Comments by the Centre for Human Rights Law on the Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22

March 2017

I. Introduction

1. The Centre for Human Rights Law, SOAS, welcomes the Committee's decision to adopt a revised General Comment on the implementation of Article 3 of the Convention in the context of article 22.[1] This submission focuses on selected issues, particularly the nexus between the prohibition of refoulement and other obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention), the application of the prohibition of non-refoulement to all forms of ill-treatment, effective remedies and reparation in case of refoulement, and the role of the Istanbul Protocol.

II. Challenges to the prohibition of refoulement

2. The prohibition of refoulement, though absolute, has faced unprecedented challenges since the Committee adopted its first General Comment on Article 3 of the Convention in 1997, particularly in the counter-terrorism and immigration context, which often overlap. We suggest that the Committee underscores the seriousness of these challenges, and explicitly highlights practices that risk violating, or violate the prohibition of refoulement. In respect of counter-terrorism, such practices include extraordinary rendition programmes,[2] diplomatic assurances (which are referred to briefly in paragraphs 19 and 20 of the Draft prepared by the Committee

[1] The submission was prepared by Dr. Lutz Oette, Director, Centre for Human Rights Law.

[2] See in particular *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005); *Alzery v. Sweden*, Communication No. 1416/2005, UN Doc. CCPR/C/88/D/1416/2005 (2006); *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention represented by its vice-chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its chair, Jeremy Sarkin*, UN Doc. A/HRC/13/42, 19 February 2010, and United States Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Programme*, 2014.

(Draft)) as well as deprivation of nationality followed by deportation.[3] In the context of immigration, areas of particular concern are border closures, pushbacks, and cooperation between states, particularly in pursuit of non-entrée policies,[4] as well as fast-track procedures and presumptions of safety that may preclude sufficient individualised assessment of risk upon return (safe countries of origin, safe third countries, European Union Dublin regulation).[5]

III. State cooperation and responsibility for breaches of the prohibition of refoulement and related violations

3. Refoulement may form part of a close cooperation between states, such as in the context of extraordinary rendition programmes or memoranda of understanding in the field of immigration control. Where a State party exercises effective control in a third State in the context of such cooperation, relevant conduct falls within its jurisdiction (as noted in paragraphs 9 and 10 of the Draft), with the result that the State party may be responsible for a breach of Article 3 and other articles of the Convention. An example of this practice is Australia's policy of operating detention centres in Nauru and Papua New Guinea.[6] Cooperation may also take the form of a State party aiding and assisting a third State, which is acting in breach of the Convention, for example by handing over a person to be tortured by officials of a third State in order to obtain information.[7] In such instances, the State party may bear responsibility for complicity in the act(s) of torture, in addition to having breached Article 3 of the Convention.

IV. Nexus between refoulement and other violations of the Convention

4. We suggest that the Committee draws attention to the close nexus between measures taken in the context of refoulement and other violations of the Convention. Refoulement is frequently preceded by detention, which may give rise to a violation of the Convention, particularly where its prolonged, administrative nature causes a degree of psychological suffering that meets the

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[3] See in this respect Article 8 of the Draft articles on the expulsion of aliens, adopted by the International Law Commission at its sixty-sixth session, 2014, which prohibits deprivation of nationality for the purpose of expulsion, as well as Article 24, ibid. (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment). See further, with particular reference to the practice of the United Kingdom, Guy S. Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, Revised draft of a paper presented at a Seminar at Middlesex University on 14 February 2014.

[4] See James C. Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Journal of Transnational Law*, 53 (2015), 235-284.

[5] See on fast-track procedures, including the detention of torture survivors, *Detention Action v. Secretary of State for the Home Department* [2014] EWHC 2245 (Admin); *The Lord Chancellor v. Detention Action* [2015] EWCA Civ 840. For a detailed discussion of relevant practice in the European context, Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law*, (Oxford University Press, 2015), Chapter V.

[6] Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc. CAT/C/AUS/CO/4-5, 23 December 2014, para.17. See further The Senate, *Select Committee on the Recent Allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, August 2015.

[7] Hathaway and Gammeltoft-Hansen, above note 4, 276-82; Sarah Fulton, 'Cooperating with the enemy of mankind: can states simply turn a blind eye to torture', *The International Journal of Human Rights*, 16(5) (2012), 773-795.

threshold of Article 16 if not article 1 of the Convention.[8] The method of expulsion, particularly excessive use of force, may also constitute a form of ill-treatment in its own right, as recognised in the Committee's jurisprudence and the practice of other treaty bodies.[9] State cooperation, such as in the counter-terrorism context, may result in a violation of the prohibition of refoulement under Article 3 of the Convention and a violation, or violations, of other articles of the Convention (see paragraph 3 above).

5. The policies and measures referred to in paragraph 14 of the Draft, such as detention in poor conditions for indefinite periods[10] or rendering asylum seekers destitute,[11] may, in addition to resulting in refoulement, constitute violations of other obligations that States have accepted as parties to the Convention.

V. The application of the prohibition of refoulement to cruel, inhuman or degrading treatment or punishment

6. The Draft General Comment rightly underscores, in paragraphs 29 and 30, that the risk of the infliction of cruel, inhuman or degrading treatment or punishment is an indication of the risk of torture. This guidance is useful but does not specify whether exposure to the risk of ill-treatment other than torture may on its own constitute a violation of the Convention, here Article 16. The Committee has held that the norms enshrined in Articles 1-15 of the Convention apply to cruel, inhuman or degrading treatment or punishment under Article 16, even where the latter does not specifically refer to the article in question.[12] Applying the same rationale, and considering the position set out in its General Comment 2, we suggest that the Committee makes it clear that the prohibition of refoulement applies equally to ill-treatment other than torture under Article 16 of the Convention.

7. The European Court of Human Rights held in *Othman (Abu Qatada) v. United Kingdom* that exposing an individual to the risk of being subjected to a trial in which evidence obtained by

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[8] Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc. CAT/C/AUS/CO/4-5, 23 December 2014, para. 17: "The combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering." See also *F.K.A.G. et al. v. Australia*, Communication no. 2094/2011 (2013), para. 9.8, and *M.M.M. et al. v. Australia*, Communication no. 2136/2012 (2013), para. 10.7.

[9] Committee for the Prevention of Torture, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 24 October 2012*, CPT/Inf (2013) 14, para. 9; *Diory Barry v. Morocco*, Communication no. 372/2009, UN Doc. CAT/C/52/D/372/2009 (2014), para.7.2.

[10] See footnote 8 above.

[11] See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Grand Chamber, Judgment of 21 January 2011, paras. 249-264, and *Regina v. Secretary of State for the Home Department (Appellant), ex parte Adam (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant),ex parte Limbuela (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Tesema (FC) (Respondent) (Conjoined Appeals),* [2005] UKHL 66.

[12] Committee against Torture, *General Comment No.2: Implementation of article 2 by States parties*, UN Doc. CAT/CGC/2, 24 January 2008, para.3.

torture is admitted constitutes a flagrant violation of the right to a fair trial under the European Convention on Human Rights.[13] The General Comment provides an opportunity to draw on this jurisprudence and clarify that sending an individual to a country where he or she is facing the risk of being subjected to a trial in violation of Article 15 of the Convention, would be considered a breach of the prohibition of refoulement under the Convention.

VI. Preventive measures

8. The best practices recommended in paragraph 18 of the Draft constitute an important check-list for States parties and provide valuable guidance. We suggest that the Committee highlights that any failure to adhere to the best practices will be a factor to be taken into consideration when assessing compliance of a State party with its obligations under Article 3 of the Convention.

9. The Istanbul Protocol sets out internationally recognised standards in the documentation of torture. The General Comment would be strengthened by underscoring the central importance of the Istanbul Protocol in the determination of asylum claims and in the assessment of risk upon return, which would go beyond exhorting States parties to take the Istanbul Protocol into account, as provided for in paragraph 18(g) of the draft.

VII. Diplomatic assurances

10. Resort to diplomatic assurances in order to secure the transfer of individuals to States where they would be at risk of torture has been a highly problematic practice. The unequivocal rejection of such diplomatic assurances, as set out in paragraph 20 of the Draft, is an important safeguard for individuals who may be the objects of diplomatic assurances. It is also an important means of reminding States parties that they have committed themselves, in the words of the Convention's preamble "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." Making decisions concerning refoulement subject to special agreements between States on security grounds, where the receiving State is known to place individuals at risk of torture, compromises the broader object and purpose of the Convention.[14]

VIII. Redress and compensation

11. The Centre welcomes paragraph 20 of the Draft which highlights the potentially detrimental impact of expulsion of torture survivors, and clarifies States parties' obligations in this regard.

12. We suggest that the Committee expands on paragraph 21 of the Draft with a view to clarifying the scope of States parties' obligation to provide an effective remedy and reparation in case of a

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[13] *Othman (Abu Qatada) v. United Kingdom*, Application no. 8139/09, Judgment of 17 January 2012, paras. 183-207; 258-287.

[14] *Report of the Special Rapporteur on the question of torture*, *Manfred Nowak*, UN Doc. E/CN.4/2006/6, 23 December 2005, paras. 28-33.

breach of Article 3 of the Convention. The present draft puts emphasis on subsequent risk and torture, and on access to procedures that can prevent the risk from materialising or torture to continue. While such access is important, the text is silent on the consequences of a breach of the prohibition of refoulement under Article 3 of the Convention, including compensation, which is mentioned in the heading. A breach of the prohibition of refoulement constitutes a serious violation, which should entail appropriate forms of reparation.[15] This should include damages for the anxiety and psychological suffering caused by the refoulement, rehabilitation for the same, satisfaction and guarantees of non-repetition, both in the individual case and beyond in the form of legislative and other reforms of deficient procedures and practices.[16]

IX. Merits: medical examination of torture

13. The Committee rightly draws attention, in paragraph 43 of the Draft, to the importance of medical examinations as a safeguard against refoulement. We suggest that the Committee calls on States parties to use the Istanbul Protocol as standard in respect of medical examinations where an applicant alleges that he or she has been tortured. This includes guidance on the interpretation of findings according to which the "absence of … physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars."[17]

[15] *Agiza v. Sweden*, above note 2, paras. 13.6-13.7; *Alzery v. Sweden*, above note 2, para. 13; *Hirsi Jamaa and others v. Italy*, Application no. 27765/09, Grand Chamber, Judgment of 23 February 2012, para. 215; *M.S.S v. Belgium and Greece*, above note 11, paras. 407-411; *Pacheco Tineo Family v. Plurinational State of Bolivia*, Inter-American Court of Human Rights, Judgment of 25 November 2013 (Preliminary objections, merits, reparations and costs), Series C No. 272, paras. 277-285.

[16] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly Resolution 60/147 (2006).

[17] Istanbul Protocol, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1999, para. 161.