



*Garante Nazionale
dei diritti delle persone private della libertà personale*

Presidente

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Here below, please find the second contribution from the Italian NPM in response to the Subcommittee's request to provide further observations on the Draft general comment No.1 on places of deprivation of liberty (article 4).

With this letter, the Italian NPM also expresses interest to participate in the public discussion in June.

Respectfully yours,

Mauro Palma

President

Garante nazionale dei diritti

delle persone private della

libertà personale

Italian National Preventive Mechanism (NPM)



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**Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment
or Punishment**

**Remarks from the Italian NPM on the Draft general comment No. 1 on places of deprivation
of liberty (article 4) – CAT/OP/GC/R.1**

The Italian NPM welcomes the opportunity to make a submission on this Draft general comment No.1 on places of deprivation of liberty (article 4).

It is pleased to acknowledge that the Subcommittee has paid close attention to the suggestions the Italian NPM provided in its first submission (letter dated May 25, 2021).

The current text is notably precise and comprehensive, covering a broad definition of deprivation of liberty (places and forms), in order to ensure that the Subcommittee's and the NPMs' oversight powers are exercised anywhere and at any time. However, the National Guarantor would like to integrate the following, so to make the general comment much detailed on some specific sections:

III. Places of deprivation of liberty under article 4 – custodial setting

With reference to section **III. Places of deprivation of liberty under article 4**, where it is well specified that «*Article 4 places within the scope of the Optional Protocol any public or private **custodial setting** under the jurisdiction 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*» (paragraph 19), the Italian NPM has appreciated any further explanations on the specific elements mentioned in said paragraph. However, in its opinion, it seems important to better explain the wording **custodial setting** since - if left unclarified - it may be strictly interpreted as a place which requires the presence of a guardian or a keeper (therefore a custody¹, from Latin “custodia”) to control the setting. Indeed, to define a place or a situation depriving a person of their liberty, it is sufficient, that such a person, for whatever reason, in a situation in which the State either exercises or might be expected to exercise a regulatory function, does not have a real possibility of leaving at their own will (see next observation) the same place or situation. It is crucial and imperative that a separate section explaining the definition of a custodial setting be included.

III. Places of deprivation of liberty under article 4 – permission to leave at will

The National Guarantor would appreciate if, in paragraph 30 (‘In which persons are not permitted to leave’), the Inter-American Court of Human Rights’ more explicit interpretation of a place or situation of deprivation of liberty (in paragraph 18) is repeated, leaving behind any potential literal understanding of the ‘permission to leave’ if confronted with the ‘impossibility

¹ ‘Surveillance’ in the French version of the Optional Protocol text.



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to leave', as stated in the Court's "unable to leave or abandon at will the place or establishment". This specification can substantiate, for instance, the identification of a vessel stuck at sea in international waters – due to the lack of permission to dock and to disembark people on board – as a place of deprivation of liberty: it is in fact, the impossibility or the person's incapability² to leave the ship at will that classifies the vessel as a 'custodial setting', and not the relation to the 'permission to leave' the ship given by somebody having effective control on the means of transportation.

III. Places of deprivation of liberty under article 4 – jurisdiction or control

In paragraphs 24-28 ('Jurisdiction or control'), the commentary is very careful in clarifying that States should allow visits to all places where they exercise jurisdiction or control. Apparently, the draft comment makes a distinction between jurisdiction and control. In the National Guarantor's belief, it is self-evident that control means the State's exercise of a jurisdiction also outside its territory (for further discussion, see the European Court on Human Rights' *Guide on Article 1 of the European Convention on Human Rights* https://www.echr.coe.int/documents/guide_art_1_eng.pdf) to the extent that both terms are no longer distinct.

However, if the comment is written with the intention of maintaining the difference, some issues may arise when reading §28 in that it may be read as allowing NPMs to visit all places of deprivation of liberty under their jurisdiction while the SPT can exercise its visitation powers also in territories which may not be under the effective control of a State.

For greater clarity, it might be useful to rephrase part of §28 as follows: «*States parties should allow national preventive mechanisms to visit and monitor all, and any suspected, places or forms of deprivation of liberty, as set out in articles 4 and 29 of the Optional Protocol, that are within its jurisdiction or under its effective 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 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*».

IV. Scope of places of deprivation of liberty

In paragraph 38, although the National Guarantor is aware that any list included in the general comment is not exhaustive, it would be necessary to add to the given taxonomic enumeration

² For example, people with impairment or disability or poor health conditions.



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in said paragraph the words "any means of transportation used in forced-return operations" after "vehicles, ships and aeroplanes".

The same reference to forced-return operations and the need for NPMs and the SPT to consider forced returns in the scope of their monitoring mandate is to be made clear in paragraph 14 which refers to the situations where people are "being involuntarily transported" as a situation of deprivation of liberty. In this context, the National Guarantor suggests establishing an explicit reference to the monitoring of forced returns (and all its phases), as has already been suggested by Picum and the Greek Council for Refugees³.

³ See <https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/cfis/gc1-art4/submission-spt-gc-article4-PICUM-GCR.pdf>