

Response to Draft General Comment No.2 issued by the United Nations Committee Against Torture

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Submission to United Nations Committee Against Torture in response to Draft General Comment No 2

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1. Summary and Recommendations

1.1 Introduction

The Human Rights Law Resource Centre Ltd ("**HRLRC**") aims to promote and protect human rights in Australia through policy development, litigation and education.

The HRLRC makes this submission in response to the *Draft General Comment on the Implementation of Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("**Draft General Comment**") issued by the United Nations Committee Against Torture ("**the Committee**").

According to article 2 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*¹ ("**the Convention**"):

- (a) each state party must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction;
- (b) no exceptional circumstances (e.g. whether a state is at war; has internal political instability or any other public emergency) can justify an act of torture;
- (c) an order from a superior officer or a public authority may not be invoked as a justification for an act of torture.

1.2 General Observations

The Draft General Comment is of significant importance to the normative development of international human rights law.

Although the prohibition against torture is a non-derogable human right and a peremptory norm of customary international law, it continues to be flagrantly violated. For example, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ("**Special Rapporteur**") reports that during the period from 16 December 2005 to 15 December 2006, he sent 79 letters of allegations of torture to 35 governments and 157 urgent appeals to 60 governments on behalf of persons who might be at risk of torture or other forms of ill-treatment.²

These statistics highlight the urgent need for state parties to receive practical instruction in respect of the Convention and in particular, article 2, which underpins the Convention's absolute prohibition against torture.

The Draft General Comment is comprehensive and provides useful guidance on various aspects of article 2. However, it could be strengthened by reference to relevant jurisprudence of the European Court of Human Rights ("**ECtHR**") (in particular, article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*³ ("**European Convention**"))

¹ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

² Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [5], UN Doc A/HRC/4/33 (2007).

³ Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

and the General Comments of the United Nations Human Rights Committee ("**HRC**"), with particular reference to articles 7 and 10 of the *International Covenant on Civil and Political Rights*.⁴ A consideration of comparative jurisprudence provides a useful framework for the interpretation and application of the Draft General Comment.

This submission considers the Draft General Comment with a particular emphasis on the following issues:

- (a) the definition of 'torture';
- (b) the particular circumstances in which the prohibition against torture may be relevant, including arrest, prison conditions, immigration detention and detention for mental health purposes, *non-refoulement* and the 'war on terror';
- (c) protection of vulnerable groups;
- (d) the nature and scope of the negative, positive and procedural obligations arising out of the norm; and
- (e) the burden and standard of proof relevant to alleged violations of the norm.

1.3 Recommendations

The HRLRC recommends that:

- (a) the terms 'torture' or 'cruel, inhuman or degrading treatment or punishment' should be interpreted together in relation to all impugned actions;
- (b) given the unique circumstances surrounding the detention of children as reflected under the *United Nations Convention on the Rights of the Child* ("**CRC**"), the Draft General Comment should specifically refer to the conditions imposed by article 37 of the CRC;
- (c) the Draft General Comment should refer to the Convention's *non-refoulement* obligations, including comparative jurisprudence which extends beyond actions of public officials (and to private forms of violence), constituting 'cruel, inhuman and degrading treatment';
- (d) the Draft General Comment should consider specific circumstances where breaches have occurred in contravention of the Convention, which would provide useful practical guidance on the operation of article 2 of the Convention in the context of the 'war on terror';
- (e) the Draft General Comment should set out information that the Committee requires to evaluate compliance by state parties to implement the Convention (as discussed in the HRC General Comment Number 23);

⁴ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

- (f) the Draft General Comment should specifically refer to other vulnerable groups subject to discrimination or marginalisation, such as children and unaccompanied minors;⁵
- (g) the Draft General Comment could be improved with particular reference to procedural obligations to be undertaken by state parties with respect to the criteria adopted by the ECtHR;
- (h) the Draft General Comment should consider the issue of burden of proof. The Committee may wish to adopt the approach taken by the ECtHR in relation to article 2 of the Convention, with particular reference to the following issues:
 - (i) a contravention of article 2 of the Convention must be proved beyond reasonable doubt; and
 - (ii) the burden of proof must rest with the applicant unless the events in issue lie wholly or in large part within the exclusive knowledge of the state authorities (in which case the burden of proof shifts to the authorities to disprove the applicant's allegations).

This submission considers the developing international jurisprudence on the prohibition against torture and aims to assist the Committee by demonstrating how the norm has been interpreted in other jurisdictions. For example, it is recommended that the definition of 'torture' should be interpreted as including acts committed by private / non-state actors. Notwithstanding that approach, the submission acknowledges the textual limitations of the definition of 'torture' and notes that developments in other jurisdictions may not necessarily be applicable to the content of 'torture' under the Convention.

It is recommended that where possible and to the extent that the definition of 'torture' allows, the Committee consider the developments in other international jurisdictions, for example, the ECtHR and the HRC and adopt a flexible approach in interpreting the Convention. Where it is not possible to do so (due to the textual limitations and the particular protection afforded under the Convention), it is recommended that the Committee acknowledge the developments in the other jurisdictions and the limitations under the Convention.

2. The definition of Torture

The definition of 'torture' is integral to an accurate interpretation and understanding of the operation of article 2 of the Convention. Article 1 of the Convention defines 'torture' and turns on the operative elements of article 2 of the Convention. Taking into account that the prohibition against torture is a *jus cogens* norm, the preference is to interpret 'torture' broadly.

The Draft General Comment notes that:

⁵ *A v the United Kingdom* (1998) VI ECtHr 90. International law recognises the critical need for children to be protected and accorded treatment appropriate to their age and legal status. This has been reflected in various international instruments including Article 24 of the *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and the *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

- (a) the prohibition against ‘torture’ is non-derogable. States party cannot derogate from their obligation to prohibit torture (and exceptional circumstances cannot be pleaded as a justification);⁶
- (b) the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is not clear. The conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment;⁷
- (c) the prohibition against ‘torture’ has been imprecisely incorporated into domestic law, creating actual or potential loopholes for impunity;⁸
- (d) the intent and purpose of article 1 requires an objective determination according to the circumstances and does not involve a subjective inquiry into the motivations of the perpetrators;⁹
- (e) victims, perpetrators and the public must be given a clearer understanding of what constitutes ‘torture’ and the gravity of the offence;¹⁰
- (f) ‘torture’ includes acts by private individuals ‘through consent to or acquiescence in torture, where conduct is inflicted by or at the instigation of non-state officials or private actors in circumstances where persons exercising official capacity knew or should have known that the conduct was being or likely to be committed and failed to take reasonable and necessary measures to prevent torture or ill-treatment’;¹¹ and
- (g) the discriminatory use of mental or physical violence or abuse is an important and independent factor in determining whether an act constitutes torture.¹²

It may be useful for the Draft General Comment to consider whether the distinction between ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’; and the distinction between public and private realms should continue under the Convention’s definition of torture.

These two issues will be considered in further detail below.

⁶ Draft General Comment [1], [4]-[6].

⁷ Ibid [3].

⁸ Ibid [8].

⁹ Ibid.

¹⁰ Ibid [9].

¹¹ Ibid [19].

¹² Ibid [20].

2.1 Jurisprudence relating to the Convention's definition of 'torture'

Various international legal instruments proscribe torture.¹³ However, 'torture' is not defined in many of these instruments and they turn to the Convention's definition for guidance.¹⁴

'Torture' is defined under the Convention as follows:

for the purposes of [the Convention], torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention's definition of 'torture' includes the following four elements:

- (a) **infliction of severe treatment or punishment:** for conduct (either an act¹⁵ or omission¹⁶) to be regarded as 'torture' under article 1 of the Convention, mental and/or physical harm of a certain level of severity needs to be occasioned. While the level of severity required to be met under the ECtHR jurisprudence has not been determined definitively, 'torture' has been held by the ECtHR to involve 'deliberate inhuman treatment causing very serious and cruel suffering'.¹⁷
- (b) **intention:** requires that suffering be intentionally inflicted.¹⁸

¹³ See, eg, *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, U.N. Doc. A/CONF.183/9, arts 7(1)(f), 8(2)(a)(i) (entered into force 1 July 2002) ('*Rome Statute*'). In the context of international criminal law more generally: see, eg, *United Nations Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, art 5, U.N. Doc. A810 (1948); *American Convention on Human Rights*, concluded on 22 November 1969, 1114 UNTS 123, art 5(3) (entered into force 18 July 1978); *ICCPR*, Opened for signature 19 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976); *CRC*, Opened for signature 20 November 1989, 1577 UNTS 3, arts 37(a), 39 (entered into force 2 September 1990); *European Convention*, Opened for signature 4 November 1950, 213 UNTS 222, art 3 (entered into force 3 September 1953).

¹⁴ See, eg, *Abdullah Aydin v Turkey (No 2)*, no 63739/00 (Sect III) (10 November 2005); *Soering v United Kingdom* (1989) 11 ECtHR (ser A) 439; *Selmouni v France* (1999) V ECtHR 25803/94, 101; *Ilaşcu and Others v Moldova and Russia* (2004) ECtHR 48787/99; *Prosecutor v Furundžja (Trial Chamber Judgment)*, Case No IT-95-17/1-T (10 December 1998) [160]; Association for the Prevention of Torture, *The Definition of Torture: Proceedings of an Expert Seminar*, Geneva, 10-11 November 2001.

¹⁵ Potentially including inchoate acts, eg, where a perpetrator has 'participate[d] in an integral part of the torture and of the purpose behind the torture': *Prosecutor v Furundžja (Trial Chamber Judgment)*, Case No IT-95-17/1-T (10 December 1998) [257]. It is also possible that a person may be found vicariously liable for the acts of, eg, the acts of subordinates: see, eg, *Prosecutor v Delalić, Mucić, Delić and Landžo (Trial Chamber Judgment)*, Case No IT-96-21-T (16 November 1998).

¹⁶ See, eg, *Hajrissi Dzemajl and others v Yugoslavia*, UN Doc CAT/C/29/D/161/2000 (1999).

¹⁷ *Ireland v United Kingdom* (1978) 2 ECtHR 25, 162 (App No 5310/71); applied in, eg., *Salman v Turkey* (2000) VII ECtHR 21986/93, 114 and *Elci and others v Turkey* (2003) ECtHR (App Nos. 23145/93 and 25091/94) (Sect. IV), 634.

¹⁸ *Greek Case* (1969) 12 Eur Comm HR 1; *Salman v Turkey* (2000) VII ECtHR 21986/93, 114.

- (c) **purpose:** the impugned conduct must be purposive¹⁹ (eg, obtaining information or a confession, punishing, intimidating, coercing or 'for any reason based on discrimination of any kind').
- (d) **public (as opposed to private) conduct:** the 'pain and suffering' must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. This element is broader than what is considered in other legal instruments.²⁰

Article 1 of the Convention does not expressly include 'cruel, inhuman or degrading treatment or punishment' as part of the definition of 'torture'. However, article 16 of the Convention provides a textual basis for including 'cruel, inhuman and degrading treatment or punishment' as part of the proscription of 'torture' contained under the Convention:

Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The ECtHR has refused to read the proscription of torture and inhuman or degrading treatment or punishment under article 3 of the European Convention as a composite phrase. Rather, it has insisted on maintaining a separation between 'torture' on the one hand and 'inhuman or degrading treatment or punishment' on the other. The ECtHR considers that what constitutes torture, inhuman or degrading treatment 'depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim'.²¹ The ECtHR also requires the European Convention to be interpreted according to present day conditions, (i.e., increasingly high standards of rights protections), stating that:

Having regard to the fact that the Convention is a living instrument which must be interpreted in light of present day conditions...certain acts which were classified in the past as inhuman and degrading as opposed to torture could be classified differently in the future.²²

It is therefore not possible to categorically state whether a particular form of treatment will amount to 'torture' or 'inhuman or degrading treatment or punishment'.

¹⁹ Ibid.

²⁰ See, eg, the *United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 3452 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, annex, UN Doc A/RES/3452 (1975); *Inter-American Convention to Prevent and Punish Torture*, opened for signature 9 December 1985, 67 OASTS, art 3 (entered into force 28 February 1987) (restricted to public servants or employees who, acting in an official capacity, order, instigate, induce, commit or fail to prevent torture, or persons who do so at the instigation of such an official); Rachel Lord, 'The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2003) 4 *Melbourne Journal of International Law* 112, 117.

²¹ See, eg, *Ireland v United Kingdom* (1978) 2 ECtHR 25, 162 (App No 5310/71).

²² *Selmouni v France* (1999) V ECtHR (App No. 25803/94), 101.

2.2 Issues that the Committee should consider in relation to the definition of torture

The Committee may wish to consider whether the definition of 'torture' under the Convention should consider 'torture' separately from 'cruel, inhuman or degrading treatment or punishment' and whether the definition of 'torture' should be limited to a consideration of a public element. The Committee's views expressed in the Draft General Comment relating to these issues represent a progressive reconsideration of the definition of 'torture'. It is, however, recommended that the Committee consider the matters discussed below, which would further clarify the approach to be taken by the Committee in considering human rights protection.

(a) Including cruel, inhuman or degrading treatment or punishment within the meaning of torture

While incorporating the terms 'cruel, inhuman or degrading treatment or punishment' within the definition of 'torture' would be preferable from a rights protection perspective, it presents the danger that states party would resist their international reputation attracting the special stigma attached to torture whilst being prepared to accept the lesser damage to their reputation by less serious conduct, i.e., cruel, inhuman or degrading treatment or punishment.²³

In the Draft General Comment, the Committee notes that 'cruel, inhuman or degrading treatment or punishment' should be treated in the same way as 'torture' under article 2 of the Convention. However, it does not go as far as stating 'torture' or 'cruel, inhuman or degrading treatment or punishment' is a composite phrase. Therefore, it presupposes a division between 'torture' and 'cruel, inhuman or degrading treatment or punishment'. Treating 'torture or cruel, inhuman or degrading treatment or punishment' as a composite phrase would bring the Committee's position in accordance with that taken by the HRC.²⁴

(b) Public/private responsibility

Article 1 of the Convention requires pain or suffering to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Draft General Comment therefore presupposes proximity between an act of torture and public officials.

Considering at least two major developments in the law over the past twenty years - the rise of the regulatory state (which sees states governing in an increasingly indirect manner, eg, through outsourcing)²⁵ and the increased recognition of individual responsibility for crimes

²³ Such a cynical approach to torture may not be limited to those state parties with poor human rights practices. It can, for instance, be discerned in an Office of Legal Counsel opinion on torture: see US Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. 2340-2340A* (2002) <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo_20020801.pdf> at 13 August 2007.

²⁴ Joseph, et al, note that 'where the HRC finds a violation to have occurred [under the ICCPR], it often fails to specify which aspect of the article has been breached. Violations may simply be described as, "violations of article 7": S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) 208; Human Rights Law Resource Centre, *Guide to the Victorian Charter of Human Rights and Responsibilities* (2007) 22.

²⁵ See, eg, J Braithwaite and C Parker, 'Regulation' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003).

under international law (particularly international humanitarian law)²⁶ - insisting on a public/private dichotomy may be outdated. Further, the maintenance of the public/private dichotomy indirectly introduces discriminatory elements into the normative structure of the proscription of torture in failing to protect against forms of harm which are more typically suffered by women.²⁷ Sexual and gender based violence is inflicted on women because of their *sex* and/ or *gender* and in most cases they involve 'private' violence, where the perpetrator is a non-state actor. Under the current definition of 'torture', women suffering sexual and gender based violence may not be protected under the Convention. The definition of torture should be interpreted so as to remove the public/private dichotomy completely.²⁸ One way of doing so is to interpret the term 'acquiescence' as broadly as possible. It is recommended that 'torture' or 'cruel, inhuman or degrading treatment or punishment' be interpreted as referring to one and not two separate crimes.

3. Arrest, prison conditions, immigration detention and detention for mental health purposes

Although the Draft General Comment is to apply to states in circumstances of arrest and detention of individuals, there is limited discussion of these circumstances in the document. In relation to arrest and detention/imprisonment, the Draft General Comment:

- recognises that the Convention provides basic guarantees of human rights of detainees, and calls upon state parties to use these specific rights in the Convention;²⁹
- explains that state parties must take responsibility to prohibit torture not only in their own territory but also in all territories that are controlled by other state parties³⁰ and in respect of facilities where the states' obligations are 'contracted out' to third parties;³¹

²⁶ For example, under Article 7(2)(e) of the *Rome Statute*, opened for signature 17 July 1998, UN Doc. A/CONF.183/9 (entered into force 1 July 2002), "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.' That is, there is not a public element to the definition of torture under the *Rome Statute*. See further, T McCormack and S Robertson, 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court' (1999) 23 *Melbourne University Law Review* 635-67 and Rachel Lord, above n 20, 137-8.

²⁷ H Charlesworth, C Chinkin and S Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 627-9.

²⁸ As was stated in *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeals Chamber Judgement) Case No.IT-96-23 and IT-96-23/1-A (12 June 2002) [493]: 'With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences ... the involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question.' (cited with approval in *Prosecutor v Krnojelac* (Trial Chamber Judgment), Case No IT-97-25-T (15 March 2002) [187]).

²⁹ Draft General Comment [13].

³⁰ Ibid [16].

³¹ Ibid [18], [19].

- emphasises that state parties must 'undertake to prevent' ill-treatment, as well as torture, of individuals, particularly in prisons or other institutions where individuals may be detained;³² and
- recognises the further specific preventative measures under articles 3 to 15 that reinforce the general prohibitions under article 2 of the Convention, in particular, the obligations under article 11 on states party to review treatment of persons subject to arrest and persons in custody.³³

It would be preferable for the Draft General Comment to include specific obligations on states party with respect to the prohibition of torture and cruel, inhuman or degrading treatment of individuals during arrest, imprisonment and detention as discussed in the following paragraphs.

3.1 Arrest

In Australia, Courts have recognised that the State's power of arrest cannot be used only for the purpose of interrogation or questioning³⁴ (although limited statutory rights exist for the State to detain individuals for questioning, but only over a short period of time).³⁵

The ECtHR has recognised that the use of the power of arrest itself can amount to a sufficient degree of humiliation so as to constitute a breach of article 3 of the European Convention.³⁶ According to article 3 of the European Convention, an arrest is degrading if the humiliation or debasement to which the individual is subjected to is of a 'special level and in any event different from the usual degree of humiliation inherent in arrest or detention'.

To provide further clarification to article 2 (and also article 15) of the Convention, it would be preferable for the Draft General Comment to:

- include an absolute prohibition of the use of a State's power of arrest (but not restricted periods of detention) for the purpose of questioning or interrogation only and that the use of the States' power in this manner will amount to at least cruel, inhuman or degrading treatment of the type prohibited by article 16 of the Convention;
- recognise the potential for individuals to be unreasonably degraded during an arrest itself, potentially with reference to article 3 of the European Convention. For example, the Draft General Comment might clarify that in circumstances where an individual is detained or arrested, the person will not be exposed to a level of duress

³² Ibid [17].

³³ Ibid [25].

³⁴ *Williams v the Queen* (1986) 161 CLR 278; *The Queen v Iorlano* (1983) 151 CLR 678; *R v Dalley* [2002] NSWCCA 284; *Drymalik v Feldman* (1966) SASR 227, 234; *R v Banner* (1970) VR 240, 249; *R v Stafford* (1976) 13 SASR 392, 400-401; *R v Clune* (1982) VR 1, 10-11, 17-19; *R v Larson and Lee* (1984) VR 559, 568-569.

³⁵ *Police Powers and Responsibilities Act 2000 (Qld)* s 234; *Anti Terrorism Act 2004 (Cth)* amending the *Crimes Act 1914 (Cth)*.

³⁶ For example, *R L and M-J D v France* (2004) ECtHR 15 (Section III) (App No. 44568/98); *Rehbock v Slovenia* (2000) ECtHR (App No. 29462/95).

or humiliation which a reasonable person would consider to be in excess of what a person would usually be exposed to in such circumstances.

3.2 Prison conditions, immigration detention and detention for mental health purposes

The Draft General Comment imposes broad obligations on states party in respect of conditions during detention and imprisonment.

Specific reference to obligations of state parties under articles 7 and 10 of the ICCPR would provide further clarification and consistency, in particular taking into account the HRC's findings in relation to imprisonment and/ or detention conditions.³⁷

Many countries commit acts of torture against detained individuals.³⁸ Specific reference in the Draft General Comment to the Optional Protocol to the Convention mandating that independent international experts conduct regular visits to places of detention would further encourage States Parties signing, ratifying or acceding to it.³⁹ Reference to specific obligations for states party to provide reports on safeguards and reviews of interrogation rules and instructions would ensure accountability and clarify the states parties' investigation and reporting obligations in relation to conditions of prisons and other detention facilities. It may also be useful to refer to specific obligations for states parties to provide reports on safeguards and reviews of interrogation rules, instructions, methods and practices and arrangements for custody of persons (and their treatment while in custody), particularly as they relate to vulnerable persons. The HRC in General Comment No 20 on the ICCPR, also notes that, 'it is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.'⁴⁰

Finally, article 37(b) of the CRC provides that 'the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for

³⁷ For example, *Tshitenge Muteba v Zaire*, UN Doc. Supp. No. 40 (A/39/40) at 182 (1984); *Jean Miango Muiyo v Zaire*, U.N. Doc. CCPR/C/OP/2 at 219 (1990), where beating, electric shock to the genitals, mock executions, deprivation of food and water and thumb presses all constituted torture; *Fray Deidrick v Jamaica*, UN Doc. CCPR/C/62/D/619/1995 (1998), where the HRC decided that being locked up in a cell 23 hours a day, without mattress or bedding, integral sanitation, natural light, recreational facilities, decent food or adequate medical care was "cruel and inhuman" treatment. Other examples include *Francis v Jamaica*, UN Doc. CCPR/C/54/D/606/1994 (1995), *Damian Thomas v Jamaica*, UN Doc. CCPR/C/65/D/800/1998 (1999), *Young v Jamaica*, UN Doc. CCPR/C/62/D/615/1995 (1997), *Polay Campos v Peru*, UN Doc. CCPR/C/61/D/577/1994 (1998). This may also invoke the U.N. Standard Minimum Rules for the Treatment of Prisoners, and the prohibitions against prolonged solitary confinement, see *White v Madagascar* (115/82).

³⁸ Such allegations were made at least against China, Egypt, Indonesia, Iraq, Nepal, Nigeria, Russia, Syria, Turkey and Uganda by Human Rights Watch, *Torture Worldwide* (27 April 2005) <<http://hrw.org/english/docs/2005/04/27/china10549.htm>> at 13 August 2007.

³⁹ In June 2007 Amnesty International reported that 56 States had signed the Protocol and 34 had ratified or acceded to it. Amnesty International, *Public Statement: The UN Convention against Torture at 20 - Remarkable Achievements, Formidable Challenges* (25 June 2007), AI Index: IOR 51/004/2007 <<http://web.amnesty.org/library/Index/ENGIOR510042007>> at 13 August 2007.

⁴⁰ Office of the High Commissioner For Human Rights, *General Comment No 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7): ICCPR General Comment No. 20. (General Comments) (1992)*, [5].

the shortest appropriate period of time'. Article 37(c) of the CRC sets out further specific obligations in relation to detention conditions for children.

4. 'Refoulement'

A growing number of asylum seekers who are refused refugee status under article 1A(2) of the *United Nations Convention on the Status of Refugees* 1951⁴¹ have resorted to the Convention for protection over the past decade.⁴² The intersection of article 22 (individual communications), article 1 (definition of 'torture') and article 3 (prohibition on refoulement) of the Convention provides an alternative or additional measure of protection against *refoulement* for individuals facing deportation.⁴³

Article 3 of the Convention is an absolute and non-derogable provision that states party should not expel, return (*refoule*) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture, explicitly drawing on the language of article 33 of the Refugees Convention.

Article 33 (1) of the Refugees Convention states that:

No Contracting State shall expel or return (*refoule*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

A person can benefit from the protection of *non-refoulement* only if they meet the definition of 'refugee' under the Refugees Convention and the Optional Protocol, which requires a person to establish that:

owing to a *well founded fear* of being *persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁴

Article 7 of the ICCPR also includes a *non-refoulement* provision which is much broader than that afforded by the *Refugees Convention*:

⁴¹ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugees Convention*').

⁴² *Bs v Canada* (2001) [2.2] UN Doc CAT/C/27/D/166/2000; *Mr M.P.S. v Australia* (2002) UN Doc. A/57/44 at 111.

⁴³ GS Goodwin - Gill, *The Refugee in International Law* (2nd ed, 1996) 153.

⁴⁴ *Refugees Convention*, Opened for signature 28 July 1951, 189 UNTS 150, article 1A (entered into force 22 April 1954) [emphasis added]. The Organisation of African Unity's *Convention on the Specific Aspects of Refugee Problems in Africa* (entered into force 10 September 1969) has an added ground specifying that the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality: see Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5 *Washington University Journal of Law and Policy* 129.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.⁴⁵

Unlike the Refugees Convention, the Convention does not permit any exception to the principle of non-refoulement, as the prohibition on torture is considered a norm of *jus cogens*, a peremptory norm of international law regarded by the international community to be so fundamental that it must not be derogated from under any circumstances.⁴⁶ Article 3 of the Convention also draws from the case law relating to article 3 of the European Convention, which prohibits states from subjecting individuals to 'torture' or 'inhuman or degrading treatment or punishment'. Article 3 of the European Convention has been interpreted as obliging states to not only prevent such treatment from occurring within their own territory, but also to prevent them from returning individuals to other states where they might be subjected to such abuse.

In the United States of America ("US"), *non-refoulement* extends only to non-removal in the context of torture and in Canada it extends to 'torture' or 'cruel or unusual treatment or punishment', whereas in Australia the on-shore protection system does not consider complementary protection under the Convention.⁴⁷

A notable feature of article 3 of the Convention is that only a person fearing 'torture' can be protected by the non-refoulement provisions. Thus a higher degree of state complicity is required than under the Refugees Convention, which does not require persecutory acts to be linked to a governmental authority and could therefore encompass both public and private forms of persecution.⁴⁸ By contrast, under the European Convention, states may be liable for the conduct of private actors where domestic law does not adequately protect the rights guaranteed by the European Convention or guarantee an effective remedy if the right is violated. Accordingly, the scope of article 3 of the European Convention has been held to encompass treatment by both state and non-state actors.⁴⁹ This parallels the ICCPR.⁵⁰

⁴⁵ ICCPR article 7 prohibits torture and 'cruel, inhuman and degrading treatment or punishment'; the HRC has also read that language to bar state parties from exposing individuals to those dangers 'upon return to another country by way of either extradition, expulsion or refoulement.' See Office of the High Commissioner For Human Rights, *General Comment No 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7): ICCPR General Comment No. 20.* (General Comments) (1992), [9]. See generally, Guy Goodwin-Gill, above n 43, 124-125.

⁴⁶ *Soerang v UK* (1989) 11 ECtHR 439.

⁴⁷ J McAdam, *Complementary Protection in International Refugee Law* (1st ed, 2007) 113.

⁴⁸ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention of the 1967 Protocol Relating to the Status of Refugees* UN Doc HCR/IP/4/Eng/Re v .1 (2nd ed, 1992) 65.

⁴⁹ For example among many cases involving female asylum seekers, the ECtHR has found that the risk of an Iranian refugee accused of adultery, being subjected to treatment contrary to Article 3 of the European Convention, including potentially death by stoning, if she were returned to Iran. See *Jabari v Turkey* (2000) ECtHR (App No. 40035/98).

⁵⁰ Office of the High Commissioner For Human Rights, *General Comment No 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7): ICCPR General Comment No. 20.* (General Comments) (1992).

Although legal status does not accrue from recognition by the Committee that an individual has a need for protection under article 3 of the Convention, the Draft General Comment is silent on *non-refoulement* and the importance for states to take positive action to reinforce the prohibition against torture through legislative, administrative, judicial or other actions which are effective in preventing it.

5. 'War on Terror' and anti-terror legislation

The Draft General Comment:

- (a) considers the 'war on terror' and anti-terror legislation and reiterates the absolute and non-derogable character of the prohibition against torture as set out under article 2 of the Convention;
- (b) specifically identifies circumstances that directly relate to the 'war on terror', including a state of war, a threat of war, internal political instability or any other public emergency;
- (c) refers to a 'threat of terrorist acts' and expresses concerns about the attempts made by state parties to justify torture and ill-treatment on the basis of public safety in order to avert emergencies;
- (d) repeatedly emphasises the non-derogable nature of the prohibitions under the Convention: article 2 (prohibiting torture), article 15 (prohibiting confessions extorted by torture from being admitted in evidence, except against the torturer) and article 16 (prohibiting cruel, inhuman or degrading treatment or punishment);
- (e) states that the non-derogable right against torture extends to 'any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of a State party'.⁵¹ This would include a state party's control over persons in detention and those detained under suspicion of terrorism;⁵²
- (f) specifically refers to 'incidents of torture or ill-treatment as a consequence of anti-terrorism measures' (possibly referring to situations such as Guantanamo Bay) and emphasises that the absolute and non-derogable nature of the prohibition (as set out under articles 2, 15 and 16) continues to apply in the implementation of any anti-terrorism measure.⁵³

The principles espoused in the Draft General Comment complement UN resolutions, including the resolution on *Torture and other cruel, inhuman or degrading treatment or punishment*⁵⁴ adopted on 14 February 2007 which clearly condemns:

⁵¹ See also Draft General Comment, p. 5, describing a state's responsibility for the participation in torture by state authorities and others (such as non-state officials or private actors) by a state's 'routine indifference or inaction'.

⁵² Ibid, pp. 3-4.

⁵³ Ibid, p. 2.

⁵⁴ GA Res 61, UN GAOR, 61st sess, UN Doc A/Res/61/153 (2007).

any action or attempt by States or public officials to legalize, authorize or acquiesce in torture and other cruel, inhuman or degrading treatment or punishment under any circumstances, including on *grounds of national security* or through judicial decisions.⁵⁵ [emphasis added]

The non-derogable prohibition against torture also accords with article 7 of the ICCPR, which, according to the HRC, cannot be violated under any circumstances.⁵⁶ The prohibition against torture is particularly significant in the context of the 'war on terror'. Numerous States Parties, such as the US, have attempted to 'widen the boundaries of what is permissible in terms of "counter-resistance techniques"'.⁵⁷ In particular, there have been cases where a number of states have interpreted Security Council Resolution 1373 (listing proscribed organisation) and subsequent resolutions, which refer to 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts' as legitimating or even mandating extreme measures in the name of the 'war against terrorism'.⁵⁸ Although UN bodies urge the need for state parties to ensure that measures to be taken to combat terrorism comply with all their obligations under international law,⁵⁹ the Special Rapporteur in the Guantanamo Bay Report notes the following concerns:

[a]ttempts by the United States Administration to redefine 'torture' in the framework of the struggle against terrorism in order to allow certain interrogation techniques that would not be permitted under the internationally accepted definition of torture are of utmost concern. The confusion with regard to authorized and unauthorized interrogation techniques over the last years is particularly alarming.⁶⁰

The Special Rapporteur also listed a number of the 'interrogation techniques' which had been permitted by US policy at various stages since 11 September 2001. These included: the use of stress positions (like standing) for a maximum of four hours; placing a hood over the detainee's head during transportation and questioning; deprivation of light and auditory stimuli; removal of clothing; interrogation for up to 20 hours; use of detainees' individual phobias (such as fear of dogs) to induce stress; exposure to extreme temperatures and deprivation of light and auditory stimuli; and environmental manipulation including altering the environment to create

⁵⁵ *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 61, UN GAOR, 61st sess, [4], UN Doc A/Res/61/153 (2007).

⁵⁶ Office of the High Commissioner For Human Rights, *General Comment No 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7): ICCPR General Comment No. 20* (General Comments) (1992), [3]. See, eg, *Mukong v Cameroon* (1994) UN Doc CCPR/C/51/D/458/1991, 9.93; *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 4 All ER 515; *Holomiov v Moldova* (2006) ECtHR (App No 30649/05); *Istratii and others v Moldova* (2007) ECtHR (App No 8721/05); and *Benediktov v Russia* (2007) ECtHR (App No 106/02).

⁵⁷ UN Economic and Social Council Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, [47] <http://www.globalsecurity.org/security/library/report/2006/guantanamo-detainees-report_un_060216.htm> at 20 August 2007 ('*Guantánamo Bay Report*'). See also *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006) where the Bush Administration, by setting up military commissions to try detainees at Guantánamo Bay, was held by the Supreme Court to have violated Common Article 3 of the *Third Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

⁵⁸ See, eg, Human Rights Watch, *The Security Council's Counter-Terrorism Effort* (10 August 2004) <<http://www.hrw.org/backgrounder/un/2004/un0804/2.htm>> at 13 August 2007.

⁵⁹ *Guantánamo Bay Report*, above n 57.

⁶⁰ *Ibid* [86].

moderate discomfort (for example, adjusting temperature or introducing an unpleasant smell).⁶¹

There have also been concerns raised in relation to the treatment of detainees accused of terrorism in Uzbekistan,⁶² Jordan⁶³, Israel⁶⁴ and Egypt. In addition, there have been many other examples of torture, inhuman treatment and ill-treatment in various jurisdictions related to the war on terror.⁶⁵

6. Protection for vulnerable groups

The Draft General Comment at part IV(c) discusses the protection of individuals and groups made vulnerable by discrimination or marginalisation. At [22] it notes that States frequently report that they lack specific and sufficient information on the implementation of the Convention with respect to women. Paragraph 23 sets out information required by the Committee to evaluate compliance by state parties to implement the Convention. The HRC (at General Comment 23) sets out matters which should be taken into account when interpreting article 7 of the ICCPR (and article 24, which mandates special protection for children). It states that the Committee needs to be provided information on national laws and practice with regards to violence against women, including rape, etc. It further requests information on measures preventing forced abortion or forced sterilization and where the practice of female genital mutilation exists, information on the extent of the practice and the measures taken by the state party to eliminate it. The information provided by state parties on these issues should outline measures of protection, including legal remedies, for women whose rights under article 7 have been violated.⁶⁶

⁶¹ Ibid [49]–[50].

⁶² Human Rights Watch, *Torture Worldwide* (27 April 2005) <<http://hrw.org/english/docs/2005/04/27/china10549.htm>> at 13 August 2007.

⁶³ Manfred Nowak, above n 2, [6].

⁶⁴ In 1997, Israel claimed that the use of interrogation techniques involving moderate physical and psychological pressure helped save countless lives due to terrorist attacks being thwarted. The techniques were held to breach the Convention, even though they were designed to protect the population from a particularly deadly terrorist threat. The committee was of the view that even though Israel faced a terrible dilemma in relation to their national security, being a state party to the Convention it was precluded from raising exceptional circumstances as justification for such acts.

⁶⁵ See, eg, *Ireland v United Kingdom* (1978) 2 ECtHR 25, 162 (App No 5310/71); *Bilgin v Turkey* (2000) ECtHR (App No 23819/94); *Dulas v Turkey* (2001) ECtHR (App No 25801/94); *Kurt v Turkey* (1998) ECtHR 44 (App No 24276/94); *Cakici v Turkey* (1999) [GC] IV ECtHR [98] (App No. 23657/94); *Tanis v Turkey* (2005) VIII ECtHR (App No 65899/01); *Bazorkina v Russian Federation* (2006) ECtHR [139] (App No. 69481/01); *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006) ECtHR (App No 13178/03); *Sultan Oner and Others v Turkey* (2006) ECtHR (App No 73792/01) and *Berktaş v Turkey* (2001) ECtHR (App No 22493/93).

⁶⁶ Office of the High Commissioner For Human Rights, *General Comment 28: Equality of rights between men and women (article 3)* [11] (2000).

7. Positive and procedural obligations

The Draft General Comment emphasises that the obligations of state parties are not limited to negative obligations under the Convention (i.e., to not subject persons to torture).⁶⁷ Rather, as is evident in the text of article 2 of the Convention, state parties have a range of positive obligations (i.e., to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture'.) These positive obligations also include a range of procedural obligations.

The Committee expressly notes that state parties must take affirmative action to prevent acts of torture. It is recommended that the Draft General Comment also consider the approaches taken in the jurisprudence of the ECtHR and the HRC.

The ECtHR has found that a State's responsibility can arise where it fails to provide an effective legal or practical framework to protect all persons under its jurisdiction against torture.⁶⁸ The effective and practical framework contemplated by the ECtHR implies procedural obligations in varying contexts under the European Convention, to ensure that the rights guaranteed under the Convention are not theoretical and illusory but are practical and effective.⁶⁹

The ECtHR and the HRC have consistently held that the prohibition on torture gives rise to a procedural obligation requiring States to ensure that there be 'effective' official investigations of an arguable claim of torture.⁷⁰ An effective investigation is one that leads to identification and punishment of those responsible, which is not an obligation of 'result' but of 'means'. The ECtHR has considered the following criteria in determining whether an investigation is or has been effective:

- timely investigation that allows for discovery and preservation of evidence as well as the realistic identification of the perpetrators;⁷¹
- collection of all relevant evidence, such as interrogating the officers involved;⁷²
- prompt trial of the perpetrators to prevent the prosecution from being time barred;⁷³ and

⁶⁷ For example at paragraph 7, the obligation to define and make the offence of torture punishable at law; at paragraph 12, the obligation to eliminate any normative or other obstacles that impede the eradication of torture; and at paragraph 18, the obligation to adopt effective measures to prevent public authorities and other persons acting in an official capacity from participating or being complicit in acts of torture.

⁶⁸ See, eg, *M.C. v Bulgaria* (2003) ECtHR 646 (App No. 39272/98) at paras 149-153, 186-187.

⁶⁹ *Khushiyevev and Akayeva v Russia* (2005) ECtHR (App. No. 57942/00) at paras. 177-180.

⁷⁰ Ibid. See also *Rodriguez v Uruguay* (1994) UN Doc. CCPR/C/51/D/322/1988 and *Zelaya Blanco v Nicaragua*, UN GAOR, 49th Session, UN Doc CCPR/C/51/D/328/1988 (1994).

⁷¹ *Aydin v Turkey* (1998) ECtHR (App. No. 23178/94).

⁷² *Veznedaroglu v Turkey* (2000) ECtHR (App. No. 32357/96).

⁷³ Interights, *Lawyers Manual on the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment under the European Convention on Human Rights (Art 3)* (2006) 58.

- reasonable access of and scrutiny by the victim or his or her relatives to the investigation.⁷⁴

Finally, both the ECtHR and the HRC have consistently held that a failure to act and discharge positive obligations to prevent debasement, humiliation and degrading treatment may constitute a violation of the prohibition against torture. Examples from the case law under the ICCPR and the European Convention include findings of a violation in relation to:

- failure to provide adequate health care to a mentally ill prisoner;⁷⁵
- failure to provide appropriate drug withdrawal and medical treatment to a heroin dependent prisoner;⁷⁶
- failure to provide the level of medical care necessary to treat a prisoner with a severe urological condition, even where such health care may not be available to that same person outside of prison;⁷⁷
- failure to provide humane conditions of detention. Prison conditions such as lack of natural light, inadequate ventilation, overcrowding, poor quality food and inadequate exercise facilities may amount to cruel, inhuman or degrading treatment even absent any intention on the part of authorities to humiliate or debase prisoners;⁷⁸
- failure of a local authority to act to prevent children in a family from ongoing abuse and neglect;⁷⁹ and
- failure to provide support to persons so as to leave them destitute.⁸⁰

⁷⁴ Ibid. Refer also to the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 55/89, UN GAOR (2000), which provide a procedure for ensuring that all allegations of torture or other cruel, inhuman or degrading treatment or punishment are promptly and impartially examined by the competent national authority. In the Guantánamo Bay Report, the Special Rapporteur found that 'the lack of any independent investigation into the various allegations of torture and ill-treatment at Guantánamo Bay amount to a violation of the obligations of the United States under articles 12 and 13 of the Convention against Torture', Guantánamo Bay Report, above n 57 [56].

⁷⁵ *Keenan v United Kingdom* (2001) 33 ECtHR 913. See also *Price v United Kingdom* (2001) 34 ECtHR 1285.

⁷⁶ *McGlinchey v United Kingdom* (2003) 37 ECtHR 821 (where the ECtHR held that a heroin dependent prisoner had died in conditions which violated art 3 of the *European Convention* due to the failure of prison authorities to take more effective steps to address her withdrawal symptoms and deteriorating health).

⁷⁷ *Holomiov v Moldova* (2006) ECtHR (App No. 30649/05), in which the Court held that lack of adequate medical treatment for a prisoner with a serious urological condition amounted to a violation of art 3. The Court stated that that the quality of healthcare to those imprisoned by the action of the state is not to be relative. While an individual in society may have no right to healthcare under the Convention, let alone adequate healthcare, where he or she is in the state's custody the state must ensure that he receives the medical care he requires. Scarce resources or logistical difficulty will not be legitimate excuses.). See also *Istratii and others v Moldova* (2007) ECtHR (App No 8721/05).

⁷⁸ *Todor Todorov v Bulgaria* (2007) ECtHR (App No. 50765/99); *Andrey Frolov v Russia* (2007) ECtHR (App No. 205/02).

⁷⁹ *Z v United Kingdom* (2001) 34 ECtHR 97.

⁸⁰ In 2005, the UK House of Lords found that a law prohibiting the provision of support for asylum seekers whose claims for asylum were not made as soon as 'reasonably practicable' so as to leave them destitute and potentially

The jurisprudence of the ECtHR and the HRC make it clear that ‘no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons’.⁸¹ For example, in *Mukong v Cameroon*, the HRC rejected an attempt by the state party to justify appalling prison conditions on the basis of economic and budgetary problems.⁸² The UK Court of Appeal made a similar finding in *R (Noorkoiv) v Secretary of State for the Home Department*, where it held that the Government could not be excused from what were otherwise breaches of the right to liberty and freedom from cruel treatment in the prison context ‘simply by pointing to a lack of resources that are provided by other arms of government’.⁸³

8. Burden and standard of proof

The Draft General Comment is silent on the issue of proof of a breach of article 2 of the Convention.

Given that the Draft General Comment is silent on the issue of proof, it is necessary to consider how it is addressed in comparative jurisprudence.

The burden of proof required under the *Rome Statute* and the ECtHR is that a Court must be convinced of the guilt of the accused *beyond reasonable doubt*.⁸⁴ The ECtHR’s general approach to the standard of proof under article 3 of the European Convention is for the applicant to provide evidence of treatment or punishment in contravention of the provision. However, the ECtHR recognises that in many instances the respondent State holds the information, records and other such relevant pieces of evidence in relation to claims under article 3,⁸⁵ as was stated explicitly in *Salman v Turkey*:

where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumption of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of

without food or water, amounted to cruel treatment in violation of art 3 of the Convention: *R v Secretary of State for the Home Department; ex parte Limbuela* [2005] UKHL 66.

⁸¹ Office of the High Commissioner For Human Rights, *General Comment No 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7): ICCPR General Comment No. 20.* (General Comments) (1992), [3].

⁸² Office of the High Commissioner For Human Rights, UN Doc CCPR/C/51/D/458/1991 (1994) [9.93].

⁸³ [2002] 4 All ER 515 [31]. See also decisions of the ECtHR such as *Holomiov v Moldova* (2006) ECtHR (App No. 30649/05); *Istratii and others v Moldova* (2007) ECtHR (App No. 8721/05) and *Benediktov v Russia* (2007) ECtHR (App No. 106/02).

⁸⁴ *Rome Statute*, opened for signature 17 July 1998, U.N. Doc. A/CONF.183/9, art 66(3) (entered into force 1 July 2002); *Ireland v United Kingdom* (1978) 2 ECtHR 25, 162 (App No 5310/71). The ECtHR has emphasised that this standard of proof is *not* to borrow the approach of national systems that use that or a similarly worded standard: *Mathew v Netherlands* (2005) ECtHR (App No. 24919/03). The ECtHR’s application of the standard has an autonomous meaning.

⁸⁵ This approach was supported by the *General Recommendations of the Special Rapporteur on Torture* [26(d)] UN Doc. E/CN.4/2003/68 (2003) <<http://www.ohchr.org/english/issues/docs/recommendations.doc>> at 20 August 2007; and also in the cases of *Mukong v Cameroon*, UN Doc. CCPR/C/51/D/458/1991 (1994); *Ribitsch v Austria* (1995) 21 ECtHR 573; and *Berkay v Turkey* (2001) ECtHR (App No. 22493/93), where it was incumbent on the state to produce evidence that proved beyond reasonable doubt that any confession was not obtained by unlawful means, including torture and similar ill-treatment.

proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.⁸⁶

In such instances, the burden of proof will shift to the respondent to disprove the applicant's allegations. Such a discharge of the burden of proof may take into account the actions and attributes of the alleged victim.⁸⁷

The ECtHR adopts a factual and practical approach to the issue of proof, and has shown that in certain cases it will attach significant value to reports and submissions made by international organisations and NGOs in considering whether there is sufficient proof of the commission of torture. For example, in *Hilal v United Kingdom*⁸⁸ the ECtHR relied (in part) on findings submitted in a report by Amnesty International and the US Department of State to make a finding that deportation of the applicant was contrary to article 3.⁸⁹ Similarly, the ECtHR found in *Thampibillai v Netherlands*⁹⁰ and *Venkadajalasarma v Netherlands*⁹¹ that as stated in various international and NGO reports, the security situation in Sri Lanka had improved considerably and therefore the applicants' expulsion to the State would not constitute degrading or inhuman treatment or punishment.

⁸⁶ (2000) VII 34 ECtHR 425 (App No. 21986/93).

⁸⁷ *Berlinski v Poland* (2002) ECtHR (App. No. 27715/95 and 329/96). In this case the applicants were bodybuilders who resisted the attempts of police to legitimately apprehend and arrest them and were subsequently convicted of assault on the police.

⁸⁸ (2001) 33 ECtHR 31.

⁸⁹ In that case, the applicant, an active member of the opposition party in Tanzania, maintained that his expulsion to Tanzania would place him at risk of torture or inhuman or degrading treatment, that he would not receive a fair trial there and that he had no effective remedy available. The Amnesty report supported these claims by showing that there was still active persecution of members of the opposition party, that the government's human rights record remained very poor, that the police committed extra-judicial killings and mistreated suspects, and that arbitrary and prolonged detention remained pervasive problems.

⁹⁰ (2004) ECtHR (App No. 61350/00).

⁹¹ (2004) ECtHR (App. No. 58510/00).