Legal Briefing Series

Application of OPCAT to a State Party's places of military detention located overseas[1]

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I. Introduction

An essential instrument in the prevention of torture, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) establishes "a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment" (Art.1 OPCAT). At the international level, a UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) carries out different torture prevention activities set forth in the OPCAT. At the domestic level, States Parties have to establish or designate one or more National Preventive Mechanism(s) (NPM).

The SPT and the NPM conduct regular visits to places where persons are or may be deprived of their liberty, as defined in Article 4 OPCAT[2]. The type of places open to this outside scrutiny is wide-ranging and includes military places of detention.[3]

[1] For an analysis of the question of OPCAT application to foreign military places of detention located on a State Party's territory, in particular under an existing Status of Forces Agreement (SOFA), see Association for the Prevention of Torture, *Establishment and Designation of National Preventive Mechanisms*, 2006, pp.20-21, available at www.apt.ch.

[2] See also Articles 11(a), 12(a), 14(a)(c), 19(a) and 20(a)(c) OPCAT.

[3] See Association for the Prevention of Torture, *Establishment and Designation of National Preventive Mechanisms*, 2006, pp.18-19. See also Association for the Prevention of Torture, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A Manual for Prevention*, 2005, available at www.apt.ch

However, if the State Party's military places of detention located on its own sovereign territory can, on the basis of the OPCAT, be visited by the SPT and the NPM of that State, the question arises whether such an NPM (as well as the SPT) can also visit the State Party's military places of detention located overseas.

Article 4§1 OPCAT states that each State Party shall allow visits by the SPT and the NPM "to any place under its jurisdiction and control" where persons are or may be deprived of their liberty. The French version of the OPCAT, which is equally authentic according to Article 37§1 OPCAT, mentions "sous sa jurisdiction *ou* son contrôle" (under its jurisdiction *or* its control).

Therefore, the issue of whether the SPT and a State Party's NPM shall be allowed to visit the State Party's military places of detention located overseas will depend on the interpretation given to the notion of "jurisdiction and/or control".

II. Interpretation of the concept of "jurisdiction and/or control"

The interpretation supported in this briefing is that Article 4§1 OPCAT provides that access to the SPT and the NPM must be granted not only to places within the States Parties' sovereign territory, but also to extraterritorial places of detention upon which they exercise jurisdiction and/or control.[4]

This interpretation is corroborated by the positions taken by the Committee against torture (CAT) in relation to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[5] the Human Rights Committee (HRC) in relation to the International Covenant on Civil and Political Rights (ICCPR),[6] as well as various UN Special Procedures and the International Court of Justice (ICJ) in relation to different international human rights instruments.

In that regard, the interpretation provided by the CAT is particularly important because of the clear link between the OPCAT and its parent treaty, the UNCAT, in particular regarding the obligation of States Parties to adopt effective preventive measures according to Articles 2§1 and 16§1 UNCAT. More broadly, given the need for consistency in the interpretation of the scope of application of the international human rights legal framework, to which the OPCAT, the UNCAT and the ICCPR belong, the views of the above-mentioned bodies shall be taken into account while interpreting the significance of the "jurisdiction and/or control" stipulated by the English/French versions of Article 4§1 OPCAT.

[4] See also, Manfred Nowak/Elisabeth McArthur, *The United Nations Convention against Torture. A Commentary*, Oxford University Press, p. 932-933.
[5] Available at http://www2.ohchr.org/english/law/cat.htm. See Articles 2§1 and 16§1 UNCAT.
[6] Available at http://www2.ohchr.org/english/law/ccpr.htm See Article 2§1 ICCPR.

II. A. Interpretation by the Committee against Torture

Article 2§1 UNCAT provides that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction", whereas Article 16§1 UNCAT extends this obligation to other acts of cruel, inhuman or degrading treatment or punishment.

The OPCAT has a clear and direct relevance to the States' obligations under Articles 2§1 and 16§1 UNCAT to take effective preventive measures. The ratification and implementation of OPCAT can indeed be considered as such a measure.[7] In that regard, the Committee against Torture, in its General Comment n°2 on the implementation of Article 2 UNCAT by States Parties, cites the establishment of "impartial mechanisms for inspecting and visiting places of detention and confinement" as forming part of the guarantees against torture that States shall put in place in order to comply with their obligations to take preventive measures.[8]

Both Articles 2§1 and 16§1 UNCAT provide for their application in any territory under the State Party's jurisdiction.

According to the CAT, this notion "includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State Party".[9] It further explicitly declares that:

> "16. Article 2, paragraph 1, requires that each State Party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee has recognized that "any territory" 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. The reference to "any territory" in Article 2, like that in Articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State Party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces Article 5, paragraph 1 (b), which requires that a State Party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that the scope of "territory" under Article 2 must also include situations where a State Party exercises, directly or indirectly, de facto or de jure control over persons in detention."[10]

[7] This view is also supported by the Preamble to the OPCAT, which notably explicitly refers to Articles 2 and 16 UNCAT.
[8] Committee against Torture, General Comment n°2, CAT/C/GC/2, §13. See also, Manfred Nowak/Elisabeth McArthur, *The United Nations Convention against Torture. A Commentary*, Oxford University Press, p. 410.
[9] Committee against Torture, General Comment n°2, CAT/C/GC/2, §7.
[10] Ibid, CAT/C/GC/2, §16, emphasis added.

In the States Parties reporting procedure, this issue has been addressed during the CAT's review of, inter alia, the United Kingdom and the United States.[11]

The position of the United Kingdom was that those parts of the UNCAT which apply only to territory under the jurisdiction of the State Party cannot be applicable in relation to actions of its troops in Afghanistan and Iraq.[12] The CAT explicitly rejected that view. In its concluding observations, it expressed its concern at:

> "[4](b) the State Party's limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that "those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State Party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq"; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State Party and considers that this principle includes all areas under the de facto effective control of the State Party's authorities; […]"[13]

As regards the United States, the CAT reiterated its position as follows:

> "15. The Committee notes that a number of the Convention's provisions are expressed as applying to "territory under [the State Party's] jurisdiction" (Arts. 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State Party, by whichever military or civil authorities such control is exercised. The Committee considers that the State Party's view that those provisions are geographically limited to its own de jure territory to be regrettable.
>
> **The State Party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State Party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.**"[14]

Following the CAT's clear interpretation of the notion of territory under a State Party's jurisdiction as provided by the UNCAT, and considering that the application of the OPCAT shall be seen as an implementing measure of the UNCAT, it can be confidently argued that Article 4§1 OPCAT shall be interpreted as providing the SPT and the NPM of a given State Party access to that State's military places of detention overseas, as these places fall under the jurisdiction and/or control of that State Party.

[11] See also, for instance, Committee against Torture, Concluding observations on Israel, A/64/44, §49 (11).
[12] Committee against Torture, Summary record of the 627th meeting, CAT/C/SR.627, §22.
[13] Committee against Torture, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, A/60/44, §39 lit.b, emphasis added.
[14] Committee against Torture, Concluding observations on the United States of America, A/61/44, §37(15).

II. B. Interpretation by the Human Rights Committee

Article 2§1 ICCPR provides that "each State Party […] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]".

On the issue of extra-territorial applicability of the ICCPR, the HRC has made it clear that the notion of *jurisdiction* must not be understood as being limited to the territory of the State Party:

> "States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies 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 peace-keeping or peace-enforcement operation."[15]

In the State Parties reporting procedure, the HRC has also rejected the views of the United Kingdom in its recent Concluding observations adopted during its 93rd session of July 2008:

> "14. The Committee is disturbed about the State Party's statement that its obligations under the Covenant can only apply to persons who are taken into custody by the armed forces and held in British-run military detention facilities outside the United Kingdom in exceptional circumstances. It also notes with regret that the State Party did not provide sufficient information regarding the prosecutions launched, the sentences passed and reparation granted to the victims of torture and ill-treatment in detention abroad. (Arts. 2, 6, 7 and 10)
>
> **The State Party should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control. The State Party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel**

[15] HRC, General Comment n°31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, §10, emphasis added. See also, notably, *López Burgos v. Uruguay*, HRC Communication n°52/1979, §12.3.

> **(including commanders), in detention facilities in Afghanistan and Iraq. The State Party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime. The State Party should adopt all necessary measures to prevent the recurrence of such incidents, in particular by providing adequate training and clear guidance to its personnel (including commanders) and contract employees, about their respective obligations and responsibilities, in line with Articles 7 and 10 of the Covenant. The Committee wishes to be informed about the measures taken by the State Party to ensure respect of the right to reparation for the victims.**"[16]

This position is consistent with the Committee's earlier rejection of the position taken by the United States. In its concluding observation to the US, it stated that:

> "10. The Committee notes with concern the restrictive interpretation made by the State Party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; (b) its failure to take fully into consideration its obligation under the Covenant not only to respect, but also to ensure the rights prescribed by the Covenant; and (c) its restrictive approach to some substantive provisions of the Covenant, which is not in conformity with the interpretation made by the Committee before and after the State Party's ratification of the Covenant. (Articles 2 and 40)
>
> **The State Party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State Party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate.**"[17]

Given in particular the similarity of the obligations flowing from Articles 7 and 10 ICCPR on the one hand and the ones contained in the UNCAT, to which the OPCAT is deriving, as explained above, on the other hand, the clear interpretation given by the HRC as regards the scope of application of the ICCPR shall constitute an additional element supporting the position taken in the present analysis.

[16] HRC, Concluding observations, CCPR/C/GBR/CO/6, §14.
[17] HRC, Concluding observations, CCPR/C/USA/CO/3/Rev.1, §10.

II. C. Interpretation by UN Special Procedures

The issue of extra-territorial applicability of international human rights law has also been addressed by different UN Special Procedures.

In particular, five of those Special Procedures issued a joint report on the situation of detainees held at Guantanamo Bay[18] where they explicitly stated, based notably on the International Court of Justice's and the Human Rights Committee's views, that such a human rights legal framework applies to overseas military bases:

> "11. While Article 2 [ICCPR] refers to persons "within [a State Party's] territory and subject to its jurisdiction", the Human Rights Committee, which monitors implementation of the Covenant, has clarified that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party". Similarly, the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* recognized that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to "acts done by a State in the exercise of its jurisdiction outside of its own territory". Accordingly, the particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba and under United States domestic law does not limit the obligations of the United States under international human rights law towards those detained there. Therefore, the obligations of the United States under international human rights law extend to the persons detained at Guantánamo Bay."[19]

In addition, as regards more particularly the extra-territorial application of the UNCAT, the Special Rapporteurs stated that given the clear wording of Articles 2§1 and 16§1 UNCAT ("in any territory under its jurisdiction", whereas in the Article 2§1 ICCPR one reads "all individuals within its territory and subject to its jurisdiction"), the territorial applicability of the UNCAT to US activities at Guantánamo Bay was "even less disputable than the territorial applicability of ICCPR".[20]

[18] Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Special Rapporteur on the independence of judges and lawyers, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Special Rapporteur on freedom of religion or belief, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

[19] Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Situation of detainees at Guantánamo Bay, E/CN.4/2006/120, §11, emphasis added.

[20] Ibid, E/CN.4/2006/120, footnote n° 11.

II. D. Interpretation by the International Court of Justice

As underlined by the UN Special Procedures, the International Court of Justice has also taken position on the issue of extra-territorial applicability of international human rights law. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, it had to consider if Israel's human rights obligations applied in the OPT. It notably took the view that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[21] It did the same as regards the Convention on the Rights of the Child[22] (cf. Article 2§1 CRC which defines the scope of application of this Convention to each child within the State Party's jurisdiction).[23]

III. Conclusions

It can soundly be argued that given the accessory nature of the OPCAT to the UNCAT, as well as the necessary need to have a consistent approach to extra-territorial application of international human rights instruments, the meaning of the expression *under its jurisdiction and/or control* mentioned in Article 4§1 OPCAT (English/French text versions) can legitimately be interpreted in consistency with the UNCAT and other relevant international human rights instruments as applied by the concerned UN Treaty Bodies and other relevant international mechanisms, such as the Human Rights Council's Special Procedures and the International Court of Justice.

Hence, following the similar wording used in the OPCAT, the UNCAT, the ICCPR and the CRC when it comes to their respective scope of application (Article 4§1 OPCAT, Articles 2§1 and 16 §1 UNCAT, Article 2§1 ICCPR, Article 2§1 CRC), and the consistent opinions issued by the CAT, the HRC, the UN Special Procedures and the ICJ as regards the scope of application of the relevant international instruments, **it shall be submitted that the OPCAT gives the SPT and the State Party's NPM the competence to monitor that State Party's military places of detention located overseas**.

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[21] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, §111.
[22] Available at http://www2.ohchr.org/english/law/crc.htm
[23] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion of 9 July 2004, § 113.

Annex

The relevant provisions[24]

OPCAT

Article 4
1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in Articles 2 and 3 to any place under its 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 (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
(…)

Article 11
1. The Subcommittee on Prevention shall:
(a) Visit the places referred to in Article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
(…)

Article 12
In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in Article 11, the States Parties undertake:
(a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in Article 4 of the present Protocol;
(…)

Article 14
1. In order to enable the Subcommittee on Prevention to fulfill its mandate, the States Parties to the present Protocol undertake to grant it:
(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;
(…)
(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
(…)
2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

[24] Emphasis added.

Article 19
The national preventive mechanisms shall be granted at a minimum the power:
(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in Article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
(…)

Article 20
In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:
(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;
(…)
(c) Access to all places of detention and their installations and facilities;
(…)

UNCAT

Article 2
1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
(…)

Article 16
1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
(…)

ICCPR

Article 2
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
(…)

CRC

Article 2
1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
(…)