



## **Submission on Draft General Comment No. 1 on Article 4 of the OPCAT**

**April 2023**

1. The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries.
2. The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and substantively independent entity of the IBA, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.
3. The IBAHRI welcomes the UN Subcommittee on Prevention of Torture's (SPT) initiative to elaborate a General Comment on Article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and is grateful for the opportunity to provide input on the first public draft.
4. The draft General Comment covers important aspects of the definition of places of deprivation of liberty with a view to clarifying State parties' obligations as they pertain thereto. This, as highlighted by the SPT, is an essential issue as the core object and purpose of the OPCAT is the system of preventive visits by the SPT and national preventive mechanisms to all places of deprivation of liberty.
5. This submission focuses on paragraphs that the IBAHRI believes, in the spirit of collaboration and support, would benefit from further elaboration or clarification to strengthen the draft General Comment. It conveys observations and offers suggested changes, noting that these should be understood on their own terms and not as an endorsement or rejection of other aspects on which comment is not offered.

### **Comprehensive approach to defining places of deprivation of liberty**

6. The IBAHRI welcomes the SPT's comprehensive and expansive approach to determining what constitutes deprivation of liberty and places of deprivation of liberty to ensure the effective realisation of the Optional Protocol in light of its object and purpose.

### **A. Consistency with the objective of the Optional Protocol**

7. Regarding **Draft Paragraph 9**, the SPT may wish to include in the second sentence:

A restrictive interpretation of article 4 would also violate the obligation to interpret treaties in good faith, as expressed in the Vienna Convention on the Law of Treaties, article 31 of which provides that every treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. As the objective of the Optional Protocol is the prevention of torture and other cruel, inhuman or degrading treatment or punishment through visits to places of deprivation of liberty, a good faith

interpretation cannot restrict the definition of places of deprivation of liberty so as to leave out places where persons could be deprived of liberty and where torture **and ill-treatment** could be taking place. Moreover, the Optional Protocol was intended to extend to all places where persons may be deprived of their liberty by instigation, consent or acquiescence, and not just places where persons are deprived of liberty through a formal order.

## **B. Broad definition in international law**

8. Regarding **Draft Paragraphs 13 – 18**, the IBAHRI welcomes the reference to and analysis of various international and regional human rights mechanisms' definitions of (places of) deprivation of liberty and detention. This could be further strengthened through the inclusion of examples from the African human rights system. For example, in addition to communications referred to in the submission by the Human Rights Implementation Centre on the draft General Comment, the African Commission on Human and Peoples' Rights has noted that '[a]ny individual who is deprived of liberty in any situation, by or on behalf of a governmental authority at any level including detention by non-state actors that is authorized by domestic law...' has the right to challenge the lawfulness of their deprivation of liberty without delay.<sup>1</sup>
9. Furthermore, Article 30(c) of the African Charter on the Rights and Welfare of the Child provides for "special alternative institutions" for holding expectant mothers and mothers of infants and young children who have been accused or found guilty of infringing criminal law.<sup>2</sup> The African Committee of Experts on the Rights and Welfare of the Child, noting that such institutions should only be considered as a last resort where alternatives to detention cannot be considered, refers to prison nurseries, smaller facilities and halfway houses.<sup>3</sup>

## **Place of deprivation of liberty under Article 4**

10. Regarding **Draft Paragraph 19**, the SPT may wish to consider rephrasing the first sentence as follows in line with the approach set out in Draft Paragraphs 3 and 24 - 25:

Article 4 places within the scope of the Optional Protocol any public or private custodial setting under the jurisdiction **or and** control of the State party in which persons may be deprived of their liberty and are not permitted to leave, either by an order given by any judicial, administrative or other authority or at its instigation or with its consent or acquiescence. The present section contains a further explanation of each of these elements.

## **A. Public or private**

11. Regarding **Draft Paragraph 21**, the SPT may wish to consider clarifying in the second sentence:

The Subcommittee highlights that the categories of public and private settings have been expressly indicated in the Optional Protocol to ensure clarity about the scope of the places of deprivation of liberty that can be visited by the Subcommittee and national preventive mechanisms to prevent torture. The obligation of the States parties and the **national preventive** mechanisms is to ensure that visits are undertaken to all institutions, including private ones, where persons are or may be deprived of their liberty either by an order of a public authority (judicial, administrative or other) or at

---

<sup>1</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa* (2015), Part 3, Para. B(v), p. 20.

<sup>2</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child* (1990) p. 23.

<sup>3</sup> African Committee of Experts on the Rights and Welfare of the Child, *General comment on Art. 30 of the African Charter on the rights and Welfare of the Child*, ACERWC/GC/01 (2013) Para. 50-53.

its instigation or with its consent or acquiescence. This means that the Optional Protocol encompasses places beyond those of detention or imprisonment and that States parties should allow national preventive mechanisms to visit any private institution, and institutions operated by private actors as a result of outsourcing or by non-State officials, from which a person is not permitted to leave at will.

12. Regarding **Draft Paragraph 22**, the SPT may wish to consider clarifying the following in the third and fourth sentences:

Although this provision of article 4 (2) is formulated in a clear way and does not leave any room for ambiguity, information from national preventive mechanisms reveals that some States parties to the Optional Protocol consider only public custodial settings as places of deprivation of liberty. Such interpretation undermines the objective stemming from article 1 of the Optional Protocol, namely to establish 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. Moreover, such a restrictive understanding of article 4 (2) renders it impossible for the Subcommittee and national preventive mechanisms to ~~operate in compliance with States' obligations fulfil their mandates~~ under the Optional Protocol and denies the protection clearly afforded to potential victims of torture and ill-treatment therein. Therefore, any such **restrictive** regulations within a domestic legal system **or approach in practice** must be considered as contrary to the Optional Protocol.

## **B. Jurisdiction or control**

13. Regarding **Draft Paragraph 24**, the SPT may wish to include in the second sentence:

It is established in article 4 (1) that States parties shall allow visits “to any place under its jurisdiction and control” where persons are or may be deprived of their liberty. The scope of “jurisdiction and control” of article 4 (1) should be understood in accordance with international law on the treatment of persons deprived of liberty and the obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment, bearing in mind that the prohibition of torture **and ill-treatment** is absolute and imperative. This means that “jurisdiction and control” in article 4 should be understood to mean “jurisdiction or control”.

14. Regarding **Draft Paragraph 25**, the SPT may wish to consider elaborating as follows:

This is in fact consistent with the French version of the Optional Protocol text, which contains the wording “sous sa juridiction ou sous son contrôle” – under its jurisdiction or control. As stated in article 37(1) of the Optional Protocol, the Arabic, Chinese, English, French, Russian and Spanish texts of the Optional Protocol are equally authentic. **Article 33(4) of the Vienna Convention on the Law of Treaties refers to the application of Articles 31 and 32 when a comparison of the authentic texts discloses a difference of meaning. As per Article 31(1) of the Vienna Convention, a treaty shall be interpreted in accordance with the ordinary meaning of the terms in their context and in light of its object and purpose.** Therefore, if there is one **text** that is more consistent with the spirit of the Optional Protocol and international obligations to prevent torture **and ill-treatment**, that ~~one~~ **text** should guide the approach.

15. Regarding **Draft Paragraph 28**, the SPT may wish to consider including in the first and third sentences:

States parties should allow national preventive mechanisms to visit all, and any suspected, places of deprivation of liberty, as set out in articles 4 and 29 of the Optional Protocol, that are within its jurisdiction **or control**. Moreover, it is stated in article 29 of the Optional Protocol that the provisions of the Optional Protocol extend to all parts of federal States without any limitations or exceptions. As 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 **and national preventive mechanisms'** mandate. The Subcommittee considers that its mandate extends over the entirety of the internationally recognized territory of a State and it has attempted to visit places of deprivation of liberty under the control of armed groups.

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

13. Regarding **Draft Paragraph 32**, the SPT may wish to consider clarifying in the fifth sentence and including in the final sentence:

The part of article 4 under consideration in the present subsection is focused on two possible situations. The first concerns deprivation of liberty that was caused by order of a public authority. This is when the domestic authorities have exercised their regulatory or institutional function to deprive an individual of liberty. In most cases, such a decision will stem from criminal law; however, it may be based on a decision of a judicial, administrative or other authority. The type or title of such decision is not relevant. The second refers to deprivation of liberty **by the State “or at its at the State’s “instigation or with its consent or acquiescence”**. This entails a wider range of situations in which the State **either exercises or** might be expected to exercise a regulatory function and use its powers to promote, accept, ~~or~~ allow, **limit, or otherwise regulate** deprivation of liberty.

14. Regarding **Draft Paragraph 34**, the SPT may wish to consider including in the third sentence:

In the Spanish version of the Optional Protocol, “consent and acquiescence” are translated as “consentimiento expreso o tácito” – express or tacit consent. Thus, consent means that the detention has been expressly consented to, and acquiescence means tacit consent, allowing the deprivation of liberty in question to happen and not exercising the powers of the authority to avoid it. This would include situations in which the State should regulate deprivation of liberty **in accordance with its obligations to protect and fulfil human rights** and chooses not to do so, regulates it in contravention of the Optional Protocol or regulates it in accordance with the Optional Protocol but allows violations of such regulations. This may concern situations in which the State tolerates, allows or in any other form chooses to turn a blind eye to deprivation of liberty caused by any other entity or person.

15. Regarding **Draft Paragraph 35**, the SPT may wish to consider rephrasing the first sentence as follows in line with States’ positive obligation of due diligence to, inter alia, prevent deprivation of liberty by non-State actors or otherwise address it:

The term “acquiescence” necessitates a broad interpretation, under which States are responsible for the actions of ~~public officials and~~ non-State actors **who have where the State knew, or ought to have known, about 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. In the Subcommittee’s view, acquiescence may involve only partial or very limited knowledge of the detention by the authorities. The 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. This may mean, for example, tolerating the existence of a legal lacuna that de facto allows for the detention of individuals. The fact that States may choose not to undertake any actions aimed at correcting such a deficiency or that they may in any other way allow the existence of places of detention outside their authority does not exclude such places from the mandate of the Subcommittee and national preventive mechanisms.

### Scope of places of deprivation of liberty

16. Regarding **Draft Paragraph 37**, the SPT may wish to consider clarifying whether the second half of this paragraph is the SPT's position or a continuation of NPM practice and/or experience. It may also wish to consider including, either in this paragraph or elsewhere, examples of deprivation of liberty in the context of protests. Finally, one consolidated list of examples is recommended (c.f. Draft Paragraphs 36 – 38).
17. Regarding **Draft Paragraph 38**, the SPT may wish to consider including deprivation of liberty in court custody in the non-exhaustive list of places of deprivation of liberty.<sup>4</sup>
18. Regarding **Draft Paragraph 39**, the SPT may wish to clarify in the third sentence:

The Subcommittee would like to clarify that, in some cases, an individual might be found in a place that – examined separately – does not constitute a place of deprivation of liberty, but does indeed constitute a place of deprivation of liberty when examined in context. This does not concern only the ability to leave such a place. As noted by **the UN Special Rapporteur on Torture in his report to** the Human Rights Council, 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. In the view of the Subcommittee, if the ability to leave such a place or facility would be limited or would entail exposing a person to serious human rights violations, that place should also be perceived as a place of deprivation of liberty, in accordance with article 4 of the Optional Protocol.

19. The IBAHRI welcomes the opportunity to engage in further discussion on the important topics that this draft General Comment addresses.

\*\*\*

For further information, please contact:

Catherine Kent, Programme Lawyer  
International Bar Association's Human Rights Institute  
[cath.kent@int-bar.org](mailto:cath.kent@int-bar.org)

---

<sup>4</sup> See, e.g., the Lay Observers, a member body of the UK national preventive mechanism: <https://layobservers.org/>; <https://www.nationalpreventivemechanism.org.uk/members/>.