

OBSERVATIONS OF THE AUSTRALIAN GOVERNMENT

General Comment No. 1 on places of deprivation of liberty (article 4)

1. The Australian Government (Australia) presents its compliments to the United Nations Subcommittee on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee) and has the honour to refer to the Subcommittee's call for submissions on its draft General Comment on Article 4(1) of the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol).
2. Australia is a longstanding party to the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) and is firmly committed to upholding its obligations under the Convention and the Optional Protocol.
3. Australia expresses its appreciation and gratitude to the Subcommittee for its work in preparing the draft General Comment, and welcomes the Subcommittee's clarification about the obligations of State parties to the Optional Protocol as they pertain to allowing visits to places of deprivation of liberty.
4. Australia thanks the Subcommittee for the opportunity to provide a written submission on the draft General Comment. In making these observations, Australia notes that it has focused on the draft General Comment's approach to effective control and attribution and, specifically, its concerns with certain aspects of the proposed approach.

Effective Control

5. Australia disagrees with the Subcommittee's view at paragraph's 3 and 24 that the phrase in Article 4(1) 'jurisdiction and control' should be understood to mean 'jurisdiction or control'. Australia takes the view that the ordinary meaning of the term 'and' must be the starting point in interpreting Article 4(1) consistently with Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT).
6. Australia agrees with the Subcommittee that a State's human rights obligations may apply extraterritorially. However, in Australia's view, a very high degree of control is required for the extraterritorial application of international human rights law obligations. Whether a State is in effective control is a question of fact.¹
7. Australia is also concerned with the Subcommittee's view at paragraph 26 that a State will have jurisdiction 'where it exercises effective control directly or *indirectly, whole or in part*, de jure or de facto (emphasis added) and where any person, citizen or non-citizen, is or could be found, who is subject to the de jure or de facto control of that State party'. Australia considers that this

¹ By way of example, Australia does not agree with the Committee's view that the military forces of a State party acting outside its territory will automatically be in effective control over persons (paragraph 27). Australia notes that other bodies of international law (for example, international humanitarian law in situations of armed conflict) will be relevant.

statement goes beyond the threshold at which a State's human rights obligations apply extraterritorially. In particular, actions undertaken 'indirectly' would not meet this threshold.

Attribution

8. Australia is concerned with the Subcommittee's views in paragraphs 31 to 35 of the General Comment as they pertain to the definition of the phrase in Article 4(1) '...or at its instigation or with its consent or acquiescence'.
9. Specifically, Australia is concerned that the Subcommittee purports to extend the responsibility of States Parties to the conduct of non-State actors which goes beyond the accepted rules of state responsibility in international law. For example, Australia disagrees that the obligation in Article 4(1) extends to allowing visits to places of detention where non-State officials instigate the detention of an individual (paragraph 33) unless that instigation can be attributed to the State. Similarly, Australia disagrees that States Parties are responsible for the actions of non-State actors where the State's authorities have only partial or very limited knowledge about the detention of an individual (paragraph 35).
10. Australia is of the opinion that relevant principles of customary international law, as reflected in the International Law Commission's Articles on State Responsibility, establish the legal framework for attribution of responsibility to a State for the actions of non-State actors.

Concluding Remarks

11. Australia reiterates its firm support for the important work of the Subcommittee. It sincerely hopes that the Subcommittee seriously considers the comments and concerns raised by States when it reviews and finalises the draft General Comment. Australia looks forward to continued engagement in developing this and other General Comments, and avails itself of this opportunity to renew to the Subcommittee the assurances of its highest consideration.