

‘Deprivation of liberty’ as per Article 4 of OPCAT: the scope

Article 4 is one the key provisions of the Optional Protocol to the United Nations Convention against Torture (OPCAT)¹ as it sets out the extent of and limits to the mandates for both National Preventive Mechanisms (NPMs) and the Subcommittee on Prevention of Torture (SPT) in relation to the types of places of deprivation of liberty that these entities may visit. Therefore correct interpretation and application of this provision is essential for proper adherence to the obligations undertaken by the States Parties upon the ratification of OPCAT.

1. The problem.

a. Discrepancy between para 1 and para 2 of Article 4

Article 4(1) of OPCAT obliges States parties to allow visits by both the NPMs and SPT to any place under their jurisdiction and 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’. This is a very broad definition which means that visits must be allowed not only to such places as prisons and police cells where persons are deprived of their liberty by virtue of an order given by a public authority, but also to private custodial settings. This means that visits must be allowed also to institutions such as private hospitals, nursing homes and children homes because while persons in such places may be detained by non-state actors, this is done with the knowledge and acquiescence of a public authority and thus Article 4(1) of OPCAT applies.²

However, a potential conflict arises between Article 4(1) and 4(2) of OPCAT as Article 4(2) appears to set out more a limited definition of ‘deprivation of liberty’. According to Article 4(2) ‘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’. This omits reference to consent or acquiescence by the public authority and it would thus appear that mere knowledge about detention, as described above, would not be sufficient.

b. Russian language text

A further potential complication may arise if the Russian language text of Article 4 of OPCAT is examined. The Russian language text employs the term ‘содержания под стражей’ which literally means ‘holding someone under (armed) guard’. This poses a

¹ GA Res. 57/199 on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc. A/RES/57/199, 18 Dec. 2003, adopted by 127 votes to 4, with 42 abstentions.

² See also: M Nowak and E McArthur ‘The United Nations Convention against Torture. A Commentary’, Oxford University Press, 2008; p. 931

challenge especially in the post-Soviet countries many of whom have inherited the Soviet system of criminal justice where this term was used only to refer to imprisonment and police custody and therefore excluded such forms of deprivation of liberty as placement in social care homes or orphanages.

2. The problem in practice

This has been a challenge in some countries which are in the process of implementing their obligations under OPCAT and are therefore drafting the requisite legislation on NPMs. Thus, for example, this has been a stumbling block in the Republic of Kazakhstan where a disagreement between ministries has arisen as to whether places such as care homes and children homes could fall under the umbrella of Article 4 of OPCAT, the argument being that in such places nobody is being held under armed guard.

Interestingly, in the neighbouring Kyrgyz Republic, the draft NPM legislation draws a distinction between ‘places of deprivation of liberty’ and ‘places of *restriction* of liberty’ (emphasis added), extending the NPM mandate to both. It would thus appear that a similar issue may have arisen in the Kyrgyz Republic as well and the introduction of two rather similar terms was deemed to present a solution. The said draft legislation was tabled before the Kyrgyz Parliament in June 2011 and hearings commenced in September 2011.

3. Commentary

In cases like the present one, when a question of interpretation of an international treaty arises, the Vienna Convention on the Law of Treaties of 1969 (VCLT) must be applied. Article 31 of the VCLT 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’.³ Furthermore, in accordance with Article 32 of the VCLT when interpreting any ambiguity recourse may also be made to the travaux préparatoires of the treaty and the circumstances of its conclusion.⁴ In this instance it is clear from the preparatory work and draft texts of the OPCAT that it was intended to cover a broad range of places where people are deprived of their liberty either at the instigation of a public authority or with their consent or acquiescence.⁵ Thus, interpreting Article 4 systematically as well as taking into consideration the object and purpose of OPCAT leads to the conclusion that Article 4(2) of OPCAT must be interpreted in the light of the broader definition set out in Article 4(1) of OPCAT.⁶

The practice of the SPT is also consistent with this interpretation as during its in-country visits the Subcommittee has visited centres for children⁷, psychiatric hospitals⁸ and

³ Vienna Convention on the Law of Treaties, UN Doc.A/CONF.39/27, 1969, Article 31.

⁴ Ibid, Article 32.

⁵ See for example Article 1 Original Costa Rica Draft, UN Doc E/CN.4/1409; Article 1 Revised Costa Rica Draft, UN Doc E/CN.4/1991/66; Article 1 of the Text of the Articles which Constitute the Outcome of the First Reading, UN Doc E/CN.4/1996/28; and Article 1 of the Text of the Articles which Constitute the Basis for Future Work, UN Doc. E/CN.4/2000/58.

⁶ This interpretation is consistent with that provided by other international commentators: see M Nowak and E McArthur ‘The United Nations Convention against Torture. A Commentary’, Oxford University Press, 2008; p. 932; APT and IIDH ‘Optional Protocol to the UN Convention against Torture. Implementation Manual. Revised Edition’, Geneva, 2010; p. 54

⁷ See: Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I

⁸ Report on the Visit of the Subcommittee on Prevention of Torture to Mexico; UN Doc CAT/OP/MEX/1 of 31 May 2010, Annex I; also Report on the Visit of the Subcommittee on Prevention of Torture to Paraguay; UN Doc CAT/OP/PRY/1, Annex II

detoxification centres.⁹ It is thus clear that the SPT has adopted the broader definition of ‘deprivation of liberty’ as per Article 4(1). Moreover, this practice and therefore this interpretation by the SPT has been accepted by State parties since none of the States parties have objected to the types of places SPT has chosen to visit during its in-country visits.

Furthermore, the examination of the practice adopted by existing NPMs also supports this interpretation. For example, in 2009 the Estonian Chancellor of Justice, the institution which is designated as the Estonian NPM, conducted visits not only to prisons and police detention facilities but also to psychiatric institutions, social welfare institutions, care homes, special schools for children with behavioural problems as well as rehabilitation centres for children with addiction problems.¹⁰

Similarly, the Commissioner for Civil Rights Protection of Poland, the institution that is designated as the Polish NPM, in 2009, *inter alia*, visited social care centres, psychiatric hospitals, a youth care centre and youth sociotherapy centres.¹¹

Equally, when turning to the Russian text and the potential discrepancy with the English text, according to Article 33 of the VCLT the terms of the treaty authenticated in two or more languages are presumed to have the same meaning in each authentic text. Thus the rules of interpretation contained in Articles 31 and 32 of the VCLT applies and due regard must be taken of the object and purpose of the treaty.

Moreover, if the texts of OPCAT in the Spanish and French language versions are compared, it emerges that these adopt the same wording as the English language version. The Spanish text employs terms ‘forma de detención o encarcelamiento o de custodia’ which translated literally means ‘form of detention or imprisonment or custody’ and similarly the French text uses terms ‘toute forme de détention ou d’emprisonnement’, meaning ‘any form of detention or imprisonment’.

Further, it should be emphasized that the Republic of Kazakhstan is the only one of the 61 State Parties to OPCAT where the issue has arisen and it should be noted that it certainly is not the only State Party which relies on the Russian text of OPCAT. For example, as noted above, a similar problem did not arise in the neighbouring Kyrgyz Republic when the requisite NPM legislation was drafted.

It therefore follows that the term ‘deprivation of liberty’ employed in Article 4(2) extends to places where people are held by an order of a public authority or at its instigation or with its consent or knowledge. It therefore covers both ‘traditional places of detention’ such as prisons and police cells as well as less traditional ones such as, but not limited to, social care homes, psychiatric hospitals and centres for children.

4. Possible recourse by the SPT

This is not the first instance when a discrepancy between the texts of OPCAT in different languages has arisen. In case of language discrepancy between the wording of Article 24 of OPCAT in different language texts, the SPT referred the matter to the United Nations Office of Legal Affairs for resolution.¹² It is possible therefore that if the language discrepancy

⁹ Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I

¹⁰ ‘2009 Overview of the Chancellor of Justice. Activities for the Prevention of torture and other cruel, inhuman or degrading treatment or punishment. Statistics of Proceedings.’ Tallinn, 2009; pp. 38-47

¹¹ ‘Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009’, Warsaw, 2010; pp. 41-68

¹² For further details see para 48 of The Third Annual Report of the SPT, CAT/C/44/2

between various language texts of Article 4 is deemed sufficiently serious by the SPT then it could take a similar approach. It is however doubtful that this would be required as in marked contrast to the practice of State Parties in relation to Article 24 which lacked uniformity¹³, there is total uniformity of practice in relation to the interpretation of Article 4 by both States Parties (through their NPMs) and the SPT (to which States Parties have not objected). Moreover, the travaux préparatoires in relation to the adoption of Article 4 are also clear.

Conclusion

The interpretation of Article 4 in the light of the object and purpose of OPCAT as well as taking into consideration the travaux préparatoires of the treaty and the circumstances of its conclusion all lead to the same broad interpretation of ‘deprivation of liberty’ contained in Article 4. This is further consistent with English, French and Spanish language texts of OPCAT and reflects the practice of both States parties and SPT. Consequently, ‘deprivation of liberty’ as per Article 4 of OPCAT must be read to include not only ‘traditional’ forms of deprivation of liberty such as imprisonment, but also ‘less traditional’ ones like placing in the social care home.

Human Rights Implementation Centre
October, 2011

¹³For example, the Republic of Kazakhstan signed OPCAT on 25 September 2007, made the declaration under Article 24 on 8 February 2010 but ratified the treaty on 22 October 2008. It should however be noted that the declaration was accepted in deposit on 22 May 2010 in the absence of any objection on the part of one of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of three months from the date of the notification circulating the declaration, i.e., on 22 February 2010. See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en#5