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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.

23 May, 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 the establishment of national preventive mechanisms 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 at the Centre have been following the progress of this Draft Law for a number of years. Given the critical stage that the Draft Law has now approached, we would like to offer the following three core observations for your consideration.

1. The Draft Law is effectively a compilation of proposed amendments in a number of existing legislative acts of the Republic of Kazakhstan with the core NPM provisions being anchored in the Law on 'Order and Conditions of Detention' ('О порядке и условиях содержания под стражей') and with references to this Law being introduced in various other laws of the Republic of Kazakhstan.

   We however would like to note that firstly this approach is unnecessarily complex and does not contribute to the effective implementation of OPCAT nor to the principle of legal certainty. The core obligation under OPCAT is the establishment of a national preventive mechanism (NPM) by every State party and the approach adopted by the Draft Law scatters this appointment across a large number of legislative acts, making it very difficult to ascertain of the precise legal nature, status, mandate, powers and functions of the NPM. Secondly and moreover, the anchoring of the core NPM provisions in the Law on 'Order and Conditions of Detention' ('О порядке и условиях содержания под стражей') leads to limited understanding of 'deprivation of liberty' as it links the understanding of 'deprivation of liberty' to the understanding of this term used in the Law which falls short of requirements of OPCAT, an aspect elaborated upon in detail below.

2. Article 4 is one the key provisions of OPCAT as it sets out the extent of and limits to the mandates for both NPMs and the Subcommittee on Prevention of Torture (SPT). Article 4(1) of OPCAT obliges States parties to allow visits to any place under their jurisdiction and control where persons are or may be deprived of their liberty 'either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'. This is a very broad definition which means that visits must be allowed not only to such places as prisons and police cells where persons are deprived of their liberty by virtue of an order given by a public authority, but also to private custodial settings. This means that visits must be allowed also to such institutions as private hospitals, nursing homes and children homes as while persons in such places may be detained by non-state actors, this is done with the knowledge and acquiescence of a public authority and thus Article 4(1) of OPCAT applies.[1]

   We would also like to draw to your attention that the SPT has adopted its revised Guidelines on National Preventive Mechanisms[2] (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'.

   The practice of the SPT is also consistent with this interpretation as during its in-country visits, in addition to prisons and police stations, the Subcommittee has also carried out visits to centres for children[3], psychiatric hospitals[4] and detoxification

[1] See also: Murray, R., Steinerte, E., Evans, M. and Hallo de Wolf, A. 'The Optional Protocol to the UN Convention against Torture', Oxford University Press, 2011, Chapter 4; Nowak, M. and McArthur, E 'The United Nations Convention against Torture. A Commentary', Oxford University Press, 2008; p. 931

[2] See CAT/OP/12/5 of 09 December 2010

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

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

centres.[5] Moreover, it 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.[6] 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 OPACT.

Finally, NPMs that have been established around the world also follow the same practice. Thus, for example, the Estonian Chancellor of Justice, the institution which is designated as the Estonian NPM, in 2009, in addition to visits to prisons and police detention facilities, also carried out visits to psychiatric institutions, social welfare institutions, care homes, special school for children with behavioural problems as well as rehabilitation centres for children with addiction problems.[7] Similarly also the Commissioner for Civil Rights Protection of Poland, the institution that is designated as Polish NPM, in 2009, *inter alia*, visited social care centres, psychiatric hospitals, a youth care centre and youth sociotheraphy centres.[8]

Consequently limiting the scope of NPM activities only to places of deprivation of liberty which fall within the jurisdiction of the Ministry of Interior or in any other way which does not follow the broad scope of 'deprivation of liberty' as set out in Article 4 of OPCAT would lead to serious failure on behalf of the Republic of Kazakhstan in its efforts to duly implement the provisions of OPCAT.

3. Finally, we would like to express concern about the proposal to use the mechanism of public social procurement (государственный социальный заказ) for the operation and financing of the system of regular visits by NPM due to the following three reasons:

   1) The use of a public social procurement procedure (государственный социальный заказ) suggests an ad-hoc approach to the creation of an NPM: a tender is announced and interested parties are free to submit their proposals. What would happen in a hypothetical, but possible, situation where no organisation applies or no organisation with the requisite expertise applies? It should be recalled that Article 17 of the OPCAT places an obligation upon states parties in the strictest terms to establish an NPM. While States are free to choose the mode for NPM establishment, the obligation to have an NPM in place is expressed in the strictest terms. Thus the use of the public social procurement procedure (государственный социальный заказ) has the potential to undermine Article 17 of OPCAT.

   2) The use of public social procurement procedure (государственный социальный заказ) traditionally suggests that the eventual success of a proposal is most often determined on the basis of cost rather than expertise. In other words, the one who can provide the service at the cheapest rates will be successful. Therefore, it is by no means certain

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

[6] See: CAT/C/48/3 of 19 March 2012 at para 49

[7] '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

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

that the successful organisations will have the necessary expertise to carry out the NPM mandate. This is incompatible with Article 18(2) of the OPCAT.

3) Finally, the use of the public social procurement procedure (государственный социальный заказ) also means that some sort of contractual relationship will exist between the State and the organisations that perform the tasks of the NPM. This raises some concerns as to the status of the NPM's recommendations. Article 19 (b) of OPCAT makes it clear that NPMs are to make recommendations to the relevant authorities who, in turn, in accordance with Article 22 of OPCAT, are to examine these recommendations and enter into a dialogue with the NPM on possible implementation measures. How would the use of public social procurement procedure (государственный социальный заказ) affect the status of these recommendations when in fact the body making them has a contractual relationship with the State? It is possible that this contractual relationship may place a strain on the independence, and perceived independence of the NPM.

Due to the aforementioned reasons the use of public social procurement procedure (государственный социальный заказ) or a system akin to this for ensuring the work of the NPM in Kazakhstan runs a serious risk of undermining provisions of OPCAT and therefore should be reconsidered.

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