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Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Subcommittee)
Office of the United Nations High Commissioner for Human Rights
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Distinguished Subcommittee Members

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

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney welcomes the opportunity to provide comments on the Subcommittee's draft general comment on article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Optional Protocol').

We have had the opportunity to review the submissions of the Australian National Preventive Mechanism (NPM) and the Australian Human Rights Commission, and support the comments made therein. This submission builds on those submissions, and makes three recommendations:

Recommendation 1 **That the Subcommittee omit the reference to 'legal competence' in the definition of 'jurisdiction' in paragraph 26, and instead adopt an approach consistent with that taken by the Human Rights Committee and the Committee against Torture.**

Recommendation 2 **That the Subcommittee expand on its comments in paragraphs 37 and 39 to address some of the arguments that States might raise to justify denying NPMs and the Subcommittee access to places of deprivation of liberty at sea.**

Recommendation 3 **That the Subcommittee clarify how article 4 should be interpreted in situations where States enter into arrangements with other States or non-State actors to 'outsource' detention, such as to avoid engaging their obligations under the Optional Protocol.**

1 Jurisdiction or control

We note that the Subcommittee's approach to the issue of jurisdiction is, subject to the comments below, appropriate and consistent with the established position under international human rights law.

It is worth reiterating that the term 'jurisdiction' has several different meanings under international law.[i] Whereas under general public international law, 'jurisdiction' delimits the lawful scope of a State's power or competence to act on the international plane, under international human rights law it is a largely factual determination of whether a State's actual power or control over people or places is sufficient to establish the legal link necessary to engage its human rights obligations.

Unfortunately, there continues to be some confusion about the difference between these meanings of 'jurisdiction. This confusion has been particularly evident in the context of offshore processing in Australia, with the Australian government resisting advice that its human rights obligations extend to asylum seekers transferred to and detained in the Republic of Nauru and Papua New Guinea[ii] by reference to the sovereignty or 'jurisdiction' of those States.

There is a risk that the reference to 'legal competence' in paragraph 26 of the draft comment may exacerbate this confusion by suggesting that a State's human rights obligations only extend to territory over which it has lawful authority. To this end, we note that neither the Human Rights Committee nor the Committee against Torture refer to 'legal competence' in their relevant general comments. Instead, they focus on situations in which States exercise, directly or indirectly, in whole or in part, *de jure* or *de facto,* power or effective control over people or places, even if not situated within their territories.[iii]

We recommend that the Subcommittee omit the reference to 'legal competence' in the definition of 'jurisdiction' in paragraph 26, and instead adopt an approach consistent with that taken by the Human Rights Committee and the Committee against Torture.

Deprivation of liberty at sea

In paragraphs 37 and 39, the draft comment acknowledges that places of deprivation of liberty can exist on 'any type of terrain (land, sea or air)' and that 'if the ability to leave such a place or facility would be limited or would entail exposing a person to serious human rights violations, that place should also be perceived as a place of deprivation of liberty, in accordance with article 4 of the Optional Protocol'.

These comments are particularly pertinent to the practice of Australia and other States of intercepting and detaining asylum seekers and migrants at sea, including on the high seas.

We recommend that the Subcommittee expand on these comments to address some of the arguments that States might raise to justify denying National Preventive Mechanisms (NPMs) and the Subcommittee access to places of deprivation of liberty at sea.

As a preliminary matter, the Subcommittee might comment on how the unique features of the maritime environment influence the interpretation of a place of deprivation of liberty. Unlike on land, people at sea (or in the air) may not be free simply to leave the place where they are being held. If a migrant or asylum seeker is intercepted at sea and unable to freely leave and continue their voyage – either because national authorities are exerting control over them in some way, or because they have no independent and seaworthy means of transport – they may be deprived of liberty even if they are not subject to physical restraints or held in a closed space. Deprivation of liberty can occur even if people remain on their own vessel. It can also occur if a person is forced to choose between remaining on an unseaworthy vessel, being 'pushed' or turned back to a place where they would face persecution or serious human rights violations, or embarking a national vessel and submitting to the control of the relevant authorities.

The Subcommittee may also wish to affirm that broad references to 'national security' or the integrity of operations to combat people smuggling cannot be invoked to deny NPMs or the Subcommittee access to places of deprivation of liberty at sea. Nor can logistical and practical challenges be relied upon to justify denial of access. If States parties to the Optional Protocol choose to undertake maritime interception operations which may or do in fact involve deprivation of liberty at sea, they are required to allow oversight and cannot avoid their obligations by making access physically impossible or denying NPMs the information and resources necessary to fulfil their mandates at sea.

On this issue, we commend to the Committee the work of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, which includes a report on means to address the human rights impact of pushbacks of migrants on land and at sea (A/HRC/47/30).

Good faith application of the Optional Protocol

In the context of immigration and border controls, States are increasingly resorting to extra-territorialisation and cooperative agreements to outsource, push-back or avoid their obligations under international human rights and refugee law. For example, Australia's 'regional' or 'offshore' processing regime involves forcibly transferring asylum seekers who arrive in Australia to other countries to be detained and processed there, instead of in Australian territory. Italy and other States have been criticized for 'outsourcing' their maritime rescue or interception operations to Libyan authorities. To the extent that such practices are employed to circumvent States' obligations with respect to asylum seekers and refugees, they run contrary to the duties to interpret and perform treaties in good faith (Vienna Convention on the Law of Treaties, articles 26 and 31).

Paragraph 9 of the draft comment recognises and affirms the importance of good faith in interpreting the scope of article 4 of the Optional Protocol. It provides:

> 'As the objective of the Optional Protocol is the prevention of torture and other cruel, inhuman or degrading treatment or punishment through visits to places of deprivation of liberty, a good faith interpretation cannot restrict the definition of places of deprivation of liberty so as to leave out places where persons could be deprived of liberty and where torture could be taking place. Moreover, the Optional Protocol was intended to extend to all places where persons may be deprived of their liberty by instigation, consent or acquiescence, and not just places where persons are deprived of liberty through a formal order.'

We endorse this approach and recommend that the Subcommittee clarify how article 4 should be interpreted in situations where States enter into arrangements with other States or non-State actors to 'outsource' detention, such as to avoid engaging their obligations under the Optional Protocol.

For example, the Subcommittee may wish to comment on the circumstances in which such arrangements might amount to a failure to perform the obligations contained in the Optional Protocol in good faith. The Subcommittee may also wish to remind States that their international responsibility can be engaged when they do not commit an internationally wrongful act themselves, but are complicit in the wrongful act of another through the provision of aid or assistance.[iv]

If it would assist the Subcommittee to hear from us further on these issues, we are available and would be pleased to participate in the public discussion during the 50th session of the Subcommittee in June 2023.

Kind regards

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[i] For a more detailed consideration of this issue, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011).
[ii] See, for example, Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (CCPR/C/AUS/CO/6, 1 December 2017) para 35; Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (A/HRC/35/25/Add.3, 24 April 2017) para 73.
[iii] Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add. 13, 26 May 2004) para 10; Committee against Torture, *General Comment No. 2: Implementation of article 2 by States parties* (CAT/C/GC/2, 24 January 2008), paras 7, 16.
[iv] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, art 16.