April 14, 2017

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Oral Statement on JI’s written submission to UNCAT: Scope, Effective Remedy, and Implementation

1. Mr. Chairperson, distinguished members, and delegates: I thank you on behalf of the Open Society Justice Initiative for the opportunity to provide its views on the revised draft General Comment on Article 3 in the context of Article 22. While we welcome the draft General Comment, we have significant reservations with respect to the current version which, if not addressed, could seriously undermine the Convention’s non-refoulement protections.
2. Our concerns focus on Article 3’s scope of protection, the right to an effective remedy, and obligations on implementation and compliance under Article 22. Our recommendations are aimed at ensuring that the final Comment provides States with clear interpretations of their Convention obligations.
3. With respect to the scope of protection: the terms “expel, return (‘refouler’), and extradite” in Article 3 should be interpreted broadly to include all types of obligatory transfers, including, for example, the practice of extraordinary rendition. We recommend that this be done in the General Principles section of the Comment. If omitted, States might wrongly assume they can evade Article 3 due to the way they transfer someone to another State even when a real risk of torture is present.
4. Further, the Comment should make clear that an individual being forcibly transferred from one State to another need not cross an international border for non-refoulement protections to apply. This can occur, for example, when foreign security forces detain and then hand people over to a host nation.
5. With respect to the right to an effective remedy, Section III lists measures that are, in fact, part of the right to an effective remedy for preventing non-refoulement by means of an individualized risk assessment. We would therefore urge the Committee to retitle Section III to reflect this fact and to reclassify these measures as “legal obligations” rather than “recommended best practices.” Furthermore, Section III’s list of measures as currently drafted omits several requirements of an Article 3 effective remedy, such as ensuring that a non-refoulement application has an immediate and automatic suspensive effect, and promptly informing persons of their right to challenge a transfer decision. We urge the Committee to include these requirements, some of which are recognized elsewhere in the draft Comment, as well as further additions proposed in our written submission.
6. The Comment should include, as an additional General Principle, the obligation of States to comply with the Committee’s requests for interim measures and with decisions on the merits in good faith. To that end, we also urge the Committee to replace the word “should” with the word “must” in paragraph 38. The word “should” suggests that a State has discretion as to whether it complies, and we think it crucial for the language to precisely reflect the legal obligation of the State to comply.
7. Finally, to further strengthen compliance, the Committee should reaffirm that under Article 22, States must abstain from acts of intimidation or reprisal against complainants, their families, and/or authorized representatives, and that Article 13 and 22 violations may arise when communications are withdrawn under these circumstances.
8. Thank you.

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