

International Detention Coalition (IDC) submission to the Subcommittee on Prevention of Torture on the draft general comment on article 4 of the Optional Protocol to the Convention Against Torture (OPCAT)

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International Detention Coalition (IDC) welcomes this opportunity to contribute to the drafting of the general comment of the Subcommittee on Prevention of Torture on article 4 of the Optional Protocol to the Convention Against torture (OPCAT).

IDC is a global network of organisations, groups, individuals, as well as representatives of communities impacted by immigration detention, based in over 80 countries. IDC members have a wide range of specialisations related to immigration detention and alternatives to detention, including academia, law, research, policy, direct service, advocacy, and community organising.

IDC staff work across the world, nationally and regionally, in Africa, the Americas, Asia Pacific, Europe, the Middle East and North Africa, and at the global level. Staff coordinate with members and partners on advocacy, research, coalition and capacity building, as well as create opportunities for national, regional and global collaboration to end immigration detention and further rights-based alternatives to detention.

1. Introduction

Immigration detention represents one of the most flagrant human rights violations of our time, often used to arbitrarily detain migrants in large numbers. Through its widespread use, people on the move are deprived of their liberty in frequently sub-standard conditions for months or even years.

The experience of immigration detention has many damaging and enduring effects on individuals. This includes debilitating physical and mental health impacts that last

well beyond the period of detention, and are often felt for an entire lifetime. IDC members and partners have consistently documented grave and inhuman conditions in the wide range of places used to deprive migrants of their liberty. Clarifying the definition of places where people are or may be deprived of their liberty for migration related purposes, and thus the applicability of article 4 of the OPCAT and scope of the obligations of States parties to allow visits in this context, is critical to address and put an end to the human rights violations that arise from the widespread and systemic use of immigration detention across the world.

Considering the specificities of immigration detention, including its often extra-judicial nature, IDC welcomes the clarifications of the scope of the protection to "all individuals, regardless of nationality and statelessness" (paragraph 27) and of the nature of the deprivation of liberty order either by "a public authority (judicial, administrative or other) or at its instigation or with its consent or acquiescence" (paragraph 21).

The aim of this submission is to build on the references to immigration detention already included in the draft general comment by expanding on the wide range of places, practices and tools that amount to arbitrary deprivation of liberty of migrants, regardless of governments' use of terms other than detention. In doing so, this submission provides a limited set of illustrative case examples from different contexts offering rationale to language suggestions to specific paragraphs of the draft general comment (see boxes under each section below).

IDC is of the view that specific references to the particular characteristics of places, practices and tools by which migrants are or may be deprived of their liberty for migration related reasons should feature prominently in the General Comment.

2. Places of deprivation of liberty for migration related reasons

The broad interpretation used by the Subcommittee is fundamental in the context of deprivation of liberty, and particularly when it comes to the use of immigration detention.

IDC welcomes the comprehensive approach to defining places of deprivation of liberty being a central part of the draft general comment under its Section II, and acknowledges the references to places of deprivation of liberty for migration related purposes in the text, including “*closed centres for foreigners and asylum-seekers*” (paragraph 36), “*migrant detention centres*”, “*first reception centres for unaccompanied children*”, “*detention and removal centres for migrants*” (paragraph 38).

Building on these references, the following highlights some of the most worrying trends in terms of places of deprivation of liberty that IDC and its members are observing on the ground and that we believe should also be included in the general comment.

Isolated areas

An example of how people on the move may be deprived of their liberty is the use of isolated areas to “accommodate” people.

In Greece, for instance, “Closed Controlled Access Centres” (CCAC) have been established with European Union funding in order to carry out border procedures. The CCAC present a number of concerns; human rights advocates have pointed to their prison-like appearance, as well as the constant surveillance of ‘residents’. In theory, residents are allowed to leave the facilities freely between 8am and 8pm, however there have been reports that even this possibility has been restricted for those that do not hold a government-issued asylum seeker card.¹

Even if residents had complete freedom of movement outside of the CCAC, however, their location on remote islands - and the prohibition of onward movement from the islands to the Greek mainland, as well as the limited or non-existent

¹ J. Close, PhD (2022) “The EU Policy of Containment of Asylum Seekers at the Borders of Europe: (2) the Closed Controlled Access Centres”, available at: <https://internationallaw.blog/2022/04/07/the-eu-policy-of-containment-of-asylum-seekers-at-the-borders-of-europe-2-the-closed-controlled-access-centres/> (last accessed 12 April 2023). Also see I Have Rights (2023), “The EU-Funded Closed Controlled Access Centre - The De Facto Detention of People Seeking Protection on Samos”, available at: https://ihaverights.eu/wp-content/uploads/2023/02/detention_report_full.pdf (last accessed 12 April 2023).

services on the islands - clearly constitute deprivation of liberty for those held in the CCAC.

In the landmark case of *Guzzardi v. Italy* (1980), the European Court of Human Rights noted that the difference between a restriction of liberty and a deprivation of liberty is one of degree rather than nature.² It ruled that, whilst Mr. Guzzardi was not detained in a prison, the cumulative effect of his situation - strict supervision, confinement to an island, and little social contact - constituted deprivation of liberty. The current situation of people in the CCAC provides a clear parallel.³

Algeria's practice of sending migrants and refugees to the desert is yet another example of how people on the move can be deprived of their freedom. In 2018, reports emerged that Algeria had abandoned around 13,000 refugees and migrants in the Sahara Desert, without food, water or any means of transportation.⁴ Many of these individuals were left to die in the harsh desert conditions, as they were forced to walk long distances without adequate provisions. More recently, in 2021, migrants and refugees have reported being expelled from Algeria to neighboring Niger, with some being left stranded in the desert in the middle of the night.⁵

Hotels

Hotels have long served as a place of deprivation of liberty for migrants. In Australia, the government has a long-standing policy of holding people for extended periods

² *Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, available at <https://www.refworld.org/cases,ECHR,502d42952.html> (last accessed 12 April 2023)

³ J. Manek, G. Bird, A. Galán (2023), "Explaining Immigration Detention in Greece", *Border Criminologies*, available at: <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/04/explaining> (last accessed 12 April 2023)

⁴ L. Hinnant (2018), "Walk or die: Algeria strands 13,000 migrants in the Sahara", *AP News*, available at <https://apnews.com/article/deserts-niger-africa-international-news-algeria-9ca5592217aa4acd836b9ee091ebfc20> (last accessed 12 April 2023)

⁵ M. Chebil (2022), "'We were abandoned in the dessert at 2 am': Migrants expelled from Algeria to Niger", *Infomigrants*, available at <https://www.infomigrants.net/en/post/44807/we-were-abandoned-in-the-desert-at-2-am-migrants-expelled-from-algeria-to-niger> (last accessed 12 April 2023)

of time in “alternative places of detention”, including hotels, with very little public information available about such locations.⁶

In the UK, meanwhile, reports have increasingly emerged of people seeking asylum (including children) being prevented from leaving hotels where they are held and as a result being kept in *de facto* detention.⁷ According to NGOs, people are held indefinitely with severe restrictions on their freedom of movement and basic liberties. Such hotels are often located in isolated areas, far from basic services and amenities, with people's ability to access transport limited.⁸

The use of hotels as places of *de facto* detention creates further ambiguity when it comes to identifying conditions that may amount to deprivation of liberty. The fact that hotels may be simultaneously used as reception facilities that allow for freedom of movement means that particular attention must be paid to instances where individuals are deprived of their liberty in reality, in line with the comprehensive understanding of the definition of places of deprivation of liberty outlined in the draft general comment.

Referral centres for families and children and shelters

The use of euphemisms to refer to places of immigration detention has been thoroughly and continuously documented by civil society and the UN system. IDC welcomes the draft general comment inclusion of terms other than detention.

Governments often resort to this intentionally. However, sometimes governments do not identify certain places and practices as amounting to deprivation of liberty. In both instances, this draft general comment clarifying the definition of places of

⁶ Kaldor Centre for International Refugee Law, UNSW Law Sydney, “Mapping the Use of Hotels as Alternative Places of Detention”, available at <https://www.kaldorcentre.unsw.edu.au/mapping-use-hotels-alternative-places-detention-apods#:~:text=An%20APOD%20is%20a%20place,option%20to%20closed%20detention%20facilities> (last accessed 12 April 2023)

⁷ Liberty Investigates (2022) “Asylum Seekers ‘Effectively Detained’ at Home Office Hotels in Potential Legal Breach”, available at: <https://libertyinvestigates.org.uk/articles/asylum-seekers-effectively-detained-at-home-office-hotels-in-potential-legal-breach/> (last accessed 12 April 2023).

⁸ Refugee Action (2023) “Hostile Accommodation: How the Asylum Housing System is Cruel by Design”, available at: <https://www.refugee-action.org.uk/wp-content/uploads/2023/03/Hostile-Accommodation-Refugee-Action-report.pdf> (last accessed 12 April 2023).

deprivation of liberty becomes extremely relevant to protect the rights of people placed in immigration detention.

One recent example of the use of a term other than detention in the context of migration is the opening of “administrative referral offices” (oficinas administrativas de canalización) for children in Mexico. Remarkably, Mexico has recently harmonised legislation to enact a legal prohibition on immigration detention of children. Efforts have been made to bring this prohibition into policy and practice but challenges remain.

One of the key challenges that IDC and partners have identified is the existence of ad hoc “administrative referral offices” in several states, where children and families are held in prison-like conditions for extended periods of time.

These “referral offices” are not legally established, but both immigration authorities and civil society organizations are aware of their existence. The apparent reasons for their existence relate primarily to poor coordination amongst immigration, child welfare and child protection authorities, with the latter sometimes not assuming their principal authority for determining best interests of migrant children, in addition to a lack of reception capacity within the public system and a lack of trained personnel to respond to the high demand in the migration context.

Civil society actors have raised concerns that children and families are deprived of their liberty in these spaces that have seemingly become de facto detention or an “alternative form of detention”. In some cases, they occupy former immigration facility buildings, or spaces within current detention facilities or immigration offices, all of which are inappropriate places for children and families and are not in the best interests of the former.

Clarifying the scope of article 4 of the OPCAT to allow visits to referral centers that may amount to deprivation of liberty, is key to support States parties in ensuring that children and families are placed, if needed, in appropriate places and that legal prohibitions on immigration detention are implemented in practice.

Another example is the use of the term “shelter” (albergue) for places where migrants are held in detention. Inhuman conditions in these “shelters” have been consistently documented in several instances.⁹

IDC suggestions to paragraph 37 and 38 of the draft general comment

In light of the considerations above, and given the specificities of immigration detention, particularly its often extra-judicial nature, IDC suggests strengthening the current draft general comment by including a reference under Section IV to the use of isolated areas, hotels, referral centres for children and families, and shelters to deprive migrants of their liberty.

Paragraph 37 clarifies that places of deprivation of liberty “*can be any type of facility or any type of terrain (land, sea or air)*”. As illustrated by the examples above, placement of people in isolated areas such as islands and deserts, can amount to deprivation of liberty for migration related purposes.

IDC suggests adding a line to paragraph 37: “(...) *(land, sea or air)*. ***In the context of migration, deprivation of liberty can also take place when persons are placed in remote or isolated areas such as islands and the desert.*** (...)”.

Paragraph 38 makes a reference to the use of “*COVID-19 hotels*” during the pandemic. However, holding people in hotels for migration related purposes has been and continues to be common in many contexts across the world, beyond the Covid-19 pandemic. The use of hotels as de facto detention creates further ambiguity when it comes to identifying places that are or may amount to deprivation of liberty.

IDC suggests reflecting the use of hotels to deprive migrants of their liberty for migration related reasons under the already existing reference to migrant

⁹ Special Rapporteur on the human rights of migrants and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (2023) , “Press Release: UN experts call for investigations into migrant deaths at Ciudad Juarez immigration detention centre”, available at <https://www.ohchr.org/en/press-releases/2023/04/mexico-un-experts-call-investigations-migrant-deaths-ciudad-juarez> (last accessed 12 April 2023).

detention centres in paragraph 38: “(...) *migrant detention centres, such as first reception centres for unaccompanied children, **hotels** and detention and removal centres for migrants. (...)*”. Alternatively, a reference to the use of hotels as de facto detention in the context of migration can also be added at the end of paragraph 37: “**Hotels can also be used as de facto detention places for migration related purposes**”.

Paragraph 38 already includes a reference to first reception centres for unaccompanied migrants. Given the challenges in enacting a prohibition on child immigration detention in the case study explained above and the problematic use of terms other than detention, IDC suggests including the following wording in paragraph 38: “(...) *first reception centres for unaccompanied children, **referral centres for children and families, shelters** and removal centres for migrants (...)*”.

3. Digital technologies and deprivation of liberty for migration related reasons

In the context of migration management, deprivation of liberty is not limited to the use of detention places or confinement in isolated areas. Its scope also includes a variety of less obvious practices and tools. This section focuses on the use of digital technologies as an increasingly worrying trend that IDC believes should be raised in the general comment.

A range of different types of digital technology are in use when it comes to migration management, including in the context of immigration detention or other forms of deprivation of liberty for migration related purposes. In particular, technologies such as electronic monitoring and tagging and facial and voice recognition are being adopted and explored by a growing number of governments. Often these are being framed (incorrectly, in IDC's view) as “alternatives to detention” by these governments.¹⁰

¹⁰ For a summary of IDC's position on the use of electronic tagging as an 'alternative to detention', see IDC (2022) “Gaining Ground: Promising Practice to Reduce & End Immigration Detention”, available at: <https://idcoalition.org/wp-content/uploads/2022/05/Gaining-Ground-Report-2022.pdf> (last accessed 12 April 2023).

Electronic tagging involves attaching a device to a person's body, often around the ankle, and frequently uses GPS technology to track their location at any given time or require them to be next to a base unit at set times. The devices often require that an individual stay next to a power source for several hours per day in order to charge them.¹¹

According to the European Union's Fundamental Rights Agency, "Electronic monitoring is the most intrusive of the various alternatives to detention, as it substantially interferes with a person's right to privacy, restricts freedom of movement and can have a negative impact on their dignity."¹²

The Committee on the Rights of All Migrant Workers and Members of Their Families General Comment No. 5 (2020) on migrants' right to liberty and freedom from arbitrary detention, meanwhile, states that electronic tagging is "not appropriate in the context of migration" and may "amount to de facto detention."¹³

Tagging substantially curtails liberty and freedom of movement, and combined with other measures - including for instance curfews - has been found to constitute a deprivation of liberty.¹⁴

¹¹ National Immigration Forum (2019) "Fact Sheet: Electronic Monitoring Devices as Alternatives to Detention", available at: <https://immigrationforum.org/article/fact-sheet-electronic-monitoring-devices-as-alternatives-to-detention/> (last accessed 12 April 2023).

¹² European Union Agency for Fundamental Rights (2015) "Alternatives to detention for asylum seekers and people in return procedures", available at: <https://fra.europa.eu/sl/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures> (last accessed 12 April 2023).

¹³ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "General comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention", available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-5-2021-migrants-rights-liberty> (last accessed 12 April 2023).

¹⁴ Alice Edwards (2011) "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", UNHCR Legal and Protection Policy Research Series, available at: <https://www.unhcr.org/4dc949c49.pdf> (last accessed 12 April 2023). Also see Bail for Immigration Detainees, Medical Justice and Public Law Project (2022) "Every Move You Make: The Human Cost of GPS Tagging in the Immigration System", available at: https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/682/GPS_Tagging_Report_Final.pdf (last accessed 12 April 2023).

IDC suggestions to Section IV of the draft general comment

In light of the above, and particularly as a way of building on the authoritative guidance provided by the Committee on Migrant Workers in its General Comment No. 5, that “*restrictions of movement, such as electronic surveillance (...) may even amount to de facto detention*”, IDC believes it is critical for the Subcommittee to consider including under Section IV a reference to the use of electronic monitoring and tagging and the growing use of digital technologies.

Section IV of the draft general comment addresses the scope of places of deprivation of liberty using the Subcommittee's necessary wider interpretation. As such, paragraph 36 provides a set of examples of “*places and forms of deprivation of liberty*”.

IDC suggests including the use of electronic monitoring and tagging by either considering an additional paragraph to Section IV or adding to paragraph 37 or paragraph 40 the following: “***When considering forms of deprivation of liberty, national preventive mechanisms should look into the use of digital technologies combined with other practices. As noted by the Committee on the Rights of All Migrant Workers and Members of Their Families, measures such as electronic tagging for migration control purposes may sometimes amount to a form of deprivation of liberty.***”

4. Note on civil society and migrant-led organisations

Whilst places of detention used in the context of the criminal justice system are usually subject to strict regulation, often this is not the case when it comes to immigration detention. As illustrated by the examples given above, governments deprive migrants of their liberty in a number of locations that are not always formally identified or designed for this purpose. Moreover, the use of euphemistic language - such as ‘shelter’, ‘hotel’, ‘referral centre’ - can obscure the true nature of such places.

As a result, it is critical that the Subcommittee on Prevention of Tortures meets and consults extensively with civil society and migrant-led organisations in preparation

for and during the visits that it undertakes. Such consultations will allow civil society to highlight places of detention and/or de facto detention that falling under the scope of the OPCAT are of concern to the Subcommittee and the communities it serves.

When it comes to deprivation of liberty of migrants for migration related reasons, such consultations give the Subcommittee a better understanding of the varied locations that are used to detain people on the move, as well as helping them to identify places of detention that may not be immediately recognisable at such or new forms of deprivation of liberty that may arise.

IDC suggestions to Section V, paragraph 41, of the draft general comment

Considering the fundamental role of civil society and migrant-led organisations in identifying places of detention and forms of deprivation of liberty used for migration related reasons, IDC believes it is particularly relevant for the Subcommittee to consider including a reference to this role in the last Section, paragraph 41 of the draft general comment.

IDC suggests adding the following to paragraph 41: “(...) *the concept of places of deprivation of liberty is not fixed or limited and should allow for novel circumstances of deprivation of liberty that may arise in new contexts. **Importantly, civil society and migrant-led organisations have a key role to play in identifying different, and potentially new, places and forms of deprivation of liberty.***”