

Submission to the
United Nations Subcommittee on Prevention of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment

General Comment on the
Article 4 of the OPCAT (Optional Protocol to the Convention against Torture)

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Introduction:

The interdisciplinary United Nations Working Group on Human Rights and Digital Technology welcome the Committee's initiative to prepare a General Comment on Article 4 of the Optional Protocol to the Convention against Torture. We are honored to have the opportunity to share our research concerning the definition of 'deprivation of liberty'. The Working Group welcomes and supports the extensive and comprehensive approach that the Committee has taken in determining what constitutes deprivation of liberty. We agree that the broad approach outlined in the draft General Comment would serve as a preventive and corrective tool for independent parties to investigate abuses under the Convention and carry out the mandate of the Subcommittee. To ensure the General Comment maintains relevance, the Working Group recommends the General Comment articulate and **broaden the definition of "places where persons are deprived of liberty" to include digital spaces** where such rights are exercised in light of developing technological breakthroughs.

As the digital landscape continues to evolve rapidly, it is crucial to ensure that the definition of "place of deprivation of liberty" under Article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) remains relevant and effective in safeguarding human rights in light of technological developments. In particular, we recommend broadening the definition of "place of deprivation of liberty" to explicitly include digital spaces which extends to social credit systems, health code passes, and the development of the metaverse in various countries among others. We further recommend including broad language in the definition to

respond to evolving future technological developments such as neurotechnologies.

Recommendation 1: Include explicit reference to deprivation of liberty in digital spaces

Access to digital and meta-digital spaces is essential for the exercise of economic and social rights. These spaces are used for work since the transition to remote working, to communicate with family and friends, to collect valuable information, to access education, to transfer and receive money, and to connect with government and social services. These spaces are also an access point for government and non-governmental organizations to share information critical to the exercise of other fundamental human rights, including information about healthcare, housing, and education.

The increasing reliance on digital technologies has led to novel forms of surveillance, control, and potential human rights abuses. Social credit systems, which aim to monitor and regulate citizens' behavior based on various data points, have the potential to restrict an individual's freedom in various ways. Such systems may limit access to essential services or opportunities based on one's "social score," effectively depriving individuals of their liberty in ways not previously considered by Article 4.

Moreover, during the COVID-19 pandemic, various countries implemented health code passes to control the spread of the virus. While these measures may have been necessary from a public health perspective, they have raised concerns about privacy and the potential for misuse. By potentially restricting individuals' access to public spaces, employment, and services, these health code passes can inadvertently lead to a deprivation of liberty. Under the pretense of public health, national authorities have broad powers to curb liberties in an ambiguous manner.

Lastly, the emergence of the metaverse, a collective virtual shared space, has given rise to new questions about the protection of human rights in these environments. As individuals interact, work, and conduct business within the metaverse, the possibility of experiencing cruel, inhuman, or degrading treatment or punishment in these digital spaces cannot be ignored. Existing definitions of "place of deprivation of liberty" may not adequately address the unique challenges posed by these virtual worlds.

State Parties may impose restrictions or differential treatment when there is both a legitimate government aim and when the measure is proportionate to meet that aim. But, in some cases, State practice has not satisfied this test. The purpose of many blanket bans and restrictions is to restrict certain populations from access to the digital realm. But, even assuming a government could show a legitimate aim, a blanket ban or restriction that applies to all individuals cannot be proportionate. The government must create less restrictive, tailored measures that narrowly and

specifically address unique concerns that may arise, while ensuring everyone can continue to exercise their rights and access the digital realm uninterrupted.

To address the new forms of deprivation of liberty in digital and non-physical spaces, the Subcommittee should consider amending Article 4 of the OPCAT to explicitly include these spaces within its scope. The amendment could take the form of an additional clause, such as:

"Places of deprivation of liberty shall also include any digital or non-physical spaces in which an individual's freedom of movement, expression, or access to essential services is limited or controlled."

To provide greater clarity on the application of the OPCAT provisions to digital and non-physical spaces, the Subcommittee should consider developing a set of guidelines or a supplementary protocol that specifically addresses the unique challenges posed by these environments. The guidelines or protocol could:

- a. Define key terms, such as "digital space," "social credit system," "health code pass," and "metaverse."
- b. Clarify the responsibilities of Member States in monitoring and preventing torture and other cruel, inhuman, or degrading treatment or punishment in digital and meta-physical spaces.
- c. Offer guidance on the establishment and operation of National Preventive Mechanisms (NPMs) in digital spaces.
- d. Address privacy and data protection concerns related to the monitoring of digital spaces.
- e. Provide best practices for engaging with relevant stakeholders, including technology companies, civil society organizations, and individuals, to ensure effective oversight and protection of human rights in digital and meta-physical spaces.

These amendments would ensure that the OPCAT remains relevant in the face of rapid technological advancements and is better equipped to protect individuals from human rights abuses in digital and non-physical spaces.

Recommendation 2: Include language to guarantee that the definition of 'deprivation of liberty' will evolve in light to technological developments.

At present, the definition of 'deprivation of liberty' could be interpreted as limited to physical spaces. The 'places of detention' referred to in international law documents and the draft General Comment are physical, real-world spaces and 'liberty' is understood as pertaining to the physical body.

However, with technological developments, it may be possible in the future to create conditions where an individual is unable to exercise liberty in non-physical spaces. For example, developments in neurotechnology may enable interventions that change our understanding of 'liberty' at a neural-level. Through neurotechnologies, it may be possible in the near future to deprive or alter an individual's ability to freely think or leave at-will. In such situations, the 'private' sphere is even more private - that of the individual's own brain. Cognitive liberty

(i.e., the right to mental self-determination) would be undermined. A person may be, figuratively speaking, trapped in their own mind. Such activities may constitute a violation of both the prohibition on torture and a deprivation of liberty.

Human rights scholars have begun to explore the implications of neurotechnologies on human rights, leading to calls to formally articulate a new set of neurorights. Adding language where relevant within the existing human rights framework, such as the Optional Protocol, would help to address these concerns.

To ensure that the definition of ‘deprivation of liberty’ will respond to this and other similar technological developments, we recommend adding clarifying language to the following subsections of Section III:

(a). Public or Private should also be understood as including ‘non-physical’ spaces, like the human mind.

(c). In which persons are or may be deprived of their liberty should include mental and cognitive liberty.

In conclusion, a combination of amending Article 4 of the OPCAT and developing a set of guidelines or a supplementary protocol will ensure that the Convention remains an effective tool in protecting individuals from torture and other cruel, inhuman, or degrading treatment or punishment in the rapidly evolving digital landscape. These changes will provide a comprehensive framework for Member States to address the unique challenges posed by digital and meta-physical spaces while upholding their obligations under the OPCAT.

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