

Dr Elina Steinerte
Prof Rachel Murray
Human Rights Implementation Centre
Law School, University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ
United Kingdom

Tel: +44 (0) 117 954 5330
Fax: +44 (0) 117 925 1870
E-mail: Elina.Steinerte@bristol.ac.uk

To: Members of the Working Group on 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.

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.

6 June, 2012

Dear Members of the Working Group,

The Human Rights Implementation Centre welcomes the open discussions that are taking place in the Republic of Kazakhstan regarding the Draft Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan, on the matter of establishing a national preventive mechanism aimed at the prevention of torture and other inhuman or degrading treatment or punishment (Draft Law). In the light of the obligations undertaken by Kazakhstan upon its ratification of the Optional Protocol to the UN Convention against Torture (OPCAT), we would like to offer the following observations regarding the interpretation of Article 4 of OPCAT and the term ‘deprivation of liberty’ in particular.

Article 4 is one of the key provisions of the 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) in relation to the types of places of deprivation of liberty that

these entities may visit. Therefore correct interpretation and application of this provision is essential for proper adherence to the obligations undertaken by the Republic of Kazakhstan upon the ratification of OPCAT and should be duly reflected in the national legislation concerning the NPM.

Article 4(1) of OPCAT obliges States parties to allow visits by both the NPMs and the SPT 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 institutions such as private hospitals, nursing homes and children homes because 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, a potential complication may arise if the Russian language text of Article 4 of OPCAT is examined. The Russian language text employs the term ‘содержания под стражей’ which literally means ‘holding someone under (armed) guard’. This poses a challenge especially in the post-Soviet countries many of whom have inherited the Soviet system of criminal justice where this term was used only to refer to imprisonment and police custody and therefore excluded such forms of deprivation of liberty as, for example, placement in social care homes or orphanages.

In cases like the present one, 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’.² Furthermore, in accordance with Article 32 of the VCLT when interpreting any ambiguity recourse may also be made to the travaux préparatoires of the treaty and the circumstances of its conclusion.³ In this instance it is clear from the preparatory work and draft texts of the OPCAT that it was intended to cover a broad range of places where people are deprived of their liberty either at the instigation of a public authority or with their consent or acquiescence.⁴ Thus, when turning to the Russian text and the potential discrepancy with the English text, according to Article 33 of the VCLT the terms of the treaty authenticated in two or more languages are presumed to have the same meaning in each authentic text. Thus the rules of interpretation contained in Articles 31 and 32 of the VCLT applies and due regard must be taken of the object and purpose of the treaty.

Moreover, if the texts of OPCAT in the Spanish and French language versions are compared, it emerges that these adopt the same wording as the English language version. The Spanish text employs terms ‘forma de detención o encarcelamiento o de custodia’ which translated literally means ‘form of detention or imprisonment or custody’ and similarly the French text uses terms ‘toute forme de détention ou d’emprisonnement’, meaning ‘any form of detention or imprisonment’. This means that the term ‘deprivation of liberty’ encapsulated

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

² Vienna Convention on the Law of Treaties, UN Doc.A/CONF.39/27, 1969, Article 31.

³ Ibid, Article 32.

⁴ See for example Article 1 Original Costa Rica Draft, UN Doc E/CN.4/1409; Article 1 Revised Costa Rica Draft, UN Doc E/CN.4/1991/66; Article 1 of the Text of the Articles which Constitute the Outcome of the First Reading, UN Doc E/CN.4/1996/28; and Article 1 of the Text of the Articles which Constitute the Basis for Future Work, UN Doc. E/CN.4/2000/58.

in Article 4 of OPCAT covers a broad range of places where individuals may be deprived of their liberty, such as psychiatric institutions, children's homes, homes for elderly and transit zones at international and security forces stations.

We would also like to draw to your attention that the SPT's position is clear that the definition of deprivation of liberty must be broadly defined. The SPT has adopted its revised Guidelines on National Preventive Mechanisms⁵ (Guidelines on NPMs) and in para 10 makes it clear that the mandate of NPMs must 'extend to all places of deprivation of liberty, as set out in Article 4 of the Optional Protocol'. In all of the SPT's visit reports that are in the public domain, the SPT reiterates this point. Furthermore, we would like to draw to your attention the SPT's position, - expressed in its Report on its first visit to Honduras, - that **giving a broad definition to the deprivation of liberty is a 'minimum requirement' of OPCAT.**⁶

Moreover, the practice of the SPT is also consistent with this interpretation as during its in-country visits the Subcommittee has visited centres for children⁷, psychiatric hospitals⁸ and detoxification centres.⁹ In its latest Annual Report, published only in March 2012, the SPT reports its dedicated efforts 'to increase its activities in relation to non-traditional places of detention', mentioning immigration facilities and medical rehabilitation centres as examples.¹⁰ It is consequently clear that the SPT has adopted the broad definition of 'deprivation of liberty' as per Article 4(1) and this has also been accepted by State parties to OPCAT. Furthermore it must be emphasized that this practice and therefore this interpretation by the SPT has been accepted by State parties since none of the States parties have objected to the types of places the SPT has chosen to visit during its in-country visits.

Additionally, the examination of the practice adopted by existing NPMs also supports this interpretation. For example, in 2009 the Estonian Chancellor of Justice, the institution which is designated as the Estonian NPM, conducted visits not only to prisons and police detention facilities but also to psychiatric institutions, social welfare institutions, care homes, special schools for children with behavioural problems as well as rehabilitation centres for children with addiction problems.¹¹

Similarly, the Commissioner for Civil Rights Protection of Poland, the institution that is designated as the Polish NPM, in 2009, *inter alia*, visited social care centres, psychiatric hospitals, a youth care centre and youth sociotherapy centres.¹²

Finally, it should be emphasized that the Republic of Kazakhstan is the only one of the 63 State Parties to OPCAT where this issue has arisen and it should be noted that it certainly is not the only State Party which relies on the Russian text of OPCAT. For example, in the

⁵ See CAT/OP/12/5 of 09 December 2010

⁶ See CAT/OP/HND/1 para.263. See also CAT/OP/BEN/1, para 19; where it is clear that 'a broad definition of places where people are or may be deprived of liberty [is] in line with the provisions of the OPCAT'.

⁷ 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

⁸ 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

⁹ 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

¹⁰ See: CAT/C/48/3 of 19 March 2012 at para 49

¹¹ '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

¹² 'Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009', Warsaw, 2010; pp. 41-68

neighbouring Kyrgyz Republic, the draft NPM legislation draws a distinction between ‘places of deprivation of liberty’ and ‘places of *restriction* of liberty’ (emphasis added), extending the NPM mandate to both. It would thus appear that a similar issue may have arisen in the Kyrgyz Republic as well and the introduction of two rather similar terms was deemed to present a solution.

The interpretation of Article 4 in the light of the object and purpose of OPCAT as well as taking into consideration the travaux préparatoires of the treaty and the circumstances of its conclusion all lead to the same broad interpretation of ‘deprivation of liberty’ contained in Article 4. This is further consistent with English, French and Spanish language texts of OPCAT and reflects the practice of both States parties and SPT. Consequently, ‘deprivation of liberty’ as per Article 4 of OPCAT must be read to include not only ‘traditional’ forms of deprivation of liberty such as imprisonment, but also ‘less traditional’ ones like placing in the social care home.

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
Prof Rachel Murray