



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

Distr.
GENERAL

CAT/C/SR.778
8 January 2008

ENGLISH
Original: FRENCH

COMMITTEE AGAINST TORTURE

Thirty-eighth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 778th MEETING

Held at the Palais Wilson, Geneva,
on Wednesday, 16 May 2007, at 3 p.m.

Chairperson: Mr. MAVROMMATIS

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* The summary record of the second part (closed) of the meeting appears as document CAT/C/SR.778/Add.1.

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The meeting was called to order at 3.05 p.m.

DRAFT GENERAL COMMENT NO. 2 CONCERNING THE IMPLEMENTATION OF ARTICLE 2 OF THE CONVENTION BY STATES PARTIES (CAT/C/GC/2/CRP.1/Rev.1) (English only) (*continued*)

1. The CHAIRPERSON invited the members of the Committee to continue consideration of the draft general comment concerning the implementation of article 2 of the Convention, contained in document CAT/C/GC/2/CRP.1/Rev.1.
2. Mr. GROSSMAN, returning to paragraph 4 of the draft, and in particular the words “general amnesty” in the last sentence, noted that, in the context of torture, amnesty – whether collective or individual – was an unacceptable measure. Accordingly, the word “general” should be deleted.

Paragraph 6

3. The CHAIRPERSON recalled that at the previous meeting, some members of the Committee had expressed reservations about the reference to the Constitution in the paragraph. Such a reference could be deleted.
4. Ms. GAER (Rapporteur for the draft general comment) said that perhaps a reference could simply be made to the legal system or criminal laws.

5. Mr. MARIÑO MENÉNDEZ (Alternate Rapporteur for the draft general comment) endorsed the proposal to delete the reference to the Constitution, which should dispel the concerns raised earlier by Mr. Wang Xuexian.

6. *It was so decided.*

7. *Paragraph 6, as orally amended, was adopted.*

Paragraph 7

8. Ms. SVEAASS wondered about the use of the words “elements of intent” in that paragraph.
9. Ms. GAER (Rapporteur for the draft general comment) said that the aim was to be more exact. “Elements of intent” was more specific than “References to intent”.

10. *Paragraph 7 was adopted.*

Paragraph 12

11. Ms. GAER (Rapporteur for the draft general comment) said that the word “establishing” should be inserted before “new forms”.
12. Ms. SVEAASS said that the first sentence should also mention the consequences of torture.

13. *That proposal was approved.*
14. *Paragraph 12, as orally amended, was adopted.*

Paragraph 15

15. Mr. MARIÑO MENÉNDEZ (Alternate Rapporteur for the draft general comment) said that the words “in their own State” at the beginning of the paragraph were superfluous: it went without saying that the State exercised jurisdiction over itself.

16. Ms. GAER (Rapporteur for the draft general comment) said that the aim was to emphasize the fact, expressly provided for in the Convention, that the State must take measures wherever it exercised its jurisdiction, including, for example, during peacekeeping operations.

17. Mr. MARIÑO MENÉNDEZ (Alternate Rapporteur for the draft general comment) proposed that the words “in their own State” should be replaced by “in their own territory”.

18. Ms. GAER (Rapporteur for the draft general comment) said she preferred the words “in the State’s territory”.

19. *That proposal was approved.*

20. *Paragraph 15, as orally amended, was adopted.*

Paragraph 16

21. Mr. WANG Xuexian had doubts about the second sentence, because article 14 of the Convention concerned torture, and not ill-treatment. Moreover, article 16 referred to the obligations set out in articles 10 to 13, and not in article 14.

22. The CHAIRPERSON agreed, but said that in the past, the Committee had also linked those provisions to article 14 mutatis mutandis. Why should victims of ill-treatment not have a right to compensation?

23. Mr. WANG Xuexian said that the practice was one thing, but a general comment was another. There was no precise definition of ill-treatment, and the term could cover virtually anything, domestic violence for example; how could a State possibly be bound to investigate every minor violent incident arising between individuals and compensate every victim?

24. The CHAIRPERSON pointed out that the provisions of article 16 limited the scope of those provisions to persons acting in an official capacity and did not cover domestic violence. However, to allow for Mr. Wang Xuexian’s legitimate concerns, the words “has determined” could be replaced by “has held”, and it would be specified in the same sentence that the right to compensation applied to victims of ill-treatment as defined in article 16.

25. Ms. GAER (Rapporteur for the draft general comment) said that in referring to articles 10 to 13 of the Convention, article 16 was referring to the prevention of the acts in question. When article 16 of the Convention had been drafted, the inclusion of a reference to article 14 had been envisaged, but not retained. However, in its practice from the outset, the Committee had consistently established – including in cases falling under article 22 of the Convention – that the

victims of ill-treatment had a right to compensation, rehabilitation etc. Incidentally, much had been said and written on the subject of domestic violence. The fact that a State did not investigate such cases with the necessary diligence encouraged such practices. As the Committee had indicated on many occasions, the obligation to prevent ill-treatment was an obligation to act.

26. Mr. MARIÑO MENÉNDEZ (Alternate Rapporteur for the draft general comment) said that Mr. Wang Xuexian's concerns might be dispelled by specifying in the last sentence that custody or control ensured by State officials was concerned. That would be possible under a broad interpretation of article 14; at issue was a general principle of law which had every reason to be addressed in a general comment.

27. Ms. SVEAASS said that the obligation to investigate with diligence was an established principle. What was important in the paragraph was that the State must intervene and that acquiescence or inaction on the part of the authorities must give rise to compensation. It was therefore legitimate to refer to article 14. In addition to children and the aged, paragraph 16 should also include mentally ill and disabled persons and even immigrants and asylum-seekers placed in institutions.

28. The CHAIRPERSON said that in his view, a reference to mentally ill and disabled persons was perfectly acceptable.

29. Ms. GAER (Rapporteur for the draft general comment) said that it would be useful to examine the Committee's past practice; it was important to ensure that the wording of paragraph 16 was not diluted. One solution might be to simply delete the reference to article 14, since the reference to articles 10 to 13 was not exhaustive.

30. The CHAIRPERSON said that the Committee could simply delete the reference to article 14 and note that, in past cases in which it had held that a victim of ill-treatment should receive compensation, it had acted pursuant to a broad interpretation of article 16. It would probably be best to leave it to the Rapporteurs to find a satisfactory wording.

31. Mr. WANG Xuexian insisted that the reference to article 14 should be deleted, since the Committee was drafting a general comment and not a review of its past decisions.

32. The CHAIRPERSON said that in addition to the deletion of the reference to article 14, the words "has determined" could be replaced by "has consistently held".

33. Mr. MARIÑO MENÉNDEZ (Alternate Rapporteur for the draft general comment) thought it possible to find a wording that was satisfactory to Mr. Wang Xuexian without deleting the reference to article 14, which it would be preferable to retain in connection with Committee practice.

34. The CHAIRPERSON said that Mr. Wang Xuexian's concern was all the more legitimate in that pursuant to article 14, the right to obtain compensation was expressly guaranteed to the victims of acts of torture. In accordance with the rule of interpretation expressio unius est exclusio alterius, that tended to exclude victims of ill-treatment from benefiting from that right.

35. Ms. BELMIR said that she had no objection to retaining the reference to article 14, given that by law, any prejudice resulting from an illegal act conferred a right to compensation for the victim, regardless of whether the act was inflicted by a State official or a private actor.

36. The CHAIRPERSON suggested that it should be left to the Rapporteurs to deal with the question and to qualify the current wording by taking account of the comments made by the members of the Committee, and he reiterated his proposal to replace the words “has determined” by “has consistently held”.

37. *It was so decided.*

Paragraph 18

38. The CHAIRPERSON proposed that the words “is a violation by” in square brackets should be merged with the rest of the sentence by introducing the following phrase: “a failure amounting to a violation”.

39. *The proposal was approved.*

40. Mr. MARIÑO MENÉNDEZ (Alternate Rapporteur for the draft general comment), referring to the two proposed titles for section B, which paragraph 18 came under, said that he was prepared to withdraw his proposal in favour of Ms. Gaer’s, namely “Participation in torture by State authorities or others”. He was opposed to the use on two occasions in the body of the paragraph of the word “complicit”, because it unduly restricted the scope of the acts for which State officials bore individual responsibility under the Convention. In his view, when State officials consented to, allowed or tolerated acts of torture, they were not complicit in a violation of the Convention, but were perpetrators.

41. Ms. BELMIR said that she did not see how the State could be held responsible for acts committed by private actors and asked for clarification on that point.

42. Ms. GAER (Rapporteur for the draft general comment) cited the example of prisons run by private companies. In permitting persons to be imprisoned in such facilities although it was aware that acts of torture or cruel, inhuman or degrading punishment might be practised there, the State failed to fulfil its obligation under article 2, paragraph 1, of the Convention to take effective measures to prevent acts of torture in its territory.

43. As to the concept of complicity, she cited article 4 of the Convention, which required States parties to ensure that any act that constituted complicity in torture was an offence, regardless of who the offender was. Although article 1 did not expressly refer to the “complicity” of State officials, the words “consenting or acquiescing to” conveyed the same idea. It would be meaningless to interpret the Convention as requiring States parties to punish complicity when it was the act of non-State actors while exonerating their own officials.

44. The CHAIRPERSON said that in his view, both the State and its officials were responsible, and the latter could not be accomplices of the former, because the State could act only through the intermediary of its officials.

45. Ms. GAER (Rapporteur for the draft general comment) remained convinced that it was imperative to retain the reference to the complicity of State officials, because it meant that such persons bore individual responsibility, and it provided grounds for instituting criminal proceedings against them. If the paragraph merely specified that the State was responsible for consenting or acquiescing to acts of torture committed by its officials, it would be simply a theoretical notion of responsibility without any guarantee of concrete effects; that could not be acceptable to the Committee.

46. Mr. KOVALEV said that the word “complicit” was inappropriate: State officials could not be the accomplices of the State, because they acted on its behalf. Moreover, the criminal implications of complicity varied from one State to another, depending on the State’s domestic legislation.

47. Mr. GROSSMAN said that it was vital not to limit the responsibility of State officials to acts constituting complicity, because it would create a means of defence which States and their State officials could use to evade compliance with their obligations under the Convention. A wording such as “and its officials are complicit or bear other type of responsibility” would make it possible to avoid that risk.

48. The CHAIRPERSON agreed with Mr. Grossman, but thought that the responsibility of officials as offenders should also be mentioned.

49. Ms. MORALES (Secretary of the Committee), summarizing the opinions expressed, said she took it that a consensus had emerged on the following wording: “and its officials are authors, complicit or otherwise responsible”.

50. *Paragraph 18, as orally amended, was adopted.*

Paragraph 19

51. Mr. GROSSMAN said that the phrase “and that these constitute an impermissible purpose” should be deleted, because it suggested that torture could be permissible when it was based on reasons other than discrimination; that would be totally at variance with the absolute prohibition of torture enunciated in the Convention.

52. *Paragraph 19, as orally amended, was adopted.*

Paragraph 22

53. Ms. SVEAASS proposed that the sectors of the population enumerated in the penultimate line should also include persons made vulnerable because they had been tortured in the past.

54. *Paragraph 22, as orally amended, was adopted.*

Paragraph 24

55. Ms. GAER (Rapporteur for the draft general comment) said that she would check whether, in the first line, articles other than those mentioned should also be cited and would make any necessary changes.

56. *Paragraph 24 was adopted, subject to later changes.*

Paragraph 25

57. Ms. SVEAASS, noting that in the last part of the paragraph a preponderant importance was given to the responsibility of superiors, said that a sentence should also be inserted to the effect that subordinates who carried out the orders of a superior were also responsible.

58. The CHAIRPERSON, endorsing that suggestion, asked Ms. Sveaass to submit a proposal to the Rapporteurs, who would insert it in the draft later.

59. Mr. KOVALEV said that the phrase “those exercising superior authority [...] cannot avoid State responsibility” was inappropriate. The responsibilities which those exercising superior authority could not avoid were not those of the State but those incumbent upon them under domestic legislation.

60. Ms. GAER (Rapporteur for the draft general comment) pointed out that persons exercising superior authority who were responsible for acts of torture could be put on trial not only in national courts but also in international tribunals, such as the International Criminal Court. It might be useful for the paragraph to make that point.

61. The CHAIRPERSON, agreeing with those comments, entrusted the Rapporteur with changing and completing the phrase cited by Mr. Kovalev.

62. *It was so decided.*

63. Mr. GROSSMAN suggested that at the end of the paragraph, a phrase should be inserted to make it clear that the content of the final comment was without prejudice to any international instrument or national law containing provisions of a broader scope.

64. *The proposal was approved.*

65. *Paragraph 25, as orally amended, was adopted, pending later changes.*

66. *Draft general comment no. 2 concerning the implementation of article 2 of the Convention by States parties (CAT/C/GC/2/CRP.1/Rev.1), as orally amended, was adopted, subject to later changes.*

67. The CHAIRPERSON announced that once the Secretariat had finalized the text of the general comment, it would forward it to States parties, NGOs and the other treaty bodies and request them to send their comments within a time period of about one month so that during the inter-sessional period, the Rapporteurs could incorporate in the current version the proposals which they deemed relevant. The text would then be resubmitted to the Committee for adoption at its thirty-ninth session.

ORGANIZATIONAL AND OTHER MATTERS (agenda item 3)

68. The CHAIRPERSON said that the Committee must decide which members would represent it at the sixth meeting of the human rights treaty bodies, to be held in Geneva from 18 to 20 June 2007, and noted that Mr. Camara and Mr. Gallegos Chiriboga had volunteered.

If there were no objections, he would take it that the Committee agreed that they should assume that responsibility.

69. *It was so decided.*

70. The CHAIRPERSON said that the list of issues for the reports which the Committee would consider at its fortieth session, in May 2008, had been elaborated by the following members of the Committee: for Indonesia: Mr. Grossman and Mr. Gallegos Chiriboga; for Iceland: Mr. Mavrommatis and Mr. Wang Xuexian; for Zambia: Mr. Mariño Menéndez and Mr. Kovalev; for Sweden: Mr. Grossman and Mr. Wang Xuexian; for Algeria: Mr. Camara and Ms. Belmir; for Costa Rica: Mr. Gallegos Chiriboga and Ms. Sveaass; for the former Yugoslav Republic of Macedonia: Ms. Sveaass and Mr. Gallegos Chiriboga.

The public part of the meeting rose at 4.45 p.m.
