

**ISHR submission to the UN Committee against Torture
General Discussion on Draft Revised General Comment on the implementation
of article 3 in the context of article 22**

31 March 2017

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Summary

Defenders of refugee, asylum seeker and migrant rights play a vital role in monitoring and promoting State compliance with the Convention against Torture. This submission focuses on the need to recognize, respect, protect and facilitate the work of migrant right defenders as an aspect of implementation of the Convention, particularly the Article 3 prohibition against refoulement.

The submission analyses the jurisprudence and work of international and regional human rights bodies with regards to the issue of migrant right defenders. A recognition of the central role of migrant right defenders – including individuals, associations and institutions – is all the more needed at a time when they are criminalized and prosecuted for providing humanitarian assistance, shelter, safe passage or legal counselling to migrants in different world regions.

Pronouncements of the UN Committee against torture

The current CAT jurisprudence does not make direct references to defenders of migrant rights in either concluding observations or views. Nonetheless, a number of concluding observations and views do acknowledge the central role of human rights defenders and the need for their protection, as well as expressing concerns with regards to the rights of migrants. Both issues were raised separately at least in the following Concluding Observations:

- Qatar: CAT/C/QAT/CO/2 (January 2013)

- Sri Lanka: CAT/C/LKA/CO/3-4 (December 2011)
- Indonesia: CAT/C/IDN/CO/2 (July 2008)

The general comment provides an opportunity for the Committee to acknowledge the important role of migrant right defenders in upholding and protecting the human rights of migrants and in promoting State compliance with the Convention, including Article 3.

Pronouncements of the UN Committee on migrant workers

The Committee on Migrant Workers (CMW) has recognised the important role of migrant rights defenders in several instances.

On the occasion of the periodic review of **Mexico**¹ in 2011 (CMW/C/MEX/CO/2), the CMW recommended:

“the adoption of concrete and adequate measures to **guarantee the life, liberty, and integrity of the persons of defenders of the human rights of migrant workers and members of their families**, to ensure that they are not subjected to prosecution, harassment, detention or investigation based solely on their advocacy of respect for migrant workers’ rights”.

The Committee also urged Mexico “to adopt effective measures to prevent, investigate and punish attacks and other forms of abuse perpetrated against defenders of migrant workers rights” (both quotes from para. 52).

On the occasion of the periodic review of **Turkey** in 2016, the CMW reminded “the State party that **human rights defenders deserve special protection as their work is critical for promoting human rights for all, including migrant workers**. The Committee therefore strongly recommends that the State party take immediate action to allow journalists, human rights defenders and all non-governmental organizations to exercise their right to freedom of expression and opinion without threats and harassment. The Committee urges the State party to ensure that reported instances of intimidation and harassment of members of non-governmental organizations, human rights defenders and civil society activists are promptly and independently investigated, and those responsible for such abuses are held accountable. The Committee recommends that the State party:

- a) Encourage civil society organizations to support migrant workers and members of their families and ensure that no civil society organizations are penalized for supporting or working with undocumented migrant workers;
- b) Systematically involve civil society and non-governmental organizations in the implementation of the Convention, including the implementation of migration policies and of the agreement reached between the European Union and Turkey on 18 March 2016;
- c) Provide civil society organizations with unhindered access to detention centres to enable them to support detained migrant workers and members of their families effectively.”

Pronouncements of the UN Human Rights Council

In its resolution 29/2 of 2 July 2015, the Human Rights Council (HRC) explicitly acknowledged the role of individuals and institutions who provide humanitarian support and defend the rights of migrants (para.7):

¹ All text in bold in the document are the authors’ emphasis.

“Calls upon all States to ensure that their immigration policies are consistent with their obligations under international human rights law, and to promote the enjoyment of human rights by all migrants without discrimination, including by taking steps:

...

(c) To the effect that domestic law and administrative provisions and their application **facilitate the work of all actors providing humanitarian assistance to and defending the human rights of irregular migrants**, including by avoiding any criminalization, stigmatization, impediments, obstructions or restrictions thereof contrary to international human rights law”

Pronouncements of the UN Special Rapporteur on migrants

The UN Special Rapporteur on Migrants M. François Crépeau has emphasised the importance of enabling migrants to join unions, and explicitly made a link between unions and human rights protection. In his report to the General Assembly of 4 August 2016 (A/71/285), the Rapporteur stated (para. 84):

“States must also ensure that all migrant workers, irrespective of their skill level, job sector or administrative status, are protected by labour standards, and should facilitate the unionization of all migrant workers, regardless of status, in order to ensure their effective empowerment to **defend their own rights.**”

In the context of country missions, the Special Rapporteur has also expressed grave concern at the deleterious effect on the enjoyment and protection of migrant rights of restrictions on the work of migrant rights defenders. Following his November 2016 mission to **Australia**, for example, he noted that “Civil society organisations, whistleblowers, trade unionists, teachers, social workers and lawyers, among many others, may face criminal charges under the Border Force Act for speaking out and denouncing the violation of the rights of migrants.” (End of mission statement, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E>.

Pronouncements of the UN Special Rapporteur on human rights defenders

The UN Special Rapporteur on human rights defenders (SR-HRDs) M. Michel Forst addressed human rights violations against individuals and institutions who champion migrant rights in several country visits. During the most recent session of the HRC, M. Forst expressed the will to “review the situation of persons acting to defend the rights of migrants” (A/HRC/34/52; para.27).

During his most recent visit to **Mexico** (January 2017), the SR-HRD dedicated substantial attention to migrant rights defenders:

“I am also worried by the risks faced by defenders working on migrants’ rights. As Mexico has become both a country of destination and transit for thousands of people coming from Central America, the work led by defenders has increasingly become vital in the protection of these populations. Defenders who provide humanitarian assistance to migrants, those who work along the route of the ‘Beast’ train route face particular risks, mainly due to the criminal activity of armed groups who target both migrants and human rights defenders through extortion, rape, kidnapping and murder.” (End of mission statement, available at <https://goo.gl/AZ0Yft>).

On the occasion of his October 2016 visit to **Australia**, the SR identified defenders of migrant rights as bearing the brunt of threats and stigmatization.

“I was astounded to observe what has become frequent public vilification of rights defenders by senior government officials, in a seeming attempt to discredit, intimidate

and discourage them from their legitimate work. The media and business actors have contributed to stigmatization. Environmentalists, trade unionists, whistleblowers and individuals like doctors, teachers, and **lawyers protecting the rights of refugees** have borne the brunt of the verbal attacks”. (End of mission statement, available at: <https://goo.gl/CJTmCd>).

The SR-HRDs also raised the situation of migrant right defenders during his recent visit to Hungary (February 2016):

“In Hungary, there are no specific policies or mechanism to protect human rights defenders from attacks, threats or harassment. Several testimonies heard during my visit show that **some of the most vulnerable human rights defenders, namely those working on migration and Roma would benefit greatly from such protection**”. (End of mission statement, available at: <https://goo.gl/2hGo1l>).

Pronouncements of the UN High Commissioner for Human Rights

In his proposed draft “Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations” of January 2017 (A/HRC/34/31), the High Commissioner explicitly acknowledged the important role of migrant rights defenders and the need to protect them. Draft principle 18 currently recommends that States “**Respect and support the activities of human rights defenders and others working to rescue and provide assistance to migrants.**” In a statement welcoming the Commissioner’s report, ISHR highlighted restrictions on access to facilities housing unaccompanied migrant children in Serbia².

Pronouncements of the Council of Europe Commissioner on human rights

The Council of Europe (CoE) Commissioner on human rights provides a relevant example of regional human rights mechanism taking a stand on defenders of migrant rights. In a pronouncement³ dated 19 December 2012, the Commissioner Nils Muižnieks used strong terms to condemn “restrictions on defenders of migrant rights”. “**It is not acceptable to intimidate and attack defenders of migrants’ rights**” the Commissioner said, citing examples of European countries where “the rise of xenophobic and anti-migrant discourse has negatively impacted on the work of human rights defenders who protect and promote the rights of migrants”. The Commissioner went on to encourage CoE member states to “go back to the letter and spirit of the 1998 UN Declaration on human rights defenders” and to “no longer tolerate threats and attacks on defenders protecting migrants”. “The essential work carried out by human rights defenders should be recognised and supported, including by national authorities, in particular when this work is at risk,” the Commissioner concluded.

The CoE Commissioner on human rights regularly raises the issues of migrant rights defenders in his work. For instance, his “Positions On The Rights Of Migrants In An Irregular Situation” of June 2010 (CommDH/PositionPaper(2010)5) includes a dedicated chapter on “decriminalising migration” in which the Commissioner affirms that “International law has clearly established the principle that **foreign nationals whose only offence is the violation of provisions relating to migration should not be treated as criminals or potential criminals by transit or host states**”.

² See more at <https://www.ishr.ch/news/migration-and-human-rights-defenders-have-crucial-role-play>

³ Available at <https://goo.gl/pD99u2>

Pronouncements by other international institutions

Migrant rights defenders are exposed to a wide range of threats, assaults and intimidation related to their work. In Western Europe and notably in France, defenders who provide safe passage or humanitarian assistance are regularly prosecuted for what migrant rights defenders have labelled as *délit de solidarité*⁴ (offense of solidarity).

Several international institutions have condemned this crackdown on defenders of migrant rights, and some have called for unhindered access to migrant detention centres by NGOs and independent monitors. For instance, a UN human rights monitoring mission “visited France on 16-19 November 2016 to assess the human rights situation of migrants and refugees in the wake of the Calais camp closure. The mission visited a number of camps in the vicinity of Calais and heard concerns about migrants’ **restricted access to legal assistance and information** during the dismantlement”.⁵

National human rights and Ombudsmen institutions regularly call for compliance with international human rights standards in the management of the global refugee crisis, including the protection of migrant rights defenders, and access to migrant detention centres.

For instance a coalition of Ombudsman institutions adopted the “Tirana Declaration”⁶ in September 2016 on migratory flows which recalls the duty of states to uphold migrant rights and requests them: “To guarantee access at transit centres and detention centres by civil society, and to enable the control and inspection by institutions independent from the government, such as Mediator and Ombudsmen institutions, as well as international organizations operating in the field of human rights protection”.

Suggested amendments to the draft General Comment

ISHR recommends that:

- The draft General Comment be revised to include a new and separate paragraph which recognises the vital role of human rights defenders in protecting the rights of refugees, asylum seekers and migrants and in promoting and monitoring State compliance with the Convention, including Article 3. This paragraph should reaffirm the obligation of States to provide a safe and enabling environment for the work of migrant rights defenders and to protect them from any instances of intimidation or reprisal. The paragraph could also include references or citations to the jurisprudence and comments of the UN and regional human rights bodies mentioned above;
- Paragraph 14 of the draft General Comment be expanded to recognise that, in addition to not “cutting funds for assistance programs to asylum seekers”, States should also avoid other measures or policies, including legislative restrictions, which have the purpose or effect of restricting the activities of migrant rights defenders and the support and assistance they can provide.

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⁴ E.g. see <https://goo.gl/M2h6dW>

⁵ <https://goo.gl/553SDS>

⁶ Available at <https://goo.gl/CpDdO8>