



**IMPACTUM**  
ASSESSING THE IMPACT OF URGENT MEASURES



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## ***CONTRIBUTION ON THE DRAFT OF GENERAL COMMENT OF THE SUBCOMITTEE ON PREVENTION OF TORTURE (SPT)***

### ***Article 4 of the Optional Protocol to the Convention against Torture (OPCAT)***

Ghent, 14 April 2023

The IMPACTUM research team together with the Programme for Studies on Human Rights in Context have the honour to share their views on the draft of SPT's General Comment N° 1 on places of deprivation (Article 4 OPCAT). IMPACTUM (assessing the Impact of Urgent Measures in Protecting At-Risk Detainees in Latin-America)<sup>1</sup> is a large-scale research project funded by the European Research Council (ERC) and hosted by the Programme for Studies on Human Rights in Context (Ghent University, Belgium). One of our aims is to examine the diverse impacts of urgent measures adopted by international human rights bodies, including the UN Committee Against Torture (UNCAT) to protect persons deprived of liberty in Peru, Ecuador, Colombia, Nicaragua, El Salvador and Guatemala. We truly believe that this general call is especially important for these States, considering sub-standard prison conditions, a mass wave of incarceration and pre-trial detention that has led to overcrowding, increase of (gang) violence and poor hygienic and medical conditions,<sup>2</sup> ratification of OPCAT with the exception of El Salvador and Colombia, and the existence of diverse forms of deprivation of liberty in public and private spheres.

1. The draft is highly relevant because it elaborates on the definition of deprivation of liberty and its multiple forms which at large, contributes to prevent torture and other cruel, inhuman or degrading treatment or punishment. Therefore, it is necessary to clarify the criteria on how to define which places of deprivation of liberty fall under the National Preventive Mechanisms (NPMs) and the Subcommittee on prevention of torture (SPT) mandate so as to be able to perform an effective monitoring and protect those who may be even more invisible, marginalised, stigmatised and whose situation may raise no public empathy or concern.
2. In order to contribute to the SPT's observations and arguments, our analysis is divided into two parts. Firstly, we present some reasons why we agree with the draft. Secondly, we make suggestions to complement the observations of SPT about its mandate and NPMs and its broad interpretation of the concept of deprivation of liberty.

### **The importance of a General Comment on Article 4 of OPCAT**

3. This draft recognizes the human dignity and equality of all persons in any system or form of deprivation of liberty, and the States' position as a guarantor of their life and well-being. It

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<sup>1</sup> IMPACTUM, Assessing the Impact of Urgent Measures, ERC project, <https://www.humanrightsincontext.be/copy-of-research>

<sup>2</sup> Burbano-Herrera, C., Haeck, Y. (2021). The Innovative Potential of Provisional Measures Resolutions for Detainee Rights in Latin America Through Dialogue Between the Inter-American Court and Other Courts. In E. Rieter, K. Zwaan (Eds.), Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures (pp. 223-244). Springer. <https://doi.org/10.1007/978-94-6265-415-0>



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reinforces the *jus cogens* prohibition of torture and inhumane, cruel and degrading treatment and punishment, which imposes obligations to any detaining actor, regardless of their nature as public authorities or private individuals, outlawing derogations under any circumstance.

4. We agree that the concept of places of deprivation of liberty should be construed broadly to incorporate any place where persons are interned, confined, and at risk of being subjected to torture, and other ill-treatment. Although the draft does not provide a fixed list, it is open for novel circumstances of deprivation of liberty, and its examples correspond to the reality in most countries. This draft recognizes that in parallel to the criminal justice system, there could be public or private, visible or clandestine, secular or religious, formal or informal, regulated or unregulated, monitored or unmonitored places where persons are deprived of their liberty, with or without their consent. Often, such systems lack independent and external monitoring, have euphemistic labels, and are justified as necessary and beneficial, raising lesser if any, social alarm. In this sense, we also concur with the inclusion of the notion of States' exercise or expected exercise of regulatory function as an element to determine places covered by the SPT and NPMs' mandate. Undoubtedly, this extends to education or health services managed by private actors like schools, clinics, communities, religious institutions, factories or *maquilas*.
5. While detainees are considered as a group in a situation of vulnerability, some individuals may experience additional suffering or experience greater risks of discrimination, violence, or location in parallel forms of deprivation of liberty. This is the case for women, persons with disabilities, children, LGBTQIA+ individuals, and elderly people. We find it especially relevant that the draft builds on the concept of intersectionality since detention experiences are different and diverse due to the interaction and overlap of factors like age, race, ethnic origin, nationality, sex, gender, identity, social and economic background, education, disability, among others.
6. In 2022, the Inter-American Court of Human Rights, in its Advisory Opinion N° 29, addressed the situation of vulnerability of these groups, and States' special obligations and differential approaches in detention. Even though this advisory opinion focused on prison systems, it reaffirmed the right of detainees to equality, the principle of non-discrimination<sup>3</sup> and the relevance of periodic judicial review and independent monitoring of sentence execution and detention conditions.<sup>4</sup> The Inter-American Court also pointed out that the States have a minimum obligation to ensure external and independent monitoring in order to prevent violations of personal integrity and life of LGBTQIA+ persons deprived of liberty.<sup>5</sup>
7. In relation to children, the draft's broad definition of deprivation of liberty finds support in the 2019 UN Global Study on Children Deprived of Liberty. This study covered multiple forms of detention like administration of justice; children living with their primary caregivers, usually

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<sup>3</sup> Inter-American Court of Human Rights. Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments). Advisory Opinion OC-29/22 of May 30, 2022. Series A No 29, par.28, [https://www.corteidh.or.cr/docs/opiniones/seriea\\_29\\_esp.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_29_esp.pdf)

<sup>4</sup> Id. par.244.

<sup>5</sup> Id. par.257.



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the mother; for migration-related reasons; in institutions; in the context of armed conflict and due to national security grounds.<sup>6</sup>

8. As we will argue in the next section, since deprivation of liberty might take place in times of peace, armed conflict or other situations of violence, the draft provides an opportunity to reinforce the interaction and complementarity between International Human Rights Law (IHRL) and International Humanitarian Law (IHL).

## Observations and recommendations on the Draft General Comment

9. This section refers to the following aspects:

- the sources for a broad definition of deprivation of liberty;
- the notion of States' jurisdiction and the mandate of the SPT and NPMs;
- the impossibility to leave a place of deprivation of liberty at will;
- the deprivation of liberty by non-state armed groups in non-international armed groups and indigenous and tribal peoples' authorities;
- the potential of interim measures granted by UNCAT to strengthen NPMs and SPT's mandate and prevent torture across different systems and forms of deprivation of liberty.

10. **Sources for a broad notion of deprivation of liberty (Section II. C, par. 27).** The draft refers to situations of deprivation of liberty that may take place outside of the territory of the State, such as military occupation, international peacekeeping or peace-enforcement operations. We support that the SPT and NPMs should also be allowed to exercise their mandate in such situations based on the notion of States' jurisdiction and effective control. Given the application of IHL in those contexts and the International Committee of the Red Cross's (ICRC) role as a guardian of IHL,<sup>7</sup> we recommend to cite its broad concept of detention which defines it as: *the custodial deprivation of liberty [...] caused by the act of confining a person in a narrowly bounded place, under the control or with the consent of a State, or, in non-international armed conflicts, a non-State actor.*<sup>8</sup>

11. **Jurisdiction (Section III.B, par. 27).** We consider it relevant to make reference to the Inter-American Commission of Human Rights (IACHR), which has consistently held that the concept of jurisdiction is not restricted to the territory of the State.<sup>9</sup> This construction prevents that individuals transferred to other territories suffer torture and other forms of inhumane treatment, go missing, or be outside law protection. At the same time, it promotes transparency, justice, and states' accountability. We underscore that even in the most extreme situations, such as states of emergency or armed conflict, *habeas corpus* should not

<sup>6</sup> Committee on the Rights of the Child, 2019, UN Global Study on Children Deprived of Liberty

<https://www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty>

<sup>7</sup> Sandoz, Y. (1998) The International Committee of the Red Cross as guardian of International Humanitarian Law, <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>

<sup>8</sup> International Committee of the Red Cross, detention, <https://casebook.icrc.org/a-to-z/glossary/detention>

<sup>9</sup> In relation to the IACHR opinion on States' extraterritorial obligations: Burbano-Herrera, C., Haeck, Y. (2021). Extraterritorial obligations in the Inter-American Human Rights System. In M. Gibney, G. Erdem-Türkelli, M. Krajewski, W. Vandenhoe (Eds.), Routledge handbook on extraterritorial human rights obligations (pp.110–124). <https://doi.org/10.4324/9781003090014-11>



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be limited or suspended, conditions of detention should be compatible with human dignity and detainees should preserve the right to contact their family and a lawyer of their choice.

12. **Places which persons are not permitted to leave at will (Section III.D, par. 30).** We support the condition where a person is not permitted to leave at will as an element of deprivation of liberty. As the draft rightly suggests, this includes places of deprivation of liberty, whether the person entered voluntarily or involuntarily. This argument is reinforced by different circumstances, for example, when consent was given upon admission or institutionalisation but sooner or later is withdrawn or revoked. Furthermore, relating to persons with disabilities, children, or persons with a chronic, degenerative or terminal illness, it is possible that their consent was not duly obtained. Additionally, deprivation of liberty could have been based on conflict of interest of family or custodians, undue influence, will substitution (interdiction), disregard of preferences and best interests of concerned individuals.<sup>10</sup>
13. Additionally, it is crucial not to leave aside situations in which persons may be free to leave at will, but for physical or economic reasons, they remain under the custody of those institutions, unable to leave by their own means or without support of another person.
14. We consider that absence of legal safeguards, independent monitoring or sufficient assurances of free and informed consent of persons in a higher situation of vulnerability such as the ones described above, raise concerns on eventual arbitrary detention, and is a strong reason for a special focus by the SPT and NPMs monitoring work.
15. **Deprivation of liberty by non-state armed groups (Section III.B, par. 27, 28; Section E, par. 30-35; and IV, par. 38).** We consider that deprivation of liberty by non-state armed groups in a non-international armed conflict may not correspond to an order given by public authority, their instigation, consent or acquiescence. However, we agree that SPT's mandate extends over the entirety of the internationally recognised territory of the State even when non-state armed groups dispute or control some parts of it. In those cases, it would be worth indicating that the SPT and NPMs could strive to get access and visit authorisation by *de facto* detention authorities. Traditionally, the ICRC has performed this task in several contexts, but it is possible that it does not have operations in the territories of some OPCAT ratifying states. In this regard, IHL provides for the possibility of impartial humanitarian organizations to visit detainees.<sup>11</sup> The ICRC 2023 report on detention by armed groups mentioned in its rule 10 that *"Impartial humanitarian organizations, such as the ICRC, may offer their services with a view to undertaking humanitarian work in places of detention, in particular to verify the conditions of detention and to restore contact between detainees and their families."*<sup>12</sup>
16. In this sense, States should allow monitoring activities, guarantee security, respect confidentiality and ensure NPM members have immunity from criminal, disciplinary or any other type of legal liability for the dialogue with members of armed groups and any protection

<sup>10</sup> UN Convention on the Rights of Persons with Disabilities, Article 12. Equal recognition before the law.

<sup>11</sup> Common Article 3 of Geneva Conventions "[...] An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

<sup>12</sup> International Committee of the Red Cross, 2023, Detention by Non-State Armed Groups. Obligations under International Humanitarian Law and examples on how to implement them, rule 10, pp.48-50, <https://www.icrc.org/fr/publication/4687-detention-non-state-armed-groups-obligations-under-international-humanitarian-law>



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activity on behalf of detainees. Armed groups should also abstain from any attack on the SPT and NPMs personnel. In sum, the SPT or NPMs could act as a humanitarian body considering that they must also comply with principles of confidentiality, impartiality, non-selectivity, universality and objectivity.<sup>13</sup>

**17. Deprivation of liberty by indigenous or tribal peoples' authorities (Section IV, par. 36).**

Although the draft is not exhaustive, we suggest to include that NPMs' and the SPT's mandate may also extend to indigenous and tribal peoples' systems of deprivation of liberty. As it is possible that they are not registered or do not make part of regular prison system, we recommend that the SPT and NPMs reach out to traditional authorities to coordinate monitoring activities. We stress the importance that these institutions have independent and external monitoring since, according to the Indigenous and Tribal Peoples Convention No. 169, they have the right to retain their own customs and institutions, which must be compatible with fundamental rights defined by the national legal system and with internationally recognised human rights.<sup>14</sup> Monitoring work, however, should have a differential and multicultural perspective, incentivize dialogue and ensure respect for diversity, autonomy and self-determination.

**18. SPT and NPMs monitoring visits and relationship with interim measures (Section V, par. 41).**

In international human rights law interim measures (also referred to as provisional measures, urgent measures of protection, precautionary measures, emergency measures, and conservatory measures) have been used as a mechanism for protecting persons in a situation of danger and for preventing human rights violations. Interim measures are -on many occasions- the best tool at the disposal of international bodies to compel States to respect the object and purpose of the international legal framework on prevention of torture.<sup>15</sup> States have the correlative obligation to implement them as part of their international commitments in good faith.<sup>16</sup>

19. In this regard, we highlight the competence of the UNCAT to issue interim measures<sup>17</sup>, and their potential to protect survivors and persons who face a risk of torture. In connection to this, UNCAT could use interim measures with the purpose to enhance monitoring and public scrutiny of places of deprivation of liberty, which in the end prevents torture and saves lives. Also, interim measures should be implemented for removing restrictions or obstacles to SPT or NPMs monitoring visits to a place of deprivation of liberty.

20. We recommend that the draft underlines the possibility for any person to request interim measures to the UNCAT. Consequently, requested, adopted, rejected and lifted interim measures should be available to the public in user-friendly and accessible formats, for following-up on their compliance. The UNCAT should facilitate access to information about

<sup>13</sup> OPCAT, Article 2. Also, see the Additional Protocol II to Geneva Conventions, Article 18.

<sup>14</sup> International Labour Organization (ILO), C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 8.2.

<sup>15</sup> Burbano-Herrera, C., Viljoen, F. (2015). Danger and fear in prison: *NETHERLANDS QUARTERLY OF HUMAN RIGHTS*, 33(2), pp.163–193.

<sup>16</sup> [Nijmegen Principles and Guidelines on Interim Measures for the Protection of Human Rights](#)

<sup>17</sup> Rieter, E. (2021). The Protective Potential and Legitimate Use of Interim Measures in Human Rights Cases. In E. Rieter, K. Zwaan (Eds.), *Urgency and Human Rights: The Protective Potential and legitimacy of Interim Measures* (pp.245-296). Springer. <https://doi.org/10.1007/978-94-6265-415-0>



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the use of interim measures and provide reasons behind their issuance or rejection. Similarly, we suggest the implementation of communication campaigns and dissemination of the different procedures and protection mechanisms to protect persons deprived of liberty and prevent torture.

21. As evidence shows, effective monitoring of places of detention reduces the risks of abusive treatment, including torture and ill-treatment, of persons deprived of liberty.<sup>18</sup> In our opinion, these are compelling reasons for stressing out, disseminating, promoting, requesting, processing and deciding such measures. Public or private institution's refusal to allow NPMs or the SPT access should also weigh in favour of granting interim measures, given the reasonable presumption of higher risks of torture in those places.

### Final remark

We thank the SPT for the analysis and consideration of this contribution and express our interest in participating in the public discussion taking place in Geneva in June. We confirm the need to clarify the interpretation on the concept of deprivation of liberty and the mandate of the SPT and NPMs. More importantly, we reaffirm that this initiative is a necessary step to bring to light, subtle forms of deprivation of liberty which could have serious and harmful impacts on dignity, life, physical, mental and psychological integrity for those deprived of their liberty, but also for their families and communities. Finally, we hope that the final General Comment encourages other States to ratify OPCAT, cooperate with human rights bodies and strengthen their own capacities to monitor deprivation of liberty and eradicate torture.

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<sup>18</sup> Engström, P., Pegram, T. (2023). Torture prevention in Latin America: Rights of Persons Deprived of Liberty and the Role of National Preventive Mechanisms. In Burbano-Herrera, C., Haeck, Y. (Eds), *Human Rights Behind Bars, Tracing vulnerability in prison populations Across Continents from a Multidisciplinary Perspective*. Springer, pp.346, 347.