

General Discussion on the Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22

Submitted by the Child Rights International Network - CRIN (www.crin.org), 30 March 2017

We welcome the Committee Against Torture's decision to revise its General Comment No. 1 on the implementation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) in the context of Article 22. Our contribution is focused on implications the draft General Comment has on children.

The nature and degree of suffering experienced by an individual may be difficult to verify objectively and may depend on various factors, including the victim's gender and age. CRIN's submission is based on the recognition that children are particularly vulnerable to ill-treatment on account of their age and the effects of torture and ill-treatment are heightened compared to the effects experienced by an adult.¹

1. Suggestions to section II of the draft General comment on general principles

Non refoulement

We urge the Committee to reflect in this section and in paragraph 30(o) the expansive definition of the principle of non-refoulement and of 'irreparable harm' given by the Committee on the Rights of the Child in its General Comment No. 6, which should be invoked when bringing a child's case before the Committee. It states in particular that: "[I]n fulfilling obligations under the Convention [on the Rights of the Child], States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child."

"Irreparable harm" refers to a particularly broad set of rights and the Committee on the Rights of the Child specifies articles 6 (rights to life and survival) and 37 (rights to liberty and freedom from torture) of the Convention on the Rights of the Child (CRC) as examples of issues that might rise to the level of "irreparable harm" referred to in its definition of non-refoulement. Article 37 includes prohibitions on the sentence of life without parole for children, unlawful or arbitrary deprivation of liberty, and inappropriate detention practices, and requires the provision of legitimate legal proceedings. Referring to Article 6, the Committee notes that "the assessment of the risk [...] should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services."

¹ Camille Giffard, *The Torture Reporting Handbook*, Human Rights Centre, University of Essex, February 2010, available at: [https://www.essex.ac.uk/torturehandbook/handbook\(english\).pdf](https://www.essex.ac.uk/torturehandbook/handbook(english).pdf) and SR on Torture: "In determining the seriousness of acts that may constitute ill-treatment or torture, due consideration must be given to physical and mental effects and the age of the victim. In the case of children, higher standards must be applied to classify treatment and punishment as cruel, inhuman or degrading. In addition, the particular vulnerability of children imposes a heightened obligation of due diligence on States to take additional measures to ensure their human rights to life, health, dignity and physical and mental integrity."

The Committee also refers to article 38 of the CRC and articles 3 and 4 of the Optional Protocol to the CRC on the involvement of children in armed conflict: “States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.”²

2. Suggestions to section III on preventive measures to guarantee the principle of “non-refoulement”

Paragraph 18 of the General Comment addresses preventive measures against possible violations of the principle of non-refoulement. We urge the Committee to include special guarantees for children within this section.

All legislative, administrative and other preventive measures against possible violations of the principle of “non-refoulement” should consider children’s specific needs and ensure they are neither excluded from accessing remedies nor discriminated against. All children must have “access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings”.³

The Committee in its General Comment No. 3 on the implementation of article 14 highlights “the importance that appropriate procedures are made available to address the needs of children, taking into account the best interests of the child and the child’s right to express his or her views freely in all matters affecting him or her, including judicial and administrative proceedings, and that the views of the child are given due weight in accordance with the age and maturity of the child. States parties should ensure the availability of child sensitive measures for reparation which foster the health and dignity of the child.”⁴

3. Suggestions to section VIII on the duties of States parties to consider specific human rights situations in which the right of “non-refoulement” applies

We suggest that the Committee highlights the denial of children’s right to access justice and to a fair trial in paragraph 30(d) as “human rights situations which may constitute an indication of a risk of torture”.

The legal system must provide children and their representatives the means to obtain a quick, effective and fair response to protect their rights; the means to prevent and solve

² http://www.unicef.org/protection/files/CRCGC6_EN.pdf and https://www.hrw.org/sites/default/files/related_material/Fordham%20Law.pdf

³ UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 32, available at: http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2005/102/Add.1.

⁴ http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf

disputes; mechanisms to control the abuse of power; and all of this must be available through a transparent, efficient, accountable and affordable process.⁵

We also urge the Committee to explicitly explain in paragraph 30 (f) that all sentences of corporal punishment of children amount to torture or cruel, inhuman or degrading treatment or punishment.

UN treaty bodies and the Special Rapporteur on Torture clearly call for the prohibition of corporal punishment as a criminal sentence for children. The UN Special Rapporteur on Torture, in his 2015 report to the Human Rights Council on children deprived of liberty recalled that “Some States still allow the use of corporal punishment as a criminal sentence for children. With regard to the jurisprudence of United Nations treaty bodies and the European Court, the mandate holder has found that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (see A/60/316 and A/67/279).”⁶ The Committee on the Rights of the Child, in its General Comment no. 13 on the right of the child to freedom from all forms of violence considers that physical violence includes “All corporal punishment and all other forms of torture, cruel, inhuman or degrading treatment or punishment”.⁷

4. Suggestions to section X on Specific requirements for the submission of individual communications under Article 22 of the Convention and interim measures of protection

Article 3 of the Convention is confined in its application to cases where there are substantial grounds for believing that the person would be subjected to torture if expelled. The burden of proof is on the potential victim to present an arguable case: they must establish that the risk of torture is personal and present and that the grounds for this belief are substantial. However this requirement does not exempt the State from making substantial efforts to determine whether there are grounds for believing that the complainant would be in danger of being subjected to torture if returned.⁸

In this context, we would urge the Committee to take account, in paragraph 41, of the heightened obligation of due diligence on States to take additional measures to ensure the human rights to life, health, dignity and physical and mental integrity of children, as recognised by the Special Rapporteur on torture in his 2015 report.⁹ This obligation may give

⁵ For more on access to justice for children, read: CRIN, *Rights, Remedies and Representation: Global Report on Access to Justice for Children*, January 2016, available at: https://www.crin.org/sites/default/files/crin_a2j_global_report_final_1.pdf.

⁶ UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, *report to the Human Rights Council on children deprived of liberty*, A/HRC/28/68, 5 March 2015.

⁷ UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f13&Lang=en.

⁸ *K.H. v. Denmark* [2013] Communication No. 464/2011.

⁹ UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Human Rights Council on children deprived of liberty*, A/HRC/28/68, 5 March 2015, para. 70.

rise to a duty to investigate the risk of torture to a child in a country of destination prior to deportation beyond the obligations that exist for an adult.

Paragraph 49 states that “When assessing whether the risk of being subjected to torture is personal, present, foreseeable and real for the complainant, the Committee does not exclude that cruel, inhuman or degrading treatments or punishments inflicted or which have reportedly been inflicted in the State of origin on the complainant would amount to torture in specific circumstances.”

We urge the Committee to consider the specific vulnerability of children in determining whether treatment is likely to constitute torture in line with the recommendation of the Special Rapporteur on torture that in determining the seriousness of acts that may constitute ill-treatment or torture, due consideration must be given to the physical and mental effects and the age of the victim.¹⁰

Paragraphs 42 and 43 aim to ensure certain protection standards for States to implement during the assessment process of asylum seekers.

We urge the Committee to remind States that the guarantees and safeguards provided should take into account the specific vulnerability of children, especially unaccompanied children and more specifically, children should not be detained during the assessment process of their claim and should have access to effective redress mechanisms. On the issue of age assessment, we urge the Committee to take into consideration the recommendation of the Committee on the Rights of the Child in General Comment no.6 on the treatment of unaccompanied and separated children outside their country of origin that “if there is a possibility that the individual is a child, she or he should be treated as such”. If there is no serious doubt, authorities should trust the documents provided or the statement made by the child. It adds that “Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.”

5. General recommendation on children in the jurisprudence of the Committee

We have analysed the communications before the Committee¹¹ relating to children’s rights and have found that in all recent cases where children are involved, they are part of a family where the father or the mother is the individual who is at risk of being subjected to torture in case of expulsion. In most of those communications, the Committee considered that the

¹⁰ UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Human Rights Council on children deprived of liberty*, A/HRC/28/68, 5 March 2015, para. 70.

¹¹ Report forthcoming. Full version of the analysis on file with CRIN.

children (and wife or husband) were dependant upon the main complainant's claim and, consequently, did not find it necessary to consider these cases individually.¹²

Children as rights holders are entitled to the protection of the rights enshrined in the Convention against torture and other cruel, inhuman or degrading treatment and punishment, on an equal basis with adults and on an individual basis.

We recommend that the General comment reflect this principle and consider that when a communication involving a child is brought before the Committee, the specific circumstances of the child should be addressed, even when the case relates to the children together with their parents.

¹² For example, see *M.A.M.A. and al. v. Sweden*, Communication No. 391/2009, 23 May 2012; *E. J. et al. v. Sweden*, Communication No. 306/2006, 14 Nov 2008.