



# INTERNATIONAL COMMISSION OF JURISTS

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## **ICJ submission to the Committee against Torture on its draft General Comment concerning the obligation of States parties to implement article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

September 2011

The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the draft General Comment of the Committee against Torture (the Committee) on the obligation of States parties to implement article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention).

The ICJ commends the Committee on its draft and expresses concurrence with much of the text. With a view to further strengthening the text, the ICJ wishes to make the following comments:

### **General Comments**

#### State parties' duty to protect against human rights abuses by non-State actors

The ICJ believes that the Committee should include in the present draft a paragraph on States' responsibility to protect against conduct of torture or ill-treatment that may occur within their jurisdiction by non-State actors. Non-State actors, in this respect, may include, business enterprises and their officers and responsible employers, members of armed groups, and other private persons. The responsibility to protect against the impairment of human rights, including the right to be free from torture and ill-treatment, has been affirmed by this Committee, as well as by the Human Rights Committee in respect of article 7 of the ICCPR. In this regard, the Committee could refer to its General Comment No 2.<sup>1</sup> Additional support can be found in the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises *Protect, Respect and Remedy: a Framework for Business of Human Rights*,<sup>2</sup> affirming that: "States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction".<sup>3</sup> That Framework also affirms the imperative of access to remedies, including judicial remedies, for abuses by businesses. The responsibility to protect against torture and ill-treatment also extends to acts of complicity and participation as referred to in article 4(1) of the Convention affirming that: "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture".

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<sup>1</sup> Committee Against Torture, General Comment No 2: Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2 (2008), para 18. See also, in respect of the Human Rights Committee, General Comment No 31: The nature of the general legal obligation imposed on States parties, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 8.

<sup>2</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business of Human Rights*, UN Doc A/HRC/8/5 (2008).

<sup>3</sup> *Ibid*, para 18.

Acknowledged in these references is the fact that States may breach their international human rights obligations if they fail to exercise due diligence and take appropriate measures to prevent, investigate, punish and redress abuses by non-State actors.

### Terminology

The ICJ would bring to the Committee's attention two matters concerning the use of terminology in the draft General Comment. The first concerns the apparent use, without distinction, of the terms "torture" and "torture or ill-treatment".<sup>4</sup> The ICJ assumes, in this respect, that the Committee is using the term "ill-treatment" as shorthand for "other cruel, inhuman or degrading treatment or punishment, as proscribed under the Convention.

The ICJ is concerned that the use of both sets of terms could lead to confusion, potentially leading to an understanding that some parts of the text apply only to torture whereas others apply to both torture and ill-treatment. The intent of the disparate use is unclear, but the ICJ would underscore, and the Committee has itself recognised, that the general right to remedy and reparation applies to all forms of proscribed ill-treatment. The ICJ suggests, therefore, that the Committee always uses the wording "torture and ill-treatment", given also that in paragraph 1 of the draft it is stated: "Article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment without discrimination of any kind".

As a second matter concerning terminology, the ICJ would stress the importance of using consistent terminology throughout when referring to gender-based violence. "Sexual violence" is just one category of gender-based violence and it would be advisable to reflect this in the language used. One appropriate approach the Committee could consider would be to simply use the term "gender-based violence" throughout.<sup>5</sup> This would be consistent with the language used by the Committee in its General Comment No 2.<sup>6</sup>

### Addressing the particular needs of women and girls in relation to substantive remedies

The Committee addresses the particular needs of women and girls in the context of the procedural component of the right to remedy. This approach is welcome and it would be highly valuable for the Committee to similarly address the specific requirements that may arise in relation to substantive remedies.

Particularly in cases of gender-based violence, specific substantive obligations may arise for States in order to meet the specific needs and priorities of the victims. As asserted by the Special Rapporteur on violence against women, this may include "the need to address the pre-existing inequalities, injustices, prejudices and biases or other societal perceptions and practices that enabled violations to occur, including discrimination against women and girls".<sup>7</sup>

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<sup>4</sup> See paras 6, 11, 12, 13, 16, 18, 20, 21, 25, 32, 33, 36 and 40(b) and (g) of the current draft General Comment on article 14.

<sup>5</sup> This would be the case in lines 3 and 6, para 30, and lines 5 and 6, para 31.

<sup>6</sup> CAT General Comment No 2, above note 1, para 22.

<sup>7</sup> Report of the Special Rapporteur on Violence Against Women, UN Doc A/HRC/14/22 19 April 2010, page 2. The requirement that States craft gender-sensitive reparations has also been recently confirmed and explored by the Inter-American Court of Human Rights in *Gonzalez v Mexico*, decision of 16 November 2009.

## Specific Comments and Recommendations

### PARAGRAPH 3: Definition of victim

3. Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted. The term 'victim' also includes the immediate family or dependants of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. The term "survivors" may, in some cases, be preferred by persons who have suffered harm. The Committee uses the legal term "victims" without prejudice to other terms which may be preferable in specific contexts.

In paragraph 3, line 5, of the draft General Comment it is stated that: "The term 'victim' also includes the immediate family or dependants of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".

The ICJ would recommend completing the abovementioned definition with the language used in article 24(1) of the International Convention for the Protection of all Persons from Enforced Disappearances, adopted by consensus resolution of the General Assembly in December 2006, which provides that: "For the purposes of this Convention, 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance". The ICJ suggests that this wording, substituting the violation of torture and ill-treatment for enforced disappearance, is more appropriate than that currently used in paragraph 3 since it is taken from the most recent Convention adopted on the subject and because it provides a broader and more protective definition of the term victim. The ICJ would also recall that enforced disappearance *per se* constitutes proscribed conduct under the Convention against Torture.

#### Recommendation

The ICJ proposes that paragraph 3 be amended to read:

"Victims are persons who...The term 'victim' also includes the immediate family or dependants of the victim and persons any individual who have has suffered harm as the direct result of an act of torture or ill-treatment or in intervening to assist victims in distress or to prevent victimization..."

### PARAGRAPH 5: The obligations of States parties to implement article 14

5. The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. At the procedural level, States parties must enact legislation and establish complaints mechanisms, investigation bodies and institutions capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties must ensure that a victim of torture or ill-treatment obtains full and effective redress and reparative measures, including compensation and the means for as full rehabilitation as possible.

In paragraph 5, line 6, of the draft General Comment it is stated "States parties must ensure that a victim of torture or ill-treatment obtains full and effective redress and reparative measures, including compensation and the means for as full rehabilitation as possible".

For the sake of consistency with universal international standards on the subject, such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

Gross Violations on International Human Rights Law and Serious Violations of International Humanitarian Law (the UN Principles on Reparation and Impunity),<sup>8</sup> the ICJ would suggest to use the wording “reparation” instead of “reparative measures”. Also, by using the expression “reparative measures”, the General Comment could be taken as suggesting that States parties would only be bound by a procedural obligation of conduct (to provide *any* kind of reparative measure), rather than a substantive obligation of result (to provide *full and effective* reparation).

### Recommendation

The ICJ proposes that the last sentence of paragraph 5 be amended to read:

“...At the substantive level, States parties must ensure that a victim of torture or ill-treatment obtains full and effective redress and ~~reparative measures~~ reparations, including compensation and the means for as full rehabilitation as possible.”

### **PARAGRAPHS 21 TO 25: Judicial remedies**

The ICJ wishes to draw the attention of the Committee to the importance of providing *judicial* remedies for victims of gross human rights violations as a critical feature for the proper implementation of article 14.

Without undermining the significant role of non-judicial remedies, especially in countries where judicial proceedings are known to be exceedingly long or ineffective, the ICJ believes that it is crucial nonetheless that when gross human rights violations occur, judicial remedies are always available to victims, even if as a last resort and complementary to other non-judicial mechanisms.

The Human Rights Committee (HRC) in its General Comment No 31 has stressed the importance of both by judicial and administrative mechanisms in providing remedies under the International Covenant on Civil and Political Rights (ICCPR). In its jurisprudence on individual communications, the HRC has frequently and consistently reiterated the need for judicial remedies in cases of serious violations of the ICCPR.<sup>9</sup> For its part, the Committee on the Elimination of Discrimination against Women (CEDAW) has recommended that effective protection includes: effective legal measures, including penal sanctions, civil remedies and compensatory remedies, preventive measures and protective measures.<sup>10</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that the right to an effective remedy may be of a judicial or administrative nature and that “whenever a Covenant right cannot be made fully effective without some role of the judiciary, judicial remedies are necessary”.<sup>11</sup>

As far as regional systems in the Americas are concerned, the right to a “judicial” remedy is enshrined in article XVIII of the American Declaration of the Rights and Duties of Man and article 25 of the American Convention on Human Rights. The jurisprudence of the Inter-American Court has held that victims must have a right to judicial remedies in accordance

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<sup>8</sup> Adopted by the Commission on Human Rights, in its resolution E/CN.4/RES/2005/35 of 19 April (2005), and by the General Assembly in its Resolution A/RES/60/147 of 16 December (2005), paras 2(c), 3(d), 11, 13 and 15 to 18.

<sup>9</sup> See Human Rights Committee (HRC) views in *Bithashwiva and Mulumba v Zaire*, Communication 241/1987, UN Doc CCPR/C/37/D/241/1987 (1989), para 14, where the HRC considered that the State had to provide the applicants with an effective remedy under article 2(3) of the ICCPR, and “in particular to ensure that they can effectively challenge these violations before a court of law”.

<sup>10</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No 19 on Violence against Women, UN Doc A/47/38 (1992), para 24(t).

<sup>11</sup> Committee on Economic, Social and Cultural Rights, General Comment No 9 on the domestic application of the Covenant, UN Doc E/C.12/1998/24 (1998), para 9.

with the rules of due process of law.<sup>12</sup> The African Commission on Human and Peoples' Rights, in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, has asserted that "everyone has the right to an effective remedy by the constitution, by law or by the Charter",<sup>13</sup> meaning that an effective remedy can only be truly effective if there is a judicial remedy. The European Court of Human Rights has indicated that while the right to an effective remedy (under article 13 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) does not require a judicial remedy in all instances,<sup>14</sup> the nature of the remedy depends on the nature of the right infringed.<sup>15</sup> By virtue of the nature of gross violations of human rights such as torture or ill-treatment, remedies for such violations should therefore be of a judicial nature.<sup>16</sup>

Furthermore, paragraph 12 of the UN Principles on Reparation and Impunity, which is the standard endorsed by all UN members in General Assembly resolution 60/147 of 2005, provides:<sup>17</sup>

"A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law."

This should be interpreted as giving primacy to judicial remedies for victims of gross human rights violations or, when domestic law provides otherwise, as ensuring the availability of a judicial remedy as at least a remedy of last resort.

### Recommendation

Whether by adding a specific paragraph, or by integration elsewhere within the draft General Comment, the ICJ recommends that the Committee emphasise that, in any case of a gross human rights violation such as torture or ill-treatment, judicial remedies must always be available to victims, even if complementary to other non-judicial mechanisms.

### **PARAGRAPH 27: The duty to ensure effective access to justice by victims**

27. Judicial proceedings regarding remedies for victims should comply with fair trial guarantees to ensure effective access to justice. States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress. States parties shall also make readily available to the victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge. A State party's failure to provide evidence, such as records of medical evaluations or treatment, can unduly impair victims' ability to lodge complaints and to seek redress, compensation, and rehabilitation. States parties should ensure that judicial bodies refrain from applying doctrines that impede or preclude them from considering the merits of claims for redress made by victims of torture or ill-treatment.

<sup>12</sup> See *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights judgment of 26 June 1987, Series C No 1, para 91.

<sup>13</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C(a).

<sup>14</sup> *Silver v UK* [1983] ECHR 5, para 113.

<sup>15</sup> *Chahal v UK* [1996] ECHR 54, paras 150-151; and *Aksoy v Turkey* [1996] ECHR 68, para 95.

<sup>16</sup> International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide*, Practitioners Guide No 2 (2996), page 51.

<sup>17</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations on International Human Rights Law and Serious Violations of International Humanitarian Law*, above note 8, para 12.

In paragraph 27, line 5, of the draft General Comment it is stated: “States parties shall also make readily available to the victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge”.

The ICJ would suggest using the word “information” instead of “evidence”. This is in order to make clear that the term “evidence” is not to be interpreted as to limit the information States parties must make available to victims to only the type information that is admissible before a Court as evidence in judicial proceedings.

### Recommendation

The ICJ proposes that paragraph 27 be amended to read:

“...States parties shall also make readily available to the victims all ~~evidence~~ information concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge....”

### **PARAGRAPH 30: Applying gender-sensitive procedures to the right to obtain redress**

30. The Committee underlines the importance that judicial and non-judicial proceedings apply gender sensitive procedures which avoid re-victimisation and stigmatisation. With respect to sexual violence and access to due process and an impartial judiciary, the Committee emphasizes that in any proceedings, civil or criminal, to determine the victim's right to redress, including compensation, rules of evidence and procedure in relation to sexual and gender violence must afford equal weight to the testimony of women and prevent the introduction of discriminatory evidence and harassment of victims and witnesses. The Committee considers that complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation, and trafficking are able to come forward and seek redress.

The ICJ believes it is important to highlight in paragraph 30 of the draft General Comment the requirement on States to ensure that the judiciary deals appropriately with cases involving gender-based violence. In order to do so, a special focus should be given to the importance of providing specific training for the judiciary.

### Recommendation

The ICJ recommends that the Committee refer to the recent CEDAW decision in *Vertido v The Philippines*, specifying that, in order to give effect to women's equal right to a remedy, states should:<sup>18</sup>

“Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women.”

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<sup>18</sup> See Committee on the Elimination of Discrimination against Women views in *Vertido v The Philippines*, Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8(9)(b).

### PARAGRAPH 34: Obstacles to the right to obtain redress for women

34. As the Committee has emphasized in its General Comment No. 2, “gender is a key factor. Being female intersects with other identifying characteristics or status of the person...to determine the ways that women and girls are subject to or at risk of torture or ill-treatment”. With regard to the obligations in article 14, States must avoid measures that impede the ability of women and girls to seek and obtain redress and must effectively address such obstacles. Women and girls must be treated fairly and equally and obtain fair and adequate compensation, rehabilitation and other reparative measures which respond to their specific needs.

In paragraph 34, line 4, of the draft General Comment it is stated: “States must avoid measures that impede the ability of women and girls to seek and obtain redress and must effectively address such obstacles”.

The ICJ believes that States parties not only have a duty to *address* existing obstacles impeding women and girls to seek and obtain redress, but that they must also act *effectively to eliminate* those obstacles.

#### Recommendation

The ICJ proposes that paragraph 34 be amended to read:

“...With regard to the obligations in article 14, States must avoid measures that impede the ability of women and girls to seek and obtain redress and must effectively ~~address~~ act to eliminate such obstacles...”

### PARAGRAPH 38: Reservations to article 14

38. The Committee considers that reservations to article 14 may be incompatible with the object and purpose of the Convention. States are therefore encouraged to consider withdrawing any reservations to article 14 so as to ensure that all victims of torture or ill-treatment have access to redress and remedy.

In the first line of paragraph 38 of the draft General Comment it is stated: “The Committee considers that reservations to article 14 may be incompatible with the object and the purpose of the Convention”.

The ICJ considers that reservations to article 14 will always be incompatible with the object and the purpose of the Convention, and the Committee should be more categorical in this respect. The reasoning was well expressed by the Human Rights Committee in its General Comment 24, wherein it expressed its view that a reservation with respect to article 2(3) of the ICCPR concerning remedies would be incompatible with the ICCPR:<sup>19</sup>

“The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy.”

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<sup>19</sup> Human Rights Committee, General Comment No 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6 (1994), para 11.

Of course, not all statements deposited upon ratification or accession to a treaty that purport to be reservations, are in fact reservations. Some are in fact interpretative declarations without objective legal consequences. For the text of this General Comment to be more effective, and to be consistent with international standards in respect of reservations to human rights treaties, the Committee may therefore need to make a clear distinction between actual reservations versus interpretative declarations so as to enable it to use stronger language in relation to reservations to article 14. In this regard:

- According to article 2(1)(d) of the Vienna Convention on the Law of Treaties, the term reservation “means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.<sup>20</sup>
- An interpretative declaration is defined by the International Law Commission as “a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions”.<sup>21</sup>
- The crucial difference between a reservation and an interpretative declaration, which is often difficult to detect, lies in the legal effect it intends to produce: when the statement purports to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, it is then to be considered as a reservation.
- Under article 19(3) of the VCLT a State may make a reservation provided it is not incompatible with the object and purpose of the treaty.

Because the right to obtain redress by a victim of torture or ill-treatment is considered to be part of the object and purpose of the Convention, the ICJ takes the view that any statement by a State party wishing to exclude or modify the legal effect of article 14 is incompatible with the object and purpose of the Convention. This should be made clear in the General Comment and could be emphasised by first distinguishing between real reservations and interpretative declarations.

### Recommendation

The ICJ proposes that paragraph 38 be amended to read:

“The Committee considers that reservations, as defined under the Vienna Convention on the Law of Treaties, i.e. aiming to exclude or to modify the legal effect of the provisions, to article 14 may be to be incompatible with the object and purpose of the Convention. States are therefore encouraged to withdraw any reservations to article 14 so as to ensure that all victims of torture or ill-treatment have access to redress and remedy.”

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<sup>20</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, page 331, article 2(1)(d).

<sup>21</sup> International Law Commission, draft guidelines constituting the *Guide to Practice on Reservations to Treaties*, provisionally adopted by the Commission, UN Doc A/65/10 (2010), para 1.2.