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# MASTER-THESIS

“The National Preventive Mechanism in Kazakhstan:  
Failure to Comply with International Standards?”

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## Abstract

Kazakhstan is a part of the main international regulations aimed on torture and ill-treatment prevention: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol (the OPCAT) that were ratified in 1998 and 2008 respectively. Under OPCAT the State obliged to establish national preventive mechanism (NPM), assigned to undertake monitoring visits to the places of detention, and formulate recommendations to improve the treatment and conditions at the national level. The NPM started to be operational in April 2014 after the adoption of the law designating the NPM under the Commissioner for Human Rights of Kazakhstan (Ombudsman). However, international experts and local human rights activists harshly criticized the NPM for a number of nonconformities with established criteria.

The primary purpose of this study was to determine if the State's NPM corresponding to the OPCAT and the Paris Principles on Functioning of National Human Rights Institutions, which the OPCAT referred to in the Article 18(4). Therefore, the NPM was analysed using relevant provisions of the OPCAT and the Paris principles regarding the transparency of the NPM designation process, the legal basis, mandates and powers, and the functional and financial independence of the NPM and its members. The results concluded that the NPM in Kazakhstan not in compliance with abovementioned international standards due to the lack of functional and financial independence of the NPM under the Ombudsman Office.

**Keywords:** *National Preventive Mechanism, Kazakhstan, OPCAT.*

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# Chapter 1: Introduction

## 1.1 Background

Freedom from torture and other cruel, inhuman, or degrading treatment and punishment<sup>1</sup> is an absolute human right that cannot be derogated in any circumstances.<sup>2</sup> International human rights law<sup>3</sup> thus prohibits torture and establishes a number of precise responsibilities for the states to prevent torture, to criminalize acts of torture, to bring its perpetrators to justice, and provide victims of torture with adequate reparations for the harm suffered.<sup>4</sup> Nevertheless, torture and ill-treatment remain common practice in most countries in the world, including functioning democracies and Kazakhstan is not an exception. Especially, the use of torture is highly probable and frequently systematically practiced in closed governmental institutions and detention facilities because such institutions are usually isolated and surrounded by the opacity. Typically, those who practice torture feel confident that they are outside the reach of effective monitoring and accountability.<sup>5</sup>

Kazakhstan has a long history related to practice of torture in governmental closed institutions, as most of the Commonwealth of Independent States (CIS) countries<sup>6</sup> that inherited Soviet

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<sup>1</sup> In further course of this thesis the term "ill-treatment" will be used in order to describe the whole spectrum of torture and other cruel, inhuman or degrading treatment or punishment. The OPCAT refers to the definition of torture contained in Art.1. UNCAT.

<sup>2</sup> See *Gäfgen v. Germany*, Judgment of 1 June 2010, para. 107: "The prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult", available at: [http://hudoc.echr.coe.int/eng?i=001-99015#{"itemid":\["001-99015](http://hudoc.echr.coe.int/eng?i=001-99015#{) [accessed 10 July 2015]

<sup>4</sup> UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 January 2012, A/HRC/19/61, available at: <http://www.refworld.org/docid/4f3923b92.html> [accessed 10 July 2015]

<sup>5</sup> *ibid.*

<sup>6</sup> The CIS consist of ten former Soviet Republics: Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

legacy, especially in penitentiary system structure.<sup>7</sup> The recent concluding observations by UN Committee against Torture (CAT Committee), which is the body consisting of experts that monitor the implementation of the Convention Against Torture (CAT)<sup>8</sup>, shows that situation regarding torture rather deteriorated in Kazakhstan in the past several years.<sup>9</sup> In August 2011 the prison administration system of Kazakhstan was transferred from the authority of the Ministry of Justice to the Ministry of Interior.<sup>10</sup> It was justified by the lack of ability in the Ministry of Justice to guarantee appropriate supervision of the system.<sup>11</sup> This resulted high "militarization", present in some prisons where the security is maintained by the use of internal troops.<sup>12</sup> The deterioration of the State's commitments regarding torture and ill-treatment also connected with Zhanaozen protest in December 2011<sup>13</sup>, as the civil society organizations alleged numerous cases of torture and ill-treatment of those who were arrested in the connection with the protest.<sup>14</sup> The systematic allegations of torture in Kazakhstan are also connected with police interrogations or

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<sup>7</sup>UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Mission to Kazakhstan, 16 December 2009, A/HRC/13/39/Add.3, p. 7, available at: <http://www.refworld.org/docid/4d872f4c2.html> [accessed 15 May 2015].

<sup>8</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 8 June 2015].

<sup>9</sup> See the CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 53 Session (03 Nov 2014 - 28 Nov 2014) Information from Civil Society and Concluding Observations: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en) [accessed 8 June 2015].

<sup>10</sup> Decree of the President of the Republic of Kazakhstan of 26 July 2011 no. 129, "On Penitentiary System of the Republic of Kazakhstan". See also the statement by Ambassador Kairat Abdrakhmanov at the 878th OSCE Permanent Council meeting, Vienna, 1 September 2011.

<sup>11</sup> Letter from the Ministry of the Interior to the Office of PRI in Central Asia, 7th Sept 2011.

<sup>12</sup> UN Committee Against Torture (UNCAT), "Concluding observations of the Committee against Torture: Kazakhstan", 12 December 2008, CAT/C/KAZ/CO/2, available at: <http://www.refworld.org/docid/49631f8b2.html> [accessed 8 June 2015].

<sup>13</sup> The Zhanaozen protest took place in Kazakhstan's western Mangystau region over the weekend of 16–17 December 2011. The protesters were workers from the Ozenmunaigas oil field that went on strike over salary. Local courts declared the protest illegal and the state oil company fired nearly thousand employees. At least, fifteen protestors were killed by the police during the clashes, with unrest spreading to other towns in the region. According to Amnesty International report, the central police station in Zhanaozen arrested 700 individuals aftermath of the clashes. Many of them described how they were tortured or ill-treated in detention by being stripped naked, made to lie or crouch on a cold concrete floor, doused with cold water, beaten and kicked by security officers, often to the point of losing consciousness. See the Amnesty International 'Kazakhstan the Submission to the Committee Against Torture', October 2014, pp.12-13.

<sup>14</sup> See Human Rights Watch 'Kazakhstan: Submission to the UN Committee Against Torture', 20 October 2014, available online: <https://www.hrw.org/news/2014/10/20/kazakhstan-submission-un-committee-against-torture> [accessed 8 June 2015].

the transfer of arrested persons to detention facilities.<sup>15</sup> The overall system depends on confessions more than other practices to obtain evidence and police performance is estimated by the rate of successful crime investigation, and police authorities demand high conviction rates.<sup>16</sup> This system provides a reason for police to use 'coercion' and therefore the suspects are vulnerable to torture and ill-treatment at the initial period in the police custody and investigation.<sup>17</sup> There is high rate of violence between prisoners, 'self-mutilations', and high number of deaths in custody, especially of persons infected with HIV/AIDs. There are numerous cases of forced placement in psychiatric institutions of human rights activists. In the judicial proceedings the complaints about torture and ill-treatment are regularly neglected. Evidently, many of the "shadow reports" submitted to the CAT Committee by civil society organisations criticise the lack of implementation of legislative framework improvements in practice.<sup>18</sup>

There are certain instruments developed to bring the transparency in the closed institutions. Kazakhstan is being a party to the main international treaties and mechanisms on torture prevention. In particular, Kazakhstan ratified the CAT, the main international treaty aimed at preventing torture on 28 August 1998. The CAT contains a broad range of provisions designed to prevent torture and ill-treatment and sets out a number of guarantees against torture as well as positive obligations on states in relation to the prevention of torture. The requirement for State Parties to the CAT to include visits to the places of detention as part of comprehensive preventive framework that has been emphasised by the CAT Committee in its interpretation of Articles 2 and 11.<sup>19</sup> The Optional Protocol to the Convention on torture and Cruel, Inhumane or Degrading Treatment or Punishment (OPCAT)<sup>20</sup> is a practical tool to assist States Parties members to the CAT to put their existing duties into effect in order to prevent torture and other

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<sup>15</sup> Amnesty International, '*Kazakhstan: No effective safeguards against torture*', Index: EUR 57/001/2010, March 2010, p. 6, available at: <http://www.amnesty.org/en/library/asset/EUR57/001/2010/en/88639715-0122-4cdd-ab15-9583ec80f30d/eur570012010en.pdf> [accessed 1 May 2015].

<sup>16</sup> *ibid.* See also, Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan', 16 December 2009.

<sup>17</sup> *ibid.*

<sup>18</sup> UN Committee against Torture's Concluding Observations on Sweden, Ukraine, Venezuela, Australia, Burundi, USA, Croatia and Kazakhstan. Geneva, 24 November, 2014) See more at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID) [accessed 8 May 2015]

<sup>19</sup> See CAT, General Comment No 2; and APT, *Torture in International Law: A guide to Jurisprudence*, APT, Geneva, 2008, pp. 25-26.

<sup>20</sup> UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199, available at: <http://www.refworld.org/docid/3de6490b9.html> [accessed 1 July 2015].

forms of ill-treatment. By acceding to OPCAT in 2008, Kazakhstan provided consent to establish dual monitoring mechanism on international and national levels. The international monitoring system is provided by the UN Subcommittee on Prevention of Torture (SPT), which is a treaty body to OPCAT in the UN human rights system that performs monitoring visits to all States Parties. More importantly, the OPCAT puts into force the obligation of a State Party to 'set up', 'designate' or 'maintain' such monitoring instrument at the domestic level one or more visiting body, the national preventive mechanism (NPM)<sup>21</sup> and it is to do so within one year of its ratification of the instrument.<sup>22</sup> The NPM aims to prevent torture and other ill-treatment by regular visits to all places of detention in the country and on the basis of these visits submit reports and recommendations, queries to government and authorities. Also beyond the visiting mandate, it is commonly mentioned, that the NPM should be using 'publicity' and 'awareness raising activities' to underline the concerns with torture within the State. More precisely, the NPM also should raise awareness for those in the detention so that they can be aware of their fundamental rights as well as of the existence of the NPM.<sup>23</sup>

The OPCAT contains no blue print as to how the NPM ought to look like, how they should be constituted or how should they be structured. Nevertheless, the OPCAT contain direct reference to the Paris Principles relating to the Status of National Institutions<sup>24</sup> adopted by United Nations Human Rights Council (UNHRC) and clarifying the status and functioning of national human rights institutions for the protection of human rights (NHRI). The Paris Principles contain certain requirements for NHRI on competence and responsibilities, composition and guarantees of independent pluralism, and methods of operation of such institutions. Generally, OPCAT and Paris Principles request NPMs to be independent from authority of the Government<sup>25</sup> and provided adequate funds to do their work.<sup>26</sup> They also should have the power to access all places

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<sup>21</sup> OPCAT, Article 3.

<sup>22</sup> OPCAT, Article 17.

<sup>23</sup> R. Murray, E. Steinerte, M. Evans, A. H. Wolf, *The Optional Protocol To The UN Convention Against Torture*, Oxford University Press, Oxford, 2011, p. 117.

<sup>24</sup> In further course of this thesis the "Principles relating to the Status of National Institutions" will be referred as the "Paris Principles". UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles), 20 December 1993, A/RES/48/134, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> [accessed 8 May 2015].

<sup>25</sup> OPCAT, Article 18,

<sup>26</sup> OPCAT, Article 18(3).



of detention without limitations,<sup>27</sup> have access to the important information,<sup>28</sup> and to be able to conduct interviews with detained persons in private.<sup>29</sup>

The OPCAT was ratified by Kazakhstan 22 October 2008. In July 2013, the Government adopted the law designating NPM under the office of the Commissioner for Human Rights in Kazakhstan (Ombudsman office) as an NPM in cooperation with civil society. Accordingly, the model of the NPM was designed as "Ombudsman plus" and the NPM started to be operational in April 2014. This fact arise many concerns since the Ombudsman office in Kazakhstan itself fails to completely conform to the Paris Principles on NHRI. The International Coordinating Committee of the NHRIs accredited the Ombudsman office with "B status", which means that the institute is only partially compliant with the Paris Principles.<sup>30</sup> The observers like European Parliament, the Office of the High Commissioner for Human Rights (OHCHR), the CAT Committee, and numerous countries participants, during the universal periodic review (UPR) sessions urged Kazakhstan to strengthen the Commissioner in conformance to international standards. The critique of NPM focuses on the structure of NPM, which prevents the independence of the mechanism. Also, the international experts and the human rights activists in Kazakhstan criticize the NPM for a number of functional problems related to the realization of the NPM mandate in practice. The lack of financial and structural independence of the Ombudsman institute believed to endanger the accountability and effectiveness of NPM, since it falls into the Ombudsman office.<sup>31</sup> The critique was expressed also during the process of designing the NPM: at the meetings between governmental representatives and civil society institutions. International organizations such as Penal Reform International (PRI)<sup>32</sup> and the

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<sup>27</sup> OPCAT, Article 20(c).

<sup>28</sup> OPCAT, Article 20(a)(b).

<sup>29</sup> OPCAT, Article 20(d)(e).

<sup>30</sup>International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 26 – 30 March 2012, available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WITH%20ANNEXURES.pdf> [accessed 8 May 2015].

<sup>31</sup> See the Human Rights Watch, Amnesty International, Open Dialog, Civil Society Organizations Submissions to the United Nations Committee Against Torture, 20 October 2014.

<sup>32</sup> Penal Reform International (PRI) is an international nongovernmental organization working on penal and criminal justice reform worldwide. See <http://www.penalreform.org/> [accessed 8 May 2015].

Association for the Prevention of Torture (APT)<sup>33</sup> that participated in the negotiations were mentioning problems related with the NPM structure.<sup>34</sup>

## 1.2 Research question

The current research is aimed at the detailed analysis of NPM in Kazakhstan, in order to identify the conformity with the Optional Protocol to the Convention against Torture and the Paris Principles on the National Human Rights Institutions.

## 1.3 Review of materials

In order to answer the research question, the NPM shall be analyzed in accordance with legal documents: the CAT, the OPCAT and the Paris Principles on Status of NHRI. As well as guidelines, provisional statements, and other relevant materials developed by the SPT, the treaty body to OPCAT in the UN human rights system: *The SPT Guidelines on NPM*, *the SPT Analytical Self-assessment Tool for NPM* together with the matrix, which are preliminary guides regarding the functioning of an NPM, that should be considered by the States while developing NPM.

For the interpretation of the OPCAT, relevant distinguished academic publications will be used, including *The United Nations Convention Against Torture - A Commentary* by Manfred Nowak and Elizabeth McArthur, *The Optional Protocol to the United Nations Convention against Torture* by Kerstin Buchinger, *The Optional Protocol to the UN Convention Against Torture* by Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf.

Moreover, the relevant materials developed by the international human rights organizations such as APT, which is an international non-governmental organization focused on the prevention of torture and other ill-treatment, will be used as a tool to assess the compliance to the international standards. Most importantly, the APT Guide on Establishment and Designation of NPMs, as a

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<sup>33</sup> The Association for the Prevention of Torture (APT) is an international non-governmental organization focused on the prevention of torture and other acts of cruel, inhuman, or degrading treatment. See <http://www.apr.ch/> [accessed 8 May 2015].

<sup>34</sup> The APT Country Information, available online: [http://www.apr.ch/en/opcat\\_pages/opcat-situation-34/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/opcat-situation-34/?pdf=info_country) [accessed 8 May 2015].

recommended and comprehensive source, aimed to provide assistance to the countries in NPMs establishment. Another publications by APT such as *Monitoring Places of Detention: a Practical Guide* (2004) and *Monitoring Police Custody Practical Guide* (2013) that comprises the recommendations on the monitoring visits by NPM and special procedures involve. Also, relevant publications of the PRI, which is another international non-governmental human rights organization that works on penal and criminal justice reform worldwide, will be used.

The analytical part of the work on the on practical implementation of the NPM refer to the first annual Consolidated Report prepared by the members of NPM of Kazakhstan on the results of preventive visits conducted in 2014 (issued in May 2015) that contains a general overview on the work of NPM including general information on structure and legislation, statistical information, as well as practical challenges for NPM work. In addition, the analysis involves the relevant national legislation provisions on the establishment of NPM, the Commissionaire on Human Rights, and other legal documents regulating the structural framework and functions of NPM and Ombudsman.

For the current assessment of the NPM compliance with the standards and practical realization of the work of the NPM, the work refers to the Concluding Observations, Country Reports, and State Parties Reports from the last examination of Kazakhstan's 3rd periodic report to the CAT Committee in November 2014. To get the critical insight of the practical OPCAT implementation the materials from the same examination will be reviewed. In particular the submissions by State Parties including national civil society organizations in Kazakhstan, Human Rights Watch (HRW) Amnesty international, PRI, Open Dialog Foundation, and Global Initiative to End Corporal Punishment of Children.

Additionally, the thematic reports and materials of the Coalition Against Torture, an alliance of NGOs in Kazakhstan that perform broad range of functions related to the torture and ill-treatment prevention, including advisory, awareness-rising, and lobbying functions. As well as thematic reports, country-specific reports, briefings, conference summaries by Amnesty International, PRI, Freedom House and Open Dialogue Foundation. Furthermore, 5 interviews with selected representatives of civil society and NPM members will be used in order to get an overview of the current practice of the NPM and challenge.

### 1.3 Structure and Methodology

The thesis contains 11 main chapters, which also divided by subchapters. Chapters 1-3 cover the descriptive part of the thesis and dealing with the introduction into the legal framework of the NPM together with explanation on the structure of NPM and functions of NPM bodies. Chapter 1 includes brief introduction to the thesis, the objective of the research, description of the materials used and the research methods applied. Chapter 2 provide an introduction to the international and national legal framework on torture prevention including OPCAT, Paris Principles, and National Legal Framework established by Kazakhstan on torture prevention and the NPM establishment and operation. Chapter 3 include descriptive information on the structure of NPM, including the roles and functions of the composite bodies o the NPM: the Commissioner for Human Rights (CHR), the office of the CHR, the Commission on NPM under the CHR, The Coordination Council of NPM, and the NPM members.

Chapters 4-6 include the analytical part of the thesis that elaborates on the direct application of the international and national legal framework in practice to analyse the institutional and operational organization of the NPM. Chapter 4 examines the most important requisite for NHRI, the overall independence of the NPM, including the independence of members and staff, and financial independence of the mechanism. Chapter 5 dealing with the membership and composition of NPM; also, elaborating on the capabilities and professional knowledge, as well as gender balance and ethnic minority representation in NPM. Chapter 6 contains information on the preventive visits namely the access to places of detention, access to information, access to people, and other powers of NPM regarding the monitoring visits. Also the compliance of the abovementioned procedures with international standards is examined in course of every subchapter.

Chapters 7-9 dealing with the effectiveness of the NPM work regarding the realization in practice, namely the Chapter 7 covers the procedures on the recommendations by NPM and their implementation by the Government and the consideration by the administrations of detention facilities and closed institutions. Chapter 8 examine the cooperation of NPM with the national civil society, including the Public Monitoring Commissions (PMCs) that also vested by the national legislation to conduct external monitoring visits in detention facilities. Chapter 9 describes the cooperation of the NPM with other international organizations.

The final Chapter 11 conclusion part synthesizes all the information on the compliance of NPM with international standards and answer the research question of the thesis.

## Chapter 2: International and national legal framework

### 2.1 Background

From a legal point of view, the right not to be tortured or subjected to ill-treatment is clearly defined. The prohibition of torture and ill-treatment is contained in numerous international and regional human rights treaties and declarations, such as the Universal Declaration of Human Rights (UDHR)<sup>35</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>36</sup>, the European Convention on Human Rights (ECHR)<sup>37</sup> the African Charter on Human and Peoples' Rights (ACHPR)<sup>38</sup>, and the American Convention on Human Rights (ACHR)<sup>39</sup>. Most states worldwide have signed and ratified at least one of these treaties. All of the named treaties and declarations establish the prohibition of torture as an absolute right and that it cannot be subject

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<sup>35</sup> UDHR Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 1 July 2015]

<sup>36</sup> ICCPR Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 1 July 2015]

<sup>37</sup> ECHR sec. 1 Rights and Freedoms, Article 3 Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 1 July 2015]

<sup>38</sup> ACHPR Article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 1 July 2015]

<sup>39</sup> ACHR, "Pact of San Jose", Costa Rica Article 5 Right to Humane Treatment, para 2: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 1 July 2015]

to derogation.<sup>40</sup> In addition, article 2(2) of the CAT determines that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'<sup>41</sup>

Even in the case when the State is not part of any of the abovementioned international documents, the State still cannot legally resort to torture because the prohibition of torture is considered to constitute *ius cogens*,<sup>42</sup> which is a 'peremptory norm' of general international law.<sup>43</sup> This means, that while states are in principle allowed to decide whether they wish to be compelled to a number of human rights obligations, the prohibition of torture is today recognised by the international community of states as a whole and no disposal of the prohibition either by means of an inter-state treaty or by customary law is possible. In other words, it is binding in all states by international customary law, regardless of whether the state ratified any human rights document. The ban of torture has therefore is a fundamental norm of international law and states cannot invoke not to be bound by this norm.

Being bound by abovementioned international obligations, Kazakhstan is also a party to the primary UN human rights treaties and instruments that prohibit the use of torture. The State ratified the ICCPR and its Optional Protocol on 24 January 2006 and 30 June 2009, respectively, the International Convention on the Elimination of All Forms of Racial Discrimination (in 1998) as well as the Convention on the Elimination of All Forms of Discrimination against Women (in

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<sup>40</sup> Under specific conditions, States have the possibility to suspend (derogate from) a number of human rights responsibilities in times of national crises, such as (civil) war, terrorism or natural disasters. However, even if an emergency occurs which threatens the life of a nation, a State cannot derogate from the prohibition of torture, since this prohibition is bounded in the list of non-derogable rights in the major human rights treaties mentioned above. Thus, unlike other rights (e.g. freedom of expression, freedom of assembly or the right to life) it cannot be exposed to any limitation for reasons of national safety, the prevention of disarrangement or wrongdoing or even for the protection of the rights and freedoms of others. The right not to be tortured is also an absolute because under normal circumstances there are no limitations permitted. See M. Nowak, E. McArthur *The United Nations Convention Against Torture - A Commentary*, 2008, Oxford University Press, Oxford, p.119, para.60.

<sup>41</sup> CAT, Article. 2(2).

<sup>42</sup> UN Doc. E/CN.4/1314, 1979, 11, para. 53. *Ius cogens* (from Latin: compelling law; English: peremptory norm) refer to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. See I. Brownlie, *Principles of Public International Law 5th ed.*, Oxford, 1998.

<sup>43</sup> Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10. See also, International Criminal Tribunal for the former Yugoslavia, Prosecutor v Delalic and Others, Case IT-96-21-T, Judgment 16 November 1998, paras 452, 454; Prosecutor v Furundzija, Case IT-95-17/1-T, Judgment 10 December 1998, paras 139 and 143; Prosecutor v Kunarac and Others, Case IT-96-23-T & IT-96-23/I-T, para 466.

1998), and Geneva Conventions together with Optional Protocols (in 1992).<sup>44</sup> However, the State is not a party to the Rome Statute of the International Criminal Court.<sup>45</sup> The State acceded to the CAT on 26 August 1998; and in 2008 signed OPCAT and recognized the competence of the UNCAT to receive individual complaints. Kazakhstan also cooperates with the UN Universal Periodic Review (UPR).<sup>46</sup> The UN Special Rapporteur on torture visited Kazakhstan in May 2009 at the invitation of the State. The Special Rapporteur concluded that Kazakhstan had 'made good progress in reforming its legal framework and its institutions' since gaining independence in 1991, but that 'considerable gaps' persisted concerning the law and practical implementation of law.<sup>47</sup>

The legislation of Kazakhstan also recognizes the prevalence of the international treaties over the national over the national by the Article 4 of the Constitution, which entails that international treaties ratified by the State 'shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law.'<sup>48</sup> In addition, Article 8 of the Constitution states that the State 'shall respect the principles and norms of international law'.<sup>49</sup> The Constitution also includes legal provisions related to torture and ill-treatment in the Section II, which lists the rights of the individuals and citizens. Article 17(1) specifies that 'person's dignity shall be inviolable', and Article 17(2) that 'no one must be subject to torture, violence or other treatment and punishment that is cruel or humiliating to human dignity.' Article 16 protects the right to personal freedom, and specifies the legal time

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<sup>44</sup> United Nations Treaty Collection, available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> [accessed 1 July 2015].

<sup>45</sup> International Criminal Court website, States Parties, available at: <http://www.icccpi.int/Menus/ASP/states+parties/> [accessed 1 July 2015].

<sup>46</sup> Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Kazakhstan", UN Doc. A/HRC/14/10, pp. 3-6, available at: <http://www.upr-info.org/en/review/Kazakhstan/Session-20---October-2014>. [accessed 1 July 2015].

<sup>47</sup> Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, in human or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan", p. 20.

<sup>48</sup> Constitution of Republic of Kazakhstan, 30 August 1995, Art. 4(3), unofficial English translation available: <http://www.wipo.int/edocs/lexdocs/laws/en/kz/kz019en.pdf> [accessed 8 May 2015].

<sup>49</sup> *ibid.* Article 8.

limit for detention by police at seventy-two hours before an individual must be released or charged with a crime.<sup>50</sup>

Torture is also criminalised under Article 146 in the Criminal Code of Kazakhstan, which undergo two amendments with a view to bringing the definition of torture in line with Article 1 of the CAT. The last amendment in the Criminal Code, which improved the formulations of torture, came into force starting from January 2015.<sup>51</sup> However, the current Article 146 of the new Criminal Code is still not fully in compliance with Article 1 of the UNCAT. The CAT requires liability if severe pain or suffering is 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.<sup>52</sup> However, the Article 146 of the Criminal Code fails to include a reference to 'persons acting in an official capacity'. The last PRI report to CAT comments that this gap can result in impunity, for example of security staff of the institutions that also under governmental custody but hires private companies to securing the institution.<sup>53</sup>

## 2.2 State obligation to prevent torture and ill-treatment

The CAT is the most comprehensive among all the other international treaties addressing the issues of torture and ill-treatment that was signed by Kazakhstan. The requirement for States Parties to the CAT to include visits to places of detention as one of the parts of a wide-ranging preventive framework, which has been emphasized by the CAT in its interpretation of Articles 2 and 11. According to Article 2 of the CAT, entitled 'Obligation to Prevent Torture', State Parties have to set effective legislative, administrative, and judicial procedures to prevent torture in any territory under their jurisdiction.<sup>54</sup> In addition, the CAT includes a number of obligations, which, directly or indirectly, target to prevent torture. Correspondingly, article 16 requires that states shall also 'undertake to prevent torture and other acts of cruel, inhuman or degrading treatment or

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<sup>50</sup> REDRESS, Torture in Asia: The law and practice, October 2013, ISSN 1811 7023, available at: <http://www.refworld.org/docid/52fa25204.html> [accessed 8 May 2015].

<sup>51</sup> The Criminal Code of the Republic of Kazakhstan, unofficial English translation available at: <http://prokuror.gov.kz/eng/state/new-codes/criminal-code-republic-kazakhstan>. [accessed 8 May 2015].

<sup>52</sup> CAT, Article 1.

<sup>53</sup> PRI Written submission to the UN Committee against Torture 53rd session, "Examination of Kazakhstan's third periodic report under Article 19 of the Convention", 17 October 2014. Available online: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KAZ/INT\\_CAT\\_NGO\\_KAZ\\_18643\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KAZ/INT_CAT_NGO_KAZ_18643_E.pdf) [accessed 8 May 2015].

<sup>54</sup> CAT, Art. 2.



punishment'. Article 16 makes clear reference to articles 10 to 13 UNCAT thus reasserting the obligation of states to provide training to security personnel regarding the prevention of cruel, inhuman or degrading treatment, as well as the responsibility to investigate allegations of such abuse.<sup>55</sup>

The extensive experience of with the CAT implementation and practical knowledge gathered by organizations such as the International Committee of the Red Cross (ICRC) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) has demonstrated that regular visits to places of detention can be extremely effective for preventing torture and other ill-treatment. The possibility of being exposed to unannounced external inspection can have a significant deterrent outcome.<sup>56</sup> Furthermore, visits empower independent experts to examine personally, rather than through intermediaries, the treatment of persons deprived of their liberty and the conditions in which they are detained. Grounded on the specific situation witnessed and private interviews with persons deprived of liberty, experts can make credible, practical recommendations and communicate with the authorities in order to improve the situation. Additionally, visits to the places of detention can be an important because of the moral support for persons deprived of their liberty.<sup>57</sup>

### 2.3 OPCAT and Paris Principles

The OPCAT is a new human rights instrument, which was adopted by the General Assembly in December 2002 and entered into force in June 2006. Any State that has ratified the CAT should ratify the OPCAT.<sup>58</sup> Instead of reacting once violations have occurred, the OPCAT sets up a 'proactive system' of visits to prevent violations from happening.<sup>59</sup> The OPCAT complements the CAT, its parent treaty, rather than substituting and establishes two new actors in the field of torture prevention: the SPT and NPMs. This 'two-pillar system' can work in a harmonising way as the SPT, in addition to conducting visits on its own, can provide 'adequate resources' to assist

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<sup>55</sup> CAT, Art. 16.

<sup>56</sup> Cp. Buchinger, 2009, p. 131.

<sup>57</sup> *ibid.*

<sup>58</sup> If a State has signed the UNCAT, it can also sign the OPCAT, but it cannot ratify the OPCAT until it has ratified the UNCAT.

<sup>59</sup> APT and Inter-American Institute for Human Rights, *Optional Protocol to UN Convention against Torture Implementation Manual (revised edition)*, 2010, p. 12. Further referred as *APT Manual*.

NPMs in functioning effectively.<sup>60</sup> The SPT mandated to conduct in-country missions to all States Parties to the OPCAT in order to visit places of detention, and to assess prevention practices. However, the SPT require State's consent and is unable to visit places of detention within States Parties as regularly as the NPM.<sup>61</sup>

The OPCAT does not prescribe the structure of the NPM, thus offering the flexibility for States Parties to designate a mechanism. However, NPM must comply with the minimum guarantees and powers set out in the OPCAT. Part IV of the OPCAT (Articles 17-24) comprises seven articles that set out States Parties' obligations in respect of NPMs. This section details the national element of the system of prevention of torture and other forms of ill-treatment set out by the OPCAT.

According to Article 18(4) the OPCAT obliges States Parties consider the Paris Principles while creating NPM:

'(...) 4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights. (...)'<sup>62</sup>

The Paris Principles are a combination of international principles implemented by the UN General Assembly that structure and direct the work of NHRIs,<sup>63</sup> stipulating for their impartiality, extensive human rights mandate, sufficient capital, and inclusive and transparent selection and appointment process.<sup>64</sup> Initially, the Paris Principles were intended to provide guidance for human rights institutions with broad mandates. Therefore, some provisions of the Paris Principles cannot be related to the OPCAT's preventive procedure, while more

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<sup>60</sup> OPCAT, Article 11(b).

<sup>61</sup> See SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, UN Doc. CAT/C/44/2, 25 March 2010, para 21.

<sup>62</sup> OPCAT, Article 18(4).

<sup>63</sup> The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7 - 9 October 1991), adopted by Human Rights Commission Resolution 1992/54 in 1992 and General Assembly Resolution 48/134 in 1993.

<sup>64</sup> OHCHR, Paris Principles: 20 years guiding the work of National Human Rights Institutions (30 May 2013), accessed 16 December 2013, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/ParisPrinciples20yearsguidingtheworkofNHRI.aspx> [accessed 11 April 2015].

comprehensive provisions in the OPCAT replace those in Paris Principles.<sup>65</sup> In addition, the NHRI's compliance with the Paris Principles does not assure that it will fulfil the provisions of the OPCAT.<sup>66</sup>

The NPM in Kazakhstan is based under the office of the Commissioner for Human Rights, which is a NHRI, a state body with a constitutional and legislative mandate to protect and promote human rights.<sup>67</sup> The NHRI is funded by the State but functions independently and mandated to provide a "bridge" between civil societies and governments in the implementation of human right activities. The Paris Principles are the main indicator of the compliance of the Ombudsman's office with the international standards, since the principles deliver a standard for evaluating the legality and authority of NHRIs by the assessment procedure by the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC) of the NHRIs.<sup>68</sup> The ICC SCA also dealing with explanatory matters regarding the Paris Principles,<sup>69</sup> which offer practical assistance on various issues to be considered when establishing an NPM. However, according to the SPT the NHRI accreditation should not be used for accrediting the NPMs in general, since it is for the Subcommittee to make such assessments in individual cases.<sup>70</sup>

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<sup>65</sup> APT, NPM Manual, p. 91.

<sup>66</sup> SPT, Third Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 25 March 2010, CAT/C/44/2 para 61.

<sup>67</sup> The Office of the UN High Commissioner for Human Rights (OHCHR), Professional Training Series 4, National Human Rights Institutions: History, Principles, Roles and Responsibilities (Rev. 1, 2010), p.13.

<sup>68</sup> The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) was originally established by NHRIs at their International Conference in Tunis in 1993. It coordinates the activities of Paris Principle-compliant NHRIs internationally, including the accreditation of its members (i.e. providing official recognition that NHRIs meet or continue to comply fully with the Paris Principles). Accreditation takes place under the rules of procedure of the International Coordinating Committee's Sub-Committee on Accreditation (SCA). The SCA can accord NHRIs with one of three statuses: "A status" denotes a voting member of the ICC that complies fully with the Paris Principles; "B status" denotes an observer member that does not fully comply with the Paris Principles or has not yet submitted sufficient documentation to make that determination; and "C status" denotes a non-member that does not comply with the Paris Principles. See OHCHR, Professional Training Series 4, National Human Rights Institutions: History, Principles, Roles and Responsibilities (Rev. 1, 2010), pp. 44-45.

<sup>69</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) Sub-Committee on Accreditation (SCA), General Observations as adopted in Geneva in May 2013, accessed 16 December 2013

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>

<sup>70</sup> SPT, Third annual report of the SPT (March 2010) (CAT/C/44/2).

## Chapter 3: NPM Designation Process

### 3.1 General Requirements on the Designation Process

Article 17 of the OPCAT states:

'Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol, if they are in conformity with its provisions.'<sup>71</sup>

Article 17 and 3 allows States Parties flexibility in relation to fulfilling with the responsibility to establish a system of regular and preventive visits at the national level. It is not specified in OPCAT which organisational system that NPM should form. Considering the background of the country, the presence of existing independent monitoring bodies, the country's geography, and the particularity of the country's governmental, legislative and financial structures,<sup>72</sup> States Parties may select to establish one or several new specialised bodies, designate one or several existing bodies, or design bodies of both types to undertake the NPM mandate. The States Parties should follow a transparent, inclusive and comprehensive decision-making process to establish the most suitable form for the NPM bearing in mind country-specific factors.<sup>73</sup> During the whole process of designation States Parties national actors should be in contact with each other and the SPT that should be able to provide information and guidance regarding the designation process, and the formation of effectively functioning NPM.<sup>74</sup>

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<sup>71</sup> OPCAT Art.17

<sup>72</sup> SPT, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2009 to March 2010, UN Doc. CAT/C/44/2, 25 March 2010, §49.

<sup>73</sup> APT, OPCAT Manual, p. 86.

<sup>74</sup> APT, OPCAT Manual, p.106.

### 3.1.1. Transparency and inclusiveness

Characteristics such as legitimacy, trustworthiness and reputation are very important to guarantee an effective operation of the NPM. Therefore, the quality of the NPM establishment process has direct consequences for the legitimacy and reputation of the mechanism. The participation of all the relevant stakeholders is important to ensure an inclusive and transparent process to develop appropriate organs that meet the particularities of the country, but also to ensure that these stakeholders accept the outcome of the process. For the work of the NPM to be effective, government officials and civil society be credible and independent. Moreover the Government should proactively publicise the process, prospects for contribution, and the criteria, methods and motive for the final decision.<sup>75</sup>

The broadest possible range of relevant actors should be included in the discussions: representatives of the political authorities of the executive government and relevant members of the permanent administration with technical expertise, national NGOs and other civil society groups, national human rights institutions, organisations that already conduct monitoring the visits to places, members of the legislature representing both government and opposition parties, in some cases, regional and international inter-governmental and non-governmental organizations and experts.<sup>76</sup>

The process of designation in Kazakhstan involved an inclusive and transparent consultation of various actors. The Government initiated the creation of the consultation body to provide the designation for NPM, so-called national anti-torture working group, which consisted of the thirteen persons. The creation of such consultation body is one of the recommended schemes of the designation process, according to the APT Guide. The consultative body was established in early 2008 after the State acceded to OPCAT, under the auspices of the Ombudsman's Office. The Ombudsman also vested to inspect the use of torture and ill-treatment in the country and its mandate also included the implementation of OPCAT provisions. The membership of this body is wide-ranging as it includes representatives from the Ministries of Justice and Interior,

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<sup>75</sup> APT, NPM Guide, p.9.

<sup>76</sup> APT, NPM Guide, p.9.

Prosecutor's Office, Committee of National Security, Commission for Human Rights, National Centre for Human Rights as well as three NGOs representatives.<sup>77</sup> However, there were observably more representatives of the governmental structures in the anti-torture group, rather than civil society representatives.

Throughout the negotiations the specific consideration as a perspective NPM was to the existing mechanisms with appropriate mandate in Kazakhstan: the Office of the Commissioner for Human Rights and its supporting entity, the National Centre for Human Rights and the so-called Public Monitoring Commissions (PMC), as these bodies that already exercised some activities that would fall within the responsibility of an NPM.<sup>78</sup>

In November 2008, the discussions were arranged by the Representative Office of Office of the High Commissioner for Human Rights (OHCHR) in Central Asia, British Foreign and Commonwealth Office, Embassy of the Republic of Germany in Kazakhstan, the Bureau for Human Rights and Rule of Law in Kazakhstan, Freedom House regional office, National Centre for Human Rights (the part of the Office for Commissionaire for Human Rights in Kazakhstan) and the APT to discuss the various NPM options for Kazakhstan.<sup>79</sup> Delegates from the Government, civil society organisation and the national anti-torture working group joined the conference. Some alternatives were discussed during this conference, including the prospect of designating the Ombudsman's Office with the collaboration of civil society organisations as the NPM.<sup>80</sup>

The negotiations at the national level continued in 2009, there were two meetings held in February and December 2009, that brought suggestions of designating the Commissioner for Human Rights as the NPM as well as and the Commissioner for Human Rights with the Public Monitoring Commissions (PMCs) as the NPM. The PMCs are independent mechanism that performed the function of preventive visits in Kazakhstan since 2004. However, the preferences

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<sup>77</sup> APT 'Kazakhstan. National Preventive Mechanisms. Country-By-Country Status under the Optional Protocol to the UN Convention Against Torture', available online: [http://www.apr.ch/en/opcat\\_pages/npm-designation-31/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/npm-designation-31/?pdf=info_country)

<sup>78</sup> See Saniya Ler, "The Inventory Paper on the Places of Deprivation of Liberty in the Republic of Kazakhstan in the Light of the Optional Protocol to the United Nations Convention Against Torture" (in Russian); Publication of the Legal Policy Research Centre, Kazakhstan, June 2009.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

raised various concerns among the partakers due to lack of correspondence with OPCAT of both bodies. In February 2010 there was an event organized to supplement the former negotiations regarding the designation of the most suitable NPM option. Two members of the SPT contributed in the national negotiations and provided recommendations on several OPCAT implementation issues.<sup>81</sup>

The Ministry of Justice elaborated the NPM proposal, which had been designed by the anti-torture working group and concluded that the existing PMCs alone cannot function as NPM. The anti-torture working group claimed that through a course of legislative change these PMCs could be placed under the OPCAT criteria - the amendments to the existing laws should be made. Numerous civil society representatives expressed concerns about this proposal due to deficiencies in the light of the minimum requirements of the OPCAT, in particular concerning independence, lack of a fixed budget, limited access to other types of places of detention, limited human resources and membership, including difficulty to recruit external experts, non ability to provide comments and observations on existing legislations, lack of privileges and immunities, and lack of coordination between the 16 existing public monitoring commissions.<sup>82</sup>

In October 2010 the Ministry of Justice proposed NPM structure based on National Human Rights Centre together with contracted NGOs. This proposal raised some concerns: the intended financial provisions would possibly construct a relationship of dependence between the NGOs and the National Human Rights Centre; the draft of the NPM law was very complicated, as it proposed making amendments to 12 existing laws (there was no separate NPM law); there was no mention in the law on how the general NPM would operate in practice; various key OPCAT related provisions were not included in the draft law.<sup>83</sup>

The proposal on the designation of the Ombudsperson as the NPM (or part of the NPM) provided some concerns due to lack of correspondence with the provisions of the OPCAT. The Commissioner for Human Rights is founded by a Presidential Decree and does not have an impartial legal foundation. Furthermore, it was reported that the Ombudsman had 'limited human, financial and material resources'. The Ombudsman has only one office in the capital and

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<sup>81</sup> *ibid.*

<sup>82</sup> APT, Kazakhstan - OPCAT Situation, 20 October 2014, available at: [http://www.apr.ch/en/opcat\\_pages/opcat-situation-34/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/opcat-situation-34/?pdf=info_country) [accessed 11 April 2015]

<sup>83</sup> *ibid.*

lacks the representative offices in the country, which was reported to have a significant impact in the NPM operation, in particular in a country with such a great territory.<sup>84</sup>

Even the designation process was inclusive and transparent, the final outcome was unsatisfactory for some of the designation process participant from civil society groups. The fact, that the PMCs were not considered in the final NPM model is rather irrational, since the PMCs are existing body that partially undertakes the visiting mandate of the NPM. The PMCs are well represented in all the regions of Kazakhstan and undertake visits to the detention facilities (not all the closed institutions). According to the SPT Guidelines, 'the NPM should complement rather than replace existing systems of oversight and its establishment should not preclude the creation or operation of other such complementary systems.'<sup>85</sup>

### 3.1.2 Deadline for the NPM establishment

Article 17 reasserts the responsibility set under Article 3 to put in place one or several NPMs and sets a time limit for States Parties to fulfill this obligation. The States Parties have one-year time to develop the NPM. The indication of time limit when States Parties must have NPMs in place was envisioned to encourage quick ratification while addressing the issue that NPM designation process and establishment require time. This underlines the requisite for States Parties to initiate the process of determining on the system of their NPM at the earliest occasion in order to be prepared to fulfill their obligations within one year after acceding to the OPCAT.<sup>86</sup>

However, the States may extend the time of putting in place the obligations under the treaty on the place. The Article 24 of OPCAT offers the States that wish to become a party to the OPCAT additional time to find the best option for enactment of the duties set out under the treaty. In practice, States could utilise Article 24 when plan to create a new body as the NPM, or make substantial modifications to existing national legislation, in order to fulfill with their

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<sup>84</sup> See 'The Bristol OPCAT Project Background Paper, Inventory of Existing Mechanisms of Monitoring in Kazakhstan and their compliance with OPCAT standards for National Preventive Mechanisms', June 2009, available at: <http://www.bris.ac.uk/media-library/sites/law/migrated/documents/kazakhstanreport.pdf> [accessed 11 April 2015].

<sup>85</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Twelfth session Geneva, 15–19 November 2010, Guidelines on national preventive mechanisms, CAT/OP/12/5, para 5.

<sup>86</sup> OPCAT Manual, APT, p. 86.



responsibilities under Part IV of the OPCAT.<sup>87</sup> According to Article 24, States Parties may make a declaration to temporarily postpone their responsibilities in respect of either the SPT or NPMs. The postponement possible up to three years with the possibility, of an extension for an additional two years after the approval by the CAT Committee. The first postponement of responsibilities has been designed to permit the States Parties an initial four-year postponement period in relation to NPM since the States Parties already have one year from the time of ratification to establish the NPM according to the Article 17.<sup>88</sup>

'1. Upon ratification, States Parties can make a declaration postponing the implementation of their obligations either under part III or under part IV of the present Protocol.

2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two year period.<sup>89</sup>

The clarification of Article 24(1) of the OPCAT has demonstrated to be a controversial issue since it is not clear if a declaration to postpone should be made immediately at the moment of ratification or it can be made at any time later.<sup>90</sup> The discrepancy is connected with the inconsistent translations and interpretations of the phrase 'upon ratification' in the treaty's correspondingly accurate in Arabic, Chinese, English, French, Russian and Spanish<sup>91</sup> versions.<sup>92</sup> According to the Article 33 of the Vienna Convention on the Law of Treaties<sup>93</sup>, the terminologies of the treaty should have the same meaning in each of the translated texts. Furthermore, Article 37(1) of the OPCAT does not specifically stipulate any one specific version

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<sup>87</sup> *ibid.*

<sup>88</sup> Nowak and McArthur, *The UNCAT*, p.1108.

<sup>89</sup> OPCAT, part V, Art. 24.

<sup>90</sup> OPCAT Manual, p. 106.

<sup>91</sup> UN official languages.

<sup>92</sup> See OPCAT, Article 37(1): 'The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.'

<sup>93</sup> United Nations, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 12 March 1986, available at: <http://www.refworld.org/docid/3ae6b3924.html> [accessed 11 June 2015]

of the text to prevail, yet the fact that the English version was the principal basis for the preliminary discussions.<sup>94</sup> The English and French versions of Article 24(1) clearly state that the declaration of postponement must only be made at the time of ratification, not later. The original Russian version implies that the declaration should be made after ratification.<sup>95</sup>

The abovementioned disagreement between the translations of OPCAT raises some uncertainties if Kazakhstan managed to fulfill the obligation concerning the timing of the NPM establishment. Kazakhstan ratified the OPCAT on 28 October 2008, therefore the country was obliged to designate its NPM by the 22 October 2009 as prescribed by Article 17 of the OPCAT. However, the declaration on postponement was announced on 8 February 2010 invoking the Russian version of the OPCAT. In the absence of any objection on the part of States Parties to the OPCAT, the Secretary General of the UN acknowledged the declaration in question within a period of three months from the date of the notification.<sup>96</sup> Kazakhstan made a declaration under Article 24 of OPCAT, which allowed postponement of the NPM designation for three years therefore constructing the 22 October 2012 the final deadline for establishment. It was however only on 2 July 2013 that the Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan was finally approved by the Government. This law sets out the parameters of the Kazakh NPM and thus brought Kazakhstan nearer to fulfilling its obligations that it undertook when it became a party to OPCAT. After the law establishment the NPM were still in the process of being established. The Bristol University Human Rights Implementation Center submission to UPR in 2014 concluded that Kazakhstan de facto breached its obligations under OPCAT, as it has failed to establish an NPM within the prescribed period of time.<sup>97</sup> Kazakhstan explained the late implementation due 'to the global financial-economic crisis and forced budget cuts.'<sup>98</sup> The interpretation of the treaty by Kazakhstan established a precedent

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<sup>94</sup> OPCAT Manual, p. 106.

<sup>95</sup> APT, 'Linguistic Issues in OPCAT Article 24', APT, Geneva, 27 March 2007, p.2.

<sup>96</sup> C.N.57.2010.TREATIES-2, Depositary Notification, February 2010, available online: <https://treaties.un.org/doc/Publication/CN/2010/CN.57.2010-Eng.pdf> [accessed 3 May 2015].

<sup>97</sup> Human Rights Implementation Centre, University of Bristol- individual UPR submission- Kazakhstan – October/November 2014 (20th session), available at: <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/secondcycleuprkazakhstan.pdf> [accessed 5 May 2015].

<sup>98</sup> The Information Bulletin of the Commissionaire for Human Rights in the Republic of Kazakhstan Number 1 for 2014 (original document: Информационный бюллетень Уполномоченного по правам человека в Республике Казахстан № 1) за 2014 год, available at: <http://www.ombudsman.kz/upload/file/b1-2014.pdf> [accessed 5 May 2015]

since no other country utilized the possibility to announce the declaration of the postponement some time after the ratification.<sup>99</sup>

## Chapter 4: Legal framework of the NPM

### 4.1 Structure of the NPM law

The Paris Principles state that the establishment such as an NHRI should have its legal basis, either in the constitutional or regular legislative mechanism of the state.<sup>100</sup> Therefore, the law on NPM falls under the regular legislative mechanism, in accordance with the Paris Principles. The SPT advises NPM to be founded by a constitutional or legislative documents that defines its central elements, including the organ's mandate and powers, its appointment process for staff and members, its terms of office, its funding and its lines of accountability.<sup>101</sup> However, it was also discussed in the commentaries to the Paris Principles that, in the case of the NHRIs having the Constitution, as a legal basis for the entity can be very beneficial, especially in transitional societies.<sup>102</sup> The same can be mentioned about the NPMs: a constitutional basis would provide more legitimacy to the body, add to the perceived independence and authority of such entity and generally such texts are more difficult to amend. However, a constitutional basis is not a strict requirement, since constitutional texts are generally more difficult to amend, it may be counterproductive to include detailed NPM provisions in the constitutional provisions as any changes in the future may be difficult to achieve. A clear legal basis should be arranged, as being established through an act of legislature not only lends the body legitimacy but also acts as a certain guarantee of its independence since changes in legislation are more difficult to achieve than for example, amendments in the acts of executive.<sup>103</sup>

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<sup>99</sup> APT, NPM Manual, p. 105.

<sup>100</sup> Paris Principles, Competence and responsibilities.

<sup>101</sup> SPT, First annual report, para. 28.

<sup>102</sup> Richard Carver and Alexey Korotaev "Assessing the Effectiveness of National Human Rights Institutions"; Report on the behalf of the UNDP Regional centre in Bratislava, October 2007, Part 2.

<sup>103</sup> 'The Bristol OPCAT Project Background Paper, Inventory of Existing Mechanisms of Monitoring in Kazakhstan and their compliance with OPCAT standards for National Preventive Mechanisms.

On July 2, 2013, the President of the Republic of Kazakhstan has authorized a Law On Introduction of Changes and Addendae to Certain Legislative Acts of the Republic of Kazakhstan on Establishment of the National Preventive Mechanism to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment<sup>104</sup> (hereinafter the law on the NPM). Therefore, the legal basis for NPM is grounded on the changes to the existing normative legislative acts.

The law on NPM in Kazakhstan is very complex since it invokes 18 different legislative acts. The law on NPM entails introduction of changes in four codes: Criminal Procedure Code, Penal Code, Code of Administrative Offences, Public Health and Healthcare System Code. Complementary to that amendments to four laws were also introduced to establish the legal basis for the work of NPM:

- 1) "The Law on the Order and Conditions of Detention of Persons in Specialized Facilities Ensuring Temporary Isolation from Society"
- 2) "Prevention of Juvenile Crimes"
- 3) "The Law on the Forced Treatment of Persons with Alcohol and Drug Addictions"
- 4) "The Law on the Rights of the Child".

Each of the amendments of the codes divided into eleven Articles and contain similar provisions. The law on NPM contains the required provisions that necessary for the NPM functioning. The Articles include provisions on: the mandate and powers of the NPM, the structure of the NPM, requirements for the members of the NPM, rights and duties of the NPM member, termination of competencies of a NPM members, types and frequency of preventive visits, order of preventive visits, information on annual consolidated report, confidentiality and interaction of the competence state bodies with the NPM members.<sup>105</sup>

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<sup>104</sup> Original version of the document: 'Закон Республики Казахстан от 2 июля 2013 года № 111-V О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам создания национального превентивного механизма, направленного на предупреждение пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания.'

<sup>105</sup> Bulletin of the Ombudsman, 2014.

Additionally to that, the NPM law is supplemented by the regulations and rules indicating the procedures of the NPM. The Rules and Regulations are issued by the Ombudsman and adopted by the Government on the regular basis. The regulations set by the Commissioner for Human Rights are developed in order to coordinate the work of the NPM linked with the guideline for monitoring preventive visits and appointment procedures. The Government approved the following Ombudsman orders:

- 1) The Statute of the Commission on Election of Coordinating Council Members under the Commissioner for Human Rights in the Republic of Kazakhstan and its composition;
- 2) The Statute of the Coordinating Council Members under the Commissioner for Human Rights in the Republic of Kazakhstan;
- 3) The Rules of forming NPM members into groups to conduct preventive visits;
- 4) Rules of selection of the NPM members;
- 5) The Methodological guidelines for preventive visits;
- 6) The Rules of drafting of the annual consolidated report on the results of preventive visits;
- 7) The Rules of Compensation to NPM members for preventive visits;
- 8) The Regulations for Preventive Visits by NPM members.<sup>106</sup>

The abovementioned 8 orders, together with 4 codes and 4 separate laws constitute legal framework of the NPM. The authority to design the legislation was exclusively granted to the Ministry of Justice of the Republic of Kazakhstan. There were some alternative legislation drafts proposed during the designation period but consequently they were not considered by the anti-torture working group. The complexity of the current law on the NPM was criticised during the designation process and after the adoption of the law since it do not provide the appropriate scope of the term 'deprivation of liberty'. This is one of the most important challenges with the NPM legislation. Despite many recommendations the state authorities did not adopt a new,

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<sup>106</sup> Ibid.

separate legislation on NPM<sup>107</sup> but have chosen a number of legislative modifications to the existing legislation. This implies that the present law approves amendments in 16 different legislative acts, which makes it very problematic to establish of the defined idea on the NPM mandate. There is no single predominant definition of one of the central terms under the OPCAT, the 'deprivation of liberty' rather the mandate of the NPM to visit places of deprivation of liberty is 'disseminated' throughout a range of laws.<sup>108</sup> The legislative amendments to the 16 laws indicate that the NPM will have access to prisons, army detention places, pre-trial detention facilities, juvenile institutions and selection of health care institutions such as psychiatric institutions for treatment of drug addiction etc. However, the amendments fail to allow access for visiting for such institutions as refugee detention places, elderly houses, orphanages etc.<sup>109</sup>

## 4.2 Legal basis for the Commissioner for Human Rights office

The Office of the Commissioner for Human Rights in Kazakhstan (Ombudsman's office) is established pursuant to the Decree of the President of the Kazakhstan 19 September 2002. The President, according to Article 40 of the Constitution of Kazakhstan, is the head of the government and according to Article 20 (1) of the Constitutional Law on the President, such Decrees have binding force in the territory of Kazakhstan. While according to the Article 1 of the Law on Legal Acts<sup>110</sup>, the Presidential Decrees are considered to be legal acts in the country, nevertheless these are clearly acts of the executive and not of the legislative basis. In addition, the work of the Ombudsman, as noted in Article 30, is supported by the special Centre for

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<sup>107</sup> See Human Rights Implementation Centre, Expert Advice letter to the 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 of 23 May 2012; Available online: <http://www.bristol.ac.uk/law/research/centres-themes/hric/expertadvicebyhric/kazakhstan.html> [last accessed 30 June 2015]

<sup>108</sup> Bristol UPR submission 2014, p.3.

<sup>109</sup> See chapter 8.2 Access to All Places of Detention in this thesis.

<sup>110</sup> Law of the Republic of Kazakhstan On Legal Acts of 24th March 1998, No 213-I (original document: Закон Республики Казахстан от 24 марта 1998 года № 213-І О нормативных правовых актах).

Human Rights under the Commissioner's Office, the statute of which is also approved by the Presidential Decree.<sup>111</sup>

Consequently the institution of Ombudsman and its supporting institution, the Centre, both rest on executive Decrees which may give rise to serious concerns in terms of the independence of the body. The need to back-up the institution of Ombudsman in the Constitution of Kazakhstan has been pointed out by the Venice Commission of the Council of Europe (Venice Commission).<sup>112</sup> It has been recommended that the constitutional text need not contain detailed provisions of the Ombudsman institution and be limited to granting the entity a constitutional status.<sup>113</sup> In addition, it has been recommended that the details of the functioning of the institution be set out further in detail in the normative text, normal legislation of the country, adopted by the legislature of the Kazakhstan.<sup>114</sup>

That also means that the NPM, being a part of the Ombudsman office possesses more solid legal ground than the Ombudsman office itself. Taking into account the fact that Ombudsman office is the central body involved in the NPM work and granted an extensive power regarding the coordinating procedures, the independence of the Ombudsman office is a crucial point. The legal basis grounded on the act of the executive of the Ombudsman office may invoke concerns concerning the absolute correspondence to the Paris Principles.

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<sup>111</sup> Order of the President of the Republic of Kazakhstan of 10th December 2002 No 992 On the Establishment of the National Centre on Human Rights (original document: Указ Президента Республики Казахстан от 10 декабря 2002 года N 992 О создании Национального центра по правам человека).

<sup>112</sup> European Commission for Democracy Through Law (Venice Commission) Opinion on the Possible Reform of the Ombudsman Institutions in Kazakhstan Adopted by the Venice Commission at its 71<sup>st</sup> Plenary Session; Opinion No. 425/2007 of 5 June 2007; paras 10 and 30.

<sup>113</sup> *ibid*; para 7

<sup>114</sup> *ibid*; para 11

## Chapter 5: Structure and institutional framework of the NPM

Having a clear internal structure is especially important in the case of NHRIs holding the NPM mandate. The SPT recommends setting a separate NPM body to execute the NPM mandate. Since the Commissioner for Human Rights designated as the NPM performs other functions in addition to those under the OPCAT, its NPM tasks should be placed within a separate division or department, with its individual staff and financial plan.<sup>115</sup> It is vital that the internal structure, procedures, and division of tasks, roles and responsibilities of each NPM are made clear. In addition, the structure of the overall system should remain manageable, coherent and understandable to all actors, including the authorities, persons deprived of their liberty, and the NPMs themselves. Thus, best practice suggests identifying a coordinating body.<sup>116</sup>

The main actors of the NPM in Kazakhstan are the Office of the Commissioner for Human Rights together with the supportive body the Centre for Human Rights, the Coordination Council, the Commission, and the NPM members. As it was mentioned before the NPM in Kazakhstan is formed under the Office of the Ombudsman and the Ombudsman himself is a central figure in the work of the NPM due to immense power and responsibilities granted by the NPM law. The Coordination Council is an advisory body formed to regulate the activities of the NPM, even the powers granted to the organ are rather appropriate for the executive body. The Commission is the ad hoc organ that main function is the election of the members of the Coordination Council. The NPM members are the experts running the primary function of the NPM - the monitoring visits and providing the recommendations.

### 5.1 Commissioner for Human Rights

The NPM in Kazakhstan is a part of the Office of the Commissioner for Human Rights and its supporting entity, the National Centre for Human Rights. The Commissioner for Human Rights,

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<sup>115</sup> The SPT Guidelines, p.5, para. 32.

<sup>116</sup> APT, NPM Manual, p.254.



who is the Chairman of the Coordination Council has the special status and role, he is mandated to coordinate the activity of the NPM members, approve the plan of work of the Coordination Council; takes actions compliant with the laws of the Republic of Kazakhstan to ensure that NPM members have required capacity and professional knowledge. He examines and decides on the cases of any complaints from the heads of administration of institutions, being subjected to preventive visits, in the case of misconduct NPM members.<sup>117</sup>

The Ombudsman generates and approves all the regulations and rules of the NPM documents including the regulations on the procedure for the selection of participants of the NPM; Procedure for the formation of groups of members of the NPM for the preventive visits; guidelines for preventive visits; the procedure for preparation of the annual consolidated report on the results of preventive visits.<sup>118</sup>

Moreover, the Ombudsman plays a role in the results of the preventive visits conducted by the NPM members. He is vested to examine complaints and reports, adopted by the participants of the NPM. He is also dealing with the torture complaints and revision of the NPM member's reports and directs them to the Prosecutor's office for further investigation. He can also contact the authorized state bodies or officials with a request to initiate disciplinary or administrative action or criminal proceedings against the person in official capacity that violate the rights and freedoms of man and citizen, based on the reports on the results NPM members order preventive visits.<sup>119</sup>

## 5.2 Coordination Council

The powers of the Coordination Council of the NPM specified in the Regulations, ratified by the Ombudsman. The main responsibility of the Coordination Council, as an advisory body is to make suggestions and comments to address the problems in the implementation of the activities of the NPM. The tasks of the Council contain operational support of the preventive visits conducted by the NPM members. The members of the Council can request necessary documents from government agencies, institutions and organizations of preventive visits, and organizations.

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<sup>117</sup> Article 4 of the NPM Law in Kazakhstan

<sup>118</sup> *ibid*

<sup>119</sup> *ibid*.

The Council determines the dates and the establishing the list of the places of detention and closed institutions subjected to preventive monitoring within the allocated budget.

The Coordination Council's 19 members, representatives of civil society sector of Kazakshstan, conducted 5 meetings from the time of the establishment, mostly for the reason to select NPM members according to the procedures. The Coordination Council is also vested to invite to its meetings the heads and representatives of various public authorities, administrations of the institutions being monitored, public associations and other organizations. The members present the reports and the information from the relevant officials on issues within their competence. The members also receive the reports and complaints of torture and ill-treatment and review the results of preventive visits. Considering the reports of the NPM members the Council generates and sends recommendations to public authorities to improve the treatment of persons detained in institutions and organizations subjected to preventive visits. After the consultation they may develops proposals on improvement of legislation of the Republic of Kazakhstan. Another task of the Coordination Council is the preparation of the annual consolidated report of the members of the NPM with regard to their reports on the results of preventive visits.

The Coordination Council has an Administrator, who also have special responsibilities to organise and supervises the preparation of materials for consideration by the Coordination Council members during the meetings. For the rest, all the members of the Coordinating Council have equal rights in terms of expressing their ideas freely at the meetings. Any of the members can propose suggestions and recommendations but if they have opposing opinion they can deliver it in writing.

The Civil society organisations expressed some concerns that NPM's decision making structure is not 'democratic' enough. The Coordination Council is an executive rather than a governing or advisory body, with the real power belonging to the Ombudsman.<sup>120</sup>

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<sup>120</sup> The CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 53 Session (03 Nov 2014 - 28 Nov 2014) Information from Civil Society: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en) [accessed 8 June 2015].

## Chapter 6: Independence of the NPM

Article 18 of the OPCAT:

'1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

(...)

4. When establishing national preventive mechanisms, States shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.<sup>121</sup>

The visits by NPMs cannot effectively prevent torture or other ill-treatment if the NPMs are not absolutely independent. Article 18(1) of the OPCAT is the main provision requiring States to take measures to ensure the functional independence of NPMs. Article 18(4) refers to the Paris Principles, which themselves include additional detail about measures to safeguard the independence of such institutions. The term independence applied to the impartiality of the members and the staff of the NPM, as well functional and financial independence.

### 6.1 Independent members and staff

The members of the NPM should have expertise and be personally and institutionally independent from the State authorities.<sup>122</sup> NPMs should not include persons who are occupying working positions in the criminal justice: prosecutors or attorneys and judges. The members of the NPM should not have multiple roles for a prisoner/detainee, institution, or officials to avoid the conflict of interests.<sup>123</sup> The members of NPMs should also be personally independent from

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<sup>121</sup> OPCAT, Art. 18.

<sup>122</sup> SPT Guidelines.

<sup>123</sup> See also the International Council on Human Rights Policy and Office of the High Commissioner for Human Rights publication, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva, 2005); and UN Centre for Human Rights Professional Training Series No. 4, *National Human Rights Institutions: A Handbook on*

the executive government - they should have no personal connections with significant political figures in the executive administration, or with law execution employees, such as political allegiances, close friendships, or pre-existing professional relationships. Similarly, if the suggested member would in fact act in an objective manner, if she or he could practically be supposed as being biased, this could compromise the work of the NPM.<sup>124</sup>

The NPM should have authority to select and employ its own staff based on requests and criteria determined by the NPM itself.<sup>125</sup> The International Council on Human Rights Policy and the UN Office of the High Commissioner for Human Rights state that the staff of national human rights institutions “should not automatically be seconded or re-deployed from branches of the public service.”<sup>126</sup> To guarantee functioning sovereignty, the NPM should also have power to develop its own policies of process without external modification.<sup>127</sup>

The Paris Principles recommend that NHRI might involve representatives of the Parliament and Government departments.<sup>128</sup> However, in the context of the OPCAT, the presence of parliamentarians who are participants of the governing party, or other government deputies, in the NPM would be 'inappropriate, even in an advisory capacity'.<sup>129</sup> First, the OPCAT requires that the NPM and State authorities enter into a dialogue with one another about possible measures to implement the NPM's recommendations.<sup>130</sup> The government authorities cannot take part in the discussions and negotiations within the NPM that will result the recommendations to the government itself. Another reason is that the work of the NPM will essentially involve “confidential information”, including sensitive statements from individual detainees, which Article 21(2) of the OPCAT specifies is to be restricted from revelation to the State authorities. These reflections, taken together with the specific functions of the NPM as separate from other

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the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights (Geneva, 1995), pp. 12-15.

<sup>124</sup> NPM Manual, p.88.

<sup>125</sup> *ibid.*, p.13

<sup>126</sup> *ibid.*, p.13

<sup>127</sup> NHRI Handbook, p. 11, paragraph 71.

<sup>128</sup> Paris Principles, Composition and guarantees of independence and pluralism, (d), (e).

<sup>129</sup> OPCAT Manual, p.41.

<sup>130</sup> OPCAT Article 22.

types of more, exclude the presence of the government representatives in any capacity within the NPM.<sup>131</sup>

In the case of Kazakhstan the governmental representatives are present in the structure of the NPM, which is not according to the above-mentioned recommendations. The membership of the Coordination Council distributed among the 19 civil society representatives and relevant public figures and academic figures. However, the Coordination Council members being elected by the special Commission under the Commissioner for Human Rights consisting of 17 people. The members of this Commission are appointed by the Ombudsman, involving the representatives of the governmental structures: the Deputies of the Parliament of Kazakhstan, and representatives of state authorities.

The members of the NPM are those who conduct the preventive visits to the closed institutions and detention facilities. They are elected by Coordination Council from the number of representatives of Public Monitoring Commission and civil society organizations, human rights activists, lawyers, social workers, medical experts etc.<sup>132</sup> The members of the NPM are elected by the Coordination Council following the procedure set out in the special regulations declared by the Ombudsman.<sup>133</sup> The election of NPM members is preceded by the announcement, published on the Ombudsman's website, social media networks and other media.<sup>134</sup>

The Kazakh NPM comprises of 112 members who were elected on 19 February 2014, at the first meeting of the NPM Coordinating Council. They were classified under 15 regional groups made of 5 to 12 members each. There is no certain limitation on the number of NPM members in each of the region of the country established by law. The number of NPM members vary in each of the region. As there is no certain limit for NPM membership documented in the legislation, the

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<sup>131</sup> NPM Guide, p.40.

<sup>132</sup> Ombudsman Information Bulletin 2014, p.

<sup>133</sup> See The regulations for the election of participants of the national preventive mechanism approved by the order of the Commissioner for Human Rights on September 26, 2013 No 20 (original document: Правила отбора участников национального превентивного механизма Утверждены распоряжением Уполномоченного по правам человека от 26 сентября 2013 года No 20)

<sup>134</sup> See The Regulations for the formation of groups of members of the national preventive mechanism for preventive visits approved by order the Commissioner Human Rights on September 26, 2013 № 21 (original document: Правила формирования групп из участников национального превентивного механизма для превентивных посещений Утверждены распоряжением Уполномоченного по правам человека от 26 сентября 2013 года № 21)

Coordination Council may reject some applications. The Coordination Council explains the limited places available for NPM members due to the limitation of budget. However, this gap in legislation may be used as a tool of selective approach to NPM membership election.

NPM members receive compensation for the preventive visits conducted from state budget. The document that regulates remuneration is the Protocol of Coordination Council, that state the time and list of the institutions and organizations that have to be subjected to monitoring visit, the composition of the groups of NPM members, and confirmations of the expenses including the overhead expenditures on transportation and report writing upon the visits. The members of the NPM receive remuneration for the report submitted after the visit. The remuneration amounting the minimal wage that equals 21,364 tenge for 2015 (approximately 100 euro). Apart from that the members receive compensation for the expenditures connected with transportation of to the remote places of preventive visits and stationary expenditures. It is mentioned by the Ombudsperson that the salary received for the successful submission of a report concerning the preventive visit conducted that provides detailed overview and recommendations to be implemented.<sup>135</sup> There are claims that the opportunity to receive money for preventive visits attract people who do not possess required knowledge and skills to conduct preventive visits.<sup>136</sup> The major cities can suggest experienced human rights workers, psychologists, journalist, and people who have active social position. As for the other regions, there is a visible lack of experienced specialists and people who can uphold active position. According to the Ombudsman institute data, in 2014 there were 165 applications in total for 112 available places for NPM members, determined by the Coordination Council. The comparatively low participation in NPM members election is predictable as the body is newly emerged. On the other hand, the positions were not extensively advertised, and appeared only on the web page of the Ombudsman office. Article 18 (2) of the OPCAT requires that members have the necessary expertise and that the appointment process strives for a gender balance and the adequate representation of ethnic and minority groups in the country. Both of these factors are difficult to achieve due to the small number of participants during the NPM enrolment process.

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<sup>135</sup> The Information Bulletin of the Commissionaire for Human Rights in the Republic of Kazakhstan Number 1 for 2014 (original document: Информационный бюллетень Уполномоченного по правам человека в Республике Казахстан № 1) за 2014 год, available at: <http://www.ombudsman.kz/upload/file/b1-2014.pdf> [accessed 5 May 2015]

<sup>136</sup> Interview with NPM member Tatiyana Chernobil.

The NPM members are enrolled every year and there is a list of certain documents they have to submit in order to be qualified for the election by Coordination Council. The documents are regular for the governmental officials: such as the certificate on the absence of criminal records, that they have to submit every year as a bureaucratic routine. The human activists mention, as many institutions are under custody, the special permit is required and members of civil society should be committed to certain qualifications, which is justified but only from the point of view of the order of closed institutions, not the exclusion of "unwanted" members of the NPM.<sup>137</sup>

However, the NPM legislation contains a number of limitations towards the membership of the NPM and some of these give rise to concerns. For example, those suspected of a crime cannot be members of the NPM. This seems to be overly restrictive as the person does not need to be charged or be convicted of having committed a crime, a mere suspicion of having committed a crime is sufficient to refuse membership of the NPM. This not only stands at odds with the presumption of innocence, encapsulated in Article 14 of the ICCPR but also holds potential for abuse. Equally, those on the psychiatric or narcological register cannot become members of the NPM. This once again seems overly restrictive and even potentially contradictory to the provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD) and Article 5 of the OPCAT.

Finally, also those who have been dismissed from the service, service at penitentiary institutions and those who have been struck off the register of advocates for "negative reasons" are prevented from becoming members of the NPM. Once again, this appears to be overly restrictive and does not comply with the pluralistic composition of the NPM as required by OPCAT.

Another issue that was mentioned in various reports is that there is no clear provision regulating the removal of NPM members. The law is vague about the circumstances that may cause removal of an NPM member from the monitoring group. As grounds for such a dismissal the law refers to 'causing a threat to the functioning safety of the facility', 'interference with the activities of the facility', or 'circumstances raising doubts about the impartiality of the NPM participant'.<sup>138</sup>

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<sup>137</sup> *ibid.*

<sup>138</sup> OSCE Supplementary Human Dimension Meeting On Prevention Of Torture, 10-11 April 2014, Vienna Statement By The Ngo Coalitions Against Torture In Kazakhstan, Kyrgyzstan And Tajikistan, PC.SHDM.NGO/11/14.

## 6.2 Appointment procedure and composition

The Paris principles on the NPM members appointment states that:

'In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.'<sup>139</sup>

Enacting suitable procedures for the selection of members can be particularly important for guaranteeing independence of the mechanism. Therefore undoubtedly there is an obligation upon states parties to provide the necessary services and resources to guarantee an appropriate NPM appointment process.<sup>140</sup> The law determining the NPM should define "method of appointment, criteria for appointment, duration of the appointment, immunities and privileges, dismissal and appeals procedure."<sup>141</sup> The decision as to whom to appoint should not be directly decided by the executive branch of the Government, though this does not exclude formal appointment by the head of state after the decision has been taken by a separate body.<sup>142</sup> The procedure should authorize consultation with or direct participation of a broad variety of civil society elements such as non-governmental organisations, social and professional organisations, universities, and other experts.

'1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

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<sup>139</sup> Paris Principles, Composition and guarantees of independence and pluralism (3)

<sup>140</sup> R. Murray 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does Not Fit All' in *Netherlands Quarterly of Human Rights*, Vol. 26/4 (2008); p. 497.

<sup>141</sup> APT NPM Guide, p.41.

<sup>142</sup> Assessing NHRI, op.cit., p. 14.



- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
- (b) Trends in philosophical or religious thought;
- (c) Universities and qualified experts;
- (d) Parliament;
- (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).<sup>143</sup>

Creation of a special body including representatives from these communities, which deal with the selection of the NPM members is desirable. According to the best practice example, the International Council on Human Rights Policy and the OHCHR have recommended that for most NHRI “five years is a reasonable period within which members can be effective but not too influenced by concerns about future job prospects.”<sup>144</sup> During the fixed term of office, an individual should have strong security of occupation; in other words, members of the NPM should be subject to removal from office, only by the vote of a large majority of the NPM members.<sup>145</sup>

### **6.2.1 Appointment procedure and personal independence of the Commissioner for Human Rights**

The Decree on the Ombudsman in section 2 describes the appointment procedure for the Ombudsman. The criteria specified give rise to some concerns in the light of the independence

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<sup>143</sup> Paris Principles, para B.1.

<sup>144</sup> *ibid.*, p.12.

<sup>145</sup> NPM Guide, p.42.

requirements specified in the OPCAT and Paris Principles. The Article 8 states that the President of the State appoints the Ombudsman after consultations with the Committees of the Parliament although the list of candidates is determined by the President as well. This does not imply an inclusive and transparent procedure, as the selection of the candidates happens to be in the exclusive competency of the executive body. Furthermore, upon appointment, the Ombudsman is to be adjured by the President in the presence of the Chairmen of the Chambers of the Parliament, Chairmen of the Parliamentary Committees and other officials and give an official oath, as arranged by Article 12 of the Decree.

Additionally, the vacancies for the position of Commissioner are not advertised openly and the selection process does not engage a broad consultation with civil society. Such a process, the obvious participation of the executive body give a rise to concerns at least in respect of the perceived independence of the Ombudsman.<sup>146</sup>

The Ombudsman can be removed from the position by the President of the State, according to the Article 8 of the Decree. Though the reason for removal, as described in Article 14, are very ambiguous: for instance, the Ombudsman can be removed for gross abuse of the official responsibilities, command of offense inconsistent with the position and undermining the authority of the State. In absence of any additional specification as to what this entails and in the lack of any process whereby the possible elimination of the Ombudsman would be considered in an open and transparent procedure, the personal independence of the Ombudsman is very compromised.<sup>147</sup>

Being assigned by a President the Ombudsman is factually being a governmental. As any other state officials he is limited by censorship that restrict any criticism of the Government or Governmental officials, including the President. The Ombudsman is a civil servant and a state employee, appointed, and required to abide, among others, by the Ethics Code for Civil Servants and State Employees. This Code instructs civil servants and state employees to refrain from undertaking 'any discrediting actions against the institutes of the State'. This is particularly the case with the present Ombudsman, Mr. Askar Shakirov, who is former state official to different Ministries and a person with a rather bureaucratic approach to human rights. The human rights

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<sup>146</sup> Bristol Background paper, p. 16.

<sup>147</sup> Ibid.

activists claim the Ombudsperson lacks the influence and has never made effective public statement on controversial issue.<sup>148</sup>

### 6.2.2 Functional and financial independence of the Commissioner for Human Rights

According to the article 18 (1):

'1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.'<sup>149</sup>

Article 18 (3) obliges states parties to provide their respective NPMs with the necessary resources for their functioning and the Paris Principles require that:

'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.'<sup>150</sup>

Further assistance on the budgetary issues is provided by the SPT in its Guidelines for the ongoing development of NPMs, which has noted that NPM budget should be 'ring-fenced'. Therefore there are two basic requirements in terms of the NPM budget: it should be adequate to allow the NPM to pursue the mandate and only the NPM itself should decide on the expenses.

The budgetary requirements of the Commissioner for Human Rights Office are very limited as Article 35 of the NPM law only provides provision that the activities are funded by the state budget, but there are no further requirements as to who regulates the amount of such budget or what are the powers of the Ombudsman to decide how that budget is distributed. Therefore, some international bodies have expressed concerns over the impartiality of the body due to

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<sup>148</sup> *ibid.*

<sup>149</sup> OPCAT, Article 18(1).

<sup>150</sup> Paris Principles, Composition and Guarantees of Independence and Pluralism; para 2.

financial issues. Therefore the CAT Committee has expressed its worries over the lack of own budget for the Ombudsman's Office, observing that this obstructs the independence of the unit.<sup>151</sup> Besides, the Venice Commission has suggested that legislation on the Ombudsman should provide for the adequate budgetary allocation as well as ensure budgetary independence of the body. The current budgetary provisions of the Commissioner for Human Rights fail to satisfy Article 18 of the OPCAT.

The work of the Ombudsman, as set in the Article 30, is maintained with the support of the National Centre for Human Rights, the legal basis of which is also agreed by the Presidential Decree.<sup>152</sup> According to Article 14 of this Decree, it is the Commissionaire for Human Rights who is responsible for the arrangement of the Centre and appointment and removal of the Head of the Centre, according to the Article 15. That means that the Ombudsman is in control of the entity, which supports the work. The fact that gives questions the guarantees towards the personal independence of the Ombudsman, as described above, which may adversely impact the independence of the National Centre for Human Rights and the NPM.

In addition, according to Article 19 of the Decree on the National Centre for Human Rights,<sup>153</sup> the financial and technical supplies services for the Centre are provided by the Administration of the President. While Article 18 stipulates that the financial plan of the Centre is approved by the Head of the Centre together with the Ombudsman. However, there are no additional requirements on whether any other body or authority can interfere with the budget planning or whether the plan should be developed by the Administration. Thus, there emerges a large possibility of potential intervention of the executive branch over the budget, which gives similar worries in terms of the functional independence of the Centre and in respect of the Ombudsman.

The impartial operation of the NPM is mentioned in Article 20 of the OPCAT, which sets out more detailed requirements about its independent function. The Paris Principles which are mentioned in Article 18 (4) of the OPCAT, require that:

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<sup>151</sup> Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Concluding Observations of the Committee Against Torture. Kazakhstan. CAT/KAZ/CO/2 of 12, para. 23.

<sup>152</sup> Order of the President of the Republic of Kazakhstan of 10th December 2002 No 992 On the Establishment of the National Centre on Human Rights (original document: Указ Президента Республики Казахстан от 10 декабря 2002 года N 992 О создании Национального центра по правам человека).

<sup>153</sup> *ibid.*

‘Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional.’<sup>154</sup>

Considering these requirements, serious concerns appears when observing the relevant provisions concerning to independence of the Office of the Commissioner for Human Rights. The right of the Ombudsman to consider complaints limited, since according to Article 18, the Ombudsman has no power to consider complaints against 'actions and decisions of the President, Parliament and its members, the Government, Constitutional Council, Prosecutor General, Central Electoral Commission and the courts.' This is a very obstructive provision, which doubts the ability of the Commissioner to operate effectively.<sup>155</sup>

A further practical feature that obstruct the ability of the Ombudsman's Office to fulfill the the OPCAT requirements, is the fact that the institution does not have regional representatives. Kazakhstan has a vast territory covering 2.7 million square kilometers. However, the Ombudsman Office residing only in Astana, the capital city of the country. It was recommended

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<sup>154</sup> Paris Principles, Methods of Operation.

<sup>155</sup> CSOs submission to CAT, 2014.

by the Venice Commission to organise regional or local offices staffed by representatives of the national Ombudsman, with or without being elected as "Deputy Ombudspersons".<sup>156</sup>

The Ombudsman's office in Kazakhstan has a traditional role envisioned for the NHRI - it is charged with more of a "reactive mandate", since it deals with complaints. The OPCAT on the other hand requires a preventive method, which in order requests pro-active engagement with the governing authorities. The challenge for the Ombudsman Office to adapt to this as that will demand not only a change in terms of character of the institution, but also in terms of "thinking and methodology."<sup>157</sup>

### 6.3 Independence of the Coordination Council members

The members of the Coordinating Council, with the exception of the Ombudsman, elected by a special Commission, which is ad hoc body set by the Commissioner for Human Rights. All the regulations concerning the appointment, the composition, responsibilities, and removal from the office are documented in the Regulations issued by the Ombudsman office. The Commission members are appointed by the Ombudsman from the citizens of the Republic of Kazakhstan.<sup>158</sup> The Commission is formed from the 'Deputies of the Parliament of the Republic Kazakhstan, representatives of state bodies of Kazakh public associations, international organisations, academics, mass media and other persons, with relevant expertise and experience in the field of human rights. The total number of members of the Commission is 17 people. The composition of the Commission is approved Commissioner for Human Rights every five years.

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<sup>156</sup> European commission for democracy through law (Venice commission) Opinion on the possible reform of the ombudsman institution In Kazakhstan Adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), p. 9

<sup>157</sup> Bristol Background Paper, 19. See Summary and Recommendations for the Conference OPACT in the OSCE region: What it means and how to make it work? Prague, Czech Republic, 25-16 November 2008; p. 6; Available at: <http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf> (accessed on 20 May, 2015)

<sup>158</sup> Regulation of the Commission on the election of members of the Coordination Council under the Commissioner for Human Rights Approved by order the Commissioner Human Rights on December 29, 2013 number 29 (original document: Положение о Комиссии по избранию членов Координационного совета при Уполномоченном по правам человека Утверждено распоряжением Уполномоченного по правам человека от 29 декабря 2013 года № 29)

The composition of the Commission on the election of the Coordination Council members involve the deputies of the Parliament, and the representatives of the state organs. This fact is allowable by the Paris Principles, even though is not recommended in regard to NPM. However, the Commission is an organ that is not directly involved in the NPM work. The Commission is an advisory body granted the power to elect the members of the Coordination Council. The Commission general standard meeting is conducted every 2 years or according to the decision of the Ombudsman, who is also the member and the chairman of the Commission.

The Chairman of the Coordination Council is also appointed by the Human Rights Commissioner from the elected members of the Coordination Council. The election of members of the Coordination Council is carried out by secret ballot by a simple majority of the commission. As for the terms of the appointments: the half of the members of the Coordination Council is elected every four years. The term of the other half of the members expires every 2 years. After the first election, the names of those members with two-years term is chosen by the Chairman of the Coordinating Council. In the circumstances of doubtful impartiality of a member of the Coordination Council, the Chairman of the Coordination Council can withdraw the membership. The Coordination Council can also send a notification in any form to replace its member to the Commissioner for Human Rights.<sup>159</sup>

## 6.4 Financial Independence

Article 18:

'3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms. (...)<sup>160</sup>

Paris Principles:

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<sup>159</sup> Bulletin of Ombudsman, 2014.

<sup>160</sup> OPCAT, Article 18.

"The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence."<sup>161</sup>

Article 18(3) obliges States Parties to provide the necessary resources for the functioning of the NPM. According to the Paris Principles, financial independence is a fundamental requirement; deprived of it, a NPM would not be able to exercise its functional independence, nor its impartiality in decision-making processes. Therefore, as an additional protection to maintaining the independence of the NPM, the founding and structure of the financial provision should be stipulated in the implementing law.<sup>162</sup>

The law should also indicate the procedure for the allocation of annual funding to the NPM, and that process should not be under direct executive government control. The International Council on Human Rights Policy (ICHRP) and the UN OHCHR suggest a procedure for NHRIs<sup>163</sup> that could serve NPMs well.<sup>164</sup> It is recommended that NPMs draft their own annual budget. The universal amount of the funding required under that budget to be submitted to a vote in Parliament; Within the allocation made by the Parliament, the NPM would be permitted to regulate its spending on specific matters. The process recommended by the ICHRP and OHCHR underlines that the NPM budget should not be just an 'item in a larger ministry budget'. Financial accountability should be through regular public financial reporting, and a yearly impartial review.<sup>165</sup>

In relation to the financing of the NPM, the Kazakh NPM legislation only states that the compensation of the expenses incurred by the members of the NPM shall be reimbursed according to the Order established by the government. It is essential that, when adopted, this Order is such as to allow the requisite degree of financial independence of the NPM as per

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<sup>161</sup> Paris Principles, para B2.

<sup>162</sup> NHRI Handbook, op.cit, p. 11, paragraph 74.

<sup>163</sup> Assessing NHRI, op.cit, p. 13 and NHRI Handbook, ibid., p. 11.

<sup>164</sup> NPM Guide, p. 46.

<sup>165</sup> Ibid.



Article 18 of OPCAT and the Paris Principles. Moreover, there are no provisions regarding the financing of the work of the NPM and thus it is currently unclear how the NPM will be able to, for example, ensure transport to various places of deprivation of liberty or whether it will have any funding for administrative support. It is therefore crucial that direct provisions regarding the financing of NPM are adopted which would correspond to the requirements of Article 18(1) of OPCAT.

The NPM financing is dependent on Ombudsman financing and there is no separate budget line in the state budget developed specifically for NPM. Exactly the same situation appears with Ombudsman institute, there are very vague formulations concerning the financing of the organ. The budgetary provisions of the Ombudsman's Office are very scarce and activities are funded by the state budget without further specification on how the procedure looks like or what are the powers of the Ombudsman to decide how that budget is spent. The Article 18 demands that the Ombudsman and head of the Human Rights Centre under Ombudsman approve the financial plan. However, there are no further provisions on, for example, whether any other institution or authority can interfere with such plan or whether such plan must be met by the Administration. Therefore there appears to be a rather large scope of potential influence of the executive over the budget, which gives similar concerns in terms of the functional independence of the Centre as those in respect of the Ombudsman described above.

Thus the CAT Committee has already expressed its concerns over the lack of own budget for the Ombudsman's Office, noting that this obstructs the independence of the NPM as well. Furthermore, the Venice Commission has recommended that legislation on the Ombudsman should provide for the adequate budgetary allocation as well as ensure budgetary independence of the body. It thus appears that the current budgetary provisions of the Ombudsman's Office would fail to satisfy Article 18 of the OPCAT. Therefore, the current funding strategy clearly prevents NPM from being independent from the Government. Moreover, the NPM have a real threat to be subjected to financial control that affects its efficiency and impartiality. In order to avoid financial control and increase the independence of the mechanism, the NPM should have an opportunity to determine the budget and the separate line in the state budget should be developed, together with transparency on the budget determination and allocation of resources.

## Chapter 7: Membership and Composition

### 7.1 Capabilities and professional knowledge

Article 18(2) of the OPCAT stipulates on the expertise and professionalism of the NPM members:

'(...) 2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. (...)'<sup>166</sup>

For the NPM operational effectiveness, the members not only must be sovereign from the government, the judiciary, and the authorities accountable for places of detention and closed institutions. The Article 18 clearly demands, the members must have appropriate expertise and the NPM in general must combine the mandatory diversity and balance of diverse areas of professional experience.<sup>167</sup> The UN Special Rapporteur on Torture has specified that "of the utmost importance that States Parties ... ensure membership from different professions" in the NPM.<sup>168</sup> The States Parties thus must consider the suitable variety of professionals, and acknowledge the requirement for balance, in the executing the OPCAT.

The APT NPM Guide recommends a combination of the members with the following competences and professional qualifications should be involved in the work of the NPM:

- '1) lawyers (especially with expertise in national or international human rights, criminal law, refugee and asylum law, and in some cases humanitarian law),
  
- 2) doctors (including but not limited to forensic specialists);

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<sup>166</sup> OPCAT, Article 18(2).

<sup>167</sup> NPM Guide, p.50.

<sup>168</sup> UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 70.

- 3) psychologists and psychiatrists;
- 3) persons with prior professional experience regarding policing, administration of prisons and psychiatric institutions;
- 4) NGO representatives;
- 5) persons with prior experience visiting places of detention;
- 6) persons with prior experience working with particularly vulnerable groups (such as migrants, women, juveniles, persons with physical or mental disabilities, indigenous peoples, and national, ethnic, religious or linguistic minorities);
- 7) anthropologists;
- 8) social workers.<sup>169</sup>

The NPM can also engage external experts in order to complement the operational experience. The legislation should explicitly allow the NPM to involve such specialists and allow the specialists to accompany the NPM members on their visits. However, this recommendation not followed by the legislation of Kazakhstan. Only NPM members can do the monitoring visits and there is no stipulation on involving of any external actors during the monitoring visits.

## **7.2 Gender Balance and Ethnic and Minority Representation**

Article 18 of the OPCAT instructs:

- '2. (...)They shall strive for a gender balance and adequate representation of ethnic and minority groups in the country. (...)<sup>170</sup>

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<sup>169</sup> NPM Guide, p.50

<sup>170</sup> OPCAT, Article 18(2).

The recommendation indicated in Article 18 is important in terms of encouraging equality in public institutes, furthermore it particularly important to guaranteeing that the NPM have the expertise and the capability to collect the information required to make effective recommendations after the preventive visits.

The actual knowledge of the cultural, religious, medical, and other needs of diverse groups within the society assists in guaranteeing that NPM members are capable to recognize how an institution addressing the requirements of detainees from vulnerable groups. Accordingly, gender balance and representation of ethnic and minority groups, and persons with disabilities, in the NPM are necessary for it to work efficiently. Since Kazakhstan is a highly ethnically diverse country this requirement are even more important to be addressed. Having a variety of linguistic capabilities of the members of the NPM are also important, as NPM members will generally acquire information from interviewees best, if they can communicate directly without interpreters.

Since the detainees and prisoners can be interviewed concerning extremely intimate subjects they may feel more comfortable talking with persons of their own gender, or minority group representative. For example, a female prisoner can be more open about sexual violence or harassment if a female member of the NPM interviews her. Representatives of a certain ethnic group or minority group might be more comfortable discussing their treatment with someone who is from the same group. They may be doubtful of the reasons of a person who is from another group. For above-mentioned reasons, the clause specified in Article 18 should be incorporated in the domestic implementing legislation and in the appointment process for NPM membership.

The Article 8(2) of the Law on NPM states:

'(...)2. When forming a preventive visit group nobody shall be discriminated against on the grounds of origin, social, official and proprietorial status, gender, race, nationality, language, religion, belief or other grounds and circumstances.(...)'

It is not possible to trace if this requirement is followed, since there is no information concerning the minority or gender representation available. The Information Bulletin issued by the

Ombudsman contains the full list of the members of the Coordination Council, the Commission under the Ombudsman, and the list of the leader group for every of the 15 regions.<sup>171</sup> There are various proportional representation according to the gender, ethnicity and language in every regional NPM group.

## Chapter 8: Mandate and functioning of the NPM

### 8.1 Monitoring visits procedure

Article 19(a) of the OPCAT states:

'The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture, cruel, inhuman or degrading treatment or punishment; (...)<sup>172</sup>

The idea of initiating a system of national preventive monitoring to places of detention was devised for assurance that places of detention were visited on a regular basis. The more frequent and regular the visits, the more effective the monitoring schedule will work as a preventive instrument.<sup>173</sup> Article 19(a) however does not stipulate what regularity of visits should be, or what the term “regularly examine” denotes. This implies that NPMs have the power to determine the regularity themselves. Therefore, NPMs are able to shape their schedule of preventive monitoring visits to meet the needs in the national context.<sup>174</sup>

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<sup>171</sup> See The Information Bulletin of the Commissioner for Human Rights in the Republic of Kazakhstan, Number 1 for 2014 (original document: Информационный бюллетень Уполномоченного по правам человека в Республике Казахстан № 1 за 2014 год), available at: <http://www.ombudsman.kz/upload/file/b1-2014.pdf> [accessed 5 May 2015]

<sup>172</sup> OPCAT, Article 19(a)

<sup>173</sup> OPCAT Manual, p.92

<sup>174</sup> *ibid.*

The public monitoring over the conditions of detention and respect of the rights of detained persons in closed institutions cannot be properly traced according to the results of a single visit. Moreover, the NPM members provide recommendations, implementation of which will have to be supervised. Due to the fact that vast majority of institutions in Kazakhstan have never been visited before, the institutions might require several numbers of visits per year.<sup>175</sup> Also the vast majority of institutions were never open to the PMC, and the administrations of the institutions were not ready for public scrutiny by NPM monitoring groups. The administrations of some institutions are not aware of the external public monitoring bodies.<sup>176</sup>

The legislation for NPM in Kazakhstan distinguishes three types of visits that can be conducted by NPM members – the periodic, intermediate and special visits. Article 7 of the NPM law contain provisions on the types and frequency of preventive visits:

- 1) Periodic preventive visits, carried out on a regular basis, not less than four times a year;
- 2) Interim preventive visits carried out between periodic preventive visits to monitor implementation of recommendations that followed previous periodic preventive visit, as well as to ensure non-prosecution of persons whom NPM member interviewed by administration of an institution subject to preventive visit.;
- 3) Special preventive visits carried out as follow-up of received torture and ill-treatment allegations and complaints.<sup>177</sup>

The Coordination Council of NPM develops the yearly plan of monitoring visits, which includes exact terms for periodic and intermediate visits and the list of institutions to be visited according to the budget allocate by the Government.

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<sup>175</sup> 'National Preventive Mechanism under the Optional Protocol to the Convention against Torture' by Turmagambetova, Executive Director of the Public Fund's Charter for Human Rights. (original text: 'Национальный превентивный механизм в соответствии с Факультативным протоколом к Конвенции против пыток' Ж. Турмагамбетова, Исполнительный директор ОФ Хартия за права человека)

<sup>176</sup> *ibid.* p. 3.

<sup>177</sup> The Law on NPM, Article 7(1).

The periodic and intermediate visits lasts usually one day and not more than two days not counting the time spent on the way to the place and back. There is also an opportunity to prolong the visit for 5 days in exceptional cases from the consent of CHR. In practice, most of the visits do not last longer than one day.<sup>178</sup> Some of the NPM members notice that sometimes the time is not sufficient to establish trust relations with detainees. Moreover, different monitoring groups can be scheduled to visit one detention institution, which restricts the possibility to trace if previous recommendations were implemented. This is also caused by the poor communication between NPM members – there is lack of established exchange of the information obtained during the visits.<sup>179</sup> The communication between regional NPM groups is even looser due to the lack of common trainings and absence of standardization of visiting procedures.

The special preventive visits are unannounced and based on the information that torture and ill-treatment being practiced in a particular institution. The decision concerning the conduct of a special visit is made by the Commissioner of Human Rights himself. This aspect is limiting the ability of NPM to react swiftly for possible torture allegation since the process of asking for the approval may be lengthy and bureaucratic. Moreover, there was already a case when the Ombudsmen declined the proposal for the special visit.<sup>180</sup>

All the visits conducted by the members of NPM divided into groups of maximum four people. There is no opportunity to conduct the visits more than four people according to the regulations. The Coordination Council choose a leader of the group, who also determines the composition of the NPM group, taking into account the specifics of the visited institutions and organizations to carry out preventive visits. The NPM members notice a tendency that in most of the time, the leaders of the group those, who are more or less loyal to the Government and unlikely to critical and public concerning the information obtained.<sup>181</sup>

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<sup>178</sup> 'National Preventive Mechanism under the Optional Protocol to the Convention against Torture' by Turmagambetova, Executive Director of the Public Fund's Charter for Human Rights. (original text: 'Национальный превентивный механизм в соответствии с Факультативным протоколом к Конвенции против пыток' Ж. Турмагамбетова, Исполнительный директор ОФ Хартия за права человека)

<sup>179</sup> Interview with NPM member Zulfia Baisakova.

<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*

## 8.2 Access to All Places of Detention

Article 4 of the OPCAT stipulates that States Parties should allow visits to:

'(...) any place under its 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 (hereinafter referred to as places of detention). (...)'<sup>182</sup>

It also contain provision on the definition of the 'deprivation of liberty':

'(...) any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.'<sup>183</sup>

All the State detention facilities in Kazakshtan can be classified according to the Ministries and governmental bodies, which they fall under:

- 1) The Ministry of Health: child care institutions, orphanages, juvenile detention facilities, special hospitals, medical and social rehabilitation centres;
- 2) The Ministry of Education and Science: boarding schools, juvenile rehabilitation centres;
- 3) The Ministry of the Interior: penitentiary system, including pre-trial, post-trial and administrative detention facilities, social and psychological rehabilitation centres for drug users;
- 4) Ministry of Labor and Social Welfare: institutions for elderly and disabled, centres for homeless;

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<sup>182</sup> OPCAT, Article 4(1).

<sup>183</sup> OPCAT, Article 4(2).



5) Committee for National Security: Pre-trial detention facilities (in Astana, Almaty and other major cities), special vehicles for escorting suspects, defendants and convicts, detoxification centres;

6) Ministry of Defense: The premises of the military transport police, Special vehicles for escorting suspects, defendants and convicts, Disciplinary military cells (Hauptwache) – for disciplinary arrests and custody of suspects.

However, not all of the places listed above are fall under the mandate of the NPM. The inadequate interpretation of the term 'deprivation of liberty' in practice is one of the most important challenges with the NPM in Kazakhstan. The legislation of the country failed to incorporate the Article 4 provisions of the OPCAT. Despite of the several recommendations<sup>184</sup> the State authorities did not approve the establishment of a separate law on NPM but rather chose to make a number of legislative amendments to the existing legislation of Kazakhstan. The current law on NPM is based on amendments in 16 different legislative acts and therefore makes it very difficult to determine of the exact scope of the places to be monitored by preventive visits.<sup>185</sup> There is no separate overarching definition of one of the central requirements under OPCAT, the 'deprivation of liberty' and the mandate of the NPM to visit places of deprivation of liberty is distributed among a variety of laws. However, scope of the NPM visits according to the OPCAT must be allowed not only to 'official' places like prisons and police cells, but also to such untraditional ones like psychiatric institutions and social care houses for elderly etc.

The legislative modifications conducted to the 16 existing Kazakh laws specify that the NPM scope of the places of preventive visits. According to the abovementioned normative legislative acts amendments, the institutions being subjected to monitoring visits include detention facilities, compulsory treatment facilities, special institutions for temporary isolation from society, adaptation centres for minors, and educational organization with a special regime of

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<sup>184</sup> See, for example, Human Rights Implementation Centre. Expert Advice letter to the 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 of 23 May 2012; available at <http://www.bristol.ac.uk/law/research/centres-themes/hric/expertadvicebyhric/kazakhstan.html>

<sup>185</sup> Miller, A. 'Expert Review of the Implementation of the National Human Rights Plan of the Republic of Kazakhstan for years 2009-2012 by the State Organs', at p. 7.

detention, such as juvenile institutions and variety of health care institutions such as psychiatric institutions, rehabs etc.

However, the amendments do not cover visits to the centers where the asylum seekers and refugees are processed or held (although there are no such distinct places in Kazakhstan presently).<sup>186</sup> Outside of the reach also appeared some medical and social care institutions for the disabled and children with psycho-neurological pathologies, institutions for disabled children and children with disorders of the musculoskeletal system, nursing homes for the elderly people, orphanages, special boarding institutions, and other organisations of social purpose. Moreover, there is no mention about the offices of police departments, military barracks to be subjected to preventive visits in the NPM law. The issue of limited scope of the places to be monitored, was raised during the NPM designation with the legislative bodies but was rejected as it was concluded by the body that persons in such settings are not "deprived of liberty" within the scope of Article 4 of OPCAT.<sup>187</sup>

Additionally, Article 4 of OPCAT mentions the places where torture and ill-treatment may potentially occur. The State Parties must be allowed to have an access to all places "where persons are or may be deprived of their liberty." This has also been recognized by the SPT in its Guidelines on NPMs<sup>188</sup> that mentions that not only existing places are to be exposed to the NPM inspection but also "potential places of deprivation of liberty".<sup>189</sup> This provision is principally important in the context of Kazakhstan because the country is boarding upon the complex task of restructuring its colony-type prisons and transfer to cell-type accommodation prisons.<sup>190</sup> This transition include the reorganization of existing places as well as construction of new facilities.

The limited coverage of the places is a serious inconsistency with the Optional Protocol, which include a clear statement that a system of regular visits of the NPM should cover all places,

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<sup>186</sup> Bristol UPR submission 2014, p.3

<sup>187</sup> *ibid.*

<sup>188</sup> Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), at para 24.

<sup>189</sup> *Ibid.*

<sup>190</sup> See Salamatov E.A. Expert opinion on the concept of the draft of the Criminal Executive Code of the Republic of Kazakhstan (revised) at p. 7; (original text: Саламатов Е.А. Экспертное заключение на Концепцию проекта Уголовно-исполнительного кодекса Республики Казахстан); Rahimberdin. K., Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011 (June, 2012); Recommendation No 12.

where people are deprived of liberty. It is worth mentioning that some of the institutions that are not included in the mandate of the NPM, still fall under the mandate of the Ombudsman in accordance with paragraph 15 of the Regulations on the Ombudsman. But due to a low efficiency of Ombudsman institute and limited time and resources, the places are barely monitored to detect the cases of torture and ill-treatment. The experts notice that gap in the coverage of institutions subjected to monitoring visits caused by the lack of solid law on NPM. As it was mentioned above the NPM was established by the series of amendments. If there were a separate law on NPM with the clear structure the list of institutions subjected to monitoring visits can be well-defined.

Article 20 of the OPCAT states:

"In order to enable the national preventive mechanisms to fulfill their mandate the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;

(...) (c) Access to all places of detention and their installations and facilities;

(...) (e) The liberty to choose the places they want to visit and the persons they want to interview; (...)"<sup>191</sup>

Article 20(c) requires the States to provide the NPM free access to all parts of any place of detention and closed institution. This would include "living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters."<sup>192</sup> By visiting all areas within a place of detention, the NPM can acquire a full overview of the conditions of detention and treatment of persons deprived of their liberty: physical safety arrangements, building construction, and other organisational elements that play an significant part in the daily life of those persons deprived of their liberty.

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<sup>191</sup> OPCAT, Article 20 (a), (d), (e).

<sup>192</sup> NPM Guide, p.54.

The OPCAT provides no exception to the right of the NPM to visit any part of the place of detention, including for the reasons of security or safety. National legislation obliged make well-defined regulation that no part of the place of detention should be concealed from scrutiny by the NPM. However, there is no clear provision in the NPM legislation and the regulations of the Ombudsman concerning the unimpeded access to all the parts of the detention facility of closed institution. The Article 8(3) states: "the administration of an institution subjected to preventive visit is responsible for ensuring safety of NPM members. Should NPM member act lawlessly, head of the visited institution shall notify in writing the Commissioner for Human Rights."<sup>193</sup> In practice, this could be an obstacle for the NPM members to access all the parts of the detention places since they can be restricted by the administrations due to a safety reasons.

### 8.3 Choice of Places to Visit

Article 20(e) of the OPCAT emphasizes that the NPM must have the freedom to choose the places it will visit. Therefore, OPCAT requires that the NPM members have the right to be provided with current information concerning the data on the number of persons deprived of their liberty in each place of detention, as well as the total number of places and their location in accordance with Article 20(a) of the OPCAT. The right to access this information recommended to be provided by the implementing legislation.<sup>194</sup>

The task to develop the program of visits is a responsibility of the Ombudsman office and the Coordination Council. The Ombudsman's office generates the list of the institutions to be monitored under NPM. The Coordination Council determines timeframes and list of institutions subject to preventive visit within the limits of allocated budget.

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<sup>193</sup> NPM law, Article 8(3)

<sup>194</sup> NPM Guide, p. 55.

### 8.2.3 Unannounced Visits

The NPM should have the power to undertake visits without prior notice for the effective prevention of torture and ill-treatment. For the throughout comprehensive visits, prior notice of the authorities can contribute to a more productive visit. Nevertheless, undertaking shorter unannounced visits is the only approach when the NPM can observe an accurate image of everyday reality of places of detention. The opportunity of unannounced visits is also indispensable for the deterrent effect of the NPM visits.

The UN Special Rapporteur on Torture, who also visits places of detention in the course of country missions, has elaborated as follows, noting the similarity between the standards applicable to his visits to places of detention and those under the Optional Protocol: 'it is axiomatic that freedom of inquiry in places of detention implies: unimpeded access, with or without prior notice, to any place where persons may be deprived of their liberty.'<sup>195</sup> He stressed 'while in some cases he may indicate to authorities in advance which facilities he intends to visit, access to all places implies that he will also conduct visits with little or no prior notice.'<sup>196</sup>

Interpretation of Article 20 of the OPCAT concludes that the NPM must have authority to undertake unannounced visits. The reasonable inference is that no circumstances permit even a temporary objection by the government to any visit by the NPM; it is entitled to access at any time of day or night. Relevant governmental and expert bodies also have concluded that effective NPMs must have authority to undertake unannounced visits:

According to the Coalition of Torture, which is alliance of non-governmental organizations dealing with torture, the first year of the NPM practice demonstrated some failures to meet the above-mentioned requirement. NPM members have little opportunity to conduct unannounced visits and adequately respond to allegations of torture.<sup>197</sup> In general, NPM members are allowed

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<sup>195</sup> UN Special Rapporteur on Torture, 2006 Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/6 (23 December 2005), paragraphs 22 and 23.

<sup>196</sup> Ibid. paragraph 24.

<sup>197</sup> The CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 53 Session (03 Nov 2014 - 28 Nov 2014) Information from Civil Society and Concluding Observations:

by law to conduct the regular visits, follow-up (interim) visits and special visits. The program of the preventive visits is prepared by the Coordination Council and approved by the Ombudsman in advance. In practice the regular visits includes specific dates, which reduce the purpose of discovering violations through unannounced visits.<sup>198</sup>

The special visits, which are aimed at responding to urgent complaints of torture that need an immediate response, should be approved by the Ombudsman office. There are, however, no further inscribed guidelines concerning the procedure on how, when and by whom the approval of the unannounced visit should be issued. The NPM members reported that the approval of special visits was frequently denied or took long period to respond. There were instances when requests were reviewed by junior staff of the Ombudsman office and consequently denied due to the fact that "allegations of prisoner's relatives were based merely on suspicion rather than factual information on instances of torture."<sup>199</sup>

The lengthy and bureaucratic procedure of approving the possibility of the special visit challenges the requirement of OPCAT to be able to conduct the announced visit. The whole purpose of special visits and seriously limits NPM members in delivering adequate and timely response to urgent cases of torture complaints.

### 8.3 Access to Information

According to Article 20 of the OPCAT:

'In order to enable the national preventive mechanisms to fulfill their mandate, the States Parties to the present Protocol undertake to grant them:

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en) [accessed 8 June 2015].

<sup>198</sup> *ibid.*

<sup>199</sup> *ibid.*

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention; (...)<sup>200</sup>

The information to which the NPM is allowed to have an access to, under Article 20(a), about numbers and locations of detainees and places of detention, is important for the NPM to be able to plan its visiting program. The variety of information enclosed by Article 20(b) is extremely broad, including the "aggregate and individual medical records, dietary provisions, sanitary arrangements, schedules (including records of time spent in cells, exercise, indoor/outdoor, work, etc.), suicide watch arrangements, disciplinary records, and so on."<sup>201</sup>

Article 21 stipulates further that:

"2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned."<sup>202</sup>

The NPM members have an access to specific, potentially very sensitive, information about individual detainees, obtained during the preventive visits. One of the examples of such information is individual medical information.<sup>203</sup> It is also probable that some of the information the NPM members obtains about other persons at a place of detention, such as employees or NGO members, could also be of a personal rather than a professional nature. In Kazakhstan all such information is generally protected against disclosure pursuant to legislation for the NPM.

Protection by the NPM of personal data in accordance with OPCAT Article 21 is central to guarantee that the work of the NPM does not infringe the privacy rights of individuals and to

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<sup>200</sup> OPCAT, Article 20 (a), (b).

<sup>201</sup> NPM Guide, p.58.

<sup>202</sup> OPCAT, Article 21(2).

<sup>203</sup> NPM Guide, p.60.

guarantee that all individuals feel they can be open with the NPM.<sup>204</sup> The provision is mentioned in the document issued by the Ombudsman in the paragraph concerning the responsibilities of the NPM members. The NPM members are 'not entitled to disclose information about the person's private life, which became known to him during preventive visits, without the consent of that person.'<sup>205</sup>

It is also recommended that legislation should permit the NPM to reveal or publish data about individuals where the individual gives express consent. The Government should not be permitted to conceal under the 'personal privacy rights' in order to block publication of data that both the NPM and the person want to publicise. The NPM members can also follow the recommendation if the individual that being interviewed requests to refer his/her complaint to another institution such as a prosecutor office. The NPM must also be given unrestricted ability to publicize collected information derived from personal data, and to publish relevant information in any other matter not revealing the personal data (anonymous publications).<sup>206</sup>

In practice this requirement was not actually implemented in the work of the NPM members. The members of the NPM have serious restrictions concerning the revealing the data obtained and publication of the information obtained. According to the interview with NPM member, the NPM members received an oral instruction by the Ombudsman that it is not recommended to publicise any of the information about torture allegation or other information obtained during the preventive visits. The members were also notified that they are responsible for the reliability of the information obtained and being publicized. This fact entailed the reluctance of the NPM members, some of whom are journalists to publish any kind of information gathered during the preventive visits.<sup>207</sup>

Instead of publicising the information revealed after preventive visits the NPM members have to report on torture and ill-treatment cases, obtained during the visits, to the Prosecutor office or the official authority in order to check if the cases of torture and ill-treatment really occurred. The information obtained should be genuine otherwise the NPM members bear responsibility for the

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<sup>204</sup> *ibid.*

<sup>205</sup> Ombudsman Information Bulletin, 2014, p. 40.

<sup>206</sup> NPM Guide, p.61

<sup>207</sup> Interview with NPM member Tatiyana Chernobil.



authenticity of the information under the 'threat of sanctions'.<sup>208</sup> This fact seriously restricts power of the NPM members and limit their scope of work. In practice the NPM members feel themselves as the governmental officers performing supplementary function to the Prosecutor offices, rather than being an institution of public control. Therefore, there is a need to issue certain legislation clarifying the role of NPM members and define that the NGO/civil society members of the NPM are not understood to be state employees and are not bound by the ethics rules of state employees or state servants.<sup>209</sup>

## 8.4 Access to People

The Article 20 of the OPCAT requires:

'In order to enable the national preventive mechanisms to fulfill their mandate, the States Parties to the present Protocol undertake to grant them:

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose (...) the persons they want to interview; (...)<sup>210</sup>

Article 20(d) grants the NPM members the power to conduct private interviews with persons of their choice. This provision is vital to guarantee that the NPM develop a more wide-ranging overview of the situation in a detention facility by consideration of the testimonials from those who are directly affected.

The opportunity of interviewing in private is necessary to allow people deprived of their liberty to speak more cooperatively with less fear of punishments from the administration. The UN

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<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

<sup>210</sup> OPCAT, Article 20 (d), (e).

Special Rapporteur on Torture pointed that 'the right to interview detainees in private, i.e. without any prison official being able to see or hear the conversation' is one of the most significant features of preventive visits.<sup>211</sup> Otherwise, he continues, 'detainees cannot develop the trust in the inspection team that is absolutely essential for receiving truthful information.'<sup>212</sup>

Therefore, the implementing legal framework recommended identifying the right of the NPM members to interview detainees and other relevant persons without any interruption or other surveillance by the place of detention staff, administration, inmates, or other persons. Such 'eavesdropping' or 'surveillance' should be strictly forbidden.<sup>213</sup> The only exception should be where the visiting team itself makes a specific request to conduct an interview out of hearing but within sight of guards, for safety reasons.<sup>214</sup>

The visiting group should not be commanded to accept places selected by the institution's administration and staff for interviews. Instead, the members should have the freedom to choose any adequately secure place it considers suitable.<sup>215</sup> The staff of the place of detention may suggest conducting an interviews in a particular place in order to protect the personal safety of the NPM members. However, such guidance should be given detailed concern by the NPM members. Nonetheless, NPM members must have the right to proceed with the interview if they consider the risk to their individual safety to be "acceptable".<sup>216</sup> This is a particularly the case with the some of the NPM members' visits conducted in Kazakhstan. According to the interview with NPM member, they are sometimes being restricted from access the detainee in private because of the personal safety concerns, dictated by the administration of the institutions. Many NPM members note problems connected with conduction of interviews in terms of balance the their duty to comply with security prescriptions. In many cases the prison authorities allowed for

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<sup>211</sup> Report of the UN Special Rapporteur on Torture, UN Doc. A/61/259 (14 August 2006), para 73.

<sup>212</sup> *ibid.*

<sup>213</sup> NPM Guide, p. 60.

<sup>214</sup> See APT, *Monitoring Places of Detention: a practical guide* (Geneva, 2004), p. 80.

<sup>215</sup> See APT, *Monitoring Places of Detention: a practical guide*, *ibid.*, p. 80. The choice of location will influence the attitude of the person deprived of liberty. Locations that would be likely to equate the visitor with the staff of the institution in the eyes of the detainee (for instance, administrative offices) are to be avoided. Visitors should be able to choose places likely to be secure from eavesdropping. Living quarters of the detainee, visiting rooms, courtyards, and libraries are among the possible locations.

<sup>216</sup> See APT, *Monitoring Places of Detention: a practical guide*, The reason for this rule is that concerns for the personal safety of the visitors can otherwise easily be used as an excuse to deny access to given detainees.

wide discretion to decide on issues related to personal security of the NPM members during their visits. This can be used as a pretext to prevent them from meeting detainees in private.<sup>217</sup>

The lack of the possibility to conduct confidential interviews of detainees and people in closed institutions is a serious obstacle for NPM effective work. According to the NPM members themselves, the trust of detainees is very low. The victims of torture and ill-treatment feel unconfident and insecure to report on violations. Moreover, the image external monitoring bodies, including the PMCs, is that they are considered to be unreliable for detainees. The impunity of torture perpetrators together with lack of measures implemented concerning the security decay the NPM effectiveness to carry out its mandate on torture prevention.<sup>218</sup>

## Chapter 9: NPM Recommendations and their Implementation

### 9.1 Recommendations of the NPM

The Article 19 of the OPCAT states:

"The national preventive mechanisms shall be granted at a minimum power:

(...) (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; (...)"<sup>219</sup>

In addition to that Article 22 stipulates:

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<sup>217</sup> Interview with Zulfia Baisakova.

<sup>218</sup> PRI evaluation report, 2013.

<sup>219</sup> OPCAT, Article 19(b).

"The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures."<sup>220</sup>

The NPMs are required not only to carry out preventive visits but also to make recommendations to the appropriate authorities identifying the solutions for the improvements. It is also in the best interest of the State to consider the recommendations. The recommendations are a tool for the State to benefit from comprehensive practical and expert assistance and observations to contribute it in improving the situation and meet the obligations under the CAT, other international treaty and customary law. There should be a strong encouragement for the Government to conduct a constructive dialogue with NPM and implement the recommendations provided.

To strengthen this incentive, Article 22 obliges the State authorities to consider these recommendations and to discuss their further implementation with the NPM. The recommendations enactment should be conducted at the level of the specific place of detention or at the general national level.<sup>221</sup>

## 9.2 Reports on preventive visits

According to the results of each preventive visit each NPM monitoring group have to prepare a written report, based on the form which is approved by the Coordination Council. The report should be approved and signed by all members of the group who carried out the preventive visit. A member of the group having a dissenting opinion prepares his own report and attaches it to the main report, according to the NPM regulations.<sup>222</sup>

There are detailed regulations concerning the report writing by the NPM members, included in the information bulletin published by the Ombudsman. It is ensured that the results of preventive

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<sup>220</sup> OPCAT, Article 22.

<sup>221</sup> NPM Guide, p.64.

<sup>222</sup> Ombudsman Information Bulletin, p.42

visits conducted by the NPM in Kazakhstan should be compiled into reports, as reports are a tool to improve the situation in the institution subjected to the preventive visit. The report should contain the analysis of the implementation of the relevant norms by the institutions. As it suggested by the Ombudsman the recommendations should be divided into three levels: the level of the institution administration, the level of the governing body of the institution, and the highest national level. Each of these categories may be provided by recommendations in the reports. It is also states that the principle of confidentiality of information should be implemented while generating the report, as it is noted by the Ombudsman.<sup>223</sup> As it noted by the NPM members the quality of such reports vary from each NPM group due to different expertise of the members. There is no precise requirement on the amount of the pages of the report therefore some of the reports may contain just several pages on basic information, while other reports contain dozens of pages with detailed information. There were cases already when the Coordination Council refused to accept the report of one of the groups due to a low quality, while the group did not received the compensation for the preventive visit as well. It is noted by the Coordination Council that the remuneration of the NPM members are connected with the report-writing and not only a preventive visit itself.<sup>224</sup>

In addition to the reports of the members of the NPM, the Coordination Council vested to prepare the annual consolidated report. This full-size report combines all the NPM members' recommendations regarding their preventive visits for the authorized State bodies to improve the treatment of detained persons, and suggestions to improve the legislation of the State concerning various related issues. This consolidated report is prepared by one member of the Coordination Council who is appointed by the Ombudsperson. The structure of the report is also established by the NPM regulations, it is included in the Ombudsman document "Application Regulation of preparation of the consolidated annual report the results of preventive visits"<sup>225</sup>

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<sup>223</sup> Ombudsman Information Bulletin, 2014.

<sup>224</sup> Interview with NPM member Tatiyana Chernobil.

<sup>225</sup> Infomation Bulletin of the Ombudsman, 2014, p. 29.

### 9.3 Dialogue with the State and implementation of recommendations

The statistics exemplify poor procedure effectiveness on bringing to justice the perpetrators and provide the remedy for persons who was subjected to torture. The OPCAT leaves to the preference of the NPM the determination as to which governmental bodies are "relevant" to any specific recommendation.<sup>226</sup> Systematical issues that require decisions to be taken at the state-run level or by amendments to legislation clearly must be directed to authorities in the governmental structure in order to have a chance of implementation. It is therefore recommended that implementing legislation should permit the NPM to determine which authorities are appropriate to receive particular recommendations.<sup>227</sup> The relevant bodies have a duty under national law to report on the implementation of the recommendations being raised, or to refer the recommendation to another competent body, which would have the duty to address the issue.<sup>228</sup>

In the Ombudsman regulation in the section concerning the responsibilities of public authorities and of officials in their interaction with members of the NPM it is stipulated that the relevant authorities should give a feedback on the implementation of the recommendations:

'(...) within three months from the date of receiving of the consolidated annual report of the NPM, the members should report in written to the Commissioner for Human Rights on the measures adopted after the consideration of the reports; (...)'<sup>229</sup>

Also during the preventive visit, the NPM members may come across individual cases such as torture and ill-treatment allegations. These complaints must be investigated for adjudication, prosecution, or other legal action outside of the 'preventive' mandate of the NPM.<sup>230</sup> In such incidents, the 'relevant authority' in Kazakhstan is a prosecutor's office, which consider and process individual complaints. Therefore, the recommendations should be directed to the authority to investigate the individual case. In such circumstances, the limitations on disclosure

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<sup>226</sup> NPM Guide, p. 65.

<sup>227</sup> *ibid.*

<sup>228</sup> *ibid.*

<sup>229</sup> Ombudsman Information Bulletin, p. 41.

<sup>230</sup> NPM Guide, p. 65.

of personal data resume to apply, so a transfer of this category could only include the information about the particular complainant upon his/her consent.<sup>231</sup>

The Prosecutor's office is an only relevant authority in Kazakhstan to address the allegations of torture. However, the effectiveness of the body is very questionable in the light of last observations of the CAT Committee. In November 2014 during the presentation of the third periodic report on the implementation of obligations under CAT, one of the main recommendations of the UN Committee outlined the need to establish effective, independent and accountable body capable to conduct prompt, impartial, comprehensive and effective investigations into allegations of torture.<sup>232</sup> The Government addressed this issue by introduction of the Special Prosecutors to conduct investigation on complaints of torture. This practical innovation has not yet presented to be effective since the institution of Special Prosecutor lacks resources, accountability and transparency in investigations of torture allegations. Another problem is the publicity and transparency of Prosecutor General on the measures taken to address the cases of torture, including communication with the media. There is no practice of official press conferences or annual reports of the General Prosecutor to address the issues of torture and present complete official statistics on the number of complaints and measures implemented. Statistics on cases of torture significantly vary in every report of governmental bodies.

According to the procedure, members of the NPM register complaints on torture as prescribed by the Ombudsman and then communicate the information to the Ombudsman office. In addition to that, they can refer the complaint to the Prosecutor's office. The NPM members note that the complaints mechanism of governmental bodies remains tremendously ineffective and lengthy. The NPM members notice the absence of independent body to investigate torture complaints or complaints on the police or security officials misconduct or abuse can explain the persistent torture impunity in Kazakhstan.

According to an official data, criminal case proceedings on the allegations of torture, even being reported by the NPM, are rarely instituted. According to the consolidated report of NPM for the 2014, 14 special visits were conducted to the penitentiary institutions, allegation of

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<sup>231</sup> *ibid.*

<sup>232</sup> The UNCAT Concluding observations, 2014.

torture registered during these special visits were directed to the Prosecutor's office upon the approval of the Ombudsman. As a result of special visits to institutions members of the NPM in 2014, only 4 criminal cases against officials were established: in one case the fact of torture was concluded, and in three other cases the fact of the abuse of power were indicated (not torture) but those cases were subsequently dismissed due to lack of evidence or failure to identify facts of the crime.

The open statistics presented by the Prosecutor General from January to May 2015 reports on 109 allegations of torture, violating article 146 being registered in the country.<sup>233</sup> This statistics includes all allegations of torture recorded, without further stipulation if the abuse conducted by person with official capacity or not. As the result, only 3 cases were transferred to the Court. Also, from January to May 2015, the investigation terminated 144 cases of torture and 4 cases closed due to the lack of evidence. Throughout the same period, five officers were recognized guilty, two of them imprisoned (for 2 years), 1 person restricted of liberty, and 3 received conditional punishment. That means, that barely 3 % from all complaints were addressed to the court from the beginning of this year.

Article 21 of the OPCAT calls for the protection of the detainees in context of the NPM visits:

"1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way. (...)"<sup>234</sup>

In addition to that, victims of torture who dare to complain are frequently subjected for further prosecution - they are threatened, blackmailed or put in danger. Especially, in cases of detainees and prisoners, since the persons acting on official capacity, who are suspected of having committed torture, continue to hold their positions in the law-enforcement agencies.<sup>235</sup> This practice allows them to affect the course of investigation, including applying pressure on

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<sup>233</sup> Official data from the Committee of Legal Statistics of the Prosecutor General's office of Kazakhstan <http://service.pravstat.kz/portal/page/portal/POPageGroup/Services/Pravstat>

<sup>234</sup> OPCAT, Article 21(1).

<sup>235</sup> "Torture in Kazakhstan: Yesterday. Today. Tomorrow" Report of the Coalition of NGOs against torture in Kazakhstan, June 2015 (original text: "Пытки в Казахстане: Вчера. Сегодня. Завтра?" Отчет Коалиции НПО Казахстана против пыток, Июнь 2015.)



victims. The 2015 Coalition Against Torture reports the absence of mechanism aimed to secure the torture victims as well as witnesses during the criminal procedures on the facts of torture. This mechanism cannot be implemented in practice because the law does not allow the transfer of detainees into other institution outside The Ministry of Internal Affairs jurisdiction.<sup>236</sup>

## **Chapter 10: NPM cooperation at the national and international level**

As it was mentioned before, the NGOs and other members of civil society were included in the process of determining the NPM. Another role recommended to the NPM to consider the civil society organisations as an important source of information for the NPM and a source of external scrutiny and accountability for the NPM.<sup>237</sup>

According to the NPM members there is lack for external cooperation between the NPM and other relevant actors. The State already have a monitoring body that implements the mandate corresponding to the mandate of the NPM - the Public Monitoring Commissions. However, there is no exchange on the information even as both organs are conducting preventive visits to similar institutions. The PMCs aimed to conduct monitoring visits to closed institutions in parallel with NPM. PMCs have a lot in common with NPM in terms of legal basis and powers granted. Being founded in 2004 and comprising NGO activists, lawyers and academics, as well as with persons with a pro-governmental position. It is worth noting that some of the NPM members are the also the participants of PMC at the same time. The legal basis for PMC also rooted in legal amendments, but only to Penitentiary Code therefore, the places to monitored limited and include only correctional institutions, pre-trial detention centers, and correctional institutions under the Ministry of Interior. The PMCs are well represented in all the regions of the State and their members have commands to visit prisons, although they have to announce their visits in advance and only during the working hours. The PMC has an independent financing, and what makes the mechanism more flexible is that they are not restricted in the choice of visited institutions and the order of visits. Unlike NPM that has a special schedule of visits developed

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<sup>236</sup> *ibid.*

<sup>237</sup> NPM Guide, p. 70.

yearly by Coordination Council. In this respect, PMC more corresponds to the criteria established by OPCAT.

The PMC mandate is to provide support to persons in the correctional institutions and detention facilities, in terms of living conditions, medical and sanitary security, organization of labor, leisure and education. Therefore, the PMC focused on broader spectrum of human rights issues and only some of them dealt with torture and inhuman conditions of detention as one among many other issues. NPM in turn addresses particularly prevention of torture and ill-treatment. In practice, the mandate of both PMC and NPM overlaps with each other. However, there is a strong tendency for the NPM members to prioritise the prison medical and sanitary conditions, instead of concentrating on torture cases identification, this is clearly visible in the first consolidated report that was issued in May 2015. The differences in mandate designed to supplement the work of each body and therefore there should be strong division of responsibilities between PMCs and NPM. Moreover, the PMC is not vested with the mandate to cooperate with the International Human Rights System, including the UN, as well as international and national NGOs and civil society organizations.

Another relevant body is a Coalition Against Torture, the large alliance of NGOs in Kazakhstan that was formed in 2007, mandated to perform advocating and promoting work on torture-related issues. The Coalition provides resources to NPM since the members of the Coalition are also members to NPM and the Coordination Council of NPM. In 2015, from 112 NPM members, 41 are part of the Coalition, as well as 10 out of 19 members of the Coordinating Council are members of the Coalition.

In addition to that NPMs are recommended to cooperate on the international level. The Article 20 of the OPCAT states:

'In order to enable the national preventive mechanisms to fulfill their mandate, the States Parties to the present Protocol undertake to grant them (...) the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.'<sup>238</sup>

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<sup>238</sup> OPCAT, Article 20(f).

The NPM should interact at the international level by direct and confidential contact between NPMs and the SPT. In a particular case of Kazakhstan, the SPT participated in the process of the designation of the NPM and consulted the Government concerning the explanation of some OPCAT provisions.

## **Chapter 11: Conclusion**

Since the very establishment, the NPM brought numerous concerns on the implementing legislation in conformity with the international standards. This fact prevents the effective implementation of the OPCAT and restricts the overall efficiency of the mechanism in practice. The mechanism is recently developed and lacks some of the features inherited to the well-established monitoring bodies. Therefore, the adequate utilization of the OPCAT provisions and relevant recommendations is important for Kazakhstan to meet the requirements incorporated in the international and national legal framework and strengthen the preventive capacity of the NPM. The inconsistency with the international principles related to the following components: the timing of the designation process of the NPM legislature, functional independence, independence of the NPM members and staff (especially the Ombudsman office), financial independence, and scope of the "places of detention" in implementing legislation.

At the initial stage of the NPM designation, the State partly met the requirements established by the Article 17 of the OPCAT and relevant Paris Principles on the designation of the NHRI. The process of designation involved prescribed transparency and inclusiveness. However, the State was not able to address the implementation of the OPCAT in a proper timing, set by the OPCAT. Considering one-year time allocated for the designation, including 3 years for the postponement declared under the Article 24 of the OPCAT, the State established the functioning NPM later than it was required. Nevertheless, the issue of meeting that requirement is disputable, since the State utilized the Russian version of the OPCAT. This fact caused the wrong interpretation of the OPCAT provision by the Government of the State.

Concerning the scope of the places subjected to visits, the State failed to comply with the Article 4 and Article 20 of the OPCAT in terms of including all the places of detention in the NPM implementing legislation. All closed institutions should be included in the mandate of NPM, however some institutions appeared outside the mandate of the NPM namely: some medical and

social care institutions for the disabled and children with psycho-neurological pathologies, institutions for disabled children and children with disorders of the musculoskeletal system, nursing homes for the elderly people, orphanages, special boarding institutions, and other organisations of social purpose, military barracks as well as pre-trial detention places.

The Article 18 was not met in the case of Kazakhstan since the State was unsuccessful to ensure the NPM's functional independence and independence of its members. The NPM is affected by strong state centralization and therefore is lack of proper institutional structure. The Ombudsman office, which is NPM based on, does not fully comply with Paris Principles and classified by SCA only with 'B status'. The power of Ombudsman is extensive in Coordination Council since every action should be initially agreed upon the consent. However, the lack of functional, financial independence of the Ombudsman deprecates the position of NPM. Also the Ombudsman is not granted the immunity, which is contradicting the article 35 of the OPCAT, as he/she can be removed from the office by the order of the President without precise stipulation on the procedure in the legislation. Moreover, the independence of the NPM members is restricted to the high level of censorship and internal regulations concerning the publication of the information discovered during the preventive visits.

The implementing legislature on NPM do not meet the requirement set in Paris Principles under Article A2 and the OPCAT relative provision on functional independence. The legal basis for the NPM is complex and fragmented as it based on the 18 amendments to various laws. The legal basis for the Ombudsman office is even unstable, as it based on the Presidential Decree, which is an executive order. The executive order on Ombudsperson establishment should be replaced by legislative act to grant the Ombudsman permanent status and independence. As for the NPM, there is a need for solid well-structured law, preferably constitutionally based as it is recommended in OPCAT guidelines.

The Article 18 of the OPCAT is partially met by the State. The implementing legislature of the NPM leaves a place for the financial control of the Government, which deprives NPM's functional independence, as the NPM has no authority to determine the amount of budget and financial support of the work of the NPM. There is NPM dependent from the Government since the timing of visits to places of detention is connected with the allocation of funds provided by the state budget. Moreover, uncertain legislation on the procedure of budget determination leaves a scope for intervention of different actors. This gap for intervention should be filled with the

ability of NPM to determine its yearly budget, as it recommended by the NPM implementation guides.

Currently the investigation procedures failed to meet international standards to conduct prompt, throughout and impartial investigations and ability to deliver justice. Impunity for human rights violations by the police and security services including torture and other ill-treatment remains unchallenged. Therefore, special rules on investigation should be developed to exclude any collaboration of special prosecutors with the law enforcement bodies. There is an urge to establish a well-funded, transparent and accountable independent agency to investigate all allegations of human rights violations committed by the officials.

Additionally, there is a lack of cooperation of the NPM with external bodies, such as national civil society and PMC. The public oversight over the work of the investigative bodies should be introduced, empowering NGOs with the authority of submitting materials related to ongoing investigation for consideration and inclusion in criminal files to improve the work and legitimacy of the NPM.

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<b>10/2013 – up to date</b>	Vienna University, Austria MA in Human Rights
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<b>09/2007 – 06/2010</b>	College of International Relations and World Languages, Almaty, Kazakhstan Post-secondary education diploma of interpreter (English- Russian Kazakh languages)

**WORK EXPERIENCE:**

<b>12/2014 – 04/2015</b>	Internship in Freedom House (Almaty, Kazakhstan) <u>Responsibilities:</u> Research conduction on specific issue - Analysis of National Preventive Mechanism on Torture in Kazakhstan - Report preparation on torture prevention in Kazakhstan
<b>08/2012 – 11/2012</b>	Internship in UN CRC PC (United Nations Children’s Rights Policy Center) NGO (Nicosia, Cyprus) <u>Responsibilities:</u> Internship in UN CRC PC (United Nations Children’s Rights Policy Center) non-governmental organization in Nicosia, Cyprus <u>Responsibilities:</u> - Coordination and implementation of NGO's projects, fundraising campaigns and management of youth organizations - Research work to upgrade database on unaccompanied minors and children trafficking. - Monitoring youth policies with focus on EU region - Assistance in coordination of “Beat bullying” campaign in schools and campaign dealing with sexual abuse “One in Five” - Assistance in human rights trainings for children project - Assistance with projects: European Child Helpline 116111 and European Hotline for Missing Children 116000 - Preparation of the reports on organization’s activities
<b>09/2011 - 06/2013</b>	BARS Society of Kazakh students in Poland <u>Position:</u> leader, project coordinator <u>Responsibilities:</u> - Development and coordination of social and cultural activities to promote image of Kazakhstan in Poland. Organization and management of such events: “Days of Kazakhstan” in Polish universities, “Festival of Kazakh movies” in several Polish cities, “European Forum of

Kazakh youth” in Warsaw, “Festival of Kazakh culture” in Warsaw.

- Communicational tasks.
- Support of functioning of all the branches of the organization

**02/2008 – 09/2010**

Volunteer activities under Komanda SOS coordination center (Kazakhstan, Almaty)

Responsibilities:

- Organization of various fundraising events (such as Art4Peace charity concerts, World Languages lessons in orphanages, Code X International volunteering, annual Seimar Open Golf Competition etc.) - Aid provision to orphans and children with disabilities through private donations programs

**SKILLS:**

Excellent social and communication skills: open-minded, co-operative. Possess international experience and culture awareness.

Personal skills: organized, energetic, ambitious, imaginative, proactive.

Working skills: hard-working to deadlines, flexible, always willing to learn.

**LANGUAGES:**

English (fluent), Russian (native), Kazakh (native), Polish (colloquial), German (basic)

**INTERESTS:**

Filming, learning languages, photography, playing guitar, singing, travelling, hiking, extreme sports, international cuisine.

**ADDITIONAL INFO:**

Driving license (B category)

Active computer user; office equipment skills

Musical school degree on classical guitar

Photo-techniques and photo-redactors user

## Abstrakt

Kasachstan ist Mitglied der wichtigsten internationalen Regulierungen zur Prävention von Folter und grober Misshandlung: das Übereinkommen der Vereinten Nationen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe (CAT) und das Zusatzprotokoll (OPCAT), welche in den Jahren 1998 und 2008 ratifiziert worden sind. Unter OPCAT ist der Staat dazu verpflichtet nationale Präventionsmechanismen (NPM) zu etablieren, Untersuchungsausschüsse zu formen für Haftanstalten und Empfehlungen zu erstellen um die Behandlung und Bedingungen auf nationalem Gebiet zu verbessern. Der NPM wurde im April 2014 implementiert nach dem Verabschieden des Gesetzes, welches durch den Menschenrechtsbeauftragten (Ombudsmann) betreut wird. Jedoch kritisieren internationale Experten und lokale Menschenrechtsaktivisten den NPM aufgrund zahlreicher Defizite in der Ausführung mit den gesetzten Maßstäben.

Der Hauptaugenmerk dieser Studie lag darauf zu ermitteln, ob der staatliche NPM mit den Bestimmungen des OPCAT und den Pariser Grundsätzen zur Arbeitsweise von Nationalen Menschenrechtsinstitutionen übereinstimmt, auf welche sich das OPCAT mit Artikel 18 (4) beruft. Dementsprechend wurde der NPM basierend auf relevanter Bestimmungen des OPCATs und der Pariser Grundsätzen bezüglich der Verfahrenstransparenz des NPMs, dem rechtlichen Rahmen, Mandaten und der funktionellen und finanziellen Unabhängigkeit des NPMs und seinen Mitgliedern analysiert. Die Resultate schließen darauf, dass der NPM in Kasachstan nicht in Übereinstimmung ist mit den vorher erwähnten internationalen Standards aufgrund von Mängeln von funktioneller und finanzieller Unabhängigkeit des NPM im Büro des Ombudsmannes.

