14 April 2023

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
8-14 Avenue de la Paix
CH 1211 Geneva 10
Switzerland

By email: laetitia.colucci@un.org

tocol').

he submissions of the Australian National Preventive
uman Rights Commission, and support the comments made
submissions, and makes three recommendations:

mmittee omit the reference to 'legal competence' in the
sdiction' in paragraph 26, and instead adopt an
stent with that taken by the Human Rights Committee
tee against Torture.

mmittee expand on its comments in paragraphs 37 and
ome of the arguments that States might raise to justify
and the Subcommittee access to places of deprivation of

mmittee clarify how article 4 should be interpr eted in
e States enter into arrangements with other States or
s to 'outsource' detention, such as to avoid engaging
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

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 S2.3 (i)3-1.145Tc 0, e.1 (ngko(t th)0.6n)-12.3 (l) (per)-6.3 (t)-UR.3 (t)-URyed i vea, m sh61 (a

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]