



COMMITTEE AGAINST TORTURE

DRAFT GENERAL COMMENT ON ARTICLE 2

SUBMISSIONS BY THE REDRESS TRUST

22 August 2007

1. REDRESS welcomes the UN Committee against Torture's decision to prepare a General Comment on Article 2 and is grateful for the opportunity to submit comments on the current draft.
2. As states' failure to incorporate the Convention against Torture into national law is a recurring theme in the Committee's jurisprudence, the adoption of this General Comment should contribute significantly to the fuller implementation of the Convention.
3. Also, the adoption of a General Comment on Article 2 is particularly timely given the attempts by a number of states to derogate from their obligations under the Convention against Torture in relation to their responses to current terrorist threats.
4. REDRESS' submission begins with some preliminary suggestions on structure and emphasis, then proceeds to focus on several issues arising in respect of Article 2 Paragraphs 1 and 2.

PRELIMINARY SUGGESTIONS ON STRUCTURE AND EMPHASIS

5. As it is foreseeable that states parties and other actors seeking to implement the Convention will rely heavily on the General Comment for guidance, its utility may be enhanced by following the structure of Article 2 itself. Addressing the three subsections of Article 2, with subheadings as required, would provide a more accessible framework but still allow the Committee to address thematic issues which cut across the Article - and indeed the Convention - as a whole.
6. The text of the General Comment is currently seven pages which is much longer than its previous comment on non-refoulement and/or the typical general

comments of the Human Rights Committee. It is suggested that where possible, the text may be shortened.

Article 2 Paragraph (1): Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction

A. Principles on Implementation

7. As a starting point, the General Comment should ideally remind states of the binding nature of the Convention and their duty to implement the Convention in good faith.¹ This could be accompanied by the reminder that pursuant to Article 27 of the Vienna Convention on the Law of Treaties, no state can ‘invoke provisions of its internal law as justification for its failure to perform a treaty.’
8. In recognition of the failure of a number of states to fully implement their obligations into national law, the adoption of a General Comment provides the opportunity for the Committee to consolidate its jurisprudence on implementation and make it accessible in one location. A clear and detailed analysis of the specific substantive and practical steps that states parties must take in order to fully implement the Convention will greatly increase the likelihood that states parties will fulfil their obligations. In this respect, a revision of the structure and greater elaboration of the specific steps required in the implementation process would make what is currently Part III of the General Comment much more useful and accessible to states parties and civil society alike.
9. The General Comment provides in Paragraph 10 a general description of Article 2, paragraph 1. It is suggested that the reference to the obligation of states parties emanating from this Paragraph as “broad, general” detracts from the importance of the measures set out therein and the need for states parties to implement. In order for states to be in a position to implement obligations, those obligations must be clear and unambiguous, and be seen to be so. Further, it is suggested that the second sentence is deleted as it arguably over-emphasises the preventive aspect of the Convention overall, in the absence of the other important aspects of the Convention, in particular the need to ensure accountability of those who perpetrate torture and the obligation to afford remedies to victims, both of which are important components of the Convention’s preventive mandate, but also constitute independent obligations under the Convention.

B. Protection for individuals and groups made vulnerable by discrimination or marginalisation

10. In line with the discussion in the current section IV (c), paras. 20 – 24 on ‘the protection for individuals and groups made vulnerable by discrimination or

¹ Article 26 of the Vienna Convention on the Law of Treaties 1969.

marginalization’, it would be helpful for the General Comment to emphasise that in implementing their obligations under the Convention, states parties must ensure that in all of their actions, including in particular their counter-terrorism activities and the context in which they are placed, they do not contribute to discriminatory treatment and ‘dehumanisation’ and the fostering of a climate conducive to the justification of torture of members of groups believed to be associated with alleged terrorists.

C. Incorporating the Definition of Torture

11. The General Comment highlights the failure of many states to incorporate the definition of torture accurately into national law.² It would be useful to make clear in Paragraph 7, that the offence of torture and other cruel, inhuman and degrading treatment and punishment is a *criminal* offence, which should be reflected in the relevant criminal code or other specialised criminal statute. While paragraph 9 provides a useful discussion of the importance of incorporating a specific definition of torture into national law, it would be helpful to specifically explain the shortcomings in state practice, possibly with specific examples from the Committee’s jurisprudence, as well as to provide clarification on the justifiable limits regarding the potential for the definition of torture to be qualified ‘by domestic law or by judicial interpretation.’³ Moreover, it would also be helpful for states parties which have not yet incorporated the definition of torture into national law to outline the options available to them to comply with the Convention. For example, the General Comment could highlight that states must define torture specifically - preferably through the wholesale incorporation of Article 1 (including Article 1(2) allowing for broader definitions of torture as reflected in international criminal and humanitarian law) - either through the enactment of dedicated legislation implementing the Convention and/or the amendment of existing legislation.
12. REDRESS welcomes the General Comment’s specific acknowledgement in paragraph 3 of the General Comment that Article 2 covers cruel, inhuman or degrading treatment or punishment (in addition to torture) and the recognition of the connection between torture and ill-treatment in that, ‘the conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture.’⁴ However, the characterisation of the ‘definitional threshold’ between torture and cruel, inhuman or degrading treatment or punishment as ‘often not clear’ may suggest scope for interpretation and flexibility in what constitutes torture, when indeed, the definition is quite clear, leaving little room for interpretation. This would be of particular concern given the recent attempts by some states to ‘redefine’ torture by significantly increasing the threshold in respect of incidents and events that may constitute torture. Indeed, regional and

² In paragraph 8, it may be more appropriate to replace the word ‘serious’ with ‘significant’ as ‘serious’ sets a very high threshold.

³ Paragraph 8.

⁴ Paragraph 2 - 3.

international jurisprudence has widened the threshold, recognising an increasingly wide array of types of incidents and events that may constitute torture. As the European Court of Human Rights has recently held, “[H]aving regard to the fact that the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’ . . . , the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”⁵

13. The General Comment should also remind states that the definition of torture does not require and is not based on demonstration of physical injuries but also encompasses mental suffering.

D. Obligation to eliminate normative, or other obstacles

14. The General Comment additionally highlights the obligation ‘to eliminate any normative or other obstacles that impede the eradication of torture.’⁶ However, it does not explain the nature of such obstacles. While the specification of obstacles need not and indeed, could not, reflect an exhaustive list, it would be helpful to provide examples from the Committee’s jurisprudence. The reference to amnesties in paragraph 4 of the current draft might more appropriately be contained in Part III. This might also be accompanied by a reference to immunities and statutes of limitations as also violating the principle of non-derogability and therefore, where they are provided for by national law, torture and cruel, inhuman or degrading treatment or punishment should be specifically excluded.

E. Custodial and other safeguards

15. Paragraph 13 addresses custodial safeguards. Again while the General Comment addresses some of the custodial safeguards necessary to prevent torture, it does not reference all of the safeguards acknowledged in its jurisprudence. The General Comment currently does not explain the rationale behind the development of custodial safeguards in recognition of the vulnerability of persons detained and their frequent exposure to the risk of torture and ill-treatment. As such, the General Comment should emphasise that custodial safeguards must not be seen in isolation but as interrelated in their protection of vulnerable persons against the arbitrary exercise of state power.

⁵ See, *Selmouni v. France* ECHR (1999) at para. 101

⁶ Para. 12

16. It would be important for the General Comment to underscore that custodial safeguards apply both in the questioning of potential suspects and from the moment of arrest. In particular, in paragraph 13, ‘detainees’ could be replaced with ‘individuals arrested and/or detained’ in order to encompass the common scenario in which individuals are tortured or subjected to ill-treatment immediately following arrest and before reaching a detention facility.
17. Furthermore, the General Comment should highlight the importance of ensuring that the key safeguards relating to the right to a lawyer, the right to inform family members and the right to medical assistance are enshrined in legislation, jurisprudence, and administrative procedures. Emphasis should also be made to the right of victims to effective remedies, particularly in relation to *habeas corpus*, in order to ensure that custodial safeguards apply in practice.
18. As discussed below, the General Comment should also point to the role of accountability and reparation in contributing to the prevention of torture.

F. Other ‘effective measures’

19. Beyond the definition of torture, the removal of obstacles impeding the eradication of torture and reference to custodial safeguards, the General Comment notes that the Committee has ‘developed a jurisprudence regarding effective measures’⁷ on implementation without specifying what these effective measures are. In order to ensure the practical and effective implementation of the Convention, it would be helpful for the General Comment to provide clearer and more specific references to these measures, drawing on its own jurisprudence. REDRESS would suggest that it would be especially important to address more specifically, monitoring mechanisms and reparation to victims in the elaboration of the types of effective measures necessary to prevent torture and cruel, inhuman or degrading treatment or punishment.
20. In this respect, the General Comment could provide further guidance on the specific types of monitoring mechanisms that may contribute to prevention. For example, the Committee has previously recommended that states consider the establishment of a national system to review all places of detention and cases of alleged torture and ill-treatment while in custody and allow national and international monitors such as the International Committee of the Red Cross, national human rights commissions and independent non-governmental organisations access to carry out regular, independent, unannounced and unrestricted visits to all places of detention.⁸ In this vein, the General Comment could also encourage states parties to ratify the Optional Protocol to the Convention.

⁷ Para. 11

⁸ See e.g. CAT/C/TJK/CO/1 7 December 2006 (in relation to Tajikistan)

21. Beyond the general reference to Articles 3 to 15 in the current para. 25 of the General Comment as ‘constitut[ing] specific preventative measures that the drafters and States Parties deemed essential to prevent torture and cruel, inhuman or degrading treatment or punishment, particularly in custody or detention,’ [see REDRESS’ earlier comment on Paragraph 10, at para. 9, above] the General Comment does not specifically address the relationship between Article 2 and Article 14 on reparation. In this respect, it would be appropriate for the General Comment to link reparation to the prevention of torture as required by Article 2(1). In particular, the General Comment could detail the function of the guarantee of non-repetition, one of the 5 enumerated forms of reparation enumerated in the recently adopted Basic Principles and Guidelines on the Right to A Remedy and Reparation,⁹ as a preventative mechanism in furtherance of Article 2(1), particularly as it includes an obligation to review laws that contribute to or allow forms of torture, and to reform these laws with a view to preventing torture. It would also be useful for the General Comment to address the preventative role of criminal and administrative sanctions as provided by Articles 4 – 9 of the Convention in order to emphasise the interconnectedness of the obligations contained in the Convention.

G. Specifying the roles of different state actors

22. In addition to greater specification of the ways in which states are obliged to implement the Convention, it would be particularly helpful if the General Comment moved beyond reference to the obligations of states as a whole and outlined the roles of specific actors including the Executive, the Legislature, Administrative Bodies, Law-Enforcement Bodies, the Judiciary (with emphasis on the independence of the judiciary as a necessary component to the independent implementation of the rights contained in the Convention), and national human rights institutions. The General Comment should also acknowledge the role of civil society in monitoring and highlighting shortcomings in implementation in law and practice, contributing to reforms and conducting education and public-awareness campaigns on the prohibition of torture.

23. Building on paragraph 12 of the General Comment, in addition to outlining the obligations and the ways in which states parties should implement the Convention into national law, the General Comment could also highlight the importance for states to periodically review the compatibility of their national laws with the obligations contained in the Convention, drawing in particular on the jurisprudence developed by the Committee which provides an authoritative interpretation of the Convention’s provisions. In this respect, the General Comment could call on states parties to establish a dedicated mechanism to conduct such a compatibility exercise and to take the necessary measures to resolve inconsistencies, where they arise. Again, such a mechanism should pay particular attention to the shortcomings in state practice identified by the Committee and the recommendations made in its jurisprudence.

⁹ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

24. In dealing with torture by non-state actors, it would be helpful if paragraph 19 of the General Comment clarified the obligations of state parties in respect of the various circumstances under which non-state actors may commit torture or other cruel, inhuman or degrading treatment or punishment. In this respect, it would be appropriate to reframe or shift the 3rd sentence in that paragraph beginning with “**For example, if a person...**” as it appears to refer to ‘extraordinary renditions’. Such practice has frequently involved state actors at all stages of the process and should systematically be dealt with as an aspect of counter-terrorism and torture. Moreover, states incur direct responsibility for such acts, rather than responsibility for the failure to exercise ‘due diligence’ as the current wording of the draft appears to imply.
25. It would be helpful if the General Comment drew attention to the scale of acts of torture and cruel, inhuman or degrading treatment or punishment by non-state actors, in particular armed groups, and provide a comprehensive overview of the obligations of states in relation to such acts. The current draft of paragraph 19 focuses mainly on the positive obligation of states to seek to prevent and to respond to torture by non-state actors. The Committee against Torture should also draw attention to the direct responsibility of states for acts of torture by non-state actors and the concomitant obligation either to refrain from conduct resulting in torture by non-state actors or to exercise control in such a way that such torture will be prevented. States are responsible for violations by “others who have acted under the direction, instigation or control of those organs, i.e. agents of the state.”¹⁰ An example is where the state delegates functions, such as prison management, to private actors and other instances where state organs supplement their own actions by recruiting private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State.¹¹ Beyond such direct links, human rights jurisprudence has recognised that a state is responsible for violations by non-state actors where it exercises effective overall control.¹²
26. The Committee against Torture could draw attention to its jurisprudence according to which states may not send a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture at the hands of non-state actors, at least those who are in effective control of that area.¹³ The Committee may also use the opportunity to recommend that states parties follow a protective approach concerned with the actual risk of torture to the individual irrespective of the nature of its source.

¹⁰ See Article 8 *ibid.* and Commentary on the ILC Draft Articles on State Responsibility, p.80.

¹¹ *Ibid.*, p. 104

¹² See for example ECHR, *Cyprus v Turkey* (2002), 35 EHRR 30 at para. 56

¹³ See *Elmi v Australia*, Communication No 120/1998 14 May 1999 CAT/C/22/D/120/1998

Article 2 Paragraph (2): No exceptional circumstances whatsoever, whether a state of war, internal political instability or any other public emergency, may be invoked as a justification of torture

27. In the past six years, attempts to justify or carve out exceptions to the absolute prohibition of torture have accompanied some states parties' counter-terrorism policies and practices. In this respect, the General Comment is timely in reminding states parties of the terms of Article 2(2) which set out that there are no exceptions to the prohibition of torture, even in scenarios in which theories such as the 'ticking bomb' are advanced. In paragraph 4, it may be appropriate for the Committee to specifically 'condemn' rather than express 'its deep concern' about 'any efforts by States to justify torture and ill-treatment.'
28. It would be useful to insert a paragraph into the General Comment which recalls the legal standards and jurisprudence developed not just by the Committee against Torture but also by other international, regional and national bodies which have repeatedly underscored the absolute prohibition of torture to which no 'exceptional circumstances whatsoever' whether a state of war or a threat of war, internal political instability or any other public emergency, can justify torture. By recalling the fundamental and entrenched nature of Article 2(2), the General Comment will demonstrate the firm basis on which to reject arguments that the global reach of the so-called 'war on terror' somehow distinguishes current terrorist threats from those of the past and therefore permits or justifies derogation.
29. It is recommended that the General Comment should then specifically state that the implementation of counter-terrorism measures directed by the Security Council or any other international, regional or national body, provide no basis for derogation from the absolute prohibition of torture; to the contrary, they must be implemented in full recognition and adherence to states' obligations under the Convention and broader international law.
30. The General Comment should also emphasise that states parties cannot evade the non-derogability of the absolute prohibition of torture by outsourcing torture, violating the principle of *non-refoulement* under Article 3 by participating in or facilitating 'extraordinary renditions' or by using evidence obtained by torture, even if they did not directly commit the torture themselves. In recognition of the interconnectedness of Articles 2(1) and 2(2), the General Comment should also remind states that in the implementation of their obligations under the Convention, they should specifically ensure that the use of evidence obtained by torture is prohibited under national law.
31. In paragraph 6, the Committee reminds states to report to it 'any incidents of torture or ill-treatment as a consequence of anti-terrorism measures ... and the measures taken to investigate, punish and prevent further torture or ill-treatment

in the future.’ The General Comment as a whole and this paragraph in particular would be strengthened if the Committee also referenced the measures taken to provide reparation to those who have been subject to torture and cruel, inhuman or degrading treatment or punishment in the context of counterterrorism activities.