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Re: Review of the Law on Ombudsman (Akyikatchy) of the Kyrgyz Republic in the light of the Optional Protocol to the United Nations Convention against Torture and Draft Law of the Kyrgyz Republic ‘On the National Centre of the Kyrgyz Republic on prevention of torture and other inhuman, degrading treatment or punishment’

22 November, 2011

Dear Mr Azimov and members of the Working Group,

We note that the Draft Law of the Kyrgyz Republic ‘On the National Centre of the Kyrgyz Republic on prevention of torture and other inhuman, degrading treatment or punishment’ has been submitted to Jogorku Kenesh, the national Parliament and that the debates on it are forthcoming.

It has been brought to our attention that one of the contentious issues surrounding the forthcoming debates at the end of November 2011 over the Draft Law is a concern that the functions of the National Preventive Mechanism (NPM) as stipulated in the Draft Law, may duplicate the functions of the existing Ombudsman (Akyikatchy) institution in the Kyrgyz Republic. We would like to offer the following observations for this debate.

The Law on Ombudsman (Akyikatchy) of the Kyrgyz Republic (Law on Ombudsman) sets out guarantees of independence of this institution in terms of the appointment, dismissal, mandate, operation and finances as well as provides it with broad powers in the area of human

rights protection in the Kyrgyz Republic. Given the reference to the Paris Principles in Article 18(4) of OPCAT it would thus indeed initially appear to duplicate the criteria for an NPM as stipulated in the provisions of OPCAT. However careful consideration of the Law on Ombudsman in the light of OPCAT criteria in relation to NPMs reveals a number of differences.

Firstly, the mandate of Ombudsman, as stipulated in Article 1 of the Law on Ombudsman, extends to all rights and freedoms of individuals and citizens as stipulated in the constitution of the Kyrgyz Republic, other legislative acts of the Kyrgyz Republic as well as international treaties and agreements that the Kyrgyz Republic is a party to. This, according to Chapter Two of the Constitution, coupled with the international human rights treaties to which the Kyrgyz Republic is a party to, constitutes a rather comprehensive catalogue of human rights, ranging from civil and political rights to social and economic rights. The focus of OPCAT, on the other hand, is comparatively specific as it deals with prevention of torture and ill-treatment and as such it requires an in-depth approach to this one specific freedom. While the freedom from torture and ill-treatment is also among the catalogue of rights and freedoms that fall within Ombudsman's remit, the requisite level of in-depth engagement that OPCAT imposes upon NPMs in addressing the prevention of torture and ill-treatment may be very challenging to achieve for the institution that has a whole range of other human rights and freedoms to address.

Secondly, the Ombudsman of the Kyrgyz Republic, as a traditional Ombudsman office, possesses a number of quasi-judicial powers as stipulated in Articles 8(12) (14), (17) and (19) as well as in Article 13 of the Law on Ombudsman. It is also a complaints handling mechanism as provided for in Article 10 of the same Law. While these powers are suited for an effective functioning Ombudsman office, the mandate of NPMs is markedly different. According to Article 1 of OPCAT, NPMs are to exercise preventive mandate and in the remits of that mandate they are to carry out a system of preventive visits to places of deprivation of liberty. The outcomes of such visits are recommendations issued by NPMs, as provided in Article 19 (b) of OPCAT at which stage a constructive dialogue between the NPM and authorities on the implementation of these recommendations must commence (Article 22 of OPCAT). Thus the aim of the preventive system stipulated in OPCAT is to engage the respective authorities in a constructive dialogue with NPM about the implementation of its recommendations, which, given the far-reaching scope of prevention, can be fairly extensive and aimed at systemic changes. This requires a different approach from quasi-judicial and complaints handling functions. The ability to combine these two strikingly different mandates and approaches have been alluded to by the Subcommittee on Prevention of Torture (SPT) which has recommended that:

‘(...) a clear distinction should be made between such bodies [Ombudsman offices], which generally act in response to specific situations, and national preventive mechanisms, which have preventive functions.’¹

Thirdly, while Article 8(5) and (10) of the Law on Ombudsman allow the Ombudsman to carry out visits to places of detention, this falls short of the OPCAT requirements in two crucial ways. Initially, Article 4 of OPCAT provides a very far reaching definition of ‘deprivation of liberty’ which is to encompass not only ‘traditional’ places of detention such as prisons and police cells, but also such ‘non-traditional’ places such as children homes, psychiatric institutions

¹ Third Annual Report of SPT; UN Doc CAT/C/44/2 of 25 March 2010 at para 51

and social care homes.² This is not reflected in the current Law on Ombudsman. Crucially, the mandate of NPMs must extend to all such places (Article 4 of OPCAT) and it must be noted here that the Draft Law of the Kyrgyz Republic ‘On the National Centre of the Kyrgyz Republic on prevention of torture and other inhuman, degrading treatment or punishment’ (Draft Law) properly reflects the requirements of Article 4 of OPCAT (see Article 1 (2) and (3)).

Moreover, Article 19 of OPCAT requires that NPMs carry out *regular* visits to such places of deprivation of liberty (emphasis added), a requirement which is absent in the current Law on Ombudsman.

Consequently while the Law on Ombudsman and the Draft Law both establish human rights mechanisms that operate/would operate in the Kyrgyz Republic the purpose and mandates of these two mechanisms are strikingly different. The Ombudsman Office has the overarching task of dealing with a variety of human rights and a mandate to ensure that the state and municipal authorities do not trespass upon the rights of individuals with the main avenue for this being a complaints handling mechanism. In order to carry out this mandate, the Ombudsman also has extensive powers to address courts, request information and even issue binding orders to authorities. The aim of OPCAT in requiring States Parties to establish NPMs must be distinguished from this as NPMs are preventive entities that are to examine the existing systems of the country and engage in a constructive dialogue on how these systems can be further strengthened with the aim of preventing torture and ill-treatment.

We very much hope that these reflections will be of use in the forthcoming debates on the Draft Law. Please do not hesitate to contact us if we can be of any further assistance.

Sincerely yours,

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² For detailed discussion see: Human Rights Implementation Centre (Bristol) Policy Paper ‘Deprivation of liberty’ as per Article 4 of OPCAT: the scope’ (October, 2011); Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/news/2011/26.html>