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Report/Presentation on the compatibility of the Armenian legislation with the requirements of the Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

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Introduction.

OPCAT is not a traditional international human rights treaty as it moves away from the usual forms of the supervision and enforcement: such 'traditional' supervision mechanisms like reporting system and complaints procedure are not envisaged in the instrument. Rather it introduces a double-tiered system of torture prevention by establishing an international Subcommittee on the Prevention of Torture (SPT) (Article 2) and imposes an obligation upon the states parties to designate, establish or maintain one or more preventive mechanisms (NPM) (Article 3) at the national level. Both the SPT and NPMs are charged with a double duty:

1. carrying our preventive visits to places of deprivation of liberty (Article 4);
2. engaging in a dialogue with/making recommendations to the respective authorities with the aim of improving the treatment and conditions of persons deprived of their liberty (Articles 11 and 19).

The SPT has additional duties in relation to the states and NPMs as provided for in Article 11.

The establishment, designation or maintenance of an NPM is thus the central obligation of each state party to the OPCAT. However, the OPCAT itself contains little guidance on how this NPM should look like. This Report will thus deal with six key areas that must be examined when a country is establishing an NPM and assess to what extent this has been done in Armenia so far. These areas are:

1. The process of establishment;
2. Independence;
3. Mandate;
4. Expertise and Capacity;
5. Funding;
6. Relations with the SPT.

The basis for this assessment will be the empirical data from the research being carried out by the OPCAT research team of the University of Bristol: Prof Rachel Murray, Prof Malcolm Evans, Mr Antenor Hallo de Wolf and myself, on the implementation of OPCAT and designation of NPMs.

1. The Process of Establishment.

OPCAT does not prescribe a specific way of how an NPM should be created. Article 17 is rather vague and only requires that states parties 'maintain, designate or establish, at least one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms (…)'.

It is worth to re-cap at this stage that the rationale behind the system of preventive visits as envisaged by the OPACT, was the idea that permanent and ongoing visits, especially with the possibility of unannounced visits, is a realistic mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment. It was evident that in practice such a system could only work if such visiting body or bodies would be permanently in-country. Thus OPCAT obliges each state party to establish, maintain or designate an NPM.

"*Establish*" was aimed at those potential states parties who do not have any national human rights institutions or other visiting bodies and who would therefore need to create some new body with the powers to visit places of deprivation of liberty;

"*Maintain*" was designed for those states parties that already had bodies with the relevant powers to visit places of deprivation of liberty with a view to making recommendations for the strengthening of the protection of persons deprived of liberty;

"*Designate*" was envisaged for such state parties that (a) already had established a national human rights institution(s) and could therefore expand its powers without having to undergo the expenses of creating a new mechanism; (b) that had several human rights bodies or even visiting bodies that together could constitute an NPM.

It is thus clear that states parties are free in choosing the method by which an NPM is created in the country. However there are also some criteria which must be complied with when the designation process takes place. OPCAT contains direct reference to Paris Principles (Article 18 (4)) and obliges states parties to give due consideration to these when establishing NPMs. Two aspects are of particular importance here:

1. the legal basis of the institution;
2. the quality of the process of establishment.

Paris Principles are rather vague on the point of legal basis and only state that a national institution must be given as broad mandate as possible, which shall be clearly set forth in a constitution or legislative text, specifying its composition and its sphere of competence. As a minimum, it is clear that every NPM must have a clear basis in the domestic legislation which would set out its powers and mandate and provide the legitimacy to its actions. It is also clear that having a Constitutional basis have considerable advantages[1]: first, constitutional basis ensure legal certainty as it is generally more difficult to amend such legal texts as opposed to normal legislation; secondly having constitutional basis also adds to the legitimacy and perceived independence of an institution, which is particularly important in transitional societies and can be particularly helpful for an NPM- a body which will have to establish itself in a dialogue with state authorities.

In the case of Armenia, the Human Rights Defender derives the authority from the Constitution and it is further elaborated in the Law on Human Rights

[1] See Carver and Korotaev '*Assessing the Effectiveness of National Human Rights Institutions*'; Report on behalf of UNDP, October 2007; at para 2

Defender. It thus appears that there is a clear legal basis for the operation of this institution, which is also anchored in the Constitution.

The second aspect, which must be considered here, is the quality of the process of establishment. Here the aspect of prime importance is the transparency and inclusiveness of the process. It must be remembered that an NPM, just like a national human rights institution (NHRI) will be 'bridging the gap' between the civil society and state authorities. Such aspects as legitimacy, trustworthiness and reputation, perceived legitimacy perhaps being the most significant issue here, are of paramount importance and will ultimately add to the potential effective operation of an NPM. It is thus of utmost importance that when establishing an NPM, the state party engages in open and transparent consultations with all the relevant stake holders, such as various governmental departments, existing statutory visiting bodies, civil society and non-governmental organisations (NGOs).

An excellent example of such transparent and inclusive process could be observed in Paraguay[2], where in 2006 a Working Group was elected from a National Forum, which was charged with the duty of analysing the implementation of OPCAT. This Working Group included wide participation from state institutions and civil society and drafted an NPM proposal in an open and inclusive meetings, where outsiders were also welcomed. This draft law is currently under the consideration by the Senate.

Thus organisation of events like the present one in Yerevan is a very good initiative, as long as it includes all the relevant stake- holders. We are aware that there have been other discussion roundtables organised, the latest one taking place exactly one month ago. It has been however brought to our attention that at that event a different NPM model was discussed and the participants were surprised to find out that there is another proposal circulating. If this is so, we invite the relevant parties to act in more transparent, open and inclusive manner when discussing the establishment of NPM in Armenia as the practice shows that this is an essential precondition for the future effectiveness of an institution.

2. Independence.

Throughout OPCAT references to an *independent* NPM (emphasis added) can be traced (see Articles 1, 17, 18 and 35) and it is evident that the concept of independent NPM is central to the Protocol. This concept is equally central to the Paris Principles which reiterate the need to for independence both in terms of the composition of the NHRI and its operation. It is thus possible to distinguish two aspects here:

1. functional independence;
2. independence of personnel.

First, when examining the issue functional independence, several aspects must be taken into account. As reflected in the Paris Principles:

> '2. 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'.

In terms of funding, it has been presumed that in order to ensure the independence of NHRI from the executive, it would preferable that the funding comes from the Parliament. However such a provision, *per se*, is neither an ultimate guarantee of independence nor a definite assurance that the institution would receive adequate funding.

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[2] See APT '*National Preventive Mechanisms. Country-By-Country Status under the Optional Protocol to the UN Convention Against Torture (OPCAT)*'; Report of 15 November 2007; pp. 36-37

The existing Armenian NPM proposal, which aims at designation the National Human Rights Defender's Office as the NPM, presupposes that the funding would be allocated in state budget, which the government submits for the approval to the Armenian Parliament (Article 24 of the Law on National Human Rights Defender). This certainly raises doubts about in terms of independence. It must be ensured that in practice there is no undue influence by the government by, for example, having powers to revise the budget submitted by the National Human Rights Defender's Office. However the recommendation would be that the budget of the National Human Rights Defender's Office is provided from the Parliament's budget so as to strengthen the independence of the Office from the executive.

The second aspect here is the ability of the National Human Rights Defender's Office and the National Human Rights Defender himself/herself to freely decide on how this budget is spent. As the Law on the National Human Rights Defender (Article 24 (5)) states that this should be so. Therefore, as long as this is also the practice on the ground in Armenia, it appears that independence of the institution on this aspect is ensured.

The concept of functional independence also encroaches on the issue of free operation of an NPM and as required by Article 20 of OPCAT, a variety of powers must be guaranteed to the NPM. This is similarly reflected in the Paris Principles, which require that the NHRI 'shall:

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

The present NPM proposal for Armenia appears to fulfil these formal requirements in law. However, as has been noted by other international bodies, to be independent these types of bodies should have a 'capacity to be perceived as a body distinct from the police services',[3] and be an 'independent outside body' and 'not organizationally and administratively placed under the auspices' of a ministry[4]. Moreover, it must be noted that the issue of independence should not only be considered in terms of independence from the government, but also independence from others, like other statutory visiting bodies, NGOs and civil society. After all, just as government may attempt to influence the direction or decisions of the NPM, so may civil society, parliamentarians or other statutory or constitutional bodies. This is essential pre-condition for an NPM, a body which has to balance a rather difficult mandate: on the one hand it must be the 'watchdog' of the state authorities in the area of torture and ill-treatment prevention, whilst on the other hand it will have to engage in a constructive dialogue with the authorities with the aim of improving the conditions of detention in the places of deprivation of liberty. It is therefore important to consider the perceived independence of the Armenian National Human Rights Defender and his/her Office by all the relevant stake-holders, like state authorities, civil society and persons who are in the places of deprivation of liberty.

[3] 1994 visit to Austria, CPT/Inf (96) 28, para 94
[4] Visit to Czech Republic 2002, CPT/Inf (2004) 4, at para 102

The second aspect of the issue of independence, the independence of personnel, and it is commendable to see that this aspect has been examined in great detail by the National Human Rights Defender's Office (see the Research Paper). The five essential aspects: the method, criteria, duration, dismissal and immunities of the National Human Rights Defender have been taken into consideration and appear to be well reflected in the current Armenian proposal.

However it must also be noted that equally important issue is the staff of the institution and not only the named members, like the National Human Rights Defender himself/herself. Who the staff are, their experience and also their ability to be influenced by others is key when, as is often the case, they may be the ones carrying out the day to day work. Here the same principles should apply as are applicable to the more visible members of the NPM. Whilst they may not be the public face of the NPM, the manner in which they operate still has an impact on the NPM's independence. In this context it appears that the National Human Rights Defender is the person solely in charge of the appointment of his/her staff. Therefore as long as due consideration in practice is given to the aspects here mentioned regarding the staff of the institution, the proposal appears to correspond to the OPCAT criteria.

3. Mandate.

OPCAT requires that NPMs of all states parties are vested with the following powers (Article 19):

1. to regularly examine the treatment of the persons deprived of their liberty;
2. to make recommendations to the relevant authorities with the aim of improving the treatment and conditions of the persons deprived of their liberty;
3. to submit proposals and observations concerning existing or draft legislation.

Clearly, the key concept determining the scope of this mandate is the definition of a 'place of deprivation of liberty'. To this end, the text of the OPCAT is vague and Article 4 defines these as 'any place under its [state's] 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 (…)'. It goes on in para 2 to state that '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 definition is certainly rather broad and thus the reach of OPCAT goes beyond the 'traditional' places of detention, like police cells and prisons and also extends to such places as children homes, psychiatric institutions and elderly homes, just to name some examples. This has three major implications for an NPM:

1. the mandate provided to an NPM by the national legislation should extend to all these various places of deprivation of liberty. Because of the vague definition provided for in OPCAT, it is advisable not to list such places in the national legislation so that in case new places are being set up, the NPM has the power to visit these without the necessity for any amendments in the legislation. Should for some reasons such listing of places be deemed necessary, for example, in order to ease the access to certain places, this list cannot be formulated in conclusive or exhaustive terms;
2. since preventive visits will be have to be carried out to such a wide variety of places, every NPM will need expertise necessary to visit such places.

Thus, as indicated by the OPCAT (Article 18 (2)), professional knowledge must be ensured. It is evident that in order to fulfil the requirements of OPCAT, multi-disciplinary team, having such professionals as lawyers, medical professionals, social workers and forensic scientists, for example, in the NPM is essential;

3. when establishing an NPM, the state must consider that such a wide mandate will require sufficient resources, so that if an existing body is designated as an NPM, it must be ensured that the necessary finical resources are provided.

The current proposal on the Armenian NPM does not address these issues sufficiently. First of all, the current text of the Law on National Human Rights Defender, Article 8, refers to the right of 'the Defender or his/her representative to have free access, by his/her initiative, to military units, police detention centres, pre-trial or criminal punishment exercising agencies, as well as other places of *coercive* detention' (emphasis added). This list of various places of deprivation of liberty, while not exhaustive, is still unnecessarily limited by the use of words 'coercive detention' and may pose difficulties when an NPM is to visit, for example, children homes or psychiatric institutions (especially in cases when patient has consented to his/her treatment there).

Moreover, Article 12 (1) gives a right of free access to the Defender to 'any state institution or organisation'. This may pose certain difficulties if examined in the light of the definition of the place of deprivation of liberty as provided in OPACT, Article 4, which makes it clear that the definition of a place of deprivation of liberty also covers such instances when a state has effectively contracted-out the running of certain facilities to private parties. It is possible that such institutions do not exist in Armenia currently, but it is equally possible that such could exist in the future and therefore ensuring that the relevant NPM legislation extends to all possible types of places of deprivation of liberty is essential.

Similarly, the right of free access currently is not extended to the members of staff of the Defender's Office, which may impede day to day work.

The current Law on National Human Rights Defender also does not reflect the need for a multi-disciplinary staff of the Armenian NPM. This is an essential requirement if an NPM is to function effectively and independently. Clearly it may not be possible to ensure a total multi-disciplinarity of staff, but this should be an aim to strive towards and this aim should be reflected in the legislation. Furthermore, provisions in the legislation must be made so that the necessary expertise could be contracted-in, should the NPM deem it necessary. This must also be taking into account when the NPM is planning its financial budgets. Thus, for example, the Office of the Parliamentary Ombudsman in Denmark, which has been designated as the Danish NPM, is currently negotiating the possibility of contracting-in expertise from various NGO's, most notably in the medical field. The current Armenian NPM proposal does not contain such a possibility.

The current Law on National Human Rights Defender does not reflect the preventive mandate of an NPM as required by OPCAT. Article 17 of OPCAT makes it clear that NPMs are to be established with the aim of torture prevention at the domestic level. The current Armenian legislation does not charge the Defender or his/her Office with such a pro-active prevention mandate.

Moreover, the OPCAT also requires that NPMs would regularly examine the treatment of the persons deprived of their liberty and this requirement presupposes a system of preventive visits to a variety of places of deprivation of liberty. This is not reflected in the current Law on National Human Rights Defender. The Defender is given a re-active mandate: he/she has the right to receive complaints (Articles 7-8). In connection with this mandate, the Defender has, *inter alia*, the right to have free access to any state institution or

organisation and receive any information and documentation related to the complaint (Article 12). While Article 11 (4) provides that the Defender, by his/her own initiative, may at his/her discretion accept an issue for the consideration, particularly in cases when there is information on mass violations of human rights and freedoms, this cannot be deemed as sufficient basis for a mandate of a system of preventive visits as required by OPCAT.

Furthermore, careful consideration must be given to the fact that if the National Human Rights Defender of Armenia undertakes the duties of an NPM, it will have to 'juggle two hats': on the one hand, the institution will remain a quasi-judicial one, with the right to receive and deal with complaints, whilst on the other hand it will have to carry out visits and make recommendations under the preventive NPM mandate. This may pose certain difficulties in practice. Thus, for example, the New Zealand Ombudsman's Office has decided to create separate Units (with separate staff each, although liaising closely): one dealing with the Ombudsman's Office's complaints work, whilst the other would deal with the OPCAT related work. The current discussion on the Armenian NPM does not reflect on this issue sufficiently.

The aim of the system of preventive visits as envisaged in OPCAT is to improve the treatment and conditions of persons deprived of their liberty. Thus Article 19 (b) requires that NPMs have the right to make recommendations to authorities with such aim and the competent authorities of the state party in turn are obliged to examine these recommendations and enter into dialogue with the NPM on the possible implementation measures (Article 22). The current Law on National Human Rights Defender does not reflect this OPCAT requirement: the right to make recommendations with the aim of improving the treatment and conditions of persons deprived of their liberty is only partially reflected in Article 16 which provides the right of the Defender to submit 'advisory clarifications and recommendations' to state and local self-governing bodies and officials. There is no corresponding obligation of the state authorities neither to examine such recommendations nor to engage into a dialogue with the aim of their implementation which falls short of the OPCAT requirements.

Similarly, Article 12 (4) of the Law on the National Human Rights Defender only provides that the Defender with the right to 'instruct relevant state agencies to carry out expert examinations and prepare findings on the issues subject to clarification during investigation of the complaint'. This also does not adequately reflect the requirements of OPCAT.

Article 19 (c) of OPCAT also requires that NPMs be given the right to submit proposals and observations concerning the existing or draft legislation. This is not reflected in the current Law on the National Human Rights Defender: while Article 15 gives the Defender a right present reports to the President and the National Assembly, as well as Article 16 provides for the right to submit 'advisory clarifications and recommendations' to state and local self-governing bodies and officials, this certainly falls short of the OPCAT requirements. It is mentioned in the Research Paper prepared by the Human Rights Defender's Office that a Presidential Decree was adopted in July 2007 according to which all the drafts of legislative acts relating to human rights and fundamental freedoms should be sent to the Defender for his opinion before they are presented to the Cabinet discussion. It is however unclear whether the relevant authorities are obliged to give due consideration to the views of the Defender and whether he/she has the right to propose amendments in the existing legislation or introduce new draft legislation. Moreover it is advisable that such rights and powers of the Defender are reflected in the national legislation as opposed to a Presidential decree.

Finally, Article 23 of OPCAT obliges states to publish and disseminate the annual reports of NPMs. The current Law on the National Human Rights Defender,

Article 17, only requires that a report on past year's activities is presented to various stake-holders. There is no provision that (1) special reports on the activities of the National Human Rights Defender as NPM must be produced and (2) that it is the duty of the state to publish and disseminate such reports. Moreover, the restrictions in the second paragraph of Article 17 appear to present unnecessary restraint on the actions of the Human Rights Defender.

4. Expertise and Capacity.

It has already been highlighted in the section above that the effective work of an NPM as envisaged by OPCAT will inevitably require a multi-disciplinary team in the institution. The Office of the National Human Rights Defender should carry out an internal review of what expertise is available in-house and what may be required in addition so that the institution has the necessary expertise to carry out preventive visits to a wide variety of places of deprivation of liberty. It would be advisable that the need for multi-disciplinary team is reflected in the national NPM legislation.

Moreover, as indicated earlier, OPCAT requires that NPMs carry out a system of preventive visits. This must be first of all duly reflected in the relevant NPM legislation and secondly, the Office of the National Human Rights Defender should re-examine its working methods so as to (1) establish the *system* of visits[5] and (2) carry out *preventive* visits (emphasis added). The Office of the National Human Rights Defender is a fairly new institution in Armenia[6] and, as reflected in the report of the most recent CPT visit to the country, started to carry out visits to places of deprivation of liberty relatively recently[7]. It is thus possible that the institution has not yet gathered the necessary experience in carrying out such visits and it is possible that there are other bodies in Armenia that have more considerable experience on the matter. Therefore it is highly advisable that any potential Armenian NPM would draw on the expertise of other visiting bodies. This is especially important in the light of the wide mandate of an NPM, which includes preventive visits to such a wide variety of places of deprivation of liberty.

Furthermore, since the OPCAT will be in effect placing additional duties upon the Office of the National Human Rights Defender, it is more than likely that additional capacity will be necessary in terms of expertise (as indicated above) and in terms of additional human resources so that the Office is physically equipped to carry out the system of preventive visits. It has been already noted in other studies that the NHRIs who have the mandate to visit places of deprivation of liberty in the region already suffer due to lack of sufficient human resources[8]. Being designated as an NPM will only add to this duty and thus due consideration must be given to this aspect. This aspect does not appear to be well reflected in the current Armenian NPM discussion.

5. Funding.

Part 1 of this Report already dealt with the issue of independence in relation to funding (see above). In addition, the state party must ensure that if the Office of the National Human Rights Defender is designated as the Armenian NPM,

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[5] See, for example, § 1 (3) of the Law of 8th December 199 on the Public Defender of Rights in the Czech Republic: it requires a *system* of visits to be carried out by the Defender (emphasis added). It should be noted that the Czech Public Defender of Rights has been designated as the Chezch NPM.

[6] The Danish Parliamentary Ombudsman, for example, has been operational since 1958 and since the latest amendments in the Danish legislation in 1996, it has been carrying out a system of visits to a wide variety of places of deprivation of liberty.

[7] Report to the Armenian Government on the Visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20-22 April 2004; CPT/Inf (2006) 38; Published on 16 November 2006; para 19

[8] See Carver and Korotaev '*Assessing the Effectiveness of National Human Rights Institutions*'; Report on behalf of UNDP, October 2007; at para 3.5

adequate *additional* resources are provided (emphasis added) so as to reflect such issues as: the additional tasks (for example, the preventive mandate; system of visits; reports on NPM activities; review of the existing legislation; necessity to interact with the SPT), necessity for additional staff and additional expertise.

6. Relations with the SPT.

Article 23 of OPCAT gives the right to every NPM to have contacts with the SPT, to send information and to meet with it. There is also a corresponding obligation placed upon states in Article 12(c) to encourage and facilitate contacts between the SPT and NPM. The current Law on the National Human Rights Defender however does not reflect neither the right of the National Human Rights Defender to interact with the SPT, nor the obligation of the state to encourage and facilitate these contacts.

Conclusion.

It is evident that a lot of consideration has been given to the implementation of OPCAT in Armenia. Issues of independence, both in terms of the establishment of an NPM, as well as the independence of member and staff, appointments procedure and the necessary privileges and immunities are carefully evaluated.

The main shortcomings concern the over-arching purpose of the OPCAT, namely, the torture prevention. The current Law on the National Human Rights Defender does not reflect the pro-active, preventive mandate as required by the OPCAT. It is clear from the reading of the text of the Law that the Defender and his/her office is a re-active, complaints receiving institution which, whilst extremely important, does not correspond to the requirements of OPCAT. Due consideration must be given to such factors as the mandate of the Defender's Office, the expertise and capacity of his/her Office so as to reflect the need for multi-disciplinary expertise and additional resources, the right of the Defender to comment on the legislation and propose new draft legislation as well as the right of the Defender to interact with the SPT. Equally, the obligation of the state to provide the necessary additional funding to undertake all these extensive new duties must be guaranteed as well as its obligation to examine the recommendations of an NPM, to engage in a dialogue with it, the obligation to publish and disseminate NPM's reports and to facilitate its contacts with the SPT.

Moreover, it is of paramount importance that the process of the NPM establishment in Armenia is an open, transparent and inclusive process that takes into consideration all the relevant stake-holders as this is an essential pre-condition for the perceived legitimacy of the body as well as its potential effectiveness.