



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

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## Committee against Torture

Forty-third session

### Summary record of the second part (closed)\* of the 898th meeting

Held at the Palais Wilson, Geneva, on Tuesday, 3 November 2009, at 12.10 p.m.

*Chairperson:* Mr. Grossman

## Contents

Organizational and other matters (*continued*)

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\* The summary record of the first part (public) of the meeting appears as document CAT/C/SR.898.

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*The closed part of the meeting was called to order at 12.10 p.m.*

**Organizational and other matters (continued)**

1. **Ms. Gaer** said that the review of a country situation in the absence of a delegation from the country might require something more from the Committee than the usual practice of considering concluding observations. When the Committee had reviewed the situation of Cambodia, it had met to discuss the main concerns with the country rapporteur before the concluding observations had been prepared (CAT/C/CR/31/7). She proposed that at least a little meeting time should be used to discuss with the country rapporteurs for Yemen how to structure the provisional concluding observations and what issues to include.
2. **The Chairperson** suggested that the country rapporteurs should guide any such discussion, given the work they had already done.
3. *It was so decided.*
4. **The Chairperson** suggested opening the discussion of the proposed general comment No. 3 using his short summary in English, which he would read out so that Committee members could hear the interpretation, since no translations were available. The proposal for the general comment had been before the Committee for two years and had been translated 18 months previously. He had drafted the summary documents merely to support what he intended to present orally. It was high time the Committee made some progress on that matter.
5. **Ms. Gaer** said that random scheduling and not notifying the working group and other Committee members of changes in plans created problems as far as preparation for discussions was concerned. Members should have proper notification of which issues were scheduled for discussion so that they could prepare their comments accordingly. Items should not be taken up out of order.
6. **Mr. Mariño Menéndez** said there had been no means of telling that Yemen would not appear, and it was only logical to use the time made available to start work on draft general comment No. 3. If the discussion was postponed, time would be lost and it might not be possible to complete consideration of all the communications. As he saw it, the Chairperson was simply proposing to use the time to introduce the summary of his draft general comment.
7. **Mr. Wang Xuexian** and **Mr. Gaye** agreed with Mr. Mariño Menéndez. The Committee should proceed with consideration of the Chairperson's summary of draft general comment No. 3.
8. **The Chairperson** read out his summary of draft general comment No. 3, which appeared as an informal document without a symbol:

**“General comment No. 3**

*Implementation of a systematic approach to the evaluation of facts and evidence for the individual complaints procedure under articles 3 and 22*

1. This general comment creates a systematic approach for the Committee against Torture by which to evaluate facts and evidence under articles 3 and 22 of the Convention against Torture. The benefit of adopting a systematic approach is to ensure compliance with the Convention and to provide both States parties and complainants with clear, predictable guidelines for how the Committee will approach the evaluation of facts and evidence, while at the same time giving the Committee the flexibility and freedom necessary to ensure compliance with the Convention and guarantee the just resolution of article 22 claims.

2. Article 3 provides that no State party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, article 3 obliges the competent authorities within States to 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.

3. Article 22 empowers the Committee to receive and consider individual communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention. The Committee may admit and examine individual communications against a State party if the State party has expressly recognized the Committee’s competence to receive and consider such communications. If the Committee determines that an individual communication is admissible, it shall bring the communication to the attention of the State party. Then the State party, within six months, shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State party concerned.

4. The issue of the Committee’s evaluation of facts and evidence is of critical importance to States parties, complainants, and the international community. While it remains important to give considerable weight to domestic proceedings, recognizing the sovereignty of States parties, such interests must be balanced against the expectations of complainants and the paramount importance of the prohibition against torture.

5. This general comment explains three categories of cases that arise in the context of the individual complaints procedure under articles 3 and 22. In Category 1, the facts are not in dispute and consequently the Committee has no need to assess facts. In Category 2, the Committee is the first body to assess facts or evidence because the evidence and facts either were never considered or were disregarded in the domestic proceedings of the State party. Category 3 presents cases in which the complainant and the State party dispute relevant facts and evidence.

#### **I. Category 1: Cases in which the existence of facts is undisputed but the assessment or legal effect of the facts is challenged.**

6. In cases where the facts are undisputed, the complainant and the State party do not disagree as to what happened, but rather whether the facts constitute a violation of the Convention. In such a situation, the Committee, as the ultimate interpreter of the Convention, assesses the facts in light of the State party’s obligations under the Convention. The Committee has full discretion, under the Convention, to weigh the legal consequences of those facts.

7. The legal assessment of the undisputed facts to determine whether the Convention has been violated is a legal issue under the mandate of the Committee. Domestic courts are well positioned to evaluate the quality of the facts and evidence presented before them, but giving legal effect to the provisions of the Convention, and thereby monitoring States parties’ compliance with their obligations under the Convention, is well within the competence of the Committee.

8. In giving legal effect to undisputed facts, the Committee is acting consistent with the fundamental nature of States parties’ obligations under the Convention. In

Category 1, the Committee exercises the explicit and important power of solely drawing legal conclusions from the facts.

**II. Category 2: Cases in which relevant facts either were never considered or were disregarded in the national proceedings of the State party.**

9. In cases where the Committee is the first body to see relevant facts, the Committee will make a free assessment of the facts based upon the full set of circumstances in every case, as contemplated by paragraph 9 (b) of general comment No. 1. The State party is free to present factual arguments and suggest factual conclusions to the Committee, which will evaluate this information including the State party's assessment of the relevance of the facts. However, the Committee need not defer to the State party or its view of the facts because that view has not been substantiated in the State party's domestic proceedings. Instead, the Committee will freely assess the facts and reach appropriate legal conclusions.

10. Equally, the Committee must, consistent with articles 3 and 22, freely assess the facts if the State party's domestic proceedings did not satisfy minimum standards of due process. The Committee recognizes that this free assessment of facts does not contradict the principle of deference to a State party's domestic proceedings because either no such proceedings existed or the proceedings did not satisfy minimum standards of due process through failing to consider all the relevant facts and evidence. The rationale of giving deference to a State party's factual findings is based on the State party's proper examination of the facts presented. While the Committee shows deference to factual findings of domestic proceedings which afford due process, when no such proceedings have occurred, the Committee must freely assess the facts.

11. By ratifying the Convention, a State party has acceded to the definition of torture contained in article 1 and to all the obligations that emanate and flow from the Convention. Ignoring complainant's relevant factual claims or not affording minimum due process to the complainant, consistent with the Convention, provides a suitable ground for the Committee not to give the State party deference.

12. In scenarios where a State party has conducted fair, impartial domestic proceedings, but after those proceedings, new evidence arises that could not have been known or presented at the time of the domestic proceedings, the complainant's fundamental right to due process requires the Committee to freely assess the facts. Due process rights require a free and impartial assessment of all relevant facts. If, at the time that the petition is filed with the Committee, the national proceedings have not taken the new facts into account, then the complainant has not been accorded due process. If new evidence arises after domestic proceedings that could not have been known or presented at the time of the domestic proceedings, the Committee should freely assess the facts.

**III. Category 3: Cases in which the complainant and the State party dispute relevant facts and evidence.**

13. In cases involving a conflict between the facts as alleged by the complainant and the facts as alleged by the State party, the Committee gives considerable weight to findings of fact made by organs of the State party, as recognized by general comment No. 1.

14. When a complainant challenges the factual conclusions of a State party, the Committee proceeds by putting the burden on the complainant to make a showing that the domestic proceedings did not meet the minimum standards of due process. If

the complainant makes such a showing, the burden shifts to the State party to show that the domestic procedures were not flawed. If the State cannot meet the burden, then the Committee need not accord weight to the domestic proceeding's conclusions and will make its own free assessment of the facts.

15. Under articles 3 and 22, the Committee reviews the domestic proceedings of States parties to ensure that a reasonable standard of proof was applied in the determination of the complainant's claims. A reasonable standard of proof must be determined on a case-by-case basis, and, in each case, the standard will depend upon the interests at stake and the disadvantages inherent in the position of the complainant. An unreasonable standard of proof is one that fails to take into account the gravity of the rights at stake for a complainant or the disadvantages of the particular complainant. The Committee emphasizes that the standard of "beyond a reasonable doubt" was formulated within the framework of criminal law to establish that the State needed to establish the highest standard of proof possible to prove the guilt of an individual. In the case of petitions grounded in article 3 and 22, the situation is fundamentally different, in that it might involve the assessment of future risks and situations that occurred in an evolving political landscape. In criminal proceedings, the accused stands to lose life and liberty interests, but in domestic proceedings related to the rights protected under the Convention, the complainant is the one who stands to lose, or has already lost, life and liberty interests due to torture or cruel, inhuman, or degrading treatment or punishment. In addition, human rights law requires that its norms be interpreted always in the light most protective of individuals.

16. In general comment No. 1, the Committee established a specific standard of proof for when the Committee evaluates the application of article 3 of the Convention to the merits of a case. According to that standard, the complainant must show that the grounds for believing that she/he would be in danger of being subjected to torture are "substantial" and "that such danger is personal and present". The Committee identified a non-exhaustive list of factors pertinent to making such a showing. General comment No. 1 explains that the Committee gives considerable weight to findings of fact that are made by the organs of the State party concerned. The Committee, however, is not bound by the findings of fact of the domestic proceedings and instead has the power of free assessment of the facts based on the full set of circumstances in every case. The same considerations apply to article 22 situations when the Committee assesses the reasonableness of the standard of proof used by the organs of the State party concerned in its domestic proceedings. Therefore, mutatis mutandis, the Committee will apply the same non-exhaustive list of factors in the context of article 22 when evaluating the reasonableness of the standard of proof used by the organs of the State concerned in its domestic proceedings.

17. The Committee will conduct this free assessment of the facts in the same manner as is contemplated by paragraph 9 (b) of general comment No. 1. When the State party is unable to demonstrate that the domestic proceeding resulted in credible factual findings, the Committee shall exercise its authority to freely evaluate the facts and evidence, independent of the domestic proceeding's factual findings.

18. Minimum due process standards are required by general principles of international law, as recognized by the practice of a wide variety of international and regional bodies. These standards apply in the context of cases concerning articles 3 and 22. The absence of this minimum due process guarantee during a legal proceeding casts doubt on the reliability of its findings – both factual and legal. If the domestic proceeding was procedurally deficient in this regard, its factual

findings are tainted and should not be relied upon by the Committee. Accordingly, when a complainant properly challenges the adequacy of the due process guarantees in a domestic proceeding, the Committee may make a free assessment of the facts and evidence.

19. The Committee's jurisprudence demonstrates that the Committee already makes a free assessment of the facts when domestic proceedings lack minimum standards of due process. Therefore, when the Committee utilizes the free assessment approach, this does not entail a change in procedure, but rather it promotes a uniform and consistent approach to article 22 proceedings based on the existing practices of the Committee. The benefit of this standardization will be to ensure compliance with the Convention and provide both States parties and complainants with clear, predictable guidelines for how the Committee will approach future issues.

#### **IV. Scope of due process rights**

20. The Convention requires States parties to respect minimum due process standards in order to protect the rights established under the Convention. The Committee has the responsibility to consider the existence of minimum due process guarantees, including fair trial standards, in the domestic proceedings of States parties.

21. A number of international judicial bodies, organizations, conventions, and authoritative scholars have delineated the minimum fair trial standards required by international law. Such standards include, *inter alia*, the right to choose one's own defence counsel; the right to communicate with legal counsel; the right to confront adverse witnesses; the right of the person deprived of liberty to be afforded a reasonable opportunity to present his or her case; the right to judicial review of the lawfulness of detention; the right to be treated with humanity and with respect for the inherent dignity of the human person; the right to be informed promptly of any charges; and the right to be tried without undue delay or within a reasonable time. Such basic provisions are considered to reflect customary international law binding on all States regardless of their existence *vel non* as treaty obligations.

22. Independent and impartial judicial proceedings are widely recognized as essential standards of due process. Administrative proceedings must also satisfy due process requirements. In the absence of a legitimate challenge, domestic proceedings may be presumed to be independent and impartial, and the Committee will give considerable weight to any factual findings resulting from such proceedings. However, the Committee will disregard factual findings that were made by domestic organs exhibiting a lack of independence and impartiality.

23. Particular criteria have emerged under international law to measure the independence and impartiality of a tribunal and its judges. Some of the most important safeguards to avoid improper influence or control through political and financial pressures include ensuring that: (1) domestic organs are established by law and function separately from political branches of government; (2) judicial appointments, terms of service, and remuneration promote a merit based, autonomous judiciary; and (3) domestic organs maintain both actual and perceived impartiality.”

9. **Ms. Sveaass** sought clarification on the meaning of the word “deference”, which was used several times in the text.

10. **The Chairperson** said “deference” meant that the Committee would follow the determination of the State if a decision had been adopted in accordance with proper

procedures. In the European Union, the same idea was covered by the phrase “margin of appreciation”, and the Inter-American system also recognized the concept. The point was that, when in doubt, the Committee accepted the conclusions of the domestic proceedings. The Committee was not a court, and it could not put questions to the complainant; its assessments were based solely on information which it had received. Of course, it was a different matter if the complainant could show that there had not been a proper court decision, that evidence had not been considered, etc.

11. **Ms. Belmir** said that, having looked through the Committee’s jurisprudence over the past 20 years, she wondered whether the Committee could really speak of equality of arms, especially when facts were in dispute. Secondly, in cases involving extradition requests, the Committee, via the position of the requested State, often found itself in conflict with the requesting State. For example, there was no way of verifying the accuracy of an assertion by the requested State that documents from the requesting State were forgeries. Lastly, in criminal proceedings it was the State which must submit proof in support of an accusation, whereas in the cases under consideration it was the victim who must show that he or she had been tortured or risked being tortured if returned to the requesting State. Thus, the victim was in a vulnerable position and must do everything possible to substantiate his or her allegations, yet there was a tendency to give credence to the assertions of the State party simply because it was in a stronger position. She wondered whether the Committee would attempt to overcome that imbalance or would merely follow its jurisprudence.

12. **Mr. Mariño Menéndez** asked why reference had been made to both articles 3 and 22, and not just to article 22. He also thought that the document should at some point refer to the need to exhaust domestic remedies.

13. **The Chairperson**, referring to the comment by Ms. Belmir, said the point was that the Committee needed to pay deference to determinations by State organs in accordance with the rule of the exhaustion of domestic remedies. The Committee was a subsidiary body and could intervene only after petitioners had filed a complaint before a State and the State had heard the complaint. The burden was on the petitioners to present their case. However, sometimes the Committee entered into a discussion of the facts when such action was unjustified, because the requirements of due process had been met at domestic level, and sometimes it did not enter into such a discussion and paid deference even though domestic proceedings had not been in accordance with minimum standards of due process. Thus, the suggestion by Mr. Mariño Menéndez to include a reference to the role of the exhaustion of domestic procedures was most helpful.

*The meeting rose at 1.05 p.m.*