Alkarama's comments on the draft general comment of the Subcommittee on Prevention of Torture on article 4 of the OPCAT (optional protocol to the convention against torture)

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21 April 2023

ALKARAMA
2, bis Ch. Des Vignes 1209 Geneva — Switzerland
Email: info@alkarama.org

The following contribution to the draft general comment of the Subcommittee on Prevention of Torture (SPT) on Article 4 of the OPCAT (Optional Protocol to the Convention against Torture) is based on practical observations made by Alkarama while carrying out its work in several countries in the Middle East and North Africa region that are States parties to the OPCAT.

In providing this commentary, Alkarama hopes to highlight practical issues that may arise for both the Subcommittee and national preventive mechanisms (NPMs) when carrying out periodic visits under article 4 of the Protocol.

I. Introduction (*paras 1–6*)

As highlighted by the SPT, Article 4 of the Optional protocol reinforces the main purpose of the Protocol of establishing "*a system of regular visits undertaken by independent international and national bodies to places where persons are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment*".

Article 4(1) does more than establishing "the obligation of States parties to allow visits to places of deprivation of liberty by the Subcommittee and the national preventive mechanisms".

Rather, Article 4(1), second sentence, reads as follows, "[*t]hese 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*". As such, this segment constitutes a reaffirmation that State party's obligations to allow visits to places of deprivation of liberty by the Subcommittee and the national preventive mechanisms must be fulfilled in such a way as to ***strengthen*** *the protection of persons deprived of their liberty.*

This sentence must be given its due importance in the comment as it pertains to the very purpose of the Optional Protocol – *the prevention of torture through regular visits* – , especially given the numerous obstacles faced by national in the accomplishment of their mission (*para 5 of the draft comment*).

Concretely, Alkarama has documented practices of States Parties in the Middle East and North Africa which does not allow for visits to be undertaken **with a view to strengthening the protection** of persons deprived of their liberty against torture and other CIDTP, in contradiction with the principles of good faith and the *ut res magis valeat quam pereat* rule[1].

[1] We recall that according to the principle of effectiveness (*ut res magis valeat quam pereat*), "*treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text*", see: R.K. GARDINER, *Treaty interpretation*, The Oxford international law library, Oxford, United Kingdom ; New York, NY, Oxford University Press, 2015, p. 69.

An example of this practice is **Lebanon's** failure to operationalise its National Preventive Mechanism (NPM) established by a 2016 Law[2] due to a lack of effective means. In the meantime, detainees are left to submit their complains about acts of torture or ill-treatment to the same authorities that carried out or allowed such acts to initially happen. In this situation, effective remedy becomes nothing more than an illusion.[3]

Contributing to this situation is the fact that detention centres remain under the authority and control of the General Directorate of Security Forces, while Lebanese law provides that prison oversight shall be ensured by the Ministry of Justice's Prison Department.[4] Recommendations issued by the CAT to transfer the management of the prison to the Ministry of Justice, have not been implemented to date. Meanwhile the NPM has not led any single visit or received any complaint, eight years after its creation. In a June 2019 letter to the Lebanese authorities, the CAT called on the Lebanese authorities to ensure that the NPM effectively fulfils its mandate and is granted access to all places of detention.[5]

We therefore draw the Committee's attention to the importance of clarifying the implications of this part of Article 4(1), both in terms of the obligations of States Parties and in terms of the practices to be adopted by NPMs themselves in order to protect and enhance their mandate.

Furthermore, an incentive to give full effect and in good faith to Article 4 by State Parties is the publication of the SPT's reports on its visits. Such a publication could provide civil society with much needed transparency and tools to enhance prevention and accountability.

Lastly, the importance of a real independence of the NPM is crucial in order to ensure that, as provided in article 4(1): "*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."*

We suggest that the SPT emphasise this element as a sine qua non condition for the fulfilment of States Parties' obligations under Article 4, as the absence of independence and effective means would deprive the regular visits of their purpose as set out in Article 4(1), read alone and in conjunction with articles 1 and 3 of the OPCAT (*draft comment paras 1–2*).

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[2] Law No. 62 of 2016 mandating the establishment of the National Commission for Human Rights, a national human rights institution encompassing a national preventive mechanism for the prevention of torture, as required under the Optional Protocol to the Convention

[3] Committee against Torture, Concluding observations on the initial report of Lebanon, CAT/C/LBN/CO/1, 30 May 2017, para 42-44.

[4] Decree n°17315 of 28 August 1964, articles 1 and 2

[5] Follow-up letter sent to the State party UNCAT, Letter "Request for further clarification", 27 Jun 2019

II. Places of deprivation of liberty under article 4 *("jurisdiction or control", paras 24–28)*

We highlight that in the Arabic version of the OPCAT adopts the same wording as the English version of article 4 (1) that States parties shall allow visits, "to any place under its jurisdiction **and** control":

" تسمح كل دولة طرف، وفقاً لهذا البروتوكول، بقيام الآليات المشار إليها في المادتين 2 و3 بزيارات ***لأي مكان يخضع لولايتها ولسيطرتها"...***

Misunderstanding in the Arabic of the protocol should be prevented as well. The SPT should reaffirm that 'jurisdiction and control' in article 4 should be understood to mean 'jurisdiction **or** control' in all languages.

Additionally to the arguments raised by the SPT in its draft comment on interpretation of such expression by other UN treaty bodies (*paras 26–27 of the draft comment*), it should also be highlighted language discrepancies between different versions of a treaty, should be resolved in such a way as to give precedence '*to the meaning which best reconciles the texts, having regard to the object and purpose of the treaty*' (*Article 33 – 4 – of the Vienna Convention on the Law of Treaties, 1969*), in order to realise the object and purpose to a greater extent.[6]

In practice, clarification regarding this segment of article 4(1) is even more needed in light of situations, as in **Lebanon**, where 'public authority' is fragmented and some places of deprivation of liberty are under unclear authority and control – be it within the central state structure (Lebanese security agencies) or under the control of militias.[7]

More specifically, parastatal militias affiliated to Hezbollah also carry out law enforcement duties without any legal oversight, but on behalf of or with the support, direct or indirect, consent or acquiescence of the government. In recent years, Alkarama has documented cases of deprivation of liberty outside the protection of the law and torture of individuals, including journalists, by armed agents of Hezbollah in buildings owned by Hezbollah.[8]

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[6] See for example: U. LINDERFALK, *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties*, Law and philosophy library, n° Volume 83, Dordrecht, Springer, 2007, p. 369.

[7] Committee against Torture, Concluding observations on the initial report of Lebanon, CAT/C/LBN/CO/1, 30 May 2017, para 18-19.

[8] For instance, the case of journalist Rami Aysha, who was arrested and tortured by Hezbollah members clearly shows the collaboration between armed militias and governmental authorities Alkarama, Liban : Condamnation de Rami Aysha : une Confusion Très Dangereuse pour la Liberté d'Informer, https://www.alkarama.org/fr/articles/liban-condamnation-de-rami-aysha-une-confusion-tres-dangereuse-pour-la-liberte-dinformer, 12 December 2013, (accessed on 21 April 2023).

With such situations in mind, we suggest that the SPT emphasise that the obligations to provide access to places of deprivation of liberty apply to all State organs and para-State actors, whatever their configuration.

III. Scope of places of deprivation of liberty (paras 36–40)

Further examples of practices contrary to article 4 points to an intention from State parties to exclude specific locations, persons from the scope of application of the Protocol or oppose to their NPMs exclusions based on national security or the reasons of the deprivation of liberty.

In practice, some NPMs have encountered difficulties or restrictions in carrying out visits to certain places of deprivation of liberty. These obstacles can be found either in the founding text of the NPM or in the behaviour of certain state or non-state organs. In fact, the difficulties faced by NPMs do not seem to result from a mistaken or limited understanding of the State's definition of places of deprivation of liberty, but rather from an active and deliberate behaviour to remove certain places of deprivation of liberty from the protection of the law.

Tunisia's Organic Law n° 2013-43 of 21 October 2013, relating to the national authority for the prevention of torture provides in its article 2 a list of places considered as a "place of detention" which is inherently limiting (*para 37 draft comment).*

Illustratively, the first item of the list is "civilian prisons", which means that military-held places of deprivation of liberty are excluded from the scope of the NPM's mandate.[9] Furthermore, "places of detention under the jurisdiction or control of the Ministry of the Interior and the Ministry of National Defence, particularly police stations and military prisons, are not explicitly mentioned".[10]

This demonstrates that when States decide to include lists of "places of deprivation of liberty" in their laws establishing NPMs, such lists have the effect of limiting, rather than clarifying, the scope of Article 4. We suggest that the SPT reminds States parties that such lists, even if presented as merely "illustrative", should not be included in the laws establishing the mandate of their NPMs.

In the section IV. Scope of places of deprivation of liberty, of the Draft comment the SPT highlight this issue (para 36), stating that "[n]either article 4, nor the Subcommittee in its reports, provides an exhaustive list of places of deprivation of liberty. It is not the Subcommittee's intention to provide one. Such an attempt would have a restrictive effect and thus be in contradiction to the Optional Protocol."

[9] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, visit to Tunisia undertaken from 11 to 14 April 2016: observations and recommendations addressed to the national preventive mechanism, Report of the Subcommittee, CAT/OP/TUN/2, 11 August 2017, para 8.
[10] *Ibidem*.

We kindly suggest that the SPT recommend that States Parties refrain from including such lists in their legislation establishing NPMs, as this may be contrary to the principle of effectiveness and could be used to exclude certain places or individuals from the protection of the Protocol, in violation of the *bona fide* principle.

As a striking manifestation of such a behaviour, the Committee raised noted with concern that several bodies including the National Authority for the Prevention of Torture have been denied access to the Gorjani judicial police facility near Tunis, in which terrorism suspects are usually held, "*on the grounds that it is not a place of deprivation of liberty*" (arts. 2, 11–14 and 16). This practice must be read considering the "list of places of detention" included in the above-mentioned article 2 of the **Tunisia**'s Organic Law n° 2013-43 which becomes *in fine* a limiting, rather than an indicative list.

Limitations *rationae loci* of the scope of article 4 can be found in the use of administrative buildings (such as basements or offices within ministerial or military buildings) in the beginning of a detention to place the person outside the protection of the law. These situations deserve particular attention, as they place the person deprived of liberty at greater risk of torture and other inhuman and degrading treatment. Consequently, particular attention should be paid to exclusions and objections by authorities to NPMs as strong signals of non-compliance with articles 4 and 1 of the Protocol.

Another example of State practices aiming at limiting the scope of the NPM's mandate, and hence the respect of their obligation under article 4, are limitations on the basis of "national security". In this regard, Article 13 of the **Tunisian** Organic Law n° 2013-43 of 21 October 2013, relating to the national authority for the prevention of torture provides that the "concerned authorities" can object to a periodic or unexpected visit of a given place "for pressing and compelling reasons related to the national defence, public security, natural disasters or serious disorders in the place to be visited".[11] This objection has been raised by the authorities to prevent the NPM's access to places of deprivation of liberty in which protesters were being detained.

We also recall that in 2016, the Committee against torture expressed concern "about consistent reports that torture and ill-treatment continue to be practiced", particularly in cases related to national security such as against terrorism suspects.[12] Furthermore, the Committee expressed concern that under Act No. 2016-5, the assistance of a lawyer can be delayed for up to 48 hours in cases of terrorism and about reports of *incommunicado* detention before the arrest has been officially registered in cases related to counter-terrorist activities and in which claims of torture have been made."

[11] Organic Law n° 2013-43 dated 21October 2013, relating to the national authority for the prevention of torture, N° 85 Official Gazette of the Republic of Tunisia, 25 October 2013, p. 707.
[12] Committee against Torture, *Concluding observations on the third periodic report of Tunisia*, U.N. Doc. CAT/C/TUN/CO/3, 10 June 2016, para 15.

In 2016, the CAT recommended that Tunisia "provide all monitoring mechanisms with free access to all places of detention, including pretrial detention and interrogation centres. Such mechanisms should be able to conduct unannounced visits and to interview inmates without witnesses."[13]

Similarly, in **Morocco**, Article 11 of the Law 76-15[14] also adopts a limiting definition of what should be considered as "places of deprivation of liberty" by referring to "places of detention" and "penitentiary facilities" before referring specifically to other institutions such as "psychiatric hospitals and detention centres for illegal immigrants".

We believe that such imitative definitions should be clearly characterised by the SPT as in contradiction with the principle of effectiveness of the protocol and is antithetical to the comprehensive definition of places of deprivation of liberty. States should not adopt definitions that may exclude places where persons are deprived of their liberty, under the pretext that it is not officially a "detention centre".

Furthermore, and similarly to the Tunisian law, Article 11 of the Law 76-15 allows the authorities to object to visits by the NPM for "serious and imminent reasons of national defence or public security, or in cases of natural disasters or serious disturbances in the place to be visited". The characterisation of a situation as falling under this clause is left to the discretion of the detaining authority, with no review or effective judicial remedy.

We therefore stress the importance of recalling that access to places of deprivation of liberty may not be restricted for any reason: persons deprived of their liberty must be accessible immediately upon their arrest, irrespective of the reasons for such an arrest, of the detaining authorities and of the place of deprivation of liberty.

We suggest that the SPT emphasise that restricting NPMs' access to places of deprivation of liberty on the basis of broad and vague references to "national security", "disorder" or "public health" is contrary to States parties' obligations under Article 4 and deprives the OPCAT of its protective effect precisely in cases where such protection is most needed.

[13] *Ibid*., para 31-32
[14] Law No. 76-15 on the reorganisation of the National Council for Human Rights, 22 February 2018

Alkarama is a non-governmental human rights organisation based in Geneva and created in 2004 to support all individuals, including many human rights defenders, in North Africa and the Middle East who are subject to, or at risk of extrajudicial execution, enforced disappearance, torture or arbitrary detention.

The organisation acts as a bridge between victims and international mechanisms for the protection of human rights.

Comment written for Alkarama by:
Dr Khadidja NEMAR, human rights lawyer and consultant.
Email: kn.jur@posteo.eu

ALKARAMA
GENEVA OFFICE
–
2, bis Ch. Des Vignes
1209 Geneva — Switzerland
Email: info@alkarama.org