

Submission by the World Organisation Against Torture (OMCT) to the United Nations Committee Against Torture regarding a new General Comment on Article 3 of the CAT

I. Introduction

The World Organisation Against Torture (OMCT) would like to invite the Committee Against Torture (Committee) to draft a new General Comment on Article 3 of the Convention Against Torture (CAT). There are mainly three reasons as to why a new General Comment on non-*refoulement* is vital.

First, expulsion, extradition and *refoulement* of individuals who risk being subjected to torture or cruel, inhuman, or degrading treatment are increasingly becoming a universal problem. The principle of non-*refoulement* is challenged universally. While the case law of the Committee has addressed compliance in particular in relation to western states, our work shows that transfers of individuals in violation of Article 3 of the CAT are a growing concern in developing states. This is also reflected in the recent case of *Alexey Kalinichenko v. Morocco*¹ in which the Committee found Morocco to have violated Article 3 of the CAT because it extradited the petitioner to Russia where he was under a considerable risk of torture or disappearance as this has been the fate of his business partners.

Second, states parties increasingly seek to circumvent or undermine Article 3 obligations when addressing national security concerns and countering terrorism. In doing so, the non-*refoulement* principle has not only been ignored in some single incidents, but has been questioned as such. Particularly, states parties have argued for proportionality assessments that can take into account the threat the person to be deported poses to the host state.² These kinds of arguments impeach the very core of the principle of non-*refoulement*. However, such challenges are not reflected in the General Comment Nr. 1 on Article 3 that is thus incomplete, outdated, and needs to be replaced by a modern document providing guidance to states.

Third, the Committee drafted a conducive and progressive General Comment Nr. 3 that integrated modern concepts of remedy and reparation into the interpretation of the Convention. In this sense, we invite the Committee to build on its good practice and to provide clarification on other important issues, such as the concept of non-*refoulement*. This paper thus highlights seven key areas in the context of non-*refoulement* on which guidance by the Committee would be needed: (1) scope and nature of non-*refoulement*; (2) domestic safeguards; (3) the meaning of “consistent pattern of gross, flagrant or mass violations of human rights”; (4) diplomatic assurances; (5) the internal relocation alternative; (6) interim measures; and (7) suspensive effect.

¹ *Alexey Kalinichenko v. Morocco*, Comm. No. 428/2010, U.N. Doc. CAT/C/47/D/428/2010, 18 January 2012.

² See for instance the intervention by Lithuania, Portugal, Slovakia and the United Kingdom before the ECtHR in *A. v. the United Kingdom*, Appl. No. 4900/06, Judgment (Third Section), 20 July 2010, para. 130.

II. Selected Issues in Need of Guidance and Clarification

1. Scope and Absolute Nature of Non-*refoulement*

Article 3 of the CAT protects from expulsion, *refoulement*, and extradition if the person concerned is under a risk of torture. The wording of Article 3 of the CAT does not encompass other cruel, inhuman, or degrading treatment. Member states have frequently exploited this narrow wording. For instance, in an individual petition Australia argued that the petitioner concerned was unable to prove that he would face pain inflicted intentionally and of the severity needed for torture as opposed to other forms of ill-treatment.³ Similarly to the Committee's approach towards Article 15,⁴ Article 3 should be interpreted teleologically so as to encompass cruel, inhuman, and degrading treatment. Such an interpretation ensures coherence with regional and other universal standards that extend the non-*refoulement* principle to torture and cruel, inhuman or degrading treatment.⁵ It also reflects the common interpretation that the principle of non-*refoulement* derives itself from the absolute prohibition of torture, cruel, inhuman, or degrading treatment.

In the light of states parties' national security and counter-terrorism activities, it is important to stress that non-*refoulement* is an absolute and non-derogable right. Several states have repeatedly argued that the right to asylum should be weighed against the threat a person poses to the host state.⁶ Such considerations might be in line with the Geneva Refugee Convention, but are not permissible under the CAT. Hence, the CAT and the Committee have an important gap filling function in refugee law.

The absolute nature of Article 3 also means that it applies to all forms of obligatory departures of a human being from one jurisdiction to another, including (extraordinary) renditions.⁷ In addition, the increasing extraterritorial regulation of migrant flows at the high sea⁸ as well as the transfer of terror suspects to countries where ill-treatment of detainees is widespread⁹ are problematic circumventions of the non-*refoulement* principle. Hence, the Committee's clarification on the extraterritorial application of Article 3 would be most helpful.

2. Domestic Safeguards against *Refoulement*

One of the most important and effective means against *refoulement* are certainly administrative and judicial safeguards at the domestic level. The Committee has found that such safeguards include the

³ *X v. Australia*, Comm. No. 324/2007, U.N. Doc. CAT/C/42/D/324/2007, 30 April 2009, paras. 4.7–4.8.

⁴ UN General Assembly Activities of the Committee against Torture Pursuant to Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey, U.N. Doc. A/48/44/Add.1, 15 November 1993, para. 28.

⁵ HRC, General Comment No. 20, 28 July 1994, U.N. Doc. HRI/HEN/1/Rev. 1, para. 9; ECtHR, *Soering v. the United Kingdom*, Appl. No. 14038/88, Judgment (Plenary) 7 July 1989, para. 111; ECtHR, *Chahal v. the United Kingdom*, Appl. No. 22414/93, Judgment (Grand Chamber), 15 November 1996, para. 86.

⁶ See e.g. ECtHR, *Saadi v. Italy*, Appl. No. 37201/06, Judgment (Grand Chamber), 28 February 2008, para. 120.

⁷ See Concluding Recommendation on the United States' Periodic Report, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20 and Concluding Recommendation on Morocco's Periodic Report, U.N. Doc. CAT/C/MAR/CO/4, 21 December 2011, para. 11 in which the Committee made clear that renditions are contrary to Article 3 of the CAT.

⁸ See for instance the practice of Australia in intercepting boat refugees and bringing them to immigration detention facilities on Christmas Island, which is outside Australia's migration legislation: Committee on the Elimination of Racial Discrimination, Concluding Observations on Australia's Periodic Report, U.N. Doc. CERD/C/AUS/CO/15–17, 13 September 2010.

⁹ See e.g. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Mission to the United States, U.N. Doc. A/HCR/6/17/Add. 3, 22 November 2007, paras. 36–38.

right to appeal as well as access to a lawyer.¹⁰ However, further guidance by the Committee is needed on other elements and requirements for domestic safeguards against *refoulement*.

3. The Meaning of “consistent pattern of gross, flagrant or mass violations of human rights”

According to paragraph 2 of Article 3 of the CAT the competent authorities shall take into account the existence of a “consistent pattern of gross, flagrant or mass violations of human rights” when determining whether there are grounds for believing that he or she would be in danger of being subjected to torture. The Committee found such a pattern present for instance in El Salvador during the internal conflict between 1989 and 1991,¹¹ in the Democratic Republic of Congo in 2011,¹² and in Zaire in the early 1990s.¹³ Although these cases provide relevant indications, further clarification is needed on the requirements under which the Committee finds an Article 3 violation based on a consistent pattern of gross, flagrant or mass violations of human rights.

4. Diplomatic Assurances

The Committee has repeatedly raised concerns about diplomatic assurances.¹⁴ There have been several alarming cases in which individuals were severely tortured despite diplomatic assurances.¹⁵ In order to avoid the circumvention of the principle of non-*refoulement* through diplomatic assurances, a clear position by the Committee in a new General Comment would be of great legal and practical value.

5. Internal Relocation Alternative

States parties have advanced the argument of the internal relocation alternative according to which a person is not under the risk of torture in the receiving state if he or she could relocate to a safe area.¹⁶ The internal relocation alternative is not unproblematic and needs to be subjected to strict requirements. Possible criteria are (1) whether there is a real risk of harm in the other region; (2) whether the person can gain admittance to that region; and (3) whether the general circumstances prevailing in that part allow for a living in relative safety.¹⁷ In a new General Comment the Committee could advance valuable requirements as to whether or not and if so when the internal relocation alternative is permissible.

6. Interim Measures

Based on Rule 114 of the Rules of Procedure, the Committee may request a contracting state to take interim measures.¹⁸ Ever since the Committee introduced interim measures, states parties disputed the authority to do so, as well as the nature of such a request. Canada, for instance, argued in an

¹⁰ *J.H.A. v. Spain*, Comm. No. 323/2007, U.N. Doc. CAT//41/D/323/2007, 21 November 2008, para. 2.1.

¹¹ *M.C.M.V.F. v. Sweden*, Comm. No. 237/2003, U.N. Doc. CAT/C/35/D/237/2003, 12 December 2005, para. 6.4.

¹² *Sylvie Bakatu-Bia v. Sweden*, Comm. No. 379/2009, U.N. Doc. CAT/C/46/D/379/2009, 8 July 2011, para. 10.6.

¹³ *Mutombo v. Switzerland*, Comm. No. 13/1993, U.N. Doc. CAT/C/12/D/13/1993, 27 April 1994, para. 3.2.

¹⁴ See e.g. *Agiza v. Sweden*, Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005, para. 14.3; *Pelit v. Azerbaijan*, Comm. Nr. 281/2007, U.N. Doc. CAT/C/38/D/281/2005, para. 11.

¹⁵ UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 30 August 2005, U.N. Doc. A/60/316, paras. 48–50.

¹⁶ See e.g. *H.M.H.I. v. Australia*, Comm. No. 177/2001, U.N. Doc. CAT/C/28/D/177/2001, 1 May 2002, para. 4.11

¹⁷ These criteria have been developed by the ECtHR. See e.g. *Sufi and Elmi v. The United Kingdom*, Appl. Nos. 319/07; 11449/07, Judgment (Fourth Section), 28 June 2011, para. 266.

¹⁸ Rules of Procedure, U.N. Doc. CAT/C/3/Rev.6, 13 August 2013.

individual complaint that “in the absence of a provision in the Convention for interim measures an indication given [...] cannot be considered to give rise to a binding obligation on Contracting Parties.”¹⁹ Despite such reluctance in accepting interim measures, the Committee has repeatedly held that a failure to comply with the requested provisional measures violates the CAT. For instance, in the case of *Cecilia Rosana Núñez Chipana v. Venezuela*, the Committee stated that

the State Party, in ratifying the Convention and voluntarily accepting the Committee's competence under Article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.²⁰

In the case of *Agiza v. Sweden* the Committee further found that the state party had violated Article 22 of the CAT for removing an applicant immediately after the government's decision of expulsion. It was therefore impossible for the complainant to seek interim measures under the CAT.²¹ Contracting states that have authorized the Committee to consider individual complaints are thus obliged not to interfere with the processing of such complaints. The non-compliance with interim measures hampers the processing of petitions as it destroys the subject matter of a complaint and makes it impossible for an individual to seek a real remedy before the Committee.²² It is thus important that the Committee clarifies the scope and nature of interim measures.

7. Suspensive Effect

Complaints submitted to the Committee are rarely given suspensive effect by national authorities. This means that governments remove individuals despite a communication submitted to the Committee. This practice might considerably prevent and frustrate considerations by the Committee. By acceding to the Committee's authority under Article 22 of the Convention, states accept to cooperate with the Committee in good faith so as to enable it to consider communications.

Suspensive effect is equally important for domestic appeals. In cases dealing with extradition and expulsion, domestic remedies need to be provided with suspensive effect.²³ The lack thereof risks to render remedies and judicial safeguards ineffective and illusory. For these reasons, clarification on the suspensive effect of complaints are needed.

We thank the Committee for considering our submission and are available for any further information and discussions.

¹⁹ *T.P.S. v. Canada*, Comm. No. 99/1997, U.N. Doc. CAT/C/24/D/99/1997, 4 September 2000, para. 8.2.

²⁰ *Cecilia Rosana Núñez Chipana v. Venezuela*, Comm. No. 110/1998, U.N. Doc. CAT/C/21/D/110/1998, 16 December 1998, para. 8.

²¹ *Agiza v. Sweden*, Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005, para. 13.9.

²² *Ibid.* 23.

²³ Conclusions and Recommendations on France's Periodic Report, U.N. Doc. CAT/C/FRA/CO/3, 3 Apr. 2006, para. 7.