

IRCT observations on CAT revised General Comment 1

IRCT submission on the UN Committee against Torture's Draft Revised General Comment on the implementation of article 3 in the context of article 22.

1. Introduction

The International Rehabilitation Council for Torture Victims (IRCT) welcomes the UN Committee against Torture's revision of its General Comment no. 1 on Article 3 of UNCAT in order to strengthen access to an effective remedy for individuals who claim to be victims of a violation of Article 3 of the Convention against Torture. We are pleased to be able to submit written contributions and as part of this process, IRCT has consulted with its members and included their feedback in this submission.

Our observations focus on access to specialised rehabilitation services for victims of torture, the investigation and documentation of allegations of torture or ill-treatment and guarantees and safeguards for vulnerable persons. Text that we consider should be removed is in strike through, our suggested additional text is in bold.

As a general comment, the IRCT observes that the development of standards for the implementation of Article 3 should be guided by the experiences of victims and existing health based knowledge about what happens to persons when they are tortured. In relation to the effective implementation of Article 3, it is particularly relevant to ensure that existing knowledge about the psychological impact of torture and ill-treatment and how this impacts victims' wellbeing and ability to engage with judicial processes is taken into account. This is well documented in health based research and increasingly recognised by international and regional human rights bodies and some national courts. The IRCT proposes that this element is included in the General Principles section since it is of paramount importance to every aspect of the implementation of Article 3. We would propose the following wording:

INSERT NEW PARAGRAPH:

“The physical and psychological damages from torture can last for decades and affect several generations. Many torture survivors suffer from psychological symptoms such as anxiety, depression, withdrawal and self-isolation. They also struggle with cognitive symptoms, including confusion, flashbacks and memory lapses; and neuro-vegetative symptoms such as fatigue, insomnia and recurrent nightmares. The most frequent psychiatric diagnoses are posttraumatic stress disorder (PTSD) and major depression. Although the psychological consequences of torture are often more persistent and long-lasting than the physical effects, a large number of torture survivors also suffer from chronic physical pain years after their abuse. The Committee considers that States parties must put in place special measures to ensure that safeguards and remedies are effective for persons with physical and psychological trauma from torture and other ill-treatment.”

2. Victims of torture must be able to access specialised rehabilitation services.

The language in the General Comment regarding a torture victim's right to rehabilitation should be consistent with language used in other interpretative guidance issued by the Committee¹. In particular the holistic nature of rehabilitation and the criteria on which a state's obligations to provide rehabilitation are measured, i.e. on the basis that rehabilitation services are available, appropriate and readily accessible should be reflected more clearly. In addition, a State that has erroneously refouled a person to another State where they are at risk of torture or ill-treatment are obliged to repair the harm it has caused to that person. This includes the obligation to provide access to an independent medical and psychological evaluation to assess the extent of harm suffered and therefore their rehabilitation needs. Further to this, the person should be provided immediately with access to holistic rehabilitation services.

We suggest that paragraphs 21 and 22 should be amended to read as follows:

"21. States parties should take into account that victims of torture and other cruel, inhuman or degrading treatment or punishment suffer physical and psychological traumas which may require **support from sustained specialized holistic rehabilitation services, treatment including medical and psychological care, as well as legal and social services.** ~~Once~~ ~~their health fragility and need for treatment has been medically certified,~~ they should not be removed to a State where adequate medical services for their rehabilitation linked to their torture-related trauma are not available or not guaranteed. **Where the person has been evaluated physically or psychologically and signs of torture or ill-treatment have been identified, they are entitled to rehabilitation and therefore should not be removed to a State where specialized holistic rehabilitation services are not available, accessible or appropriate, and are not guaranteed at the earliest point in time after the person's return.**"

"22. ... When necessary, the sending State should undertake legal and administrative or other (diplomatic) procedures for the return of the persons concerned to its territory **where they should be guaranteed immediate access to an independent medical and psychological evaluation of their needs and where required to specialized holistic rehabilitation services.**"

3. Torture and ill-treatment must be effectively investigated and documented

Effective documentation of allegations of torture and ill-treatment is an essential element of ensuring implementation of Article 3 since documentation may help validate allegations of past torture or ill-treatment and because the documentation capacity in the country of return may contribute to the overall risk assessment. The Istanbul Protocol is the internationally accepted standard for effective investigation and documentation of allegations of torture and ill-treatment and is thus a relevant and applicable standard to be integrated into the General Comment.

Based on the IRCT's experience, a number of concrete measures should be added to make the General Comment more responsive to the situation that victims of torture and ill-treatment find themselves in. Since many victims predominantly exhibit psychological symptoms, it is critical that any effort to document torture and ill-treatment includes both a physical and a psychological evaluation. The specific purpose of this evaluation must be to determine the consistency of torture allegations with physical and psychological findings (rather than establishing the general health of the person) and it must be done at the earliest point in time so that action can be taken in relation to the provision of rehabilitation services and the further processing of the refoulement case.

We suggest that paragraphs 18.(d) and (g) and 30.(a)(iv) and (v) should be amended to read as follows:

¹ In particular §§11-15 of the UN Committee against Torture's General Comment no. 3.

18. (d) The referral of the person alleging previous torture **at the earliest point in time** to an independent medical **and psychological** examination **to detect signs or symptoms of past torture or trauma. The evaluation should be offered free of charge and be according to the standards in the Istanbul Protocol. Where required, an interpreter must be available for the examination and should be independent, professional, proficient in the preferred language of the person and gender appropriate;**

(g) An effective training of medical **health professionals – including medical and psychological** - and other personnel dealing with **vulnerable persons, including** detainees, migrants and asylum seekers, **children and victims of sexual or gender-based violence** in identifying and documenting signs of torture, ~~taking into account~~ **based** on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).

30. (a)(iv) access to an independent medical doctor **and psychological health professional** for an examination and treatment of his/her health or, for this purpose, to a medical doctor **and psychological health professional** of his/her choice, at his/her own expenses;

(v) access to an independent specialized **medical and psychological health professional** or entity **qualified** to certify his/her allegations of having been subjected to torture **according to the standards in the Istanbul Protocol;**

4. Specific requirements for the submission of individual communications under Article 22 of UNCAT and interim measures of protection (Section X.C. on Merits)

The General Comment should clarify that where an individual makes an arguable case of past torture or ill-treatment as evidence of a real risk of such treatment on removal, the burden of proof shifts to the State party to credibly refute that risk. Secondly, the General Comment needs to outline more clearly the appropriate guarantees and safeguards that should be afforded to vulnerable persons, including victims of torture or ill-treatment. For example, there is an obligation on states to adapt the assessment process to take into account the vulnerability of the person and victims of torture must have access to rehabilitation services to enable them to engage effectively in proceedings and to avoid retraumatization. Further, the specific psychological trauma that victims of torture may suffer and how this impacts on their ability to present a coherent and consistent account needs to be explained clearly.

We suggest that paragraphs 40, 42, 43, 47, 52, 53(c), (d), (h) and (i) should be amended to read as follows:

40. ... torture is foreseeable, present, personal and real. **However, where an arguable case of past torture or ill-treatment is made as evidence that a real risk of such treatment upon removal exists, the burden of proof shifts to the State to refute that risk. In practice, this places a specific obligation on the State to effectively investigate the claim, including the veracity of the allegations of past torture or ill-treatment, as well as the bearing that they may have, if any, on the real risk of torture or other ill-treatment upon removal.** ~~However,~~ When the complainant is ... the burden of proof is reversed and it is up to the State concerned to investigate the allegations and verify the information on which the communication is based. **The applicable standard for an investigation is the Istanbul Protocol and in particular its principles guiding forensic medical evaluations.**

42. In its procedure of assessment, ... especially if the person is deprived of his/her liberty or the person is in a particularly **considered to be vulnerable** situation such as the situation of, **including if they are** an asylum seeker, **a disabled person, a mentally ill person, a pregnant woman, a victim of torture or ill-treatment,** an unaccompanied minor or a ~~woman~~ **person** who has been subjected to violence of a sexual **or gender-based** nature.

43. Guarantees and safeguards should include linguistic, legal, medical, ~~and/or~~ psychological, social and, when necessary,

financial assistance... In particular, **an independent medical and psychological examination requested by a complainant according to the standards in the Istanbul Protocol** to prove the torture that he/she has suffered **allegations** should always be ensured,... so that the authorities deciding on a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of that **independent medical and psychological examination**, without any reasonable doubt.

INSERT NEW PARAGRAPH: to address access to rehabilitation services for those raising allegations of torture or ill-treatment:

“Once a person has presented an arguable case of past torture or ill-treatment, holistic rehabilitation services must be made available and special measures must be put in place to ensure that the person is not re-traumatised by the proceedings and that adapted processes are put in place to ensure that physical and psychological trauma from torture or ill-treatment does not jeopardise the person’s right to an effective remedy.”

44. As regards potential factual contradictions and inconsistencies in the author's allegations, the States parties should not require complete accuracy, as it can seldom be expected from victims of torture, unless such inconsistencies give rise to doubts about the general veracity of the author's claims. **Torture victims and other vulnerable persons frequently suffer from Post-Traumatic Stress Disorder (PTSD) which can result in a broad range of symptoms, including involuntary avoidance and dissociation. These symptoms may affect the ability of the person to disclose all relevant details or to relay a consistent story throughout the proceedings. In order to ensure that victims of torture or other vulnerable persons are afforded an effective remedy, state parties should refrain from following a standardised credibility assessment process to determine the validity of a refoulement claim.**

47. ..., expulsion or extradition when the complainant presents credible facts that demonstrate that a substantial risk exists **and where the State fails to refute an arguable case of past torture or other ill-treatment.**

52. ..., such as **by implementing** clear legislative provisions... and their punishment commensurate with the gravity of the crime committed when they are found guilty, **providing victims of torture or ill-treatment with access to redress and reparations, including compensation and rehabilitation.**

53. (c) Is there medical, **psychological** or other independent evidence to support a claim by the complainant that he/she has been tortured or ill-treated in the past? Has the torture had after-effects? **Does the complainant need rehabilitation as a result of the past torture or ill-treatment?**

(d) ... , in particular, to an independent medical **and psychological examination according to the standards of the Istanbul Protocol and provided free of charge** to assess his/her claims that he/she has previously suffered torture or ill-treatment in his/her country of origin?

We suggest that 53.(h) and (i) are merged and we would suggest the following wording is considered: **“Whether the complainant has a history of PTSD or other similar symptoms that may result in their inability to disclose all relevant details of their case or cause the person to present incomplete or inconsistent accounts.”**

5. Additional comments on issues outlined in the revised General Comment

The following comments are of a more general nature but important for the Committee to consider. Firstly, we recommend that the General Comment confirms that non-refoulement obligations are triggered when removal entails a risk of torture or other ill-treatment², perhaps by adding a provision at the beginning of the text which clarifies this.

2 As outlined by the UN Committee against Torture in its General Comment no. 2.

Secondly, we encourage the Committee to elaborate on its position with regard to diplomatic assurances (Section IV). In most cases diplomatic assurances risk under-mining the principle of non-refoulement, even where the returning State is obligated to monitor the other State's compliance with the diplomatic assurances.³ If the use of diplomatic assurances is to be accepted by the Committee then even where the returning State does not have substantial grounds for believing the person would be at risk of torture in the State it is deporting to, it should make reasonable efforts to confirm that the receiving State complies with the diplomatic assurance. In addition, paragraph 20 refers only to "diplomatic assurances from a State party to the Convention ..." (emphasis added). Given the customary nature of the non-refoulement principle, it is arguable that diplomatic assurances - if they are to be accepted by the Committee - should apply without distinction.

Thirdly, we encourage the Committee to clarify the relationship between the "internal flight alternative" and the notion of "local danger" which is not wholly clear from the current wording of paragraphs 50-51 of the General Comment. It is our understanding that the two are closely interlinked, and that the Committee has confirmed through its jurisprudence that the internal flight alternative is not acceptable on the sole basis that danger is of a local nature.⁴

Finally, in the section addressing specific human rights situations (Section VIII, paragraph 30), there is no mention of assessing whether a state criminalises same-sex conduct as an indication that there could be a risk of torture. This is of particular concern given the evidence we see that states where homosexuality is criminalised often use non-consensual anal examinations as an erroneous means of obtaining evidence of homosexuality. This practice is both medically worthless and amounts to torture and ill-treatment.⁵ We would strongly recommend that a sub-paragraph referring to states where consensual same-sex conduct is criminalised is inserted to paragraph 30.

We hope that these observations are helpful to the Committee. Should you require any further clarification of our comments, please do not hesitate to contact Asger Kjærum, Director of Advocacy (akj@irct.org) or Rachel Towers, Advocacy Advisor (rto@irct.org).

³ See Special Rapporteur on Torture, Report submitted in accordance with General Assembly resolution 59/182, U.N. Doc. A/60/316, 30 August 2005, paragraphs 46 and 50

⁴ For example: *Mondal v. Sweden*, Comm. No. 338/2008, 7 July 2011, para. 7.4.

⁵ Independent Forensic Expert Group (IFEG), Statement on Anal Examinations in Cases of Alleged Homosexuality, published in the *Torture Journal*, Vol. 26, No. 2, 2016, p.85.

Contact

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About the IRCT

With more than 150 torture rehabilitation centres in over 70 countries working in the field of rehabilitation for torture victims, IRCT is the world's largest membership-based civil society organisation working with rehabilitation. The organisation is governed by its members through democratic processes and has as its objective that effective rehabilitation services are provided for all torture victims.

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