centre, both rest on executive Decrees which may give rise to serious concerns in terms of the independence of the body. The need to 'anchor' the institution of Ombudsman in the Constitution of Kazakhstan has been pointed out by the Venice Commission of the Council of Europe (Venice Commission)[23]. It has been recommended that the constitutional text need not contain detailed provisions of the Ombudsman institution and be limited to granting the entity a constitutional status[24]. In addition, it has been recommended that the details of the functioning of the institution be set out further in detail in the normative text, normal legislation of the country, adopted by the legislature of the Kazakhstan[25].

The PMCs were established through legislative amendments of 29th December 2004[26] and thus these bodies are 'anchored' in the normal legislation of Kazakhstan. However the details of the establishment of these Commissions as well as their operational details are set out in the Decision of the Government[27], which according to Article 1 of the Law on Legal Acts[28], are not considered to be legislative acts in the country. Thus the operational aspects of the PMCs are subjected to the regulation of

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[20] The Constitutional Law of the Republic of Kazakhstan of 26th December 1995 No 2733 *On the President of Kazakhstan* (Конституционный закон Республики Казахстан от 26 декабря 1995 года № 2733 *О Президенте Республики Казахстан).*

[21] Law of the Republic of Kazakhstan *On Legal Acts* of 24th March 1998, No 213-I (Закон Республики Казахстан от 24 марта 1998 года № 213-I *О нормативных правовых актах)*

[22] Order of the President of the Republic of Kazakhstan of 10th December 2002 No 992 *On the Establishment of the National Centre on Human Rights* (Указ Президента Республики Казахстан от 10 декабря 2002 года N 992 *О создании Национального центра по правам человека).*

[23] European Commission for Democracy Through Law (Venice Commission) *Opinion on the Possible Reform of the Ombudsman Institutions in Kazakhstan* Adopted by the Venice Commission at its 71st Plenary Session; Opinion No. 425/2007 of 5 June 2007; paras 10 and 30

[24] Ibid; para 7

[25]Ibid; para 11

[26] Law '*On the Amendments and Additions in some legal acts of the Republic of Kazakhstan concerning institutions of justice'* of 29th December 2004, No 25-III (Закон *«О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам органов юстиции»* от 29 декабря 2004 г. № 25-III)

[27] Supra note 10

[28] Supra note 21

the executive which may give rise to serious concerns in terms of the independence of these bodies. This has been noted as a shortcoming by the national NGOs too[29].

Consequently neither the Ombudsman's Office of Kazakhstan nor the PMCs have sufficient legal basis to fulfil the criteria of the OPCAT for an NPM.

c. Independence

Independence is the central requirement for the NPM as set out in Article 18 of the OPCAT, which calls for functional independence and independence of the personnel.

i. Functional Independence

Article 18 (3) obliges states parties to provide their respective NPMs with the necessary resources for their functioning and the Paris Principles require that:

> 'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.'[30]

Further guidance on the budgetary issues is provided by the Subcommittee on the Prevention of Torture (SPT), which has noted that NPM budget should be ring-fenced in its Guidelines for the on-going development of NPMs (NPM Guidelines)[31].

Thus there are two basic requirements in terms of the NPM budget that emerge: it should be sufficient to allow the entity to carry out its mandate and only the NPM itself should decide how that budget is spent.

The budgetary provisions of the Ombudsman's Office are very scarce as Article 35 only provides activities are funded by the state budget, but there are no further stipulations as to who determines the size of such budget or what are the powers of the Ombudsman to decide how that budget is spent. However some

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[29] Yevgeni Zhovtis *Summary of Remarks at the International Conference "OPCAT in an OSCE region: its meaning and implementation"* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/pragueseminar.html#docs (accessed on 19 March 2009)

[30] Supra note 5; Composition and Guarantees of Independence and Pluralism; para 2

[31] *First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; CAT/C/40/2; 14 May 2008; Section II, Part B; para 28; section vii

international bodies have expressed concerns over the independence of the body due to budgetary issues. Thus the United Nations Committee against Torture (CAT) has expressed its concerns over the lack of own budget for the Ombudsman's Office, noting that this impedes the independence of the entity[32]. Furthermore, the Venice Commission has recommended that legislation on the Ombudsman should provide for the adequate budgetary allocation as well as ensure budgetary independence of the body[33]. It thus appears that the current budgetary provisions of the Ombudsman's Office would fail to satisfy Article 18 of the OPCAT.

In addition, according to Article 19 of the Decree on the National Centre for Human Rights[34], the material and technical supplies services for the Centre are provided by the Administration of the President. While Article 18 stipulates that the financial plan of the Centre is approved by the Head of the Centre together with the Ombudsman, there are no further provisions on, for example, whether any other institution or authority can interfere with such plan or whether such plan must be met by the Administration. Therefore there appears to be a rather large scope of potential influence of the executive over the budget, which gives similar concerns in terms of the functional independence of the Centre as those in respect of the Ombudsman described above.

The Decision of the Government on the PMCs, Article 1 (3) stipulates that such commissions operate on the voluntary basis which, coupled with absence of any provisions on the budget, strongly suggests that such bodies have no budgets[35]. This raises serious concerns in terms of Article 18 of the OPCAT as may impede or even halt the ability of the body to carry out tasks of the NPM.

Therefore it appears that neither the Ombudsman's Office, nor the Centre and the PMCs satisfy the requirements of OPCAT in terms of their budget.

Turning further to the free operation of the NPM, Article 20 of OPCAT sets out more detailed requirements about its unimpeded operation. The Paris Principles, which are refereed to in Article 18 (4) of the OPCAT further specify that:

'Within the framework of its operation, the national institution shall:

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[32] Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. *Concluding Observations of the Committee Against Torture. Kazakhstan*. CAT/KAZ/CO/2 of 12 December 2008; para 23

[33] Supra note 23; para 30; part VI

[34] Supra note 22

[35] See also supra note 9; p. 12

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

(f) Maintain consultation with the other bodies, whether jurisdictional'[36].

In the light of these requirements, serious concerns arise when examining the relevant provisions relating to the Ombudsman's Office. The powers of the Ombudsman to consider complaints are very narrow as, according to Article 18, he/she has no power to consider complaints against actions and decisions of the President, Parliament and its members, the Government, Constitutional Council, Prosecutor General, Central Electoral Commission and the courts. This is a very restrictive provision which calls in question the ability to operate in any meaningful way.

The operational freedoms of the PMCs are even more restrictive: Article 1 (4) of the Decision of the Government on the PMCs stipulates that when exercises the public control, the PMCs may not interfere with the operation of the correctional institutions, which is rather broad formulation, calling into question the ability of such commissions to carry out meaningfully the tasks prescribed for the NPM.

Finally, Article 35 of the OPCAT also prescribes that the NPMs be accorded such privileges and immunities as are necessary for the independent exercise of its functions. The Decision of the Government on the PMCs has no provisions on the matter and neither does the Decree on the Ombudsman's Office or the Decree on the

[36] Supra note 5; Methods of Operation

National Centre for Human Rights, which clearly falls short of the OPCAT requirements.

Consequently, as the above analysis suggests, neither the Ombudsman's Office and the Centre nor the PMCs comply with the requirements of functional independence of an NPM as set out in Article 18 of OPCAT.

ii. Independence of Personnel

Article 18 (2) of the OPCAT requires that states parties ensure that the members of the NPM have the necessary expertise and that the appointment process strives for a gender balance and the adequate representation of ethnic and minority groups in the country. Further, reference to Paris Principles in Article 18 (4) allows for some additional guidance on the matter as these require that the appointment procedure be such as to 'afford all the necessary guarantees' and includes a wide variety of representatives from government (in advisory capacity only), NGOs and parliament[37]. Moreover, there is a requirement 'that appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.'[38]

Thus clearly there is an obligation upon states parties to provide the necessary facilities and resources to ensure an appropriate NPM appointment process[39]. The Decree on the Ombudsman in section 2 sets out the appointment procedure for the Ombudsman. However the criteria stipulated give rise to some serious concerns in the light of the independence requirements set out in the OPCAT and Paris Principles. Thus Article 8 states that the Ombudsman is appointed by the President after consultations with the Committees of the Parliament while the list of candidates is determined by the President. This does not suggest an inclusive and transparent process as the selection of the candidates appears to be in the exclusive competency of the executive. Moreover, upon appointment, the Ombudsman is to be adjured by the President in the presence of the Chairmen of the Chambers of the Parliament, Chairmen of the Parliamentary Committees and other officials and give an oath, as

[37] Ibid; Composition and Guarantees of Independence and Pluralism; para 1
[38] Ibid; para 3
[39] Rachel Murray '*National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does Not Fit All'* in Netherlands Quarterly of Human Rights, Vol. 26/4 (2008); p. 497

prescribed by Article 12. Such a procedure, the prominent involvement of executive in it most importantly, gives rise to concerns at least in respect of the perceived independence.

Furthermore, the Ombudsman can be removed from the office by the President (Article 8) however the grounds for removal, as described in Article 14, are very vague: for example, the Ombudsman can be removed for gross abuse of official duties, commission of misdeed inconsistent with the post and undermining the authority of the state. Without any further stipulation as to what this entails and in the absence of any procedure whereby the potential removal of the Ombudsman would be considered in an open and transparent process, the personal independence of the Ombudsman is seriously compromised.

In addition, the work of the Ombudsman, as noted in Article 30, is supported by the National Centre for Human Rights, the statute of which is approved by the Presidential Decree[40]. According to Articles 14 of this Decree, it is the Ombudsman who is in complete charge of the structure of the Centre and appoints/removes the Head Centre (Article 15). This is a very positive aspect as it means that the Ombudsman is in charge of the entity, which supports his/her work. The factor that gives rise to concern is the questionable guarantees towards the personal independence of the Ombudsman, as described above, which may adversely impact the independence of the Centre.

Turning to the PMCs, section 2 of the respective Decision of the Government sets out the establishment procedures for these bodies. According to Article 6 such Commissions are established by the initiative of NGOs who wish to carry out public control in detention facilities. The selection process thus appears rather inclusive whereby members of domestic NGOs and citizens are recruited through newspaper advertisements[41]. The running of the Commissions is completely in hands of the Commissions themselves and the leadership is provide by the Chairperson who is elected by majority of the members of the Commission (Article 8). However there is nothing in the Decision on the way the Commission is constituted- who receives applications from the potential candidates, who makes selection or what are their terms of office. A potential further problem rests with the fact that the establishment

[40] Supra note 22

[41] Amnesty International *Kazakstan Summary of Concerns on Torture and Ill-Treatment. Briefing before the United Nations Committee Against Torture.* November 2008; AI Index: EUR 57/001/2008; p. 7

of such Commissions is not compulsory but entirely voluntary, as already noted above.

Consequently it appears that neither the current stipulations on the Ombudsman's Office, nor the Centre and the PMCs satisfy the requirements of OPCAT in terms of the independence of personnel of the NPM.

d. Composition

Article 18 (2) also stipulates that there should be a variety of expertise reflected the in the membership of the NPM. Given the wide scope of the definition of 'deprivation of liberty' in Article 4 of the OPCAT, the details of which will be addressed in the next section of this Report, the NPMs are either to have the necessary variety of expertise 'in-house' or have the ability, both legally and financially, to contract it in. Thus the NPMs are not to be bodies composed solely of lawyers, but should strive to have aboard experts from different backgrounds, like medical doctors, social workers, forensic scientists, psychiatrists etc.

The Decree on the Ombudsman specifies in Article 7 that the candidate to the post ought to have a University degree in law or humanities and have at least three years of experience in legal work or in the field of human rights. Certainly legal education can be very useful in carrying out the Ombudsman's mandate. However the OPCAT calls for the need of diversity on the NPMs expertise. Undoubtedly, the Centre could also play a role in supplementing the necessary expertise. The Decree on its establishment however contains no provisions on the diversity of expertise. Moreover, neither the Decree on the Ombudsman nor the Decree on the Centre provide for a possibility to contract-in expertise in case of a necessity.

Pursuant to Article 7 of the Decision on the PMCs, a Commission may be formed in each of the administrative regions of the country and in fact all 14 administrative regions have one Commission formed[42]. However some Commissions have reported difficulties in recruiting enough members[43] which may have implications for the functional abilities of these entities. Nevertheless, it is reported

[42] Supra note 9; p. 11

[43] Amnesty International *Kazakstan Summary of Concerns on Torture and Ill-Treatment. Briefing before the United Nations Committee Against Torture.* November 2008; AI Index: EUR 57/001/2008; p. 8

that generally PMCs have some diversity of expertise among their membership as most are composed of lawyers, advocates, journalists[44].

Moreover, it should be noted that Article 18 (2) of the OPCAT also requires that the NPM be representative of the minority and ethnic groups within the country as well as strive for a gender balance. Such requirements are not present in Decree on Ombudsman, on the Centre or in the Decision on the PMCs.

II. Functioning of an NPM

The functions of the NPM are set out in Articles 19-23 of the OPCAT, which set out the minimum powers that NPMs must have, the duties of the states parties towards the NPM and gives some details of the way NPMs are to operate.

The main aim of the NPMs mandate is that of prevention and to this end the main venue envisaged in the text of the OPCAT is visiting places of deprivation of liberty, as noted in Article 1. Nonetheless, if this provision is read together with the Preamble to the instrument, it becomes evident that the scope of the mandate to prevent is wider than just visiting places of deprivation of liberty. Para 5 of the OPCAT's preamble calls for 'education and a combination of various legislative, administrative, judicial and other measures'.

However, before embarking upon the examination of NPMs preventive mandate, special attention should be paid to the notion of 'deprivation of liberty' in the OPCAT as it has direct implications for the scope of the NPMs mandate.

a. Notion of 'deprivation of liberty'

Article 4 of the OPCAT states:

> ''1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 [the SPT and NPMs] to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

[44] Supra note 29

> 2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.'

This is certainly a very broad definition of 'deprivation of liberty'. Thus the NPMs, as stipulated by Article 4(1) of the OPCAT, are to visit not only more 'traditional' establishments like prisons and police cells, but also such less 'traditional' places as psychiatric institutions, refugee camps, centres for juveniles, immigration centres, transit zones at international points etc. Moreover, the specifics of each country may add to the list of such places: for example, in some countries it has been suggested that it may be necessary to detain people in order to contain contagious diseases[45] which would then in turn expand the scope of the places to be visited. In other words, the list of the places of deprivation of liberty must be kept flexible so as to accommodate the specifics of each state party as well as intricacies dictated by the contingencies of each situation.

Furthermore, Article 4(1) states that the visits must be allowed to places where persons 'are or *may* be deprived' (emphasis added) which means that not only actual but also potential places of deprivation of liberty are subjected to the visiting scheme.

The SPT in its NPM Guidelines has stipulated that the definition of places of deprivation of liberty in national legislation of states parties must reflect this broad definition adopted in OPCAT[46] and that the work programme of NPMs must cover all potential and actual places of deprivation of liberty[47].

The reach of the mandate of the Ombudsman in Kazakhstan however is phrased in more limited terms. Article 15 (5) of the Decree states that the Ombudsman may enter and stay on the territory and its premises of the state agencies, organisations, including military units and detachments as well as detention areas. This leaves off the list any potential private institutions to whom the state might have contracted out some of its functions. While such places may not exist in Kazakhstan

[45] Conference Report of the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT) 'The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards' Law School, University of Bristol, April 19-20, 2007; p. 17
[46] Para I of NPM Guidelines
[47] Para VIII of NPM Guidelines

at the moment, the legislation should not exclude the possibility of their existence in future.

The powers of the Centre to visit places of deprivation of liberty in the meaning of OPCAT are less clear as the Decree contains no specific reference to such rights. However, according to Article 8 (2), the Centre is to facilitate the fulfilment of Ombudsman's mandate, which, if interpreted widely, could also encompass visits to places of deprivation of liberty. Nevertheless such an interpretation would stand at odds with the rest of Article 8, which sketches in the Centre as an entity, which is to carry out primarily research and information gathering and analysing activities.

Finally, turning to the mandate of the PMCs, the amendments in legislation that established these Commissions, Article 19 (1) allows them access to correctional institutions and pre-trial detention centres (investigatory isolation wards). It has been reported that the PCMs do not have access to military places of deprivation of liberty[48], for example, and thus it appears that non-traditional places of deprivation of liberty are excluded from the scope of mandates of the PCMs.

Consequently none of the three institutions have the powers to visit the wide scope of places of deprivation of liberty as stipulated in the provisions of OPCAT.

b. Mandate to prevent

As was explained earlier, the main rationale of the NPMs mandate is prevention of torture and other forms of ill treatment. This can be further usefully divided into two cohorts: visiting places of deprivation of liberty and other preventive measures.

i. Visits to places of deprivation of liberty

Visits to places of deprivation of liberty are at the heart of the NPM mandate: Article 1 calls for a system of regular visits by the NPMs and the SPT. There are several main features about the visiting mandate of the NPMs that can be distinguished: visits are to be regular (Article 1 of the OPCAT); NPMs are free to choose the places they want to visit and the persons they want to interview (OPCAT, Article 20 (e)), to have private interviews (OPCAT, Article 20 (d)) as well as have free access to relevant information (OPCAT, Article 20 (a) (b)) and any place and installation of the given establishment (OPCAT, Article 20 (c)); the NPMs are to

[48] Supra note 9; p. 13

make recommendations to authorities and the authorities have a corresponding obligation to enter to consider these recommendations (OPCAT, Articles 19 (b) and 22) and there must be guarantees against reprisals against those who communicate with the NPM (OPCAT, Article 21). Another important aspect of the visiting mandate is the question of unannounced visits. Even though the OPCAT does not expressly mention the option of 'unannounced visits', the examination of the drafting process shows that it was clearly understood that both the SPT and the NPMs were to be able to conduct unannounced visits to any place of detention as defined under Article 4[49]. The mandate to conduct unannounced visits can also be interpreted from Articles 12, 14 and 20 of the OPCAT, as well as the overall preventive objective of the instrument as defined in Article 1, so that both the SPT and NPMs must be able to choose when they want to carry out a visit, which is essential to facilitate the overall effectiveness of the SPT's and NPM's visits as a preventive tool.

Furthermore, it must be underlined that visiting places of deprivation of liberty as per OPCAT is not an aim in itself. Rather it is a starting point of a continuous dialogue with the authorities on the implementation of the recommendations of the NPM. The authorities are obliged to consider the recommendations and the dialogue with the NPM about their implementation should be meaningful.

When examining the relevant provisions of the respective institutions in Kazakhstan, some serious shortcomings emerge. The Decree on the Ombudsman does not stipulate the need for a system of visits to places of deprivation of liberty. While suggestions have been made that such visits are carried out on a basis of a plan, it is also noted that such visits are not unannounced but rather the plan is produced in consultation with the authorities of the respective places of deprivation of liberty[50]. Moreover, even though it has been reported in fact that the Ombudsman's office carries out visits to a variety places of deprivation of liberty, also 'non-traditional places, like military places and medical institutions, it is noted that such visits are normally in response to complaints received from those detained in these places[51]. Such visits, while certainly having an important role in the overall aim of torture prevention, do not however constitute the type of system of regular preventive visits as envisaged in the OPCAT.

[49] Manfred Nowak and Elizabeth McArthur*, The UNCAT: A Commentary,* p. 906, §44 and p.1011, §24-27.
[50] Supra note 9; p. 5
[51] Ibid

A further practical aspect that may impede the ability of the Ombudsman's Office to comply with the OPCAT requirements, is the fact that the institution does not have regional representatives. Kazakhstan is a vast country covering a territory of 2.7 million square kilometres[52], which raises serious doubts as to whether a body based in the capital would be practically able to carry out visits on a regular basis without some presence in the regions.

Moreover, it appears that the Ombudsman is not carrying out unannounced visits, and while the reports on visits can be published in the mass media (Article 15 (7) of the Decree), there are no provisions about the recommendations to be issued to the authorities and no obligation upon authorities to engage with the Ombudsman on the implementation of recommendations. Thus the essential feature of the preventive visiting as per OPCAT, the dialogue with authorities, is missing.

Furthermore, when looking into the provisions on details of visits, it emerges that the Ombudsman's powers currently do not meet the requirements of Article 20 in terms of the rights to have private interviews with those detained and others and in terms of access to information: while the Ombudsman may request information (Article 15 (1)), there is no corresponding obligation to provide such information or even to reply to the request. Moreover, no information can be requested from the President, Parliament and its members, the Government, Constitutional Council, Prosecutor General, Central Electoral Commission and the courts (Article 15 (1).

Turning to the PMCs, the Decision clearly stipulates that access to places of deprivation of liberty is not free but must obtain a permit from the Head of the respective institution or from the body governing the given institution[53]. Such a system certainly does not correspond to the requirements of OPCAT. Moreover, as reported by the PMCs themselves, in fact some of the administrations of the places of deprivation of liberty deny access to the members of the PMCs as well as ignore their recommendations[54]. On this latter point, it must be noted that the Decision does not

[52] See: http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1298071.stm (accessed on 20 March 2009)

[53] See Article 4, 12 of the Regulations on the Visiting of Institutions that Carry out Punishment as well as Investigatory Isolation Installations by Private Persons of 7th January 2003 No.6 (In Electronic Legal Dictionary 'Paragraf', 2009) (См. п. 4, 12 Правил посещения гражданами учреждений, исполняющих наказания, следственных изоляторов от 7 января 2003 года № 6// Электронный юридический справочник «Параграф», 2009)

[54] See Almaty Helsinki Committee Press Release on the Monitoring of Human Rights No 05/2006 of May 2006; Available at: http://www.humanrights.kz/press_review_12.php (accessed on 20 March 2009)

oblige the authorities of the respective institutions even to engage with the PMCs on their recommendations, which the PMCs also have no obligation to produce. Furthermore, the PMCs also do not have the right of unannounced visits. This is a right that the members of these Committees have noted as important for their effective functioning and have thus called for its establishment in law[55]. Finally, the Decision does not provide for the rights of the members of the PCMs to conduct interviews in private with those detained and others, to receive information it deems necessary as well as there is no stipulation about free access to all parts and installations of the establishment. Therefore the existing visiting mandate of the PCMs does not meet the requirements set out for the NPM mandate in the OPCAT.

Finally there are no guarantees against reprisals against those who have communicated with the Ombudsman or the PCMs as required by Articles 21 and 15 of the OPCAT.

Therefore, as the above analysis indicates, there are serious shortcomings in the existing visiting powers of both the Ombudsman and the PMCs if compared to the mandate of the NPM as set out in OPCAT.

ii. Other Preventive Measures

As noted earlier, para 5 of OPCAT's Preamble calls for 'education and a combination of various legislative, administrative, judicial and other measures' in order to achieve effective prevention of torture and other forms of ill-treatment. This means that the NPMs are to engage in wider activities aimed at the prevention, like awareness-raising campaigns and work with the legislation[56]. On this latter point, Article 19 (c) expressly requires that the NPMs have the powers to submit proposals and observations concerning the existing legislation.

The Decision on the PMCs contains no such rights for the Commissions and generally it appears that the remit of these entities is limited to carrying out visits to places of deprivation of liberty. Therefore these bodies are not endowed with the preventive mandate as that envisaged in the OPCAT for the NPMs.

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[55] See Almaty Helsinki Committee Press Release on the Monitoring of Human Rights No 08/2006 of August 2006; Available at: http://www.humanrights.kz/press_review_17.php (accessed on 20 March, 2009)

[56] Nele Parrest *The Concept of Prevention* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationparrestnotes.pdf (accessed on 20 March 2009)

The Ombudsman, according to Article 19 of the Decree, has the right to contribute to the improvement of the legislation; however it is unclear whether such a 'contribution' may entail submission of legislative proposals.

According to Article 20, the Ombudsman is to facilitate legal education in the field of human rights and freedoms, be involved in development of curricula and raising the level of public awareness on legislation and international human rights instruments. While this is a welcome step towards the preventive mandate of the NPM as per OPCAT, it is unclear why it is limited to the legal education only as curricula of other professions, like medical doctors, psychiatrists, social workers etc may need to have a human rights component. Moreover, it must be underlined that a stipulation in law is only the first step and it is therefore necessary to ascertain to what extent these powers are actually utilised by the Ombudsman's Office.

The Centre appears to have many tools at its disposal, which could facilitate the implementation of the preventive mandate. Pursuant to Article 9, the Centre has the mandate to conduct studies, gather information, produce analytical reports, engage in public awareness raising campaigns, analyse the existing legislation etc. It should be once again underlined here that it is important that these are actually carried out by the Centre, i.e., the effectiveness on the ground is the important factor.

However there is a wider problem that the Ombudsman's office would have to face should it be considered for the role of the NPM. The Ombudsman's office in Kazakhstan possesses the traditional role envisaged for such institutions: it is charged with more of a reactive mandate, i.e., it deals with complaints. The OPCAT on the other hand requires a preventive approach, which in turn seeks pro-active engagement with authorities. The challenge for the Ombudsman Office thus will be how to adapt to this as that will require not only a shift in terms of ethos of the institution, but also in terms of thinking and methodology[57].

c. NPM Report

Article 23 of the OPCAT prescribes the need for the NPMs to produce annual reports and puts an obligation upon states parties to disseminate these reports.

[57] Summary and Recommendations for the Conference *OPACT in the OSCE region: What it means and how to make it work?* Prague, Czech Republic, 25-16 November 2008; p. 6; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf (accessed on 20 March, 2009)

Moreover, in order to make the reporting process more effective, it is advisable that the NPM report is also discussed by, for example, in a Parliament session or special meetings of the relevant stakeholders.

The Decree on the Centre in Article 9 (12) provides that the centre ensures the timely preparation of the Ombudsman's Report which is submitted to the President[58]. Certainly this report concerns the activities of the Ombudsman's office as such and adjustments would need to be made for an NPM report. Moreover, it would be an obligation upon state to disseminate the NPM reports.

The Decision on the PMCs contains no provisions about the annual reports. Therefore it is evident that the requirements of the OPCAT in respect of the NPM report are not met by either of the entities.

d. Work with the SPT and other bodies

Article 20 (f) of the OPCAT gives the right to the NPMs to meet with the SPT, to send information to it and to meet with it and the states parties are obliged to grant NPMs such a right.

The Decree on the Centre in Article 9 (13) states that upon the authorisation of the Ombudsman the Centre facilitates the interaction with other institutions of human rights in Kazakhstan as well as with international and foreign human rights organisations. However there is no provision about the rights to meet and peculiarly, nothing about the cooperation with international human rights organisations is mentioned in the Decree on the Ombudsman. Similarly, nothing on the matter is stipulated in the Decision on the PMCs.

III. NPMs in other states parties to the OPCAT

The research conducted in the Law School of the University of Bristol on the implementation of OPCAT around the world[59] suggests that states parties to the OPCAT commonly look at the practice of each other when selecting an appropriate NPM. To a large extent this is prompted by the lack of detailed guidelines in the text of the instrument as to how NPMs ought to look like as well as by the uniqueness of the role that this international instrument prescribes to a national body. Therefore

[58] See also Article 23 of the Decree on Ombudsman
[59] See Supra note 8

when looking for an appropriate NPM in Kazakhstan, it is worth examining the practice of other states parties to OPCAT.

So far there are three NPM models emerging:

1. the designation of existing NHRIs as NPMs: Ombudsman Offices or National Human Rights Commissions (like, for example, Estonia, Armenia, Czech Republic and Mexico);
2. the designation of a number of institutions, like New Zealand where the NPM is composed of five 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;
3. the creation of a totally new institution for the purposes of the NPM, like the creation of the general Inspector of Places of Deprivation of Liberty in France in July 2008 or the forthcoming National Committee for the Prevention of Torture in Paraguay and the very recent decision (February 2009) to create the office of the National Observer of Places of Deprivation of Liberty for the purposes of the NPM in Senegal.

It should be noted that the establishment of an NPM in a country ought to be viewed as a process, and the proclamation of a certain body or bodies as NPMs should not be taken as an end but rather the very start of such a process. It has been highly recommended that such decision be revisited after a period of time and that review of the work and mandate, review of the NPM composition and well as review of funding takes place[60]. Indeed, state practice so far already indicates that revision of NPM designation is necessary: in Denmark, the designation of the Parliamentary Commissioner for Civil and Military Administration (Danish Ombudsman) as the Danish NPM was deemed straight-forward by the government, requiring no amendments in any of the existing legislation or practices. Now, two years down the

[60] Supra note 57; Recommendation (a); p. 10

road, the government is openly admitting that changes in legislation may be necessary.

Both the Maldives and Mauritius established provisional NPMs in the anticipation of the SPT's visit to these countries in 2007. Now both countries are undergoing processes leading to the proper establishment of their respective NPMs that may well differ from the provisional ones.

Consequently, as state practice shows, it is vital to view the NPM designation as a starting point of the NPM process, which is kept under review and it is important that Kazakhstan authorities take note of this emerged state practice.

Conclusion

Establishment of an NPM for any state party to the OPCAT has not been an easy task: even countries that initially thought that their existing bodies meet the requirements of the NPM and thus designated such entities, now find themselves with the need to adjust their mandates so as to meet requirements of OPCAT. The respective authorities of Kazakhstan must therefore ensure that the process of NPM establishment is transparent and inclusive not only because such a process is required by the OPCAT, but also because such a process will allow arriving at an NPM model which is most suited to the specific geo-political, social, cultural and legal features of the country. Such a process will also lend legitimacy to the body, which is an essential prerequisite for the potential effectives of it in future.

As this Report demonstrates, none of the existing institutions in Kazakhstan (the Ombudsman, the Centre and the PMCs) comply with the criteria set forth in the OPCAT. The two roundtables that have been organised in Astana have already produced useful suggestions for ways forwards in the given situation: it has been suggested that the Ombudsman's office could carry out the coordinating function of the NPM, while the PCMs which have presence in all administrative regions of the country, could be the entities that carry out the day-to-day work of the NPM[61]. Certainly, this would still require that all the requirements of Part IV of the OPCAT, as analysed in this report, would be met. Moreover, not only legislative amendments would have to be made, the practices of the existing bodies would need to be re-

[61] Yevgeni Zhovtis *The Concept and Establishment of the National Preventive Mechanism in the Republic of Kazakhstan* Presentation in the international conference *'Prevention of Torture in the Republic of Kazakhstan: from discussions to practical implementation'* Astana, Kazakhstan; 27 February; p. 6

examined so as to ensure that the pro-active and wide preventive mandate of the NPM is actually reflected not only in the law but also in the practice of the Kazakhstan's NPM. It is also vital to make the necessary provisions in the establishing NPM legislation for a periodic review of the designation, which would include review of the work, mandate, composition and funding of the Kazakhstan's NPM.

Finally, the process of establishment of the NPM can also serve another useful purpose in Kazakhstan- the review of the mandates of the existing bodies, such as Ombudsman's Office. It has received considerable criticism for failure to comply with the Paris Principles[62], something that can be usefully addressed through a thorough review that the country is undergoing when looking for its NPM.

[62] See: Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. *Concluding Observations of the Committee Against Torture. Kazakhstan*. CAT/KAZ/CO/2 of 12 December 2008; para 23; *Alternative Report of NGOs of Kazakhstan on the Implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Almaty, 2008; p. 33; Yevgeni Zhovtis *Summary of Remarks at the International Conference "OPCAT in an OSCE region: its meaning and implementation"* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008; Available at: http://www.bris.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/pragueseminar.html#docs (accessed on 19 March 2009)
It should also be noted that the institution has not been accredited by the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights