

**Response to the Draft General Comment No 1 on Article 4 of the OPCAT
14 April 2023**

The World Organisation against Torture (OMCT) welcomes the opportunity to provide comments for the General Comment on Article 4 of the OPCAT and would like to highlight the following issues: NPM monitoring of demonstrations, monitoring in times of crisis and emergencies, civil society monitoring of places of detention, monitoring of places where women are detained, and monitoring of places where children are detained.

1. NPM Monitoring of Demonstrations

According to Article 4 para. 1, States are obliged to allow visits by NPMs and the SPT to “any place [...] where persons are or may be deprived of their liberty”. Para. 2 of Article 4 specifies that “deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”. The OPCAT does not contain a list of such custodial settings and purposefully adopts a broad approach. The SPT considers that it includes “those places in which persons are de facto detained, for example individuals who in practice are unable to leave of their own free will”.¹ The preventive approach means that the interpretation of places of detention “should be as extensive as possible in order to maximize the preventive impact of the work of NPMs.”² This definition should also apply to demonstrations and protests where authorities control and restrict people’s movements. Particularly, the practice of so-called kettling, that involves the formation of large cordons of police in order to contain a crowd within a limited area, confines demonstrators for long periods of time. It is often during this containment that police use tear-gas, live ammunition and other excessive measures that can amount to torture or other ill-treatment.³ Several international human rights bodies have therefore criticized this practice.⁴

This is why a number of NPMs have started to monitor protests and demonstrations.⁵ Following a wave of arrests and violence during demonstrations at the beginning of 2021, the Tunisian NPM, for instance, undertook to monitor demonstrations and other political or social protests. According to the Tunisian NPM, this form of monitoring is part of the so-called “indirect” prevention, reducing risk factors for torture and ill-treatment. To this end, the NPM deploys its members to observe the management of the demonstration, document arrests made during and afterwards, and visits the centers where protestors are subsequently brought to. As described above, the NPM has taken the view that demonstrations can turn into places of deprivation of liberty where the risk of torture and other ill-treatment is heightened. In Tunisia, demonstrators are often prevented from leaving a certain perimeter, some are handcuffed and placed on the ground in the vicinity of the demonstration at a police assembly point or in police vehicles. In the context of Tunisia, a country marked by the hegemony of the security apparatus with little checks and balances and where repression is rising, an NPM has an important role to play during demonstrations and protests.

¹ https://www.ohchr.org/sites/default/files/Documents/Publications/NPM_Guide_EN.pdf.

² Ibid.

³ E.g. in Kazakhstan: <https://fpc.org.uk/police-kettling-in-kazakhstan/>.

⁴ See e.g. A/HRC/35/28/Add.1

⁵ E.g. in Austria: <https://www.etc-graz.eu/wp-content/uploads/2020/09/BHHR-1.pdf>;
<https://volksanwaltschaft.gv.at/en/preventive-human-rights-monitoring>

Recommendations

- The phrase “any place under its jurisdiction and control where persons are or may be deprived of their liberty” should be understood to include demonstrations and protests during which people could be contained by police or others acting with official capacity and are unable to leave a certain area and the para. 30 of the current draft comment should be amended accordingly;
- States should be required to mandate their NPMs with monitoring of protests and demonstrations.

2. Monitoring in Times of Crisis and Emergencies

Crisis and emergencies, like the global Covid-19 health pandemic pose particular risks for people deprived of liberty and are particularly challenging when it comes to monitoring. The Covid-19 pandemic brought about the suspension or curtailment of monitoring work in places of detention, despite calls to ensure the effective functioning of monitoring and oversight mechanisms in places of detention, as emphasized by the World Health Organization in its interim guidance.⁶

While in some countries, restrictions lasted for a short period and independent monitoring bodies were able to regain access relatively quickly, the disruption of regular monitoring work is still affecting a number of countries and it is feared that the long-term impact of far-reaching restrictions on access to and transparency of places of detention will be felt for years to come.⁷ Many NPMs played a crucial role during the Covid-19 pandemic, from its very early stages, in upholding the health, safety and personal integrity of persons held in places of detention and the staff, through an active and creative preventive monitoring approach. Among the key tasks and roles fulfilled, some of the most noteworthy include: the collection of information by joining closed groups on social media set up by people quarantined; virtual detention visits; successful advocacy to be recognized as “essential workers”.⁸

Yet, the Covid-19 pandemic laid bare pre-existing challenges and gaps, with many NPMs, NHRIs and other State monitoring mechanisms stopping their main functions or facing a very limited operational capacity, due to a wide range of reasons, including: structural under-resourcing curtailing the staff and resource capacity, concerns regarding their independence and autonomy or the existence of cumbersome administrative procedures or lack of cooperation from the authorities limiting their ability to respond quickly to the health emergency.

Recommendation

- While welcoming the Covid-19 references in the draft comment, it should particularly mention States obligations to ensure that in times of crisis or emergency, including health emergencies, independent national and international monitors are afforded the institutional guarantees necessary for their efficient functioning and access to places of detention. Such guarantees should be incorporated in human rights-compliant emergency preparedness and response protocols adopted by detention authorities.

⁶ World Health Organization, Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention - Interim Guidance, 15 March 2020, p. 5.

⁷ For instance in Belarus, Russia, Kazakhstan, and Uzbekistan authorities used the pretext of Covid-19 to stop independent monitors from entering detention facilities in most of 2021 and 2022 also when all Covid-19 measures were lifted outside prison walls.

⁸ See, among others, compilation of good practices published by APT and the OSCE Office for Democratic Institutions and Human Rights (ODIHR), Guidance: Monitoring Places of Detention through the COVID-19 Pandemic, 2020.

3. Civil Society Monitoring of Places of Detention⁹

Article 4 of the OPCAT requires states to allow visits to places of detention by National Preventive Mechanisms (NPM) and the Sub-Committee on the Prevention of Torture (SPT). In accordance with SPT's approach to prevention, it is argued here that CSO monitoring, alongside NPM and SPT monitoring, should be strengthened. As early as 2010, the SPT has noted that “there should be no exclusivity in the preventive endeavour. Prevention is a multifaceted and interdisciplinary endeavour”.¹⁰ In particular, the role of NPMs, national human rights and ombudsman institutions with a preventive mandate is “supported and complemented by civil society, which also plays an important role in ensuring transparency and accountability by monitoring places of detention, examining the treatment of detainees and by providing services to meet their needs”.¹¹ In that sense, the SPT encouraged the Tunisian NPM to “support international and national human rights organizations in lobbying the Government of Tunisia to guarantee them continuing access to places of detention and to enable them to pursue their monitoring and oversight activities” and to “work closely with civil society organizations in carrying out its functions, in particular by ensuring that visits to places of detention cover the entire national territory, but also by organizing awareness campaigns and training activities for the prevention of torture”.¹² Moreover, the SPT recommends States and NPMs to engage with CSOs to seek synergies, including through increased participation in visits by the NPM and in its dialogue with the authorities.¹³

Similarly, the UN Committee against Torture (CAT) has raised the importance of the monitoring work of CSOs in places of detention on multiple occasions during the review of States' compliance with the obligations enshrined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Convention). In light of reported obstacles in gaining access to prisons to undertake monitoring activities, including denial of access, refusal of accreditation or other administrative restrictions and obstacles, the CAT has recommended that States take all appropriate steps to enable CSOs to carry out periodic, independent, unannounced and unrestricted visits to places of detention (e.g., Cameroon¹⁴, Bolivia¹⁵, Thailand¹⁶). On Türkiye, the CAT recommended the State party to “adopt formal regulations explicitly authorizing human rights non-governmental organizations, medical professionals and members of local bar associations to undertake independent visits to places of detention”.¹⁷

There is a domestic trend in allowing civil society organisations to monitor detention. Last year, for instance, the Constitutional Court of Colombia ruled in 2022 that civil society organisations need to be ensured “the permanent and timely possibility to enter the EROs

⁹ Information in this paragraph is drawn from a 2022 OMCT publication entitled (Re)opening Prison Doors to Civil Society, https://www.omct.org/site-resources/legacy/Guidance-Note_3_monitoring_EN.pdf.

¹⁰ SPT, The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/OP, 12/6, 30 December 2010, para. 5(i).

¹¹ Ibid, para. 5(h).

¹² SPT, Visit to Tunisia undertaken from 11 to 14 April 2016, UN Doc. CAT/OP/TUN/2, 11 August 2017, para. 32.

¹³ SPT, Visit to Brazil undertaken from 19 to 30 October 2015, UN Doc. CAT/OP/BRA/3, 16 February 2016, para. 89; SPT, Visit to Hungary undertaken from 21 to 30 March 2017, UN Doc. CAT/OP/HUN/2, 23 April 2021, paras. 27-30.

¹⁴ CAT, Concluding Observations on Cameroon, UN Doc. CAT/C/CMR/CO/4, 19 May 2010, para. 26.

¹⁵ CAT, Concluding Observations on Bolivia, UN Doc. CAT/C/BOL/CO/2, 14 June 2013, para. 20(b).

¹⁶ CAT, Concluding Observations on Thailand, UN Doc. CAT/C/THA/CO/1, 20 June 2014, para. 24(a).

¹⁷ CAT, Concluding Observations on Türkiye, UN Doc. CAT/C/TUR/CO/4, 2 June 2016, para. 38.

[prisons of the national penitentiary system] and access information on the prison and penitentiary system” to be able to feed the Court with a vital source of information. The Court alludes to the secluded nature of penitentiary institutions to justify the need to grant unrestricted access to prisons to human rights organisations.

CSOs have a particular and important role to play in visiting and monitoring places of detention, some reasons are described in the following.

First-hand Knowledge and Expertise: Detention authorities engaging with civil society organisations can benefit from valuable evidence-based knowledge which draws on accumulated inter-disciplinary experience as practitioners in the human rights, detention and criminal justice fields, among others. Detention institutions often recognise and value the benefits of high levels of cooperation with civil society actors, which can lead to the improvement of conditions of detention and the elimination of risks for the personal integrity of detainees and staff. Likewise, NPMs and NHRIs often benefit from the involvement of civil society experts in detention-related activities, including collaboration and trainings in interview techniques, visiting procedures, the detection of signs and risks of torture and other ill-treatment, report writing or outreach activities.¹⁸

Reaching groups in situation of vulnerability and families of detained: CSOs are best placed to reach communities and groups in situation of vulnerability, notably detainees and their families, due to their expertise, local presence and connections with local, grassroots and family networks.¹⁹ Reaching groups in situation of vulnerability and family members of detained persons has been particularly important during the Covid-19 pandemic where communication between detained and the outside world was interrupted and more difficult to maintain.

Emotional support: CSOs have been identified as a great source of moral and emotional support for detainees. The possibility to receive visits from persons caring about one’s well-being and conditions of detention, who often advocate on their behalf, taking into account the limited options of detainees to be connected to the outside world.²⁰ This is specially the case for children deprived of liberty, who are not always able to see their families on a regular basis.

Detection of signs and risks of torture and other ill-treatment: CSOs play a vital role in the detection and collection of signs and allegations of torture and other ill-treatment, which often entails close collaboration with NPMs and other oversight bodies. This is particularly the case when organisations have been able to build a bond of trust with detainees and are linked to community-based support networks, relatives’ associations and the like.²¹ CSOs are key to channeling and processing complaints, and liaising with experts with whom an inter-disciplinary follow-up can be ensured (lawyers, psychologists, doctors, social workers).

¹⁸ The collaboration between CSOs and NPMs can take different forms. CSOs can be part of the NPM or integrate NPM consultative or advisory bodies. When CSOs do not have a formal role within the NPM structure, collaboration can be formalised through a memorandum of understanding that may include the articulation of CSOs visiting places of detention jointly with or in collaboration with NPMs, or more informal agreements or dynamics.

¹⁹ Brechenmacher S., Carothers T., Youngs R., Civil Society and the Coronavirus: Dynamism Despite Disruption, Carnegie Endow.

²⁰ See, for instance, Fleay C., ‘The limitations of monitoring immigration detention in Australia’, Australian Journal of Human Rights, 2015, Volume 21(1): 21-45, p. 28.

²¹ As an illustrative example, Antigone reports having been the first entity to be able to file a criminal complaint and become a civil party in the trial for the alleged mass beating in the prison of Santa Maria Capua Vetere (Campania), which led to the indictment of 105 people including police officers and civil staff in the largest trial for torture in Europe, thanks to trust gained by the association, which led many prisoners and family members to report the violence they have suffered to them.

Recommendations

- In order to effectively prevent torture in detention, member States are required take the necessary steps to enable civil society organisations to carry out periodic, independent and unrestricted visits to all places of detention;
- interpretation of Article 4 OPCAT should promote collaboration, coordination and complementarity of CSOs with NPMs and other State monitoring bodies.

4. Monitoring of Places where Women are Detained

Women are particularly vulnerable when in detention and face specific forms of gender-based violence; as has also been criticized by the SPT.²² While situations vary according to the country, there are common reasons for this heightened risk of torture and ill-treatment, including a high level of mental health care needs, often as a result of domestic violence and sexual abuse; disproportionate levels of sexual or physical abuse prior to detention; the likelihood of having caring responsibilities for children and other family members; and stigmatisation and abandonment by their families when in prison and once released. Often, facilities were built for men not accommodating specific needs of women detainees which contributes to cruel, inhuman or degrading detention conditions. Moreover, in many countries there are only few or no facilities in which women can stay with their children.

Over the recent years, the number of women in prison has grown rapidly and, over the past decade, at a disproportionately higher rate than that of men. The increase has been 50% in Asia, 19% in Central and South America and 24% in Africa.²³ But because there are still far fewer women detained than men, women detainees receive less attention and support.²⁴

An analysis of SPT's recent published reports on country visits suggests that the SPT delegation did not systematically visit women detention facilities.²⁵

Recommendation:

- In order to effectively monitor women detention centers, Article 4 of OPCAT, in line with the Bangkok Rule 25(3), should require that NPMs include female members;
- in order to better prevent torture of women in detention, the SPT should visit women detention facilities during every country visit.

5. Monitoring Places where Children are Detained

Based on our and our partners experience, monitoring juvenile detention centers are often not a priority for NPMs. Since detained children have even less ability than adults to defend themselves or report torture or other ill-treatment, monitoring their treatment and detention conditions by an independent mechanism is all the more important. In many countries, it is assumed that the treatment of children and the conditions in juvenile detention centers is better than of adults. This is, however, not always the case. In Brazil for instance, children are placed in socio educative centers that are outside the justice system without judicial supervisions. At the same time, the OMCT and its partners found severe torture and abuse of children in several socio educative centers.

²² Visit to Costa Rica: recommendations and observations addressed to the State Party, UN Doc. CAT/OP/CRI/ROSP/1, 6 January 2021, paras. 82-84.

²³ <https://www.penalreform.org/blog/addressing-the-105000-increase-in-the-global-female/>.

²⁴ <https://www.womenbeyondwalls.org/forgottenbyfunders>.

²⁵ E.g. in the visit reports to Bulgaria (2021), United Kingdom (2019), Switzerland (2019) there is no indication that women in detention were visited.

Many NPMs lack specific knowledge and expertise on monitoring juvenile detention facilities and on conducting interviews with children.

Recommendations:

- NPMs need to develop policies and trainings for its members on child sensitive detention monitoring;
- monitoring juvenile detention facilities should be made a priority for NPMs and the SPT during every country visit.

6. About the OMCT

The OMCT (based in Geneva with offices in Brussels and Tunisia) works with 200 member organisation to end torture and ill-treatment to assist victims, and protect human rights defenders at risk wherever they are Together, we make up the largest global group actively standing up to torture in over 90 countries. We work to protect the most vulnerable members of our societies, including women, children, indigenous peoples, migrants and other marginalized communities. To achieve this, we advocate with governments to change or implement their laws and policies, we help victims seek justice and strive to hold perpetrators to account.