

### **Expert opinion of the Intentional Commission of Jurists on the use of decisions of the UN Committee Against Torture in proceedings before domestic courts.**

**February 2015**

#### ***Introduction***

The International Commission of Jurists (ICJ) was requested to give an expert opinion in proceedings in Kazakhstan brought on behalf of *Oleg Evloev*.

The underlying matters in the proceeding had been the subject of a decision by the UN Committee against Torture ("the CAT Committee"), acting under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention").<sup>1</sup> In its conclusions, the Committee stated among other things as follows:

The Committee urges the State party to conduct a proper, impartial and independent investigation in order to bring to justice those responsible for the complainant's treatment, to provide the complainant with redress and fair and adequate reparation for the suffering inflicted, including compensation and full rehabilitation, and to prevent similar violations in the future.

In this opinion, the ICJ:

- (1) outlines the procedure that results in the adoption of a decision by the Committee on an individual communication under Article 22 of the Convention; and
- (2) concludes that:
  - a. in order to comply with the State's obligations under the Convention, state organs including national courts must use whatever means lie within their power in order to give effect to a decision issued by the Committee; and
  - b. a refusal by national courts even to consider and give due weight to relevant UN CAT Committee findings when adjudicating remedies as provided for by the Convention, would violate the state's obligations under the Convention.

#### ***States' obligations under the UN Convention Against Torture***

The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment is an international treaty<sup>2</sup> and as such, under international law, is legally binding upon the States parties to it. Kazakhstan acceded to the Convention on 6 August 1998.

In addition to other obligations under the Convention, States parties must "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".<sup>3</sup> Article 14(1) of the Convention provides that, "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

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<sup>1</sup> UN Doc CAT/C/51/D/441/2010 (decision of 5 November 2013, published 17 December 2013).

<sup>2</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, adopted by the United Nations General Assembly on 10 December 1984, entry into force on 26 June 1987.

<sup>3</sup> Convention, article 12.

The Committee has explained aspects of article 14(1) in its General Comment No.3, including that, "Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation".<sup>4</sup>

Article 22 of the Convention provides that a State party to the Convention may declare that it "recognizes the competence of the Committee to receive and consider 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". Kazakhstan made such a declaration on 21 February 2008. The decision issued by the Committee in the case of *Oleg Evloev* was issued pursuant to article 22 of the Convention.

### ***Committee Procedure for Deciding Individual Communications under Article 22 of the Convention***

Consideration of an individual complaint made under article 22 of the Convention involves two stages – first, a decision as to the admissibility of the communication and, second, a decision on the merits of the case. The procedures for deciding individual communications are partly provided for in article 22 of the Convention; more detailed procedures are set out in the Committee's Rules of Procedure.<sup>5</sup>

Article 22(3) of the Convention requires the Committee to bring any communications submitted to it under the article to the attention of the State Party that is alleged to be violating the Convention. Article 22(3) also provides that, within six months, the receiving State 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 decides by a simple majority of votes if the complaint is admissible, applying criteria set out in Article 22 and in the Rules of Procedure.<sup>6</sup>

Under Article 22(4), if the communication is admissible, the Committee is to consider the communication "in the light of all information made available to it by or on behalf of the individual and by the State Party concerned". Following "examination of the communication in one or more closed meetings" (as provided for in article 22(6)), article 22(7) provides that, "The Committee shall forward its views to the State Party concerned and to the individual."

In most cases, the Committee examines the admissibility together with the merits of the case. If admissibility and merits are, exceptionally, to be considered separately, the Committee fixes deadlines for submissions on the merits on a case-by-case basis.<sup>7</sup>

In all cases, the complainant and the State party have an opportunity to comment on one another's information and submissions. The complainant and the State party may also be invited to be present at closed meetings of the Committee to provide clarification and answer questions on the merits of the complaint.<sup>8</sup> In addition to the information submitted to it by the individual and by the State, the Committee may at any time in the course of the examination obtain any document from United Nations bodies, specialized agencies, or other sources that may assist in the consideration of the complaint.<sup>9</sup>

The Committee then makes "findings on the merits" which the Rules of Procedure specify shall be known as "decisions".<sup>10</sup> The decision is, as earlier mentioned, then forwarded to the complainant and to the concerned State.

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<sup>4</sup> Committee against Torture, General Comment no 3 on Implementation of article 14 by States parties, UN Doc no CAT/C/GC/3 (19 November 2012), para 30.

<sup>5</sup> Committee against Torture, Rules of Procedure, UN Doc CAT/C/3/Rev.6 (1 September 2014), Rules 102 to 121..

<sup>6</sup> Rules of Procedure, Rule 111(1).

<sup>7</sup> Rules of Procedure, Rules 115, 117.

<sup>8</sup> Ibid,117(4).

<sup>9</sup> Ibid,118(2).

<sup>10</sup> Rules of Procedure, Rules 118(1) and (4).

## **National Courts and Decisions of the Committee Against Torture**

A State is responsible for any failure by any organ of the State, including the judiciary, to comply with the State's obligations under international law.<sup>11</sup> In other words, the international legal obligations of the State are binding on all organs of the State, including the judiciary.

This general principle of international law is reinforced in the case of the Convention against Torture, in that as was mentioned earlier, the Convention specifically requires States to ensure that victims of torture have access to an enforceable right to compensation within the legal system, i.e. a judicial remedy.

The leading scholarly commentary on the Convention, by Manfred Nowak and Elizabeth McArthur, states as follows:

...the decisions of the Committee are more than just mere recommendations that can be taken up by States parties at their discretion. They are, as stated by *Hanski* and *Scheinin* with regard to decisions by the *Human Rights Committee* (which follows the same procedure as the Committee against Torture), 'the end result of a quasi-judicial adversarial international body established and elected by the States parties for the purpose of interpreting the provisions...and monitoring compliance with them'. They further argue that the basis of the procedure would be undermined if a State did not accept the Committee's decision and replaced it with 'its own interpretation' after having 'voluntarily subject[ed] itself to such a procedure'.

The Committee against Torture, as the Human Rights Committee, has chosen a detailed and powerful structure and method to consider individual complaints under Article 22(4). The 'views' or decisions taken by the Committee against Torture are, as observed by Human Rights Committee member *Christian Tomuschat*, 'not ... a quasi-diplomatic communiqué but rather a statement clearly borrowing from judicial ideals'.

A further entry-point establishing the quasi-binding nature of Article 22 decisions is Article 14 obliging States parties to offer redress to a victim whose rights under the Convention have been violated. *Ingelse* underlines that the States parties have mandated the Committee to adopt 'a legal approach in order to come to an objective, Convention-based assessment of the observance of Convention obligations'. Once the Committee has established a violation, the State party is under an obligation to indicate how it will comply with Article 14 and provide remedy or redress for the violation.<sup>12</sup>

The International Court of Justice has said with respect to the Human Rights Committee established under the International Covenant on Civil and Political Rights (ICCPR), that the International Court of Justice "should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".<sup>13</sup> The Human Rights Committee has issued a General Comment explaining its interpretation of the Optional Protocol to the ICCPR, which as noted by Nowak and McArthur, sets out an individual communications procedure similar to that provided for by Article 22 of the Convention against Torture.<sup>14</sup>

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<sup>11</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 4.1.

<sup>12</sup> Manfred Nowak and Elizabeth McArthur, *United Nations Convention Against Torture, A Commentary* (Oxford University Press, 2008), pages 777-778, citing: Rajia Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (Turku/Åbo, 2003), 22 and 11 et seq; Christian Tomuschat, 'Comment on the Massera case (*Massera et al. v Uruguay*, No.5/1977 under the Human Rights Committee)' (1979), 6 *Europäische Grundrechte-Zeitschrift* (EuGRZ) 501-502; Chris Ingelse, *The UN Committee against Torture: An Assessment* (The Hague/London/Boston, 2001), 196.

<sup>13</sup> *Ahmadou Sadio Diallo*, Merits, Judgement, I.C.J. Reports 2010(II), 639[66].

<sup>14</sup> Human Rights Committee, General Comment no 33 on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc CCPR/C/GC/33 (5 November 2008).

In its General Comment, the Human Rights Committee states, among other things, as follows:

While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views". These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

...  
The character of the views of the Committee is further determined by the obligation of States parties to act in good faith,<sup>15</sup> both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

...  
(...) In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.<sup>16</sup>

The same points apply with respect to the Committee against Torture acting under the Convention against Torture.

Other commentators approach the role of Committee decisions in national courts from a different angle. Van Alebeek and Nollkaemper, for instance, conclude that States, "violate their obligations under individual complaints procedures when they do not ensure that their national courts can pay heed to the outcome of these procedures in possible subsequent domestic proceedings".<sup>17</sup> They find merit in the argument that once a State accepts a Committee's competence to determine whether a breach of the treaty has occurred (for instance, by making the declaration under Article 22 of the Convention or accepting the Protocol to the ICCPR), it would be incongruous for the state to thereafter feel free to ignore the Committee's findings and conclusions.<sup>18</sup> They thus hold that "an obligation to give the contents of Views serious consideration is implied in the structure of the provisions on the competence of treaty bodies".<sup>19</sup> In their view, expertise of the Treaty Body can create "a presumption in favour of substantive correctness" of their Views and, if a state disagrees with the View expressed in a certain case, "it must present good arguments in counter-argument".<sup>20</sup> "Blanket refusals to implement particular Views,

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<sup>15</sup> Here the Committee is referring to the principle is known in international law as *pacta sunt servanda*. This principle is codified in the Vienna Convention on the Law of Treaties, 1155 UNTS 331, entry into force 27 January 1980, to which Kazakhstan acceded on 5 January 1994. Article 26 of the Vienna Convention provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

<sup>16</sup> Human Rights Committee, General Comment no 33, paras 11, 12, 13, 15 and 20.

<sup>17</sup> Rosanne van Alebeek and André Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law" in Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: law and legitimacy* (Cambridge: Cambridge University Press, 2012), p 359.

<sup>18</sup> *Ibid* p. 385.

<sup>19</sup> *Ibid* p. 385.

<sup>20</sup> *Ibid* p 385, citing Tomuschat, *Human Rights : Between Idealism and Realism*, 2<sup>nd</sup> edition (Oxford University Press, 2006), at 220.

without considering them or attaching any weight to them, sit uneasily with the obligations flowing from or implied by the relevant conventions and protocols".<sup>21</sup> "[S]tates must enable their organs, including their courts, to consider the consequences of decisions of treaty bodies in their determination of the position of a successful author under national law".<sup>22</sup>

For the above reasons, the ICJ concludes as follows:

- (1) In order to comply with the State's obligations under the Convention, state organs including national courts must use whatever means lie within their power in order to give effect to a decision issued by the Committee; and
- (2) A refusal by national courts even to consider and give due weight to relevant UN CAT Committee findings when adjudicating remedies as provided for by the Convention, would violate the state's obligations under the Convention.

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<sup>21</sup> Ibid pp 386-387.

<sup>22</sup> Ibid p 391.