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To: Mr Rashid Tusupbekov

Minister of Justice
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CC: Ms Elvira Azimova

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Re: Draft Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan on the matter of the establishment of national preventive mechanisms aimed at the prevention of torture and other inhuman or degrading treatment or punishment.

Dear Mr Minister,

The Human Rights Implementation Centre (HRIC) has been informed that the process of adopting the necessary legislative framework has encountered the difficulty of interpreting Article 4 of Optional Protocol to the United Nations Convention against Torture (OPCAT) and namely, the scope and meaning of ‘deprivation of liberty’. Given our long-standing involvement in the process, we would like to offer some insights into the international practice that may shed light on the content of ‘deprivation of liberty’ and assist in overcoming the difficulty.

Initially, we would like to remark that Article 4 is one of the key provisions of OPCAT as it sets out the extent of and limits to the mandates for both National Preventive Mechanisms (NPMs) and the Subcommittee on Prevention of Torture (SPT). Therefore correct interpretation and application of this provision is essential for proper adherence to the obligations undertaken by the States parties upon the ratification of OPCAT.

Article 4(1) of OPCAT obliges States parties to allow visits to any place under their 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’. This is a very broad definition which means that visits must be allowed not only to such places as prisons and police cells where persons are deprived of their liberty by virtue of an order given by a public authority, but also to private custodial settings. This means that visits must be allowed also to such institutions as private hospitals, nursing homes and children homes as while persons in such places may be detained by non-state actors, this is done with the knowledge and acquiescence of a public authority and thus Article 4(1) of OPCAT applies.¹

However, potential conflict arises between Article 4(1) and 4(2) of OPCAT as Article 4(2) sets out more limited definition of ‘deprivation of liberty’ which is to mean ‘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 omits reference to consent or acquiescence by the public authority and it would thus appear that mere knowledge about detention, as described above, would not be sufficient.

In cases like this when a question of interpretation of an international treaty arises, the Vienna Convention on the Law of Treaties of 1969 (VCLT) must be applied. Article 31 of the VCLT provides that every treaty must be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Interpreting Article 4 systematically as well as taking into the consideration the object and purpose of OPCAT leads to the conclusion that Article 4(2) of OPCAT must be interpreted in the light of broader definition set out in Article 4(1) of OPCAT.²

The practice of the SPT is also consistent with this interpretation as during its in-country visits the Subcommittee has visited centres for children³, psychiatric hospitals⁴ and detoxification centres.⁵ It is thus clear that the SPT has adopted the broader definition of

¹ See also: M Nowak and E McArthur ‘The United Nations Convention against Torture. A Commentary’, Oxford University Press, 2008; p. 931

² This interpretation is consistent with that provided by other international commentators: see M Nowak and E McArthur ‘The United Nations Convention against Torture. A Commentary’, Oxford University Press, 2008; p. 932; APT and IIDH ‘Optional Protocol to the UN Convention against Torture. Implementation Manual. Revised Edition’, Geneva, 2010; p. 54

³ See: Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I

⁴ Report on the Visit of the Subcommittee on Prevention of Torture to Mexico; UN Doc CAT/OP/MEX/1 of 31 May 2010, Annex I; also Report on the Visit of the Subcommittee on Prevention of Torture to Paraguay; UN Doc CAT/OP/PRY/1, Annex II

⁵ Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I

‘deprivation of liberty’ as per Article 4(1). Moreover, this practice and therefore this interpretation by the SPT has been accepted by State parties.

Furthermore, the examination of the practice adopted by existing NPMs also confirms this. For example, the Estonian Chancellor of Justice, the institution which is designated as the Estonian NPM, in 2009, in addition to visits to prisons and police detention facilities, also carried out visits to psychiatric institutions, social welfare institutions, care homes, special school for children with behavioural problems as well as rehabilitation centres for children with addiction problems.⁶

Similarly also the Commissioner for Civil Rights Protection of Poland, the institution that is designated as Polish NPM, in 2009, *inter alia*, visited social care centres, psychiatric hospitals, a youth care centre and youth sociotherapy centres.⁷

We very much hope that you will find these comments of assistance in your work on furthering the compliance of the Republic of Kazakhstan with the requirements of OPCAT and of course remain at your disposal should you require any further assistance.

Sincerely yours,

Dr Elina Steinerte

⁶ ‘2009 Overview of the Chancellor of Justice. Activities for the Prevention of torture and other cruel, inhuman or degrading treatment or punishment. Statistics of Proceedings.’ Tallinn, 2009; pp. 38-47

⁷ ‘Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009’, Warsaw, 2010; pp. 41-68