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To:
All The Participants of the
27th March 2008 Roundtable
On the implementation of OPCAT in Georgia

20 March, 2008

Dear Participants,

On behalf of the OPCAT project team at the University of Bristol we are very grateful for the opportunity to comment on the proposed amendments to the Law on the Public Defender. We welcome the openness of the Georgian Ombudsman's Office in distributing the draft amendments and are honoured to be included in the process of consultation. We have some general comments below that we hope may be of help to you. Please note that our comments are based on our understanding of OPCAT requirements and our experiences considering NPMs in other countries and national human rights institutions and ombudsman's offices more generally.

1. The concept of prevention lies at the heart of the OPCAT (see para 5 of the Preamble to the OPCAT). However the idea of prevention requires a much broader approach than just visits to places of detention and inspection of material conditions of detention. Visiting places of deprivation of liberty certainly fits in the concept of prevention, but other measures, such as educational campaigns, studies, revision of training programmes for the staff of the places of deprivation of liberty, have an equally important role to play. The current amendments do not reflect this broader, pro-active mandate (see Art. 19 of the proposed amendments), but appear to be fulfilling the more traditional role of the Ombudsman's office, i.e., the reactive mandate, driven by the complaints received. The OPCAT requires that an NPM carries out a system of preventive visits (see Art. 19 of the OPCAT), whereas the proposed amendments limit the Public Defender to the inspection of the places of places of imprisonment (see Art. 19 of the proposed amendments) and the mandate as described in the proposed Article 20 is more of a protective, re-active nature.

Moreover, there are some specific requirements that are included in the text of the OPCAT that do not seem to be reflected in the proposed amendments, for example, the powers of an NPM to make recommendations to the relevant authorities (see Article 19b of the OPCAT) and the corresponding obligation of the authorities to enter into dialogue with the NPM on the implementation of these

recommendations (see Article 22 of the OPCAT); the right of the NPM to comment on both existing and draft legislation (see Article 19 c of the OPCAT) or the safeguards that ought to be put in place against reprisals against anyone who communicates to the NPM (see Art. 21 of the OPCAT) or the SPT (see Art. 15 of the OPCAT).

2. OPCAT contains a very broad definition of the 'places of deprivation of liberty' (see Article 4 of the OPCAT). The proposed amendments however adopt a much more restricted wording which may potentially exclude other, less traditional places of deprivation of liberty, like psychiatric hospitals or homes for older persons (see Art. 18 and 19 of the proposed amendments). Similarly, the language of OPCAT also includes places of deprivation of liberty run by private actors, i.e., instances when the state has effectively contracted-out certain functions to private actors. This does not appear to be reflected in the proposed amendments (see Art. 18 of the proposed amendments). We would like to draw your attention to the fact that the OPCAT language on the matter is rather vague, i.e., the term 'places of deprivation of liberty' is employed which is an inherently wider term than such terms as 'places of imprisonment'.

3. The proposed amendments contain very little provisions regarding the proposed Georgian NPM: in the draft article 19¹ a reference to 'invited experts' who will be part of the NPM is made, but there is no further clarification as to who these experts will be, how many will they be, how will they be selected, what will be the selection criteria, what will be the selection process like, will the OPCAT's requirements for diversity in terms of expertise, gender, minority representation etc be reflected? The OPCAT also requires that due regard is given to the Paris Principles in the process of the NPM establishment (see Art. 18 (4) of the OPCAT). Clearly the NPM is the central entity in the OPCAT and as such its composition and the selection process is of utmost importance. It is essential that these points are dealt with by the law to ensure legitimacy, accountability and transparency that will ultimately have an impact on the credibility of the NPM.

4. The proposed amendments set forth somewhat restricted powers for the potential Georgian NPM. Thus in the proposed Article 19 the Public Defender enjoys the right to talk to detained persons, administrative prisoners and those being in pre-trial custody and the convicted ones. However the members of the NPM may find it very useful to talk also to the prison guards, other employees of the particular establishment, doctors and even the relatives of those deprived of their liberty. Similarly, the same Article 19 sets out the right of the Public Defender to check the documents confirming the legality of detaining the persons in the particular institutions. However, keeping in mind the preventive mandate of the NPM, it may well require getting acquainted with other documents, like internal prison reports, internal statistics etc. Thus the powers of the NPM to have communications and access information should be determined by its mandate.

5. The proposed amendments do not fully reflect the obligation of the NPM to produce an annual report and the corresponding obligation of the state to disseminate such a report (see Art. 23 of the OPCAT). The proposed Articles 21 and 22 provide for the general report of the Public Defender, however the OPCAT requires that an NPM report is produced. In our experience, in cases when the NPM functions are subsumed by an existing body, like the National Human Rights Institution, there is a danger that the NPM report may be subsumed by the reports on the other activities of an institution. To avoid such a situation, for example the National Human Rights Commission of Mexico, who is the designated NPM for Mexico and is the only NPM who has produced a report on its NPM activities to date, issued a separate report on its NPM activities for 2007.

Moreover, in order to maximise the effects of such a report, it would be advisable that an obligation to examine report in the Parliament is included in the amendments so as to strengthen the preventive mandate of the Georgian NPM.

We would also suggest that the scope of such a report be expanded: the proposed Article 21 limits this to listing various bodies and authorities who systematically violate human rights and freedoms and do not follow the recommendations of the Public Defender. Such a provision, whilst very useful for the traditional role of the Ombudsperson, may pose certain difficulties with the pro-active, preventive NPM mandate, after all an NPM is to engage into dialogue with the authorities about improving the conditions of detention. Moreover, the report should reflect all the activities that are carried out with the remits of this pro-active, preventive mandate and not be limited to denunciation of systematic violations.

6. The proposed amendments contain little regarding the budget of the NPM and it appears from the text that the activities of the NPM will be financed from the budget of the Office of the Public Defender. It would be first of all advisable that the budget of the Public Defender comes from the Parliament's budget so as to ensure independence from the executive. Moreover, as stipulated by Article 18 c of the OPCAT, states are to make available the necessary resources for the functioning of an NPM. Thus states are obliged to provide additional funding and it would advisable that such funding is 'ring-fenced' within the budget of the Office of the Public Defender so as to ensure that these finances are not used for other activities of the Office. Finally, only the NPM should be in charge of determining how this budget is spent, but equally it ought to be transparent by accounting for its expenditure through, for example, the annual report.

We hope that you might find these comments useful. Please do not hesitate to contact us if we can be of any further assistance.

Yours sincerely, 

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