Training Programme for Lawyers on Convention Against Torture Claims and Refugee Law
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An Analysis of the various legal issues under Article 3 CAT

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OVERVIEW

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1. ARTICLE 3, CAT

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

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
2. TYPES OF OBLIGATORY DEPARTURE (BROAD APPLICATION OF CAT)

- Extradition: on request of receiving State for the purpose of criminal justice
- Expulsion: in the interest of the expelling State (public order, national security etc.)
- Exile: expulsion of citizens (severely restricted by Article 12(4) CCPR: “arbitrarily”)
- Return: sending back to country of departure (even at the border)
2. TYPES OF OBLIGATORY DEPARTURE (BROAD APPLICATION OF CAT) (cont’d)

- Deportation: Execution of an extradition or expulsion order: Moving a person by force to another country or jurisdiction

- “Ordinary Rendition”: Abducting a person in a third country for the purpose of bringing him or her to justice

- “Extraordinary Rendition”: Abducting a person for the purpose of bringing him or her to a third country (often for the purpose of torture)
3. MEANING OF “A PERSON”

• Every human being, regardless of any status, such as nationality, citizenship or residence status: usually applied to aliens, but also citizens protected

• Broader than Article 33 Refugee Convention (only refugees and asylum seekers)

• Absolute and non-derogable nature of non-refoulement: even the most dangerous terrorist is protected: no balancing of interests as in Articles 13 and 17 CCPR

• Case of Tapia Paez v. Sweden (No. 34/1995) concerning a member of Sendero Luminoso; also Agiza v. Sweden (No. 233/2003), Iratxe Sorzábal Díaz v. France (No. 194/2001), Abdussamatov et al. v. Kazakhstan (No. 444/2010) and Othman (Abu Qatada) v. United Kingdom (No. 8139/09)
4. MEANING OF “ANOTHER STATE”

• Any State in the world where the person faces a real risk of torture: not only States parties to CAT

• Country of origin or destination, but also any third State where the person faces a risk of being further deported to a torture State

• Case of Korban v. Sweden (No. 88/1997): prohibition to send an Iraqi citizen to Iraq or to Jordan in light of risk of being expelled from there to Iraq

• Case of Z.T. v. Australia (No. 153/2000): confirmed prohibition to send a citizen of Algeria to a third country where it is foreseeable that he subsequently may be expelled to a country where he is exposed to torture

• In fact, the term “another State” also means to “another jurisdiction”: e.g. transfer of detainees from US or UK custody in Iraq or Afghanistan to Iraqi or Afghan authorities
5. MEANING OF “TORTURE”

- Non-refoulement only applies to torture in sense of Article 1, not to CIDT: GenC 1, § 1; S.V. et al. v. Canada (No. 49/1996)

- More narrow scope than Article 3 ECHR and Article 7 CCPR

- No application to threats posed by non-State actors: case of G.R.B. v. Sweden (No. 83/1997) concerning a Peruvian woman abducted and raped by Sendero Luminoso

- Application to threats posed by non-State actors only in exceptional circumstances, such as “failed States”: case of Elmi v. Australia (No. 120/1998) concerning Somalia
6. TIME OF RISK ASSESSMENT

The Convention against Torture

- Cases of Attia and Agiza v. Sweden (Nos. 199/2002 and 233/2003): risk must be assessed “in the light of the information that was known, or ought to have been known, to the State Party’s authorities at the time of the removal.”

- But “subsequent events are relevant to the assessment of the State party’s knowledge, actual or constructive, at the time of removal”.

- Difficult balancing, but CAT-Committee follows a pragmatic approach

- See also dissenting opinion of Guibril Camara in T.P.S. v. Canada (No.99/1997); ECtHR case of El-Masri v. Macedonia (No. 39630/09)
7. OBJECTIVE AND SUBJECTIVE TEST

- Objective test specified by Article 3(2) CAT: “consistent pattern of gross, flagrant or mass violations of human rights”: possibility to resort to the CAT-Committee’s own inquiry procedure under Article 20 CAT, to findings of Special Procedures of the UN Human Rights Council and other information (NGOs, media, UNHCR etc.)

- Motumbo v. Switzerland (No. 13/1933): If torture is systematically practiced in receiving State (Zaire), the burden of proof shifts to the host State: see also cases relating to Turkey (No. 21/1995), Somalia (No. 120/1998), Iran (No. 149/1999) or Mexico (No. 133/1999).

- If torture is not systematically practiced in the receiving State, applicant must provide stronger evidence why he or she is at risk of torture: e.g. Spain (No. 63/1997)

- In any case, both tests are necessary in order to decide on a case
8. INTERNAL FLIGHT ALTERNATIVE

• In case of gross and systematic human rights violations (Article 3(2) CAT), the Committee usually does not accept an internal flight alternative: e.g. with respect to Turkey (No. 21/1995) or Somalia (No. 120/1998)

• But see H.M.H.I. v. Australia (No. 177/2001): “… the complainant will be at liberty to avail himself of the UNHCR voluntary repatriation programme and choose the area of Somalia to which he wishes to return”.

9. REFOULEMENT AND ASYLUM PROCEDURE

• Certain overlap between both procedures

• Refugee Convention does not provide for individual complaints to international monitoring body, such as UNHCR

• Refugee Convention allows balancing of interests relating to both the asylum and the non-refoulement procedure whereas Article 3 CAT is absolute and non-derogable

• Aemei v. Switzerland (No. 34/1995) concerning an Iranian activist of the People’s Mojahedin: Switzerland does not have to change its negative asylum decision but it must find a solution to comply with its obligation under Article 3 not to deport him to Iran (temporary residence, expulsion to a safe third country etc.)
10. DIPLOMATIC ASSURANCES

- Practice of the US, UK (MoU with Jordan, Libya, Lebanon and Algeria), Sweden and other States in the fight against terrorism aimed at circumventing the non-refoulement principle

- UN Special Rapporteur on Torture: should never be resorted to in relation to torture (as distinct from death penalty, fair trial etc.)

- ECtHR: Chahal v. UK (1996); Mamatkulov and Askarov v. Turkey (2005); Garabayev v. Russia (2007); Saadi v. Italy (2008); El-Masri v. Macedonia (2012); Othman (Abu Qatada) v. United Kingdom (2012): leaves a certain door open
10. DIPLOMATIC ASSURANCES (cont’d)

• CAT-Committee: Agiza v. Sweden (No. 233/2003): ”The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk; Abdussamatov et al. v. Kazakhstan (No. 444/2010): “The Committee recalls that diplomatic assurances cannot be used as an instrument to avoid the application of the principle of non-refoulement.”

• HRC: Alzery v. Sweden (No. 1416/2005): State party relied on diplomatic assurances alone, which contained no mechanism for monitoring or enforcement and were therefore not sufficient to eliminate the risk

• Committee of Ministers of the Council of Europe decided against the use of diplomatic assurances in relation to torture
11. CORPORAL AND CAPITAL PUNISHMENT

- Article 3 CAT only applies to torture

- Jurisprudence of ECtHR (Soering v. UK) and UN HRC (Ng v. Canada) originally developed in relation to capital punishment in the US (death row phenomenon, cruel method of execution)

11. CORPORAL AND CAPITAL PUNISHMENT (cont’d)

- CAT-Committee: A.S. v. Sweden (No. 149/1999) concerning a woman who had been sentenced to death by stoning for adultery: violation of Article 3, obviously because this type of corporal punishment amounts to torture.

- HRC: Judge v. Canada (No. 829/1998): every deportation to a country where person concerned faces the death penalty violates Article 6 CCPR; Kwok Yin Fong v. Australia (No. 1442/2005) concerning China: even though Australia currently had no plans to remove complainant, the HRC considers that an enforced return to China would constitute violations of Australia as a country which has abolished the death penalty.

- ECtHR, possible violations of Articles 2, 6 (Bader and Kanbor v. Sweden)
Question & Answers

Discussion

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