Denmark's comments on the draft General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22

General comments

Denmark appreciates the opportunity to respond to draft General Comment No. 1 regarding the implementation of Article 3 in the context of Article 22 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment of Punishment ("CAT"), and thanks the Committee for its general work.

To avoid confusion, Denmark suggests using the same reference throughout the document (that is "receiving" and "sending state" rather than "state of origin" and "state of deportation" as used in e.g. para. 29).

While recognizing the relevance of updating the General Comment on the implementation of article 3 in light of the Committee's case-law, Denmark is concerned that the draft General Comment on some points goes beyond the obligations stemming from CAT as developed by the Committee in its case-law[1]. Denmark suggests that the distinction between the interpretation of existing obligations and suggested best practice is made clearer throughout the draft General Comment.

It is observed that during armed conflicts there may be a correlation between International Humanitarian Law and international human rights obligations[2]

The scope of the Convention, para. 10

Denmark is concerned that the wording of para. 10 of the draft General Comment would expand the jurisdictional scope of CAT beyond the existing scope. Therefore, Denmark suggests replacing the wording "[…] has a factual control and authority" with the following wording: "in practice exercises effective control. A State party must also observe the principle of "non-refoulement" in relation to persons who are in the territory of another State but who are under the State party's authority and control through its agents operating – whether lawfully or unlawfully – in the other State."[3]

The assessment of the state, paras. 11 and 41

Denmark would suggest to replace the wording of paras. 11 and 41 with the wording of para. 6 from the current General Comment No.1. This would emphasize that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.[4]

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[1] Reference is made to e.g. paras. 10, 18 (d), 29, 43 (3) and 53 (d).

[2] Reference is made, e.g., to para. 11 of The Human Rights Committee's General Comment No. 31 which indicates a balancing of law of armed conflict and international human rights obligations. Reference is also made to the Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of the ICJ, 8 July 1996, para. 25, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, ICJ, 9 July 2014, para. 106, Case Concerning Armed Activities on the Territory of the Congo, Judgement, ICJ, 19 December 2005, para. 216, the European Court of Human Rights judgement of 16 September 2014 in the case of Hassan v. the United Kingdom, paras. 103 to 107, all considered at length in chapter 4 on "The relationship between the law of armed conflict and International Human Rights Law" in Practioners' Guide to Human Rights Law in Armed Conflict, Daragh Murray, Dapo Akande, Charles Garraway, Francoise Hampson, Noam Lubell and Elizabeth Wilmshurst, Oxford University Press 2016."

[3] Reference is made to The European Court of Human Rights' judgement of 16 November 2004 in the case of *Issa v. Turkey*, paras. 69 and 71.

[4] Para. 6 of the current General Comment reads: 'Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must

Medical examination, paras. 18 (d), 43 (3) and 53 (d)

It follows from the draft General Comment para. 18, that "for the purpose of fully implementing Article 3 of the Convention, States parties should take legislative, administrative and other preventive measures against possible violations of the principle of "non-refoulement". Recommended best practices are: […] (d) The referral of the person alleging previous torture to an independent medical examination free of charge; […]".

Denmark suggests adding the following ending to the sentence**:** "if the outcome of the medical examination is considered to be of relevance to the case."

It follows from para. 43 that medical examination requested by a complainant to prove the torture that she or he has suffered should always be ensured, regardless of the authorities' assessment of the credibility of the allegation, so that the authorities deciding a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of that medical examination, without any reasonable doubt.

In the opinion of Denmark, a torture examination should be conducted only if such an examination will be of relevance to the case, keeping in mind that the relevant question is whether the person in question currently runs a risk of torture if expelled, returned or extradited. The decision of whether or not to make a medical examination should be based on a specific and individual assessment of the circumstances of the case. The assessment should include the specific details of the case in conjunction with the general background information on the country that the person is from, the possible outcome of the examination, and the person's explanation and credibility.

Denmark finds that a torture examination should not be conducted – as part of the asylum process – if it is obvious that the asylum seeker will be granted asylum due to the information available prior to initiating a torture examination.

Furthermore, a torture examination should not be conducted if the asylum seeker by the competent authorities is assessed to be in general lack of credibility. This is in accordance with the Committee's case law, *e.g.*, the decision adopted by CAT on 12 November 2003 in the case of *Milo Otman v. Denmark* in which the complainant's statements on torture and the medical information provided were set aside due to the complainant's general lack of credibility. Reference is also made to the decision adopted by CAT on 14 May 2014 in the case of *Nicmeddin ALP v. Denmark* where the Committee stated: "The Committee, however, notes that the State party's authorities thoroughly evaluated all the evidence presented by the complainant, found it to lack credibility, and did not consider it necessary to order a medical examination".

In this context, Denmark recalls the wording of paras. 8 (f) and 8 (g) in the current General Comment No.1: "The following information, while not exhaustive, would be pertinent: […] f) Is there any evidence as to the credibility of the author? g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"

Therefore, Denmark urges the Committee to revise this part of the comment. It is suggested to delete the following wording from 43 (3): "In particular, a medical examination requested by a complainant to prove the torture that he/she has suffered should always be ensured, regardless of the authorities' assessment on the credibility of the allegation, so that the authorities deciding on a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of that medical examination, without any reasonable doubt."

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be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.'

Furthermore, it is suggested to delete the following wording from 53 (d): "… and, in particular, to an independent medical examination to assess his/her claims that he/she has previously suffered torture or ill-treatment in his/her country of origin?"

Diplomatic assurances, paras. 19 and 20

Regarding paras. 19 and 20 of the draft General Comment, Denmark generally refers to the joint observations submitted by the US, Canada, the United Kingdom and Denmark on 31 March 2017.

Redress and compensation, paras. 21 and 22

With regard to para. 21, Denmark recalls that according to another international human rights instrument[5], the competent authorities should assess, in accordance with the international human right obligation, the risk faced by an individual in light of the information concerning his or her state of health and the existence of appropriate treatment in the country of origin, and only in exceptional cases should the return of a person suffering from a serious illness not be carried out.

Concerning para. 22, Denmark observes that State parties' asylum authorities should only return asylum seekers to their country of origin after a thorough examination of their asylum application and of their need for protection, including whether the applicants are in danger of being subjected to torture upon the return. Furthermore, the asylum authorities must monitor closely the general situation in the asylum producing countries and they must have a comprehensive collection of background information. Thus, Denmark cannot support a general reference to the need for continued monitoring of persons upon their return to the country of origin, nor the envisaged mechanisms of financial and legal aid and therefore suggests deleting para. 22 or categorising it as a recommendation or best practice.

Other international human rights instruments, para. 27

With regard to para. 27, Denmark suggests that article 3 of the European Convention on Human Rights on 'prohibition of torture' is added to the non exhaustive examples of other international provisions directly relevant to the application of the principle of "non-refoulement".

Previous ill-treatment and torture, paras. 18 and 29

With reference to the above mentioned comments to para.18 (d), Denmark is concerned that while the principle of "non refoulement" relates to the assessment of a current risk of torture, some of the recommended best practices, as presently worded in para. 18, seem to be triggered by allegations of <u>previous</u> torture.

Denmark finds that previous infliction of cruel, inhuman or degrading treatment will not be an indicator of future torture in all cases. In this connection, Denmark recalls that according to the case law of the Committee, the relevant question before the Committee is whether the complainant <u>currently</u> runs a risk of torture if returned to her or his State of origin[6].

Therefore, Denmark suggests replacing the wording in para. 29 with the wording from the Committee's case-law e.g. *S.G. v. Denmark* (Communication no. 458/2011), para. 9.5: "[...] [T]he Committee recalls that ill-treatment suffered in the past is only one element to be taken

[5] Reference is made to The European Court of Human Rights' case-law regarding article 3 of The European Convention on Human Rights, *e.g.*, judgment of 2 May 1997 in the case of *D v. The United Kingdom*, judgement of 27 May 2008 in the case of *N v. The United Kingdom* and judgement of 13 December 2016 in the case of *Paposhvili v. Belgium.*

[6] Reference is made to *S.G. v Denmark* (Communication no. 458/2011 of 28. november 2014, para. 9.5.

into account, the relevant question before the Committee being whether the complainant currently runs a risk of torture if returned [..]".

The last sentence in para. 29 of the draft General Comment could be added to the abovementioned wording.

Pertinent examples of human rights situations which may constitute an indication of a risk of torture, paras. 30 and 46

With regard to paras. 30 and 46, Denmark generally finds that the non-exhaustive list of human rights situations that may constitute an indication of a risk of torture should only be considered if relevant to the specific case.

Denmark finds that para. 30 (d) is too far-reaching and suggests that the sentence "which does not guarantee the right to a fair trial" is replaced with the wording "that would amount to a flagrant denial of justice."[7] Similarly, Denmark finds that para. 30 (m) is too far-reaching and suggests deleting the sentence: "members of the family or witnesses of his/her arrest and detention, such as violent and terrorist act against them, the disappearance of those family members or witnesses, their killings or their torture".

Non-State actors, para. 32

Denmark suggests to add "private" before "military operation programs" to underline that the focus of the section is non-State actors.

Interim Measures, para. 39

In relation to para. 39, Denmark finds that interim measures is an important part of the cooperation between State Parties and the Committee in individual complaint cases, and that States that have accepted the individual complaints mechanism in CAT art. 22 are obliged to fulfil the obligations flowing from that article in good faith in accordance with the principle of pacta sunt servanda. However, Denmark finds that the wording of para. 39 is too absolute. Non-compliance by a State party in relation to a decision by the Committee would not make evident that the State party has failed to fulfill its obligations to cooperate with the Committee. Thus, the Government suggests rephrasing or deleting para. 39.

Burden of proof, para. 40

Denmark recalls the guidelines set out by another international human rights instrument: "regarding the burden of proof in expulsion cases, […] it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it". [8]

Furthermore, Denmark refers to UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, which states in para. 196:

'It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived

[7] Reference is made to The European Court of Human Rights' judgement of 17 January 2012 in the case of *Othman (Abu Qatada) v. The United Kingdom*.
[8] Reference is made to The European Court of Human Rights' judgement of 23 August 2016 in the case of *J.K. and Others vs. Sweden.*

with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests in the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all means at his disposal to produce the necessary evidence in support of the application […]'.

Reference is also made to Article 4 (1) of the EU Qualification Directive that states: "Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application"

Due to the abovementioned, Denmark considers the suggested wording for reversing the burden of proof to be too far reaching. Therefore, Denmark strongly suggests deleting this part of the para.

Violations of human rights in the State concerned, para. 45

With regard to para. 45, Denmark recalls that it follows from the article 3 (2) of CAT, that "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".

Denmark finds that, it should be reflected in the draft General Comment that information about a consistent pattern of gross, flagrant or mass violations of human rights, should be taken into account only when relevant for the specific case.

Para. 45 (f) of the draft General Comment reads: '[S]ituations of international and non-international armed conflicts'. Denmark would like to point out that situations of armed conflict do not per se lead to the existence of a 'consistent pattern of gross, flagrant or mass violation of human rights'.

Internal flight alternative, paras 50, 51 and 52

As mentioned in UNHCR's Guidelines on International Protection, "Internal Flight or Relocation Alternative within the Context of Article 1 A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees of 23 July 2003", the 1951 Refugee Convention does not require or even suggest that the fear of being persecuted need always extend to the *whole* territory of the refugee's country of origin. The concept of an internal flight or relocation alternative therefore refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life.

Therefore, Denmark would like to stress that an assessment of the opportunity to invoke an Internal Flight Alternative is still applicable to individuals, who have been subjected to torture as long as it is based on an individual assessment including personal circumstances. Thus, it cannot be demanded that the State of deportation has taken effective measures able to guarantee full and sustainable protection of the rights of the person concerned. Denmark observes, that it seems to be without legal basis in CAT that the Committee demands reliable information that the State of deportation has taken effective measures able to guarantee full and sustainable protection of the rights of the person concerned before the enforcement of a return.

Independence of assessment of the Committee, para. 54

In para. 54 of the draft General Comment, the fact that the Committee is not an "appellate body, a quasi-judicial or an administrative body" is not reflected. Thus, it is suggested to replace the wording of para. 54 with the wording of para. 9 from the current General Comment No.1.