



World Organisation Against Torture (OMCT)

Rue du Vieux Billard 8, CP 21, 1211 Geneva 8, Switzerland

Tel: 0041 22 809 4939, Fax: 0041 22 809 4929

Email: omct@omct.org, Internet: www.omct.org

Submission by the World Organisation Against Torture (OMCT)

United Nations Committee Against Torture regarding

Draft General Comment No.3

A. General remarks

The World Organisation Against Torture (OMCT) welcomes the opportunity to contribute to the draft General Comment No.3 of the United Nations Committee Against Torture on the obligations of state parties under article 14 of the UN Convention Against Torture.

The following observations are based on OMCT's experience in providing personalized legal, medical and social assistance to victims of torture and cruel, inhuman or degrading treatment or punishment. They are equally based on its long-standing engagement in submitting alternative reports to the UN Committee Against Torture, in cooperation with the members of its global SOS Torture network.

Article 14 CAT is a cornerstone of the Convention playing a fundamentally important role, both for ensuring that victims of torture do enjoy their right to remedy and reparation and for the prevention of torture and ill-treatment. Unfortunately, we see in our daily work that victims of torture and ill-treatment face multiple challenges in law and/or practice when they seek to access their right to remedy and reparation.

We therefore welcome the draft general comment which can provide vital guidance to States Parties in implementing the guarantees enshrined in article 14 CAT.

In this regard, the OMCT expresses its appreciation for the scope and depth of draft general comment No. 3 and its interpretation in light of broader general international law. We welcome in particular the endorsement of the overriding concept of the right to remedy and reparation as well as the clarification that the right to redress entails both substantive and procedural obligations. The OMCT equally applauds the

Committee for having defined rehabilitation as a holistic concept, including social, legal and medical rehabilitation. In this regard it is vital to stress that rehabilitation must be voluntary and that victims of torture must have confidence into rehabilitation schemes they can access.

This submission addresses a few selected areas in which the present draft general comment could be strengthened further, inter alia, by:

- Recognising the special **vulnerability of children** subjected to torture and other forms of ill-treatment;
- Highlighting impediments to the right to remedy and reparation in many state parties as a result of **national security or counter-terrorism laws**, including lacking control and oversight over the intelligence community (including in its international cooperation);
- A clarification that the obligations under article 14 CAT can involve more than one state in cases of **complicity in torture or ill-treatment**;
- Explicit references to state obligations in relation to **private military and security operators**, to prevent repetition and to ensure an effective access to remedy and to reparation;
- Strengthening references to the **judicial nature of the required remedies** in case of redress for acts of torture or ill-treatment;
- The duty of state parties who have accepted the jurisdiction of the Committee in **individual communications** to cooperate with the procedure and the provision of remedies and reparation as indicated in these decisions.

B. Specific remarks:

I. Remedy and reparation of children

Based on the experience of its Child Rights Activities with regard to torture and ill-treatment perpetrated against children, its causes and consequences,¹ the OMCT would like to suggest the members of the Committee to bring further emphasis on child victims' special needs in the final version of the General Comment n°3.

¹ OMCT, Children, Torture and other forms of Violence. Facing the Facts, Forging the Future, International Conference in Tampere, Finland, Nov.-Dec. 2001.

Due to their condition (age, physical and mental immaturity), children are a vulnerable group with the need for special protection, including legal safeguards.² It is generally recognized that child victims of torture and cruel, inhuman or degrading treatment or punishment may suffer particular grave consequences.³ This may include both short and long-term consequences on their health, development and behaviour as well as stigmatisation and interruption of education or training.⁴ Despite some progress in the recent years, children still generally have little awareness and influence to defend their rights. Even more than adult victims, they encounter difficulties, due to their immaturity, to comprehend what happened to them and why they have been tortured or ill-treated. Moreover, reporting, complaints and judicial procedures rarely match the needs of the children which make them feel largely insecure and afraid.⁵

Therefore, the OMCT would like to suggest the Committee to further take into account the following rights and principles into its General Comment:

The best interests of the child victim: Article 14 CAT should be interpreted in light of the principle of the best interest of the child as reflected in Article 3 CRC. The UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime provide further guidance stating that “every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development”.⁶ The UNHCR Guidelines on Determining the Best Interest of the Child specify further that this principle requires that measures are taken to ensure that due attention is given to the specific situation and protection risks of children.⁷

² Declaration proclaimed by the UN General Assembly Resolution 1386 (XIV), Preamble, November 20, 1959, U.N. Doc. A/4354; Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, at para. 56, Case of the Ituango Massacres, para. 244, Case of the “Mapiripán Massacre”, para. 152, Case of the Gómez Paquiyauri Brothers, para.163, and Case of the “Juvenile Reeducation Institute”, para.147 in Mónica Fera Tinta, The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child, 2008, p. 367; UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, para. 7(b).

³ Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, U.N. Doc E/CN.4/1996/35, §10.

⁴ OMCT, Children, Torture and other forms of Violence. Facing the Facts, Forging the Future, International Conference in Tampere, Finland, Nov.-Dec. 2001, p. 48; UN Committee on the Rights of the Child, General Comment n°13, The right of the child to freedom from all forms of violence, CRC/C/GC/13, 2011, para. 15(a),(b).

⁵ OMCT, Children, Torture and other forms of Violence. Facing the Facts, Forging the Future, International Conference in Tampere, Finland, Nov.-Dec. 2001, p. 66; REDRESS, Victims of Torture and Access to Justice, available on IRCT web site: http://www.irct.org/Files/Filer/IPIP/training/Victims_and_Acces_to_Justice-Primer.pdf.

⁶ UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, para. 8 (c).

⁷ UNHCR Guidelines on Determining the Best Interest of the Child, p.20.

The right to participation of the child victim: Based on article 12 of the UN Convention on the Rights of the Child,⁸ the UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime state that “Every child has [...] the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.”⁹

Child-sensitiveness: This principle includes positive measures to provide the child victims with effective access to all procedures and services. “‘Child-sensitive’ denotes an approach that balances the child’s right to protection and that takes into account the child’s individual needs and views.”¹⁰

In application of these principles, the OMCT suggests that the General Comment include guidance to the States parties on child victims’ access to justice, involvement in judicial proceedings and specific rehabilitation:

Access to justice of child victims of torture and ill-treatment requires reporting mechanisms that provide information, facilitate the participation of child victims in the proceedings, establish support services and train relevant personnel about their special needs. Appropriate reporting mechanisms should be safe, well-publicized, confidential and accessible to children.¹¹ There should be a duty to notify any act or risk of act of violence for the professionals who come into contact with children.¹² The procedural framework should facilitate access to special support, including their prompt and adequate information, their treatment in a child-friendly and sensitive manner, the free access to the services and the special support of competent professionals.

Involvement in judicial procedures requires an adjustment of the procedural framework for accommodating children’s needs and that justice officials ensure that the following rights and principles are respected: the best interests of the child, the right to privacy and confidentiality, the right to prompt and adequate information, the treatment in a child-friendly and sensitive manner, the right to be assisted, the right to be heard and the right to safety (the decision to separate a child victim from his/her parents or family environment should be taken only when it is his/her best interest). Moreover, so that a child victims actually take part in the proceedings, they

⁸ Article 12 of the UN Convention on the Rights of the Child has been explained into details by the Committee of the Rights of the Child in its General Comments n°12 (2009) The right of the child to be heard, CRC/C/GC/12. See in particular paragraphs 62 to 64 on the right to be heard of the child victim and child witness.

⁹ UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, para. 8 (d).

¹⁰ UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, para. 9 (d) and 14.

¹¹ UN Committee on the Rights of the Child, General Comment n°13, The right of the child to freedom from all forms of violence, CRC/C/GC/13, 2011, para. 49 and next.

¹² Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, para. 33; Justice in Matters involving Child Victims and Witnesses of Crime, Model Law and related Commentary, article 3.

should be as short as possible, involve specialised services that are freely accessible as well as special support professionals whose role is to accompany the child victims.¹³ It is also of utmost importance that the child victim is not re-victimised or re-traumatised neither considered as an offender (this is too often the case for child victims of commercial or sexual exploitation and when children who are accused of having committed an offence are subject to ill-treatment while in the hand of the law enforcement officials).

Specific rehabilitation: The States parties should provide universal, free, accessible and child-sensitive health and social services to the child victims, and where appropriate, to their families. According to article 39 of the Convention on the Rights of the Child, rehabilitation of child victims includes physical and psychological recovery as well as social reintegration where the child's view should be given due consideration. For more than any other victims, the magistrates and the social services should prefer educational measures that improve attitudes, competencies and behaviours of the child victims. As far as possible, the rehabilitation of the child victims should be provided with the participation of the child family and community. When a placement appears indispensable, it should always be decided in accordance with the best interests of the child victim and the placement should never be in justice facilities. As far as possible, the child victims should stay with his/her family or inside his/her community, unless this is not in his/her best interests.

II. National security and counter-terrorism

The OMCT submits that the draft general comment No.3 should duly reflect the various challenges to an effective right to redress witnessed in the context of national security and/or counter-terrorism laws and policies.

This would provide vital guidance to State parties in ensuring effective redress and in ensuring the non-repetition of such violations. In light of the experiences not only over the last decade with national security and counter-terrorism laws this general comment should reiterate that the right to an effective remedy and reparation needs to be vigilantly upheld also when states are confronted with national security threats, such as terrorist acts. The right to remedy and reparation is inherent in the absolute prohibition of torture itself and it should apply at all times, including during war or publicly declared states of emergency. Such reference would be a useful as the lack of accountability for torture risks undermining the universal prohibition of torture by de facto distinguishing between 'guilty' and 'innocent' victims of torture and ill-treatment.

¹³ Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, para. 18-34; Justice in Matters involving Child Victims and Witnesses of Crime, Model Law and related Commentary, article 4; UN Committee on the Rights of the Child, General Comment n°13, The right of the child to freedom from all forms of violence, CRC/C/GC/13, 2011, para. 54.

Non-repetition and intelligence services:

The OMCT suggest that the draft addresses in particular the importance to ensure effective oversight and control over intelligence services, including its cooperation with third countries.

There is a compelling body of evidence, including in reports considered by the Committee Against Torture, that the turn to an intelligence paradigm to national security and its cooperation with other countries have resulted in acts of torture, cruel and inhuman or degrading treatment, or in complicity therein.¹⁴

It is in this context that remedies and reparation typically prove illusory and remedies that may exist on paper are tremendously difficult to enforce in practice. The OMCT therefore suggests integrating into the section on non-repetition a specific reference regarding civilian oversight mechanisms vis-à-vis intelligence services, including regarding their international cooperation with other services.¹⁵

It also considers that in line with emerging best practice there should be a reference that in principle law enforcement and intelligence tasks should remain separated, and intelligence services should as a rule not have separate detention powers.¹⁶ This

¹⁴ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, 4. February 2009, U.N. Doc A/HRC/10/3, § 69; Report of the Eminent Jurist Panel on Counter-Terrorism, Terrorism and Human Rights, 2009, (ICJ Geneva 2009), 'Assessing Damage, Urging Action', chapter IV, part 5, p. 89 et seq. with numerous country examples. On the issue of extraordinary renditions and secret detention as a global phenomena, see UN Human Rights Council, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: 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' (26 January 2010) UN Doc A/HRC/13/42 (Secret Detention Study 2010); Council of Europe Parliamentary Assembly, 'Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States' (12 June 2006) Doc 10957 (PACE Secret Detentions Report 2006); Council of Europe Parliamentary Assembly, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report' (11 June 2007) Doc 11302 rev (PACE Secret Detentions Report 2007); European Parliament, 'Draft Report of the Temporary Committee on the Alleged use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (24 November 2006) Doc 2006/2200 (INI) (Draft Report of the Temporary Committee 2006); European Parliament, 'Resolution on the Alleged use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners' (14 February 2007) P6 TA PROV (2007) 0032 (European Parliament Resolution on Detention 2007).

¹⁶ Report of the Eminent Jurist Panel on Counter-Terrorism, Terrorism and Human Rights, 2009, (ICJ Geneva 2009), 'Assessing Damage, Urging Action', chapter IV, part 5, p. 89. UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Compilation of Good Practices on Legal and Institutional Framework and Measures that Ensure Respect for Human Rights by Intelligence Agencies While Countering Terrorism, Including Their Oversight' (5 May 2010) UN Doc A/HRC/14/46 14 (Good Practices Study).

would constitute an important safeguard against the repetition of torture and ill-treatment.

National security doctrines and redress:

The access to the right to an effective remedy and reparation has been impeded in particular in relation to the invocation of national security exceptions, such as state secrecy and other similar doctrines (national security, foreign relations, special circumstances or considerations, etc.).¹⁷

The OMCT welcomes the recognition of this element in the draft general comment. It suggests, however, expanding on these references to provide more detailed guidance. This should indicate that state secrecy and other national security invocations must serve a legitimate national security interest in the first place (preventing embarrassment or accountability for wrong-doing, serious human rights violations or crimes under international law is never legitimate), that there must be an effective process to independently assess the veracity of such invocations, and to the extent that there are legitimate security interests involved, to ensure that they are not having the intent or effect of depriving the victim of torture of the essence of his/her right to an effective remedy and reparation.

Moreover, there are a great variety of additional doctrines or legal measures that have resulted in impunity for torture and in a lack of effective remedy and reparation. These include, amongst others, typically the lack of access to an independent civilian judicial remedy, good faith clauses, reliance on legal advice or impediments such as the need to seek permission for remedies against members of the military or other security forces.

Multiple states/complicity/international cooperation:

Recent years have illustrated that states can engage cooperatively into practices of torture or cruel, inhuman or degrading treatment or punishment. It is suggested that the general comment therefore clarifies that the obligation to provide redress can incur on more than one state in situations in which agents of another state have

¹⁷ Report of the Eminent Jurist Panel on Counter-Terrorism, Terrorism and Human Rights, 2009, (ICJ Geneva 2009), 'Assessing Damage, Urging Action' chapter IV, part 5. UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Compilation of Good Practices on Legal and Institutional Framework and Measures that Ensure Respect for Human Rights by Intelligence Agencies While Countering Terrorism, Including Their Oversight' (5 May 2010) UN Doc A/HRC/14/46 14 para 21 (Good Practices Study).

committed, authorized, participated in or were otherwise complicit in acts of torture.¹⁸

In the same context, states should ensure as a means of non-repetition that its intelligence and law enforcement services do not rely on information obtained by another state by means of torture and that there is an effective legal framework that prevents against possible complicity.¹⁹

In the broader context of international cooperation, the OMCT suggests furthermore to add to the duty to extradite or prosecute a reference that states should cooperate in investigations and judicial proceedings through the provision of mutual legal assistance.²⁰

III. Private security and military operators

An issue so far unaddressed in the draft General Comment is the proliferation of private military or security companies who are operating in and outside of armed conflicts. This has raised multiple practical and legal challenges for individuals subjected to torture and ill-treatment in enjoying their effective right to remedy and reparation. This has been further complicated in when private security operators are not based in the country they are operating.

The issue has been raised as states are increasingly relying on services provided by private military and security companies (PMSCs) in areas generally understood as *intrinsic functions* of the State.²¹ As the Committee has recognized in its General Comment No.2 States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State Party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that

¹⁸ See article 4 CAT; see also Responsibility of States for internationally wrongful acts, U.N. General Assembly, A/RES/56/83, 28 January 2002 and Prosecutor v Anto Furundzija, (Judgment of the Trial Court) IT-95-17/1-T (1998), 121 ILR 213, § 42.

¹⁹ Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Juan E. Méndez, 3. February 2011, U.N. Doc A/HRC/16/52, § 58; see Report of the Eminent Jurist Panel on Counter-Terrorism, Terrorism and Human Rights, 2009, (ICJ Geneva 2009), 'Assessing Damage, Urging Action', chapter IV.

²⁰ See European Court of Human Rights, Rantsev v Cyprus & Russia, ECHR, Application No. 25965/04, 7 January 2010, § 289.

²¹ MEDEA Group, Innovative Security and Development, *Private Military and Security Companies: State Sponsorship, Use of Force Violations and International Human Rights*, June 2007, p.13.

engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.²²

Moreover, in cases in which private security companies are providing security functions to protect private or business interests, including outside their jurisdiction, the OMCT encourages the Committee to emphasise in draft General Comment No. 3 the need of States (including the state of origin of the security company) to provide an effective legal and administrative framework to prevent violations by private security actors and to ensure that victims of such violations have effective access to remedies and are able to receive adequate compensation or reparation.²³ In this regard, the OMCT encourages the Committee to draw inspiration from the emerging framework of the UN Human Rights Council on the state obligation to prevent and protect²⁴ and the responsibility of private security companies to respect the rights of others under international human rights law.²⁵

IV. The nature of remedies as judicial remedies

The OMCT welcomes the strong references to the concept of accessible and effective remedies. It would like to encourage highlighting in the draft general comment the importance of judicial remedies in relation to torture and ill-treatment.

While other mechanisms, such as national human rights commissions or ombudspersons, may provide in some countries useful avenues for redress, they are typically non-judicial and non-binding. The OMCT considers that the draft general comment should contribute to the emerging consensus that violations of the crime of torture do require in fact a judicial remedy, whereas other remedies may play a complementary role.

In a similar token, the OMCT would welcome the inclusion of references not only to the role of the police but also to the responsibilities of the prosecuting authorities.

V. Committee's individual views/decisions

²² UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para. 15. See also The Montreux Document, *On pertinent international legal obligations and good practices for States related to operations of private military companies during armed conflict*, DFAE, ICRC, August 2009, p.11.

²³ The Montreux Document, *On pertinent international legal obligations and good practices for States related to operations of private military companies during armed conflict*, DFAE, ICRC, August 2009, p.11.

²⁴ United Nations, The UN "Protect, Respect and Remedy" Framework for Business and Human Rights, September 2010, p.1.

²⁵ Ibid.

Finally, the OMCT would like to draw the Committee's attention to the important role that its own individual communication system plays for victims' right to remedy and reparation.

The Committee may recall the importance of ensuring access to the international communication procedures and the importance to ensure that those who use international remedies are safe from any reprisal (victims, families or other persons that may provide information relevant for the proceedings). In order to strengthen the implementation of article 14 CAT states should be encouraged to submit to the system of individual communications; to provide within state reports information on how decisions are implemented, notably how it has given effect to the required remedies and measures of reparation indicated by the Committee in its case work. The Committee may also recall that providing for domestic reception of its own decisions in domestic law (including by allowing the reopening of legal proceedings following the decisions of the committee) constitutes a particularly faithful implementation of the Convention that would foster the provision of remedies and reparation.

Annex: Possible amendments to draft General Comment No.3.