

CAT and articles 20 and 22

Contribution to the Festschrift for Jacob Möller Raoul Wallenberg Institute

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The Convention

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: the Convention)¹ was adopted in consensus by the United Nations Assembly on 10 December 1984, and went into force on 26 June 1987. On 1 August 1998, 105 states had ratified the Convention.

Article 1 gives a definition of torture that is widely accepted. It has proved a useful tool over the years in the fight against torture.

Article 2 prohibits torture, and emphasizes strongly that there is no excuse whatsoever for torture.

Articles 4-16 and *article 19* describe the duties of the States Parties. The main demands are: to prohibit torture, not to "refouler", to punish torturers, to educate, to rehabilitate the tortured, to control the system of interrogation and detention, and to report to the Committee.

The Committee

To make sure that the Convention's provisions are implemented in the domestic law of the States Parties and are kept in practice, a Committee against Torture (hereinafter: the Committee), (the Convention's article 17) has been established. The Committee consists of "10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity ...". The Committee "shall establish its own rules of procedure ...". The Rules of Procedure can be found in references 2, 3, and 10.

Since the start of its work, the Committee has met twice yearly, each time in a two-week session.

The author, a member of the Committee from its start in 1988, is at present Vice-Chairman.

Thus, the Committee handles cases relevant to articles 20 and 22. The secretarial activities concerning article 20 cases are attended to by the administrative secretary of the Committee; this function for article 22 cases is attended to

by the Centre for Human Rights' Communication Branch, which was headed by Mr. Jacob Möller until his retirement in October 1996.

Article 20

As of 1 August 1998 this article is in force for 94 of the 105 States Parties that have ratified the Convention. Only 11 States Parties do not recognize article 20: Afghanistan, Bahrain, Bulgaria, Byelo-Russia, China, Cuba, Kuwait, Israel, Morocco, Saudi Arabia, and Ukraine. While a State Party may "at any time" declare in favour, or can withdraw from article 22, this does not hold for article 20: only when signing or ratifying can a State Party declare not to recognize the competence. This cannot be done later, nor can a request to have this reservation enter into force again be accepted later.

Article 20, par. 1 reads:

"If the Committee receives *reliable information which appears to it to contain well-founded indications* that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned." (Italics by the author).

Furthermore, par. 5 reads "All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought."³

If the three points "reliable information", "well-founded indications", and "systematically practised" are answered in the affirmative, the Committee *shall* invite the State Party to cooperate in the examination of the information.

The secretariat collects the material, but it is the Committee that decides in each single case whether the above-mentioned criteria are met. In this connection, the Committee can seek "additional relevant information" before making a decision and inviting the State Party.

The negotiations with the State Party always take a long time: the procedure as such is slow, with wide time limits that are laid down in the Convention. Moreover, the Committee only convenes twice yearly. In order to advance the inquiry, the Committee can "designate one or more of its members to make a confidential inquiry and to report to it within a time limit ...".

The Committee, also when negotiations with a State Party are ongoing, may seek "additional information from governmental and non-governmental organisations as well as

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individual additional information or answers to questions ...", but the State Party is involved in all negotiations and investigations. Finally, the investigations may result in a visit to the country.

When all the investigations have finished, the Committee can decide "after consultation with the State Party concerned, to include a summary account of the results of the proceedings in its Annual Report.

It is noteworthy that only two procedures concerning article 20 have been finalized, viz. Turkey and Egypt. However, consultations are still ongoing. NB There are still closed meetings with respect to article 20¹¹.

Who can present information requesting the Committee to initiate an article 20 procedure?

Everybody can in principle. However, it is important to be aware of the following points:

1. Only incidents that have taken place after the Convention went into force in the country concerned are of interest, i.e. 30 days after the date of ratification (the Convention's article 27, par. 2).

2. The mentioned basic criteria, "reliable information", "well-founded indications", and "systematically practised", should be clarified separately.

- **Reliable information:** the organization should give a description of itself; what are the reasons for the Committee to believe that the organization is telling the truth?

- **Well-founded indications:** precise information about the torture must be available: the names of the tortured persons, the place where the torture took place, name of the torturer (if this is not possible, the reason must be given), duration of the torture, frequency.

- **Systematically practised:** if singular incidents are presented (which is the case under "well-founded indications"), they must be seen in context, e.g. special police units, special army units, etc.

3. The described torture must comply with the definition of torture, as stated in the Convention's article 1: "severe pain or suffering, whether physical or mental", "inflicted intentionally", "for such purposes", "by a public official".

It should be noted that article 20 only concerns torture. It does not concern "cruel, inhuman or degrading treatment or punishment", or any other form of organized violence that is not defined as torture (disappearances, extrajudicial executions), nor does it concern capital punishment.

4. If the information contains personal data that could be dangerous for the person concerned, his family or friends, if the authorities had the data at hand, it must be noted especially. Anonymity might be the only possibility, but that should be weighed against "reliable information" and "well-founded indications". The Committee's professional secrecy towards the public is absolute. On the other hand, the Committee has to negotiate with the authorities of the State Party, who need to have certain information to be able to verify the cases. Therefore, the optimal information for the Committee is information that can be passed on to the State Party without hesitation.

Results

The Committee against Torture has published 10 Annual Reports²⁻¹¹. Only two summary accounts on article 20 have been published, i.e. only two enquiries according to article 20 have been finalized since 1988.

The first summary account, on Turkey, was published in 1993⁷. The conclusion after a visit to the country was that systematic torture was used at the police stations in Turkey. The other summary account was about Egypt¹⁰. The negotiations with Egypt continued for five years, from November 1991 to November 1996. A visit to the country was not possible. The Committee's conclusion was that torture was "systematically practised by the Security forces in Egypt, in particular by State Security Intelligence".

Article 22

Article 22 deals with the possibilities for individuals (regardless of nationality) to complain to the State Party in which they are staying about violations of the Convention's provisions by the country concerned.

Par. 1 of article 22 gives the States Parties a possibility specifically to ratify article 22, and likewise par. 8 gives the States Parties a possibility to withdraw from the provisions in article 22. To the best of my knowledge, no country has withdrawn to date. On 1 August 1998, 39 States Parties have ratified article 22; their names are listed in table 1.

Table 1. *The state of play.* (1)

State	Total no. of cases
Algeria	-
Argentina	3
Australia	-
Austria	2
Bulgaria	-
Canada	15
Croatia	-
Cyprus	-
Czech Republic	-
Denmark	1
Ecuador	1
Finland	-
France	23
Greece	1
Hungary	1
Iceland	-
Italy	-
Liechtenstein	-
Luxembourg	-
Malta	-
Monaco	-
Netherlands	2
New Zealand	-
Norway	-
Poland	-
Portugal	-
Russian Federation	-
Senegal	-
Slovakia	-
Slovenia	-
Spain	5
Sweden	9
Switzerland	15
Togo	-
Tunisia	3
Turkey	1
Uruguay	-
Venezuela	-
Yugoslavia	-

What can you complain about?

In principle you can complain about violations of the provisions of the Convention. Here it is relevant to mention that all articles are relevant to torture, as defined in article 1 of the Convention. According to article 16 of the Convention, the concept of "torture" can be replaced with "other cruel, inhuman or degrading treatment" as far as the provisions of articles 10, 11, 12, and 13 are concerned. Only two communications have made use hereof (no. 8 and no. 46).

Conditions for receiving complaints

These are described in par. 2 and 5.

PARAGRAPH 2

- The complaint may not be anonymous. Others can complain on behalf of an individual, but then it must be quite clear that the complainant has authorization to submit the complaint.
- The complaint may not be "an abuse of the right to submission of such communications".
- The complaint may not be "incompatible with the provisions of the Convention".

PARAGRAPH 5 READS

"The Committee shall not consider any communications from an individual under this article unless it has ascertained that: The same matter has not been, and is not being, examined under another procedure of international investigation or settlement; The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention."

What to do in practice?

The conditions for submission of complaints are in practice laid down in Rule of Procedure no. 99 and in Fact sheet no. 7, "Communications Procedures"¹². Furthermore, Annex 5 in Fact sheet no. 17, Committee against Torture¹, contains a model communication.

Possible applicants may seek advice there, or they can obtain practical information by contacting the Communication Branch. The address of the Communication Branch appears at the end of the article.

Complaints should preferably be worded in English, French, or Spanish. They may also be lodged in Arabic, Chinese, or Russian, but this will automatically lead to a prolonged delay in handling the complaint. Annexes may be added in the language of origin, but their essential points should be translated into English, French, or Spanish so as to make them more easily read by the receivers of the complaint, and thus shorten the handling time.

It should be noted that the Communication Branch of the Centre for Human Rights forwards the complaint to the country in question for comments. The complaint should therefore be written in such a way that it can be read by the authorities in the country without putting the individual or a third person at risk of danger.

The Committee's handling of complaints

When the Committee's Secretariat receives a complaint, the Secretariat at first decides on whether to reject the complaint immediately for formal reasons (please cf. the above-men-

tioned conditions for lodging a complaint), or if there is such an evident lack of substance in the complaint that handling it would be meaningless. When the complaint is not rejected immediately, it is forwarded to the members of the Committee, who then first decide whether "the formal demands" have been met, and whether the complaint contains sufficient substance. If this is not the case, the complaint is rejected.

If, however, conditions have been met, the handling of the complaint as such starts. The complainant's presentation, together with any questions raised by the Committee, is forwarded to the government in question for comments. The questions for the government to answer are: 1) Do they find that the case is admissible? 2) What is the government's view? 3) What is their conclusion?

When the reply from the State is to hand, the Committee re-handles the case. There are then two possibilities. The Committee may find the complaint inadmissible, in which case the author of the complaint and the State are informed accordingly with a view to a later publication.

If, however, the Committee finds the complaint admissible, it is sent once more to the State and to the complainant, together with the Committee's conclusions and with a request to comment on the *substance* of the complaint.

When these replies are to hand, the Committee handles the case once more, and, based on the comments by the State and the complainant, including comments by both parts to each other, the Committee decides whether the State, according to the Committee's view, has violated the Convention, which paragraphs, and in which way. The conclusion may of course be that the Committee finds that the State has violated the Convention, as well as that the State has not violated the Convention. In both cases, the complaint is published in the Annual Report with a thorough account of the handling and conclusions. The name of the State Party is always published, whereas the name of the complainant is anonymous, unless the opposite is specifically requested:

Table 1 lists in alphabetical order all 39 states (out of 105 possible) that have ratified article 22, and the number of complaints received by the state concerned. At first glance, the table's contents may seem surprising. It is important to know that most of the complaints relate to the Convention's article 3 (please see below). Furthermore, the complaints are directed towards the country in which the person is staying, and not to the state to which he fears to be extradited.

Table 2 gives a survey of the 82 complaints that have been registered so far.

Table 2. *Decision on complaints in relation to article 22.*

Decisions taken	42	10 discontinued	
		19 inadmissible	
		13 views:	8: + violation
			5: - violation
Decisions pending	40	36 administrative	
		1 suspended	
		3 "in proceeding"	
Total		82 cases from 14 countries	

It will be seen that about half of the cases are pending, but only three of these are "in proceeding" – thus, the Com-

mittee is fairly up-to-date with its work. It is the number of complaints that is increasing rapidly.

It should also be noted that, as far as the decisions are concerned, only 13 express views on the substance, in eight cases it was a matter of violation of the Convention, and five cases were not found to have been in violation of the Convention.

Table 3 is a tabulated survey of the number of decisions year by year, and a splitting up of the decisions in two groups: communications related to article 3, and communications related to all others, mostly torture.

An analysis should be based on which countries have ratified article 22 (listed in table 1), and then one can ask: What can be expected from complaints?

Naturally, there were no complaints for the first two years. The Convention had *only just* entered into force, and of course it takes some time to spread the message that there is a possibility to complain to the Committee.

Since then, the number of complaints about torture or other cruel, inhuman or degrading treatment or punishment has been fairly constant, and there are only a very limited number of communications. This may give rise to astonishment. When dealing with the States Parties' reports delivered under article 19, the Committee rather often finds that torture is practised in the states. In this connection, please also compare the list of countries that have ratified article 22.

However, it is more important to point out that there are other international institutions which handle communications, and they have done so for a considerably longer period than the Committee against Torture – especially the Council of Europe's Commission for Human Rights and the Court of Human Rights and the Inter-American complaint system concerning torture.

It should also be noted that only one of the decisions was about a case which could be characterized as gross torture. This case was found inadmissible, because the torture had

occurred before the Convention entered into force in the country concerned (Argentina), Communication no. 1.

Of special interest regarding communications is article 3 of the Convention, which reads:

"1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall 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."

It should be repeated here that article 3 only comprises torture, and not "cruel, inhuman or degrading treatment or punishment"; neither does it cover capital punishment. On the other hand, *all* individuals are included in article 3: refugees who are asylum seekers, the citizens of the country, citizens in other countries, sentenced persons charged with crimes, and persons who have served their sentences for crimes. In short: *No one* must be sent back to a country where there are "substantial grounds for believing that he will be subjected to torture".

The demand in article 3 is an absolute one.

Problem of timing

The time problem is especially relevant when dealing with violations of article 3 (extradition). The Committee against Torture convenes twice a year (April/May and November). How then is a complaint to be dealt with in practice? An extradition of an individual is often done immediately after the last domestic court has spoken. According to the Committee's Rules of Procedure¹⁰, the Committee can elect a rapporteur (par. 3 of rule 106): "The Committee may designate special rapporteurs from among its members to

Table 3. Statistics about article 22. (2)

Year	No. of com.	Inadmissible			Decisions/Views					
		Other int. org.	Domestic	No sub. or abuse	Torture			Art. 3		
					a	b	c	a	b	c
1988	0									
1989	0									
1990	1			1	1					
1991	2	1	1		2					
1992	2	1		1	2					
1993	0									
1994	2					1 ¹			1	
1995	8		3	3	3			4	1	
1996	9	2	2	2				6	2	1
1997	7		1		1 ¹¹				3	3
Total	31	4	7	7						

Other int. org. = Communications raised before another international organization

Domestic = Domestic remedies have not been exhausted

No sub. or abuse = No substance in the communication or an obvious abuse of the provisions of the Convention.

a = inadmissible

b = view: plus violation

c = view: minus violation

¹ article 12

¹¹ articles 10, 11, 12, 13, 16

assist in the handling of communications", and during sessions, the chairman may designate such a rapporteur (rule of procedure no. 17, par. 2)². The rapporteur can immediately handle the case, ask for further information from the state, etc., and evaluate whether in *his* opinion there is a fair reason not to extradite the person, because in his opinion there would be "substantial grounds for believing that he would be in danger of being subjected to torture". In that case, the rapporteur can carry into effect par. 9 of rule 108: "In the course of the consideration of the question of the admissibility of a communication, the Committee or the working group or a special rapporteur designated under rule 106, par. 3, may request the State Party to take steps to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State Party does not imply that any decision has been reached on the question of the admissibility of the communication."

The complaint is forwarded to the State via telefax, requesting comments on the problem of admissibility. In order to save time, the State authorities, if they find the case admissible, are usually also requested to comment on the substance of the complaint at the same time (the second part of the official procedure described above).

Until now, the States have in all such cases complied with the Committee's recommendations, and no individual has been extradited during the handling of the case.

Communications on article 3 must contain *special information*. Apart from meeting the above-mentioned demands (please cf. the subheading "Conditions for receiving complaints"), reasons must be given for assuming that there will be "substantial grounds for believing that the person will be subjected to torture". First, a description must be given of why the person fled, and whether he was tortured before he left the country. However, the most important aspect is whether he risks being tortured on return to the country. We are dealing with the future, not the past. In this connection it is useful to have a certain knowledge about torture, torture methods, the aim of torture, and the target group. A good description can be found in the book "Torture survivor – trauma and rehabilitation"¹³.

Discussion

There are 22 million refugees all over the world. Many of them (most of them?) flee their country because of violations of human rights, whether civil, socio-economic, or the right to development, as defined in the Final Document from the World Conference on Human Rights, Vienna, June 1993¹⁴. How many of the refugees have fled because of torture is a difficult question to answer. Only very few valid, scientific investigations have been made on the problem. The latest is from Denmark. It showed that, of the children from the Middle East who came as refugees to Denmark¹⁵, 51% had a father and/or mother who had been tortured. Thus, it constitutes a large problem.

The State authorities naturally express their astonishment at the fact that the Committee, based on *papers only*, can arrive at a conclusion other than that of the national authorities, who have seen the papers, and who have also *interviewed* the person. My own personal explanation is that the members of the Committee have considerable knowledge about torture, and the way torture victims often react, knowledge that is perhaps not sufficiently disseminated within the national boards.

The Committee has of course discussed in depth what are "substantial grounds for believing that he will be subjected to torture". The discussion was based on the Committee's knowledge about torture methods, about the aim of torture and its consequences, and the potential target objects for torture.

Furthermore, the Committee has discussed the contents of par. 2 of article 3: "... existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." Here, too, the Committee sometimes reaches an opinion different from that of the State Party concerned. The State Party's opinion is to a large extent founded on reports from the embassies. However, the Committee evaluates, critically, information from UNCHR, ICRC, and other official organs and NGOs.

It is important to note that par. 2 of article 3 does not provide sufficient grounds to refrain from extraditing a person. The Committee has stated repeatedly: "... it follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances." (Communication no. 13/93, Mutombo versus Switzerland)⁸.

Thus, the important question is whether the person concerned (not a group of persons, but this particular person) is at a substantial risk of being subjected to torture.

In each single case the Committee designates a rapporteur who, usually together with the secretariat, will go over *all* the documents in a case. Such documents are usually fairly extensive and not always written in one of the official UN languages.

The Rapporteur then presents his view to the Committee, which is often a divided view: a view that advocates violation, and a view advocating no violation, because it is always the *whole of the Committee* which stands behind the views. The process leading to a decision on views is time-consuming and may be painful to both the rapporteur and to the Committee. The Committee considers torture as one of the most severe violations of human rights, and many of the members of the Committee consider torture as *the* most severe violation. Torture is such an abominable act, with so far-reaching and terrible consequences, that the thought of having made a "wrong" decision which could lead to torture of a person can give the Committee members nightmares.

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Official documents can be obtained at:
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Centre for Human Rights
United Nations office at Geneva
8-14 avenue de la Paix
1211 Geneva 10
Switzerland

Notes

- (1) As of 1 July 1997.
- (2) As of 1 July 1997.

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