**Office of the High Commissioner for Human Rights (RRDD)**

**Written submission to the Committee against Torture on the Draft revised General Comment No. 1 on the implementation of article 3 of the Convention in the context of article 22**

This input is provided by the OHCHR migration team (DESIB) with contributions from the rule of law and democracy section (ROLDS). We welcome the opportunity to input to this draft General Comment and look forward to further contributing to the drafting process.

The principle of non-refoulement is a cornerstone of international human rights law and it is ever more important as many persons are compelled to embark on dangerous journeys for a range of reasons, including reasons that do not fall within the definition of refugee in the Convention relating to the Status of Refugees. The High Commissioner for Human Rights has emphasised that millions of migrants and refugees are in a vulnerable human rights situation and that the precarious movement we witness today is rarely voluntary in the true sense of the term.

Against this backdrop, OHCHR is engaged in a number of projects in relation to the principle of non-refoulement, including an ongoing research project in collaboration with the Graduate Institute, on the scope of the principle of non-refoulement in international human rights law, focusing on the jurisprudence of the UN treaty body system.

OHCHR would also like to draw to the attention of the Committee, OHCHR’s *Recommended Principles and Guidelines on Human Rights at International Borders*,[[1]](#footnote-1) which provide guidance to States and other stakeholders on how to respect and protect the human rights of migrants, including in the context of removal and return. OHCHR is further leading the development of a set of *principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements*,[[2]](#footnote-2) which also include reference to best practices in relation to return and removal. The High Commissioner for Human Rights has also submitted an amicus brief to the European Court of Human Rights on the issues of non-refoulement and collective expulsions.[[3]](#footnote-3)

Finally, a number of reports of the High Commissioner for Human Rights provide an analysis of the human rights situation of migrants. These documents could be useful in informing the Committee of the legal, policy and practical challenges to guaranteeing the principle of non-refoulement for migrants in vulnerable situations, as well as of OHCHR’s ongoing work in this respect.[[4]](#footnote-4)

**General observations**

We welcome the timely engagement of the Committee to reaffirm the principle of non-refoulement under article 3 of CAT and provide guidance to States Parties on its effective implementation in law and practice, including with regard to human rights situations that may indicate a risk of torture and the preventive measures that should be adopted to safeguard it.

We would like to raise a few general observations and suggestions to be considered by the Committee in its drafting process as following:

* We would welcome a stronger integration of gender, providing guidance to States Parties on how to meaningfully address the different experiences and impacts of torture and refoulement on women, men, girls, boys and others and how to take a gender-sensitive approach in safeguarding the principle of non-refoulement and providing effective remedies for violations.
* The draft General Comment touches upon the important issue of vulnerability within a number of sections. We would encourage the Committee to consider elaborating in more detail on its understanding of vulnerability and how it should be integrated within the procedures to determine the risks of torture, i.e. through individualised assessments of vulnerability. In this respect it is the view of OHCHR RRDD that vulnerability arises due to a range of factors that are often intersecting, can coexist simultaneously and can influence and exacerbate each other. The factors that create a vulnerable situation might be what drives women, men, girls and boys from their countries of origin, occurs in transit and at reception or destination, and/or is related to a particular aspect of a person’s identity or circumstance. Thus, vulnerability in this context can be understood as situational (external) and/or embodied (internal).[[5]](#footnote-5)
* The draft General Comment details a range of important elements in relation to procedural and thematic aspects of the principle of non-refoulement. We note that certain issues are referred to in different parts of the draft, in particular in section VIII and section X.C (merits). For example there are multiple references to the obligation to ensure suspensive effect (paras 18(e), 43), how to address inconsistencies in testimony (paras 44, 53(h),(i)), the right to an individual examination (paras 13, 18(a), or access to medical examinations (18(d), 43, 53(d)). We encourage the Committee to consider how these aspects can be best consolidated and reflected to increase clarity and limit overlap and potential misperceptions with regard to the obligations of States Parties.

**I. Introduction**

* We suggest including an explanation that while the General Comment focuses on the implementation of article 3 in the context of individual communications, the General Comment also serves to provide States Parties guidance on the implementation of article 3 in their jurisdiction, regardless of whether they have recognised the competence of the Committee to receive and consider communications. In this regard, it would be helpful to amend para 6 under section II accordingly and move it to the introduction section I.
* We further suggest including the Committee’s Concluding Observations as contributing to this General Comment (currently limited to individual communications in para 1).
* We suggest including a sentence which clarifies the different terminology used in relation to removal or return of a person, to provide certainty that the principle of non-refoulement applies in all cases, regardless of the terminology used.

**II. General Principles**

* We note that in contrast to the prohibition of return under article 1 (F)(a) of the 1951 Convention, the principle of non-refoulement under international human rights law (CAT, ICCPR, ECHR etc.) does not allow for exceptions and is characterised by its absolute nature.[[6]](#footnote-6) The prohibition to return an individual to a place where he/she would risk torture applies regardless of the person’s character, the danger the person may pose to society, economic pressures or large numbers of arrivals.[[7]](#footnote-7) We encourage the Committee to strengthen this reflection in current paragraph 8 of the draft.
* We encourage the Committee to include as a general principle the prohibition of indirect refoulement, namely of transfers to a State where there is a risk of further removal to a third country where the person may be in danger of being subjected to torture (some reference already in para 12, 48(l)).[[8]](#footnote-8)
* The principle of non-discrimination currently mentioned in paragraph 9, is a core principle of international human rights law and essential in relation to non-refoulement. We suggest a standalone paragraph and expanded elaboration be dedicated to the principle of non-discrimination in this section.
* Paragraph 9 importantly speaks to the geographical scope of the principle of non-refoulement. OHCHR has raised concern about certain States denying individuals in law and/or practice their human rights at international borders. We therefore suggest referring not only to ships and aircrafts, but also to include specific reference to *international border areas where States Parties exercise border governance measures on their territory or extraterritorially, such as land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and so-called “no-man’s land” between border posts, as well as embassies and consulates*.[[9]](#footnote-9)
* Furthermore, the draft of the General Comment does not appear to sufficiently address the issue of transfers from one detaining authority to another within the borders of State. The draft makes regular reference to the terms “deportation”, “return”, “expel”, or “extradite”, which could be understood as implying that the non-refoulement principle applies only to cases where the person is transferred from the territory of a state to the territory of another state. However, practice shows that the non-refoulement principle also applies to transfer between different detaining authorities within the borders of a state and it would be important for the General Comment to clarify this issue. One example would be when the armed forces of country A intervene on the territory of country B at country B’s invitation, and in the conduct of operations country A’s armed forces detain an individual and then hand him over to the authorities of country B. It is the position of OHCHR and other international organisations that country A’s non-refoulement obligations apply to such a case. The draft General Comment also appears to be silent on the issue of ***secondary refoulement*** (also known as ‘chain refoulement’), that is situations in which an individual transferred from the custody of State A to that of State B risks being transferred to a third state where the individual would face a real risk of torture. It may be relevant for the Committee to consider examining this issue in the General Comment and if warranted adding it to the examples of situations which should be taken into account when assessing whether a transfer conforms with the principle of non-refoulement.
* In footnote 10 of paragraph 13 referring to collective expulsions, in addition to the CCPR General Comment reference, we suggest to also include article 22 of the International Convention on the on the Protection of the Rights of All Migrant Workers and Members of Their Families, which prohibits collective expulsions.
* With respect to paragraph 14, we suggest the following amendments to include other human rights violations that may compel individuals to return despite the risks:

*14. States parties should not take measures or adopt policies, such as detention, without due process guarantees, in poor conditions, or for indefinite periods; refusing to process or unduly prolonging these procedures to claim for asylum, other forms of temporary protection, to regularize or renew residence status, or family reunification; cutting funds for assistance programs to asylum seekers and other migrants or preventing or failing to ensure effective access to services; creating a hostile environment in which discrimination, racism, incitement to national, racial or religious hatred and hate crimes are not challenged or sanctioned; or any other measures 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.*

**III. Preventive measures to guarantee the principle of non-refoulement**

Violations of the principle of non-refoulement most often include a lack of legislative and procedural safeguards to prohibit the return of an individual who is at risk of torture, to assess this risk on a case-by-case basis, and to provide adequate protection measures. In addition, OHCHR RRDD has found that policies which aim at rapidly returning persons are eroding due process guarantees leading to arbitrary and collective expulsions and increasing the risk of refoulement, in particular with respect to those individuals who may not meet the legal category of refugee but would still be protected from refoulement under article 3 CAT.[[10]](#footnote-10) As emphasised in paragraph 13, due process guarantees and other preventive measures are therefore essential to guarantee the principle of non-refoulement.

* We therefore suggest renaming the title of this section to: ***Procedural safeguards and other preventive measures to guarantee the principle of non-refoulement*** and to include more detailed guidance for States Parties on such measures.
* As an important preventive measure, we suggest including the following best practice: *Prohibit in law the return or extradition of a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.*
* With regards to procedural guarantees and preventive measures related to individual assessments, we suggest the following amendments in relation to paragraph 18:
	1. *Ensuring the right of each person concerned to have his/her case examined individually without discrimination, in a gender, culture and age sensitive manner, taking into account the vulnerabilities of each individual*.[[11]](#footnote-11)

aa) *Ensuring individuals are immediately informed in accessible formats and in a language they are known to understand of the procedures that will be followed, their rights and obligations during the procedures, possible consequences and the remedies available to them*.[[12]](#footnote-12)

* 1. *Providing access of the person alleging a risk of torture in removal proceedings to a competent lawyer and free legal aid*;
	2. *The development and implementation of an administrative or judicial procedure, in accordance with due process guarantees, including*:[[13]](#footnote-13)
		+ *Any decision to expel an individual or group of individuals must be based in law and taken by a competent authority in accordance with the law*.[[14]](#footnote-14)
		+ *Individuals have the right to be notified in writing of the expulsion decision and to receive information about the available legal remedies and the time provided to file an appeal*.[[15]](#footnote-15)
		+ *The notice should include the reasons for the expulsion decision, the assessment of the personal circumstances, as well as an evaluation of the risks in expelling the individual and be made available to the individual in an accessible language and format*.[[16]](#footnote-16)
		+ *Individuals have the right to challenge the expulsion decision and to be heard by a competent independent authority within a reasonable time*.[[17]](#footnote-17)
		+ *Individuals have the right to be informed of their right to seek recourse to consular protection and assistance*.[[18]](#footnote-18)
	3. We recommend removing or amending this paragraph as it may give the misperception that only individuals who are victims of previous torture are protected from refoulement.
	4. No amendments proposed.
	5. *The state officials that carry out such an individualised examination should be: a) able to appreciate the full range of arguments that weigh against the expulsion of a particular individual; b) adequately trained on relevant standards of national and international law and non-coercive interviewing techniques; c) sensitised to the specific needs of individuals in a vulnerable situation, including women at risk, children, persons with disabilities, Lesbian Gay Bisexual Transsexual and Intersex individuals and older persons, as well as to the risk of stereotypes and bias; and, c) in a position to corroborate relevant elements, where necessary*.[[19]](#footnote-19)

**IV. Diplomatic assurances**

We welcome the reference to diplomatic assurances, which the Special Rapporteurs on Torture have described as unreliable and ineffective, with post-return monitoring mechanisms doing little to mitigate the risk of torture, and calling upon States not to expel anyone if there is a risk of torture.[[20]](#footnote-20) The High Commissioner has noted in this regard:[[21]](#footnote-21)

Such arrangements cannot be deemed to serve as an adequate safeguard, especially if it has been determined that the individual would face a foreseeable risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.

**V. Redress and compensation**

We suggest to also include the need for States Parties to take appropriate and effective measures to prevent the recurrence of similar violations in the future by amending those laws, policies and practices that gave rise to the violation and to hold those responsible accountable.

**VI. Extradition treaties**

We note that prisoner transfer and readmission agreements are other forms of bilateral or multi-lateral agreements, which may impact States Parties’ obligations under article 3 CAT. We recommend including reference to such agreements as well, either in a separate section or in addition to extradition treaties. With regard to readmission agreements, we are concerned that they are increasingly used as a tool by States to accelerate returns procedures, are usually not public and increase the risk of refoulement, the High Commissioner has noted in this regard:[[22]](#footnote-22)

Bilateral or multi-lateral readmission agreements are of particular concern when they foresee the return of migrants who do not hold the nationality of the country of return or who may never have entered this country in the first place, and who are likely to be subject to further expulsion from this country. These agreements also do not absolve the State from its duty to ‘adopt clear and transparent procedures with adequate judicial mechanisms for review’. Such agreements should be public and integrate rigorous human rights, due diligence, monitoring, accountability and oversight mechanisms.

**VIII. Duties of States parties**

In relation to the human rights situations under paragraph 30, we suggest including reference to living conditions of extreme poverty,[[23]](#footnote-23) lack of medical treatment,[[24]](#footnote-24) or mental illness,[[25]](#footnote-25) which have been found to qualify as reasons that should prevent return.

In paragraph 48, we suggest slight amendments as following: “(f) desertion from the army or armed groups and refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service; (g) previous torture; (h) incommunicado detention or other form of arbitrary and illegal detention in the country of origin; (i) clandestine escape from the country of origin for threats of torture; (j) religious affiliation; (k) violations of the right to freedom of thought, conscience and religion or belief, including violations related to the prohibition of conversion to a religion which is different from the religion proclaimed as official or State religion and where such a conversion is prohibited and punished in law or ~~and~~ in practice; (l) risk of expulsion to a third country where the person may be in danger of being subjected to torture and (m) violence against women, including rape.”

1. Available at: [http://www.ohchr.org/Documents/Issues/Migration/OHCHR\_Recommended\_Principles\_Guidelines.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf). [↑](#footnote-ref-1)
2. http://www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx. [↑](#footnote-ref-2)
3. Amicus briefs filed by the UN High Commissioner for Human Rights in the European Court of Human Rights in the cases of *Hirsi Jamaa et al v. Italy,* available at: [http://www.ohchr.org/Documents/Issues/Migration/AmicusBriefInHirisi.doc](https://www.ohchr.org/Documents/Issues/Migration/AmicusBriefInHirisi.doc), and *N.D. and N.T. v Spain*, available at: [http://www.ohchr.org/Documents/Issues/Migration/ThirdPartyIntervention.pdf](https://www.ohchr.org/Documents/Issues/Migration/ThirdPartyIntervention.pdf). [↑](#footnote-ref-3)
4. See *Human Rights of Migrants in Transit,* 2016 (A/HRC/31/35), available at: [http://www.ohchr.org/EN/Issues/Migration/Pages/Studymigrantsintransit.aspx](https://www.ohchr.org/EN/Issues/Migration/Pages/Studymigrantsintransit.aspx); *Promotion and protection of the human rights of migrants in the context of large movements*, 2016 (A/HRC/33/67), available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A\_HRC\_33\_67.docx. [↑](#footnote-ref-4)
5. See Report of the UN High Commissioner for Human Rights on the Promotion and protection of the human rights of migrants in the context of large movements, 2016 (A/HRC/33/67), page 9, available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_67.docx>; and Report of the UN High Commissioner for Human Rights to the Human Rights Council on the *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements, on the basis of existing legal norm,* A/HRC/34/31 (2017). [↑](#footnote-ref-5)
6. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/70/303 (2015), para 38, 41. [↑](#footnote-ref-6)
7. See amongst others CAT, Communication No. 297/2006, *Singh Sogi v Canada*, para 10.2; CCPR, Communication Nos. 1461,1462,1476,1477/2006, *Zhakhongir Maksudov and Others v Kyrgyzstan*, para 12.4; ECtHR, *M.S.S. v Belgium and Greece*, App.No. 30696/09, paras 223-224; ECtHR, *Chahal v. the United Kingdom*, App.No. 22414/93, para 79. [↑](#footnote-ref-7)
8. See CAT, General Comment No. 1 (1997), para 2; CCPR, General Comment No. 31, CCPR/C/21/Rev.1/Add. 13 (2004), para 12; CAT Communication No. 88/1997, *Hamayak Korban v Sweden*, para 7; ECtHR, , *M.S.S. v Belgium and Greece*, App.No. 30696/09, para 342. [↑](#footnote-ref-8)
9. See OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, p 4. [↑](#footnote-ref-9)
10. See Report of the UN High Commissioner for Human Rights on the Promotion and protection of the human rights of migrants in the context of large movements, 2016 (A/HRC/33/67), page 15, available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A\_HRC\_33\_67.docx. [↑](#footnote-ref-10)
11. Ibid, para 21; see also OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, Principle C.12; Guidelines 6.12-6.17. [↑](#footnote-ref-11)
12. Amicus brief, para 22; see also CAT, *Kwami Mopongo and others v. Morocco,* Communication No. 321/2007 (2014), para 11.3; *OHCHR Principles and Guidelines,* Guidelines 7.9, 9.4, 9.5. [↑](#footnote-ref-12)
13. Amicus brief, para 26. [↑](#footnote-ref-13)
14. ICRMW, Article 22(2). In this regard, the CMW has noted that “the competent authority reviewing the decision of expulsion should ideally be a court”, see CMW, General Comment No. 2, CMW/C/GC/2 (2013), para 53. [↑](#footnote-ref-14)
15. ICRMW, Article 22(3); CAT, *Kwami Mopongo and others v. Morocco,* Communication No. 321/2007 (2014), para 11.3; ILC Draft Articles, Article 26(1)(a); *OHCHR Principles and Guidelines,* Principle 9.4. [↑](#footnote-ref-15)
16. ICRMW, Article 22(3); *OHCHR Principles and Guidelines*, Principle 9.4. [↑](#footnote-ref-16)
17. ICRMW, Article 22(4); Human Rights Committee, *Pierre Giry v. Dominican Republic,* Communication No. 193/1985 (1990); CAT, *Kwami Mopongo and others v. Morocco,* Communication No. 321/2007 (2014), para 11.3; ILC Draft Articles, Article 26(1)(b), (c); *OHCHR Principles and Guidelines,* Principles 6.8, 9.5. [↑](#footnote-ref-17)
18. ICRMW, Article 23. [↑](#footnote-ref-18)
19. Amicus brief, para 23; *OHCHR Principles and Guidelines,* Guidelines 3.8-3.12, 6.10, 6.12-6.17. [↑](#footnote-ref-19)
20. Reports of the Special Rapporteur on Torture A/60/316 (2005), para 51; A/70/303 (2015), para 40, 69. [↑](#footnote-ref-20)
21. Amicus brief, para 24. [↑](#footnote-ref-21)
22. Amicus brief, para 25. [↑](#footnote-ref-22)
23. ECtHR, *MSS v Belgium and Greece*, Application no. 30696/09, 21 January 2011. [↑](#footnote-ref-23)
24. Human Rights Committee, *C v Australia*, No. 900/1999; ECtHR, *D v United Kingdom*, 146/1996/767/964; IACtHR, Advisory Opinion OC-21/14, para 229. [↑](#footnote-ref-24)
25. Human Rights Committee, *A.H.G. v Canada*, No. 2091/2011, para 10.4. [↑](#footnote-ref-25)