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REMARKS ON THE CONVENTION AGAINST TORTURE'S GENERAL COMMENT NO. 2

*Theodore van Boven**

As a former United Nations Special Rapporteur on Torture, I was kindly invited to participate in the *New York City Law Review's* Symposium, "Preventing Torture," to discuss General Comment No. 2 ("General Comment") recently adopted by the Committee against Torture ("the Committee").¹ To my regret, I am unable to attend this important event whereupon I was asked to communicate instead a few lines in writing.

When I still served as Special Rapporteur on Torture, I was made aware of the intent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention") to draw up a comprehensive statement on the scope and significance of Article 2.² I am now pleased to note that the Committee has accomplished this task in a most commendable manner.

Before highlighting some striking features of the General Comment, I would like to make two preliminary observations. The first pertains to the relationship between a treaty-based mechanism such as the Committee and a charter-based mandate like the Special Rapporteur. The respective positions of both organs functioning within the framework of the United Nations human rights program, consist in essence of their complementarities as to the defense of the *ius cogens* norm of prevention and prohibition of torture and other cruel, inhuman or degrading treatment or pun-

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¹ U.N. Office of the High Comm'n on Human Rights [OHCHR], Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *General Comment No. 2*]. The Committee Against Torture is the body of independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State Parties. The Committee is one of eight United Nations human rights treaty-based bodies, <http://www2.ohchr.org/english/bodies/cat/index.htm>.

² Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter *Convention*].

ishment throughout the world.³ Both organs may use different and distinct working methods but their aims and objectives are the same. The normative thrust of the Convention's General Comment serves equally as a guiding instrument for the Special Rapporteur.

My second preliminary observation is closely linked to the first. It is important that a treaty body like the Committee, as the custodian of the Convention, affirms its authority by providing guidance to States parties and all other organs of national and international society as to the meaning and implications of the Convention as an instrument of international law. This is imperative since, as is regrettably evident these days, there is a growing tendency in democratic States to undermine the absolute and nonderogable nature of the prohibition of torture and ill-treatment in the name of such considerations as the defense of national security.⁴ Thus, the General Comment adopted by the Committee must be appreciated as an authoritative statement "in response to evolving threats, issues and practices."⁵

In comparison with other treaty bodies, the Committee has up until now infrequently resorted to drawing up general comments. This General Comment on the implementation of Article 2 was only preceded by General Comment No. 1 relating to the application of Article 3 which was meant to provide guidance regarding the principle of *non-refoulement*.⁶ While this principle as an essential preventive prescription in the combat against torture stands out as one specific part of the Convention and is frequently invoked under the complaints procedure of Article 22 of the Convention,⁷ Article 2 touches upon the full range of the Convention and entails implications with respect to all substantive articles in their interrelationship and interdependence.⁸ The Committee was fully aware of the wide-ranging nature of Article 2 as is duly reflected in the wording and the reach of the General Comment. For present purposes, a few elements will be lifted up to underline

³ U.N.C.H.R. Res. 1985/33, U.N. Doc. E/CN.4/RES/1985/33 (Jan. 4, 1985).

⁴ See Regina Fitzpatrick, Hamdan v. Rumsfeld: *Implications for the Geneva Conventions*, 20 HARV. HUM. RTS. J. 339 (2007).

⁵ *General Comment No. 2*, *supra* note 1, ¶ 1.

⁶ U.N. OHCHR, Comm. Against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, (Refoulement and Communications)*, U.N. Doc. A/53/44, annex IX (1997); Convention, *supra* note 2, art. 3 ("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.").

⁷ Convention, *supra* note 2, art. 22 (detailing the complaint procedure).

⁸ *Id.*, art. 2.

the significance of the General Comment. Such selection is made while having in mind that the authors of the General Comment were guided by their intent to “respond to evolving threats, issues and practices.”⁹

I. REAFFIRMATION OF THE INDIVISIBLE LINK BETWEEN THE
PREVENTION OF TORTURE AND THE PREVENTION OF OTHER
CRUEL, INHUMAN OR DEGRADING TREATMENT
OR PUNISHMENT (ILL-TREATMENT)

The General Comment states clearly that the obligations to prevent torture and ill-treatment are interdependent, indivisible and interrelated and that in fact all substantive articles of the Convention are likewise obligatory as applied to both torture and ill-treatment.¹⁰ This is highly important as it recognizes that the basic standard enunciated in Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”)¹¹ forms an indivisible whole. It also implicitly recognizes the *dictum* of the European Court of Human Rights that “certain acts which were classified in the past as *inhuman and degrading treatment* as opposed to *torture* could be classified differently in the future.”¹² Further, it disassociates itself from the argument, not uncommon these days, that some harsh interrogation practices, such as “waterboarding,” should not be considered as torture but merely as cruel, inhuman, or degrading treatment and therefore permissible in exceptional circumstances, thus unwarrantedly forging a division between torture and ill-treatment.¹³

II. REAFFIRMATION THAT THE PROHIBITION OF TORTURE AND
ILL-TREATMENT IS ABSOLUTE AND NONDEROGABLE

The General Comment repeats and elaborates on the key principle reflected in the wording of Article 2, paragraph 2 of the Convention, a core principle of international human rights law and international humanitarian law, that no exceptional circum-

⁹ *Id.*; General Comment No. 2, *supra* note 1, ¶ 2.

¹⁰ General Comment No. 2, *supra* note 1, ¶¶ 3 & 6.

¹¹ Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

¹² Selmouni v. France, 1109 Eur. Ct. H.R. (1999).

¹³ Daniel Kanstroom, *On “Waterboarding”: Legal Interpretation And The Continuing Struggle For Human Rights*, 28 B.C. THIRD WORLD L.J. 269, 282–87 (2008) (discussing arguments that some harsh interrogation tactics, including waterboarding, do not constitute torture).

stances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹⁴ This means that whenever national or international authorities are faced with policy considerations of weighing or balancing public threats, for instance public health, safety or public order against the rights and interests of private persons or groups, as happens in the context of the “war on terror,” the absolute prohibition and nonderogable nature of the prohibition of torture and ill-treatment must always prevail and outlaws any balancing act.

III. REAFFIRMATION THAT THE OBLIGATION OF STATES PARTIES TO PREVENT AND PROHIBIT TORTURE AND ILL-TREATMENT APPLIES TO ALL PERSONS WHO ARE UNDER THE *DE JURE* OR *DE FACTO* CONTROL OF STATES PARTIES

The General Comment, referring to the concept of “any territory under its jurisdiction” in Article 2, and in several other articles of the Convention, states that the scope of “territory” includes situations where a State party exercises, directly or indirectly *de jure* or *de facto* control over persons.¹⁵ In its General Comment, the Committee restates its opinion on the potential extraterritorial effect of the Convention earlier put forward on several occasions, such as in its Conclusions and Recommendations relating to the United States of America.¹⁶ The same opinion was also expressed by the International Court of Justice in the case concerning the construction of a wall with regard to the application of the ICCPR for acts by a State in the exercise of its jurisdiction outside its territory.¹⁷ This principle, now anchored in international human rights law, is also affirmed in General Comment No. 31 of the Human Rights Committee on the nature of the general legal obligations imposed on States parties to the Covenant.¹⁸ This is highly relevant in situations where States are taking enforcement actions and exercising physical control, authorized or unauthorized, outside their national territories.

¹⁴ Convention, *supra* note 2, art. 2 ¶ 2.

¹⁵ Convention, *supra* note 2, art. 2 (“any territory under its jurisdiction”); *General Comment No. 2*, *supra* note 1, ¶¶ 7 & 16 (*de jure* or *de facto* control).

¹⁶ U.N. OHCHR, Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, ¶ 15, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006).

¹⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 28 (July 9).

¹⁸ U.N. OHCHR, Human Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter *General Comment No. 31*].

IV. REAFFIRMATION THAT STATES PARTIES MAY CARRY
RESPONSIBILITY FOR ACTS OF TORTURE OR ILL-TREATMENT
COMMITTED BY NON-STATE OFFICIALS
OR PRIVATE ACTORS

Also, in this respect the General Comment provides a dynamic interpretation of the Convention as a living instrument. Articles 1 and 16 of the Convention define acts of torture and ill-treatment 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. However, the General Comment states that States may also bear responsibility for such acts committed by non-State officials or private actors, if State authorities fail to exercise due diligence to prevent such acts and protect victims from violence—notably gender-based violence such as rape, domestic violence, female genital mutilation, and trafficking.¹⁹ The General Comment is in line with General Comment No. 31 of the Human Rights Committee which signifies the responsibility of States failing to exercise due diligence to prevent, punish, investigate or redress harm caused by acts by private persons or entities violating the Covenant.²⁰ The General Comment is also fully in keeping with General Recommendation No. 19 on Violence against Women where the Committee on the Elimination of Discrimination against Women (“CEDAW”) stated, “Under general international law and specific human rights covenants, States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”²¹

V. RECOGNITION THAT INDIVIDUALS OR GROUPS, ESPECIALLY
VULNERABLE AND AT RISK OF BEING TORTURED OR ILL-
TREATED, REQUIRE POSITIVE MEASURES OF
PREVENTION AND PROTECTION

The General Comment refers to the protection of minority or marginalized individuals especially at risk of torture as part of the obligation to prevent torture or ill-treatment.²² It underlines the obligation of States to apply in their domestic laws the duties deriving from the Convention to all persons “regardless of race, colour,

¹⁹ *General Comment No. 2*, *supra* note 1, ¶ 18.

²⁰ *General Comment No. 31*, *supra* note 18, ¶ 8.

²¹ U.N. OHCHR, Comm. on the Elimination of Discrimination against Women, *General Recommendation 19, Violence against women*, ¶ 9, U.N. Doc. A/47/38 (Jan. 29, 1992).

²² *General Comment No. 2*, *supra* note 1, ¶ 21.

ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum seekers, refugees or other under international protection, or any other status of adverse distinction.”²³

This listing of categories of vulnerable persons is highly significant as a monitoring yardstick insofar as it goes boldly beyond common UN categorizations, notably by the explicit mention of “sexual orientation” and “transgender identity.”²⁴ Moreover, the wording of the General Comment clearly reveals a victim-oriented approach which often happens to be absent in the human rights discourse.²⁵

VI. RECOGNITION THAT GENDER-BASED VIOLENCE, INCLUDING
DOMESTIC VIOLENCE, MUST BE IDENTIFIED AMONG
EFFECTIVE MEASURES TO PREVENT AND PROHIBIT
TORTURE AND ILL-TREATMENT

In the General Comment, gender is recognized as a key factor in determining the ways in which women are subject to or at risk of torture or ill-treatment.²⁶ Treaty bodies, such as the Committee on the Elimination of Racial Discrimination (“CERD”)²⁷ and the Committee, have in the past largely ignored the gender-related aspects of patterns and practices of violence and discrimination. This past exclusion is due to a lack of sensitivity or on the understanding that gender issues should be left exclusively to the work of CEDAW. In fact, CERD finally tried to remedy this ill-perceived stance through the adoption of General Recommendation 25 on gender-related dimensions of racial discrimination.²⁸ The Committee has now insisted in this General Comment, after prudent steps in that direction at earlier occasions. For instance on the issue of domestic violence, the General Comment requires that State reports must include specific and sufficient information on the implementation of the Convention with respect to prevention and prohibition of

²³ *Id.*

²⁴ *Id.*

²⁵ See generally *General Comment No. 2*, *supra* note 1.

²⁶ *Id.* ¶ 22.

²⁷ International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195.

²⁸ U.N. OHCHR, Comm. on the Elimination of Racial Discrimination, *General Recommendation 25, Gender Related Dimensions of Racial Discrimination*, U.N. Doc. A/55/18, annex V (Mar. 20, 2000).

gendered violations of the Convention.²⁹ Against this perspective, the General Comment also entails the duty for the Committee itself to include systematically gender-related dimensions of torture and ill-treatment in its monitoring activities.³⁰

²⁹ *General Comment No. 2*, *supra* note 1, ¶ 22.

³⁰ *Id.*