

Committee on the Rights of the Child’s comments on the Draft General Comment no. 1 on places of deprivation of liberty (article 4) issued by the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

I. Introduction

1. The SPT has invited submissions to inform the drafting of a General Comment No. 1 (the “draft General Comment No. 1”) on Article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The Committee on the Rights of the Child (CRC Committee) takes the opportunity to present its comments on the draft General Comment.

II. General Observations

2. The CRC Committee fully supports the expansive interpretation of ‘places of detention’ as provided for in the draft General Comment No. 1 on places of deprivation of liberty under article 4 of the OPCAT.

III. Comments on specific paragraphs of the draft General Comment No. 1

A. Introduction

3. The CRC Committee agrees with the comment in paragraph 4 that ‘the definition of places of deprivation of liberty must be understood broadly to include both public and private settings and situations in which there is State instigation of or consent or acquiescence to the deprivation of liberty’. Further comments will be supplied below in relative to paragraphs 20 – 23.

4. The CRC Committee recognises the kind of problems that SPTs have in accessing certain places of deprivation of liberty that are outlined in paragraph 5. These are particularly prevalent in relation to children who are placed in facilities through means other than a court order, or in privately run centres through unofficial channels, with the acquiescence of the state.

B. Consistency with the objective of the Optional Protocol

5. The CRC Committee agrees with SPT’s comprehensive interpretation of article 4 of the OPCAT suggested in paragraphs 8 and 9. With regard to children, it should be noted that a similarly broad interpretation has been taken by the UN Global Study on Children Deprived of Liberty – which included within its scope facilities that may not generally be considered to be the conventional places of deprivation of liberty such as prisons. The Independent Expert’s report leading the Global Study, submitted to the General Assembly followed the broad definition of deprivation of liberty and places of detention in article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 11 (b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty (GA Res 45/113) and stated as follows:

‘Hence, the term “places of detention” covers all places where children may be deprived of liberty, such as prisons, police lock-ups, pretrial detention centres, military camps, social care facilities, institutions for persons with disabilities or for

persons addicted to drugs or alcohol, “orphanages”, children’s homes, institutions for the educational supervision of children, psychiatric hospitals, mental health centres or migration detention centres.’¹

C. Broad definition in international law

6. The mention of ‘schools and institutions that engage in the care of children’ in paragraph 13 is appreciated.

7. The CRC Committee proposes the inclusion of an additional paragraph after paragraph 14:

The Committee on the Rights of the Child has recognised a range of custodial settings as being places where children are deprived of their liberty. In its General Comment No. 24 (2019) on children’s rights in child justice system, the Committee defined deprivation of liberty as in the article 11 (b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.² In its joint General Comment No. 23 (2017) with the Committee on the Protection of the Rights of Migrant Workers and Members of Their Families on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, the Committee, following the definition of deprivation of liberty and places of detention in article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 11 (b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty (GA Res 45/113), explained its understanding that immigration detention covers “any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents’, migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty.”³ In jurisprudence under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, the Committee considered children in migration detention (*K.K. and R.H. v Belgium* CRC/C/89/D/73/2019; *E.H. et al v Belgium* CRC/C/89/D/55/2018) and children in detentions camps in North East Syria (*F.B. et al. and D.A. et al. v France* CRC/C/89/D/79/2019 to be places of detention).

C. Public or Private

8. The CRC Committee fully supports the inclusion of both public or private places in the definition of the term ‘places of detention’. This is particularly important for children who are often placed in custodial settings that are run by private actors. Even in situations where the State has not acted to regulate custodial settings where children are accommodated, the State will nevertheless have obligations to children in such settings. In its General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, the CRC Committee stated at para 33, with regard to provision of services for child (including alternative care and deprivation of liberty) by business enterprises or non-profit organisations as follows: ‘The Committee does not prescribe the form of delivery of such services but it is important to emphasize that States are not exempted from their obligations under the Convention when they outsource or privatize services that impact on the fulfilment of children’s rights’. The CRC Committee also stated in para 34 that the States must adopt measures to ensure that children’s rights are not compromised and furthermore that:

‘They have an obligation to set standards in conformity with the Convention and closely monitor them. Inadequate oversight, inspection and monitoring of these bodies can result in serious violations of children’s rights such as violence, exploitation and

¹ A/74/136, para. 18.

² Committee on the Rights of the Child, general comment No. 24 (2019), para. 8.

³ Committee on the Rights of the Child, general comment No. 23 (2017), para. 6.

neglect’, and that children should have access to an independent monitoring body and complaints mechanism, and that there should be ‘a permanent monitoring mechanism’ in place.

The inquiry case concerning Chile undertaken by the CRC Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC/C/CHL/INQ/1) illustrates the importance that the privately run residential centres for children are included in the places of deprivation of liberty for the purpose of prevention of torture and other cruel, inhuman or degrading treatment or punishment by regular visits by independent international and national bodies.

D. Jurisdiction or control

9. The CRC Committee agrees that the ‘jurisdiction and control’ should be read as ‘jurisdiction or control’.

E. In which persons are or may be deprived of their liberty

10. The CRC Committee agrees that it is important to include the concept of ‘are or may be deprived of liberty’ and support the statement of paragraph 29.

F. In which persons are not permitted to leave at will

11. The CRC Committee agrees with the correctness of the terminology ‘not being permitted to leave at will’, explained in paragraph 30. This is congruent with the definition used by the CRC Committee in its General Comment No. 24 on the rights of children in child justice systems: ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’. This is the definition that appears at paragraph 11(b) of the UN Guidelines on Juveniles Deprived of their Liberty.

G. By virtue of an order given by a public authority or at its instigation or with its consent or acquiescence

12. The CRC Committee agrees with the need of a broad interpretation of the term “consent and acquiescence”. The Committee is in particular concerned about the situations where children can be placed into institutions based on the consent of their parents without an order given by a public authority in some States. Such placement can occur with the consent of the institutions to the specific children or with the general consent of a public authority by way of legislation that allows such placement. The Committee proposes that these cases are explicitly included in the definition of the places of deprivation of liberty in the draft General Comment No. 1. There are also States in which unaccompanied children in street or international migration situations might be brought to such centres by police or social workers, without an order given by a public authority that is required for the placement of children under legislation. These are the cases of “a lack of State-authorized actions that should have been reasonably expected” and fall within the interpretation of acquiescence suggested in para. 35. The CRC Committee proposes that the draft General Comment No. 1 explicitly mentions these cases.

H. Scope of places of deprivation of liberty

13. The CRC Committee agrees with the expansive and open-ended description of different kinds of places of deprivation of liberty in paragraph 36. Of particular relevance to children we note, and agree with, ‘centres for children’, ‘social care homes’, ‘special boarding or religious schools’, and ‘daaras’. The Committee also proposes the addition of ‘reformatories’, ‘residential industrial schools’, ‘closed centres for the treatment of drug

addiction' to be added in this paragraph. It should be noted that in its Concluding Observations to Kyrgyzstan (2014) the CRC Committee recognised Special Boarding Schools as Places of Detention⁴ and in the Concluding Observations to Cambodia (2022), the Committee recognized drug rehabilitation and youth centres as the place of detention.⁵ The Committee is also concerned about children who are detained in relation to counter-terrorism measures, and children in camps related to military action – such as those in North East Syria. The scope should be sufficiently broad to include these different kinds of detention. As it is so difficult to think of every situation, it may be preferable to rely on the list of the types of centres that are outlined in paragraph 38 rather than providing this paragraph on scope, which inevitably ends up leading to a list.

14. The CRC Committee agrees with the contents of this paragraph but would propose the addition of the words 'care', 'treatment' and 'security' in the fourth sentence of paragraph 37, which reads after revised as follows:

'They are places where persons of any age are held under the orders, at the instigation or with the consent of a public authority, for a variety of reasons, such as being in conflict with the law or for protection, care, treatment, security, humanitarian or educational reasons.'

The sentence 'Deprivation of liberty can take place when persons are arrested by police on public roads or by private guards in shopping malls, for example' is true, but it is not clear how this relates to 'places of detention'. The sentence could be linked more clearly to the subject matter, or could perhaps be deleted.

15. The CRC Committee agrees with the contents, but notes 'boarding schools' in paragraph 38. Generally boarding schools would not be included, while in paragraph 36 'special boarding schools' is listed. Perhaps this is a better way of capturing what is meant. The CRC Committee does agree that some types of boarding schools are places that do or may deprive children of liberty, but it is evident that a cautious approach should be taken so as not to draw the net too widely. Therefore, the CRC Committee proposed the addition of the word "special" before boarding schools in paragraph 38.

⁴ 'The detention of children in prison-like conditions often for homelessness, vagrancy and absenteeism at school in the Belovodsky Special Boarding School, which is used as an alternative to imprisonment, although the large number of children detained have not committed any crime' (CRC/C/KGZ/CO/3-4, para 66(c)).

⁵ 'The Committee remains deeply concerned about reports of abuse and illtreatment, including "shackling", of children with disabilities and children in detention, including in drug rehabilitation and youth centres' (CRC/C/KHM/CO/4-6, para 24).