



Geneva, 14 April 2023

Dear Ms. Jabbour,

Thank you for sharing with the Committee against Torture the advance unedited version of the draft General Comment on Article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

The Committee welcomes this document, aimed at clarifying various aspects related to the implementation of article 4, notably the determination of places of deprivation of liberty within the interpretation, object and spirit of the OPCAT.

The Committee agrees with the content and structure of the draft. Nevertheless, it would like to make the following suggestions:

- 1) In paragraph 28 of the draft, it is stated that “[a]s the practice of the Subcommittee shows, even if a territory is not ~~be~~ under the effective control of the State, it may still fall within its jurisdiction and therefore within the Subcommittee’s mandate”. Notably in this paragraph, reference is made to CAT/OP/12/5, the “Guidelines on national preventive mechanisms”, paragraphs 24 and 33 [footnote 38]. However, the Committee notes that according to paragraph 24 of the Guidelines, “the jurisdiction of the State extends to all those places over which it exercises effective control”. Hence, the Committee is concerned that some ambiguity may exist in this regard.

Noting the thesis of the text, the Committee understands that it may be the intention of the Subcommittee to include all areas under the effective control of the State within the notion of jurisdiction, while not excluding areas which are under the jurisdiction of the State, but not under its effective control. If such is the case, the Committee suggests that the Subcommittee consider clarifying this point.

The Committee would further suggest that the Subcommittee clarify the obligations of States, vis-à-vis their compliance with the OPCAT, to allow the Subcommittee and National Preventative Mechanism access to areas which are not under the State’s effective control, such as is the case for areas occupied by non-state actors or occupying forces.

- 2) The Committee notes potentially conflicting language contained in paragraph 35 of the draft that may benefit from clarification. As currently drafted, paragraph 35 states that “[t]he term ‘acquiescence’ necessitates a broad interpretation, under which States are responsible for the actions of public officials and non-State actors who have awareness of such activity and thereafter breach their legal responsibility to interfere to prevent such activity. Acquiescence implies a lack of State-authorized actions that should have been reasonably expected.” While the first sentence of this excerpt suggests that, in order for States to be considered to have acquiesced, their failure to act in prevention must have been in breach of a legal responsibility to do so; the second



sentence of the excerpt notes that States are said to acquiesce when they fail to act in prevention when such action would be “*reasonably expected*”, seemingly without regard to whether or not they have a legal responsibility to do so.

Similarly, paragraph 35 goes on to note that “[*t*]he notion of acquiescence concerns situations in which State authorities are or should be aware of violations, but still do not undertake any actions aimed at addressing them”, seemingly without regard to whether they had a legal obligation to act, or whether they would have been reasonably expected to do so.

- 3) The Committee notes that in the text of the General Comment, the Subcommittee has not extrapolated on the meaning of the term “allow” within the context of article 4. For example, how is the term “allow” to be interpreted when considering visits to off-shore locations, places of detention under the control of armed groups or places where persons are detained by criminal kidnappers. Similarly, what are the obligations of States in cases where visits are allowed, but certain conditions are imposed on visitors.

In a similar vein, paragraph 29 of the draft states that the Optional Protocol “*requires States parties to guarantee national preventive mechanisms access to all facilities...*”. The Committee notes the potential for ambiguity regarding the usage of the term “*guarantee*” as apposed the term “*allow*” as contained in article 4 itself, and suggests the Subcommittee consider further clarification in this regard.

The Committee against Torture would like to reiterate its appreciation for having had the opportunity to comment on this very important document and wish you the best for the finalization of this document and the work of the Subcommittee.

Best regards,

Claude Heller
Chairperson
Committee against Torture