

**Report on the ratification by Hungary of the Optional Protocol to the United Nations Convention against Torture and designation of the National Preventive Mechanism.**

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## 1. Executive Summary

To the date of writing the present report<sup>1</sup>, Hungary has neither signed nor ratified the Optional Protocol to the United Nations Convention against Torture (OPCAT) despite having made its intention to do so public on a number of occasions since 2006 at various international fora. Recently, on 31 May 2011 the government of Hungary adopted Government Resolution 1176/2011 (V.31.) about the *Timing of the legislative tasks necessary for the accession to the Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. This Resolution firstly approves the necessity for Hungary to ratify OPCAT and requests the Minister of Foreign Affairs and the Minister of Public Administration and Justice to take the necessary preparatory steps so that Hungary could ratify OPCAT. The Resolution secondly notes that necessary preparatory work is to be carried out so that the Ombudsman can be designated as National Preventive Mechanism (NPM) for Hungary and that Hungary will avail itself of the possibility to postpone the implementation of its obligations under OPCAT in relation to the NPM for three years as provided for in Article 24 of OPCAT. The deadline for the completion of all these steps is set out as is 1 January 2012.

The present Report details the processes surrounding the ratification of OPCAT by Hungary and examines various options for the designation of NPM in Hungary as will be required by OPCAT when Hungary ratifies the instrument. The Report concludes with three sets of recommendations addressed to the government, the Ombudsman Office and civil society. A short summary of the key recommendations is presented here:

1. Make it clear to the stakeholders as to when the government intends to ratify OPCAT.
2. Not to make a declaration under Article 24 of OPCAT.
3. As a matter of urgency, carry out an open and transparent consultation which would include all the relevant stakeholders, especially civil society, on the issues of ratification and implementation of OPCAT in Hungary as well as on the possible NPM options for Hungary.
4. Carry out explanatory work among the criminal justice system agencies as well as among all places of deprivation of liberty as per Article 4 of OPCAT and their supervising agencies about the scope and meaning of OPCAT and the mandate of NPMs.
5. Examine the Act CXI of 2011 On the Commissioner of Fundamental Rights, promulgated in the Official Journal No. 88/2011 on 26 July 2011 in the light of OPCAT requirements for NPMs and carry out consultation about the required amendments or the need to draft a new law on the functioning of NPM.
6. Designate Ombudsman Office together with NGOs to carry out the NPM mandate in Hungary.
7. Make clear the status and future of Patient's Rights Advocates.

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<sup>1</sup> Sincere thanks are due to Ms Debra Long of the Human Rights Implementation Centre (Bristol) for her invaluable comments on earlier drafts of this report. Any inaccuracies are the sole responsibility of the author.

8. An SPT member must be invited to any consultations regarding the ratification and implementation of OPCAT in Hungary, including the choice and designation of NPM.

## **2. Introduction: Background to the Project**

The present Report is produced following a research visit undertaken to Budapest, Hungary, between 27-30 June 2011 as part of a project on 'Preventing Human Rights Abuses in Place of Detention', which is run by a consortium of organisations led by the Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR). The activities undertaken in Hungary as part of this project are led and coordinated by the Hungary Helsinki Committee. The overall objective of the project is preventing human rights abuses in places of detention in Hungary and Romania. In order to achieve this objective, the project aims that the two countries set up and support a functional mechanism to carry out comprehensive monitoring in places of detention and that the prison budget allocation and expenditure are subject to public scrutiny. The present report was delivered in the framework of the first objective. The research visit was aimed at gathering information on the current state of play with the implementation of the OPCAT in Hungary.

## **3. Methodology**

Given the non-quantifiable aims of the Project, qualitative methodology was chosen as most suitable. Two specific methods were employed: literature review and qualitative in-depth interviews.

Initially, the literature review was undertaken which involved the review of reports from various international and regional human rights bodies, such as the documents associated with the Universal Periodic Review (UPR)<sup>2</sup> under the United Nations Human Rights Council, process which Hungary underwent in May 2011 as well as documents prepared by the Hungarian authorities for the UPR process<sup>3</sup>; most recent Conclusions and Recommendations of the United Nations Committee Against Torture (CAT) of 2007<sup>4</sup> and the report following the visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to Hungary in Spring 2009<sup>5</sup>. The literature review also included an examination of the relevant national legislation, such as the Act on the Parliamentary Commissioner for Civil Rights (Ombudsman)<sup>6</sup> as well as most recent yearly report published by the Parliamentary Commissioner for Civil Rights, available in English.<sup>7</sup> This method enabled a full picture to build up regarding the background to the processes surrounding the steps towards the ratification of OPCAT by Hungary and the designation of an NPM.

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<sup>2</sup> See: A/HRC/WG.6/11/HUN/2 of 21 February 2011 and A/HRC/WG.6/11/HUN/3 of 28 January 2011

<sup>3</sup> See: A/HRC/WG.6/11/HUN/1 of 16 February 2011

<sup>4</sup> See: CAT/C/HUN/CO/4 of 6 February 2007; see also List of Issues to be considered during the examination of the fourth periodic report of Hungary (CAT/C/55/Add.10) CAT/C/HUN/Q/4 of 4 July 2006 and Alternative Report Regarding the Fourth Periodic Report of Hungary under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the Hungarian Helsinki Committee, 30 March 2006

<sup>5</sup> See: CPT/Inf (2010) 16 of 8 June 2010

<sup>6</sup> Act LIX of 1993 of the Parliamentary Commissioner for Civil Rights (Ombudsman)

<sup>7</sup> See: J/11903 Report on the Activities of the Parliamentary Commissioner for Civil Rights in the Year 2009

It allowed the main stakeholders to be identified and formed an essential preparatory part of our qualitative in-depth interviews.

The qualitative in-depth interviews with the main stakeholders in Hungary were undertaken during a visit to Hungary. The interviewees were identified through the literature review process as well as through discussions with the gate-keeper and partner organisation in Budapest, the Hungarian Helsinki Committee. Overall, 8 interviews were carried out and all but one were tape-recorded (for Schedule of Meetings see Annex I). Additionally, three sets of open-ended questions were given to the representatives of three organisations which were unable to meet the researcher during the visit. These were: Mental Disability Advocacy Centre (MDAC)<sup>8</sup>, the Patient's Rights Advocate and the service user Mental Health Interest Forum. Unfortunately no replies were received from the Patient's Rights Advocate despite repeated requests.

The above methods were chosen as they allowed the recording of the perceptions of the main stakeholders in order to highlight the issues surrounding the issues of ratification of OPCAT and designation of the NPM for the country. These qualitative methods allowed accommodating the detail of the various stakeholders' perceptions, which in turn provided for the possibility of making more targeted and nuanced conclusions in this report.

#### **4. Current situation**

Before turning to the situation surrounding OPCAT in Hungary, two very important and inter-related issues must be noted since both of these have bearings on the position of Hungary towards OPCAT.

Firstly, the country has just undergone constitutional reform, the culmination of which was the adoption of a new Constitution which was submitted to the Parliament and made public on 14 March 2011.<sup>9</sup> The new Constitution was subsequently adopted on 18 April 2011, signed by the President of Hungary 25 April 2011 and pursuant to the Closing Provisions, it shall take effect on 1 January 2012.<sup>10</sup> The process of adoption of the new Constitution however received considerable criticism. Thus for example the Venice Commission characterised the process as rapid which 'raises a number of concerns which would deserve careful consideration by the Hungarian Authorities'.<sup>11</sup> In detailing these concerns, the Venice Commission argued that '[t]hese include the lack of transparency of the process and the distribution of a public draft of the new Constitution only on 14 March 2011, a few weeks before its planned adoption, shortcomings in the dialogue between the

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<sup>8</sup> Please note that this was in addition to the meeting that took place with the same organisation

<sup>9</sup> Opinion on three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011); Opinion No 614/2011 of 24 March 2011; CDL-AD(2011)001 at para 14

<sup>10</sup> Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011); Opinion No 621/2011 of 20 June 2011; CDL-AD(2011)016 at para 8

<sup>11</sup> Opinion on three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011); Opinion No 614/2011 of 24 March 2011; CDL-AD(2011)001 at para 71

majority and the opposition, the insufficient opportunities for an adequate public debate on such a fundamental process, and its very limited timeframe.’<sup>12</sup>

Secondly, an aspect especially important for the processes surrounding OPCAT in Hungary is the fact that in accordance with the new Constitution, the system of parliamentary commissioner is undergoing radical changes. These changes are summarised by the Venice Commission as follows:

‘According to Article 30, one single Commissioner for Fundamental Rights will replace the previous four parliamentary commissioners (specialized ombudspersons), whose general responsibility will be to “protect fundamental rights”. His or her deputies will be vested with the task to specifically to “defend the interests of future generations and the rights of nationalities living in Hungary” (Article 30.2).’<sup>13</sup>

At the time of the visit undertaken in the remits of preparing the present Report, a new draft law on the Parliamentary Commissioner was being considered by the Parliament of Hungary. It was subsequently adopted on 26 July 2011 and will come into force on 1 January 2012.<sup>14</sup>

#### **(i) Ratification of OPCAT**

At the time of the present research, Hungary has not ratified or signed OPCAT despite having given oral assurances to do so to CAT in 2006<sup>15</sup>, a voluntary pledge to the same effect was issued by the Hungarian government to the Human Rights Council in 2006<sup>16</sup> and an express recommendation to ratify OPCAT issued by the national non-governmental organisations.<sup>17</sup> It should be noted that ratification of OPCAT was one of the express recommendations from the UPR process<sup>18</sup> and Hungary accepted this recommendation, agreeing to report on the progress of implementing this recommendation in September 2011.<sup>19</sup>

Internally, on 9 March 2010 the Governmental Resolution 1040/2010 (III.9.) ordered the Minister of Public Administration and Justice to examine the possibility of the ratification of OPCAT which initiated a consultation between the government agencies at the beginning of year 2011.

Further, on 31 May 2011 the government of Hungary adopted Government Resolution 1176/2011 (V.31.) about the *Timing of the legislative tasks necessary for the accession to the Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. This Resolution firstly approves the necessity for Hungary to ratify OPCAT and requests the Minister of Foreign Affairs and the Minister of Public Administration and Justice to take the necessary preparatory steps so that Hungary could ratify OPCAT. The Resolution secondly notes that necessary preparatory work is to be carried out so that the Ombudsman can be

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<sup>12</sup> Opinion on three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011); Opinion No 614/2011 of 24 March 2011; CDL-AD(2011)001 at para 72

<sup>13</sup> Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011); Opinion No 621/2011 of 20 June 2011; CDL-AD(2011)016 at para 114

<sup>14</sup> Act CXI of 2011 On the Commissioner of Fundamental Rights. Promulgated in the Official Journal No. 88/2011 on 26 July 2011

<sup>15</sup> CAT/C/HUN/CO/4 of 6 February 2007 at para 5

<sup>16</sup> A/HRC/WG.6/11/HUN/2 of 21 February 2011 at para 73

<sup>17</sup> A/HRC/WG.6/11/HUN/3 of 28 January 2011 at para 1

<sup>18</sup> A/HRC/18/17 at paras 94.1-94.5

<sup>19</sup> A/HRC/18/17 at para 95.1

designated as NPM for Hungary and that Hungary will avail itself of the possibility to postpone the implementation of its obligations under OPCAT in relation to the NPM for three years as provided for in Article 24 of OPCAT. The deadline for the completion of all these steps is set out as is 1 January 2012.

## **(ii) Designation of the NPM**

As the above mentioned Governmental Resolution notes, the Ombudsman appears to be the preferred choice of the government to fulfil the role of the NPM under the provisions of OPCAT. In early 2011 three NPM options were identified by the government: (1) establishment of a new institution; (2) designation of the Prosecutor's Office as NPM; or (3) designation of the Ombudsman's office as NPM. There was a document produced by the Ministry of Justice which examined the three options in detail and this document was circulated to some government agencies.

In relation to the first of these options, the authors of the document concluded that if a new institution were to be created for the purposes of NPM, it would require adoption of new legislation which would create an institution which would in many respects duplicate the existing Ombudsman Office. It would also require large financial resources and would side-line the expertise that the Ombudsman Office has gathered during its years of monitoring detention facilities.

Turning to the second option, the Prosecutor's Office, the authors of the document noted that the office is both politically and professionally independent and enjoys the required legislative basis. Noting that the Law on the Prosecutor's Office lays the responsibility for the supervision of the lawfulness of the penitentiary institutions, of the implementation of penalties and other coercive measures upon the Prosecutor's Office, the authors concluded that in accordance with the requirements of OPCAT, prosecutors have access to all information concerning the number of people who are deprived from liberty, to every place of detention and have the power to examine the treatment of the detainees and the circumstances of the detention as well as carry out interviews in private. It was argued in the document that the only down-side of designating the Prosecutor's Office as NPM is the fact that it does not comply with the requirements of functional independence because it has the powers of a public authority related to investigation.

The third and final option considered was the designation of the Ombudsman Office as NPM. It was argued the independence of the Ombudsman is anchored in the Constitution of Hungary and that in terms of professional expertise the Ombudsman Office fulfils the requirements laid down in OPCAT for NPM. However, in accordance with the Law on Ombudsman, s/he is authorised to act and to conduct inquiries only when there appears that an abuse of fundamental rights has taken place. Nevertheless, according to the new Constitution, a new law will be drafted, covering the duties and powers of the Ombudsman which allow transposing the provisions of OPCAT into this new law thus making it OPCAT-compliant.

The document thus determined that designation of the Ombudsman Office as NPM is the best choice, especially in the light of the new law on the Ombudsman being drafted.

It should be noted that there were no public and transparent consultations carried out which would involve civil society of Hungary.

The Ombudsman Office was consulted and it carried out an internal audit considering the implications of being designated as NPM and have provided the estimate budget requirements. This estimate includes an overview of various places of deprivation of liberty in Hungary and their location; it provides for a department of 25 employees headed by one Head of the Department and includes provision of various logistical costs, like office equipment and vehicles. The total financial estimate is 272 181 000 Hungarian forints, which is nearly 1 million euros.<sup>20</sup>

As noted earlier, the system of Parliamentary Commissioner (Ombudsman) in Hungary is undergoing fundamental changes as provided for in the new Constitution adopted in 2011. A new law on the Commissioner of Fundamental Rights<sup>21</sup> has been adopted which foresees a number of provisions of crucial importance in the light of discussions surrounding designation of NPM for Hungary. Most notably, Article 1 states that the Commissioner of Fundamental Rights ‘acts as an independent, national preventive or human rights monitoring mechanism, if it is appointed to this task in order to fulfil an obligation undertaken in an international treaty’.

## 5. Analysis

### (i) Ratification of OPCAT

Turning to the question of ratification of OPCAT by Hungary and the reasons behind the delay given the publicly expressed willingness to do so dating back to 2006 as described above, there was unanimity among the interviewees who noted the lack of political will as the main obstacle to Hungary becoming party to OPCAT. It is interesting to note that this opinion was shared by non-governmental organisations as well as by most of the governmental agencies who were interviewed during this research. It was also highlighted that currently due to the constitutional reform and cardinal changes that are taking place in such offices as the Ombudsman Office, which is central to the issues related to the implementation of OPCAT, there is hesitancy among the government agencies to add yet another issue of the implementation of OPCAT to the complicated scene of reforms that are already taking place.

It is interesting to note that when asked as why the ratification of OPCAT did not take earlier when the pledges were made in 2006, all interviewees unanimously noted that this was not a priority of the previous government and that prior to ratification there was a need to examine the existing institutions to determine which one could fulfil the role of the NPM in Hungary.

Nevertheless all governmental agencies interviewed were pointing to the above mentioned governmental Resolution 1176/2011 (V.31) of 31 May 2011 which requests that all preparatory steps for Hungarian ratification of OPCAT be completed by 1 January 2012, noting that the ratification will definitely follow thereafter. NGOs interviewed were more careful in their predictions of whether this will necessarily follow. While agreeing that this is the first clear governmental document that spells out the intention of the government of Hungary to ratify OPCAT, NGOs were reserved that the ratification of OPCAT would be imminent after the 1 January 2012 given the very

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<sup>20</sup> Monthly accounting rate of the euro in August 2011 set by the EU: 1 HUF = 0.00372856077554 EUR; 1 EUR = 268.200 HUF <http://ec.europa.eu/budget/inforeuro/index.cfm?Language=en>

<sup>21</sup> Act CXI of 2011 on the Commissioner of Fundamental Rights. Promulgated in the Official Journal No. 88/2011 on 26 July 2011



reluctant attitude of the government of Hungary towards the issue so far. It was noted that the willingness of the government to ratify OPCAT had been expressed to NGOs in various forums since 2006 but very little had happened during the five years since hence the reserved attitude of the NGOs.

It was observed that there has been no public consultation about the necessity for Hungary to ratify OPCAT - the consultations regarding the possible NPM for Hungary was carried out among the government agencies (including the Ombudsman Office) only but did not involve any national NGOs, even those who currently carry out monitoring visits to places of deprivation of liberty. The government agencies interviewed also noted that such consultations are not planned in the future, noting that the position of NGOs is clear to them given the number of written petitions urging the Hungarian government to ratify OPCAT received.

Equally, despite the claims made by some government officials interviewed, ratification of OPCAT and the need to designate an NPM has not been considered in the remits of the current constitutional reform. It is most evident with the adoption of the new law on the Ombudsman which will clearly require changes to be made to it if the Ombudsman is to be designated as the Hungarian NPM, an aspect examined in detail in the section below.

It is therefore concluded that the decision to ratify OPCAT cannot be described as one resulting from well thought-through process which involved or appears to involve the future wide range of stakeholders, such as NGOs. It appears that the decision to ratify OPCAT is an outcome of the pressure from outside, especially the UPR process. The UPR process reveals that the issue of OPCAT ratification by Hungary has been predominantly raised by the European states<sup>22</sup>, which is perhaps not surprising given that Hungary in fact is among only four European Union states<sup>23</sup> that have not even signed<sup>24</sup> OPCAT.

Internally within Hungary, despite claims that the ratification of OPCAT and more specifically designation of the NPM for the country have formed part of the thinking around the constitutional reform and reform of the Ombudsman Office in particular, the present research found no evidence to support such a claim. On the contrary, it appears that a useful opportunity to adjust the new law on the Ombudsman to the requirement of OPCAT in relation to NPM has been missed as will be explained in detail in the section below.

Finally, whilst the above mentioned governmental Resolution 1176/2011 (V.31) of 31 May 2011 requests that all preparatory steps for Hungarian ratification of OPCAT be completed by 1 January 2012, there is no clear indication from the Hungarian authorities' if/when the ratification of OPCAT will follow thereafter. There is a clear presumption among the governmental authorities interviewed that ratification will follow but no clear date has been set or even indicated. This, given the reluctance of Hungary to fulfil its earlier public pledges at the international fora to ratify OPCAT, has caused considerable scepticism among civil society that the ratification will in fact follow.

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<sup>22</sup> Czech Republic, Denmark and France made specific recommendation to do so: see A/HRC/18/17 at paras 94.1-94.5 while Poland and Spain encouraged Hungary to ratify: see A/HRC/18/17 at paras 39 and 67 respectively.

<sup>23</sup> The other three are Latvia, Lithuania and Slovakia.

<sup>24</sup> Austria, Belgium, Finland, Greece, Ireland, Italy and Portugal have only signed OPCAT; all other 15 EU member states are parties to OPCAT.

## (ii) Choice of NPM

The interview process revealed that the three options considered during the inter-governmental agency consultation described above were the only three options that the interviewees had considered.

In relation to the option of creating an entirely new institution for the purposes of NPM, the interviewees all noted that this would not be a good option for Hungary. It was argued that this would not be the best use of existing limited financial and human resources. Some civil society organisations noted that creating an entirely new institution might be an ideal solution but not pragmatic given the limited financial and human resources. Thus overall there was a consensus that this is not a good option for Hungary.

In relation to the Prosecutor's Office, it was very surprising to see that despite the clear conflict with OPCAT provisions that such a designation would cause, some interviewees were ready to accept this as an NPM option; the Prosecutor's Office being adamant that this institution should at least form part of Hungarian NPM. It was explained that the supervision over the places of deprivation of liberty is carried out by a distinct Unit which is separate from other parts of the Prosecutor's Office which is involved in state prosecution in criminal cases. It was admitted that since the Prosecutor's Office has no jurisdiction over non-traditional places of deprivation of liberty such as psychiatric hospitals, the office would not be able to fulfil the NPM mandate alone and thus should be designated as the NPM together with the Ombudsman Office.

This view appears surprising as designation of a body like the Prosecutor's Office to fulfil the tasks of NPM would contradict the very *raison d'être* of OPCAT. As the Preamble to OPCAT states, one of the aims of the instrument is to strengthen the protection of those deprived of their liberty through non-judicial means of a preventive nature, based on regular visits to places of deprivation of liberty. The Prosecutor's Office is clearly a part of the criminal justice system of every state and thus any supervision carried out by the Prosecutor's Office has very different aims at the core. Moreover, Article 17 of OPCAT requires that the designated NPM is an independent institution and Subcommittee on Prevention of Torture (SPT) in its Guidelines to NPMs has requested that all NPMs carry out all aspects of their mandate in a manner which avoids actual or perceived conflict of interest.<sup>25</sup> Even though the supervisory function over the places of deprivation of liberty is carried out by a separate Unit which has nothing to do with upholding the criminal prosecutions, it is clear that the intricacy of this distinction will not be evident to those deprived of their liberty and the perceived conflict of interest thus becomes evident. Therefore, given that the Prosecutor's Office as a whole is an integral part of the criminal justice system, it is impossible to see how this institution would fulfil the requirements of an NPM as set out in OPCAT.

Turning to the final option for the Hungarian NPM, the Ombudsman Office, most interviewees noted that this would be the most suited entity to carry out the mandate of NPM in Hungary. Interestingly however the opinion was divided: the representatives of government agencies noted that the Ombudsman Office would be able to carry out this mandate, whilst the NGOs and the Ombudsman Office all noted that the Office would be able to do so only in cooperation with NGOs and only if additional funding would be provided to carry out the NPM mandate. The reasons behind why

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<sup>25</sup> See CAT/OP/12/5 at para 30

it was considered that the Ombudsman Office would be well suited for the NPM mandate were the guarantees of independence as the Ombudsman is elected by the Parliament and the Office is anchored in the Constitution of Hungary; perceived independence of the Ombudsman Office and its good reputation among the government agencies, civil society and population of Hungary; the expertise in carrying out monitoring of places of deprivation of liberty and its existing infrastructure which could be easily adapted to NPM tasks. On this note of expertise, it should be highlighted that according to the 1993 Law on the Parliamentary Commissioner, the Ombudsman office in Hungary was what could be described as a 'traditional Ombudsman Office' in that it was an independent entity that received complaints regarding breaches of fundamental rights and investigates such complaints.<sup>26</sup> Nevertheless, making use of the provision allowing for *ex officio* investigations<sup>27</sup>, the Ombudsman Office has been carrying out some 3-4 monitoring visits to the places of deprivation of liberty per year as well as initiated some thematic studies, for instance the study on conditions of detention of young people in 2008<sup>28</sup> and the study in 2009 into the situation of the Hungarian provision for psychiatric patients.<sup>29</sup>

The Ombudsman Office had also looked into the practical implications if it were designated as the NPM and made the calculations of the human and financial resources required: a department of 25 employees headed by one Head of the Department and various logistical costs, like office equipment and vehicles, with the total financial estimate of 272 181 000 Hungarian forints, which is nearly 1 million euros.<sup>30</sup> During the interview the Ombudsman Mr Szabo was very clear: his office would be keen to undertake the task of NPM to be carried out with NGOs but only if the requisite financial and human resources are provided.

As noted above, the current system of Ombudsmen in Hungary is undergoing a cardinal reform and new law has been recently adopted. At the time of the present research most government agencies interviewed were reluctant to assess whether the new law on Ombudsman would fulfil the criteria of OPCAT in relation to NPM should the Ombudsman Office be designated as such. The representatives of the Ombudsman Office on the other hand were clear that substantive changes will be required or even a new law on the functioning of NPM will be required. Most of the civil society representatives interviewed were unclear about the precise terms of the new law on Ombudsman, noting that there have been no consultations about the details of the new law and thus were unable to comment in detail.

As the new law on the Commissioner of Fundamental Rights has now been adopted<sup>31</sup>, it has been possible to examine the terms of this law in the light of the OPCAT requirements. The examination reveals a number of serious shortcomings such as:

1. The Law does not stipulate whether the NPM would be a separate Unit within the Ombudsman Office as Article 1 of the new Law only notes that the Ombudsman Office may be designated as an NPM. The recommendation of the SPT should be noted here: firstly, the

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<sup>26</sup> See Art 16 of the Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)

<sup>27</sup> See Report of the Activities of the Commissioner for Civil Rights in the Year 2009 at p. 13

<sup>28</sup> See Report of the Activities of the Commissioner for Civil Rights in the Year 2009 at p. 43

<sup>29</sup> See Report of the Activities of the Commissioner for Civil Rights in the Year 2009 at p. 27

<sup>30</sup> Monthly accounting rate of the euro in August 2011 set by the EU: 1 HUF = 0.00372856077554 EUR; 1 EUR = 268.200 HUF <http://ec.europa.eu/budget/inforeuro/index.cfm?Language=en>

<sup>31</sup> Act CXI of 2011 On the Commissioner of Fundamental Rights. Promulgated in the Official Journal No. 88/2011 on 26 July 2011

mandate and powers of the NPM, as prescribed by OPCAT, should be clearly set in the legislative text<sup>32</sup> and secondly, NPM functions should be located within a separate unit or department with its own staff and budget.<sup>33</sup>

2. Given that the new Law does not stipulate how the NPM would be configured within the Ombudsman Office, it is unclear how its staff would be appointed. It should be recalled here that the SPT has requested that the legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal and that such periods should be sufficient to foster the independent functioning of NPM;<sup>34</sup> that the NPM members should collectively have the expertise and experience necessary for the effective function of NPM, especially bearing in mind the requisite diversity of expertise as required by Article 18 of OPCAT;<sup>35</sup> and that the independence of NPM should be ensured by not appointing to it members who hold positions which would raise questions of conflicts of interest.<sup>36</sup>
3. While Article 14 of the new Law provides that the Ombudsman and the deputies enjoy immunities equal to the members of parliament, there is no provision about privileges and immunities of NPM members as required by Article 35 of OPCAT and as specified by SPT.<sup>37</sup>
4. The new Law sets out the working methods of the Ombudsman Office along the same lines as before - it is to receive complaints about alleged breaches of fundamental rights and the main task of the Ombudsman is to investigate such. Article 18 (5) allows for *ex officio* investigations but only 'in order to terminate the abuse of fundamental rights'. This is rather different from the pro-active nature of the NPM mandate as set out in Articles 19-23 of OPCAT. Moreover, the power of the Ombudsman Office to engage with those deprived of their liberty appears limited: for example, according to Article 22 of the new Law the Ombudsman or the employee of Ombudsman's Office may interview any employees of the authority which is being investigated. This is clearly insufficient for NPM functions as according to Article 20 (d) of OPCAT, NPM must have the rights to interview in private also those deprived of their liberty as well as anyone else it deems necessary. It is therefore evident that the new Law falls considerably short in setting out the power and mandate of NPM as required by OPCAT.
5. The new Law does not provide any guarantees against reprisals for those who communicate with the NPM and/or SPT, as required by Articles 15 and 22 of OPCAT and as requested by SPT.<sup>38</sup>
6. Whilst Article 28 of the new Law notes that the Ombudsman Office prepares a report, there is nothing stipulating that NPM is to issue recommendations and the corresponding obligation of authorities to engage into dialogue with NPM about the implementation of

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<sup>32</sup> See CAT/OP/12/5 at paras 6-7

<sup>33</sup> See CAT/OP/12/5 at para 32

<sup>34</sup> See CAT/OP/12/5 at para 9

<sup>35</sup> See CAT/OP/12/5 at para 20

<sup>36</sup> See CAT/OP/12/5 at para 18

<sup>37</sup> See CAT/OP/12/5 at para 26

<sup>38</sup> See CAT/OP/12/5 at para 27

such recommendations, as required by Article 22 of OPCAT. It should be further emphasized that the SPT has requested that such dialogue is meaningful.<sup>39</sup>

7. Article 40 of the new Law provides sound process of annual reporting noting that the annual report is to be presented to the Parliament which in turn discusses it and that the annual report is to be published on Ombudsman's website after the parliamentary hearing. It is however unclear whether these stipulations would apply to the annual report NPM as well: SPT has clearly requested that states publish and widely disseminate annual reports of NPM as well as ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament and that these are also transmitted to the SPT which will arrange for their publication on its website.<sup>40</sup>
8. Whilst Articles 2 and 37 set out the limits of the Ombudsman's mandate in relation to work with legislation, the recommendation of SPT that the state should inform the NPM of any draft legislation that may be under consideration which is relevant to its mandate and allow it to make proposals or observations on any existing or draft policy or legislation and take into consideration any proposals or observations on such legislation received from NPM is omitted.<sup>41</sup>
9. The new Law does not provide for the contacts between the NPM and SPT as required by Article 20 (f) of OPCAT.

It is thus clear that the new Law on Ombudsman falls considerably short of the requirements set out in OPCAT regarding NPM. It is especially regretful as the new Law has just been adopted and it thus appears that the Hungarian authorities have missed an opportunity to ensure that the new legislation complies with OPCAT criteria.

It should also be recalled that the designation of Ombudsman Office alone to carry out the NPM mandate poses a number of serious challenges.<sup>42</sup> Firstly, the Ombudsman Office is a complaints driven body whereas the NPM mandate is entirely proactive. This has implications for all aspects of Ombudsman's work, including visits. Even though Hungarian Ombudsman Office has initiated *ex officio* investigations, it is clear that these were prompted by a number of concerns raised through the examination of complaints.<sup>43</sup> The monitoring mandate of NPMs is very different as visits are not aimed at verifying or addressing specific complaints but rather to establish a picture over time of the improvements required and implemented in relation to the treatment of persons deprived of their liberty and the conditions of detention. This will require the Hungarian Ombudsman Office to considerably re-examine its working methodology and approach to monitoring mandate.

Secondly, the Hungarian Ombudsman Office enjoys quasi-judicial powers which may jeopardise the constructive dialogue which lies at the heart of NPM operation.

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<sup>39</sup> See CAT/OP/12/5 at para 38

<sup>40</sup> See CAT/OP/12/5 at para 29

<sup>41</sup> See CAT/OP/12/5 at para 28

<sup>42</sup> For more detailed examination see: E. Steinerte and R.Murray, *Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention against Torture*, in *Essex Human Rights Review*, Vol.6. No.1, 2009

<sup>43</sup> See Report of the Activities of the Commissioner for Civil Rights in the Year 2009 at p. 27: 'Reacting upon some of the complaints the Commissioner has ordered a comprehensive follow-up investigation into the situation of the Hungarian provision for psychiatric patients.'

Thirdly, the Hungarian Ombudsman Office is headed by one person who is the main decision-maker of the institution, supported by the members of staff of his office. Given that the prime task of the Ombudsman Office is to deal with complaints, the office is staffed by almost exclusively lawyers only. This poses a challenge as Article 18 (2) requires diversity of expertise among the members of NPM.

Special attention should also be paid to the opinion detailed by the Ombudsman Office and NGOs who all noted that the Ombudsman should be designated to carry out the NPM mandate together with NGOs. It was explained that some national NGOs carry out monitoring visits to various places of deprivation of liberty but most of these visits are fairly *ad hoc* as they are linked to project activities. It was also noted that access to places of deprivation of liberty varies significantly and in most instances does not have legislative basis but is rather based on Memoranda of Understanding that individual NGOs have been able to conclude with the authorities in charge of such places. This means that such monitoring is not obligatory and relies entirely upon the good-will and cooperation of the authorities in question. The inclusion of NGOs in the work of the Hungarian NPM would therefore ensure that the monitoring work of NGOs would have a legal basis and ensure the requisite access; it would add to the actual and perceived independence of Hungarian NPM as well as employ the very useful expertise and reputation that NGOs have been able to acquire through their monitoring work. It would also considerably assist the capacity of the Hungarian NPM to ensure the requisite regularity of visits as well as diversity of expertise. Consequently, inclusion of NGOs in the work of Hungarian NPM would allow to address at least some of the shortcomings that would arise should the Ombudsman Office be designated alone to act as Hungarian NPM. It is therefore a recommendation of the present Report that the Ombudsman Office together with NGOs is designated as the Hungarian NPM. The Ombudsman Office should thereafter engage in open and transparent discussions with the relevant Hungarian NGOs as to how this mandate can be practically fulfilled.

There is another institution which has been somewhat side-lined during the NPM discussion process in Hungary and that is the Patient's Rights Advocates. In its most recent visit report, CPT refers to the work carried out by the Patient's Rights Advocates in psychiatric institutions, noting they enjoy the right to carry out unannounced visits and talk privately to patients,<sup>44</sup> powers that make the institution very relevant for consideration during NPM debates in Hungary.

During the visit which was carried out in the remits of the present research an opportunity to meet with the representatives of this entity was actively sought but was fruitless. It was noted that the organisation is under considerable reform and there is lack of clarity not only about the details of reforms but about its continued existence. A set of questions was sent to the institution but at the time of writing this Report no replies have been received despite a number of reminders.

The Hungarian Civil Liberties Union, a national NGO, describes the powers of Patient's Advocates as follows:

'The principal task of the patient advocate is to help patients know and exercise their rights. The patient advocate plays an important role also in the course of the complaint procedure. A patient with a complaint can rely on the patient advocate's assistance in the first place. The advocate may

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<sup>44</sup> See CPT/Inf (2010) 16 of 8 June 2010 at para 148

help patients obtain the medical documents they need and have a copy about them; and s/he may help patients submit their complaint. In case the patient advocate succeeds in mediating between a patient and the health care providers, there will be no formal complaint at all. The patient advocate has a lot to learn from the complaints because various lessons can be drawn from them about the operation of the health care establishments.<sup>45</sup>

It thus appears that Patient's Rights Advocates carry out visits mainly within the remit of assisting with the complaints procedures. Nevertheless their expertise could be useful for the Hungarian NPM and thus should be further explored.

## 6. Conclusion

The process of ratification of OPCAT in Hungary remains unclear. On the one hand, there are public pledges by the Hungarian government to ratify OPCAT and it appears that the government has started to act on these recently with the adoption of a governmental Resolution requesting the necessary steps for ratification to be completed by 1 January 2012. On the other hand, given that the Hungarian authorities have been issuing public pledges to ratify OPCAT in the past like the voluntary pledge to the United Nations Human Rights Council in 2006 or the oral assurances issued to CAT in 2006, given that very little action has followed these, there is understandable scepticism as to whether this will ever happen. The Hungarian government should make it clear when it intends to ratify OPCAT and initiate open and transparent discussions with all relevant stakeholders, including the Ombudsman Office and NGOs, about the implications of OPCAT ratification, especially the designation of NPM.

The process of identifying an NPM for the country must be open and inclusive of all the relevant stakeholders. It is clear that whilst the Ombudsman Office is a preferred choice of the government to carry out NPM mandate, the Ombudsman Office is willing to accept this task only if it is appointed together with NGOs and the requisite financial and human resources are provided. It should be recalled that the designation of Ombudsman Office alone poses a number of challenges and the designation of NGOs to assist the Ombudsman Office in this task mitigates some of these.

There are two further conclusions to be drawn from the present research: firstly, there is little understanding among the government agencies about the meaning of OPCAT and the mandate of NPM. The fact that the Prosecutor's Office was still noted by few interviewees as suitable option for NPM clearly points to deep lack of understanding of the specifics of prevention of torture and other ill-treatment system that OPCAT puts in place.

Secondly, despite the brilliant efforts of various Hungarian NGOs to carry out monitoring visits to various places of deprivation of liberty in Hungary, there is no coordinated action among NGOs in relation to ratification of OPCAT or designation of NPM. It was surprising to observe that it was the present research that first brought some of the Hungarian NGOs together on the topic.

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<sup>45</sup> The Hungarian Civil Liberties Union 'Policy Paper On The Rights Of Patients' at p. 10; Available at: [http://tasz.hu/files/tasz/imce/betegjogiangol\\_uv.pdf](http://tasz.hu/files/tasz/imce/betegjogiangol_uv.pdf) (accessed on 8 August 2011)

## 7. Recommendations

### To the government

1. Make it clear to the stakeholders as to when the government intends to ratify OPCAT.
2. Does not make a declaration as per Article 24 of OPCAT; but if it does, provides a clear and public Action Plan justifying the need for such a declaration and detailing the steps that the government is indenting to undertake in order to bring Hungary in line with the requirements of OPCAT.
3. As a matter of urgency, carry out open and transparent consultation which would include all the relevant stakeholders, especially the civil society, on the issues of ratification and implementation of OPCAT in Hungary. Please note that this reflects the recommendation of SPT.<sup>46</sup>
4. Carry out explanatory work among its criminal justice system agencies as well as among all places of deprivation of liberty as per Article 4 of OPCAT and their supervising agencies about the scope and meaning OPCAT and mandate of NPM.
5. As a matter of urgency carry out open and transparent consultation which would include all the relevant stakeholders, especially the civil society, about the designation of NPM in Hungary. Please note that this reflects the recommendation of SPT.<sup>47</sup>
6. Designate Ombudsman Office together with NGOs as Hungarian NPM, making such designation public at the time of ratification and specifying that the mandate is to be shared between the Ombudsman Office and NGOs.
7. Examine the Act CXI of 2011 On the Commissioner of Fundamental Rights, promulgated in the Official Journal No. 88/2011 on 26 July 2011 in the light of OPCAT requirements for NPM and initiate consultation with the Ombudsman Office and civil society on the requisite changes or the need to draft a new law on the functioning of NPM. Such consultation must be carried out in an open and transparent manner.
8. Ensure that the institution which is designated as the Hungarian NPM receives required funding in order to enable it to carry out its functions effectively as requested by SPT.<sup>48</sup>
9. Make clear the status and future of Patient's Rights Advocates.
10. SPT member must be invited to any consultations regarding the ratification and implementation of OPCAT in Hungary, including the choice and designation of NPM.

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<sup>46</sup> See CAT/OP/12/5 at para 16

<sup>47</sup> See CAT/OP/12/5 at para 16

<sup>48</sup> See CAT/OP/12/5 at para 11



### **To the Ombudsman Office**

1. Request from the government of Hungary assurances as to when the ratification of OPCAT will occur.
2. Request that the government of Hungary carries out open and transparent consultation which would include all the relevant stakeholders, especially the civil society, on the issues of ratification and implementation of OPCAT in Hungary, especially the designation of NPM, as a matter of urgency. In case such a commitment from the government is not forthcoming, initiate such a consultation process itself, inviting the relevant government agencies and civil society.
3. Request that the Hungarian government does not make a declaration as per Article 24 of OPCAT; but if it does, that the Hungarian government presents a clear Action Plan justifying the need for such a declaration.
4. Assist the government in explanatory work among Hungarian criminal justice system agencies as well as among all places of deprivation of liberty as per Article 4 of OPCAT and their supervising agencies about the scope and meaning OPCAT and mandate of NPM.
5. Examine the Act CXI of 2011 On the Commissioner of Fundamental Rights, promulgated in the Official Journal No. 88/2011 on 26 July 2011 in the light of OPCAT requirements for NPM and submit its observations to the government, requesting a public consultation on the required changes or the need to draft a new law on the functioning of NPM.
6. Critically examine its own capacity to carry out the mandate of the NPM and carry out a survey of existing places of deprivation of liberty in Hungary as defined in Article 4 of OPCAT and make clear financial request to the government of resources that would be required for it to carry out NPM mandate.
7. Make it clear to the government of Hungary of whether it considers itself able to carry out NPM mandate alone or with NGOs.
8. Request that at the time of ratification the government clearly designates the Ombudsman Office with NGOs to fulfil the mandate of NPM in Hungary.
9. Engage with NGOs on elaboration of the mode of cooperation in order to be able to carry out NPM mandate.
10. Examine the expertise of Patient's Rights Advocates to see if this organisation can assist NPM work.

### To the civil society

1. Request from the government of Hungary assurances as to when the ratification of OPCAT will occur.
2. Request that the government of Hungary carries out open and transparent consultation which would include all the relevant stakeholders, especially the civil society, on the issues of ratification and implementation of OPCAT in Hungary, especially the designation of NPM, as a matter of urgency. In case such a commitment from the government is not forthcoming, initiate such a consultation process itself, inviting the relevant government agencies and the Ombudsman Office.
3. Prior to any consultations with government and the Ombudsman Office, the civil society of Hungary should carry out a consultation among itself in order to clarify its views on the implementation of OPCAT and options for NPM in Hungary. It is striking that at the time of this research the NGOs in Hungary have little knowledge of the work each one of them is carrying out in the field of OPCAT and have no knowledge of each other's views regarding NPM options for Hungary.
4. Assist the government in explanatory work among Hungarian criminal justice system agencies as well as among all places of deprivation of liberty as per Article 4 of OPCAT and their supervising agencies about the scope and meaning OPCAT and mandate of NPM.
5. Examine the Act CXI of 2011 On the Commissioner of Fundamental Rights, promulgated in the Official Journal No. 88/2011 on 26 July 2011 in the light of OPCAT requirements for NPM and submit its observations to the government and Ombudsman Office, requesting open and transparent discussion of the required changes or the need to draft a new law on the functioning of NPM.
6. Request that the work on the changes required in the Ombudsman Law is initiated prior to the ratification of OPCAT so as to be completed as soon as possible.
7. Request that the Hungarian government does not make a declaration as per Article 24 of OPCAT; but if it does, that the Hungarian government presents a clear Action Plan justifying the need for such a declaration.
8. Request that at the time of ratification the government clearly designates the Ombudsman Office with NGOs to fulfil the mandate of NPM in Hungary.
9. Engage with the Ombudsman Office on elaboration of the mode of cooperation in order to be able to carry out NPM mandate.
10. Civil society organisations should promote the involvement of survivors of torture and other ill-treatment, persons deprived of their liberty and any associations of former detainees in the decision-making process.<sup>49</sup>

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<sup>49</sup> APT, policy paper on '*Civil Society and National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture*', June 2008, p. 10. Available at [http://www.apr.ch/index.php?option=com\\_docman&task=cat\\_view&gid=51&Itemid=257&lang=en](http://www.apr.ch/index.php?option=com_docman&task=cat_view&gid=51&Itemid=257&lang=en)

### Annex I: Schedule of Meetings

date	time	name	position / field of responsibility
28 June Tuesday	8.30 am	Hanna PÁVA	state secretary responsible for the medical coordination and EU affairs, Ministry of National Resources
		Sára MARTON	desk officer at the Health Policy Department, Ministry of National Resources
		József SCHLAMMADINGER	head of the Legal Department, Ministry of National Resources
	10.30 am	András KÁDÁR	co-chair of the Hungarian Helsinki Committee
		Júlia IVÁN	legal advisor in the refugee program of the Hungarian Helsinki Committee
	2 pm	Máté SZABÓ	(general) ombudsman
		Attila PÉTERFALVI	general secretary of the ombudsman
		Katalin HARASZTI	staff responsible for refugee and asylum field, Parliamentary Commissioners' Office
		Erika CSÓRÉ	staff responsible for police cases, Parliamentary Commissioners' Office
		Edit FOGARASSY	staff responsible for prison cases, Parliamentary Commissioners' Office
	5 pm	Júlia SZIKLAY	international legal advisor, Parliamentary Commissioners' Office
Oliver LEWIS		executive director, Mental Disability Advocacy Center	
29 June Wednesday	9 am	Dorottya KARSAY	project manager of Detention Monitoring Program, Mental Disability Advocacy Center
		György VÓKÓ	prosecutor, head of the Independent Unit of Legal Supervision of the Penitentiary and Rights' Protection, Prosecutor General's Office
		József PACSEK	prosecutor, deputy head of the Independent Unit of Legal Supervision of the Penitentiary and Rights' Protection, Prosecutor General's Office
	11.30 am	András SZÚCS	prosecutor, staff at the Independent Unit of Legal Supervision of the Penitentiary and Rights' Protection, Prosecutor General's Office
	2 pm	Gergely SCHUCHTÁR	desk officer at the Department of International Organizations and Human Rights, Ministry of Foreign Affairs
		Barna MISKOLCZI	head of Department of Criminal Law Codification, Ministry of Public Administration and Justice
Zsófia ELEK		desk officer at the Department of Criminal Law Codification, Ministry of Public Administration and Justice	
30 June Thursday	8 am	Attila PONGRÁCZ	desk officer at the Department of Constitutional Law, Ministry of Public Administration and Justice
		Stefánia KAPRONCZAY	head of the Patient's Rights Program of the Hungarian Civil Liberties Union