



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Consideration of communications submitted under article 22 of the Convention

General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22*

Draft prepared by the Committee¹

I. Introduction

1. On the basis of its experience in considering individual communications under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention), addressing allegations of violation by States parties of article 3 of the Convention, the Committee against Torture (hereinafter referred to as the Committee) at its fifty-fifth to fifty-eight sessions in 2015 and 2016 discussed and agreed to revise its General Comment No. 1 entitled “General comment on the implementation of Article 3 of the Convention in the context of Article 22” which had been adopted on 21 November 1997 (A/53/44, Annex IX).

2. At its 59th session, in November - December 2016, the Committee began the drafting process of the revised General Comment, taking into account the recommendations for the consultation process in the elaboration of general comments made by the Chairpersons at their twenty-seventh meeting in San José de Costa Rica, from 22 to 26 June 2015 (A/70/302, paragraph 91).

3. The Committee, at its ... session, ... meeting held on ..., decided to replace the text of its initial General Comment No. 1 by the following text which it adopted unanimously on the same date.

* The present document is being issued without formal editing.

¹ Adopted by the Committee on first reading on 6 December 2016. The Committee intends to revise the present text, taking into consideration the comments to be received as part of a consultation process with relevant stakeholders.

II. General principles

4. Article 3, paragraph 1, of the Convention provides that “No State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²

5. Pursuant to Article 22 of the Convention, the Committee is mandated « to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention » in the case of any State party that has declared that it recognizes the Committee’s competence in this regard.

6. Most of the communications received by the Committee refer to alleged violations by States parties of Article 3 of the Convention. This General Comment provides guidance to States parties, the complainants and their representatives on the scope of Article 3 and on how the Committee assesses the admissibility and the merits of the communications submitted to the Committee for its consideration.

7. The Committee recalls that the prohibition of torture, as defined in Article 1 of the Convention, is absolute. Article 2, paragraph 2, of the Convention provides that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

8. The principle of “non-refoulement” of persons in danger of being tortured in the State to which they are to be expelled, returned or extradited is similarly absolute.³

9. As with all obligations under the Convention, each State party must apply the principle of non-refoulement in any territory under its jurisdiction or on board a ship or aircraft registered in the State party to any person without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law. As the Committee noted in its General Comment No. 2, “the concept of ‘any territory under its jurisdiction’... includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of the State party” [para. 7].

10. The principle of “non-refoulement” applies also to territories under foreign military occupation and to any other territories over which a State party, through its agents operating outside its territory, has a factual control and authority.⁴

11. The non-refoulement obligation in article 3 of the Convention exists whenever there are “substantial grounds”⁵ for believing that the person concerned would be in danger of

² Article 3 must be interpreted by reference to the definition of torture set out in article 1 of the Convention - see communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.5.

³ See communications No. 444/2010, *Abdussamatov et al. v. Kazakhstan*, decision of 1 June 2012, para. 13.7; No. 39/1996, *Paez v. Sweden*, Views adopted on 28 April 1997; No. 110/1998, *Núñez Chipana v. Venezuela*, Views adopted on 10 November 1998, para. 5.6, and No. 297/2006, *Singh Sogi v. Canada*, decision adopted on 16 November 2007.

⁴ See e.g. Concluding observations on the combined third to fifth periodic reports of the United States of America (CAT/C/USA/CO/3-5), para. 10; and Concluding observations on the fifth periodic report of Sweden (CAT/C/SWE/CO/5), para. 14.

⁵ See e.g. communication No. 39/1996, *Tapia Paez v. Sweden*, Views adopted on 28 April 1997, para 14.5.

being subjected to torture in a State to which he or she is facing deportation.⁶ The Committee's practice has been to determine that "substantial grounds" exist whenever the risk of torture is "personal, present, foreseeable and real".⁷ As the Committee has found, « the risk of torture must be assessed on grounds that go beyond suspicion ». ⁸

12. Any person found to be at risk of torture if deported to a given State should be allowed to remain in the territory under the jurisdiction or factual control and authority of the State party concerned so long as the risk persists.⁹ Furthermore, he or she should never be deported to another State where he/she would face deportation to a third State in which he/she would be subjected to torture.

13. Each case should be individually examined by the State party through competent administrative and/or judicial authorities. Any form of collective deportation¹⁰ 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.

14. States parties should not take measures or adopt policies, such as detention in poor conditions for indefinite periods, 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.

15. Article 16 of the Convention provides for the duty of States parties to prevent acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture as defined in Article 1 of the Convention. As the Committee has stated in its General Comment No. 2, paragraph 3, "The obligation to prevent ill-treatment (cruel, inhuman or degrading treatment) in practice overlaps with and is largely congruent with the obligation to prevent torture" and "In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture ...".

16. States parties should consider whether forms of cruel, inhuman or degrading treatment or punishment that a person facing deportation is at risk of experiencing could likely change so as to constitute torture before making an assessment on each case relating to the principle of "non-refoulement".

17. The Committee considers that severe pain or suffering cannot objectively be measured. It depends on the negative physical or mental repercussions that the infliction of violent acts has on each individual, taking into account all relevant circumstances of each

⁶ For the purpose of this revised General Comment No. 1, the term "deportation" covers the expulsion, return or extradition of a person or group of individuals from a State party to another State.

⁷ See communications No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005, para. 8.4; No. 226/2003, *T.A. v. Sweden*, decision adopted on 6 May 2005; and No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010.

⁸ See e.g. communications No. 203/2002, *A. R. v. Netherlands*, decision of 14 November 2003, para. 7.3; and No. 658/2015, *Meron Fekade v. Switzerland*, decision adopted on 15 November 2016, para. 7.4.

⁹ See communication No. 34/1995, *Aemei v. Switzerland*, decision of 29 May 1997, at para. 11

¹⁰ See communication No. 321/2007, *Kwami Mopongo et al. v. Morocco*, decision of 7 November 2014, paras. 6.2. - 6.3. and 11.3. -11.4.; and CCPR, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10.

case, including the duration of the treatment, the physical and/or mental effects, the sex, age and state of health and vulnerability of the victim.

III. Preventive measures to guarantee the principle of “non refoulement”

18. For the purpose of fully implementing Article 3 of the Convention, States parties should take legislative, administrative and other preventive measures against possible violations of the principle of “non-refoulement”. Recommended best practices are:

(a) Ensuring the right of each person concerned to have his/her case examined individually and not collectively, and to be fully informed of the reasons why he/she is the subject of a procedure which may lead to a decision of deportation;

(b) Providing access of the person alleging previous torture that might be deported to a lawyer and free legal aid when necessary;

(c) The development of an administrative or judicial procedure concerning the person in question in a language that he/she understands or with the assistance of interpreters and translators;

(d) The referral of the person alleging previous torture to an independent medical examination free of charge;

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

(f) An effective training of all officials dealing with persons under procedures of deportation about the respect of the provisions of Article 3 of the Convention in order to avoid decisions contrary to that Article; and

(g) An effective training of medical and other personnel dealing with detainees, migrants and asylum seekers in identifying and documenting signs of torture, taking into account the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).

IV. Diplomatic assurances¹¹

19. The term “diplomatic assurances” as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards.

20. The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of “non-refoulement”, provided for by article 3 of the Convention, and they should not be used as a loophole to undermine that principle, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.¹²

¹¹ The Committee intends to further elaborate on the issue of diplomatic assurances in future sessions after receiving comments from relevant stakeholders on this issue.

¹² See *Agiza v. Sweden*, para. 13.4, and communication No. 538/2013, *Tursunov v. Kazakhstan*, decision of 8 May 2015, para. 9.10. See also e.g. Concluding observations on the combined third to fifth

V. Redress and compensation

21. States parties should take into account that victims of torture and other cruel, inhuman or degrading treatment or punishment suffer physical and psychological traumas which may require sustained specialized rehabilitation treatment. Once their health fragility and need for treatment has been medically certified, they should not be removed to a State where adequate medical services for their rehabilitation linked to their torture-related trauma are not available or not guaranteed.

22. States parties should envisage mechanisms of financial and legal assistance to persons deported where they have subsequently faced a substantial risk of being tortured or they have been tortured in the receiving State in order to enable them to get access to judicial procedures empowered to put an end to that risk or that offence. Alternatively, they should request independent international experts or organizations or national experts and institutions to carry out monitoring and follow-up visits to the persons concerned and facilitate their access to judicial remedies.¹³ When necessary, the sending State should undertake legal and administrative or other (diplomatic) procedures for the return of the persons concerned to its territory.

VI. Article 3 of the Convention and extradition treaties

23. States parties may find that a conflict arises between the obligations they have undertaken under Article 3 of the Convention and the obligations they have undertaken under a multilateral or bilateral extradition treaty, especially when the treaty was concluded before the ratification of the Convention with a State not party to the Convention and, therefore, not bound by the provisions of its Article 3.

24. The Committee acknowledges that the timeframe for the extradition of a person for the purpose of criminal prosecution or the servicing of a sentence, who has submitted a communication under Article 22 of the Convention invoking the principle of “non-refoulement”, is a crucial factor for the respect by the State of its obligations under both the Convention and an extradition treaty to which it is a party. The Committee, therefore, requests a State party in this situation to inform the Committee about any possible conflict between its obligations under the Convention and under an extradition treaty from the very beginning of the individual complaint procedure in which the State is involved so that the Committee will try to give priority to the consideration of that communication before the time limit for the obligatory extradition is reached. The State party concerned, however, should take into account that the Committee can give priority to the consideration of and decision on such communication only during its sessions.

25. Furthermore, those States parties to the Convention which, subsequently, consider the adherence to an extradition treaty should ensure that there is no conflict between the Convention and that treaty and, if there is, they should include in the notification of adherence to the extradition treaty the clause that, in case of conflict, the Convention will prevail.

periodic reports of the United States of America (CAT/C/USA/CO/3-5), para. 16; Concluding observations on the fourth periodic report of Morocco (CAT/C/MAR/CO/4), para. 9; Concluding observations on the fifth periodic report of Germany (CAT/C/DEU/CO/5), para. 25; and Concluding observations on the second periodic report of Albania (CAT/C/ALB/CO/2), para. 19.

¹³ See communication No. 428/2010, *Kalinichenko v. Morocco*, decision of 25 November 2011, para. 17.

VII. Article 3 in the context of Article 16, paragraph 2, of the Convention

26. With reference to Article 16, paragraph 2, of the Convention stipulating that “ The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion”, the Committee wishes to point out that, insofar as it might be possible to derive from other international or national legal instruments a prohibition against extradition or expulsion to a country where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment or punishment falling short of torture, the fact that Article 3 of the Convention only deals with torture should not be interpreted as limiting the prohibition against extradition or expulsion which follows from such other instruments.

27. Non exhaustive examples of other international provisions directly relevant to the application of the principle of “non-refoulement” in cases of risk of torture and other cruel, inhuman or degrading treatment or punishment for a person under deportation to the country of deportation may be found by States parties to the Convention which are also parties to other relevant instruments, such as:

(a) The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 56, paragraph 3);¹⁴

(b) The International Convention on the Protection of All Persons from Enforced Disappearances (Article 16, paragraph 1);¹⁵

(c) The 1951 Convention relating to the Status of Refugees (Article 33, paragraph 1);¹⁶

(d) The Charter of the Fundamental Rights of the European Union (Article 19, paragraph 2);¹⁷

(e) The Inter-American Convention to Prevent and Punish Torture (the last paragraph of Article 13);¹⁸

(f) The American Convention on Human Rights (Article 22, paragraphs 8 and 9);¹⁹

¹⁴ Article 56, paragraph 3, stipulates that “in considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations”.

¹⁵ Article 16, paragraph 1, stipulates that “No State party shall expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”.

¹⁶ Article 33, paragraph 1, stipulates that “No contracting State shall expel or return “refouler” a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

¹⁷ Article 19, paragraph 2, stipulates that “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

¹⁸ The last paragraph of Article 13 stipulates that “extradition (for a person accused of being the author of acts of torture) should not be granted nor shall the person sought to be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State”.

¹⁹ Article 22, paragraphs 8 and 9, stipulate that “In no case may an alien be deported or returned to a country, regardless whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status,

- (g) The African Charter on Human and Peoples' Rights (Article 12, paragraph 3);²⁰
- (h) The African Union Convention Governing Specific Aspects of Refugee Problems in Africa (Article 5, paragraph 1).²¹

VIII. Duties of States parties to consider specific human rights situations in which the right of “non-refoulement” applies

28. Article 3, paragraph 2, of the Convention provides that “For the purpose of determining whether there are such grounds (for believing that a person would be in danger of being tortured, if expelled, returned or extradited), the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.²²

29. In this regard, the Committee observes that the infliction of cruel, inhuman or degrading treatments or punishments, whether amounting or not amounting to torture, to which an individual or his/her family were exposed in their State of origin or would be exposed in the State of deportation, constitutes an indication that the person is in danger of being subjected to torture if he/she is expelled, returned or extradited to one of those States. Such indication should be taken into account by States parties as basic element justifying the application of the principle of “non refoulement”.

30. In this connection, the Committee wishes to draw the attention of the States parties to some non-exhaustive pertinent examples of human rights situations which may constitute an indication of a risk of torture to which they should give consideration in their decisions for removal of a person from their territory and take them into account to apply the principle of “non-refoulement”. States parties should consider, in particular:

- (a) Whether the person concerned had been previously arbitrarily arrested in his/her State of origin without a warrant and/or he/she has been denied fundamental guarantees for a detainee in police custody, such as:
 - (i) the notification of the reasons of his/her arrest in writing and in a language that he/she understands;
 - (ii) access to a family member or a person of his/her choice for informing them of his/her arrest;
 - (iii) access to a lawyer free of charge when necessary and, at his/her request, access to a lawyer of his/her choice at his/her own expenses, for his/her defense;

or political opinions” (paragraph 8), and that “The collective expulsion of aliens is prohibited” (paragraph 9).

²⁰ Article 12, paragraph 3, stipulates that “Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions”.

²¹ Article 5, paragraph 1, stipulates that “the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.”.

²² See *G.R.B v. Sweden*, para. 6.3., and communications No. 177/2001, *H.M.H.I. v. Australia*, decision of 1 May 2002, para. 6.5; No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010, para. 7.2, and No. 490/2012, *E.K.W. v. Finland*, decision adopted on 4 May 2015, paras. 9.3 and 9.7.

- (iv) access to an independent medical doctor for an examination and treatment of his/her health or, for this purpose, to a medical doctor of his/her choice, at his/her own expenses;
 - (v) access to an independent specialized medical entity to certify his/her allegations of having been subjected to torture;
 - (vi) access to a competent and independent judicial institution which is empowered to judge his/her claims for the treatment in detention within the timeframe set by the law or within a reasonable time frame to be assessed for each particular case.
- (b) Whether the person has been a victim of brutality or excessive use of force by public officials based on any form of discrimination in the State of origin or would be exposed to such brutality in the State of deportation;
- (c) Whether, in the State of origin or in the State of deportation, the person has been or would be victim of violence including gender based/ sexual violence, in public or in private, or gender-based persecution, genital mutilation, amounting to torture without intervention of the competent authorities of the State concerned for the protection of the victim;
- (d) Whether the person has been judged in the State of origin or would be judged in the State of deportation by a judicial system which does not guarantee the right to a fair trial;
- (e) Whether the person concerned has been previously detained or imprisoned in the State of origin or would be detained or imprisoned, if deported to a State, in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment;
- (f) Whether the person concerned would be exposed to sentences of corporal punishment if deported to a State, in which, although corporal punishment is permitted by national law, that punishment would amount to torture or cruel, inhuman or degrading treatment or punishment according to customary international law and the jurisprudence of the Committee and of other recognized international and regional mechanisms for the protection of human rights;
- (g) Whether the person concerned would be deported to a State in which there are credible allegations or evidence of crimes of genocide, crimes against humanity or war crimes within the meaning of Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court which have been submitted to the Court for its consideration;
- (h) Whether the person concerned would be deported to a State party to the Geneva Conventions and their Protocols where there are allegations or evidence of its violation of common Articles 3 of the four Geneva Conventions of 12 August 1949 and/or Article 4 of the additional Second Protocol to the Geneva Conventions of 1977 and, in particular, of:
- (i) Article 3, paragraph 1 (a) of the four Geneva Conventions;²³
 - (ii) Article 4, paragraphs 1 and 2, of Protocol II to the Geneva Conventions.²⁴

²³ Article 3, paragraph 1 (a) of the four Geneva Conventions stipulates that in the case of armed conflict not of an international character [omissis] violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture are and shall remain prohibited with respect to persons taking no active part in the hostilities.

²⁴ Article 4, paragraph 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and

(i) Whether the person concerned would be deported to a State where there are allegations or evidence of its violation of Article 12 of the third Geneva Convention of 12 August 1949 relating to the treatment of prisoners of war;²⁵

(j) Whether the person concerned would be deported to a State where there are allegations or evidence of its violation of Article 45 of the fourth Geneva Convention relating to the protection of civilian persons in times of war;²⁶

(k) Whether the person concerned would be deported to a State where the inherent right to life is denied, including the exposure of the person to extrajudicial killings, or where the death penalty is in force and considered as a form of torture or cruel, inhuman or degrading treatment or punishment by the deporting State party, in particular:

(i) if the latter has abolished the death penalty or established a moratorium on its execution,

(ii) where the death penalty would be imposed for crimes which are not considered by the deporting State party as the most serious crimes or

(iii) where the death penalty is carried out for crimes committed by persons below the age of 18, or on pregnant women or nursing mothers or persons who have a severe mental disability.

(l) The State party concerned should also evaluate whether the circumstances and the methods of execution of the death penalty and the prolonged period and conditions of the person sentenced to death in death row detention could amount to torture or a cruel, inhuman or degrading treatment or punishment for the purpose of applying the principle of “non-refoulement”;

(m) Whether the person concerned would be deported to a State where reprisals amounting to torture have been or would be committed against him/her, members of the family or witnesses of his/her arrest and detention, such as violent and terrorist acts against them, the disappearance of those family members or witnesses, their killings or their torture;

relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, stipulates that all persons who do not take a direct part or who have ceased to take part in hostilities (with reference to armed conflicts listed in Article 2 of the Geneva Conventions and Article 1 of Protocols I and II to those Conventions), whether or not their liberty has been restricted, are entitled to respect of their person, honour and convictions and religious practices. Article 4, paragraph 2, of the Protocol stipulates that the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever : (a) violence to the life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage and (h) threats to commit any of the foregoing acts.

²⁵ Article 12 of the third Geneva Convention provides, inter alia, that “prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the (Geneva) Convention and after the Detaining Power has satisfied it-self of the willingness and ability of such transferee Power to apply the Convention”.

²⁶ Article 45 of the fourth Geneva Convention provides, inter alia, that “protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied it-self of the willingness and ability of such transferee Power to apply the present Convention”.

(n) Whether the person concerned would be deported to a State where he/she was subjected or would run the risk of being subjected to slavery and forced labour or trafficking in human beings;

(o) Whether the person concerned is below the age of 18 years and would be deported to a State where his fundamental child rights were previously violated and/or would be violated creating irreparable harm, such as his/ her recruitment as a combatant participating directly or indirectly in hostilities or for providing sexual services.

IX. Non-State actors

31. Equally, States parties should refrain from deporting individuals to another State where they would be in danger of facing torture and cruel, inhuman or degrading treatment or punishment at the hands of non-State actors over which the State of deportation has no or only partial de facto control or is unable to counter their impunity.

32. Similarly the responsibility of not deporting a person at risk of being subjected to torture and cruel, inhuman or degrading treatment or punishment in the State of transfer or return is incumbent on international organizations, military operation programs and other entities that could be qualified as non-State actors.

X. Specific requirements for the submission of individual communications under Article 22 of the Convention and interim measures of protection

A. Admissibility

33. The Committee considers that it is the responsibility of the author of a communication to provide exhaustive arguments for his/her complaint of alleged violation of Article 3 of the Convention in such a way that, from the first impression (*prima facie*), the Committee finds it relevant for consideration under article 22 of the Convention and fulfilling each of the requirements established under Rule 113 of the Committee's rules of procedure.

34. A State party's obligations under the Convention apply from the date of the entry into force of the Convention for that State Party. However, the Committee will consider communications on alleged violations of the Convention which occurred before a State party's recognition of the Committee's competence under Article 22 of the Convention through the declaration provided by that Article, if the effects of those alleged violations continued after the State party's declaration.²⁷

35. With reference to Article 22, paragraph 5a) of the Convention, which requires that the Committee shall not consider any individual communication unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement, the Committee considers that "the same matter" should be understood as relating to the same parties, the same facts and the same substantive rights.²⁸

²⁷ See communication No. 495/2012, *N.Z. v. Kazakhstan*, decision of 28 November 2014, para. 12.3

²⁸ See e.g. communications No. 247/2004, *A.A. v. Azerbaijan*, decision of inadmissibility adopted on 25 November 2005, para. 6.8; No. 479/2011, *E.E. v. the Russian Federation*, decision of inadmissibility adopted on 24 May 2013, para. 8.4; and No. 642/2014, *M.T. v. Sweden*, decision of inadmissibility

36. According to Article 22, paragraph 5b) the complainant must have exhausted all available effective domestic remedies, available in law and in practice. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of violation of the Convention.²⁹ In the context of Article 3 of the Convention, the Committee considers that exhaustion of domestic remedies means that the complainant has applied for remedies which are directly related to his/her risk of torture in the country to which he/she would be deported, not for remedies that might allow the complainant to remain in the State party.

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 that the complainant should be expelled, returned or extradited.

B. Interim measures of protection

38. When the Committee, or members designated by it, request the State party concerned, for its urgent consideration to take such interim measures that the Committee considers necessary to avoid irreparable damage to the alleged victim or victims of violation of Article 3 of the Convention, in accordance with Rule 114 of the Committee’s rules of procedure, the State party should comply with the Committee’s request in good faith.

39. Non-compliance by the State party with the Committee’s request would make evident that the State party failed in fulfilling its obligations to cooperate with the Committee.³⁰ It would constitute a serious damage and obstacle to the effectiveness of the Committee’s deliberations and would shed a serious doubt on the willingness of the State party to implement Article 22 of the Convention in good faith.

C. Merits

40. With respect to the application of Article 3 of the Convention to the merits of a communication submitted under Article 22 of the Convention, the burden of proof is upon the author of the communication who has to present an arguable case³¹ – i.e. to submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when the complainant is in a situation where he/she cannot elaborate on his/her case, for instance, when the complainant has demonstrated that he/she has no possibility of obtaining documentation relating to his/her

adopted on 7 August 2015, para. 8.3; and No. 643/2014, decision of inadmissibility of 23 November 2015, para. 6.4.

²⁹ See e.g. communications No. 024/1995, *A.E. v. Switzerland*, decision of 2 May 1995, para. 4; No. 441/2010, *Evloev v. Kazakhstan*, decision of 5 November 2013, para. 8.6; and No. 520/2012, *W. G. D. v. Canada*, decision of 26 November 2014, para. 7.4.

³⁰ See communication No. 538/2013, *Tursunov v. Kazakhstan*, decision of 8 May 2015, para. 10, and *Kalinichenko v. Morocco*, paras. 13.1, 13.2 and 16.

³¹ See communications No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 - 10.6; No. 203/2002, *A. R. v. Netherlands*, decision adopted on 14 November 2003, para. 7.3; No. 343/2008, *Arthur Kasombola Kalonzo v. Canada*, decision adopted on 18 May 2012, para. 9.3; No. 458/2011, *X v. Denmark*, decision adopted on 28 November 2014, para. 9.3.; and No. 520/2012, *W.G.D. v. Canada*, decision adopted on 26 November 2014, para. 8.4.

allegation of torture or is deprived of his/her liberty, the burden of proof is reversed³² and it is up to the State concerned to investigate the allegations and verify the information on which the communication is based.

41. It is the responsibility of the State party, at the national level, to assess, through administrative and/or judicial procedures, whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture where he/she would be expelled, returned or extradited.

42. In its procedure of assessment, the State party should provide the person concerned with fundamental guarantees and safeguards (measures of protection) especially if the person is deprived of his/her liberty or the person is in a particularly vulnerable situation such as the situation of an asylum seeker, an unaccompanied minor or a woman who has been subjected to violence.

43. Guarantees and safeguards should include linguistic, legal, medical, social and, when necessary, financial assistance as well as the right to recourse against a decision of deportation within a timeframe which is reasonable for a person in a precarious and stressful situation and with the suspensive effect of the enforcement of the deportation order. When necessary, material support should be provided to the complainant to have access to guarantees and safeguards referred to above free of charge. In particular, a medical examination requested by a complainant to prove the torture that he/she has suffered should always be ensured, regardless of the authorities' assessment on the credibility of the allegation, so that the authorities deciding on a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of that medical examination, without any reasonable doubt.

44. As regards potential factual contradictions and inconsistencies in the author's allegations, the States parties should not require complete accuracy, as it can seldom be expected from victims of torture, unless such inconsistencies give rise to doubts about the general veracity of the author's claims.³³

45. At the international level, the Committee considers crucial, to determine whether there are substantial grounds for believing that a person would be in danger of being subjected to torture, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights referred to in Article 3, paragraph 2, of the Convention. These violations include, but they are not limited to: (a) widespread use of torture and impunity of its perpetrators; (b) harassment and violence against minority groups; (c) situations conducive to genocide; (d) widespread gender violence; (e) widespread use of sentencing and imprisonment of persons exercising fundamental freedoms and (f) situations of international and non-international armed conflicts.

46. The Committee's assessment will be primarily based on the information provided by or on behalf of the complainant and by the State party concerned. It will also consult United Nations sources of information as well as any other sources that the Committee considers reliable.³⁴ In addition, the Committee will take into account any of the indications listed in

³² For comparison, see communication No. 282/2005, *S.P.A. v. Canada*, decision of 7 November 2006, para. 7.5.

³³ See e.g. communications no. 21/1995, *Alan v. Switzerland*, para. 11.3.; no. 634/2014, *M.B., A.B., D.M.B. and D.B. v. Denmark*, para. 9.6; No. 101/1997, *Haydin v. Sweden*, decision of 16 December 1998, paras. 6.6 and 6.7; No. 41/1996, *Kioski v. Sweden*, decision of 12 February 1996, para. 9.3; No. 279/2005, *C.T. and K.M. v. Sweden*, decision of 17 November 2006, para. 7.6.

³⁴ Rule 118 of the Committee's rules of procedure.

paragraph 30 above as constituting substantial grounds for believing that a person is in danger of being tortured if deported.

47. The Committee will consider that “substantial grounds” exist for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing return, expulsion or extradition when the complainant presents credible facts that demonstrate that a substantial risk exists.

48. The Committee will consider the risk as personal, present, foreseeable and real when the existence of the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of his/her deportation. Indications of personal risk may include, but they are not limited to: (a) the complainant’s ethnic background; (b) political affiliation or political activities of the complainant and/or his family members;³⁵ (c) arrest warrant without guarantee of a fair treatment and trial; (d) sentence in absentia; (e) sexual orientation and gender identity;³⁶ (f) desertion from the army or armed groups; (g) previous torture;³⁷ (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;³⁸ (k) violations of the right to freedom of thought, conscience and religion, including violations related to the prohibition of conversion to a religion which is different from the religion proclaimed as State religion and where such a conversion is prohibited and punished in law 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.³⁹

49. When assessing whether the risk of being subjected to torture is personal, present, foreseeable and real for the complainant, the Committee does not exclude that cruel, inhuman or degrading treatments or punishments inflicted or which have reportedly been inflicted in the State of origin on the complainant would amount to torture in specific circumstances.

50. Equally, when assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if he/she is expelled, returned or extradited to another State, the Committee will take into account the human rights situation of that State as a whole and not of a particular area of it. The State party is responsible for any territory under its jurisdiction. The notion of “local danger” does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured.⁴⁰

51. The Committee considers that the so called “internal flight alternative” i. e. the deportation of a person or a victim of torture to an area of a State where he/she would not be exposed to torture unlike in other areas of the same State is not admissible unless the Committee has received reliable information, before the enforcement of the deportation, that the State of deportation has taken effective measures able to guarantee full and sustainable protection of the rights of the person concerned.

52. The State of deportation referred to in the previous paragraph should in particular have taken measures to prevent torture, throughout the territory under its jurisdiction and

³⁵ See e.g. communication No. 375/2009, *T.D. v. Switzerland*, decision adopted on 26 May 2011, para. 7.8.

³⁶ Communication No. 338/2008, *Uttam Mondal v. Sweden*, decision of 23 May 2011, para. 7.7.

³⁷ See *Dadar v. Canada*, decision adopted on 23 November 2005, para. 8.5.

³⁸ See *Abdussamatov et al. v. Kazakhstan*, decision of 1 June 2012, para. 13.8.

³⁹ See *E.K.W. v. Finland*, decision adopted on 4 May 2015, paras. 9.6 – 9.7.

⁴⁰ See communication No 338/2008, *Mondal v. Sweden*, decision of 23 May 2011, para. 7.4.

control, such as clear legislative provisions on the absolute prohibition of torture and its punishment with adequate penalties, measures to put an end to the impunity for acts of torture, violence and other illegal practices committed by public officials, the prosecution of public officials allegedly responsible for acts of torture and other cruel, inhuman or degrading treatment or punishment and their punishment commensurate with the gravity of the crime committed when they are found guilty.

53. All pertinent information may be introduced by both parties to explain the relevance of their submissions under Article 22 to the provisions of Article 3 of the Convention. The following information, while not exhaustive, would be pertinent:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights?

(b) Has the complainant been tortured or ill-treated by or at the instigation of or with the consent or the acquiescence (tacit agreement) of a public official or other person acting in an official capacity in the past? If so, was this a recent past?

(c) Is there medical or other independent evidence to support a claim by the complainant that he/she has been tortured or ill-treated in the past? Has the torture had after-effects?

(d) Has the State party ensured that the complainant facing expulsion, return or extradition from the territory under its jurisdiction or de facto control, has had access to all legal and/or administrative guarantees and safeguards provided by law and, in particular, to an independent medical examination to assess his/her claims that he/she has previously suffered torture or ill-treatment in his/her country of origin?

(e) Is there any credible allegation or evidence that the complainant and/or other person's next of kin have been or will be threatened or exposed to reprisals or other forms of sanctions amounting to torture, cruel, inhuman or degrading treatment or punishment in connection with the communication submitted to the Committee?

(f) Has the author engaged in political or other activities within or outside the State concerned which would appear to make him/her vulnerable to the risk of being subjected to torture were he/she to be expelled, returned or extradited to the State in question?

(g) If returned to the State of deportation, is the complainant at risk of further deportation to another State where he/she would face the risk of being subjected to torture?

(h) Bearing in mind the status of physical and psychological fragility encountered by the majority of complainants such as asylum seekers, former detainees, victims of torture or sexual violence etc. which is conducive to some inconsistencies and/or lapses of memory in their submissions, is there any evidence as to the credibility of the complainant?

(i) Taking into account some inconsistencies that may exist in the presentation of the facts, has the complainant demonstrated a general veracity of his/her claims?⁴¹

XI. Independence of assessment of the Committee

54. The Committee is a monitoring body created by the Convention and its members are elected by the States parties themselves to guide them towards a correct and full

⁴¹ See *S.P.A. v. Canada*, decision of 7 November 2006, para. 7.5.

implementation of the Convention. The Committee gives considerable weight to findings of fact made by organs of the State party concerned,⁴² but the Committee is not bound by such findings. It follows that it will make a free assessment of the information available to it in accordance with Article 22, paragraph 4, of the Convention, taking into account all the circumstances relevant to each case, such as the characteristics of the complainant or the situation of vulnerability in which he/she finds him/her-self (e.g. sex, age, status of health and personal perception of severe suffering).

55. The principle of the benefit of the doubt, as a preventive measure against irreparable harm, will also be taken into account by the Committee in adopting its views on cases, where the principle is relevant.

⁴² See *T.D. v. Switzerland*, decision adopted on 26 May 2011, para. 7.7; and communication No. 466/2011, *Alp v. Denmark*, decision adopted on 14 May 2014, para. 8.3.