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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON THE DRAFT AMENDMENTS TO THE LAW ON THE HUMAN RIGHTS DEFENDER

OF THE REPUBLIC OF ARMENIA

on the basis of comments by

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Mr Evgeni TANCHEV (Member, Bulgaria)
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I. INTRODUCTION

1. On 22 May 2015, Mr Karen Andreasyan, Human Rights Defender of the Republic of Armenia, requested an opinion of the Venice Commission and of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on draft amendments to the Law on the Human Rights Defender (CDL-REF(2015)028, hereinafter "the Draft Law").

2. Ms Lydie Err, Mr Jorgen Steen Sørensen, and Mr Evgeni Tanchev (members of the Venice Commission) acted as rapporteurs on behalf of the Venice Commission. Mr Milos Jankovic acted as an expert on behalf of the DGI.

3. The present opinion is based on the English translation of the Draft Law provided by the Armenian authorities. The translation may not accurately reflect the original version and certain comments and omissions might be the results of these problems of translation.

4. *The present Draft Joint Opinion was adopted by the Venice Commission at its […] Plenary Session (23-24 October 2015).*

II. PRELIMINARY REMARKS

A. Pre-eminence of the constitutional reform

5. In 2013 the President of Armenia invited the Venice Commission to assist the Armenian Constitutional Commission in preparation of a large-scale constitutional reform in Armenia, which also affected constitutional provisions describing the status and the powers of the Human Rights Defender (hereinafter – the Defender)[1]. The Chapter on the Defender of the project of the new Constitution was analysed by the Venice Commission in the Preliminary Opinion on the draft amendments to Chapters 1 to 7 and 10 of the Constitution of the Republic of Armenia[2].

6. The Venice Commission notes that the constitutional reform in Armenia it is still underway. If the proposed constitutional amendments are approved, it may require having the law on the Defender reviewed anew in order to ensure its compatibility with the new Constitution. And conversely: certain recommendations contained in the present opinion on the existing law and on the amendments to it may be incorporated into the revised text of the Constitution. Thus, for the sake of upholding constitutional supremacy, it might be more reasonable to postpone the process of adoption of the Draft Law until such time when the new Constitution enters into force.

B. Scope of the opinion

7. As follows from the Draft Law, as well as from the explanatory note to it submitted by the authorities[3], the main purpose of the Draft Law is to clarify the Defender's mandate as National Preventive Mechanism (NPM). NPMs are established under the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The existing Law on Human Rights Defender (of 21 October 2003, as amended in 2008, hereinafter "the existing Law") has only one provision (Article 6.1) determining that the Defender is recognized as an NPM. The Draft Law develops this provision further: it regulates powers of the Defender as an NPM, delegation of those powers to his/her deputies, staff

[1] Currently the status and the manner of appointment of the Defender is described in Article 83.1 of the Constitution. The new constitutional provisions on the Defender are contained in Article 10 of the Draft Amendments to the Armenian Constitution, Articles 190-192 (CDL-REF(2015)034, read in conjunction with CDL-REF(2015)036).
[2] CDL-PI(2015)015rev. This document was later supplemented by the Second Preliminary Opinion on the Draft Amendments, in particular to Chapters 8, 9, 11 to 16, of the Constitution of Armenia (CDL-PI(2015)019).
[3] CDL-REF(2015)028

members and members of Expert Council of the NPM, defines places of detention which the Defender may visit, etc.

8. The focus of the present opinion will be on those new functions of the Defender which are regulated by the Draft Law and concern the Defender's role as an NPM. However, the opinion will also touch upon certain provisions of the existing law on Defender, to the extent they may contribute to increasing the efficiency of the Defender, which is defined in p. 1 of the explanatory note as one of the goals of the present reform. The opinion is based on the relevant international standards, including in particular the soft law instruments, as well as on the Venice Commission previous opinions and reports on the matter,[4] with due regard to the local context.

III. ANALYSIS

A. Comments on the existing law

9. Generally, the existing law is in compliance with European and international standards; it is well-structured and deals with most of the major issues that an Ombudsman law should regulate (except for the Defender's NPM's functions, which are dealt with in the Draft law, see Section B).

10. That being said, the existing law should be improved further. First of all, the Armenian authorities should pay attention to the previous opinion of the Venice Commission on the law on the Human Rights Defender of Armenia[5]. Some of the recommendations of that opinion are still valid today and should be incorporated in the Draft Law. In addition, or in development of its previous recommendations, the Venice Commission would like to draw attention of the Armenian authorities to several important aspects of the existing law, described below.

1. Election of the Defender

11. It would be useful to set in Article 3 rules on applications and on the vetting process for the candidates to the position of Defender. The vetting process should be transparent, include a sufficient number of independent external experts representing the civil society, academia, etc., and be entrusted to a parliamentary committee where all main political fractions are fairly represented. Such vetting committee should ensure the plurality of candidates presented to the Parliament for voting.

12. Election of the candidate by a 2/3 majority would be a better solution than a 3/5 majority provided by the existing law and by the constitutional amendments[6]. Indeed, in the previous opinion on the Defender[7] the Venice Commission welcomed the election of the Defender by a 3/5 majority, by contrast with the previously existing system; however, the question remains whether 3/5 represents "qualified majority of votes sufficiently large as to imply support from parties outside government", required by p. 7.3 of the PACE Recommendation 1615 (2003). The Venice Commission also draws attention to CDL-PI(2015)015rev where it recommended to the Armenian authorities to consider the election of the Defender by a two-third majority (§ 192).

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[4] In particular, the Optional Protocol (OPCAT), adopted in 2002, entered into force in 2006; Guidelines on National Preventive Mechanisms, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT); Compilation of the Venice Commission on the Ombudsman Institution (CDL(2011)079), and Principles Relating to the Status of National Institutions (Paris Principles of 1993).

[5] CDL-AD(2006)038

[6] See also CDL-PI(2015)015rev. For more details on the election of Ombudsman see CDL-INF(2001)007, Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, § 2.

[7] CDL-AD(2006)038, § 26

In addition to that, the ideal of "nearly-consensual" election of the Defender would better be served by ensuring personal voting in the Parliament instead of voting "by delegation".

13. Furthermore, an anti-deadlock mechanism[8] should be put in place for situations where a candidate does not obtain the necessary qualified majority of votes in the Parliament. The purpose of such mechanism would be "to create incentives for both the majority and the opposition in Parliament to find a reasonable compromise (or, rather, to create disincentives to prevent situations where they are not capable of finding a compromise)".[9]

14. The existing law does not specify whether the Defender may be re-elected. It is understood that the possibility of re-election is not excluded by the current law; if so, it should be specified in the Draft Law explicitly. In principle, the Venice Commission considers that it would be preferable to have the Defender elected for one single term, without the possibility for the re-election. Thus, in its recent opinion on the People's Advocate of Moldova, the Venice Commission observed as follows: "The principle of a single term indeed provides a safeguard contributing to the [People's Advocate's] independence and precluding the risk of accusations that his/her decisions/recommendations might be influenced by an interest in being reappointed".[10] This position echoes earlier observations made by the Venice Commission in respect of the existing law on the Defender[11]. In an opinion on the draft law on the People's Advocate of Kosovo[12] the Venice Commission expressed its preference for a longer non-renewable term for the ombudsperson. That being said, since there is no hard standard on this matter,[13] the final choice as to whether or not the Defender's mandate should be renewable belongs to the Armenian authorities.

2. Competencies of the Defender vis-à-vis the judiciary

15. Article 7 p. 1 of the existing law stipulates that the Defender is entitled to consider complaints "regarding the violations of human rights and fundamental freedoms". At the same time Article 10 p. 1 stipulates that "the Defender shall not consider those complaints that must be settled only by Court". In the opinion of the Commission, Article 10 p. 1 needs to be reformulated in order to be reconciled with Article 7 p. 1. It is sometimes difficult to draw a proper line between the powers of the ombudsperson and the role and functions of the courts of law. Judges often examine cases concerning alleged violations of human rights; therefore, chances are that a case referred to the Defender may also be introduced before a court. In essence, these are complementary legal mechanisms, not mutually exclusive. As the Commission put it in its previous opinion on the Armenian law on the Human Rights Defender, "the existence of a legal remedy should not prevent a person from filing a complaint with the Defender".[14]

16. The purpose of Article 10 p. 1 is perfectly understandable: to prevent forum shopping and ensure the supremacy of adjudication process (which takes place in the courts) over the mediation process (which takes place before the Defender). However, that does not mean that the Defender should refuse dealing with a case solely because there is a theoretical possibility that this case might end up in a court. Otherwise the Defender would have no cases to deal with. The supremacy of the adjudicative process should be ensured by procedural means: the

[8] See CDL-AD(2004)041, Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, §§ 8.1 and 11

[9] See the Preliminary Joint Opinion on the draft amendments to the law on the prosecutor's office of Georgia (CDL-PI(2015)014), §22

[10] CDL-AD(2015)017, § 45

[11] CDL-AD(2006)038 § 29

[12] CDL-AD(2007)024, § 40

[13] See, for example, the PACE recommendation 1615 (2003) which in p. 7.3 speaks of "renewable" mandates

[14] CDL-AD(2006)038, § 50

Defender should be able to take any human rights case unless that case has already been decided by a court or is being examined by a court. It is thus recommended to reformulate Article 10 p. 1 by removing the first phrase which is someway misleading[15].

17. It is also recommended to specify that the Defender should refuse to accept a case for consideration if an identical case has already been introduced by another person before a court. For example, if a decision of the municipality to build a road which affects a large number of residents of a town has been contested by some residents before the courts of law, the Defender should not accept complaints from other residents, even if the latter are not parties to the court proceedings.

18. Article 7 p. 1 stipulates that the Defender cannot intervene into judicial processes. The administrative branch is therefore submitted to the supervision by the Defender, while the judiciary is not[16]. In its previous opinions the Venice Commission warned against the direct involvement of the ombudspersons in individual court cases[17], so this model is perfectly compatible with the Venice Commission's approach. The existing law gives the Defender two specific powers in the judicial sphere: to give legal advice to the parties to the court proceedings, and to seek institution of disciplinary proceedings against judges (see respectively Article 7 p. 1, second paragraph, and Article 12, p. 1 (8)). While the Commission has no objections against the Defender acting as a legal advisor, the second power (to set disciplinary proceedings in motion) is quite unusual and appears to contradict otherwise ancillary role of the Defender vis-à-vis the judiciary. The Armenian authorities should consider removing the power given to the Defender by virtue of Article 12 p. 1 (8).

19. In order to add clarity, and to exclude overly broad interpretation of the competence of the Defender to intervene in "human rights cases" it is recommended to stipulate additionally in Article 7 p. 1 that the Defender cannot examine complaints about the alleged human rights violations by the courts. Such grievances must be addressed through the normal chain of appeals to a higher judicial instance. Probably, the text of the constitutional amendments should also be revised in order to make clear that the judiciary is excluded from the Defender's supervision.

20. That being said, the Venice Commission recalls that in its previous opinion on the Armenian law on the Defender, it observed as follows:

> *"[…] One may […] discuss the extent of the [Defender's] intervention in cases dealt with by prosecution offices and courts but limited to ensuring that these cases are conducted within a reasonable time limit and that court decisions are taken within a reasonable time and are diligently and properly executed. In some models, like the one existing in Poland, the Ombudsman's powers in this area are significantly broader."*[18]

[15] See also CDL-AD(2006)038: " […] [T]he Defender should be in a position to deal with a case until it has been taken up by a court. Of course, the Defender should inform the complainant about the judicial remedy and refer the complainant to it".

[16] In the 2006 opinion on the Law on the Human Rights Defender of Armenia (CDL-AD(2006)038) the Venice Commission noted as follows: "Under the new Constitution, the people of Armenia have clearly opted for a Defender or Ombudsman whose mandate does not extend to supervision of the courts and whose activities should be carried out under due respect for the independence of the judiciary, as reflected in the judgment of the Armenian Constitutional Court".

[17] CDL-AD(2007)024, Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), § 19, and CDL-AD(2011)034, Joint opinion on the protector of human rights and freedoms of Montenegro, § 39

[18] CDL-AD(2006)038, § 44

In other words, as a general rule the Defender is not an appeal instance vis-à-vis the courts. However, the Defender may supervise certain aspects of the process of administration of justice, specifically mentioned in the law, such as the length of the proceedings and proper execution of judgments, for example[19]. As it was stated in the CDL-AD(2015)017, with reference to the PACE Recommendation 1615(2003), "ombudsmen should have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system" (§ 33).

21. However, since there are no hard standards on this issue, so it belongs to the national legislator to define whether or not the Defender should have those powers in relation to the administration of justice.

3. Procedures before the Defender

22. Article 8 p. 5 of the existing law provides that public officials may apply to the Defender only in their personal capacity. It is understood that they cannot complain about human rights violations if they themselves are not personally affected. This is an acceptable model, in which the Defender only plays the role of a mediator in disputes between private individuals and the State. Such model prevents any *actio popularis* by public officials. However, it may prove quite useful in practice to allow State officials to complain about the general malfunctioning of the system, even where they are not direct victims of such malfunctioning. Public officials know the administration system from the inside, they are better informed and may be more efficient in defending human rights even if their own private interests are not affected. The Armenian authorities are therefore invited to reconsider this provision in order to include this possibility, within the limits set by the legislation on the status of public servants in Armenia.

23. The Venice Commission observes that a person whose rights are affected by an administrative act or omission has usually a very limited time to bring the case before a court. It appears that under the existing law bringing a complaint for mediation before the Defender does not interrupt the running of time-limits for judicial review. In such circumstances procedures before the Defender should be relatively quick, or, at least, the applicant should have a clear understanding of the time-frame for such procedures. Article 11 p. 3 of the existing law sets 30 days' time-limits for adopting a decision following a complaint, and this is commendable. However, if this decision is the one described in Article 11 p. 1 (1) ("accepting the complaint for consideration") it is unclear what would happen afterwards, during the "consideration" phase and how long that phase would last. One option would be to fix a time-limit for the "consideration" phase in the law itself; however, time-limits fixed in the law *in abstracto* do not always correspond to the realities of the Defender's work.

24. As an alternative, the Defender might be required by the law to explain in his/her reply further steps it would take in order to resolve the issue, and fix a time-limit for any such steps (depending on the importance of the issue and his/her work-load). That will make the process of "consideration" of complaint more predictable, yet sufficiently flexible for the Defender and his/her staff. The Defender may also be required by law to explain to the applicant that judicial legal avenue also exists for his/her complaint and inform the applicant about time-limits for bringing the case before the court. It would then be for the applicant to decide whether to wait until the end of the procedure before the Defendant or to go directly to a court (which, under the existing law, would end up with the closure of the procedure before the Defendant). Another possible solution would be to provide in the law that bringing a case before the Defendant

[19] For more information on this topic see CDL-JU(2011)023, Report on the relations between the Ombudsmen and the Judiciary, by Ms Gabriele Kucsko-Stadlmayer.

interrupts the running of the time-limit for bringing the case before a court, for example for three months.

4. Guarantees of the Defender's independence and efficiency

25. The Defender's immunity, as regulated by the existing law (Article 19), appears to relate to his specific powers and positions, which is compatible with the Venice Commission's approach[20]. The Venice Commission stresses that this immunity should not only concern the person of the Defender and his staff, but should also cover baggage, correspondence and means of communication belonging/used to the Human Rights Defender and his/her staff in their professional capacity – that should be added to the law.[21]

26. Furthermore, Article 23 p. 5 proposed by the Draft Law makes clear that the immunity continues to apply after termination of the mandate, and also protects staff member of the Defenders' office or any other person who has been properly mandated by the Defender to perform some of his/her functions. Indeed, "one could consider a different scope of immunity with regard to the staff [of the Defender]";[22] however the Draft Law appears to give the same level of immunity to the Defender and to his/her proxies (i.e. deputies, staff members, members of the Preventive Council etc.), which is acceptable. It is, however, strange, that only members of the Expert Council enjoy from the immunity in the performance of their functions, while members of the Preventive Council are not mentioned in the new Article 23 p. 5, as formulated by Article 12 of the Draft Law.

27. It is unclear how to interpret the exclusion from the general rule establishing the Defender's immunity, set in the first paragraph of Article 19, namely that the immunity is not applied if the Defender's opinion expressed in his official capacity contains "slander or offence". It is normal that in the course of his/her mandate the Defender would publicly condemn certain actions of State officials. The Defender must not be prevented from doing so out of fear of being prosecuted by those officials for "slander" or "offence" (whatever the latter means). State officials should be prepared to tolerate criticism from the Defender, even if the Defender is mistaken. Probably, the only possible exclusion from the general immunity rule should be where the Defender makes deliberately false and very grave public accusations.

28. Article 18 of the existing law speaks of the liability for the "intervention into activities of the Defender". However, the law contains no specific sanctions for hindering the Defender's work. In particular, it does not specify what happens if the Defender or a competent member of his/her office is not given a reply within the time-limits set in Article 13, or not given access to the prison, or if confidentiality of his/her exchanges is violated by the authorities. Probably, the most important powers of the Defender should be supported by the specific sanctions, directly specified in the law. Indeed, those sanctions should be adequate: not excessive and, at the same time, serious enough to deter State officials from ignoring the Defender's requests. It may also prove useful to revise other legislation (in particular the legislation establishing the regime of the places of detention and describing the duties of the State officials running them) in order to include corresponding provisions in those other laws.

29. Article 20 of the existing law provides that the Defender's own salary should be defined by law. In addition to this provision, it is recommended to guarantee a certain level of the Defender's salary by linking it to the salaries of MPs, Supreme Court judges or other top-level

[20] See CDL-PI(2015)015rev, § 190; see also CDL-AD(2004)041, Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, § 18
[21] See CDL-AD(2006)038, §74
[22] *Ibid.*

public officials. It is also very important to guarantee the adequate level of salaries for the Defender's staff, as well as financing of his/her office and activities.

B. Comments on the proposed amendments

30. Generally, the proposed amendments are welcomed, since without them the existing law is not sufficient as a legal basis for the Defender´s functions as NPM under the OPCAT mandate.

1. Substantive comments

a. Inter-relation between the Preventive Council and Expert Council

31. Article 14 of the Draft Law provides for the establishment of the "Expert Council of the National Mechanism for Violence Prevention" (hereinafter - the Preventive Council). However, the relationship between the Expert Council (which may be established by virtue of Article 26 of the existing law) and the Preventive Council (which is introduced by the new points 5 et seq., added by Article 14 of the Draft Law to the current Article 26) is not entirely clear.

32. Several provisions of the Draft Law suggest that these are two parallel bodies,[23] and this seems to correspond to the whole logic of the Draft Law.[24] Thus, the Preventive Council is supposed to act in a relatively narrow field regulated by the UN Convention against torture, while the mandate of the Defender is much larger and also covers all other possible human rights violations where the previously established Expert Council may be useful. Hence, the Preventive Council should be regarded as a supplementary mechanism to the already existing Expert Council. If this understanding is correct, it is necessary to amend Article 26 (and in particular its title) in order to make it absolutely clear that the Expert Council and the Preventive Council are two different bodies.

33. The whole text of the Draft Law should be revised in order to verify that the terminology is used correctly and coherently. It should always be clear which provisions of the law relate only to the Expert Council or its members, which concern the Preventive Council or its members, and which cover both bodies and their members at the same time. For example, the newly added p. 9 of Article 24 establishes the duty of confidentiality, but speaks only of the members of the "Expert Council", while members of the Preventive Council should normally also be concerned. P. 11 of this Article regulates expenditures incurred by the members of the Preventive Council, but does not mention members of the Expert Council. The privilege not to be interrogated appears to cover only members of the Expert Council and not of the Preventive Council which is not logical (see Article 12 of the Draft Law, amending Article 23 of the existing law). At the same time, the 2nd part of Article 5, added by Article 2 of the Draft Law, which establishes privilege not to reveal confidential information, speaks only of the Preventive Council and does not mention members of the Expert Council. Article 14 p. 3 of the Draft Law, which amends Article 26 of the existing law, uses the terms "Preventive Council", "Council" and "Expert Council" interchangeably, while the title of the old Article 26 ("The Expert Council") remains unchanged..

34. In sum, the Venice Commission strongly recommends scrutinising the text of the Draft Law in order to leave only those distinctions between the two Councils and their members which can be reasonably explained by their respective functions.

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[23] For example, this understanding is supported by the formula used in the new reading of the p. 4 of Article 26 proposed in the Draft Law and Article 15 of the Draft Law ("Transitional provisions").

[24] And it also seems to correspond to the already existing situation, where the Preventive Council is established and functions on the basis of the order of the Defender; see the Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Republic of Armenia, in particular §§ 13 et seq.; in http://tbinternet.ohchr.org/Treaties/CAT-OP/Shared%20Documents/ARM/CAT_OP_ARM_1_16044_E.pdf

b. Composition and mandate of the Preventive Council and of the Expert Council

35. The above said does not imply that the composition, powers and the status of members of the Expert Council and of the Preventive Council should be similar in all respects. After all, the Preventive Council is supposed to operate in a very specific context (prisons, military barracks, etc.) which may arguably require conferring more powers on its members, and that, in turn, may justify the difference in their status. A lot depends on whether the Preventive Council is conceived as a purely advisory body whose members give advice to the Defender and his/her staff on a voluntary basis, or whether the members of the Preventive Council may also perform certain external functions on a permanent basis and be remunerated.

36. In the previous opinion the Venice Commission observed in respect of the Expert Council as follows:

> *"Under the concluding sentence of para. 1 the powers of the Human Rights Defender listed in sub-paras. 1, 2, 5 and 6 may also be exercised by his or her staff upon written authorisation. However, it may be questioned whether there is reason to grant similar powers to the Expert Council or Councils, especially since these are supposed to be groups of individuals providing advice to the Human Rights Defender, which they will do merely on a voluntary basis."*

37. The main question is whether the work of the two Councils is oriented inward or outward of the Defender's office. The existing Law defines that the Expert Council as an "advisory" body. The Draft Law stipulates that the function of the Preventive Council is to provide "advisory" assistance to the Defender. So, both bodies are defined as "advisory", i.e. inward-looking.

38. At the same time, Article 4 of the Draft Law stipulates that the Defender may entrust his/her powers (such as the power to enter places of detention, get access to the documents, conduct confidential interviews, etc.) to the members of the Preventive Council (see the new wording proposed for Article 12 p. 5 in the Draft Law). The existing law gives those powers to the members of the Expert Council (see the wording of this provision in its current form). The very idea to entrust such powers to the "advisors" is quite unusual.

39. Be it as it may, the law should specify clearly that the "advisory" character of the Preventive Council does not prevent its members, if mandated, from performing directly some of the functions which the law normally attributes to the Defender. Moreover, it should be clear whether such mandate may be given only to the members of the Preventive Council, or also to the members of the Expert Council when needed, and whether such mandates are temporary or permanent. Depending on the nature of the functions of the members of the Preventive/Expert Council their remuneration should not only be possible (as proposed by the Draft Law) but obligatory.

40. Probably, those questions may be answered in the regulations issued by the Defender under Article 26 of the Law (as amended by Article 14 of the Draft Law). Under the Draft Law the Defender would have full discretion to define respective mandates of the Expert Council and the Preventive Council, set the number and status of their members, assign tasks to them, allocate fees, reimburse costs, dismiss them etc. However, in the opinion of the Venice Commission it is not appropriate to leave all those questions in the Defender's discretion. The two Councils perform very important functions, and in order to guarantee better their independence, the law should be more explicit on the number and status of their members, their functions, conditions of appointment and removal, etc.

41. Furthermore, as it may be understood from Article 6 p. 7 of the Draft Law (which amends Article 12 of the existing Law) members of the Preventive Council are entrusted, upon the decision of the Defender, with the mandate to work on individual cases based on complaints or on their own initiative. However, the work on the individual cases is of reactive nature, and therefore not in accordance with the purely preventive mandate of the NPM under the OPCAT. It is true that the Defender's mandate is of dual nature; probably, it could be reflected in the internal structure of his/her office and the staff designated to deal with NPM ideally should not interfere in individual cases through solving complaints.

42. The Draft Law (Article 14 p. 3) provides that members of the Preventive Council may come from the civil society organisations. This is a welcome development[25], provided that there is no conflict of interest between their position within their NGOs and the functions they are entrusted by the Defender as members of the Preventive Council. Furthermore, the draft law proposes that representatives of international organisations may become members of the Preventive Council. This is more problematic. First, members of the Preventive Council should be Armenian citizens, and this condition may be difficult to meet. Second, it is unclear whether "representatives of the international organisations" would sit in the Council in their personal capacity, and how their work within the Council would be compatible with their status and duties within those international organisations.

43. Staff members of the Defender's office may perform some of his/her functions based on his/her written decision (Article 4 p. 5 of the Draft Law). Apart from the obligation of the staff to keep information they receive while performing duties as an NPM on behalf of Defender confidential, law should also envisage sanctions for the breach of confidentiality.

44. In sum, it is recommended to define clearly the respective mandates of the two Councils, rules applied equally to the members of the two Councils and specific rules which are applied only to one of the Councils, depending on its functions.

c. Other recommendations

45. The Armenian authorities should consider adding to the Defender's mandate all the powers of the NPM that are provided by OPCAT. Those powers are prescribed as minimum powers necessary for successful fulfilment of NPM mandate, and as such they should all be included in the Draft Law. Among other, the power to submit proposals and observations concerning existing or draft legislation (from OPCAT 19 (c)) and power to have contacts with the Subcommittee on Prevention, to send it information and to meet with it (from OPCAT 20 (f)) should be mentioned in the Draft Law.

46. Article 9 of the Draft Law introduces Article 16.1 which gives the Defender the power to issue an opinion on any draft law which touches on human rights before its adoption[26]. The Draft Law should make it clear that the responsibility to send to the Defender any such draft law lies with the Government/Parliament. That being said, it might be difficult to define whether a particular piece of legislation relates to "human rights" and should therefore be assessed by the Defender: on this point the Government/Parliament and the Defender may have different views. For such situations, the Defender should have the right (but not the obligation) to issue an opinion on the draft law *proprio motu* before the adoption of the relevant act.

[25] See "Principles relating to the Status of National Institutions (The Paris Principles)", adopted by the UN GA resolution 48/134 of 20 December 1993, regarding composition and guarantees of independence and pluralism of the National Institutions

[26] It is understood that the Defender should be able to comment on the draft law before it is adopted by the Parliament – however, Article 16.1 added by the Draft Law says that the Defender should receive the draft acts "before presenting them to the Government". Probably, it's a translation error.

47. Under Article 6.1 (as formulated by Article 4 of the Draft Law) the Defender has the right to visit places of detention. It would be very useful to give the Defender not only access to places of detention in general, but to specify that he may also visit other installations and facilities of those institutions, as stated in the OPCAT 20(c).

48. The issue of financial independency of the NPM should be improved. Apart from having a separate budget line dedicated to the fulfilment of the NPM mandate, it is also necessary to underline that the allocated resources should be adequate for the implementation of the NPM Annual plan. This is very well formulated in Article 25 of the SPT Guidelines which state the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.

49. Finally, the explanatory note to the Draft Law mentions Military Ombudsman, but the law does not seem to give space for such a figure, at least as a separate official. The Venice Commission recalls, however, the recommendation of the PACE contained in its Resolution 1959 (2013) to "refrain from multiplying ombudsman-type institutions, if it is not strictly necessary for the protection of human rights and fundamental freedoms; a proliferation of such bodies could confuse individuals' understanding of the means of redress available to them" (p. 4.3). This reasoning, however, should not prevent greater specialisation and separation of tasks within the office of the Defender, especially given its role as a NMP.

2. Terminology

50. In addition to the above, the Venice Commission suggests harmonising the terminology used in the Draft Law with the language of OPCAT and the SPT Guidelines on NPMs and APT Guide on Establishment and Designation of NPM[27].

51. Thus, Article 2 of the Draft Law is amending 2nd part of Article 5 of the existing Law. In this section the Expert Council is entitled as the Expert Council of the National Mechanism for Violence Prevention. This may be a translation problem, but if it is not, the term "violence" is not appropriate in this context. OPCAT is dealing with mechanisms of preventing "torture", while prevention of "violence" (which is a much broader concept) is a completely separate issue. The adequate title would be the "Expert Council of the National Mechanism for prevention of Torture", which is in line with OPCAT mandate. The same concerns a "special unit" established under the new 6.1 p. 2 (Article 4 of the Draft Law).

52. Next, in Article 4 of the Draft Law the Defender is recognized as an independent NPM. Having in mind that the Defender as a national human right institution already has its scope of duties that are different from those of the NPM it is suggested to use the formulation "entrusted with the mandate of NPM" (especially having in mind that the Defender will delegate some duties and powers necessary for the fulfilment of NPM mandate to his staff, as determined in Article 6.1 p. 5, formulated by Article 4 of the Draft Law). This formulation also underlines that the performance of function of NPM is autonomous, that is, it is separated from the performance of duties as a Defender.

53. Section 3 (1) of Article 6.1 (see Article 4 of the Draft Law) uses the term of "restriction of liberty". However, deprivation of liberty and restriction of liberty are not synonyms; NPM is normally competent to visit places of "deprivation of liberty" (cases when individual is not permitted to leave a particular place at their will) and not on restriction of liberty (situations where a person can move freely within certain relatively large zone but cannot leave this zone without permission)[28]. Restriction of liberty is much brooder and to a large extent falls beyond

[27] http://www.apt.ch/content/files_res/NPM.Guide.pdf
[28] See *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, §§ 53 et seq., ECHR 2012, with reference to earlier case-law, in particular *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39.

the scope of the NPM mandate. Thus, the term “places of deprivation of liberty” or “places of detention” is more suitable.

54. In respect of Article 6.1 p. 3 (2) (see Article 4 of the Draft Law) it is not quite clear what “confidential, separate and unrestricted” manner of visits exactly means. It is understood that conversations of the NPM personnel with detained persons or prison staff should be possible without other persons overhearing the content of the conversation. Classified and confidential nature of those conversations and their records should be clearly emphasised. In addition, conversations/interviews with detainees and others should be possible without any eavesdropping or other surveillance by officials, inmates or anyone else, and it is recommended to specify so in the article. The exact wording of the relevant provisions may be taken from OPCAT (Article 20(d)) and SPT Guidelines (p. 25) and APT Guide (p. 6.5).

55. Article 6.1 p. 3 (3) (again, contained in Article 4 of the Draft Law) stipulates that Defender is authorized to make recommendations with the aim to improve detention conditions. This term should be replaced with a more general one contained in OPCAT 19(b): “treatment and the conditions of persons deprived of liberty”. Detention conditions are very important but represent only one element to be considered in respect of prevention of torture and ill-treatment. “Treatment”, in general, is a term of a broader scope and includes multiple factors that could potentially contribute to prevention of torture or ill-treatment.

56. Article 6.1 p. 3 (4) states that the Defender is authorized to “receive” certain information. At the same time following p. 3 (5) is using formulation “request and receive”. The formulation from section 3 (5) is more exact; even better is the expression “access all the information”. This formulation covers more potentially problematic situations that could appear in practice, and is in line with OPCAT Article 20(a). The provision authorizing the Defender to “access to information” should be supported by a provision stipulating that the authorities are obliged to provide such information at the request of the Defender.

57. Article 6.1 p. 3 (6) deals with the authority of the Defender to familiarize with and receive copy of documents necessary for carrying out his/her powers. The term “familiarize” might be replaced with “access”, and the term “documents” with the term “information” (which covers electronic data etc.).

IV. CONCLUSIONS

58. The Draft Law represents a significant progress compared to the law currently in force, at least from the perspective of the provisions related to Defendant’s mandate as the NPM. That being said, the Venice Commission and the DGI recommend certain further improvements to the existing law and to the Draft Law. The most important recommendations of the Venice Commission and the DGI are the following:

- To provide in the law for a transparent vetting procedure, involving a parliamentary committee and including a sufficient number of independent experts, which would suggest to the Parliament several eligible candidates for the position of the Defender;

- To make clear that a human rights complaint may be submitted to the Defender even if this complaint may in principle fall within the jurisdiction of the courts; however, the Defender should not consider disputes which have already been resolved or are being resolved by the courts; to clarify the powers of the Defender in the sphere of good administration of justice;

- To clarify in the law the respective mandates and principles of functioning of the two Councils (Preventive Council and Expert Council) and to define the status of their members accordingly; to review the language of the law in order to guarantee consistency in the use of the terms “Preventive Council”, “Expert Council” or “Council”.

- To guarantee adequate level of funding of the Defender’s office, in particular by guaranteeing an appropriate level of salaries for the Defender and his/her staff.

59. The Venice Commission remains at the disposal of the Armenian authorities for further assistance on the legal framework pertaining to the Human Rights Defender of Armenia.