

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

Draft general comment No. 1 on places of deprivation of liberty (article 4) *

I. Introduction

1. The main purpose of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is to establish, as an effective mechanism of torture prevention, a system of regular visits to places where persons are deprived of liberty. The Optional Protocol was created as a result of the conviction of the international community that further measures were necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and that States had primary responsibility for implementing effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under their jurisdiction.¹ In order to effectively fulfil the legal obligations relating to torture prevention contained in the Optional Protocol, States parties are obliged to designate national preventive mechanisms and must allow visits to all places of deprivation of liberty by those mechanisms and by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment. The aim of the present general comment is to clarify the scope of the obligations of States parties to the Optional Protocol with regard to the places of deprivation of liberty that the Subcommittee and national preventive mechanisms are to visit as part of their mandate to prevent torture, in compliance with the Optional Protocol.

2. The main purpose of the Optional Protocol, as explained above, is set out in its article 1: “The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where persons are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”

3. Article 4 of the Optional Protocol reinforces that fundamental purpose by establishing the obligation of States parties to allow visits to places of deprivation of liberty by the Subcommittee and the national preventive mechanisms. Such visits are to be undertaken with a view to strengthening, if necessary, the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment. Article 4 (1) contains a definition of the places that the Subcommittee and national preventive mechanisms have the mandate to visit, namely any place under a State party’s jurisdiction or control² where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. This constitutes a broad definition that includes not only places dedicated to the detention or custody of persons but also places where the public authority instigates or consents or acquiesces to the deprivation of liberty. Article 4 (2) contains a definition of the term “deprivation of liberty” as “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”. This definition contains specific reference to the fact that deprivation of liberty may occur in both public and private settings.

* For public consultation.

¹ Optional Protocol, preamble.

² As explained in paragraphs 24 and 25 below, although the English version of the Optional Protocol reads “jurisdiction and control”, this expression should be understood as “jurisdiction or control”. For this reason, throughout the present general comment, the phrase “jurisdiction or control” will be used.

4. The objective of the Optional Protocol, to prevent torture and other ill-treatment, and the understanding and practical application of the Optional Protocol by the Subcommittee and the majority of the national preventive mechanisms established around the world make it clear that paragraphs 1 and 2 of article 4 should be read together. This means that the definition of places of deprivation of liberty must be understood broadly to include both public and private settings and situations in which there is State instigation of or consent or acquiescence to the deprivation of liberty.

5. In practice, some national preventive mechanisms have, at different times, faced difficulties or restrictions in conducting visits to places of deprivation of liberty. In exceptional cases, these difficulties have their origin in the national law that creates the mechanism and that is contrary to the international obligations of the State; for example, when it is specified in a national law that national preventive mechanisms can only visit places where persons are deprived of their liberty by order of an administrative or judicial authority or when the national law does not contain reference to the instigation, consent or acquiescence of the public authority. National preventive mechanisms have also informed the Subcommittee about practical difficulties in entering certain places of deprivation of liberty owing to an incorrect or limited understanding by the State party of the definition of places of deprivation of liberty. In addition, the Subcommittee has also observed some discrepancies in the places that States parties allow national preventive mechanisms and the Subcommittee to visit, with more restrictions imposed on national preventive mechanisms, even though the Optional Protocol is clear that the State's obligations are the same with regard to both. This is problematic as it limits the work that national preventive mechanisms do in a way that is inconsistent with States' obligations under the Optional Protocol, with the result of preventing places of deprivation of liberty from benefiting from the important preventive actions of the national preventive mechanisms.

6. The aim of the present general comment is to clarify and address any questions that States parties, national preventive mechanisms and other relevant actors may have regarding the obligations of States parties to the Optional Protocol as they pertain to the definition of places of deprivation of liberty. The Subcommittee considers that this is a crucial issue because, as has been indicated above, the essential purpose of the Optional Protocol lies in the system of preventive visits by the Subcommittee and the national preventive mechanisms to all places of deprivation of liberty.

II. Comprehensive approach to defining places of deprivation of liberty

7. In determining what constitutes deprivation of liberty and a place of deprivation of liberty, the Subcommittee has recommended as extensive an approach as possible in order to maximize the preventive impact of the work of the national preventive mechanisms,³ as well as that of the Subcommittee. This approach is consistent with the objective of the Optional Protocol and it is the approach that has been adopted by the Subcommittee in its practice. In addition to the Subcommittee, various human rights bodies and mechanisms in the United Nations system apply the concept of places of deprivation of liberty within their respective mandates. Their comprehensive approach to the definition of deprivation of liberty sheds light on how this concept has developed in international law. The present section contains a more detailed explanation as to why this comprehensive approach to the definition of places of deprivation of liberty is essential for ensuring that States parties comply with their obligations under the Optional Protocol.

A. Consistency with the objective of the Optional Protocol

8. The importance of article 4 for the practical and effective realization of the main purpose of the Optional Protocol is paramount. Any restrictive interpretation would impair

³ [CAT/C/57/4](#) and [CAT/C/57/4/Corr.1](#), annex, para. 2. See also [CAT/OP/POL/ROSP/1](#) and [CAT/OP/POL/ROSP/1/Corr.1](#), para. 26; and [CAT/OP/PRT/1](#), para. 25.

the mechanism enshrined in the Optional Protocol and thus be contrary to its spirit. The importance of a comprehensive approach to the provisions of article 4 has been stressed by the Subcommittee on numerous occasions. The Subcommittee has underlined that the term “places of detention”, as found in article 4 of the Optional Protocol, should be given a broad interpretation. Therefore, an interpretation of places of deprivation of liberty that is limited to such conventional places of deprivation of liberty as prisons would be overly restrictive and, in the view of the Subcommittee, clearly contrary to the Optional Protocol.⁴

9. A restrictive interpretation of article 4 would also violate the obligation to interpret treaties in good faith, as expressed in the Vienna Convention on the Law of Treaties, article 31 of which provides that every treaty must 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. As the objective of the Optional Protocol is the prevention of torture and other cruel, inhuman or degrading treatment or punishment through visits to places of deprivation of liberty, a good faith interpretation cannot restrict the definition of places of deprivation of liberty so as to leave out places where persons could be deprived of liberty and where torture could be taking place. Moreover, the Optional Protocol was intended to extend to all places where persons may be deprived of their liberty by instigation, consent or acquiescence, and not just places where persons are deprived of liberty through a formal order.⁵

B. Application in the practice of the Subcommittee

10. On the understanding that a comprehensive approach to article 4 of the Optional Protocol is vital for guaranteeing and enabling the effective realization of the Subcommittee’s mission and the mandate of the national preventive mechanisms, the Subcommittee has applied such an approach in its visits and in its reports. The Subcommittee has established that places and forms of deprivation of liberty encompass more than detention in prisons and police stations. This issue is elaborated upon further in section IV below.

11. The Subcommittee has stated that the term “places of detention” should be given a broad interpretation and that the term extends to any place, whether permanent or temporary, where persons are deprived of their liberty by, or at the instigation of, or with the consent and/or acquiescence of, public authorities.⁶ It has clarified that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises or might be expected to exercise a regulatory function.⁷ The Subcommittee has emphasized in visit reports that, pursuant to article 4 of the Optional Protocol, the State party must enable and ensure visits to any place under its jurisdiction or control where persons are or may be deprived of their liberty.⁸

12. In accordance with the comprehensive approach to the definition of places of deprivation of liberty, the Subcommittee has clearly established that the two paragraphs of article 4 must be read together.⁹ This means that the two paragraphs of article 4 complement each other, establishing the definition and scope of what is considered “places of deprivation of liberty”, which is closely associated with the definition of deprivation of liberty. In other words, places of deprivation of liberty include private or public institutions as specified in paragraph 2 and deprivation of liberty includes, as specified in paragraph 1, any form of placement in a setting that a person is not permitted to leave at will, including at the instigation or with the consent or acquiescence of a public authority.

⁴ CAT/C/50/2, para. 67.

⁵ E/CN.4/1993/28 and E/CN.4/1993/28/Corr.1, paras. 35–40.

⁶ CAT/C/50/2, para. 67.

⁷ CAT/C/57/4 and CAT/C/57/4/Corr.1, annex, para. 3. See also CAT/OP/POL/ROSP/1 and CAT/OP/POL/ROSP/1/Corr.1, para. 25.

⁸ CAT/OP/PRT/1, para. 24; and CAT/OP/POL/RONPM/1, para. 28.

⁹ CAT/C/57/4 and CAT/C/57/4/Corr.1, annex, para. 1.

C. Broad definition in international law

13. The Committee against Torture has established that a State party's obligations to prohibit, prevent and redress torture and ill-treatment extends to all contexts of custody or control, for example, in prisons, hospitals, schools and institutions that engage in the care of children, older persons or persons with disabilities, including persons with intellectual or psychosocial disabilities, in military service and in other institutions and contexts. The Committee has recognized that any territory under a State's jurisdiction includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.¹⁰

14. The Human Rights Committee has explained that, under the International Covenant on Civil and Political Rights, the prohibition of torture applies in all institutions where persons are lawfully held against their will, not only in prisons but also, for example, in hospitals, detention camps and correctional institutions.¹¹ The Committee, referring to the obligation to respect the right to liberty and security of persons, has established that deprivations of liberty include police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.¹²

15. Similarly, the Working Group on Arbitrary Detention has recognized that there is an increasing number of new regimes of deprivation of liberty that arise in different situations and contexts around the world and that, while prisons and police stations remain the most common places in which individuals may be deprived of their liberty, there are a number of different places that an individual is not free to leave at will and that raise a question of de facto deprivation of liberty.¹³ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has emphasized that private custodial settings are also included within the meaning of the terms "deprivation of liberty" and "detention" and that, in practice, deprivation of liberty may include prisons or purpose-built detention facilities, closed reception or holding centres, shelters, guesthouses and camps, and also temporary facilities, vessels and private residences. The Special Rapporteur has been clear that the deciding factor for its qualification as "deprivation of liberty" is not the name given to a particular placement or accommodation or its categorization in national law but whether individuals are free to leave it.¹⁴

16. A comprehensive approach to the definition of places of deprivation of liberty is also seen within regional human rights mechanisms. The Council of Europe has stated that visits may be organized to all kinds of places where persons are deprived of their liberty, whatever the reasons may be, and that the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is applicable, for example, to places where persons are held in custody, are imprisoned as a result of conviction for an offence, are held in administrative detention or are interned for medical reasons, or where minors are detained by a public authority. This includes detention by military authorities.¹⁵

17. The European Court of Human Rights has held that deprivation of liberty is not confined to detention following arrest or conviction, but may take numerous other forms,¹⁶ including being held in psychiatric or social care institutions,¹⁷ being taken by paramedics

¹⁰ Committee against Torture, general comment No. 2 (2007), paras. 15–16.

¹¹ Human Rights Committee, general comment No. 21 (1992), para. 2.

¹² Human Rights Committee, general comment No. 35 (2014), para. 5.

¹³ [A/HRC/36/37](#), para. 52.

¹⁴ [A/HRC/37/50](#), para. 17.

¹⁵ Council of Europe, "Explanatory report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" (Strasbourg, 1987), p. 5. Available at <https://rm.coe.int/16800ca43b>.

¹⁶ *Guzzardi v. Italy*, Application No. 7367/76, Judgment, 6 November 1980, para. 95.

¹⁷ See *De Wilde, Ooms and Versyp v. Belgium*, Application Nos. 2832/66, 2835/66 and 2899/66, Judgment, 18 June 1971; *Nielsen v. Denmark*, Application No. 10929/84, Judgment, 28 November 1988; *H.M. v. Switzerland*, Application No. 39187/98, Judgment, 26 February 2002; *H.L. v. the United*

and police officers to hospital,¹⁸ confinement in airport transit zones,¹⁹ confinement in land border transit zones,²⁰ placement in a police car to draw up an administrative offence report,²¹ stops and searches by the police,²² not being permitted to leave during a house search,²³ crowd control measures adopted by the police on public order grounds,²⁴ house arrest,²⁵ holding migrants in reception facilities and on ships,²⁶ asylum “hotspot” facilities²⁷ and national lockdown on account of the coronavirus disease (COVID-19) pandemic.²⁸

18. The Inter-American Court of Human Rights has used the expression “deprivation of liberty” instead of detention because it considers it more inclusive and, in interpreting the right to personal liberty under the American Convention on Human Rights, it has adopted a broad approach, in keeping with the development of international human rights law and autonomous from the provisions of national legislation. Thus, the Court has established that the particular element that allows a measure to be identified as one that deprives persons of liberty is the fact that they cannot or are unable to leave or abandon at will the place or establishment where they have been placed.²⁹ In line with this approach, the Inter-American Commission on Human Rights has defined deprivation of liberty as referring to public or private institutions and clarifying that this category of persons includes “not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centres for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.”³⁰

III. Places of deprivation of liberty under article 4

19. 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

Kingdom, Application No. 45508/99, Judgment, 5 October 2004; *Storck v. Germany*, Application No. 61603/00, Judgment, 16 June 2005; *A. and Others v. Bulgaria*, Application No. 51776/08, Judgment, 29 November 2011; and *Stanev v. Bulgaria*, Application No. 36760/06, Judgment, 17 January 2012.

¹⁸ See *Aftanache v. Romania*, Application No. 999/19, Judgment, 26 August 2020.

¹⁹ See *Z.A. and Others v. Russia*, Application Nos. 61411/15, 61420/15, 61427/15 and 3028/16, Judgment, 21 November 2019; *Amuur v. France*, Application No. 19776/92, Judgment, 25 June 1996; *Shamsa v. Poland*, Application Nos. 45355/99 and 45357/99, Judgment, 27 February 2022; *Mogoş v. Romania*, Application No. 20420/02, Judgment, 12 April 2006; *Mahdid and Haddar v. Austria*, Application No. 74762/01, Decision, 8 December 2005; and *Riad and Idiab v. Belgium*, Application Nos. 29787/03 and 29810/03, Judgment, 24 April 2008.

²⁰ See *Ilias and Ahmed v. Hungary*, Application No. 47287/15, Judgment, 21 November 2019; and *R.R. and Others v. Hungary*, Application No. 36037/17, Judgment, 5 July 2021.

²¹ See *Zelcs v. Latvia*, Application No. 65367/16, Judgment, 20 June 2020.

²² See *Foka v. Turkey*, Application No. 28940/95, Judgment, 26 January 2009; *Gillan and Quinton v. the United Kingdom*, Application No. 4158/05, Judgment, 28 June 2010; and *Shimovolos v. Russia*, Application No. 30194/09, Judgment, 28 November 2011.

²³ See *Stănculeanu v. Romania*, Application No. 26990/15, Judgment, 28 May 2018.

²⁴ See *Austin and Others v. the United Kingdom*, Application Nos. 39692/09, 40713/09 and 41008/09, Judgment, 15 March 2012.

²⁵ See *Buzadji v. the Republic of Moldova*, Application No. 23755/07, Judgment, 5 July 2016; *Mancini v. Italy*, Application No. 44955/98, Judgment, 2 August 2001; *Lavents v. Latvia*, Application No. 58442/00, Judgment 28 February 2003; *Nikolova v. Bulgaria (No. 2)*, Application No. 40896/98, Judgment, 30 December 2004; and *Dacosta Silva v. Spain*, Application No. 69966/01, Judgment, 2 February 2007.

²⁶ See *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment, 15 December 2016.

²⁷ See *J.R. and Others v. Greece*, Application No. 22696/16, Judgment, 28 May 2018.

²⁸ See *Terheş v. Romania*, application No. 49933/20, Decision, 20 May 2021. See also [CAT/OP/10](#).

²⁹ Inter-American Court of Human Rights, Advisory Opinion OC-21/14, 19 August 2014, para. 145.

³⁰ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

judicial, administrative or other authority or at its instigation or with its consent or acquiescence.³¹ The present section contains a further explanation of each of these elements.

A. Public or private

20. In article 4 (2) of the Optional Protocol, deprivation of liberty is defined as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting”. The wording of paragraph 2 expressly indicates that the guarantees of article 4 concern both public and private places of deprivation of liberty.

21. The Subcommittee highlights that the categories of public and private settings have been expressly indicated in the Optional Protocol to ensure clarity about the scope of the places of deprivation of liberty that can be visited by the Subcommittee and national preventive mechanisms to prevent torture.³² The obligation of the States parties and the mechanisms is to ensure that visits are undertaken to all institutions, including private ones, where persons are or may be deprived of their liberty either by an order of a public authority (judicial, administrative or other) or at its instigation or with its consent or acquiescence. This means that the Optional Protocol encompasses places beyond those of detention or imprisonment and that States parties should allow national preventive mechanisms to visit any private institution, and institutions operated by private actors as a result of outsourcing or by non-State officials, from which a person is not permitted to leave at will.

22. Although this provision of article 4 (2) is formulated in a clear way and does not leave any room for ambiguity, information from national preventive mechanisms reveals that some States parties to the Optional Protocol consider only public custodial settings as places of deprivation of liberty. Such interpretation undermines the objective stemming from article 1 of the Optional Protocol, namely to establish a system of regular visits undertaken by independent international and national bodies to places where persons are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. Moreover, such a restrictive understanding of article 4 (2) renders it impossible for the Subcommittee and national preventive mechanisms to operate in compliance with States’ obligations under the Optional Protocol and denies the protection clearly afforded to potential victims of torture and ill-treatment therein. Therefore, any such regulations within a domestic legal system must be considered as contrary to the Optional Protocol.

23. In addition, understanding places of deprivation of liberty only as public custodial settings remains clearly in contradiction of the definition of places of deprivation of liberty as set forth in article 4 of the Optional Protocol. As has already been stressed, article 4 contains all the elements for a comprehensive understanding of places of deprivation of liberty, which clearly includes private custodial settings. Hence, it is paramount to stress that all places of deprivation of liberty, both private and public, fall within the ambit of article 4.

B. Jurisdiction or control

24. It is established in article 4 (1) that States parties shall allow visits “to any place under its jurisdiction and control” where persons are or may be deprived of their liberty. The scope of “jurisdiction and control” of article 4 (1) should be understood in accordance with international law on the treatment of persons deprived of liberty and the obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment, bearing in mind that the prohibition of torture is absolute and imperative. This means that “jurisdiction and control” in article 4 should be understood to mean “jurisdiction or control”.

25. This is in fact consistent with the French version of the Optional Protocol text, which contains the wording “*sous sa juridiction ou sous son contrôle*” – under its jurisdiction or control. As stated in article 37 of the Optional Protocol, the Arabic, Chinese, English, French,

³¹ CAT/C/57/4 and CAT/C/57/4/Corr.1, annex, para. 1.

³² Inter-American Institute of Human Rights and Association for the Prevention of Torture, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (2005), pp. 76–77.

Russian and Spanish texts of the Optional Protocol are equally authentic. Therefore, if there is one that is more consistent with the spirit of the Optional Protocol and international obligations to prevent torture, that one should guide the approach.

26. The Convention against Torture, in its articles 2 and 16, requires States parties to take effective measures to prevent acts of torture and other ill-treatment in all territories under their jurisdiction. Article 2 (1) establishes the general obligations of each State party, which shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction. Article 16 (1) extends this obligation to preventing other acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture, in any territory under their jurisdiction. Jurisdiction refers to the legal competence that a State party has over a territory and all areas and facilities where it exercises effective control, directly or indirectly, in whole or in part, *de jure* or *de facto*, and where any person, citizen or non-citizen, is or could be found, who is subject to the *de jure* or *de facto* control of that State party.³³

27. Understanding article 4 by referring to “jurisdiction or control” is also consistent with the scope of the obligation undertaken by the States parties to the International Covenant on Civil and Political Rights (arts.1, 2 and 7), to ensure that no one will be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This includes everyone who may be within their territory, under their jurisdiction or within their power or effective control, even if not situated within their territory.³⁴ Furthermore, the enjoyment of this protection must also be available to all individuals, regardless of nationality or statelessness, and other persons who may find themselves in the territory or subject to the jurisdiction of the State party.³⁵ This principle applies also to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation³⁶ or in the course of other types of military occupation.³⁷

28. States parties should allow national preventive mechanisms to visit all, and any suspected, places of deprivation of liberty, as set out in articles 4 and 29 of the Optional Protocol, that are within its jurisdiction.³⁸ 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.³⁹

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

29. Article 4 refers to any place where persons are or may be deprived of their liberty. This is not limited to the traditional understanding of places of deprivation of liberty, but should be understood comprehensively, in accordance with the scope and purpose of the Optional Protocol, to mean any place, facility or setting in which individuals already are or potentially may be deprived of their liberty. The Subcommittee has been clear in its visits that the Optional Protocol requires States parties to guarantee national preventive mechanisms access to all the facilities necessary so that they can carry out visits to any place where persons are, or in its opinion may be, deprived of their liberty.⁴⁰ It is crucial that States parties guarantee both the Subcommittee and national preventive mechanisms full access to

³³ Committee against Torture, general comment No. 2 (2007), para. 7.

³⁴ Human Rights Committee, general comment No. 31 (2004), para. 10.

³⁵ Human Rights Committee, general comment No. 15 (1986).

³⁶ Human Rights Committee, general comment No. 31 (2004), para. 10.

³⁷ CAT/C/USA/CO/2, paras. 14–15.

³⁸ CAT/OP/12/5, paras. 24 and 33.

³⁹ CAT/OP/UKR/3, para. 8.

⁴⁰ CAT/OP/MEX/2, para. 13.

places, facilities or settings in which individuals currently are, previously were or potentially may be deprived of their liberty. The length of time of the deprivation of liberty is irrelevant for the determination of such a place.

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

30. The lack of a possibility to leave places of deprivation of liberty constitutes a clear factor of article 4. It concerns situations in which persons cannot leave a particular place, facility or setting of their own free will. Although in some reports the Subcommittee refers to the “inability to exercise freedom of movement” when describing places in which a person is or may be deprived of liberty,⁴¹ it is the Subcommittee’s view that the correct terminology to refer to being deprived of liberty is that established in article 4 (2); namely, not being permitted to leave at will.⁴²

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

31. In line with article 4 (1), States parties must allow visits to any place under its jurisdiction or control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. As was already stressed, both paragraphs of article 4 should be read together in order to be interpreted in accordance with the scope and purpose of the Optional Protocol. In this sense, the Subcommittee has stated that any place in which persons are or may be deprived of their liberty should fall within the scope of the Optional Protocol, provided that such deprivation of liberty relates to a situation in which the State exercises or might be expected to exercise a regulatory function.⁴³

32. The part of article 4 under consideration in the present subsection is focused on two possible situations. The first concerns deprivation of liberty that was caused by order of a public authority. This is when the domestic authorities have exercised their regulatory or institutional function to deprive an individual of liberty. In most cases, such a decision will stem from criminal law; however, it may be based on a decision of a judicial, administrative or other authority. The type or title of such decision is not relevant. The second refers to deprivation of liberty by the State “or at its instigation or with its consent or acquiescence”. This entails a wider range of situations in which the State might be expected to exercise a regulatory function and use its powers to promote, accept or allow deprivation of liberty.

33. Instigation must be understood in its literal sense, namely, incitement, stimulation, incentive and encouragement; that is, the authority participates in the origin of the decision to deprive a person of liberty. Instigation implies using the State’s powers to promote or in any other way aim at causing, by its actions, the detention of an individual. This notion should be understood broadly: it is not limited to the legal sphere. Instigation of the detention of individuals may be undertaken by various actions of State officials or other persons and could include media or public statements or any other forms of expression that could be understood as instigating a person, a group of persons or a legal entity to deprive an individual of liberty.

34. In the Spanish version of the Optional Protocol, “consent and acquiescence” are translated as “*consentimiento expreso o tácito*” – express or tacit consent. Thus, consent means that the detention has been expressly consented to, and acquiescence means tacit consent, allowing the deprivation of liberty in question to happen and not exercising the powers of the authority to avoid it. This would include situations in which the State should regulate deprivation of liberty and chooses not to do so, regulates it in contravention of the Optional Protocol or regulates it in accordance with the Optional Protocol but allows violations of such regulations. This may concern situations in which the State tolerates,

⁴¹ CAT/OP/PRT/1, para. 24; and CAT/OP/POL/RONPM/1, para. 28.

⁴² CAT/C/57/4 and CAT/C/57/4/Corr.1, annex, para. 3. See also CAT/OP/POL/ROSP/1 and CAT/OP/POL/ROSP/1/Corr.1, para. 25.

⁴³ CAT/OP/MEX/2, para. 13.

allows or in any other form chooses to turn a blind eye to deprivation of liberty caused by any other entity or person.

35. The term “acquiescence” necessitates a broad interpretation, under which States are responsible for the actions of public officials and non-State actors who have awareness of such activity and thereafter breach their legal responsibility to interfere to prevent such activity.⁴⁴ Acquiescence implies a lack of State-authorized actions that should have been reasonably expected. In the Subcommittee’s view, acquiescence may involve only partial or very limited knowledge of the detention by the authorities. The notion of acquiescence concerns situations in which State authorities are or should be aware of violations, but still do not undertake any actions aimed at addressing them. This may mean, for example, tolerating the existence of a legal lacuna that de facto allows for the detention of individuals. The fact that States may choose not to undertake any actions aimed at correcting such a deficiency or that they may in any other way allow the existence of places of detention outside their authority does not exclude such places from the mandate of the Subcommittee and national preventive mechanisms.

IV. Scope of places of deprivation of liberty

36. Neither article 4, nor the Subcommittee in its reports, provides an exhaustive list of places of deprivation of liberty. It is not the Subcommittee’s intention to provide one. Such an attempt would have a restrictive effect and thus be in contradiction to the Optional Protocol. In its visits, the Subcommittee has established that places and forms of deprivation of liberty include not only prisons and police stations, but also house arrest, closed centres for foreigners and asylum-seekers, centres for children, social care homes, hospital and psychiatric institutions, facilities for military personnel (or detention centres under military jurisdiction)⁴⁵ and clandestine clinics that “treat” homosexuality.⁴⁶ Special boarding or religious schools may also constitute places of deprivation of liberty. For example, the Subcommittee has visited *daaras* operating in closed regimes because the Subcommittee, as the guarantor of the Optional Protocol, in particular article 4, considers that closed *daaras* are places where persons deprived of their liberty are or could be found with the tacit consent of the State party (“tacit consent” being the same as acquiescence).⁴⁷ The Subcommittee has also clearly stated in its visits that periods of deprivation of liberty during apprehension, transfer and removal are covered by the Optional Protocol.⁴⁸

37. National preventive mechanisms agree with the necessity of a wide interpretation of the term “place of deprivation of liberty”, as reflected by their current practice, recorded in their annual reports, and other information received from them by the Subcommittee. Some national laws include non-exhaustive lists; even in those cases, however, mechanisms have generally gone beyond them in the places that they visit. National preventive mechanisms have highlighted to the Subcommittee the need to specify that places of deprivation of liberty can be public, private, for profit or not, and civil or military. They are places where persons of any age are held under the orders, at the instigation or with the consent of a public authority, for a variety of reasons, such as being in conflict with the law or for protection, humanitarian or educational reasons. Persons held in places of deprivation of liberty can be there for any period of time, even in transit, and the place itself can be any type of facility or any type of terrain (land, sea or air). Persons held in such places may have entered voluntarily or involuntarily. Deprivation of liberty can take place when persons are arrested by police on public roads or by private guards in shopping malls, for example. Other places where persons may be de facto deprived of their liberty, such as privately owned or rented housing for persons with intellectual disabilities, owing to restrictions imposed by specific service providers, are included within the scope of article 4.

⁴⁴ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford and New York, Oxford University Press, 2008), p. 78.

⁴⁵ CAT/OP/KGZ/2, para. 40. See also CAT/OP/NLD/1, para. 45.

⁴⁶ CAT/OP/ECU/2, para. 51.

⁴⁷ CAT/OP/SEN/RONPM/1, paras. 30–31.

⁴⁸ CAT/OP/NLD/1, paras. 42 and 45.

38. The Subcommittee welcomes the practice of many national preventive mechanisms that reflects a comprehensive understanding of the definition of places of deprivation of liberty, in compliance with the Optional Protocol. While emphasizing that article 4, by nature, does not call for any type of exhaustive list, the following is a list of some of the places that national preventive mechanisms throughout the world have visited and should continue to visit as part of their obligations under the Optional Protocol: adult prisons; pretrial detention centres; juvenile or socioeducational detention centres; police units; mental health facilities; nursing homes; orphanages; residences for children and adolescents without parental care or who have suffered neglect or abuse; centres for persons with disabilities; migrant detention centres, such as first reception centres for unaccompanied children and detention and removal centres for migrants; military compounds; vehicles, ships and aeroplanes; COVID-19 hotels and formal places of compulsory quarantine and isolation, or home confinement; rehabilitation centres for drug addicts; police training schools; State security service detention facilities; and boarding schools and religious schools.

39. The Subcommittee would like to clarify that, in some cases, an individual might be found in a place that – examined separately – does not constitute a place of deprivation of liberty, but does indeed constitute a place of deprivation of liberty when examined in context. This does not concern only the ability to leave such a place. As noted by the Human Rights Council, whether a particular situation of confinement qualifies as “detention” depends not only on whether persons concerned have a *de jure* right to leave, but also on whether they are *de facto* able to exercise that right without exposing themselves to serious human rights violations.⁴⁹ In the view of the Subcommittee, if the ability to leave such a place or facility would be limited or would entail exposing a person to serious human rights violations, that place should also be perceived as a place of deprivation of liberty, in accordance with article 4 of the Optional Protocol.

40. Similarly, places of quarantine and isolation may also constitute places of deprivation of liberty: any place where a person is held in quarantine or isolation and from which that person is not free to leave is a place of deprivation of liberty for the purposes of the Optional Protocol and so falls within the visiting mandate of a national preventive mechanism.⁵⁰

V. Obligations of States parties under article 4

41. With the present general comment, the Subcommittee is providing authoritative guidance on the interpretation of Optional Protocol, which serves to clarify, to States parties, national preventive mechanisms and other relevant stakeholders, the obligations under article 4. In compliance with the Optional Protocol, places of deprivation of liberty must be understood as a comprehensive concept, as a result of the joint reading of the two paragraphs of article 4. Moreover, the concept of places of deprivation of liberty is not fixed or limited and should allow for novel circumstances of deprivation of liberty that may arise in new contexts. Only with this understanding will the Optional Protocol fulfil its purpose of preventing torture and other cruel, inhuman or degrading treatment or punishment through visits by the Subcommittee and national preventive mechanisms to places of deprivation of liberty.

⁴⁹ [A/HRC/43/49](#), para. 65.

⁵⁰ [CAT/OP/9](#).