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Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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

Fiftieth session

Summary record (partial)* of the 5th meeting

Held at the Palais Wilson, Geneva, on Thursday, 8 June 2023, at 3 p.m.

Chair: Ms. Jabbour

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* No summary record was prepared for the rest of the meeting

The meeting was called to order at 3 p.m.

General discussion on the draft general comment on article 4 of the Optional Protocol

Opening statements

1. **The Chair** said that, since the entry into force of the Optional Protocol 16 years previously, a system of regular visits to places of deprivation of liberty had been created, 75 national preventive mechanisms had been established and the Subcommittee had visited some 80 countries. In that time, however, a clear need had arisen for further definition of what constituted a place of deprivation of liberty. The Subcommittee had therefore decided to devote its first general comment to article 4 of the Optional Protocol. In a participatory process, all interested parties had been invited to submit comments on the first public draft. She wished to invite those present to share further inputs with a view to refining the draft; the discussion would be moderated by Ms. Romero, Vice-Chair of the Subcommittee.

2. **Mr. Korkeakivi** (Office of the United Nations High Commissioner for Human Rights (OHCHR)) said that general comments provided authoritative interpretations of human rights treaty provisions and guided States parties in their efforts to comply with their treaty obligations. To date, 8 of the 10 treaty bodies had adopted general comments, with more than 100 having been issued in total. They had been widely welcomed as tools for clarifying the content of human rights treaties for States, civil society representatives and other stakeholders. OHCHR was therefore pleased to note that the two treaty bodies that had yet to draft general comments, namely, the Committee on Enforced Disappearances and the Subcommittee on Prevention of Torture, had now decided to do so. The topics chosen were of critical importance. In the case of the Subcommittee, the clarification of issues relating to the definition of places of deprivation of liberty was both timely and necessary, as various actors had repeatedly put questions in that regard.

3. Moreover, the topic was closely related to the Subcommittee's core mandate, in that the essential purpose of the Optional Protocol was to ensure a system of preventive visits by the Subcommittee and national preventive mechanisms to all places of deprivation of liberty. The success of the Optional Protocol system depended on effective action by national preventive mechanisms and their ability to visit all places of deprivation of liberty. Fulfilling that task comprehensively and consistently across States parties required clarity as to what constituted a place of deprivation of liberty.

4. The paramount importance of the general comment was reflected in the wide interest and engagement it had prompted. Broad consultations were key to developing high-quality general comments. The Subcommittee had received over 60 written submissions from a range of sources, including States parties, national preventive mechanisms, civil society organizations, academic institutions, national human rights institutions and even interested private persons. The insights shared during the general discussion would be a critical part of the process, helping the Subcommittee to achieve an outcome that would make a lasting contribution to efforts to advance the prevention of torture.

5. **Ms. Romero** said that she was honoured to act as moderator for the discussion on the draft general comment, which was the fruit of three years' work by the Subcommittee.

Keynote speeches

6. **Mr. Iscan** (Committee against Torture) said that the initiative to draft a general comment was both timely and essential, since it would clarify the obligations of States parties in relation to places of deprivation of liberty. As the implementation of the Optional Protocol progressed, new situations were being encountered that gave rise to legal uncertainty. The Committee against Torture therefore expected that the general comment would reassert the obligations of States and call for a broad interpretation of the Optional Protocol in order to maximize its preventive impact. He was pleased to note that the draft referred to contemporary realities, including detention by non-State actors.

7. As the Subcommittee was aware, article 2 of the Convention against Torture required each State party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The Committee against Torture

had interpreted article 11 of the Convention as requiring States parties to develop independent and effective mechanisms for monitoring places of deprivation of liberty. The Optional Protocol had been adopted as a necessary measure to achieve the purposes of the Convention. The Committee would monitor the impact of the general comment on its own jurisprudence and be alert to potential for further progress, notably in closing protection gaps for persons deprived of their liberty by non-State actors.

8. **Ms. Kmecová** (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)) said that CPT had a mandate to visit all places where persons were deprived of their liberty by a public authority, including public and private institutions. In the experience of CPT, deprivation of liberty could be either de facto or based on a formal decision. Yet, after more than 30 years of monitoring, CPT continued to encounter grey areas. The draft general comment rightly addressed the fact that, in social care institutions, persons deemed to be voluntary residents might, in practice, not be free to leave. It was not always a simple task to establish whether a situation amounted to deprivation of liberty, especially if the person concerned did not express disapproval, was not capable of assessing their situation or had been placed in an institution with the consent of a carer or family member. By closing protection gaps, the general comment would facilitate the work of monitoring bodies established under the Optional Protocol and would influence other actors' understanding of the concept of deprivation of liberty.

9. The experience of CPT also highlighted the need for a non-exhaustive approach to defining places of deprivation of liberty. For example, CPT had begun to monitor airport transit zones, even before the European Court of Human Rights had decided that persons held in such zones were deprived of their liberty. Likewise, in 2022, CPT had established that its mandate included monitoring deprivation of liberty at borders and in the context of pushback operations – an issue that had not been foreseen when CPT had been set up. Therefore, the general comment should set out detailed principles, rather than listing establishments to be monitored. More concise and direct language would benefit national preventive mechanisms and States parties by facilitating interpretation. CPT stood ready to continue its dialogue with the Subcommittee on the nature of deprivation of liberty.

10. **Mr. Essaiem** (Committee for the Prevention of Torture in Africa) said that the adoption of the general comment would both clarify the interpretation of article 4 of the Optional Protocol and strengthen its application. By insisting on a global approach to the definition of places of deprivation of liberty and by clarifying the meaning of that term, the general comment would improve comprehension of article 4 and expand the scope of activity of prevention mechanisms. While the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa had already established the obligation of States parties to the African Charter on Human and Peoples' Rights to create monitoring mechanisms, the adoption of the general comment would further refine the framework for the prevention of torture in places of deprivation of liberty. The Committee for the Prevention of Torture in Africa stood ready to assist the Subcommittee in disseminating the general comment.

11. **Ms. Lefebvre** (International Committee of the Red Cross (ICRC)) said that article 4 of the Optional Protocol was fundamental, since it established the obligation for States parties to allow visits to any place where persons were or might be deprived of their liberty. ICRC had been visiting detainees in places of deprivation of liberty for more than 150 years. That experience had made it clear that visits by independent and impartial bodies to places of deprivation of liberty were an essential tool in the fight against torture and ill-treatment.

12. The specific role of ICRC was preserved in article 32 of the Optional Protocol. Under the Geneva Conventions of 1949, the right of ICRC to visit persons deprived of their liberty was based on the status of such persons and was not legally restricted by the category of place in which they might be found. Thus, in most cases, ICRC did not need to grapple with the legal definition of "places of deprivation of liberty", as the Subcommittee did when interpreting article 4. However, over time, ICRC had given some thought to its understanding and use of similar terms, particularly in contexts outside armed conflict. Thus, ICRC defined detention as the confinement of an individual to a bounded area, not necessarily demarcated by a physical barrier, from which he or she was unable to leave at will. When entering into visiting agreements with detaining authorities, ICRC aimed to clarify the persons and places

to which it could have access. Indeed, it aimed to negotiate access to all persons arrested, detained, interned or otherwise deprived of their liberty under the jurisdiction or control of a specific detaining authority, at all stages of detention, regardless of whether they faced criminal charges or had been sentenced. Such access encompassed all places of detention, internment or labour, whether temporary or permanent, where detainees of interest were held, regardless of the status or denomination of such places.

13. **Ms. Sijniensky** (Inter-American Court of Human Rights) said that, in its Advisory Opinion OC-29/22 of 30 May 2022 on differentiated approaches with respect to certain groups of persons in detention, the Inter-American Court had highlighted the importance of the Optional Protocol and in particular the system of regular visits it established, which contributed to efforts to uphold the rights of persons deprived of their liberty, ensure that conditions of detention complied with international standards and hold the authorities accountable. In its work on the right of liberty of person, the Court had adopted a broad and inclusive interpretation of situations of deprivation of liberty. In the Court's view, the specific element that identified a measure of deprivation of liberty was the inability of a person to leave an area or place at will. The Court applied that understanding regardless of the provisions of national legislation.

14. Furthermore, in its Advisory Opinions OC-23/17 and OC-25/18, the Court had given its interpretation of the term "jurisdiction", stating that the protection of rights recognized in the American Convention on Human Rights was broad in scope and that the obligations of States parties were not confined to the geographical boundaries of their territory but were engaged in respect of extraterritorial conducts that entailed the exercise of their jurisdiction over another territory or over persons outside their territory.

Statements on the draft general comment

15. **Ms. Romero** invited stakeholders that had provided written submissions on the draft to make statements elaborating on those inputs.

16. **Ms. Gleeson** (Kaldor Centre for International Refugee Law, University of New South Wales, Australia) said that the scope of a State's jurisdiction, and thus of its obligations under international human rights law, was the subject of much debate, especially in the context of extraterritorial migration controls. To avoid confusion, her institution recommended that the definition of jurisdiction previously given by the Committee against Torture should be reproduced exactly in the draft general comment, while the reference to "legal competence" in paragraph 26 should be omitted. Although the Subcommittee's definition of jurisdiction was contested by the Government of Australia, her institution endorsed it, considering that it better reflected the understanding of "jurisdiction" under international law.

17. Despite the concerns that had been raised by the Committee against Torture, the Government of Australia maintained, in its written submission, that a very high degree of control was required for the extraterritorial application of a State's international human rights law obligations, which was perhaps an attempt to deny the obligations of Australia with respect to the offshore processing and maritime interception of asylum-seekers. In that connection, she would encourage the Subcommittee to provide more in-depth guidance on situations of deprivation of liberty at sea and on arrangements whereby States outsourced detention to other States or non-State actors as a way of avoiding their obligations.

18. **Ms. Agrafioti** (Greek Council for Refugees), speaking also on behalf of the Platform for International Cooperation on Undocumented Migrants, said that, in their joint submission, the two entities highlighted situations of de facto detention and the use of secret detention sites where the Greek authorities arbitrarily detained asylum-seekers before pushing them back to Türkiye. Regarding the identification of places of deprivation of liberty, they suggested that the general comment might clarify the obligation to take into consideration reports by civil society organizations and journalists concerning such facilities. They noted that it would be helpful to set up a mechanism that would allow individuals to submit complaints, including anonymously, about informal places of deprivation of liberty. In Greece, several situations that were not officially framed as detention amounted to deprivation of liberty, including the de facto detention of asylum-seekers in European Union-

funded reception centres in the Greek islands. The general comment should make clear that such situations came within the scope of article 4 of the Optional Protocol.

19. **Mr. Yamaner** (Human Rights Foundation of Türkiye) said that his organization wished to suggest that, in paragraph 1 of the draft general comment, the Subcommittee should add language on the need for national preventive mechanisms to be established in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). In that regard, he wished to note that the Human Rights and Equality Institution of Türkiye, which was his country's official national preventive mechanism, did not meet the basic requirements of the Paris Principles. It did not contribute to, and in some cases severely undermined, efforts to prevent torture.

20. The Human Rights Foundation of Türkiye also wished to suggest that places where persons remained during curfews in a state of emergency should be listed among the examples of places of deprivation of liberty set out in the draft general comment. Between 2015 and 2017, in 11 cities in Türkiye, nearly 2 million people had been intentionally and arbitrarily deprived of their liberty and fundamental needs, including access to water, food and health care, for extended periods of time because of continuous curfews.

21. Lastly, the Foundation wished to propose that, after paragraph 40 of the draft general comment, the Subcommittee should insert an additional paragraph in which it addressed the issues of the extra-custodial use of force and unofficial places of deprivation of liberty. In Türkiye, extra-custodial use of force was a tactic increasingly employed by law enforcement authorities to disrupt and disperse peaceful meetings and protests, thereby turning public spaces used for protests and assemblies and private living spaces into places of confinement and torture.

22. **Ms. Finlay** (Australian Human Rights Commission), speaking via video link, said that a comprehensive approach to defining places of deprivation of liberty was particularly important in the Australian context, since the national Government had opted for progressive realization of the Optional Protocol, prioritizing preventive activities in "primary places of detention" over activities in so-called "secondary places of detention". In its concluding observations on the sixth periodic report of Australia (CAT/C/AUS/CO/6), the Committee against Torture had found that such an approach ran counter to article 4 of the Optional Protocol. The Australian Human Rights Commission supported the Subcommittee's assertion that the term "jurisdiction and control" in article 4 should be understood to mean jurisdiction or control. That clarification was important in the light of the Australian Government's claim that its Optional Protocol obligations did not extend to regional processing arrangements. The Government's regional processing arrangements with Nauru highlighted the importance of examining the wider context when determining whether a particular place was a place of deprivation of liberty.

23. **Ms. Livermore** (Australia) said that her Government was firmly committed to upholding its obligations under the Convention against Torture and the Optional Protocol thereto and recognized that the obligations of States parties to the Optional Protocol extended to all places of detention as defined in article 4. With respect to the matters of jurisdiction and attribution, her Government agreed that a State's human rights obligations might apply extraterritorially. However, a very high degree of control was required for extraterritorial application. In particular, that threshold would not be met where actions were taken indirectly. Moreover, her Government was concerned about statements in the draft general comment indicating that States parties might be responsible for the actions of non-State actors in cases where the State authorities had only partial or very limited knowledge of a situation of detention. The legal framework for the attribution of State responsibility for the actions of non-State actors was defined by principles of customary international law, as reflected in the articles on responsibility of States for internationally wrongful acts of the International Law Commission. The draft general comment thus extended the scope of the responsibility of States parties to the Optional Protocol beyond that established in the accepted rules of State responsibility under international law.

24. **Mr. Gurbai** (Validity Foundation – Mental Disability Advocacy Centre), speaking via video link, said that, in its work on the draft general comment, the Subcommittee should rely explicitly on the Convention on the Rights of Persons with Disabilities and on relevant

documents adopted by the Committee on the Rights of Persons with Disabilities, including its general comment No. 5 (2017) on living independently and being included in the community, the guidelines on the right to liberty and security of persons with disabilities (A/72/55, annex) and the guidelines on deinstitutionalization, including in emergencies (CRPD/C/5). Reference to those documents was crucially important for ensuring that the draft general comment adequately covered the full range of disability-specific forms of deprivation of liberty and disability-specific places of detention, including special boarding schools, halfway houses, group homes, family-type homes for children with disabilities, sheltered and protected living homes, hostels for persons with albinism, leprosy colonies and prayer camps. With reference to chapter III (C) of the draft general comment, it should be borne in mind that persons with disabilities must be provided with reasonable accommodation and support, without which the place, facility or setting in which they were being held should be considered a place of deprivation of liberty.

25. **Mr. Anderson** (National preventive mechanism of Australia), speaking in a pre-recorded video statement, said that, in the draft general comment, the Subcommittee noted that deprivation of liberty could occur in "places", "facilities", "settings" and "situations" which individuals were not free to leave. While the concepts of "places" and "facilities" were well understood, it would be helpful if the Subcommittee could further explain the meaning of the terms "settings", "situations" and "not free to leave", including through examples. There could be instances where individuals were not restrained or confined in a facility but were still not free to leave because of a threat of the use of force or the application of a penalty for leaving, for example, imprisonment as punishment for leaving a facility where persons undergo court-ordered rehabilitation. It would also be useful for the Subcommittee to identify factors that could prevent an individual from being able to leave a particular place, such as vulnerabilities linked to age, disabilities or the person's cultural background, which could lead to power imbalances. It should also identify types of restraint that could prevent someone from leaving a place, including physical, mechanical, chemical and coercive restraint. In addition, it would be helpful for the Subcommittee to place greater emphasis on the fact that, when determining whether a facility or setting constituted a place where persons were or might be deprived of their liberty, the length of the deprivation of liberty was not a relevant consideration.

26. **Mr. Salvador Ferrer** (Documenta, Análisis y Acción para la Justicia Social), speaking via video link, said that, in paragraph 36 of the draft general comment, the Subcommittee referred to "places where persons deprived of their liberty are or could be found with the tacit consent of the State party", while, in paragraph 28, it referred to "all, and any suspected, places of deprivation of liberty". Those two phrases did not describe the same thing. It was crucial for the Subcommittee to clarify exactly which types of private place could be visited pursuant to article 4 and what information could be used to justify visits. In that regard, it should be noted that access to such information often depended on whether the private place had been established or was operated with State involvement.

27. While situations of deprivation of liberty by private actors did not necessarily mean that the State had failed in its duty of protection, it was also true that when such situations were brought to the attention of the State – through complaints, criminal proceedings or the work of journalists or civil society organizations – or formed part of a documented pattern made possible through gaps in policy, law or regulations, the State was obliged to act in accordance with what the Inter-American Court of Human Rights had referred to as the duty of due diligence (*deber de debida diligencia*). The criterion for determining whether an illegal private facility, such as a clandestine rehabilitation clinic, fell within the scope of the definition of "place of deprivation of liberty" under article 4 should be whether the State had a duty of due diligence in respect of that facility.

28. **Ms. Allde** (Border Violence Monitoring Network), speaking via video link, said that she was participating in the meeting on the behalf of the non-governmental organization I Have Rights, which defended the rights of persons on the Greek island of Samos and was a member of the Border Violence Monitoring Network. Her organization welcomed the indication in paragraph 36 of the draft general comment that "closed centres for foreigners and asylum-seekers" fell within the scope of the definition of places of deprivation of liberty. Subcommittee members might wish to read the recent report of I Have Rights on unlawful

de facto detention in the Samos Closed Controlled Access Centre, which was funded by the European Union. Nearly a quarter of all persons who had received support from I Have Rights claimed to have survived at least one pushback before their arrival on Samos, an act that often involved de facto detention and inhuman and degrading treatment. The Closed Controlled Access Centre was thus a secondary site of detention. I Have Rights and the Border Violence Monitoring Network recommended that the Subcommittee should make explicit reference in the draft general comment to the right of visiting bodies to have access to and monitor three types of site where persons were or might be detained in the context of pushbacks, namely: places of secret or improvised detention; places of apprehension, transfer and removal; and international zones, transit zones and green borders.

29. **Ms. Burbano-Herrera** (Impact of Urgent Measures in Protecting At-Risk Detainees in Latin-America, Ghent University, Belgium) said that a broad understanding of what constituted a place of deprivation of liberty was necessary for the effective prevention of torture and was tightly bound up with the State's role as a guarantor of human rights and the protection of the rights of all persons deprived of their liberty, including their right to non-discrimination, in all circumstances. The draft general comment presented a unique opportunity to underscore that all persons deprived of their liberty had the right to protection, whether they were detained in a public or private setting, in the territory of the State party or in a place under the State party's jurisdiction or control.

30. **Mr. Parra Gallego** (Impact of Urgent Measures in Protecting At-Risk Detainees in Latin-America, Ghent University, Belgium) said that the draft general comment should highlight the fact that any person could request the Committee against Torture to adopt interim measures when the Subcommittee or a national preventive mechanism faced obstacles in gaining access to a place of deprivation of liberty. Information on such interim measures should be made available to the public in accessible formats. The draft general comment should also highlight the difficulties that children and persons with disabilities could face when attempting to leave institutional care facilities, the immunity enjoyed by members of the Subcommittee and national preventive mechanisms when visiting places of deprivation of liberty under the control of non-State armed groups and the need to ensure their security in such situations, and the importance of taking a multicultural approach when visiting places of deprivation of liberty under the control of Indigenous communities.

31. **Ms. Barragán Izurieta** (Ecuador) said that the national preventive mechanism of Ecuador had adopted a broad interpretation of article 4, visiting not only prisons but also places that, by their nature and function, were de facto places where persons were deprived of their freedom of movement, including reception centres for migrants in an irregular administrative situation, addiction rehabilitation clinics and psychiatric hospitals. In paragraph 3 of the draft general comment, where the Subcommittee referred to the obligation of States to allow visits to places of deprivation of liberty, it should also refer to the obligation of States to respect, protect and realize the human rights of persons deprived of their liberty. In addition, the Subcommittee could emphasize that, whenever a State party identified obstacles to access to a place of deprivation of liberty owing to legal restrictions or an incorrect or limited interpretation of applicable law, the national preventive mechanism could ask the State to request the Subcommittee to issue recommendations on the possible amendment of the applicable law or its interpretation in line with the Optional Protocol.

32. **Ms. Sferco** (Xumek), speaking via video link, said that the obligation of States to allow visits to all places of detention was not fully implemented in practice. Furthermore, her association questioned whether that obligation was limited to granting access for visits or whether States were also required to establish mechanisms to ensure the effectiveness of such visits and to specify which locations should be visited. It was also concerned about the limited scope of the mandates of national preventive mechanisms that only visited correctional facilities. For example, in the city of Mendoza, Argentina, few institutions housing vulnerable children were visited. Xumek urged States to establish comprehensive lists of places of deprivation of liberty to be visited and to ensure that those places were effectively monitored. It was crucial to strengthen national preventive mechanisms by allocating additional resources to them and establishing interdisciplinary teams to work on torture prevention.

33. **Ms. Fernández Bonelli** (National preventive mechanism of Uruguay), speaking via video link, said that, in paragraph 11 of the draft general comment, where the Subcommittee referred to the "regulatory function" of the State, it should also refer to the State's role as the guarantor of human rights. In its non-exhaustive list of places of deprivation of liberty, the Subcommittee should mention places that housed particularly vulnerable persons, in particular vulnerable children and adolescents, because it was common for such places to lack adequate safeguards. It could also be useful to make reference to drug rehabilitation clinics. Lastly, the Subcommittee should provide further clarification of the meaning of the phrase "not permitted to leave at will", which remained rather ambiguous in the current draft of the general comment. In that regard, she wished to point out that deprivation of liberty could also occur in facilities where there was no formal mechanism for requesting discharge.

34. **Ms. Ramírez Hernández** (Human Rights Commission of Mexico City), speaking via video link, said that, in accordance with the comprehensive approach to defining places of deprivation of liberty, the scope of what constituted a place of deprivation of liberty should be expanded to include all places that played a part in prison life, including medical facilities, educational centres, workshops, kitchens, sporting facilities, family visiting spaces and places of religious worship, because, in all such places, activities and services related to the rights of prisoners took place or were provided. Conditions in medical facilities, for example, had a direct impact on prisoners' right to health, while conditions in educational centres affected their right to education and social rehabilitation.

35. **Ms. Kent** (Human Rights Institute of the International Bar Association), speaking via video link, said that the Subcommittee was urged to ensure that ill-treatment was consistently mentioned alongside all references to torture throughout the draft general comment. The draft's analysis of the definitions of "deprivation of liberty", "detention" and "places of detention" adopted by various international and regional human rights mechanisms could be strengthened through the inclusion of examples from the African human rights system. Regarding public or private places of deprivation of liberty, the Subcommittee might wish to underscore that a State's restrictive approach to article 4 (2) in practice and restrictive regulations in its national legal system must be considered contrary to the Optional Protocol. In relation to the interpretation of treaties, the Subcommittee should refer to the relevant provisions of the Vienna Convention on the Law of Treaties in support of its interpretation of the phrase "jurisdiction and control" in the English version of article 4 (1) as meaning jurisdiction or control. In that regard, it should be clarified that the scope of article 4 included all extraterritorial places of deprivation of liberty under the jurisdiction or control of a State party to the Optional Protocol. The Subcommittee might wish to redraft the sections of the draft general comment that concerned the notion of "acquiescence" in the light of the positive obligation of due diligence that fell to the State where the latter knew or should have known about a situation of deprivation of liberty. Lastly, the Subcommittee should provide a single consolidated non-exhaustive list of examples of places of deprivation of liberty.

36. **Mr. Shen** (United Nations Working Group on Human Rights and Digital Technology) said that, in the face of technological advances, the United Nations Working Group on Human Rights and Digital Technology recommended that the definition of "deprivation of liberty" should be expanded to include digital spaces. The Working Group was deeply concerned about the recent increase in surveillance and control of digital spaces and the potential human rights abuses that could occur there. Advances in technology could give rise to conditions in which deprivation of liberty could occur in non-physical spaces and enable interventions that changed humanity's sense of "liberty" at the neurological level. The development of a set of guidelines or a supplementary protocol in that regard was essential.

37. **Mr. Albano** (National preventive mechanism of Italy), speaking via video link, said that deprivation of liberty occurred not only when a person was held in a place that they were not allowed to leave freely, but also when a person was held in a place that it was impossible to leave at will for various reasons, for example, because of physical or material impediments. The definition of the term "place of deprivation of liberty" should include both types of situation, which, in English, were expressed by the modal verbs "may" and "can". Unfortunately, some languages, such as Italian, had only a single verb to describe both scenarios. He therefore appreciated the Subcommittee's use in the draft general comment of the Latin phrases "de jure" and "de facto" to describe, respectively, situations in which

persons were not permitted to leave a given place and situations in which persons were unable to leave a given place.

38. **Mr. Cabezas** (National preventive mechanism of Chile), speaking via video link, said that, as a broad understanding of the terms "deprivation of liberty" and "place of deprivation of liberty" was essential to the protection of the rights of persons deprived of their liberty, he welcomed the mention in paragraph 37 of the draft general comment of atypical places or acts of deprivation of liberty, including, as was sometimes the practice in Chile, the detention of suspects by private security guards in shopping malls. The Subcommittee would nonetheless do well to elaborate more fully on what those terms encompassed. It would also be helpful if the general comment contained a paragraph explicitly stating that States parties had an obligation to ensure that national preventive mechanisms could visit private places, including drug treatment centres, where persons were or might be deprived of their liberty.

39. **Ms. Bernath** (Association for the Prevention of Torture) said it was important to ensure that the general comment was both practical and inspirational and promoted a broad understanding of the concept of places of deprivation of liberty, first by reading article 4 in conjunction with other articles of the Optional Protocol, in particular those related to the visiting mandate of the Subcommittee and national preventive mechanisms, and second by integrating a forward-looking preventive approach that focused on situations where the risk of ill-treatment was high. The Optional Protocol was a living instrument that should make it possible to respond to contemporary crises and emerging challenges, including the increasing outsourcing of detention and religious actors' use of private facilities for the practice known as conversion therapy; those were examples of high-risk situations that should fall within the scope of article 4. Lastly, in its analysis of deprivation of liberty, the Subcommittee should give due consideration to situations of heightened vulnerability, which were especially relevant to the concept of "free to leave at will".

General discussion

40. **Ms. Romero** invited other stakeholders to make brief statements.

41. **Ms. Almeida Sousa** (Portugal), emphasizing her country's readiness to continue cooperating with the Subcommittee and welcoming the decision to draft a general comment on article 4 of the Optional Protocol, said that, although she did not currently have a specific comment on the wording of the draft, a clear definition of the term "place of deprivation of liberty" would certainly contribute to the application of article 4 in letter and spirit.

42. **Mr. Dominguez Díaz** (Spain), noting that his Government welcomed the opportunity to express its views on the draft general comment, said that it was only natural that the Subcommittee's first general comment should clarify what was meant by the term "places of detention" and thus dispel doubts about the places that national preventive mechanisms could visit. The Subcommittee's reaffirmation that the two paragraphs of article 4 were to be read together to understand the full meaning of the term was particularly welcome.

43. As the Spanish authorities had consistently read those paragraphs together, the country's national preventive mechanism visited or otherwise monitored conditions in psychiatric hospitals, in migrant holding centres, on deportation flights, in police vans and in other places of detention in addition to more conventional places such as prisons and police stations. He welcomed the clarification that, for the purposes of the Optional Protocol, States parties should permit visits to any place of detention under their jurisdiction or control, including, as in Spain, places of detention located in autonomous entities.

44. **Ms. Ávila Ortega** (Panama) said that the Subcommittee's draft general comment was informed by a shared understanding to which the work of a number of treaty bodies – the Human Rights Committee and the Committee against Torture in particular – and the special procedures of the Human Rights Council had contributed. The Panamanian authorities shared the Subcommittee's view that the purpose of the general comment was not to draw up an exhaustive list of places of deprivation of liberty but to explore the concept of deprivation of liberty in such a way as to make it possible to adapt to changing circumstances. The Subcommittee, in her Government's view, should not stop at its first general comment. It should continue organizing consultations and other such activities with a view to drafting additional general comments.

45. **Ms. Nemar** (Fondation Alkarama) said that States parties should be reminded of their obligation to refrain from making some places of detention off-limits to national preventive mechanisms, as that practice made it impossible for those mechanisms to undertake visits with a view to strengthening the protection of persons deprived of their liberty. In its general comment, the Subcommittee should stress that States parties could fulfil their obligations under article 4 only if their national preventive mechanisms were independent and effective. In addition, States parties should be reminded not to seek to limit the scope of article 4 or, in an attempt to avoid scrutiny, to detain people in places not intended for detention. As should be stated in the general comment, such practices were a clear signal of States parties' failure to fulfil their article 4 obligations.

46. **Mr. Nas** (Türkiye), speaking via video link, said that, as the draft general comment referred to house arrest as a form of deprivation of liberty, he wished to know to what extent States parties should be expected – or how they could be expected – to facilitate visits to the private houses in which some offenders served their sentences. The Turkish authorities were of the view that the understanding of detention referred to in paragraph 39 of the draft – namely, that a situation of confinement qualified as detention if the person confined was unable to exercise his or her de jure right to leave without exposing him- or herself to serious human rights violations – was unnecessarily broad.

47. **Ms. Lorincz Sosa** (Costa Rica), speaking via video link, said that Costa Rica welcomed the development of the general comment, as it would guide the work of both the Subcommittee and the national preventive mechanisms and thus help strengthen the protection of the rights of persons deprived of their liberty. The Subcommittee's comprehensive reading of article 4 could not but facilitate the efforts that States parties made to fulfil their obligations.

48. **Mr. Corney** (Omega Research Foundation), speaking via video link, said that his organization, which worked with national preventive mechanisms, welcomed the draft general comment's mentions of non-custodial forms of deprivation of liberty, including the crowd control measures adopted by the police during protests. National preventive mechanisms should have full access to places where persons were or might be deprived of their liberty. In Brazil, for example, where his organization had worked, the national preventive mechanism had found it useful to gain access to such places as armouries, workshops, equipment stores and even classrooms.

49. **Ms. Troy-Donovan** (Border Violence Monitoring Network), speaking via video link, said that migrants and refugees in the Western Balkans and Greece were routinely detained beyond the reach of systems of independent safeguards, in such places as stables, abandoned buildings and derelict railway stations, which had become hotspots for mass human rights violations. In its general comment, the Subcommittee should therefore state that national preventive mechanisms must have access to secret and improvised places of detention, other places in which persons were deprived of liberty during apprehension, transfer or removal and international zones, transit zones and green borders.

50. **Ms. Bogojević** (National preventive mechanism of Montenegro), speaking via video link, said that places of detention that national preventive mechanisms should have access to also included places and areas at national and international borders where persons could be detained by the national or international authorities and means of transport and airports. Persons in extradition detention should be informed of the existence of a national preventive mechanism in the requested State.

51. **Mr. Castellanos** (National preventive mechanism of Guatemala), speaking via video link, said that he welcomed the Subcommittee's decision to ensure that places such as drug treatment centres, areas in ports or airports where stowaways were held and children's homes, which were considered possible places of detention in Guatemalan law, could also be understood as places of detention in international law.

Closing remarks

52. **Mr. Czepek**, thanking those without whom it would have been impossible to prepare a first draft of the general comment, said that he and his fellow Subcommittee members hoped that the general comment would contribute to a broader understanding of the term "places of

detention", rather than simply create a list of such places; help States parties and national preventive mechanisms with their practical interpretation of the Optional Protocol; and render efforts to prevent torture more robust. The comments on the draft that the Subcommittee had received would be considered with a view to adopting a document – in 2024, it was hoped – that would provide clear guidance on the interpretation of article 4.

53. **Ms. Comas-Mata Mira** said that the discussion had made it clear that the Subcommittee should put special emphasis on the places, including aboard seagoing vessels, in which migrants could be deprived of their liberty.

54. **Ms. Agomoh** said that she welcomed the comments on the draft made by States parties, national preventive mechanisms, national human rights institutions, civil society organizations and other stakeholders.

55. **Ms. Romero**, thanking the participants for their engagement, said that all comments on the draft general comment would be given due consideration.

The discussion covered in the summary record ended at 4.45 p.m.