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Mr. Šefko Crnovršanin,
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Dear Mr. Šefko Crnovršanin,

Thank you very much for allowing us to review the draft Law on Amendments to the Law on Protector of Human Rights and Freedoms of May 2009 (the Draft Law), in the light of the obligations arising to Montenegro pursuant to the provisions of the Optional Protocol to the United Nations Convention against Torture (OPCAT). Please find below our comments and observations.

1. Article 1 of the Draft Law proposes to include a new paragraph which reads 'This Law establishes the Protector as the national preventive mechanism for prevention of torture and other forms of inhuman treatment or punishment'. We would suggest that a reference to the OPCAT is included here so as to make clear the link between the Protector carrying out the functions of the national preventive mechanism (NPM) as prescribed by the OPCAT. We

would also suggest that a word 'degrading' be included after the word 'inhuman' so as to reflect the internationally established definition.

2. Article 4 of the Draft Law proposes to replace word 'Republic' with the word 'state' in Article 7. This however still does not make it clear as to where the resources for the functioning of the Protector's institution would be coming from. We would suggest that this funding would come from the legislator of the country so as to provide additional guarantees of functional independence. This also reflects the requirements for independence of the NPMs as per Article 18 of the OPCAT.
3. Article 5 of the Draft Law proposes that Protector shall be appointed at the proposal of the President of the country. We would like to suggest that this is a rather limiting provision as precludes other relevant stakeholders from the participation in this very important process. Actors of civil society as well as parliamentarians, for example, are commonly recognised as groups having a legitimate interest in this process. Moreover, such a stipulation may also put at jeopardy the independence of the Protector who thus appears to be too closely linked to the executive of the country. We would thus suggest that the pool of those eligible to nominate the candidates for the Protector is expanded and reflect the diversity of various stakeholders.
4. Article 7 of the Draft Law fails to take note of Article 18 (2) of the OPCAT in that it does not reflect the need for gender balance and the diversity of expertise.
5. We would suggest that words 'from the place of deprivation of liberty in question or any other authority' or a wording to the similar effect be included in the proposed change in Article 11 of the Draft Law so as to reflect the free access that the NPMs are to have to all places of deprivation of liberty as per OPCAT.
6. The Draft Law introduces new Article 28a, the aim of which appears to be to reflect the mandate of the NPM as envisaged in the OPCAT. However this new provision fails to reflect the preventive nature of the NPMs mandate. Thus, the proposed Article 28a vests the Protector and researchers with the power to 'check upon the respect of human rights of persons deprived of liberty'. It is possible that this construct is an outcome of an awkward translation as it fails to acknowledge the winder mandate of the NPM which certainly goes beyond the establishment of whether the human rights of those deprived of liberty have been infringed upon. The NPMs are to carry out a system of regular, preventive visits, inspecting all the facilities and installations, talking to those deprived of liberty as well as others it may deem necessary; issue recommendations upon the receipt of which the authorities are obliged to enter into dialogue with the NPM on their implementation- these aspects are not duly reflected in the Draft Law. The proposed Article 28a does not reflect the obligation of systematic, regular, preventive visits; it also does not reflect the obligation of dialogue upon the authorities- whilst draft Article 15 further proposes changes in Article 44 so as to reflect the obligation of authorities to respond to recommendations of the NPM, the provision carries more of a punitive character and does not reflect the idea of cooperative dialogue as per OPCAT.

   Moreover, the draft Article 28a omits other activities that an NPM may and should undertake as part of its preventive mandate, like educational measures, work with policies and legislation etc.

Finally, it is unclear as to why the last paragraph of the proposed Article 28a specifically singles out the places where children are deprived of their liberty. We would suggest that the Draft Law must reflect the broad definition of 'deprivation of liberty' as per Article 4 of the OPCAT so as to avoid any 'prioritisation' of some places of deprivation of liberty over the others.

7. Article 24 of the Draft Law proposes a new Article 51a to be introduced which would stipulate the composition of the bureau of the Protector. We would suggest that this provision must reflect the need for diversity of expertise as well as gender and minority representation as provided for in Article 18 (2) of the OPCAT. Moreover, we would also suggest that the General Secretary, as person heading the bureau of the Protector, be involved in the selection of the staff members.
8. Article 26 of the Draft Law proposes changes in Article 52, precluding the staff members to be 'politically active persons'. This appears to be a very broad formulation as it does not provide any detail as to what is meant by 'politically active persons' and we would thus suggest that this stipulation is deleted or substantially clarified.

Further to the above comments, we have also reviewed the other provisions of the existing Law on the Protector of Human Rights and Freedoms of July 2003 (the Law) and would like to suggest the following observations in the light of the provisions of OPCAT:

1. Article 7 of the Law refers to the 'conditions for the work'- such a formulation appears rather broad and potentially encompasses a wide range of things. We would thus recommend that this is clarified.
2. Article 8 of the Law stipulates the procedure of the election of the Protector. It does not however provide for a clear indication as to which is the competent working body of the Assembly responsible for the election. We would suggest that this be clarified.
3. Article 10 of the Law prescribes the procedure for the election of the Deputies to the Protector but fails to establish the process of selection of candidates. We would thus suggest that this is clarified.
4. Article 19 of the Law stipulates the process of termination of office and in para 5 lists the 'permanent loss of the ability to hold his or her office' as one of the possible reasons- whilst this provision may be an awkward translation, we would suggest that it is clarified as to what is meant here.
   Similarly, the Article mentions 'the competent working body of the Assembly' which is to inform the Assembly about the reasons for the termination. We would suggest that it is clarified as to which working body of the Assembly carries this function.
5. Article 23 of the Law provides for the general outline of the competencies of the Protector, but the current wording fails to recognise the preventive mandate as per OPCAT (see the above comment on Article 28a of the Draft Law in the previous section).
6. Article 25 of the Law provides for the right of the Protector to provide opinion on draft laws; however we would suggest that there would be an obligation to seek his/her opinion as well as a corresponding obligation that a 'due regard' or 'due consideration' is given to such an opinion. Moreover, the Protector, as an NPM, must have the right to launch the initiative not only for amending

legislation, but also to propose new laws and regulations if deems appropriate, as stipulated in Article 19(c) of the OPCAT.

7. While Article 28 of the Law grants the right to the Protector to visit places of deprivation of liberty, we would like to note that it is an obligation of an NPM under the provisions of OPCAT to carry out systematic visits which are to be regular and this aspect is not reflected in Article 28.
8. Article 46 on the Law does not reflect the obligation of the NPM to prepare its report nor the obligation of the state to publish and disseminate such reports as required by Article 23 of the OPCAT. We would moreover also suggest that such reports are discussed in the session of the legislator, for example, so as to make the process meaningful.

We would also like to note that neither the existing Law nor the Draft Law reflect the assurances against reprisals against those who communicate with the NPM (or the Subcommittee on the Prevention of Torture (SPT)) as required by Articles 15 and 21 of the OPCAT. Moreover, the ability of the NPM to interact with the SPT and other bodies is not reflected in either of the instruments we reviewed. Finally we would also like to point out that in order to strengthen the functional independence of the Protector (and thus the NPM) it would be advisable to stipulate that the Protector has the sole authority to decide on how the budget of the institution is spent.

We very much hope that these comments and observations are of interest and use to you and of course remain at your disposal should you require some further information or additional comments. Please do not hesitate to contact us.

Sincerely yours,

Dr Elina Steinerte
Prof Rachel Murray

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