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UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Written submission by the Association for the Prevention of Torture (APT) on the Draft General Comment No. 1 on places of deprivation of liberty (article 4)

Geneva, 21 April 2023

Introduction

1. The APT – as the organization at the origin of the Optional Protocol to the UN Convention against Torture (OPCAT) – welcomes the opportunity to provide the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment (the Subcommittee) with the following observations on Draft General Comment No.1.

2. The following submission is divided into three sections. Section A provides for general remarks on the approach adopted in the draft. Section B sets out observations in relation to specific paragraphs and themes. Section C includes recommendations about the expected public general discussion on the draft, as well as on the accessibility of the document.

A. General remarks

3. The General Comment provides for an important opportunity to clarify the scope of obligations of States parties to the OPCAT regarding the places of deprivation of liberty that the Subcommittee and national preventive mechanisms (NPMs) have a mandate to visit. The two paragraphs of article 4, read together, lie at the core of the OPCAT, and should be read in conjunction with the other articles of the treaty. In this sense, this General Comment, the first ever adopted by the Subcommittee, represents a unique opportunity to go beyond the mere interpretation of the letter of article 4 and to present a strategic vision of OPCAT and its implementation, based on its spirit and original purpose.

4. We welcome the General Comment's broad interpretation of article 4 and the emphasis on the link between its two paragraphs. However, among the elements of the definition, that are considered in the General Comment, the phrase "free to leave at will", is not developed or interpreted at the same level as the other elements of the definition. Given the importance of this element to article 4's broad scope of application, further guidance on this element of the text would significantly strengthen the draft.

5. In addition, while the draft provides for a substantive analysis of the definition of "places of deprivations of liberty" as developed in international law, the APT is of the view that the text would be strengthened by: (i) integrating a broader prevention-based lens to further clarify the OPCAT obligations of States Parties and corresponding powers of the

Subcommittee and NPMs; and (ii) applying a coherent approach while addressing the practice of both the Subcommittee and NPMs.

A.1 Integrating a broader prevention-based lens

6. The OPCAT is an operational treaty rather than a standard-setting instrument. As such, the OPCAT introduces a practical and complementary element to the preventive framework set out under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[1]

7. When a State ratifies the OPCAT, it gives its express consent to allow visits by the Subcommittee and NPMs to all types of places where people are or may be deprived of liberty. Importantly, preventive visits enable OPCAT bodies to identify risks factors, analyse both systemic faults and patterns of failures, and propose recommendations to address the root causes of torture and other ill-treatment. Indeed, the long-term objective of the OPCAT is to mitigate the risks of ill-treatment and, thus, build an environment where torture is unlikely to occur.

8. While the draft rightly stresses the need for a comprehensive approach to defining places of deprivation of liberty, it falls short of clarifying the full scope of the preventive mandates of both the Subcommittee and NPMs. This is particularly relevant in relation to places in which people may potentially be deprived of liberty, or any other setting or situation where the risks of ill-treatment are high.

9. In this regard, the APT would like to highlight the need for a broad interpretation of the preventive mandate in order for OPCAT bodies to be relevant and prevent torture in a wide number of situations. For example, during the recent Covid pandemic, NPMs reacted to issues, such as the excessive use of force and cruel, inhuman or degrading treatment in the enforcement of sanitary measures, including outside of custody. There is also an emerging practice of a number of NPMs actively involved in monitoring demonstrations and public assemblies. Indeed, as recent practice shows, such situations involve a high risk of ill-treatment and often result in potential deprivation of liberty.[2]

10. The APT believes that integrating a broader prevention-based lens in the analysis would help clarify OPCAT obligations in the context of high risk situations such as those mentioned above and, at the same time, maximize the preventive impact of the work of NPMs and the Subcommittee. Indeed, adopting such an approach would allow preventive visits to form part of a proactive, forward-looking, continuous process of reducing the risks of torture and ill-treatment, in full compliance with the spirit and purpose of the OPCAT.

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[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, 10 December 1984, articles 2, 10, 11 and 16. See also CAT, *General Comment No. 2, Implementation of article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008.

[2] See for example, the work of the NPM of Peru at https://www.defensoria.gob.pe/wp-content/uploads/2023/04/Informe-Especial-N-09-2023-DP-DMNPT.pdf Also of note is the work of the NPM of Paraguay which has monitored operations carried out by Armed Forces authorised to intervene in internal security matters due to organised crime. These "special operations" entailed raids, armed incursions, document controls of citizens, arrests and detentions, use of force, which constitute a risk of torture and ill-treatment.

A.2 Applying a more coherent approach in presenting the practice of NPMs and the Subcommittee

12. The Draft General Comment refers to the practice of the Subcommittee and NPMs. While reference to such practice is crucial for a comprehensive understanding of the definition of places deprivation of liberty, the APT is concerned about some inconsistencies in the way this practice is presented.

13. The APT notes that the draft dedicates a section on the application of the definition of "places of detention" by the Subcommittee (see Section II.B, paragraphs 10-12) while little reference is made to the corresponding practice of NPMs. In the APT's view, the draft should elaborate more on NPM practice in this regard in Section II.B, paragraphs 10-12 of the draft. In particular because no objection can be raised to NPM visits, unlike the Subcommittee, as provided by article 14(2) of the OPCAT.

14. Furthermore, while the APT welcomes the Subcommittee's approach in favour of a non-exhaustive list of places of deprivation of liberty, the APT believes that having two separate lists of places of deprivation of liberty reflecting the practice of the Subcommittee and of the NPMs (see Section IV, paragraph 36-38) may be confusing and ineffective. We would recommend having one consolidated and non-exhaustive list reflecting the practice of OPCAT monitoring bodies and beyond in Section IV, paragraph 36-38 of the draft. This would be more helpful for NPMs when in doubt but also for authorities who would then be clearer about their obligation to allow access to these places.

B. Observations on specific paragraphs and themes

B.1 Importance of article 4 in light of the purpose and spirit of the OPCAT

16. The APT welcomes the view of the Subcommittee that a comprehensive approach to defining places of deprivation of liberty is vital to maximize the preventive impact of the work of NPMs and the Subcommittee (see Section II, paragraph 7).

17. In this context, the APT believes that it would be helpful to clarify further in Section II, paragraphs 7, 8 and 9 that obligations under article 4 of the OPCAT should be read: (i) in light of the purpose and spirit of the OPCAT, (ii) in line with the relevant practice of NPMs and the Subcommittee, and (iii) in light of the OPCAT being a "living instrument" that should be ready to respond to current, emerging and future risks and challenges. Indeed, as the Subcommittee itself has noted, the "preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism''.[3]

18. It would also be useful to clarify that article 4 must be considered in the light of the OPCAT as a whole. In particular, reference should be made to the visiting powers in

[3] Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/OP/C/57/4, Annex, para. 2.

articles 11(a), 12, 14, 19(a) and 20 of the OPCAT that, *inter alia,* enable visiting bodies to make decisions about where, when and how to visit. In addition, article 4 should also be interpreted in the light of preventive powers that go beyond visits, including submission of recommendations to strengthen the protection of persons deprived of liberty under Article 11(b) and 19(b). It should also be read in conjunction with article 19(c) on the power to make recommendations and observations on existing or draft legislation.

19. Furthermore, taking into account other human rights treaties and standards, including as provided for by article 2(2) of the OPCAT, enables NPMs and the Subcommittee to take the broadest possible approach to prevention and to identify and address systemic weaknesses, including in judicial and legal safeguards, practices and in laws.

20. **The APT recommends the Subcommittee to make reference to articles 2(2), 11(a) and (b), 12, 14, 19(a), (b) and (c), and 20 in Section II A. paragraph 8.**

21. **The APT also recommends that Section II. A, paragraph 9 be edited to include the following phrase in its second to last sentence: "how to monitor places of deprivation of liberty and other settings/situations where the risk of ill-treatment is high".**

B.2 Public and private places of deprivation of liberty

22. The APT welcomes the inclusion by the Subcommittee of Section III.A, paragraphs 20-23 relating to both public and private places of deprivation of liberty. However, we suggest that the arguments in this section be made stronger through reference to: (i) the practice of the Subcommittee and NPM regarding private places;[4] (ii) the jurisprudence and practice of other international and regional bodies; and (iii) the intention of the drafters of the OPCAT.

23. Examples of relevant jurisprudence include the fact that the European Court of Human Rights (ECtHR) has made clear that deprivation of liberty includes private places, noting that "'the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements."[5] International human rights bodies have provided further examples of the contexts in which deprivation of liberty can arise. These include, *inter alia*: guardianship systems that prevent women from leaving their family homes without the permission of a guardian;[6] employers who prevent migrant domestic workers (who are often mainly women) from leaving the residences where they are employed;[7] and the "holding against their will of mentally disabled persons in conditions preventing them from leaving".[8] Here, regional visiting bodies also provide guidance, including the 35 years of evolving practice by the European Committee for the Prevention of Torture, including visits to private facilities.

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[4] New Zealand provides an interesting example here, where the NPM founding legislation was amended in 2018 to explicitly include privately-run aged care facilities. See: https://www.ombudsman.parliament.nz/what-ombudsman-can-help/aged-care-monitoring .
[5] ECtHR, *H.L. v UK*, App. 45508/99, Judgment, 5 October 2004, para. 91.
[6] Working Group on Arbitrary Detention (WGAD), Report of the Working Group, UN Doc. A/HRC/45/16, para. 47(c).
[7] *Ibidem*.
[8] WGAD, Deliberation No.7 on issues related to psychiatric detention, UN Doc. E/CN.4/2005/6, para. 51.

24. That the OPCAT was intended to cover non-traditional, temporary, and informal places is also evident from the fact that article 4(1) expressly considers that "instigation", "consent", or "acquiescence" of a public authority is enough to potentially bring about a situation of deprivation of liberty. These concepts were a part of the OPCAT from early in the drafting process,[9] and mirror the language of article 1 of the UNCAT. Accordingly, "instigation" "consent" and "acquiescence" were included in the UNCAT to prevent a government from avoiding responsibility by knowingly engaging "private" actors or by using unofficial places of detention. The repetition of these terms in the OPCAT therefore indicates that the definition of "place of detention" is not restricted to "officially ordered" acts of lawful detention or to "official" places of detention but covers a range of other types and places of "irregular" and temporary detention.[10]

25. **The APT recommends the Subcommittee incorporate in Section III.A further references to (i) the practice of the Subcommittee and NPMs; (ii) the jurisprudence and practice of other international and regional bodies; and (iii) the intention of the drafters of the OPCAT.**

B.3 Scope of "jurisdiction or control" with regard to those within the power or effective control of a State Party acting outside of its territory

26. The APT welcomes the manner in which the draft sets out the scope of "jurisdiction or control" within article 4 of the OPCAT as applying to everyone within the power or effective control of a State Party acting outside of its territory (see Section III.B, paragraph 27). Hence, access to the Subcommittee and NPMs must be granted not only to places within the States Parties' sovereign territory, but also to extraterritorial places of detention upon which they exercise jurisdiction and/or control.

27. In this regard, it would be useful to further clarify that the scope of article 4 extends beyond military bases abroad and make clear that article 4 includes all places abroad where people are detained under the jurisdiction or control of an OPCAT State Party. This may include military places, ships, offshore detention centres for migrants, and prison outsourcing.

28. As the Subcommittee itself has noted, "should a State party to the Optional Protocol (a sending State) enter into an arrangement under which those detained by that State are to be held in facilities located in a third State (a receiving State), the Subcommittee considers that the sending State should ensure that such an agreement provides for its national preventive mechanism to have the legal and practical capacity to visit those detainees in accordance with the provisions of the Optional Protocol and the Subcommittee guidelines on national preventive mechanisms."[11] Further, the Working Group on Arbitrary Detention (WGAD) has also made clear that "'[i]f a State outsources

[9] See Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights, UN Doc. E/CN.4/1991/66.
[10] See Report of the UN Working Group to draft an Optional Protocol to the UN Convention against Torture, 2 December 1992, UN Doc. E/CN.4/1993/28, paras. 38–40.
[11] Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/OP/C/57/4, Annex, para. 26.

the running of migration detention facilities to private companies or other entities, it remains responsible for the way such contractors carry out that delegation. The State in question cannot absolve itself of the responsibility for the way the private companies or other entities run such detention facilities, as a duty of care is owed by that State to those held in such detention."[12] Furthermore, " [...] national preventive mechanisms [...] must be allowed free access to the places of detention where those detained in the course of migration proceedings are held."[13]

29. The APT believes that clarifying these issues would also be in line with the practice of NPMs themselves who have made efforts to conduct monitoring visits of such places overseas, despite the significant political and practical hurdles that such visits may entail.[14]

30. **The APT recommends the Subcommittee consider the following additions in Section III.B, paragraph 27**
{...} This principle applies also to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as ***prison outsourcing overseas, offshore migrant detention, or*** forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation or in the course of other types of military occupation.

B.4 De facto places of deprivation of liberty

31. The APT welcomes the inclusion of *de facto* places of deprivation of liberty in Section IV, paragraph 39. The draft includes the phrase (quoting a report from the former UN Special Rapporteur on Torture on psychological torture) "whether a particular situation of confinement qualifies as "detention" depends not only on whether persons concerned have a de jure right to leave, but also on whether they are de facto able to exercise that right without exposing themselves to serious human rights violations".[15] In the APT's opinion, the above text could be strengthened by providing further guidance and examples on how to assess such *de facto* situations that may amount to deprivation of liberty when examined in context.

32. In this regard the APT would like to note that, in line with the jurisprudence of the ECtHR, *de facto* detention can be understood as a situation which in practice amounts to deprivation of liberty but which may not be qualified as such by the state or happen in officially recognised places of deprivation of liberty. These might include, *inter alia,* public demonstrations and assemblies, reception centres, boats at sea, and (following the view of the WGAD) the placement of individuals in "facilities where they remain under constant

[12] WGAD, Revised deliberation No. 5 on deprivation of liberty of migrants, UN Doc. A/HRC/39/45, para. 46.
[13] *Ibidem*, para. 47.
14 See for example the 2015 Annual Report of the Norwegian NPM, https://www.sivilombudet.no/wp-content/uploads/2017/06/SIVOM_FOREBYGGENH_%C3%85RSMELDING_ENG_2015_WEB.pdf .
[15] Report of the Special Rapporteur, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/43/49, para. 65.

surveillance".[16] In practice, and in considering whether a situation amounts to detention, the ECtHR cumulatively assesses the type, duration and effect of a situation and takes into consideration the specific facts of each situation.[17]

33. **The APT recommends the Subcommittee consider revising Section IV, paragraph 39 with a view to providing more criteria or examples that guide practitioners in relation to such *de facto* places.**

C. Consultations and accessibility

34. The APT welcomes the Subcommittee's invitation to relevant stakeholders to the public general discussion on the draft during the 50th session of the Subcommittee, in June 2023 (5 to 16 June). Given the importance of this General Comment and article 4 in general, we believe that such an opportunity to further improve the draft in the OPCAT spirit of openness and dialogue is essential. We thus encourage the Subcommittee to allocate adequate time for a robust discussion of the draft with all relevant stakeholders.

35. In this same line, and in the interest of ensuring that the General Comment is as accessible and widely used as possible, the APT suggests the draft be adjusted with a view to: (i) reduce the number of repetitions in the text; (ii) ensure consistency in the wording adopted in the text; and (iii) avoid overly technical language, to the greatest extent possible.

36. It is APT's view that these two steps, taken together, will contribute to a final document that provide useful guidance for States and monitoring bodies on OPCAT implementation, with a view to maximizing the preventive mandate of both the Subcommittee and the NPMs, in accordance with the spirit and purpose of the OPCAT. A General Comment that is both practical and inspirational in its broad understanding of deprivation of liberty will contribute to effective prevention by breaking secrecy and closeness, increasing transparency, therefore reducing the risks of torture and ill-treatment.

[16] Report of the WGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, UN Doc. A/HRC/30/37, para 9.
[17] See e.g., ECtHR, *Guzzardi v. Italy*, App. 7367/76, Judgment, 6 November 1980, paras. 92-93; ECtHR, *Austin and Others v. the United Kingdom*, Apps. 39692/09, 40713/09 and 41008/09, Grand Chamber, Judgment, 12 March 2012, para. 57. See also PICUM, *Immigration detention and de facto detention. What does the law say?* (2022) at https://picum.org/wp-content/uploads/2022/09/Immigration-detention-and-de-facto-detention.pdf .