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ICJ Intervention on the Review, Rationalization and Improvement of the Mandate of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Mr. Special Rapporteur,

Despite the absolute nature of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment ("torture and ill-treatment"),¹ which is a *ius cogens* norm of international law, it has been increasingly threatened by states' laws and practice, be it in efforts to develop and use excessive interrogation techniques involving torture and other ill-treatment, or by states' attempts to return people, in particular terrorism suspects, to countries where they will be at risk of being subjected to torture or ill-treatment.

The enjoyment of freedom from torture and ill-treatment is facilitated through the complementary and also absolute obligation of *non-refoulement*,² which prohibits return of people to countries where they may face a risk of torture or ill-treatment, as well as other gross human rights violations, including enforced disappearance, extrajudicial, summary or arbitrary executions or unfair trial.

The obligation not to return may not be constrained because of national security or counter-terrorism concerns. Neither may any other measure by States, including diplomatic assurances, circumvent such obligation. The ICJ recalls that the diplomatic assurances do not establish adequate safeguards for protecting people from torture and ill-treatment to satisfy the obligation of *non-refoulement*.³ These are often provided by governments of countries where torture and ill-treatment is either widespread or systematic or where there is a substantial risk of torture or ill-treatment to an individual in the specific situation, both threatening to contravene international law.⁴ Although the specific situation of an individual should be considered decisive, the fact that a consistent pattern of gross, massive or systematic violations of human rights exists in the other State should be interpreted in favour

¹ See e.g. the European Court of Human Rights, judgement in *Saadi v. Italy*, Application no. 37201/06, paragraphs 130 and 138 related to Art. 3 of the European Convention on Human Rights.

² See the High Commissioner for Human Rights' report E/CN.4/2006/94, 16 February 2006, paras. 10 and following and 34, in which it is recalled that the obligation of *non-refoulement* ranks as *ius cogens* and must be respected at all times and in all circumstances.

³ See inter alia, Decision of the Committee against Torture of 20 May 2005, Communication N° 233/2003, case of *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, para. 13.4 "[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against the manifest risk of torture or ill-treatment".

⁴ See Article 3 (2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 8 (2) of the Declaration on the Protection of All Persons from Enforced Disappearances.

of an individual. At the same time, the fact that there is no such consistent pattern does not mean that the individual may not be at risk.⁵

The Special Rapporteur on torture has demonstrated that his mandate can provide valuable guidance on the complex issues raised by torture and ill-treatment, both in scrutinising developments in individual countries, and in highlighting common concerns to all states, such as those above. It is vital that the broad mandate of the Special Rapporteur, which is complementary to those of other UN and regional bodies and organs mandates with the protection against torture and ill-treatment, be renewed by consensus for 3 years.

When extending the mandate of the Special Rapporteur, the Council should urge States:

- 1) To reconfirm the absolute nature of the prohibition of torture and ill-treatment as well as of the obligation of *non-refoulement*, both where the torture and ill-treatment are a massive or systematic practice or there are such risks in the individual situation;
- 2) To confirm that the freedom from torture and ill-treatment is a non-derogable right, even in states of emergency; refrain from torture and ill-treatment, repeal the laws and abstain from practice that leads to such treatment;
- 3) Co-operate fully with the mandate, by responding positively to requests for visits, providing for full and unhindered access, and acting on the recommendations of the Special Rapporteur. The ICJ urges countries such as Pakistan or Tunisia to respond positively to the Special Rapporteur's outstanding requests to visit;
- 4) To investigate and punish the perpetrators of torture and ill-treatment and provide effective remedies and reparation to the victims;
- 5) To integrate fully the recommendations of the Special Rapporteur into the Council's work and act on them, including during the Universal Periodic Review.

At the same time, the Council should invite the Special Rapporteur:

- 1) To continue to address all the manifestations of torture and ill treatment, both as a result of laws or policies, and in particular to respond to repeated attempts to pass by the absolute prohibition of torture through systematically invoking other cruel, inhuman or degrading treatment or punishment;
- 2) To assist to end impunity of state agents, as well as of private actors, for such gross violations of human rights;
- 3) To expand his preventative role in advising on measures that may affect protection from torture and ill-treatment;
- 4) To observe relevant judicial and administrative hearings;
- 5) To encourage all States to abandon efforts to secure diplomatic assurances against torture and ill-treatment as a ground for *refoulement*, and to actively oppose all initiatives to secure their acceptance nationally or internationally;
- 6) To undertake urgent response measures to address incidents of torture and ill-treatment, including when committed as part of the counter-terrorism measures.

⁵ See the Committee against Torture's decisions in the following cases: *Mutombo vs. Switzerland*, Communication No. 13/1993, 27 April 1994, para. 9.3; *Khan vs. Canada*, Communication No. 15/1994, 15 November 1994; *Tala vs. Sweden*, Communication No. 43/1996, 13 November 1996, para 10.1; and *Ahmed Hussein Mustafa Kamil Agiza vs. Sweden*, Communication N° 233/2003, CAT/C/34/D/233/2003, 24 May 2005, para. 13.3. See also Human Rights Committee's jurisprudence in *Mansour Ahani vs. Canada*, Communication No. 1051/2002, 29 March 2004, and European Court of Human Rights' Judgment of 15 November 1996, *Karamjit Singh Chahal vs. United Kingdom*, application No. 70/1995/576/662.

I thank you.