KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

SUBMISSION

TO

THE UNITED NATIONS SUBCOMMITTEE ON PREVENTION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

CONCERNING THE DRAFT GENERAL COMMENT NO. 1 ON PLACES OF DEPRIVATION OF LIBERTY -ARTICLE 4 OF THE OPTIONAL PROTOCOL

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I. Introduction

1. The Kenya National Commission on Human Rights (KNCHR), welcomes the opportunity to provide this commentary to the United Nations Subcommittee on Prevention of Torture (UN SPT) on its Draft General Comment No. 1 on places of deprivation of liberty under Article 4 of (OPCAT).

2. KNCHR is an independent Constitutional commission established under Article 59 (4) of the Constitution of Kenya, 2010, and operationalized under the Kenya National Commission on Human Rights Act No. 14 of 2011 with the core mandate of promoting and protecting human rights in Kenya. This mandate includes; promoting the protection, and observance of human rights in public and private institutions,[1] the investigation of matters in respect of human rights on its own initiative or on the basis of complaints,[2] and, acting as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.[3] In fulfilling its Constitutional mandate, the Commission undertakes research, advocacy, and policy development that aim to promote compliance with Kenya's human rights obligations with regard to the Prohibition of Torture.

3. KNCHR is established in accordance of 1993 UN Paris Principles on National Human Rights Institution (NHRIs) and is accredited as an A-status NHRI. At the regional level, the KNCHR enjoys affiliate status before with the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The KNCHR is also the national monitoring agency under Article 33 (2) of the Convention on the Rights of Persons with Disabilities. The Commission also wields specific oversight role on the implementation of the Prevention of Torture Act, 2017.

4. While The Republic of Kenya has not ratified OPCAT, it is a party to The United Nations Convention against Torture and has domesticated it through the Prevention of Torture Act, of 2017. Further, the Constitution of Kenya recognizes the freedom and security of the person and further secures the freedom from torture and cruel, inhuman or degrading treatment or punishment prohibition of torture within its Bill of Rights affirming it as non-derogable right.

5. The Commission has long advocated for and continues to advocate for Kenya's ratification of OPCAT, noting that the changes required by OPCAT promote stronger and more consistent human rights protections for people who are detained across all jurisdictions.

[1] Article 59(2)(b), The Constitution of Kenya, 2010.
[2] Article 59(2)(f), The Constitution of Kenya, 2010.
[3] Article 59(2)(g), The Constitution of Kenya, 2010.

6. While the Commission is not a designated National Preventive Mechanism (NPM) or NPM coordinator under OPCAT. However, under Article 59 of the Constitution and KNCHR Act[4], the Commission is empowered "to visit prisons and monitor **places of detention** and other **related facilities** with a view of assessing, audit and inspecting the conditions under which the inmates are held against the set human rights standards in order to make appropriate recommendations for relevant policy, legislative and institutional interventions to address the gaps. Further, KNCHR supported in development and enactment of a national law that seeks to reinforce the rights of Persons Deprived of Liberty Act. In this regard, there is an opportunity to enhance monitoring and reporting of abuses as outlined in the OPCAT.

II. General comments

7. The Commission appreciates the efforts of the Subcommittee in coming up with this draft General Comment. The KNCHR welcomes this document, aimed at clarifying the implementation of article 4, notably the determination of places of deprivation of liberty within the interpretation, object, and spirit of the OPCAT which establishes effective measures for torture prevention that is necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

8. The Commission supports the SPT's comprehensive and extensive approach in defining places of deprivation of liberty in order to maximize the preventive impact of the work of the national preventive mechanisms as well as that of the Subcommittee.[5] Nevertheless, the Commission notes that the General Comment uses the term 'place of deprivation of liberty' and not 'place of detention' which is the term used in the Optional Protocol. For purposes of consistency and to avoid confusion, the Commission recommends that the language of the General Comment should match that of the Optional Protocol.

III. On Places of Deprivation of Liberty

9. The Subcommittee has underlined that the term "places of detention", as found in Article 4 of the Optional Protocol, should be given a broad interpretation (*draft paragraph 8*) and therefore, an interpretation of places of deprivation of liberty that is limited to conventional places of deprivation of liberty such as prisons would be overly restrictive.

10. The Commission welcomes the emphasis on both public and private places and the interpretation of 'jurisdiction or control' noting the evolving scope of places of detention where torture and inhuman degrading treatment is practiced. For example,

[4] Sections 72, 73(1), The Prisons Act, and Section 16(1)(b) of the Kenya National Commission on Human Rights Act No 14 of 2011.
[5] Draft Paragraph 7 of the Draft General Comment No 1 on Places of Deprivation Of Liberty (article 4), OPCAT.

detention in places of worship for persons with psychosocial/intellectual disabilities on the basis of 'faith healing'.

11. The Commission however notes that the draft Comment does not adequately bring out the unique dynamics for persons with various forms of disabilities in places of detention.

12. Article 4 implies that what constitutes a "place of detention" is determined by whether the limitation placed on one's exercise of freedom of movement constitutes "deprivation of liberty' in the first place-
    a. *(Under draft paragraph 15*), it is provided that the deciding factor for qualification as "deprivation of liberty" is not the name given to a particular placement or accommodation or its categorization in national law but whether individuals ***are free to leave it***.

    b. The draft comment further refers to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights where the Court has established that the particular element that allows a measure to be identified as one that deprives persons of liberty is the fact that ***they cannot or are unable to leave or abandon at will the place or establishment where they have been placed***. *(draft paragraphs 17 and 18*).[6]

    c. The Commission however notes that according to the ECtHR, there are certain instances whereby one *may leave at will,* and still be considered to be deprived of liberty.[7] Therefore this test may be restrictive as it limits the scope of places that can be considered 'places of detention or places of deprivation of liberty". Furthermore, ECtHR jurisprudence differentiates 'restriction of movement' from 'deprivation of liberty' not only on the basis of *'freedom to leave at will'* but also on its degree or intensity, duration, effects on the person concerned, and the manner of its implementation.[8]

13. The Commission opines that using the test of 'free to leave at will' may be limiting as it contradicts the intention of having a broad interpretation. The Commission therefore suggests;
    i. Adding African Jurisprudence to Part C of Part II of the Draft Comment on "Broad definition in international law." Specifically, the African Commission on Human and Peoples' Rights which defines freedom of liberty, as '*the right to be free.* Liberty thus denotes freedom from restraint and the ability to do as one pleases provided it is done in accordance with established law'.[9]
    ii. For clarity and consistency, in *draft paragraph 15*, delete the last sentence stating; that the ***deciding factor is …****whether individuals are free to leave it*

[6] Inter-American Court of Human Rights, Advisory Opinion OC-21/14, 19 August 2014, para. 145
[7] European Court of Human Rights, *Guzzardi v. Italy*, (November 6, 1980), para. 95.
[8] ECtHR, *Guzzardi v. Italy*, 7367/76, (November 6, 1980), para. 92-93; ECtHR, *Austin and Others v. the United Kingdom*, 39692/09, 40713/09 and 41008/09, GC, (March 12, 2012), para. 57
[9] African Commission on Human and People's Rights, Communication No. 279/03, 296/05) [2009], ACHPR 100; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (27 MAY 2009).

iii. Insert draft paragraph 39 in Part C of Part III places where persons are or may be deprived of their liberty for cohesion.

iv. Expound the section to clearly bring out the rights of persons with the various forms of disabilities in places detention, while having regard to the role of monitoring agencies under Article 33 of the CRPD and the recent Guidelines on deinstitutionalization including in emergencies[10] that seek to complement the CRPD's General comment No. 5 and its guidelines on the right to liberty and security of persons with disabilities.

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

14. Under paragraph 29, the draft General Comment provides that it is crucial that state parties guarantee both the Subcommittee and national preventive mechanisms full access to places, facilities, or settings in which individuals currently are, *previously were*, or potentially may be deprived of their liberty. The length of time of the deprivation of liberty is irrelevant to the determination of such a place. Notably, however, the relevant Article in the Optional Protocol does not expressly include *previous* places of detention under its scope.

15. Even so, the importance of granting the SPT and the NPM access to places where individuals were previously deprived of their liberty cannot be downplayed, as it may act as a preventive measure since the chances of such a place being used as a potential place of deprivation are likely.

16. We, therefore, suggest the deletion of the phrase "*previously were*" as it is redundant since its intention is to prevent "potential deprivation" which has already been provided for in the article.

V. Obligations of State Parties under article 4

17. Under this heading, for easier reference, more specific obligations for the State in view of the foregoing observations by the Subcommittee could have been added. For instance, the restrictive provisions in law and application in practice appear to have been a key challenge limiting the application of Article 4 of the Protocol- Refer to paragraphs 5, 21, 22 and 23 of the draft comment. Thus, specific recommendations to State parties to review their national laws and policies which are restrictive would be one of the very specific recommendations that the general comment could have provided hereunder in additional to other specific measures that implicitly fall within the preceding paragraphs.

-The End-

[10] Guidelines available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5