SOUTH AFRICAN NATIONAL PREVENTIVE MECHANISM

SUBMISSION TO THE UNITED NATIONS SUBCOMMITTEE ON PREVENTION OF TORTURE ON DRAFT GENERAL COMMENT ON ARTICLE 4 OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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PURPOSE

1. This is a submission of the South African National Preventive Mechanism (SA NPM) to the United Nations Subcommittee on Prevention of Torture (SPT or Subcommittee) on draft General Comment No. 1 on the interpretation of article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

2. The SA NPM equally welcomes this opportunity to comment on draft General Comment No. 1 (GC or General Comment) on the interpretation of Article 4 of the OPCAT and avails itself of any opportunity to provide further information or clarity to the Subcommittee.

3. The SA NPM supports the content of the draft GC with some suggestions proposed for the Subcommittee's consideration.

INTRODUCTION

4. Torture prevention mechanisms are premised on the recognition that deprivation of liberty creates a power imbalance of power between the state and those deprived of their liberty. As a result, conditions in which certain risks, including torture and ill-treatment arise. These risks are heightened by the closed and isolated nature of places of deprivation of liberty. As such, external and independent monitoring becomes indispensable to reduce the opacity characteristic of places of deprivation of liberty and to guarantee respect for detainees' rights, to hold authorities accountable as well as prevent practices of ill-treatment and those that create a conducive environment for ill-treatment.[1]

5. To effectively fulfil the legal obligations relating to the prevention of torture and other ill-treatment contained in the Convention and its Optional Protocol, States Parties are obliged to set up, designate or maintain national preventive mechanisms (NPM) and must allow visits to all places of deprivation of liberty by the NPM and by the United Nations Subcommittee on Prevention of Torture (SPT).

[1] https://www.apt.ch/detention-focus/en/detention_issues/29/?vg=-1.

BACKGROUND

6. On 20 September 2006, South Africa signed the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT or Optional Protocol**)**.[2] Meanwhile, on 28 February 2019, the cabinet referred the OPCAT to Parliament for ratification.[3] Both the National Assembly and the National Council of Provinces approved the ratification of OPCAT on 18 and 28 March 2019 respectively. South Africa deposited the instrument of ratification of the OPCAT with the Secretary-General of the United Nations in New York on 20 June 2019. Under Article 28 (2), the OPCAT came into effect for South Africa on 20 July 2019. As a multi-body mechanism, the South African NPM consists of the Judicial Inspectorate for Correctional Services (JICS), the Independent Police Investigative Directorate (IPID), the Office of the Military Ombud (OMO) and the Office of the Health Ombud (OHO). The responsibility for coordinating the NPM has been assigned to the South African Human Rights Commission (SAHRC) by the Parliament of the Republic of South Africa.

APPROACH TO ARTICLE 4

7. The South African NPM notes that the aim of the draft General Comment No. 1 on places of deprivation of liberty (article 4) is to clarify the scope of the obligations of States parties to the Optional Protocol regarding places of deprivation of liberty that the Subcommittee and NPMs are to visit as part of their mandate, in compliance with the Optional Protocol.

8. The SA NPM reiterates its earlier submission to the Subcommittee on the development of a General Comment on Article 4 and equally endorse the contextual understanding of the SPT in paragraphs 4, 9, 21, 37 and 41.

9. The Subcommittee has previously provided a non-exhaustive list that illustrates traditional and non-traditional forms of places of deprivation of liberty.[4] These include prisons, police stations, juvenile detention centres, psychiatric institutions, migrant detention centres as well as military detention barracks [Paras14, 36, 37 and 38]

[2] Adopted on 18 December 2002 at the Fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Entered into force on 22 June 2006.
[3] Section 231 (2) of the Constitution of the Republic of South Africa, 1996.
[4] Preventing Torture: The Role of National Preventive Mechanism - A Practical Guide, 2018 United Nations at page 7.

10. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has pointed out that regardless of the name given to a particular placement or accommodation and its categorization in national law, the decisive question for its qualification as "deprivation of liberty" is whether or not persons are free to leave. In practice, the possibility of leaving must not be a merely theoretical option to be exercised at some point in the future, but also practicable and available at any time. For example, holding migrants at an international border and refusing them immigration status while granting them the theoretical right to leave to any other country or territory of their choice still amounts to deprivation of liberty for such time as they are being held.[5] Another iterative list is also provided by the Special Rapporteur on the rights of persons with disabilities.[6]

11. The SA NPM submits that the rules of treaty interpretation are well-established in international law. In this regard, Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT) prescribes the widely accepted or conventional tool for treaty interpretation. Article 31 provides that "a treaty shall 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". Meanwhile, article 32 provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31... leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable."

12. While there are various preferred methodological approaches largely informed by the intention of the drafters through the assessment of the meaning of the terms used, the purpose and object of the treaty find wide acceptance in the international treaty interpretation as it also guides any interpreter where ambiguities appear to exist. In the *Advisory Opinion on Nuclear Weapons*, the ICJ held that:

> "…[T] he constitutive instruments of international organisations are multilateral treaties, to which the well-established rules of interpretation apply…their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task

[5] A/HRC/37/50, para. 17.
[6] Report of the Special Rapporteur on the rights of persons with disabilities, 11 January 2019 at paras 38-43.

of realising common goals. Consequently, they generate the mode of interpreting as they are similarly conventional and institutional."[7]

13. Whereas, in the *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006*, the Appal Chamber affirms the applicability of the VCLT in interpreting the Rome Statute.[8] But firstly, it does so by outlining a somewhat hierarchical approach, which takes fundamental cognisance of the textual reading. Nonetheless, the purposive approach must form part of the tools available to the interpreter. It appears then that the rules of treaty interpretation in accordance with the VCLT are relevant and evidently applicable in discerning the reading to Article 4.

14. It is the submission of the SA NPM that there is no ambiguity that would require resort to the supplementary means of interpretation in terms of Article 32 of the VCLT.

15. In the same vein and within the South African context, the South African NPM has, since its designation, articulated its position regarding the ambit of Article 4. For instance, the NPM draft Bill provides that a "place of deprivation of liberty" means any "public or private [place] of custodial setting where a person is not permitted to leave at will and is placed there by an order of any judicial, administrative, or other authority**.** These places include, ***but are not limited*** to the following:

(i) Correctional centres including pre-trial/remand and sentenced offenders;

(ii) Police detention facilities;

(iii) Places outside correctional centres where offenders are employed;

(iv) Mental health institutions;

(v) Military detention facilities;

(vi) Immigration detention facilities established or designated under the Immigration Act;

(vii) Court holding cells;

(viii) Holding cells at any port of entry;

(ix) Secure and Child and Youth Care Centres;

(x) Detention centres run by intelligence agencies;

[7] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO)* (Advisory Opinion) [1996] ICJ Rep 66, 74-75 ("WHO Advisory Opinion").

[8] Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 par 33.

(xi) Hospitals or clinics where offenders or arrested persons are treated;

(xii) Means of transport for the transfer of persons deprived of their liberty;

(xiii) Social care homes provided by the State or subject to State regulations or licensing;

(xiv) Unofficial places of deprivation of liberty (such as those operating secret detentions); and

(xv) Other places of administrative detention where persons are not free to leave at will (such as drug treatment centres, old age homes, circumcision schools); and places outside South Africa where agents hold Detainees.

16. The SA NPM recommends a purposive reading of the provisions of Article 4. While the actual place where a person is or may be deprived of liberty may be the natural focus of monitoring institutions, the risk is mostly attached to the person(s) given that the place of limitation of liberty may change or be temporary (paragraph 39). For instance, a substance user can be committed to a rehabilitation centre through a section 33 court order (Involuntary rehab commitment) wherein a third interested/concerned party applies for the substance user to be committed to a drug rehabilitation centre for treatment. With regards to children, a court can grant an order in terms of the Child Justice Act or the Children's Act for a child to be housed in either a secure care centre or child and youth care centre dependent on whether the child is in conflict with the law or in need of care and protection. In each case, the person would be *de facto,* and *de jure* deprived of liberty.

17. The SA NPM notes, however, that paragraph 39 of the draft GC seems to attribute risk to the severity of human rights violations. The SA NPM respectfully submits that the risk element should not only be limited to serious human rights violations but could also include human rights violations without attributing them to their severity. Otherwise, those violations deemed to be 'less serious' could be excluded. This also leads to a subjective test available to the depriver. The fundamental and normative link is harm or potential harm reduction.

18. Given the implications of the textual reading in its entirety, deprivation of liberty can occur in both public and private settings. This raises the complexity regarding the responsibility and accountability of non-state actors and their human rights obligations when they deprive a person of their liberty. However, this deficiency could be addressed through attribution of the state's obligations for the delegated authority or functions and/or acquiescence. To a certain

extent, the due diligence obligations of the state would then apply[9] and thus, bringing such functions or delegation within the ambit of Article 4.[10]

19. Besides, the purposive understanding of Article 4 is supported by the practice of the SPT and NPMs given that their visits have focused on both public and private settings. This could be argued to be attributable to state practice and any objecting state or party (persistent objector) would then have to argue the contrary in accordance with the applicable rules of international law.

CONCLUSION

20. Considering the above, the South African NPM endorses the draft GC with the necessary adjustments to ensure that the interpretation offers the maximum protection to persons who are or may be deprived of liberty. Importantly, the ability to leave at will and be able to exercise that will both in fact and law without exposing themselves to human rights violations.

[9] See Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 (List Of Cases: No. 17 and 21).
[10] AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006).