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REFERENCE:

18 June 2012

Dear representatives of civil society,

Further to your letter of 12 June 2012 requesting clarifications regarding the position of the Subcommittee on Prevention of Torture on the current draft law on a national preventive mechanism (NPM) in Kazakhstan, I have the honour to provide you below with some observations regarding the main issues you raise in your letter.

At the outset, the SPT would like to state that it has not been provided with the text of the draft law in question, nor has it been requested to provide comments on the draft law. The SPT has only replied in writing to a request of the Government of Kazakhstan dated 2 April 2012 on the role of the Ministry of Justice in the process the leading to the establishment of the NPM; and to a request of the Government of Kazakhstan dated 14 June 2012 on the meaning of the term "place of detention" under article 4 of the Optional Protocol to the Convention against Torture.

With regard to your query concerning the role of the Ministry of Justice, the SPT recalls that, in accordance to the Optional Protocol, arts. 17 and 18, the functional independence of NPMs and their personnel shall be guaranteed. In this regard, the Subcommittee sees *a priori* no difficulties in the Ministry of Justice exercising a **coordination role in the process leading to the establishment of the NPM**, provided the process is open, transparent and inclusive, and involves a wide range of stakeholders, including civil society. The Subcommittee would, however, advise against the Ministry of Justice acting as the national coordinator of the NPM once the latter is established, as this may affect the operational independence of the NPM and its personnel, as required by the Optional Protocol and by the Subcommittee's Guidelines on national preventive mechanisms (CAT/OP/12/5). These same views were provided to the Government of Kazakhstan in the Subcommittee's reply to the Government's letter of 2 April 2012.

In addition, the Subcommittee would like to clarify that it has not expressed its support for a system of "state social order", whereby the State would call for public tenders on a regular basis and assign NPM functions to the NGO which submits the least costly proposal. The SPT believes that this model may affect the independence of the NPM and the availability of the necessary resources, as required by art. 18 of OPCAT. The SPT is further concerned that the institutional memory of the NPM and its efficiency may also be affected by this model.

By e-mail

Penal Reform International office in Central Asia
Coordinative Council of Public Oversight Boards
Coalition of Kazakhstan NGOs against Torture

With respect to the question on the interpretation of article 4 of the Optional Protocol vis-à-vis the mandate of the NPM, the Subcommittee would like to recall the language of articles 4 and 19 of the Optional Protocol:

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 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). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means 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.

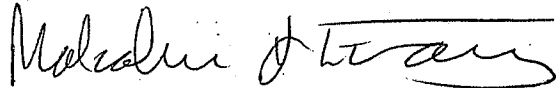
Article 19

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 and other cruel, inhuman or degrading treatment or punishment;
(...)

The SPT is of the view, as stated previously in a number of public documents (see Annex), that the term “places of detention” should be given a broad interpretation. This means that the term includes, but is not limited to, prisons (civil and military), police stations, pre-trial detention centres, psychiatric institutions and mental health centres, juvenile detention centres, migrants detention centres, and social care institutions. Indeed, the term extends to any place, permanent or temporary, where persons are deprived of their liberty by, or at the instigation of, or with the consent or acquiescence of, public authorities. Therefore, an interpretation of “places of detention” that is limited to “traditional” places of deprivation of liberty like prisons would be overly restrictive and, in the view of the SPT, contrary to the Optional Protocol.

Yours sincerely,



Malcolm D. Evans

President

Subcommittee on Prevention of Torture



Annex

1. From document "The SPT in brief" available at
http://www2.ohchr.org/english/bodies/cat/opcat/docs/SPTBrief_en.doc

Under the OPCAT, the SPT has unrestricted access to all places of detention, their installations and facilities and to all relevant information. The SPT visits police stations, prisons (military and civilian), detention centres (e.g. pre-trial detention centres, immigration detention centres, juvenile justice establishments, etc.), mental health and social care institutions and any other places where people are or may be deprived of their liberty.

2. From document "Guidelines on national preventive mechanisms" (CAT/OP/12/5)

10. The visiting mandate of the NPM should extend to all places of deprivation of liberty, as set out in Article 4 of the Optional Protocol.

24. The State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control.

3. From document "First Annual Report" (CAT/C/40/2)

para.22 (h) The work programme of national preventive mechanisms should cover all potential and actual places of deprivation of liberty

4. From document "Fourth Annual report" (CAT/C/46/2)

The Optional Protocol mandates the Subcommittee to visit all places under the jurisdiction and control of the State party 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. The Subcommittee visits police stations, prisons (military and civilian), detention centres (pretrial detention, immigration detention, juvenile justice establishments, etc.), mental health and social care institutions, and any other places where people are or may be deprived of their liberty.

5. From document "Report of SPT visit to Sweden" (CAT/OP/SWE/1)

para. 41, section (a) The mandate and powers of the NPM should be clearly and specifically established in national legislation as a constitutional or legislative text. The broad definition of places of deprivation of liberty as per OPCAT shall be reflected in that text;

section (h) The work programme of NPMs should cover all potential and actual places of deprivation of liberty;

6. From document "Report of the SPT visit to the Maldives" (CAT/OP/MDV/1)

In this regard, [the Mauritius NPM] must include an autonomous programme of visits to all places of detention and custody of persons (prisons, police stations, psychiatric hospitals, centres for minors, immigrant detention centres, etc.).