

PART IV

JURISPRUDENCE OF THE CAT COMMITTEE



In this part, we analyse the jurisprudence developed by the CAT Committee under the CAT. It is likely that the CAT Committee will be influenced by the precedents of the HRC in areas where it has not yet itself commented on a relevant issue. Likewise, the HRC can be expected to be influenced by the decisions of the CAT Committee.

4.1 Definition of Torture

Article 1 of CAT states:

“For the purposes of this Convention the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions.”

The CAT Committee has found the following acts to constitute torture in Article 22 cases:

- Victim was handcuffed to a radiator then kicked and punched by several police officers, who also racially insulted him. He was also struck with a big metal bar. He was later unfastened from the radiator and handcuffed to a bicycle, after which the punching and beatings continued with nightsticks and the metal bar. The beatings were so bad they caused the victim to bleed from his ears. The detention and beatings lasted for 5 and a half hours.⁵⁹⁹
- Victim repeatedly beaten with a baseball bat and steel cable, and kicked and punched all over his body. He lost consciousness on several occasions. The ill-treatment lasted, with only a few breaks, for 13 hours, leaving him with numerous injuries on his buttocks and left shoulder. As a result, he spent the next ten days being nursed in bed.⁶⁰⁰

⁵⁹⁹ *Dragan Dimitrijevic v. Serbia and Montenegro* (CAT 207/02), §§ 2.1, 5.3.

⁶⁰⁰ *Dimitrov v. Serbia and Montenegro* (CAT 171/00), §§ 2.1, 7.1.

- Victim was stripped to his underwear, and handcuffed to a metal bar, whilst being beaten with a police club for approximately one hour, and spending the next three days in the same room, being denied food, water, medical treatment, and access to the lavatory.⁶⁰¹

The CAT Committee has also specified in Concluding Observations that the following treatment constitutes torture:

- A combination of the following: restraining in painful positions, hooding, sounding of loud music for prolonged periods, prolonged sleep deprivation, threats including death threats, using cold air to chill, and violent shaking.⁶⁰²
- Beating by fists and wooden or metallic clubs, mainly on the head, the kidney area and on the soles of the feet, resulting in mutilations and even death in some cases.⁶⁰³

In Concluding Observations, the CAT Committee has indicated a number of breaches of the CAT without specifying whether the treatment is torture or other ill-treatment. It is submitted that the following treatment might be so severe as to contravene Article 1:

- Uninformed and involuntary sterilization of Roma women.⁶⁰⁴
- Interrogation techniques, using a combination of sexual humiliation, “water boarding”,⁶⁰⁵ “short shackling”,⁶⁰⁶ and the use of dogs to induce fear.⁶⁰⁷

601 *Danilo Dimitrijevic v. Serbia and Montenegro* (CAT172/00), §§ 2.1, 2.2, and 7.1

602 Concluding Observations on Israel, (1997) UN doc. A/52/44, § 257.

603 Concluding Observations on Yugoslavia, (1999) UN doc. A/54/44, § 47.

604 Concluding Observations on the Czech Republic, (2004) UN doc. CAT/C/CR/32/2, § 5. *A.S. v. Hungary*, Comm. No. 4/2004, Comm. on the Elimination of Discrimination against Women (14 August 2006).

605 Waterboarding “involves strapping detainees to boards and immersing them in water to make them think they are drowning”: Jon M. Van Dyke, “Promoting Accountability for Human Rights Abuses” (2005) 8 *Chapman Law Review* 153, at p. 175.

606 ‘Short shackling’ is “an uncomfortable position where the detainee’s hands and feet are tied together for long periods of time”: B. Gasper, ‘Examining the Use of Evidence obtained under Torture: the case of British detainees may test the resolve of the European Convention in an era of Terrorism’ (2005) 21 *American University International Law Review* 277, at p. 297, n84.

607 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 24.

4.1.1 Absolute Prohibition of Torture⁶⁰⁸

Article 2(2) of CAT affirms the absolute nature of this provision:

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Therefore, torture is not allowed in any situation. In recent Concluding Observations on the U.S., the CAT Committee confirmed that the CAT “applies at all times, whether in peace, war or armed conflict ... without prejudice to any other international instrument”.⁶⁰⁹

Under Article 2(3), no one may invoke an order from a superior officer or a public authority as a justification for resort to torture.

The absolute nature of the prohibition on torture was confirmed in Concluding Observations on Israel in 1997. Israel had attempted to defend its use of certain interrogation techniques as a necessary means of combating terrorism, claiming that such methods had “thwarted ninety planned terrorist attacks saving countless lives”.⁶¹⁰ The CAT Committee nevertheless found that the interrogation methods were inhuman or degrading, and in combination amounted to torture. Though the CAT Committee:

“acknowledge[d] the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, [Israel] is precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1.”⁶¹¹

4.1.2 Aspects to Definition of Torture in Article 1

As with Article 7 of the ICCPR, the CAT prohibits torture, as well as cruel, inhuman or degrading treatment or punishment in Article 16. Nevertheless, the

608 See Section 1.1 for general overview of the absolute nature of the prohibition.

609 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 14. The U.S. had tried to argue that the CAT did not apply in times of armed conflict, as that situation was exclusively covered by international humanitarian law.

610 See Israel’s Second Periodic Report under the Convention Against Torture, (1996) UN doc. CAT/C/33/Add.2/Rev. 1, especially at §§ 2-3, and 24.

611 Concluding Observations on Israel, (1997) UN doc. CAT/C/18/CRP1/Add. 4, § 134. See also Concluding Observations on Israel, (2002) UN doc. A/57/44 (2002) § 53.

definition of torture is significant, as greater legal consequences follow from an act of torture under CAT than follow from the perpetration of other forms of ill-treatment.⁶¹² Therefore, it is important to go through the constituent elements of the Article 1 definition.

a) Pain and Suffering

The pain or suffering must be severe and may be physical or mental in nature.⁶¹³

b) Intention

The perpetrator must intend to cause the high level of pain and suffering in order for it to be classified as “torture”. It may be sufficient if one is reckless as to whether one is causing extreme pain and suffering. It will not suffice for one to be negligent over whether one is causing extreme pain and suffering. Therefore, an act will not ordinarily constitute torture if that same act is unlikely to cause great suffering to an ordinary person, as the perpetrator is unlikely to have the requisite intention to cause extreme pain. If however the perpetrator is aware of the particular sensitivities of the victim, then the relevant act may constitute torture.⁶¹⁴

c) Purpose

Article 1 requires that there be a “purpose” for the act of torture, and provides a non-exhaustive list of relevant purposes. The “purpose” requirement is distinguishable from the requirement, discussed above, of “intention”. The “intention” requirement relates to an intention to inflict pain and suffering, whereas the requirement of a “purpose” relates to the motivation or the reason behind the infliction of that pain and suffering.⁶¹⁵ In order to maximise the protection offered by Article 1, it is submitted that any malicious purpose should fulfil this requirement.⁶¹⁶ However, Nowak suggests that the CAT may not

612 These legal consequences are noted below. For example, universal jurisdiction only attaches to torture (see Section 4.8).

613 See e.g., Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 29.

614 Joseph, Schultz, and Castan, above note 31, § 9.07.

615 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, pp. 124-5.

616 Joseph, Schultz, and Castan, above note 31, §§ 9.09-9.10.

provide this degree of coverage: “if one person intentionally mistreats another person severely without thereby pursuing some purpose (e.g. purely sadistically), such acts are not torture but are rather cruel treatment”.⁶¹⁷ The CAT Committee has not confirmed whether it adopts such a strict view of the “purpose” criterion.

d) Acts and Omissions

It seems likely that the definition extends to both acts and omissions.⁶¹⁸ For example, the long term deliberate withholding of food should satisfy the definition.

e) Public Officials or Persons Acting in an Official Capacity

Article 1 requires that torture be “inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity”. This requirement is intended to protect States from being held accountable for acts over which they have no control. However, this provision should not be used to absolve States from their responsibility in cases where they have abjectly failed to take reasonable steps to respond or prevent acts of torture. The definition contains four levels of involvement which may render an official implicit in the act of torture. Those levels, in order of level of involvement (from highest to lowest), are:

- infliction
- instigation
- consent
- acquiescence

Interpretation of these levels of involvement, particularly the lowest level of “acquiescence”, are crucial when the actual torture is perpetrated by a non-State actor. The meaning of “acquiescence” arose in *Dzemajl et al v. Yugoslavia* (CAT 161/00). The case concerned inhuman or degrading

617 Nowak, above note 97, p. 161.

618 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, p. 120; A. Boulesbaa, *The UN Convention against Torture and the Prospects for Enforcement*, Martinus Nijhoff, 1999, p. 15; Joseph, Schultz, and Castan, above note 31, § 9.08.

treatment under Article 16 rather than torture under Article 1; the “public official involvement” requirements for Article 16 are identical to those in Article 1 (see Section 4.2). In *Dzemajl*, the victims were Romani residents of a Roma settlement. Two Roma minors had confessed (under alleged duress) to raping a local Montenegrin girl. This incident sparked extreme racial violence against the victims. The residents of the settlement were warned by police to leave their homes, as their safety could not be ensured. Several hours later, at least three hundred non-Roma residents assembled in the settlement shouting that they were going to raze the settlement. The crowd soon began destroying everything in the settlement with arson (including the use of Molotov cocktails) and stones. The local police were clearly aware of the risk to the Roma residents and were present as the settlement was destroyed. The police failed to protect the Roma residents, or to stop the violence and destruction of their settlement. Ultimately, the settlement and all of the possessions of the Roma residents were completely destroyed. The CAT Committee found that the complainants had suffered cruel, inhuman or degrading treatment.⁶¹⁹ The police, as public officials, knew of the immediate risk and watched the events unfold. Their failure to take any appropriate steps to protect the complainants and their property was found to constitute “acquiescence” in the perpetration of the ill-treatment.

In *Agiza v. Sweden* (CAT 233/2003), the complainant suffered a breach of his Article 16 rights entailed in his treatment during an enforced deportation from Sweden to Egypt by U.S. agents.⁶²⁰ The complaint, however, was against Sweden rather than the U.S.⁶²¹ The CAT Committee found that the Swedish authorities had willingly handed the complainant, a terrorist suspect, over to U.S. authorities, and had acquiesced in the ill-treatment of the complainant at a Swedish airport, and on the subsequent flight to Egypt.⁶²²

If there is no government involvement in an act of torture or ill-treatment, then there is no violation of CAT. In *G.R.B v. Sweden* (CAT 83/97), the complainant claimed that if she was deported to Peru she would face the risk of torture from a Peruvian rebel group. Therefore, she argued that her deportation would breach Article 3 of the Convention. The Committee found that

619 *Dzemajl v. Yugoslavia* (161/00), §§ 3.6-3.8, 8.8-8.13, 9.2.

620 See Section 4.3.8.

621 The U.S. has not made a declaration under Article 22 CAT, so it was not possible for the complainant to make an individual complaint against the U.S. under the CAT.

622 *Agiza v. Sweden* (CAT 233/2003), § 13.4.

Article 3, which prohibits deportation to a State where one might face torture,⁶²³ was not activated by this claim as torture by Peruvian non-government rebel groups did not constitute torture in accordance with Article 1. The Peruvian government could not be said to “acquiesce” in the acts, or future acts, of a terrorist group that it was actively fighting against.⁶²⁴

There has been much debate in recent decades over the classification of domestic violence as torture and ill-treatment. It is now generally accepted that domestic violence often entails extreme physical and psychological suffering.⁶²⁵ However, the issue of “state involvement” is regarded as the biggest challenge in re-conceptualising domestic violence as torture; domestic violence has tended “to be viewed as a private matter between spouses rather than a state problem”.⁶²⁶ However there is a duty upon law enforcement officials to prevent harm being inflicted upon women, including harm which occurs in a domestic context.⁶²⁷ This approach to domestic violence has been accepted by the CAT Committee which has condemned “the prevalence of violence against women and girls, including domestic violence” in Concluding Observations.⁶²⁸

It may be noted, regarding the rights of women under CAT, that the CAT Committee has consistently expressed concern over the absence of legislation

623 Article 3 is considered in greater detail below at Section 4.3.

624 See also *S.V. v. Canada* (CAT 49/96) (fear of abuse from Tamil groups upon return to Sri Lanka); *Rocha Chorlango v. Sweden* (CAT 218/02) (fear of rebel groups in Ecuador). In *Elmi v. Australia* (CAT 120/98), a prospective deportee argued that his deportation to Somalia would expose him to a real risk of torture by Somalian militia groups. The Committee found that the group in question was exercising “certain prerogatives that are comparable to those normally exercised by legitimate governments” (§ 6.5) and thus fell within the definition of “public official or persons acting in official capacity” required by Article 1. The situation in *Elmi* was unique in that Somalia had no recognized government at the time of the consideration of the complaint. In more recent cases, the CAT Committee has found that the situation in Somalia has changed to the extent that a central government is now identifiable, so local clan militias no longer classify as ‘public officials’ for the purposes of Article 1. Therefore, the risk of torture by such clan militias will no longer activate protection under CAT unless the government is somehow involved in such acts of torture (see *H.M.H.I. v. Australia* (CAT 177/01)).

625 See also Section 3.2.13; see also CEDAW General Recommendation No. 19, particularly § 23.

626 D. Miller, “Holding States to their Convention Obligations”, (2003) 17 *Georgetown Immigration Law Journal* 299, p. 318.

627 A. Montavon-McKillip, “CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law”, (2002) 44 *Arizona Law Review* 247, p. 254.

628 See e.g., Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, § 5 (see also § 4). See also Concluding Observations on Ecuador, (2006) UN doc. CAT/C/ECU/CO/3, § 17; See also Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, § 6; Concluding Observations on Bahrain, (2005) UN doc. CAT/C/CR/34/BHR, §§ 6-7; Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 27.

banning female genital mutilation ('FGM') in a number of States parties. These comments indicate that such an absence of legislation, or an absence of the enforcement of such legislation, amounts to "acquiescence" of FGM by State agents.⁶²⁹ Furthermore, the permissibility of perverse defences to acts of torture or ill-treatment, such as exemption from punishment for a rapist if he marries the victim,⁶³⁰ may also constitute "acquiescence". Finally, official involvement in or toleration of the trafficking and exploitation (including sexual exploitation) of trafficked women breaches CAT.⁶³¹

In regard to private acts of torture, the CAT is possibly narrower than the ICCPR due to the explicit requirement of some minimum level of involvement by a public official. Under Article 7, States parties are required to take reasonable measures to prevent and punish acts of torture and other ill-treatment by persons acting in a private capacity.⁶³² It is possible, though uncertain, that the level of government involvement required under Article 7 is less than the standard of "acquiescence", the minimum threshold required under CAT.

f) Pain or Suffering Inherent in or Incidental to Lawful Sanctions

Pain or suffering that occurs as a result of a "lawful sanction" is expressly excluded from the definition of torture in Article 1. This raises the question of whether a sanction which is lawful under the domestic law of a State, which gives rise to pain or suffering which would otherwise amount to torture, is excluded from Article 1. For example, it is assumed that burning at the stake, or crucifixion, amount to torture. Would such punishments be excused from being classified as torture simply because they were prescribed as legitimate punishments in a State's law? A preferable interpretation of this exclusion is that the meaning of "lawful" in this context denotes compliance with international law standards. Sanctions which fail to conform to international standards should fall outside of this exclusion so that they can be classified as torture under Article 1.⁶³³ Such an interpretation would prevent States from avoiding liability for acts of torture by prescribing them as lawful under their domestic

629 See e.g., Concluding Observations on Cameroon, (2004) UN doc. CAT/C/CR/31/6, § 7.

630 Concluding Observations on Cameroon, (2004) UN doc. CAT/C/CR/31/6, § 9.

631 Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 32; see also Concluding Observations on Austria, (2005) UN doc. CAT/C/AUT/CO/3, § 4; Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, § 4.

632 Section 3.1.2.

633 Joseph, Schultz, and Castan, above note 31, § 9.18.

legislation. The importance of the interpretation of this exception is highlighted in the case of some Islamic countries which have sought to prescribe certain punishments arising under Islamic *shariah* law, including corporal punishments, in their domestic legislation.⁶³⁴ It may be that “the role of the “lawful sanctions” exclusion is very restricted; its role may be solely to clarify that “torture” does not include mental anguish resulting from the very fact of incarceration.”⁶³⁵ However the issue is not resolved, and it may be that this exception exempts even the cruellest treatment from classification as “torture” if such treatment is authorised by domestic law.⁶³⁶

This exception regarding “lawful sanctions” does not apply beyond torture to cruel, inhuman or degrading treatment or punishment under Article 16. In Concluding Observations, the CAT Committee has commonly classified *shariah* punishments as breaches of the Convention, but it has failed to specify whether the breaches were of Article 1 or 16.⁶³⁷

4.2 Cruel, Inhuman Or Degrading Treatment Under CAT

Article 16 of CAT states:

“Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular the obligations contained in articles 10, 11, 12, and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”

634 C. Ingelse, *The UN Committee against Torture: An Assessment*, Martinus Nijhoff, 2001, pp.213-214.

635 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, p. 119.

636 J. van der Vyer, “Torture as a crime under International Law” (2003) 67 *Albany Law Review* 427, p. 432.

637 See, e.g., Concluding Observations on Saudi Arabia, (2002) UN doc. CAT/C/CR/28/5, § 100; Concluding Observations on Yemen, (2004) UN doc. CAT/C/CR/31/4, § 6; Concluding Observations on Egypt, (2002) UN doc. CAT/C/CR/29/4 A/58/44, § 39.

The types of treatment that constitutes cruel, inhuman or degrading treatment are not defined under Article 16. The requirement that the acts be committed with a degree of involvement by a public official or person acting in an official capacity is expressed in a similar manner to the analogous requirement under Article 1. The other Article 1 requirements regarding severity, intention and purpose are presumably applied more leniently, if at all, in determining whether a breach has occurred.⁶³⁸ For example, negligent acts may constitute breaches of Article 16 but not acts of torture under Article 1.

A breach of Article 16 does not attract the same consequences under CAT as a breach of Article 1. For example, many of the subsidiary obligations, such as the obligation to impose criminal sanctions for torture under Article 4, do not explicitly apply to Article 16. Only the ancillary obligations in Articles 10 to 13 expressly apply to ill-treatment which falls short of torture.⁶³⁹ However, the CAT Committee may extend obligations outside Articles 10-13 to Article 16 treatment by implication.⁶⁴⁰

In *Dzemajl et al v. Yugoslavia* (CAT 161/00), the CAT Committee found that the burning and destruction of the complainants' houses and possessions constituted acts of cruel, inhuman or degrading treatment.⁶⁴¹ Aggravating factors in the circumstances were that some of the complainants were still hidden in the Roma settlement when the destruction began, and the high degree of racial motivation driving the attacks.

In *Agiza v. Sweden* (CAT 233/2003), the CAT Committee found that the complainant had suffered breaches of his Article 16 rights on his enforced flight from Sweden to Egypt accompanied by U.S. agents. For the flight, he had been hooded, strip-searched, his hands and feet bound, and strapped to a mattress.

In Concluding Observations, the CAT Committee has indicated a number of breaches of the CAT without specifying whether the treatment is torture or other ill-treatment. It is submitted that the following are examples of breaches of Article 16 rather than of Article 1:

- the detention of child offenders as young as the age of seven in specialized hospitals and protection units.⁶⁴²

638 Joseph, Schultz, and Castan, above note 31, § 9.23.

639 These obligations are all addressed below.

640 See, e.g., Section 4.6.3.

641 See also Concluding Observations on Israel, (2002) UN doc. A/57/44, § 50.

642 Concluding Observations on Yemen, (2004) UN doc. CAT/C/CR/31/4, § 6.

- the long term detention of asylum seekers while their asylum claims are considered.⁶⁴³
- Detention in a cell for 22 hours a day without meaningful activities to occupy the prisoner's time.⁶⁴⁴
- Non-segregation of juvenile and adult prisoners, and non-segregation of male and female prisoners.⁶⁴⁵
- Incidents of bullying which causes self harm and suicide in the armed forces.⁶⁴⁶
- Inappropriate use of chemical, irritant, incapacitating and mechanical weapons by law enforcement authorities in the context of crowd control.⁶⁴⁷
- Reprisals, intimidation and threats against persons reporting acts of torture or ill-treatment.⁶⁴⁸
- Prisoners having to pay for a portion of the expenses related to their imprisonment.⁶⁴⁹
- The wearing of hoods or masks by officers effecting a forced deportation.⁶⁵⁰
- The use of electro-shock stun belts and restraint chairs as methods of constraint.⁶⁵¹
- Incommunicado detention of up to five days⁶⁵² or longer.⁶⁵³
- Prolonged solitary confinement as a measure of retribution in prisons.⁶⁵⁴

643 Concluding Observations on Latvia, (2004) UN doc. CAT/C/CR/31/3, § 6; Concluding Observations on Croatia, (2004) UN doc. CAT/C/CR/32/3, § 9.

644 Concluding Observations on Croatia, (2004) UN doc. CAT/C/CR/32/3, § 8; see also Concluding Observations on Spain, (2002) UN doc. CAT/C/CR/29/329, § 56.

645 Concluding Observations on Bosnia and Herzegovina, (2005) UN doc. CAT/C/BIH/CO/1, § 14.

646 Concluding Observations on UK – Dependent Territories, (2004) UN doc. CAT/C/CR/33/3, § 4; Concluding Observations on the Russian Federation, (2002) UN doc. CAT/C/CR/28/4, § 95; Concluding Observations on Armenia, (2001) UN doc A/56/44, § 37; Concluding Observations on Ukraine, (2001) UN doc. CAT/C/XXVII/Concl.2, § 136.

647 Concluding Observations on Canada, (2005) UN doc. CAT/C/CR/34/CAN, § 4; see also Concluding Observations on Indonesia, (2002) UN doc. CAT/C/GC/2002/1, § 42; Concluding Observations on the UK, (1996) UN doc. A/51/44, § 63.

648 Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, § 6; Concluding Observations on Tunisia, (1999), UN doc. A/54/44, §§ 97, 102 (c).

649 Concluding Observations on the Czech Republic, (2004) UN doc. CAT/C/CR/32/2, § 5.

650 Concluding Observations on Switzerland, (2005) UN doc. CAT/C/CR/34/CHE, § 4.

651 Concluding Observations on the U.S. (2000) UN doc. A/55/44, § 160; see also Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 35.

652 Concluding Observations on Spain, (1997), UN doc. A/58/44, § 61.

653 See e.g., Concluding Observations on Russian Federation, (1997) UN doc. A/52/44, § 42.

654 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 36.

4.3 Non-Refoulement

Article 3 of CAT states:

1. “No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
2. “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

The large majority of individual complaints under CAT have concerned alleged violations of Article 3.

Article 3 applies only to deportations which might expose a person to a real risk of torture under Article 1, rather than breaches of a person’s rights under Article 16.⁶⁵⁵ In this respect, it seems that the protection for prospective deportees is broader under Article 7 of the ICCPR.⁶⁵⁶

It is not necessary for a State to offer asylum or permanent residency to a person who cannot be deported under Article 3. It is simply prohibited from returning a person to a State where he or she might be tortured. It would be possible for example for the person to be deported to a third State, so long as he or she did not face torture, or subsequent deportation to a State where he/she faces torture, in that third State.⁶⁵⁷

If the expulsion of a person (who claims a breach of article 3) follows proceedings which are procedurally irregular, then a breach of Article 3 may be found regardless of the substantive risk of torture in the receiving State. For example, in *Brada v. France* (CAT 195/02), the complainant, who had challenged his deportation to Algeria for fear of torture, was deported prior to his exhaustion of domestic remedies in France. Indeed, a French appeal court ultimately found that the deportation breached French law. Therefore, the CAT Committee found a breach of Article 3.⁶⁵⁸

655 General Comment 1 (CAT), § 1.

656 See Section 3.2.12. For comparative analysis of the *non-refoulement* rule under international and regional instruments, see Joint Third Party intervention in *Ramzy v. The Netherlands*, reprinted in Appendix 11.

657 See e.g., *Aemei v. Switzerland* (CAT 34/95), § 11.

658 See also *Arkauz Arana v. France* (CAT 63/97) and *Agiza v. Sweden* (CAT 233/03). See also Concluding Observations on Finland, (2005) UN doc. CAT/C/CR/34/FIN, § 4.

4.3.1 Substantiating a Claim under Article 3

The type of information which may assist the CAT Committee in determining whether a violation of Article 3 exists is described in General Comment 1 (CAT), which is reproduced above in Section 2.1.2(e).

4.3.2 Burden of Proof

The burden of proof for establishing a breach of Article 3 is initially on the complainant.⁶⁵⁹ The risk of torture in a receiving State must “go beyond mere theory or suspicion”, but one need not establish that torture would be “highly probable”.⁶⁶⁰ It must also be established that the “danger of being tortured” is “personal and present”.⁶⁶¹ For example, in *A.D. v. Netherlands* (CAT 96/97), the prospective deportee submitted information regarding prior harassment and torture by a previous Sri Lankan government. His claim did not concern the behaviour of the current government so his Article 3 claim failed.⁶⁶² Long time lapses may also mean that a threat of torture is not “current”.⁶⁶³ In *S.S.S. v. Canada* (CAT 245/04), the complainant failed to establish that he faced torture upon return to India: even if he faced a real danger of torture in the Punjab area (which the CAT Committee doubted), “the Committee [did] not consider that he would be unable to lead a life free of torture in other parts of India”.⁶⁶⁴

Where a complainant provides a certain level of detail and information the burden of proof may then shift to the State party. In *A.S. v. Sweden* (CAT 149/99), the prospective deportee feared being stoned to death for adultery upon her forced return to Iran. She had:

“submitted sufficient details regarding her sighne or muttah marriage [into which she had allegedly been forced] and alleged arrest, such as names of persons, their positions, date, addresses, name of police station etc. that could have, and to a certain extent have been, certified by the Swedish immigration authorities, to shift the burden of proof.”⁶⁶⁵

659 General Comment 1 (CAT), §§ 4-5.

660 General Comment 1 (CAT), § 6.

661 General Comment 1 (CAT), § 7.

662 See also *S.S. v. Netherlands* (CAT 191/01); *S.A. v. Sweden* (CAT 243/04); *M.A.M. v. Sweden* (CAT 196/02).

663 See *H.A.D. v. Switzerland* (CAT 216/99); *A.I v. Switzerland* (CAT 182/01).

664 *S.S.S. v. Canada* (CAT 245/04), § 8.5.

665 *A.S v. Sweden* (CAT 149/99), § 8.6.

She had also submitted evidence of the bad human rights situation for women in her position in Iran. The CAT Committee found that it was the failure of the State party to make sufficient inquiries and to follow up the evidence provided by the complainant that led the State party to find the claim to be unsubstantiated, rather than a lack of evidence provided by the complainant. Therefore, the CAT Committee found that the complainant had indeed established that her prospective deportation to Iran would breach Article 3.

4.3.3 Circumstances of the Receiving Country

As explicitly noted in Article 3(2), the CAT Committee, in considering Article 3 cases, will take account of “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”. In determining the human rights situation of the country the Committee will examine the reports of international and domestic human rights bodies and NGOs. For example in *A.S. v. Sweden* (CAT 149/99), the prospective deportee feared return to Iran where she argued that she faced death by stoning. The Committee noted UN and NGO reports, which confirmed that stoning was commonly inflicted as a penalty for adultery in Iran. In this case, the evidence on the general circumstances of Iran, combined with the complainant’s testimony of her personal risk, lead the CAT Committee to find that her deportation to Iran would violate Article 3.

4.3.4 Personal Risk

It is not enough to establish that a receiving State has a very bad human rights record. One must also establish that one is at personal risk of torture upon return to such a State. Where the complainant does not produce any evidence of personal mistreatment or torture and relies solely upon information relating to the general situation in a State, the CAT Committee is very unlikely to find a breach of Article 3. This is so, for example, even if the relevant individual is a member of an ethnic group which faces routine persecution in that country. The individual must show that he or she personally, as a member of that group, is at risk.⁶⁶⁶

666 *Z.Z. v. Canada* (CAT 123/98), § 8.4.

This requirement of “personal risk” also works in reverse. That is, Article 3 should protect someone from being returned to a State where, although there is no pervasive abuse of human rights in that State, he or she will be personally at risk.⁶⁶⁷

To establish a situation of “personal risk”, the complainant’s account of his or her previous personal history of torture/mistreatment by the receiving State will be examined. The CAT Committee has acknowledged that sometimes these accounts will contain inconsistencies or be inaccurate in some way: “complete accuracy is seldom to be expected by victims of torture”.⁶⁶⁸ The CAT Committee will also consider and may attach importance to the explanations for inconsistencies given by the complainant.⁶⁶⁹ However, while the CAT Committee recognises the impact that torture may have on the accuracy of victim testimony, it does require that past allegations of torture be substantiated in some way. Complaints will not be upheld if the alleged victim’s story is simply not credible. For example, in *H.K.H. v. Sweden* (CAT 204/02), the alleged victim provided inconsistent information to the State party and later alleged that this was caused by the effects of torture. He did not connect the inconsistencies in his testimony to torture until he faced the Aliens Appeal Board; he also failed to provide any details of the alleged torture in domestic proceedings or in his submission to the CAT Committee. Furthermore, the CAT Committee noted that the claims contained many other inconsistencies which remained unexplained and which cast doubt over the alleged victim’s credibility. The CAT Committee duly found that the Article 3 claim was not substantiated.⁶⁷⁰

Each claimant is entitled to individual consideration of his or her circumstances. States cannot automatically deny the claims of certain “categories” of people. For example, States cannot create lists of supposedly “safe” countries of origin. Both the CAT Committee⁶⁷¹ and the HRC⁶⁷² have found that this process does not accommodate, respectively, Article 3 CAT or Article 7 ICCPR. Therefore, a generalized process (i.e. a non-individualized determination) which affects an individual’s rights to be considered and granted protection from torture, is not acceptable.

667 *A.S. v. Sweden* (CAT149/99), § 8.3.

668 *Tala v. Sweden* (CAT 43/1996), § 10.3.

669 *Ahmed Karoui v. Sweden* (CAT 185/01), § 10.

670 See also, e.g., *S.U.A. v. Sweden* (CAT 223/02); *A.K. v. Australia* (CAT 148/99); *Zare v. Sweden* (256/04).

671 CAT Concluding Observations on Finland, (1997) UN doc. A/51/44, § 62.

672 Concluding Observations on Estonia, (2003) UN doc. CCPR/C/77/EST, § 13.

4.3.5 The Decisions of Domestic Courts

Nearly all Article 3 cases have been appealed at the domestic level. In many cases, domestic courts will have found on the facts that the prospective deportee does not face a relevant danger of torture in the receiving State.⁶⁷³ In such circumstances, the CAT Committee is reluctant to “overrule” those findings.⁶⁷⁴ Indeed, “[c]onsiderable weight will be given, in exercising the Committee’s jurisdiction pursuant to Article 3 of the Convention, to findings of fact that are made by organs of the State party concerned”.⁶⁷⁵ However, “[t]he Committee is not bound by such findings and instead has the power, provided by Article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case”.⁶⁷⁶ It may be, therefore, that the CAT Committee is more prepared than the HRC to “overrule municipal findings of fact in the absence of procedural deficiencies in the relevant municipal proceedings”,⁶⁷⁷ at least in Article 3 cases. Given the fact that there are numerous Article 3 cases before CAT, and relatively few like cases before the HRC, it is currently difficult to empirically determine whether CAT is indeed more lenient in this respect.⁶⁷⁸

4.3.6 Risk of further deportation if Returned to the “Receiving State”

In assessing whether it is safe for an individual to be deported to the receiving State, the CAT Committee will consider whether there is a risk of subsequent deportation to a country where the complainant may be subjected to torture.⁶⁷⁹ In *Korban v. Sweden* (CAT 88/97), the complainant faced deportation to Jordan. He feared that once deported to Jordan he would be subsequently deported to Iraq, where he risked being tortured. In assessing the risk of subsequent deportation, the CAT Committee examined reports from a variety of

673 Sometimes Article 3 obligations have not been addressed by courts, which may for example have focused purely on whether the person is a refugee under the Refugee Convention (see also Section 4.3.7).

674 Joseph, Schultz, and Castan, above note 31, §9.71.

675 General Comment 1 (CAT), § 9(a).

676 General Comment 1 (CAT), § 9(b).

677 Joseph, Schultz, and Castan, above note 31, § 9.8.

678 For an example of CAT overruling a domestic court’s assessment, see *Dadar v. Canada* (CAT 258/04).

679 General Comment 1 (CAT), § 2.

sources. These reports provided evidence that “some Iraqis have been sent by the Jordanian authorities to Iraq against their will”.⁶⁸⁰ On this basis, the CAT Committee found that the risk of subsequent deportation could not be excluded, so the proposed deportation to Jordan would be in breach of Article 3. The CAT Committee further noted that Jordan did not allow individual complaints under Article 22, so, if threatened with deportation to Iraq from Jordan, the complainant would not have the possibility of submitting another communication under CAT.

4.3.7 Article 3 and the Refugee Convention

Claims under Article 3 are often lodged by individuals who are seeking asylum or claiming refugee status. Clearly, issues under both Article 3 and the Convention Relating to the Status of Refugees 1951 (the Refugee Convention), may overlap. However, Article 3 decisions are conceptually separate from those made under the Refugee Convention.⁶⁸¹ Complainants under Article 3 should construct their arguments around the risk of torture, rather than attempt to establish a right of asylum under the terms of the Refugee Convention.⁶⁸²

The Refugee Convention is both broader and narrower than Article 3 of CAT. It is broader as a “refugee”, a person with a right to non-refoulement under Article 33 of that Convention, is a person who faces a “well founded fear of persecution” on particular grounds (e.g. race, religion) in a receiving State. “Persecution” may fall short of “torture”, so the Refugee Convention applies in circumstances where one fears a lesser form of ill-treatment in a receiving State. On the other hand, the reasons why one might face torture are irrelevant to an Article 3 assessment, whereas the reasons why one might face persecution are relevant under the Refugee Convention.⁶⁸³ Furthermore, Article 3 rights are absolute. Refugee rights under the Refugee Convention are denied

680 *Korban v. Sweden* (CAT 88/97), § 6.5.

681 Joseph, Schultz, and Castan, above note 31, § 9.83.

682 See, e.g., *X v. Spain* (CAT 23/95), *Mohamed v. Greece* (CAT 40/96). See, for a comparison of Article 3 obligations and those under the Refugee Convention, S. Taylor, “Australia’s implementation of its Non-Refoulement Obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights”, (1994) 17(2) *University of New South Wales Law Journal* 432.

683 One must be persecuted for a “Convention reason” per Article 1 of the Refugee Convention; one must have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

under Article 1F for certain categories of people, such as people who have committed war crimes, crimes against humanity, and crimes against peace. In contrast, such people have absolute rights not to be deported in situations where they face a risk of torture under Article 3.⁶⁸⁴

4.3.8 Rendition and the War on Terror

There have been numerous media allegations during the “war on terror” that “renditions” have taken place in respect of suspected terrorists. That is, terrorist suspects have apparently been taken to States where they will be tortured in order to extract information of use in the “war on terror”. Renditions are clear breaches of Article 3.

The issue of rendition arose implicitly in *Agiza v. Sweden* (CAT 233/03). The complainant was suspected of terrorist activities. His claim for asylum in Sweden failed, and he was immediately deported to Egypt, so he was not afforded an opportunity for appeal. His swift deportation was due to his classification as a national security risk by Swedish authorities. The State party tried to defend its actions by reference to the fact that it had gained a diplomatic assurance from Egypt that the complainant would not be subjected to ill-treatment upon his return. Staff at the Swedish embassy in Egypt were allowed to meet with and monitor the complainant upon his return.

The CAT Committee found a number of breaches of Article 3 in this case. A procedural breach of Article 3 arose with regard to the swiftness of the deportation, which did not allow for an appeal against the deportation decision. It also found that the complainant faced a substantial risk of torture upon his return to Egypt, which was foreseeable at the time of his deportation. The risk was heightened due to his high national security rating. The assurance obtained from Egypt did not absolve Sweden of this breach; the monitoring mechanism was found to be inadequate. For example, the Swedish authorities in Egypt were not able to interview the complainant alone without the presence of Egyptian authorities.

The removal of the complainant from Sweden to Egypt had been undertaken by U.S. agents, facilitated in Sweden by Swedish authorities. The CAT

684 See e.g., *Paez v. Sweden* (CAT 39/96); see also Concluding Observations on Canada, (2005) UN doc. CAT/C/CR/34/CAN, § 3. The same absolute protection applies under Article 7 ICCPR; see Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 17.

Committee does not explicitly acknowledge that this was an apparent case of so-called “rendition” of a terrorist suspect to a State that would be likely to torture him.⁶⁸⁵ The CAT Committee decision nevertheless makes clear that rendition is not tolerated under CAT. Article 1 and 3 remain absolute rights, regardless of any arguments regarding the supposed exigencies of the “war on terror”.⁶⁸⁶

4.3.9 Diplomatic Assurances

Diplomatic assurances, also known as diplomatic guarantees, diplomatic contacts, and memoranda of understanding, refer to arrangements between the governments of two States that the rights of a particular individual will be upheld when they are returned from one State to the other. They typically arise in the context of the refoulement and expulsion of an individual from one country to another.

These assurances will often contain provisions such as “assurances for the respect for the deported person’s due process safeguards upon arrival to the returned country, refraining from torture and ill-treatment, adequate conditions of detention, and regular monitoring visits”.⁶⁸⁷ They aim to ensure that the human rights of the individual are respected and that the receiving State upholds its obligations under international law.

However, diplomatic assurances are not an effective mechanism for protecting individuals from torture and ill-treatment. A government will seek a diplomatic assurance when it believes, in light of what it knows about the practices of the receiving State, that there is in fact a risk of torture or ill-treatment if the individual is returned to that State. Thus the returning State is aware that torture and ill-treatment is systemically practiced in the receiving State, but seeks to return the individual regardless. Regarding this situation, Alvaro

685 The case has attracted considerable media and NGO attention and is commonly cited as an example of rendition: see, e.g., <http://web.amnesty.org/library/Index/ENGEUR420012004> (accessed 28 July 2006).

686 S. Joseph, “Rendering Terrorists and the Convention against Torture”, (2005) 5, *Human Rights Law Review*, p. 339, p. 346; see also Concluding Observations on Albania, (2005) UN doc. CAT/C/CR/34/ALB, § 7.

687 Statement By The Special Rapporteur Of The Commission On Human Rights On Torture (Wednesday, 26 October 2005) at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/005D29A66C57D5E5C12570AB002AA156?opendocument>

Gil-Robles, the Council of Europe Commissioner for Human Rights, noted in 1994:

“The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains”.⁶⁸⁸

The UN High Commissioner for Human Rights notes that many of the States who give such assurances are States that routinely breach their international human rights obligations.⁶⁸⁹ Therefore, she notes:

“...if a government does not comply with binding law, it is difficult to see why it would respect legally non-binding agreements.”⁶⁹⁰

There is no international legal structure which regulates the use and enforcement of diplomatic assurances, so minimal legal weight may attach to an arrangement on which the well-being and life of an individual may depend. For example, there is no international definition of a diplomatic assurance, which outlines its parameters and operation.⁶⁹¹ Once a diplomatic assurance is established there is nothing which gives it legal weight or authority. In concluding his 2005 report to the General Assembly, the Special Rapporteur on Torture clearly rejected the use of diplomatic assurances, emphasising the lack of legal process and effect attached to diplomatic assurances as a central reason for his position:

“diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached and the person who the assurances aim to protect has no recourse if the assurances are violated.”⁶⁹²

688 Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004)13, § 19.

689 See also UN Press Release “Diplomatic Assurances Not An Adequate Safeguard For Deportees, UN Special Rapporteur Against Torture Warns” (23 August 2005) available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9A54333D23E8CB81C1257065007323C7?opendocument>

690 Report of the High Commissioner for Human Rights, “Protection of human rights and fundamental freedoms while countering terrorism”, (2006) UN doc. E/CN.4/2006/94 A, § 26.

691 Report of the High Commissioner for Human Rights, “Protection of human rights and fundamental freedoms while countering terrorism”, (2006) UN doc. E/CN.4/2006/94 A, § 23.

692 Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (2005) UN doc. A/60/316, § 51.

Acts of torture or ill-treatment are illegal acts which are often shrouded in secrecy, so it is almost impossible to effectively monitor the outcome of a diplomatic assurance upon the return of the individual to the State. The Special Rapporteur has stated that:

“Post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”⁶⁹³

The ineffective operation of diplomatic assurances is evidenced in a report by Human Rights Watch which contains numerous examples of cases where diplomatic assurance failed to protect a returnee from torture and/or ill-treatment upon return.⁶⁹⁴ Such reports only refer to the cases which have actually come to light. Many instances of torture are not reported, so we can assume that diplomatic assurances have failed in even more cases.

Diplomatic assurances aim to protect a particular individual in a context where torture and ill-treatment is known or strongly suspected to occur. It appears to promote “convenience” and “quick fixes” in difficult individual cases, without any attempt to initiate or sustain systemic change within the receiving State.⁶⁹⁵

The use of diplomatic assurances is not compatible with the absolute prohibition on torture and their operation undermines the efforts of the global community to ensure that the prohibition is upheld.

a) Case law on Diplomatic Assurances

In *Mamatkulov and Askarov v. Turkey*,⁶⁹⁶ the European Court of Human Rights recently found that the extradition of two people from Turkey to Uzbekistan did not breach the ECHR prohibition on torture, as Turkey had obtained an assurance from Uzbekistan that ill-treatment would not take place.⁶⁹⁷ The CAT

693 *Ibid.*, § 46.

694 Human Rights Watch, “Still at risk: diplomatic assurances no safeguard against torture”, (2005), available at <http://hrw.org/reports/2005>.

695 Statement By The Special Rapporteur Of The Commission On Human Rights On Torture (Wednesday, 26 October 2005) available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/005D29A66C57D5E5C12570AB002AA156?opendocument>; see also Report of the High Commissioner for Human Rights, “Protection of human rights and fundamental freedoms while countering terrorism”, (2006) UN doc. E/CN.4/2006/94 A, § 24.

696 *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99, 46951/99, Eur. Ct. of Hum. Rts. (Grand Chamber) (4 February 2005), §§ 76-77.

697 Cf *Chahal v. The United Kingdom*, No. 22414/93, Eur. Ct. of Hum. Rts. (15 November 1996), §§ 92 and 105.

Committee’s approach to such assurances is more sceptical, as exhibited in *Agiza v. Sweden* (CAT 233/03). This case, along with the CAT Committee’s view of the relevant assurance, is discussed above at Section 4.3.8. The CAT Committee’s scepticism was also manifested in Concluding Observations on the U.S.:

“the State should only rely on ‘diplomatic assurances’ in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements. The State party should also provide detailed information to the Committee on all cases since 11 September 2001 where assurances have been provided.”⁶⁹⁸

4.4 Claims Of National Security Regarding State Party Information on Torture

While national security considerations cannot justify departure from freedoms from torture, they might be relevant to a State party’s duty to cooperate with the CAT Committee (or the HRC) during the consideration of an individual complaint. For example, does a State party have to share sensitive information with these Committees if that information is relevant to a complaint?

This issue arose in *Agiza v. Sweden* (233/03), the facts of which are discussed in Section 4.3.8. The State party withheld information from the CAT Committee regarding its knowledge in early 2002 of a complaint of ill-treatment by the complainant upon his return to Egypt. This information was withheld for two years, and eventually was submitted by counsel for the complainant. Sweden was thus caught “red-handed” in misleading the CAT Committee.⁶⁹⁹ The State party attempted to justify its actions by stating that revelation of the information in early 2002 could have jeopardized the safety of the complainant. The CAT Committee did not accept these arguments, and found that “the deliberate and misleading withholding of information in *Agiza* constituted a ... breach of Article 22”.⁷⁰⁰

698 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 21.

699 It is perhaps naïve to believe that such misleading has never taken place before. Here however, Sweden was ‘caught’ doing so: see S. Joseph, “Rendering Terrorists and the Convention Against Torture”, (2005) 5 *Human Rights Law Review* 339, p. 346.

700 *Ibid*, p. 345.

The CAT Committee recognised that cases might arise where a State party has a legitimate wish to keep information from it, due to national security considerations. However, the correct approach in such a case was not to simply withhold the information and effectively mislead the CAT Committee. Rather, it was to seek some sort of permission from the CAT Committee to withhold the information. The CAT Committee claimed that its procedures were “sufficiently flexible”⁷⁰¹ to take account of such circumstances. If so, it is advisable for the CAT Committee to amend its rules of procedure, which make no reference to such situations, which are perhaps more likely to arise during the “war on terror”.⁷⁰²

4.5 Death Penalty

It may be noted that the CAT, unlike the ICCPR, does not explicitly allow the death penalty, so it is possible that the CAT is significantly broader than the ICCPR on this issue. In Concluding Observations on Armenia, the CAT Committee seemed to suggest that the imposition of the death penalty, as well as the death row phenomenon, breached Article 16.⁷⁰³ On the other hand, in (earlier) Concluding Observations on China, the CAT Committee indicated that only “some methods of capital punishment” breached Article 16.⁷⁰⁴ Furthermore, in 2006 Concluding Observations on the U.S., the Committee indicated that capital punishment is not of itself a CAT breach, by stating that the U.S. “should carefully review its execution methods”.⁷⁰⁵ Clearly, this statement anticipates the continued occurrence of execution. However, the CAT Committee went on to say that the method of lethal injection should be reviewed due to its potential to cause severe pain and suffering.⁷⁰⁶ Given that

701 *Agiza v. Sweden* (CAT 233/03), § 13.10.

702 S. Joseph, “Rendering Terrorists and the Convention Against Torture”, (2005) 5 *Human Rights Law Review* 339, p.346. It may be noted that the State party did share sensitive information with the CAT Committee over its reasons for believing that the complainant posed a national security risk to Sweden. The CAT Committee acknowledged receipt of the information, but did not publish that information in its final views. See *Agiza v. Sweden* (CAT 233/03), § 4.11.

703 Concluding Observations on Armenia, (2001) UN doc. A/56/44, § 39; see also Concluding Observations on Jordan, (1995) UN doc. A/50/44, § 169; Concluding Observations on Namibia, (1997) UN doc. A/52/44 § 250; Concluding Observations on Libyan Arab Jamahiriya, UN doc. A/54/44 (1999), § 189.

704 Concluding Observations on China, (1996) UN doc. A/51/44, § 144.

705 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 31.

706 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 31.

lethal injection is often thought to be the most humane method of execution,⁷⁰⁷ the potential outlawing of such a method could severely restrict a State's ability to carry out a death penalty without breaching the CAT.

4.6 Positive Duties Under CAT

As under Articles 7 and 10 of the ICCPR, States parties to the CAT have extensive positive and procedural duties to take measures that prevent or minimize breaches of the CAT. For example, under Article 10(1), States parties must:

“ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”

Furthermore, under Article 10(2), “[e]ach State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons”.

Under Article 11:

“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”

In Concluding Observations, the CAT Committee has given the following clues regarding appropriate positive measures by States:

- All detainees, wherever held, must be registered. Registration should contain the detainee's identity, as well as the date, time and place of detention, the identity of the detaining authority, the grounds for detention, state of health of detainee at time of being taken into custody and any changes thereto, time and place of interrogations, and dates and times of any transfer or release.⁷⁰⁸

⁷⁰⁷ See, e.g., J. Gibeaut “A painful way to die? Once called humane, lethal injection is now claimed to be cruel and unusual”, (April 2006) 92 *ABA Journal* 20.

⁷⁰⁸ Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 16.

- Medical staff in prisons should be independent doctors, rather than members of the prison service.⁷⁰⁹
- Medical examinations should routinely take place before all forced removals by air.⁷¹⁰ Independent human rights observers should be present during such removals.⁷¹¹
- Doctors should be trained to identify signs of torture.⁷¹²
- Social care institutions should employ trained personnel, such as social workers, psychologists, and pedagogues.⁷¹³
- Introduction of audio and video taping facilities for interrogations.⁷¹⁴
- Allow visits by independent human rights monitors to places of detention without notice.⁷¹⁵
- Body cavity searches in prisons are conducted by medical staff in non-emergency situations.⁷¹⁶
- Police officers should wear a form of personal identification so that they are identifiable to any person who alleges ill-treatment.⁷¹⁷
- The introduction in law of “observance of the principle of proportionality in exercising measures of coercion”, as well as “the involvement of relevant non-governmental organizations during the deportation process”.⁷¹⁸

4.6.1 Duty to Enact and Enforce Legislation

Under Article 2(1), States parties must “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.

709 Concluding Observations on Argentina, (2004) UN doc. CAT/C/CR/33/1, § 6.

710 Concluding Observations on Germany, (2004) UN doc. CAT/C/CR/32/7, § 5.

711 Concluding Observations on Switzerland, (2005) UN doc. CAT/C/CR/34/CHE, § 4.

712 Concluding Observations on Uzbekistan, (2002) UN doc. A/57/44, § 115.

713 Concluding Observations on Croatia, (2004) UN doc. CAT/C/CR/32/3, § 9.

714 Concluding Observations on Greece, (2004) UN doc. CAT/C/CR/33/2, § 6; see also Concluding Observations on the UK, (1996) UN doc. A/51/44, § 63.

715 Concluding Observations on Uganda, (2005) UN doc. CAT/C/CR/34/UGA, § 10; see also Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 23.

716 Concluding Observations on Canada, (2005) UN doc. CAT/C/CR/34/CAN, § 4

717 Concluding Observations on Germany, (1998) UN doc. A/53/44, § 196.

718 Concluding Observations on Austria, (2005) UN doc. CAT/C/AUT/CO/3, § 4.

Under Article 4, States parties to the CAT are required to make “torture” a criminal offence, as well as “complicity or participation” in torture. Such offences must “be punishable by appropriate penalties which take into account their grave nature”. Article 4 is limited in its application to torture, rather than other ill-treatment. Therefore, the ICCPR probably provides broader protection in this regard than CAT.⁷¹⁹

The State is not required to incorporate the exact text of the Article 1 definition of CAT into its domestic legislation. However the CAT Committee has become increasingly strict in its approach to this issue and has stated that States must create a separate offence of “torture” within their domestic legislation which is at least as broad in scope as that defined under Article 1 of CAT.⁷²⁰

In *Urra Guridi v. Spain* (CAT 212/02), the CAT Committee found that the light penalties and pardons conferred on civil guards who had tortured the complainant, along with an absence of disciplinary proceedings against those guards, constituted breaches of Articles 2(1) and 4(2) of the Convention. It has been suggested that a sentence of at least six years is needed to account for the gravity of the crime of torture.⁷²¹

In Concluding Observations on Colombia, the CAT Committee expressed concern over the possibility of light “suspended sentences” for persons who had committed torture and war crimes, if they were members of armed rebel groups “who voluntarily laid down their arms”.⁷²² Therefore, peace deals do not justify amnesties for grave crimes such as torture.⁷²³

4.6.2 Duty to Investigate Allegations

Article 12 of CAT requires States parties to ensure that:

“its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

719 See Section 3.2.15(a).

720 C. Ingelse, *The UN Committee against Torture: An Assessment*, Martinus Nijhoff, 2001, pp. 218-220, 338-341. See e.g., Concluding Observations on Cambodia, (2005) UN doc. CAT/C/CR/31/7, § 6; Concluding Observations on Azerbaijan, (2003) UN doc. CAT/C/CR/30/1 and Corr.1, § 88; Concluding Observations on Israel, (1994) UN doc. A/49/44, § 170; Concluding Observations on the Russian Federation, (1997) UN doc. A/52/44, § 43.

721 C. Ingelse, *The UN Committee against Torture: An Assessment*, Martinus Nijhoff, p. 342.

722 Concluding Observations on Colombia, (2004) UN doc. CAT/C/CR/31/1, § 7.

723 See also Concluding Observations on Peru, (2000) UN doc. A/55/44 (2000), § 61.

Article 13 of CAT requires that States parties:

“ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

Both Articles apply in the context of allegations of cruel, inhuman or degrading treatment under Article 16.⁷²⁴

Article 13 protects the right to complain about torture without fear of retribution, and to have one’s claims dealt with fairly. Article 12 imposes an independent duty on the State to commence a prompt and impartial investigation if there is any reason to believe torture has taken place, even in the absence of a complaint.

In *Halimi-Nedzibi v. Austria* (CAT8/91), the State’s failure to investigate an allegation of torture for 15 months was a breach of Article 12, as the delay was unreasonable and contrary to the requirement of “prompt” investigations. The obligation to investigate is completely separate from the duty to not torture. Here, a violation of Article 12 was found even though the CAT Committee found that the allegation of torture itself was not sustained.⁷²⁵

In *Blanco Abad v. Spain* (CAT 59/96), the CAT Committee explained why a prompt investigation of any complaint of torture is essential. First, there is a need to ensure that such acts cease immediately. Secondly, the physical effects of torture or ill-treatment can quickly disappear, leaving the victim without the physical evidence he or she might need to support the claim.⁷²⁶

In *Blanco Abad*, the victim was allegedly held incommunicado and tortured from 29 January to 3 February 1992. Upon her release, the CAT Committee felt there was ample evidence, including medical reports, to prompt an official investigation. The delay of 14 days before a judge took up the matter, and 18 days before the investigation commenced, constituted a breach of Article 12.

In *Blanco Abad*, the CAT Committee addressed the issue of when the State’s duty to investigate an Article 13 complaint arises. The CAT Committee stated;

724 See *Dzemajl et al v. Yugoslavia* (CAT 161/00).

725 *Halimi-Nedzibi v. Austria* (CAT 8/91), § 13.5.

726 *Blanco Abad v. Spain* (CAT 59/96), § 8.2.

“...article 13 does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence...it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim’s wish that the facts should be promptly and impartially investigated...”

When the investigation in *Blanco Abad* did actually proceed, progress was slow and incompetent. The investigating court did not request access to essential evidence, such as medical reports, for months. Crucial witnesses, such as police officers at the station where the victim had been detained, were never called to give evidence. On numerous occasions during the proceedings, the complainant requested that further evidence, other than the medical reports, be admitted to support her claim; the court did not act on these requests. The CAT Committee found no justification for this approach by the court as “such evidence was entirely pertinent since...forensic reports...are often insufficient and have to be compared with and supplemented by other information.” The catalogue of delay, incompetence, and omissions (i.e. failures to act) constituted a failure to conduct an impartial investigation in violation of Article 13.⁷²⁷

In Concluding Observations on Bolivia, the CAT Committee recommended that personnel accused of torture or ill-treatment be suspended from their duties while the investigation is ongoing.⁷²⁸

4.6.3 Duty to Compensate Victims

Article 14 of CAT requires States to ensure that victims of torture are able to obtain redress and fair and adequate compensation, including the means for as full rehabilitation as possible. If the victim should die, his or her heirs have a right to compensation.

In *Urra Guridi v. Spain* (CAT 212/02), the CAT Committee found that the light penalties and pardons conferred on civil guards, who had tortured the complainant, along with an absence of disciplinary proceedings against those

⁷²⁷ See also *Baraket v. Tunisia* (CAT 60/96); *Nikoli and Nikoli v. Serbia and Montenegro* (CAT 174/00). See also Model Complaint, *Textbox ii*, § 55.

⁷²⁸ Concluding Observations on Bolivia, (2001) UN doc. A/56/44, § 97(d).

guards, constituted breaches of Article 14. The victim had in fact received monetary compensation for the relevant acts of torture, but the CAT Committee found that the lack of punishment for the perpetrators was incompatible with the State's duty to guarantee "the non-repetition of the violations".⁷²⁹ Thus, Article 14 rights provide not only for civil remedies for torture victims, but, according to this case, a right to "restitution, compensation, and rehabilitation of the victim", as well as a guarantee of non-repetition of the relevant violations, and punishment of perpetrators found guilty.

In Concluding Observations on Turkey, the CAT Committee stated that relevant types of compensation for the purposes of Article 14 should include financial indemnification, rehabilitation and medical and psychological treatment.⁷³⁰ States should also consider establishing a compensation fund.⁷³¹

In a number of cases against Serbia and Montenegro, Article 14 violations have been entailed in the State party's refusal to conduct a proper criminal investigation into allegations of torture, thus effectively depriving the victim of a realistic chance of launching successful civil proceedings.⁷³²

Article 14 rights do not explicitly extend to victims of violations of Article 16. However, in *Dzemajl et al v. Yugoslavia* (CAT 161/00), the CAT Committee found that:

"the positive obligations that flow from the first sentence of article 16 of the convention include an obligation to grant redress and compensate the victims of an act in breach of that provision".⁷³³

Thus a failure by the State to provide "fair and adequate" compensation, where a person has suffered cruel, inhuman or degrading treatment or punishment, is in violation of its obligations under Article 16.

In Concluding Observations on the U.S., the CAT Committee was concerned that civil actions against federal prison authorities were only available if there is "a prior showing of physical injury". It recommended that legislation be amended to remove any limitation on the right to bring such civil actions.⁷³⁴

729 *Urra Guridi v. Spain* (CAT 212/02), § 6.8.

730 Concluding Observations on Turkey, (2003) UN doc. CAT/C/CR/30/5, § 123.

731 Concluding Observations on Cuba, (1998) UN doc. A/53/44, § 118; see also Concluding Observations on Ecuador, (2006) UN doc. CAT/C/ECU/CO/3, § 26.

732 See, e.g., *Dimitrijevic v. Serbia and Montenegro* (CAT 172/00).

733 *Dzemajl et al v. Yugoslavia* (CAT 161/00), § 9.6.

734 Concluding Observations on the US, (2006) UN doc. CAT/C/USA/CO/2, § 29.

In Concluding Observations on Nepal, the CAT Committee confirmed that there should be no statute of limitations for the registering of complaints regarding torture, and that civil actions for compensation should be able to be brought within two years of the publication of the conclusions of relevant inquiries.⁷³⁵

4.7 Non-Use of Statements Obtained from a breach of CAT

The non-use of statements obtained through torture or other prohibited treatment in judicial proceedings is guaranteed by Article 15 of CAT. This duty is absolute, and there are no exceptions. This issue has become topical during the “war on terror”, with the question arising as to the extent, if at all, such evidence can be used to prosecute terrorist suspects. Regardless of the dangers posed by terrorism, such statements can never be used.⁷³⁶

Article 15 applies to statements made by a tortured person about him or herself, as well as statements made about third parties. In *P.E v. France* (CAT193/01), the complainant argued that her proposed extradition from France to Spain was based on statements that had been extracted from a third party under torture. The CAT Committee confirmed that each State party must “ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.”⁷³⁷ Ultimately however, the claim was found to be unsubstantiated so no violation was found.

In Concluding Observations on the UK, the CAT Committee expressed concern over a lower test of admittance of confessions in terrorism cases in Northern Ireland, as well as the permissibility of the admittance of derivative evidence.⁷³⁸

735 Concluding Observations on Nepal, (2005) UN doc. CAT/C/NPL/CO/2, § 28; see also Concluding Observations on Chile, (2004) UN doc. CAT/C/CR/32/5, § 4; Concluding Observations on Turkey, (2003) UN doc. CAT/C/CR/30/5, § 123.

736 B. Zagaris, ‘UN Special Rapporteur Raises Torture Violations in Counter-Terrorism War’, (2005) 21 *International Enforcement Law Reporter*, p. 17.

737 *P.E v. France* (CAT193/01), § 6.3.

738 Concluding Observations on the UK, (1999) UN doc. A/54/44, § 76; See also, regarding Article 15 rights, Concluding Observations on Cameroon, (2004) UN doc. CAT/C/CR/31/6, § 8; Concluding Observations on UK, (2004) UN doc. CAT/C/CR/33/3, § 5. Direct use of compelled evidence arises when that evidence is itself used to incriminate a person in legal proceedings. ‘Derivative’ use arises when the compelled evidence is indirectly used to uncover further evidence, and that latter evidence is used to incriminate a person.

In Concluding Observations on Chile, the CAT Committee expressed concern that life saving medical care for women suffering complications from illegal abortions was apparently withheld until they revealed information about those performing the abortions; such confessions were allegedly used in later legal proceedings against the women and third parties.⁷³⁹

4.8 Universal Jurisdiction under CAT

“Universal jurisdiction” arises when a State has criminal jurisdiction⁷⁴⁰ over an act regardless of the territory in which the act was perpetrated, and regardless of the nationality of the perpetrator or the victim. Universal jurisdiction is recognised as existing for only the rarest and most heinous of crimes. Torture is such a crime.⁷⁴¹

Articles 4 to 9 of CAT, and especially Articles 5 and 7, establish a matrix of duties which have the following result: States parties may and indeed on occasion must exercise universal criminal jurisdiction over the crime of torture (as defined in Article 1).⁷⁴² That is, a State may punish a torturer even if the relevant torture did not take place within its territory, and neither the torturer nor the victim are nationals of the State. Indeed, a State must either prosecute (and punish if it convicts) an alleged torturer or extradite that person to a State that will so prosecute. A State does not have to do so if there is insufficient evidence of the guilt of the alleged torturer.⁷⁴³

In *Guengueng et al v. Senegal* (CAT 181/01), the complainants alleged breaches of Article 5(2) and 7 by the State party. The complainants credibly claimed that they had been tortured in Chad between 1982 and 1990 by agents of Chad’s then president, Hissène Habré. In 1990, Habré took refuge in Senegal, where he remained at the time of the CAT Committee’s decision in May 2006. In 2000, the complainants brought proceedings against Habré in

739 Concluding Observations on Chile, (2004) UN doc. CAT/C/CR/32/5, §§ 4 and 7.

740 A State exercises criminal jurisdiction when it prosecutes a person for a crime, or, in those States where private prosecutions are permissible, it allows a person to prosecute another.

741 Other such crimes include the crime of genocide, piracy, or the perpetration of slavery.

742 See Joseph, Schultz, and Castan, above note 31, § 9.129.

743 N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, pp. 132-133.

Senegal. These proceedings were dismissed on the basis that Senegalese courts had no jurisdiction under Senegalese law with regard to alleged torture in Chad. This ruling was confirmed on appeal.

The CAT Committee found that the State party had breached its duty under Article 5(2) to:

“take such measures as may be necessary to establish its jurisdiction over [the offence of torture] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”

As Senegal had ratified the CAT in August 1986, “the reasonable time frame within which the State party should have complied with this obligation has been considerably exceeded”.⁷⁴⁴ Therefore, the CAT Committee seemed to concede that a State does not have to pass legislation to facilitate the exercise of universal jurisdiction immediately upon the entry into force of CAT for that State; it however must do so within “a reasonable time”. Senegal had manifestly failed to do so.

The CAT Committee also found a breach of Article 7, paragraph 1 of which states:

“The State Party in the territory under whose jurisdiction a person alleged to have committed [an act of torture], shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

The State party had tried to argue that the Article 7(1) obligation did not come into play until a State had received an extradition request. The CAT Committee disagreed:

“the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition”.⁷⁴⁵

Therefore, a State party must prosecute an alleged torturer in the absence of an extradition request unless there is insufficient evidence to sustain a prosecution.

⁷⁴⁴ *Guengueng et al v. Senegal* (CAT 181/01), § 9.5.

⁷⁴⁵ *Guengueng et al v. Senegal* (CAT 181/01), § 9.7.

In any case, by the time the case was decided in 2006, Belgium had requested the extradition of Hissène Habré (in 19 September 2005). As Senegal had neither prosecuted nor complied with the request to extradite Habré, the CAT Committee found two separate breaches of Article 7.⁷⁴⁶

4.8.1 Immunity of Certain State Officials

In *Congo v. Belgium*,⁷⁴⁷ the International Court of Justice considered the international legality of the attempted prosecution by Belgian authorities of sitting government officials in the Congo for torture in the Congo. The ICJ decided that the sitting senior government officials of one State, such as the “head of state, head of government, or minister of foreign affairs, and perhaps certain other diplomatic agents”, cannot be arrested or prosecuted in another State for any crime, including torture under CAT, while they remain in office.⁷⁴⁸ This immunity does not extend to State officials outside of these categories,⁷⁴⁹ and ceases once the person no longer holds “the position that qualified them for the immunity”.⁷⁵⁰

⁷⁴⁶ *Rosenmann v. Spain* (CAT 176/00) concerned the saga of the proposed extradition of General Pinochet from the UK to Spain (from 1998-2000) to face allegations of torture perpetrated upon Spanish citizens in Chile. The complainant was a Spanish citizen who alleged he had been tortured in Chile under Pinochet’s orders. He complained that Spanish executive authorities had obstructed the extradition process, initiated by the Spanish judiciary, and had not acted in an impartial manner. The key question in *Rosenmann* was whether there is any obligation on a State party to demand the extradition of an alleged torturer. The CAT Committee concluded that there was no such obligation in the CAT. See also S. Joseph, ‘Committee against Torture: Recent Jurisprudence’, (2006) 6 *Human Rights Law Review*, forthcoming.”

⁷⁴⁷ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Merits, February 14, 2002, General List No.121 (‘*Congo v. Belgium*’).

⁷⁴⁸ N. Rodley and M. Pollard, “Criminalisation Of Torture: State Obligations Under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment”, (2006) 2 *European Human Rights Law Review* 115, p. 136.

⁷⁴⁹ *Ibid*, p. 136.

⁷⁵⁰ *Ibid*, p. 135. See *Congo v. Belgium*, § 61.