

Buenos Aires, April 5, 2017

**SECRETARIAT TO THE COMMITTEE AGAINST TORTURE
OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS**

REF: ANNOUNCEMENT OF GENERAL DISCUSSION ON THE DRAFT REVISED GENERAL COMMENT ON THE IMPLEMENTATION OF ARTICLE 3 OF THE CONVENTION IN THE CONTEXT OF ARTICLE 22.

These comments were elaborated by the Centro de Estudios Legales y Sociales (CELS). CELS is a non-governmental organization working to promote and protect human rights since 1979. CELS has a broad agenda that for the last few decades include the defense of migrants' human rights. This work is carried out today through strategic litigation both within Argentina and before international human rights bodies (Inter-American Human Rights Commission, Treaty Bodies, Special Rapporteurs etc.) as well as through research, publications and other activities. Since 2002, CELS, CAREF and the Law School at the University of Buenos Aires (UBA) coordinate a Clinical project on Immigrant and Refugee Rights. The Clinic advises and sponsors an annual average of 300 cases of migrant and / or refugee people. In turn, both organizations had an important role during the reform process of the Migration Act of Argentina (Law 25,871 of 2003) and in developing its regulatory decree adopted in 2010, which inaugurated a migratory paradigm incorporating a human rights perspective in Argentina. In addition, CELS has participated, among other regional and international processes, in elaborating contributions to the Recommended Principles and Guidelines on Human Rights at International Borders of the High Commissioner for Human Rights and has participated in the UN Summit for Refugees and Migrants during 2016.

- **Regarding paragraphs 13, 18 and 37. On the guarantees of due process and the right to judicial review of migrants.**

We welcome that par. 18 of the Draft lists a series of preventive measures to guarantee the principle of non-refoulement, especially those related to the guarantees of due process, such as par. 18(a), 18(c) and 18(e). Similarly, par. 13 and 37 provide that migrant must have their case individually examined and reviewed by an authority independent from the authority that performed the initial evaluation. On this regard, we would like to suggest that CAT considers rephrasing paragraphs 13, 18 and 37 of the General Comment in order to expand those guarantees of due process to meet the latest standards developed by the *OHCHR Recommended Principles and Guidelines on Human Rights at International*

Borders (hereinafter referred to as “Principles and Guidelines”)¹ and by the Inter-American System on Human Rights².

Regarding Paragraph 13, 18 and 37. We encourage the CAT to incorporate the right to judicial protection against decisions delivered in immigration proceedings. In line with paragraph 37 of the Draft Revised General Comment, the Inter-American Commission on Human Rights (IACHR) recognized the right to a legal recourse against a decision to deport, expulse or extradite. However, the IACHR also considers that the “effectiveness of the remedy is closely tied to the scope of the review”,³ and request states to provide judicial protection. Consistent with this standard, the Inter-American Court on Human Rights establishes that “review by a judge or court is a fundamental requirement to guarantee an adequate control and scrutiny of the administrative acts that affect fundamental rights”.⁴

Judicial protection should be an intrinsic part of any decision that could deport, expel or extradite a migrant in prejudice of the principle of non-refoulement. Article 3 of the Convention Against Torture should provide for such protection. Under these lines, we suggest the following rephrasing of paragraphs 13 and 37 of the Draft:

13. Each case should be individually examined by the State party through competent administrative authorities **and reviewed by judicial authorities**. Any form of collective deportation without an objective examination of the particular cases should be considered as a violation of the principle of “non-refoulement” as it prevents States parties from adequately verifying, through an assessment of each individual case, whether there are well founded reasons not to deport a person.

18. (e) The right of appeal by the person concerned against a deportation order to an independent administrative **and** judicial body within a reasonable period of time from the notification of that order and with the suspensive effect of its enforcement;

37. The Committee further considers that an effective remedy in the implementation of the principle of “non-refoulement” should be a recourse able to preclude, in practice, the expulsion, return or extradition of the complainant who is found personally at risk of being subjected to torture if deported to another country. The recourse should be a legally based right and not an “ex gratia” concession given by the authorities concerned and should be accessible in practice without any obstacles of any nature. In addition, the case should be reviewed by an authority independent from the authority which had initially decided **and by an independent judicial authority**.

Regarding Paragraph 18 of the Draft. Without proposing any particular wording, we would strongly request the CAT to expand paragraph 18 of the Draft to consider specifically challenges related to borders zones. In this regard, we believe that the specific situation of migrants at international borders should also inform some of the Committee’s rules on this matter. On this regard, we encourage the

¹ See http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf

² IACHR Report on Human Mobility and Inter-American Standards <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf>

³ IACHR Report, para. 321-322.

⁴ I/A Court H.R., Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010, Series C No. 218, para. 126

Committee to make an explicit mention to the States obligation to create legal recourses that are accessible for victims to appeal decisions to expel, extradite or deport before and after their enforcement at border zones, as pointed by Guidelines 6⁵, 7⁶ and 9⁷ of the Principles and Guidelines. In this sense, the par. 18 should explicitly include: (1) the specific risks suffered by persons at international borders, (2) the duty to implement pro-active mechanisms at borders that identify persons that are at risk of being tortured in their country of origin and (2) the State's duty to provide information and access to a lawyer to persons that might be deported in violation to the principle of non-refoulement at a border zone.

Recognizing this obligation under the Convention Against Torture would place more emphasis on the importance to protect persons that transit through international borders. Moreover, it would strengthen the capacity of persons that are unduly rejected to access a legal recourse to exercise their right to not be returned to a State in which they would risk torture and denounce a State that violates its obligations.

- **Paragraph 14. On the State duty to use detention as a mean of last resort.**

Paragraph 14 of the Draft mentions that “States parties should not take measures or adopt policies, such as detention in poor conditions for indefinite periods”. We believe this standard could justify the arbitrary use of detention. The wording of this paragraph seems to imply that detention would be consistent with their international obligations as long as it does not place a migrant “in poor conditions for indefinite periods”.

Both the OHCHR and the IACHR have rejected this interpretation. Guideline 8 of the Principles and Guideline explicitly develops the State's duty to avoid the use of detention and recommends that States only detain migrants as a mean of last resort after exhausting other alternatives. Similarly, the IACHR underlines that “the multiple effects that deprivation of liberty can have on the rights of persons explain why States should only use such measures as a last resort”.⁸ As the Special Rapporteur on Migrants has highlighted, “Detention for immigration purposes should never be mandatory or automatic (...) Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure”⁹. In this sense, on the one hand, States should implement efforts to end immigration detention and, on the other hand, it should ratify the prohibition of the detention of children on account of their migration status¹⁰. Pursuant to these previous developments of

⁵ Screening and interviewing

⁶ Identification and referral

⁷ Human rights-based return or removal

⁸ IACHR Report, para. 383

⁹ See Report of the Special Rapporteur on the human rights of migrants, François Crépeau. A/HRC/20/24 .Par. 68. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf

¹⁰ See *Report on Human Mobility and Inter-American Standards* Par. 406. . <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf>

international human rights law, we strongly encourage the CAT to reword paragraph 14 of its Draft as follows:

14. States parties should work towards progressively ending all forms of immigration detention, establishing a presumption against immigration detention in law. In addition, detention should be ordered only as a measure of last resort determined in a case-by-case basis and migrant children should never be detained on account of their migration status. Furthermore, States parties should not take measures or adopt policies, refusing to process claims for asylum or unduly prolong them, cutting funds for assistance programs to asylum seekers, which would compel persons in need for protection under Article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected there to torture and other cruel, inhuman or degrading treatment or punishment.

On behalf of CELS, we are grateful for the opportunity to contribute to this Expert Consultation, and hope that our comments and suggestions will be useful. Please do not hesitate to let us know of any doubt or concern that these contributions might provoke.

Sincerely,

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