RESPECTING THE PRINCIPLE OF NON-REFOULEMENT WHEN ORGANIZING THE RETURN OF PERSONS TO SUDAN

Brussels, 8 February 2018

1. Introduction

On Friday 22 December 2017, on behalf of the government, Deputy Prime Minister Jan Jambon asked the Commissioner General for Refugees and Stateless Persons to investigate whether persons had been subjected to torture or inhuman or degrading treatment after their return or removal to Sudan in the autumn of 2017, and whether there had been a violation of the principle of non-refoulement as established in article 3 ECHR. The Commissioner General accepted this mission and promised to deliver the result of his investigation in the shortest possible time.

To this end, the Office of the Commissioner General for Refugees and Stateless Persons examined three points:

- What happened in fact after their arrival in Khartoum to the ten persons who returned or were removed?
- How was the identification mission organized? And to what extent can its organization be considered unsatisfactory?
- Has the risk of a breach of article 3 ECHR been properly assessed for the ten persons who returned or were removed?

The investigation was conducted as follows:

- The claims about the possible ill-treatment or inhuman treatment of persons after their arrival in Khartoum were investigated as follows:
    - The report from the Tahrir Institute was examined. Additional information was asked from Mr Koert Debeuf and from the person who helped draw up the report (identified in the report as “a Sudanese refugee in Belgium“). An extensive conversation took place with both of them. They gave insight into the conversations they had with persons who had mentioned problems upon their return and they gave assistance to get in touch with the persons who returned or were removed to Sudan.
    - Everything possible was done to contact from Belgium (through WhatsApp and by other means) the persons who returned or were removed to Sudan. On 26 January 2018, a conversation took place with one of them. A conversation was also conducted with two Sudanese nationals in Belgium who declared that one of the removed persons had been

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apprehended by the security services upon his return to Sudan and has subsequently disappeared.
    - Contact was also taken with international organizations, especially the IOM and the UNHCR, with experts and the embassies of Belgium and EU member states in Sudan or Egypt, in order to check if they had any information about the existence of a risk in case of a return to Sudan (in general), and specifically about the persons who returned or were removed from Belgium to Sudan.
    - The risk in case of a return to Sudan (in general) was extensively researched. A variety of sources, jurisprudence and reports were consulted, and information was requested from a large number of experts and organizations.
- The organization of the identification mission was investigated as follows:
    - Information about the identification mission was asked from the Immigration Office.
    - A number of Sudanese nationals were heard.
    - The result was assessed in the light of general information about the risk run by Sudanese in case of a return or removal to their country of origin and about the Sudanese authorities' attitude towards persons returning to Sudan.
- The assessment of the risk as defined in article 3 ECHR was investigated as follows:
    - The files at the Immigration Office of the ten persons concerned were thoroughly examined.
    - The result of this examination was assessed in the light of the jurisprudence of the European Court of Human Rights (ECHR) and of Belgian courts of law, especially the Council for Alien Law Litigation, but also the Council of State and the Court of Cassation.

A mission to Sudan was initially contemplated but the idea was abandoned because it proved impossible to organize at short notice a mission that could provide relevant additional information.

For its investigation, the CGRS could count on the excellent cooperation of many persons, organizations and authorities, especially Mr Koert Debeuf and the Immigration Office, who offered maximum transparency on all the questions asked by the CGRS.

2. The facts leading to the investigation

In the summer of 2017, dozens of persons were arrested near the Parc Maximilien in Brussels or along the (motor)way to the United Kingdom (UK). They appeared to be staying illegally in Belgium. Some had been caught several times previously during controls. Many stated that they did not want to stay in Belgium but wished to continue their journey to the United Kingdom (UK). Many seemed to come from Sudan. Apparently, most of them did not want to apply for international protection.

To ensure the return or the removal of these persons to their country of origin, it appeared to be necessary to have their identity established by the authorities of the country of origin. This was the case for persons who did not possess any identity documents. In view of the relatively large number of persons to be identified, the Belgian government proposed to the authorities of Sudan to organize a

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mission of experts (from Sudan) in order to accelerate the identification of a relatively large number of persons.

From 17 to 28 September 2017, a delegation consisting of three experts from Sudan and one to three staff members of the embassy of Sudan visited several removal centres. The delegation spoke with a total 61 persons. The authorities of Sudan then issued a laissez-passer to 23 persons.

Among the persons issued with a laissez-passer following identification by the Sudanese delegation, ten returned or were removed to Sudan: one person returned voluntarily under the IOM's REAB programme, and nine persons were removed, some under escort, others without escort.

At the end of December, the Tahrir Institute published a report containing a number of testimonies from or about persons who returned or were removed to Sudan. During the conversation with Mr Koert Debeuf on 16 January 2018, the CGRS received an updated version of this report (see annex).

3. Basic principles of the assessment of the non-refoulement principle

The assessment of an application for international protection is not intended to express a value judgment on the applicant's country of origin. Such an assessment is intended to determine whether a foreign national personally has a well-founded fear of persecution based on one of the five criteria of the Geneva Convention of 28 July 1951 relating to the Status of Refugees or runs a real risk of suffering one of the three kinds of serious harm as defined for subsidiary protection. This also applies to the assessment of a real risk of suffering an inhuman or degrading treatment in the sense of article 3 of the European Convention of Human Rights (ECHR).

The notion of "unsafe country" does not exist in asylum law. Every decision to grant international protection, including on this basis, results from an *individual* assessment of the personal situation of the person concerned and of the objective situation in his country of origin.

The basic criterion is therefore not whether a country is "safe" or "unsafe":

- Regarding so-called "unsafe countries of origin", it is possible that a person is not in need of protection and can be sent back.
- Regarding so-called "safe countries of origin", it is possible that a person is in need of protection and cannot be sent back.

The fact that the Belgian government has contacts with the authorities of the country of origin is not necessarily relevant for the assessment of the risk in case of return.

4. General information on the situation in Sudan and on the risk in case of return to Sudan

It is generally acknowledged that the human rights situation in Sudan is very problematic. Many persons from Sudan have therefore a well-founded fear of persecution as defined by the Geneva Convention or run a real risk of suffering serious harm as defined for subsidiary protection. This may be the case for political opponents or persons from conflict areas, if they have no real internal flight alternative. If they

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apply for international protection, they will receive a protection status (refugee status or subsidiary protection status).

The situation in Sudan is not of such nature that international protection should be granted to every person coming from Sudan. This is generally recognized and confirmed by courts of law, including the European Court of Human Rights (e.g. the jurisprudence mentioned in the COI report of the CGRS).

A specific aspect concerns the question whether a (forced) removal to Sudan may create a special risk.

Regarding this risk, the CGRS has done additional research based on earlier research by several authorities and organizations, including the Danish and British immigration services, which sent a fact-finding mission to Sudan in February and March 2016. To this end, the CGRS contacted during the past few weeks a large number of experts, organizations (e.g. non-governmental organizations, interest groups and human rights organizations) and international agencies, among which the UNHCR and the IOM.

The result of this extensive research can be found in the COI report of the CGRS.

It is not always easy to form a correct picture of the situation because it is not always clear to what extent statements made by a person are based on facts. Some statements appear rather to express an opinion not necessarily based on facts.

The CGRS is of the view that the following conclusions can be drawn:

- In the past, there have been other claims about ill-treatment or inhuman treatment. These had to do with incidents following returns form several countries. The main claims concern returns or removals from Jordan, Israel and Italy, but also from the United Kingdom and France. Certain problems upon return, such as were encountered after return or removal from Jordan and Israel, have been widely reported by various sources. Many of these persons were removed (some 800 persons from Jordan in 2015 and more than 1,000 from Israel in 2013) without a preliminary risk assessment in case of return. Other problems are sometimes reported by a single source and it is not always clear to what extent the claims are well-founded.
- The risk upon return or removal to Sudan should be examined with utmost care, considering the problematic human rights situation in Sudan and the role of the security services in Sudan (see in particular the systematic control by the security services upon arrival).
- It must be absolutely clear that persons who are eligible for a protection status (refugee status or subsidiary protection status) because of their individual situation (e.g. political opponents), cannot be sent back. Removal of these persons would clearly violate the non-refoulement principle.
- But it is not the case that every person runs a real risk in the sense of article 3 ECHR upon returning to Sudan. This is confirmed by many experts and sources. This is also confirmed by the jurisprudence, including the jurisprudence of the European Court of Human Rights and the UK Upper Tribunal (see jurisprudence mentioned in the COI report of the CGRS). Most problems or

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incidents in case of return that are mentioned by some organizations or persons seem to refer to special situations, for which a protection status must be granted because of a risk profile (e.g. political opponents or ethnic profiles). In this case, the fact that they encountered problems is rather due to their profile than to the mere fact of their return or removal.

- Persons who enter Sudan with a temporary travel document (e.g. a laissez-passer), are interrogated more extensively, but there are no concrete indications leading to the conclusion that they are persecuted or run a real risk in the sense of article 3 ECHR for this reason. The same conclusion applies for persons who left Sudan without an exit visa.
- At the very least, it must be clear that a return or removal can only be organized when it has been satisfactorily concluded that there is no reason to grant a protection status or that there is no real risk of a breach of article 3 ECHR.

5. Was it problematic to invite an identification mission?

Complaints about the organization of identification missions

In general, persons who do not have the required identity documents or travel documents cannot be removed or sent back, unless the authorities of the country of origin confirm beforehand that the person is their national and can be sent back. Often this is done by issuing a laissez-passer. As a rule, this laissez-passer is issued by the embassy or the consulate of the country of origin.

For the group of Sudanese, the identification was carried out on the basis of their interviews with a delegation consisting of a number of staff members of the Sudanese embassy and three persons who had come over from Sudan especially for this purpose. The decisions to issue a laissez-passer have probably been taken on the basis of those interviews, whether or not with additional research in Sudan. In some cases, the interviews were rather short, for example when the person concerned refused to talk.

The following reproaches have been addressed to the Belgian government:

- The Belgian government cooperated with the authorities of a country guilty of serious human rights violations.
- The Sudanese delegation included members of the Sudanese security services.
- It was claimed that the Sudanese delegation had threatened the persons concerned and possibly their family and that the fact of having applied for asylum may entail a risk of persecution upon return. According to the report of the Tahrir Institute: “I also got the information that the members of the delegation were saying to the detainees: if you requested protection from Belgium and Belgium did not accept your request and returned to Sudan you will be imprisoned on political charges and transferred to the headquarters of intelligence.”

Some observations

At Khartoum International Airport (KIA) there are two kinds of control: one by the immigration service and one by the National Intelligence and Security Service of Sudan (NISS). This is confirmed by various

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sources (a number of sources contacted by the CGRS, and the sources consulted by the British-Danish mission of early 2016, among which several western embassies, IOM, Sudanese human rights lawyers and regional non-governmental organizations). The inspection of the travel documents at the immigration desk is followed by a security control at the NISS desk. For more information, see the COI report of the CGRS.

Upon arrival at the airport, a systematic control is carried out by the NISS. This is certainly the case for persons who arrive with a laissez-passer or without the required travel documents or residence permits. This systematic control possibly goes much further than the identification in Belgium by the embassy or an identification mission. The fact that such a systematic control takes place is more important than the fact that the identification was carried out in Belgium by a group of persons that may have included members of the security service.

Moreover, for many countries of origin, there is little difference between identification by embassy staff and identification by a delegation specially dispatched from the country of origin. The security service may also be involved in an identification carried out by embassy staff, because embassy staff includes members of the security service or because the embassy is in touch with the security services in the country of origin.

This was also acknowledged by the person whom the report of the Tahrir Institute presents as “a Sudanese refugee in Belgium”.

A number of Sudanese who were interviewed by the delegation declared in a conversation with the CGRS that the Sudanese delegation did not treat them improperly and that they had not been threatened or pressured to dissuade them to apply for asylum.

The Immigration Office confirmed to the CGRS that a staff member of the Immigration Office was always present at the interviews of the identification mission, but not always near the place of the interview and that the staff member, as a rule, did not speak the language in which the interview was conducted.

Conclusions

It is not necessarily a problem that the identification procedure required for issuing a laissez-passer is carried out by means of an identification mission which may include members of the security services.

This does not mean that utmost care should not be exercised when organizing an identification mission:

- Persons in need of protection should never be confronted with persons who represent the authorities of their country of origin. Before any identification takes place, the protection needs of the person concerned have to be thoroughly assessed (including protection under article 3 ECHR).
- In order to prevent possible problems (e.g. threats), it is recommended to take a number of measures in the case of an identification, for instance:

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- the persons concerned have to be informed in advance that they will be interviewed by representatives of their country of origin for the purpose of identification.
- the interviews have to take place in the presence of a representative of the Belgian authorities and someone (interpreter) who understands the language of the interview.

6. What happened after arrival in Khartoum?

A short survey of the claims

The note from the Tahrir Institute gives a complete survey of the claims. An updated version (including an addition of 16 January 2018) is appended. The note contains three testimonies of persons with whom direct contact was made through WhatsApp, three "indirect" testimonies, a testimony of a person (a Sudanese refugee in Belgium) who seems to have been in touch with the persons who have given their testimony, a short account of statements from Sudanese nationals living in Belgium, background information, information about the asylum procedure in Belgium, an additional "indirect" testimony about a person who disappeared in Sudan after his arrest by the security services.

Some testimonies or complaints also appeared in the press. But they apparently do not contain information other than the information mentioned in the note of the Tahrir Institute.

An assessment

Main findings:

- Efforts were made to obtain more specific information about the facts of the treatment or ill-treatment encountered upon arrival in Khartoum. The descriptions were very summary.
  - The conversations with Mr Koert Debeuf and the person identified as "a Sudanese refugee", who seemed to have played an important part in the investigation by the Tahrir Institute, did not yield more information than the information mentioned in the note of the Tahrir Institute. An analysis of the conversations on WhatsApp with some persons who were returned to Sudan (made available by Mr Koert Debeuf), did not yield any additional information either. For some aspects, a (slight) difference was found between the declarations made and their transcription in the note.
  - The conversation the CGRS had on WhatsApp with one of the persons who had been removed to Sudan did not yield any additional information either. This person did not seem to be disposed to give additional information.
  - Several embassies of EU member states let us know that no incidents or cases of ill-treatment of persons who were recently removed to Sudan had come to their attention. Neither did the UNHCR and IOM possess such information. The UNHCR informed us that they do not as a rule monitor rejected asylum seekers or persons who did not apply for asylum after their return
- The CGRS has not been able to obtain absolute certainty or clarity about the question whether the facts mentioned in the report of the Tahrir Institute have actually taken place. There is no

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hard evidence that the facts actually took place. Neither could it be established with certainty that the facts mentioned did not take place. However, some findings of the CGRS give rise to serious doubts, at least regarding some of the testimonies.

- A distinction must be made between the person who returned voluntarily under the IOM REAB program, and the nine persons who were removed. For the voluntary returnee, it has been alleged that he had in fact been forced to return. This claim does not appear to be well-founded. Regarding the first testimony reproduced in the note of the Tahrir Institute, the following was stated: "MR. … was going through a process organized by the IOM and didn't leave Belgium voluntarily. … They forced me to sign the papers to go to Sudan. They told me we will do you a business investment, they will forcibly deport me, so they intimidated me so I signed the papers. … They told me I will get 1.700 euros. … They cheated me, they didn't do anything for me. They didn't even give me one euro until today." But on the other hand it appears that on the day after his detention (on 5 September 2017), the person involved announced that he wanted to return voluntarily and that on 3 October 2017, he benefited from special counselling by the IOM and reiterated on that occasion his wish to return voluntarily. The visit of the identification mission took place after the person concerned announced that he wanted to return voluntarily. It also appears that the IOM did all the necessary to support the business plan of the person concerned: on 16 October 2017 (four days after his arrival), the person concerned visited the IOM for the first time. He then came back several times to put his business plan in order. Financial aid was due to be paid on 16 November but because the person concerned did not present himself in person, the payment could not be executed. The project was eventually concluded in January 2018: "Mr. … has been fully assisted - on Monday 22nd of January 2018 business of play station center will be established in his area of origin Rabak – White Nile state". Regarding this person, the report of the Tahrir Institute also stated: "I am from Darfur and our lives are difficult in Darfur. … My life is difficult and dangerous in Darfur". According to his statement (included in his file at the Immigration Office), he was born in Rabak, capital of the State of White Nile. This is also mentioned on the laissez-passer. And IOM confirmed that he is to start his integration project in "his area of origin Rabak – White Nile state". Many elements in the testimony appear not to be true. One therefore wonders if the other elements mentioned in the testimony are true. This concerns the person mentioned first in the report of the Tahrir Institute, whose testimony is the most extensive.
- For one person (the second testimony in the report of the Tahrir Institute), it appears that he made his first visit to the IOM office on the day of his arrival in Khartoum. He appears to have visited this office for the first time on 22 October 2017 and to have arrived in Khartoum shortly after midnight on the same day or shortly before midnight. IOM confirmed the following: "MR … approached our office for the first time on 22 October 2017. He received his in-kind entitlements on 28 January for purchasing mobile phones for release. We did not come across any harsh treatment complaint from Mr. …, neither has he shown any traces of possible harsh treatment." On the other hand, it appears that according to the report of the Tahrir Institute he claimed the following: "Upon arrival in Khartoum, he was detained at the airport for two days

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and interrogated on political charges: questioned on where he was from in Darfur and accused of working with the Darfur opposition. He denied it and was tortured physically (beaten with a stick) and psychologically for three hours. … ". Contrary to the statement as reported, it appears from the analysis of the WhatsApp conversation that the person concerned declared to have been detained for one day. On 26 January 2018, the CGRS had a brief conversation with this person on WhatsApp. During this conversation, he repeated that he had been detained for one day, from the afternoon until the next morning. He did not give any more information about possible ill-treatment. After some time, he seemed no longer willing to continue the conversation. His testimony seems incompatible with the fact that he visited the IOM office on the day of his arrival. The same can be said regarding his statement that he cannot leave his room and look for work.

- The CGRS found that three of the persons mentioned in the report of the Tahrir Institute have contacted IOM to start an integration project in Sudan. This concerns the first three persons mentioned in the note of the Tahrir Institute, i.e. the three persons who gave a direct testimony. Two of them had the most outspoken complaints about ill-treatment after their arrival in Khartoum. The third person has not mentioned ill-treatment upon arrival. For all three persons, IOM confirmed that they visited their office at least once to obtain financial help to start an integration project in Khartoum or Rabak. For all three persons, IOM also confirmed that while visiting the IOM office, they did not say anything about any incidents upon their arrival. The fact that those three persons are not "persecuted" at the moment can be considered as an indication of the fact that they do not belong to special categories at risk.
- Because the CGRS has not been able to thoroughly assess the situation of the persons concerned , it is impossible to formulate a clear conclusion regarding their profile and the risk in case of return. Most of the persons who returned or were removed may very well belong to profiles that are not at risk of being persecuted, tortured or treated in an inhuman way; for some of them, questions can be raised about the credibility of their claims or their profile, for others there are no concrete indications.
- A special situation concerns the last, indirect testimony mentioned in the updated version of the report of the Tahrir Institute. Regarding this person, the report of the Tahrir Institute states: "He said he was from Darfur and was recruited for the armed struggle. He claimed he was a minor (16 years old) but a medical examination (bone scan) carried out by the Belgian authorities determined he is 20 years old +/- 2 years. … Once In Khartoum he was questioned and beaten for a fully day, then released. He went home to his family. A week later, a group of men (probably form intelligence) came to violently take him away from his home, and this was witnessed by the relatives present. Since then, he has disappeared. One of his uncles – a deportee from Israel – was recently killed for having attempted to migrate." The information mentioned in the report about an attempted removal via Istanbul, from where the person concerned was allegedly sent back to Belgium with an escort by the Turkish authorities, is clearly not true: the planned removal via Istanbul was cancelled before the departure to Istanbul. This raises doubts about the accuracy of the rest of the testimony. It is likely that the

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testimony is not based on the own words of the person concerned or of a family member who has met the person concerned. In order to find out more about this aspect, the CGRS had a conversation with two Sudanese nationals who were said to have more information or to be in touch with the person concerned or his relatives. The first person, who was contacted on the advice of Mr Koert Debeuf, informed us that he did not know that much and had got his information from another person. This person (still detained in a removal centre, heard on 7 February 2018) in turn let us know that he had not had any direct contact. However, he claimed to have been present during a conversation of a fellow inmate (who left for Italy in the meantime) with a person living in France, at the end of December. This person in turn was allegedly in touch with relatives of the "missing" person. Until now the CGRS has not been able to obtain more information. Therefore it is difficult to assess the profile of the person concerned and the claims made, especially the fact that the person has disappeared. But in this case also, some elements of the so-called testimony are clearly not true, which raises doubts about the truthfulness of the rest of the testimony. Moreover, it was found that various persons gave the impression that they had been in touch with the person concerned, whereas this appeared to be untrue.

Conclusions

The CGRS has not been able to obtain absolute certainty or clarity about whether the facts stated in the report of the Tahrir Institute actually took place. But regarding the three main testimonies from this report, it was found that some important elements were not true, to such an extent that this raises serious doubts about the rest of the testimony.

To obtain more certainty in this matter, additional research would be necessary.

7. The assessment regarding article 3 ECHR

How was the risk regarding article 3 ECHR assessed?

Information about the cases was collected as follows: the files at the Immigration Office of the ten returned or removed persons were consulted (on the basis of a copy of the file sent by the Immigration Office), a conversation with the representatives of the Immigration Office took place in order to obtain more information.

Main findings:

- The ten persons concerned were apprehended at different places, some near the Parc Maximilien, others in harbours or while moonlighting. Some of them had already been arrested several times previously for staying illegally in Belgium. At the moment of detention, an order to leave the country was notified. This order did not contain any assessment of a possible risk regarding article 3 ECHR. This was found to be the case for each of the ten persons concerned. Their files do not show that prior to the notification of this order, the person concerned was

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asked whether he would be in danger in case of a return or a removal. According to the Immigration Office, the question was asked by the police and the possibility to apply for asylum was mentioned when necessary.

- Reception at the removal centre follows a triple intake: besides an administrative and a medical intake there is also a social intake (by the social worker of the centre). In this case, the possibility to ask for a lawyer, to lodge an appeal and to mention any problems in case of return on the basis of a "right to be heard" is pointed out to every person. This information is repeated in an information leaflet, a video…
- If a person asks to be assisted by a lawyer, his request is forwarded to the consultation and defence office, which appoints a lawyer. In the removal centres of Bruges and Vottem, the local consultation and defence office regularly organizes consultation hours.
- A number of persons asked for a lawyer. For some persons, no lawyer intervened. The files do not show whether the person concerned had requested the assistance of a lawyer.
- The files of the ten persons concerned show that, except for the person who decided to return voluntarily, each of them used the so-called "right to be heard" in order to express their fear in case of return. For this "right to be heard", the persons concerned receive a form that they can complete themselves (or with their lawyer, if necessary) or have completed for them by someone of the removal centre (a social worker). It appears that in the case of the nine persons concerned, the form was completed with the assistance from someone of the removal centre. In most cases, the conversation appears to have been held in English. If the detained person appears to have insufficient knowledge of the language, help from another person in the centre (if necessary another inmate) or from an interpreter (by phone) was requested for the conversation or interview.
- For the ten persons concerned, the following has been found:
    - All persons (except for the person who chose to return voluntarily) have made use of the "right to be heard" and thus made known that they are in danger in case of return. Some persons referred to this right several times and as a result, they have been heard more than once. Therefore the Immigration Office assessed their situation several times. For a number of persons, it has been found that in addition to the interview conducted under their "right to be heard", they received separate counselling during which they were informed of the possibility of applying for asylum.
    - By means of a questionnaire, the actual risk in case of return was assessed. For all of the ten persons concerned, it was found that the answers to the questions were very short (often only one sentence), which made it impossible to assess if there was a real risk regarding article 3 ECHR in case of return. Because of the shortness of the answers it was impossible to assess whether the reasons referred to were "credible" or well-founded.
    - The questionnaire always points out the following:
        - "If you fear to be subject to torture or inhuman or degrading treatment or punishment (article 3 ECHR): do you want to invoke your right to request

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international protection (asylum or subsidiary protection)? If you fear to be subject to a violation of article 3 ECHR, it is recommended to apply for asylum. This is the appropriate procedure."

- "Yes: help the person concerned to apply for asylum. No: ask the person concerned why s/he does not want to apply for asylum and write the answer below. Mind you: If s/he wants to continue travelling to the UK, you can inform him/her that s/he has already been registered in Belgium and that the chance is real that the UK will send him/her back to Belgium or to another country."

- Most persons appear to have been heard under the "right to be heard" only after the embassy was invited to identify the persons concerned.

- The statements made under the "right to be heard" have always been assessed after the person concerned had been heard. This assessment was done by a staff member of the central service of the Immigration Office.
  - In general, that assessment concluded that there was no real risk regarding article 3 ECHR because the elements mentioned by the person concerned were to be considered as elements on the basis of which a protection status (refugee status or subsidiary protection) could be obtained, and as a consequence they were not considered relevant for an article 3 ECHR assessment on account of the fact that the person concerned refused to apply for asylum, even though this possibility had been pointed out explicitly (and repeatedly) to him. As a result, the reasons mentioned were not assessed "on their merits". Such an assessment would not have been possible on the basis of the short answers to the questionnaire.
  - This assessment can be found in the file of the Immigration Office in the form of a note but was not communicated in the form of a decision to the person concerned.
- As the CGRS did not receive any file for any of the ten persons in question, the CGRS did not assess their situation.

Provisional conclusion:

- Detained persons are informed of the possibility of lodging an appeal and obtaining assistance from a lawyer. They have a real opportunity to request the assistance of a lawyer and lodge an appeal.
- For persons detained in a removal centre, additional efforts are made to assess whether there is a real risk regarding article 3 ECHR in case of return. The persons concerned are given the opportunity (if necessary several times) to invoke a risk. It is made clear to them (if necessary several times) that they have the possibility to apply for asylum. In any case, this was found to be the case for the persons who were subsequently removed to Sudan. To these persons, even more than to other persons, it was pointed out that they have the possibility to invoke a possible risk and to apply for asylum.
- If a person mentions that he runs a real risk of inhuman or degrading treatment in case of return, it is pointed out to him that if such is indeed the case, he must apply for asylum (in order to have his risk assessed and to be granted a protection status if need be). The fact that no

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application for asylum was introduced is considered as an indication that there is no real risk. As a result, the reasons invoked were not assessed "on their merits". Such an assessment would not have been possible on the basis of the short answers to the questionnaire.

It remains to be seen if this assessment can be considered as sufficient or appropriate as far as the risk mentioned in article 3 ECHR is concerned. This is hereafter examined in the light of the jurisprudence of the European Court of Human Rights, the Council for Alien Law Litigation and the Court of Cassation.

What does the jurisprudence show?

The jurisprudence of the European Court of Human Rights shows the following:

- Given the importance of article 3 ECHR, it results from this article that every state is under the obligation to examine any indications of a real risk regarding article 3 ECHR. All relevant aspects have to be effectively assessed
- The person concerned must fully cooperate with the authority carrying out the assessment and, whenever possible, provide documents and other information.
- There is a shared responsibility between the person concerned and the authority which has to assess his situation. This obligation to cooperate applies even more when "reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".
- One judgment at least shows that the fact of not applying for asylum does not "exempt" the state from assessing whether there is a real risk. The Court stated: "… In any event, the Court considers that it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return**".** The Court continued: "*the fact that the parties concerned had failed to expressly request asylum* ***did not exempt Italy from fulfilling its obligations under Article 3***". Moreover, the Court judged in another case: "*Having regard to the absolute nature of Articles 2 and 3 of the Convention, though, it is hardly conceivable that the individual concerned could forego the protection afforded thereunder. It follows therefore that, regardless of the applicant's conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran".*

For more information about this jurisprudence, see the annexe.

There is no extensive jurisprudence from the Council for Alien Law Litigation about the situation in which the fact of not applying for asylum is considered as an indication of the fact that there is no real risk in accordance with article 3 ECHR. This is probably due to the fact that persons from a "problematic" country generally apply for asylum. Still, there are some recent rulings in this matter (Council for Alien Law Litigation no 189 793 of 17 July 2017, Council for Alien Law Litigation no 196 623 of 14 December 2017). While the Immigration Office stated in its note that the requesting party did not apply for asylum, and consequently had not made a reasonable case for its claims regarding a violation of article 3 ECHR, the Council for Alien Law Litigation rejected this argument and concluded that the real risk regarding

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article 3 ECHR had not been satisfactorily assessed. In an earlier ruling (Council for Alien Law Litigation no 192 584 of 26 September 2017), the Council for Alien Law Litigation, sitting as a Grand Chamber, also decided to annul a decision because nothing in the file showed that there had been an article 3 ECHR assessment or that the person concerned had been given the possibility to put forward any claims to this end. But this ruling possibly concerned a slightly different issue, because a readmission by France or Italy was contemplated, without the risk of removal to Sudan being excluded.

In a recent ruling, the Court of Cassation (Cass., no P.18.0035.F of 31 January 2018) also confirmed this assessment: “Dans la mesure où il revient à soutenir que le demandeur ne sera tenu à un examen du risque invoqué par un étranger de subir des traitements contraires à l’article 3 de la Convention que lorsque celui-ci a introduit une demande d’asile, le moyen manque en droit.”

Conclusions

Certainly for countries of origin for which the COI shows that the human rights and security situation is particularly problematic (e.g. as the result of an armed conflict), it seems difficult to uphold that the fact that no application for asylum has been made, even though the person concerned invokes elements that are liable to make him eligible for an international protection status, can be considered as an indication that there is no real risk regarding article 3 ECHR. In this case, the authority’s obligation to cooperate implies that the assessment “on the merits” should be carried out more thoroughly so as to assess whether the elements invoked are “credible” and may indicate a real risk regarding article 3 ECHR.

This risk assessment has to be carried out before any identification by the authorities of the country of origin.

This assessment does not necessarily have to be conducted according to the rules laid down for the assessment of an application for international protection (asylum application), but it has to be carried out in accordance with the rules of good governance. And the result of the assessment must be put in a motivated decision, which implies the possibility to lodge an appeal.

The CGRS is of the opinion that if this assessment shows that there is a real risk regarding article 3 ECHR, the person concerned cannot be removed to the country of origin, but nevertheless a residence status does not necessarily have to be granted, especially when the person concerned refuses to apply for asylum.

In the present case, the CGRS limited itself to an investigation as to how the risk as defined in article 3 ECHR has been assessed in cases where the person concerned does not apply for asylum and comes from a country where the human rights and security situation is particularly problematic. This situation must be distinguished from the situation in which the person concerned applies for asylum and/or comes from a country where the situation is not very problematic.

8. Conclusions

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For its investigation, the CGRS could count on the excellent cooperation of many persons, organizations and authorities, especially Mr Koert Debeuf and the Immigration Office, who offered maximum transparency on all the questions asked by the CGRS.

Asylum law aims at checking individually for each person whether he or she needs protection. This is also the case for the risk assessment regarding article 3 ECHR. The fact that the Belgian government has contacts with the authorities of the country of origin is not necessarily a relevant factor.

The fact that the identification in order to issue a laissez-passer is carried out by means of an identification mission, some members of which may belong to the security services, is in itself not necessarily a problem. This does not mean that one does not have to be careful when organizing an identification mission or in case of identification by representatives of the authorities of the country of origin:

- An identification by the authorities of the country of origin is only possible if the protection needs of the person concerned have been examined beforehand (including the protection need regarding article 3 ECHR);
- It is recommended to take some precautions in the case of the identification, e.g.:
    - to inform in advance the persons concerned that, for their identification, an interview will take place with representatives of their country of origin;
    - to have the interviews take place in the presence of a representative of the Belgian authorities and a person (interpreter) who understands the language of the interview.

The CGRS has not been able to obtain absolute certainty or clarity regarding the question whether the facts mentioned in the note of the Tahrir Institute have actually taken place. But for the three most important testimonies from the report of the Tahrir Institute, some important parts of the testimony have been found to be untrue, to the extent that this casts serious doubts on the rest of the testimony. To obtain more certainty in this matter, additional research would be necessary.

Most certainly for countries of origin, for which general information (COI) shows that the situation regarding the respect for human rights or security (e.g. as a result of an armed conflict) is particularly problematic, it seems difficult to uphold that the fact that a person has not applied for asylum, even though he put forward elements which may make him eligible for an international protection status, can be considered as an indication that there is no real risk regarding article 3 ECHR. In such case, their obligation to cooperate requires from the authorities that they assess this risk more effectively “on the merits” whenever the elements put forward are “credible” and of such nature that they indicate a real risk regarding article 3 ECHR. This assessment does not necessarily have to be conducted according to the rules laid down for the assessment of an application for international protection (asylum application), but it has to be carried out in accordance with the rules of good governance. And the result of the assessment must be put in a motivated decision, which implies the possibility to lodge an appeal.

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The CGRS is of the opinion that if there is found to be a real risk regarding article 3 ECHR, the person cannot be removed to his country of origin, but nevertheless a residence status does not necessarily have to be granted, especially when the person concerned refuses to apply for asylum.

The CGRS is of the opinion that the removal or return of persons to Sudan can be resumed provided the protection need of each of the persons concerned has been assessed "on its merits" beforehand (including a protection need regarding article 3 ECHR).

9. Annexes

List of annexes:

- The report of the Tahrir Institute – the updated version with an addition of 16 January 2018
- A note of the CGRS containing a summary of the result of an ad hoc query spread through EMN about the return to Sudan from the EU+
- A note of the CGRS containing a short survey of the jurisprudence of the European Court of Human Rights
- A note of the CGRS with general information about the risk in case of return to Sudan.

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