

PICUM and the Greek Council for Refugees Joint Submission to the Draft general comment No. 1 on places of deprivation of liberty (article 4) of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

April 2023

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of 164 organisations working with undocumented migrants in 31 countries, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With twenty years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

The Greek Council for Refugees (GCR) has been active since 1989 in the field of asylum and human rights in Greece. On a daily basis, GCR welcomes and offers free legal and social advice and services to refugees and asylum seekers. GCR systematically and successfully carries out a series of institutional interventions to uphold and respect human rights and to improve the living conditions of people in need of international protection in Europe.

PICUM and the Greek Council for Refugees (GCR) welcome the opportunity to provide inputs to the Draft general comment No. 1 on places of deprivation of liberty (article 4) of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Our submission follows the structure of the first public Draft. This submission highlights practices in Europe with a particular focus on the situation in Greece. With the present submission, we would also like to express our interest in participating in the public general discussion on the draft during the 50th session of the SPT, taking place from 5 to 16 June 2023.

II. Comprehensive approach to defining places of deprivation of liberty

We welcome the Subcommittee’s clarification that any restrictive interpretation of “places of deprivation of liberty” would be contrary to the spirit of the Optional Protocol (paragraph 8). We endorse the comprehensive approach adopted by the Subcommittee throughout the document and the objective not to provide any exhaustive list of places of deprivation of liberty, as this would be in contradiction with the Optional Protocol (paragraph 36).

C. Broad definition in international law

Paragraph 14 refers to the situations in which people are “being involuntarily transported” as a situation of deprivation of liberty. In this regard, **we recommend that the General Comment includes an explicit reference to the monitoring of forced returns.** In some EU member states, the majority of return operations are [not monitored](#) or monitored only partially, despite the severe risk of ill-treatment during forced returns. For instance, during a joint return operation from Munich, Germany, to Kabul, Afghanistan in August 2018, a team of observers of the Committee for the Prevention of Torture of the Council of Europe recorded two incidents involving the use of unauthorised restraint techniques: a headlock that caused a [shortage of breath to the returnee and the application of pressure to his genitals](#).

III. Places of deprivation of liberty under article 4

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

We welcome the clarification that the scope of article 4 covers situations in which people “might” be deprived of their liberty. In paragraph 29, we suggest clarifying, in a non-exhaustive way, the possible ways in which these places might be identified. In particular, we suggest **clarifying an obligation to take into consideration reports by civil society organisations as well as journalists.** In the past years, several places of *de facto* detention have been unveiled thanks to the work of investigative journalists. For instance, in 2022, the non-profit newsroom Lighthouse Reports [uncovered](#) the existence of clandestine detention places for migrants in Bulgaria, Croatia, and Hungary. People detained in these “black sites” are prevented from seeking asylum and are then deported. Another recent [investigation](#) by the same newsroom found that asylum seekers, including children, have been chained and locked up below deck in unofficial jails on commercial ships – in the form of metal boxes and dark rooms – to facilitate pushbacks from Italy to Greece. These are not isolated cases: in 2020, the New York Times had revealed the use of [secret detention facilities](#) used in the context of pushbacks in Greece.

It would also be helpful to set up a mechanism that would allow individuals to submit complaints, including anonymously, on informal places of deprivation of liberty, that would trigger a visit.

D. In which persons are not permitted to leave at will

According to the European Court of Human Rights (ECtHR), there is no clear line between “detention” and “restriction of movement”. The difference lies in the intensity of the measure, rather than its nature. The ECtHR analyses the specific facts of each case to determine whether a measure formally qualified by the state as restriction on freedom of movement amounts to detention in practice. To this end, the ECtHR assesses the type of measure, its duration, its effects on the person concerned,

and the manner of its implementation.¹ Crucially, the ECtHR assesses these criteria in a cumulative manner. This implies that a series of restrictions, which in themselves would not reach the threshold of detention, may amount to detention when taken together. In particular, **some situations in which the person might be permitted to leave from the centre might still amount to deprivation of liberty due to the cumulative effect of other restrictions.**

In a specific case, the ECtHR found that a situation amounted to detention because the applicant was obliged to stay on a small area of an island for 16 months; was subject to a night-time curfew; was required to report to the authorities twice a day and inform them of the telephone number of his correspondent; and his trips required the consent of the authorities and were supervised by the police.²

Whereas the ECtHR considers home arrest as deprivation of liberty,³ it qualified a more lenient form of this measure as a restriction on freedom of movement. This was the Court's conclusion in a specific case, where the applicant's initial house arrest was substituted by a measure permitting the person to go to work during weekdays and obliging him to stay at home for 12 hours at night during weekdays and the whole day during weekends.⁴

In Greece, several situations which are not officially framed as detention in practice amount to deprivation of liberty and should therefore be included in the scope of article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. For instance, Article 40 of the new Greek Asylum Code⁵ provides for the possibility of a 25-days "restriction of freedom of movement within the premises of the Reception and Identification Center" for newly arrived asylum seekers in Greece for purposes of registration and identification, a measure which is tantamount to detention. An infringement procedure has been initiated recently by the EU Commission with regards this provision of the Greek legislation.⁶

In the new EU funded migration management facility on the Greek Eastern Aegean Island of Samos, from mid-November 2021 until early spring 2022, CSOs reported on an arbitrary prohibition of exit amounting to an illegal de facto detention measure; residents who did not have an asylum applicant smart card (which is necessary to pass through the centre's security systems) were generally forbidden from leaving the site.⁷ This prohibition was implemented without any administrative decision and without provision of information regarding the exit ban's legal basis. On 17 December 2021, the

¹ 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.

² ECtHR, *Guzzardi v. Italy*, para. 95.

³ ECtHR, *Buzadji v. Moldova*, 23755/07, GC, (July 5, 2016), para. 104; ECtHR, *Delijorgji v. Albania*, 6858/11, (April 28, 2015), para. 75.

⁴ ECtHR, *Trijonis v. Lithuania*, 2333/02, admissibility decision, (March 17, 2005).

⁵ Article 40 Law 4939/2022 (previously, see article 39 Law 4636/2019).

⁶ ECRE, [Greece: Infringement Letters from the European Commission, NGOs Urge More Oversight on Greek Islands, Joint Civil Society Rule of Law Submission, Hundreds of Thousands 'Prevented' Entry](#), 2023

⁷ [GCR and Oxfam contribution to the European Ombudsman's own-initiative inquiry OI/3/2022 MHZ on how the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece](#); GCR-Oxfam Bulletin, March 2022, [Chapter "Illegal Detention Practice"](#), p.4;

Amnesty International, [Greece: Asylum seekers being illegally detained in new EU-funded camp](#), 2 December 2021.

national Administrative Court of Syros, ruling in the case of an Afghan resident, confirmed that the prohibition of exit from the Samos CCAC imposed by the Greek state was unlawful.⁸

Until the end of November 2022, newly arrived asylum seekers on the Eastern Aegean islands were placed in automatic mandatory quarantine for 5 or more days –regardless of their vaccination status or COVID-19 infection status –under the pretext of preventing the potential spread of coronavirus, which amounted to *de facto* detention. This was a discriminatory measure, as it was not imposed on anyone else entering Greece, including those fleeing the Ukraine war. The detainees were not registered as asylum seekers by Greek authorities until after the quarantine, they were not served with an administrative detention order and had no access to legal information.⁹ Since late November 2022, new arrivals who test negative to COVID19 are restricted in the so called “First Reception Area” without issuance of a formal detention decision or documentation and without access to legal aid, until their registration by the Reception and Identification Service.¹⁰ Those who test positive continue to be held in isolated quarantine areas for five or more days with restricted access to their rights in the above-mentioned conditions.

In addition, **we suggest merging section D with paragraph 39**, which clarifies that a situation might amount to a deprivation of liberty even if the person is able to leave the place, for instance, if this would lead to risks of serious human rights violations. This is for instance the case of transit zones, as analysed further in PICUM’s briefing “[Immigration detention and *de facto* detention: What does the law say?](#)”. This aspect could be further clarified in the General Comment.

E. By virtue of an order given by a public authority or at its instigation or with its consent or acquiescence

We welcome the clarification that article 4 covers situations in which people are deprived of their liberty based on an order of a public authority, as well as situations in which there is no such decision. This is essential to cover situations of *de facto* detention, which are [on the rise in the EU](#). We suggest adding to paragraphs 33 and 34 a clarification that **this includes actions by state officials, including police and border guards, even when these are formally denied by the government or other authorities who should be in charge**. This should also include actions by third-state actors and by agencies, such as the European Border and Coast Guard Agency. Documented pushback cases in Greece demonstrate how asylum seekers are arbitrarily held in official or unofficial detention sites (i.e. storage rooms, isolated containers on a hill) by the Greek authorities before eventually being pushed back to Turkey. Official detention procedures are not followed, no one is officially registered, and asylum seekers do not have access to water, food, phone calls or lawyers.¹¹ In some pushback

⁸ GCR Press Release, [The Administrative Court of Syros ruled unlawful the measure of prohibiting the exit of an Afghan asylum seeker from the new Closed Controlled Access Facility of Samos \(CCF Samos\)](#), 22 December 2021.

⁹ AIDA Country Report: Grounds for Detention - GREECE, last updated 30 May 2022, <https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/legal-framework-detention/grounds-detention/>.

¹⁰ [Greek Council for Refugees\(GCR\) and Oxfam contribution to the European Ombudsman's own-initiative inquiry OI/3/2022 MHZ on how the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece](#) .

¹¹ NCHR, [Interim Report, Recording Mechanism of Informal Forced Returns](#), January 2023; GCR, [At Europe's Borders: Between Impunity and Criminalization](#), 2 March 2023; Human Rights Watch, [Greece: Violence Against Asylum Seekers at Border Detained, Assaulted, Stripped, Summarily Deported](#), 17 March 2022; [Report to the](#)

cases, people also identified an official Border Guard Station in Evros as the site of their informal detention and ill treatment.¹²

In addition, we suggest clarifying that article 4 also covers situations in which people did receive a detention order, but were placed in settings in which they have some seriously limited degree of freedom of movement. These places would therefore amount to “alternative forms of detention”. This is for instance the case of the so-called “[return houses](#)” for families in Belgium.

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[Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\)](#), March 2020, <https://rm.coe.int/1680a06a86>, paras. 10, 24, 55.

¹² GCR, [At Europe's Borders: Between Impunity and Criminalization](#), 2 March 2023.