



**Committee against Torture, Draft Revised General Comment No. 1
on the implementation of article 3 of the Convention in the context of article 22**

COMMENTS BY THE GOVERNMENT OF CANADA

1. The Government of Canada appreciates the work of the Committee against Torture in monitoring States Parties' implementation of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("the Convention"). Canada wishes to thank the Committee for the opportunity to comment on Draft Revised General Comment No. 1 on the implementation of article 3 of the Convention in the context of article 22 ("the Draft Revised General Comment").¹ Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States Parties on issues such as the content of General Comments.
2. Canada recognises the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Convention that is necessarily agreed upon by States Parties.
3. As a general comment, Canada recommends that the Committee use a consistent term to distinguish the State that performs the removal, deportation or extradition from the State that receives the individual. For greater clarity, Canada proposes "the removing State" and the "receiving State".
4. Similarly, Canada also encourages the Committee to avoid paraphrasing and directly use the language of the Convention particularly Article 3, where possible.

(1) Comments concerning the Article 22 procedure

Paragraphs 36 and 37: Remedies

5. In paragraphs 36 and 37, Canada does not agree with the Committee's narrow approach to what kinds of remedies must be exhausted as a condition of admissibility, in the context of Article 3. According to Article 22(5)(b) of the Convention, exhaustion of domestic remedies requires an individual to exhaust all "available domestic remedies" that are not "unreasonably prolonged" or "unlikely to bring effective relief".
6. Canada's interpretation is that a domestic process will be an available and effective domestic remedy to prevent Article 3 violations if it: (1) is reasonably accessible; (2) can potentially lead to suspension of the individual's removal pending completion of the process²; (3)

¹ CAT/C/60/R.2/General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22. Adopted by the Committee on first reading on 6 December 2016.

² See below at paragraphs 26-27, for additional discussion of the "suspensive effect" of domestic remedies.

involves consideration of the implications of removal for the individual concerned, and in light of that consideration has the potential to allow the individual to remain in the removing State; (4) is a procedure provided by law; and (5) is reviewable by independent administrative and/or judicial authorities.

7. In Canada's view, paragraphs 36 and 37 should reflect the principles set out above. Additionally, Canada has specific concerns with two aspects of paragraph 37. First, the call for recourses to be accessible "without any obstacles of any nature" is overly broad and unrealistic in practice. A remedial avenue need only be "reasonably accessible". Second, the indication that decisions "should be reviewed" by an independent authority is also overbroad. An effective remedial scheme should provide for the possibility of review, but paragraph 37 could be misunderstood as implying that review should occur for each decision as a regular practice. It is more appropriate to call for decisions to be "reviewable" by independent authorities.

Paragraph 39: Requests for interim measures

8. Canada's next area of comment relates to paragraph 39. Canada has a long-standing commitment to engage in good faith with the individual communications procedure established by Article 22. Canada appreciates that interim measures requests may be an important means by which fundamental human rights may be protected from immediate and irreversible harm, pending the Committee's consideration of a case. Nevertheless, interim measures requests are not legally binding in international or domestic law.
9. Canada supports the important work of the Committee and always gives its requests due consideration. However, Canada firmly disagrees with the position taken in paragraph 39. There is no requirement under Article 22 for States Parties to comply with the Committee's requests. Where a State Party does not agree with the Committee's decision to make an interim measures request but nevertheless continues to engage with the communications procedure (for example through the filing of written submissions to explain its position), this is not a failure of the State to fulfill obligations under the Convention, including any obligation to cooperate with the Committee.

Paragraph 43: Assessment of an individual's claim

10. Canada's next area of comment is paragraph 43, which describes best practices to facilitate a fair domestic assessment of an individual's claim that his or her removal would be a violation of Article 3. In Canada's view, this text should be more flexible in identifying potential best practices. With respect to medical examinations, it is unrealistic and inappropriate to describe them as a process that must be provided in each case. Depending on the circumstances, there are often other ways to assess an individual's credibility, and allegations of past torture can be one of many relevant factors in assessing risk on a prospective basis.
11. Canada therefore suggests that paragraph 43 be replaced with the following:
"Where appropriate and depending on an individual's circumstances, guarantees and safeguards can include:
 - (a) Linguistic, legal, medical, social and, when necessary, financial assistance;

- (b) Reasonable access to review of a decision of deportation within a timeframe which is reasonable for an individual in a precarious and stressful situation and with the potential for the review application to have a suspensive effect on the enforcement of the deportation order; and
- (c) Where appropriate, a medical examination at the initiative of a complainant, which can help to assess the credibility of the individual's allegations, and assist authorities in completing their assessment of the risk of torture."

Paragraphs 50 and 51: Article 3 and the internal flight alternative

12. Canada's next area of comment relates to the notion of internal flight alternative and its relevance to the implementation of Article 3. In paragraph 50 of the Draft Revised General Comment, the Committee signals that it "will take into account the human rights situation of that State as a whole and not a particular area of it", partially because the "State party is responsible for any territory under its jurisdiction."
13. Canada does not agree with this approach to Article 3, and recommends deletion of paragraph 50. The assessment of risk is a factual one, and it must take into account all of the person's individual circumstances to determine whether the person would be at risk of torture upon return. In certain circumstances, especially where the receiving State is geographically large and/or the risk faced by the individual is based in a specific identifiable area, variations in rights protection between different areas of the receiving State can be a relevant concern. Although the receiving State has responsibilities for any territory under its jurisdiction (if it is a State Party to the Convention), the relevant question for Article 3 is a factual assessment for the individual and not a legal assessment of responsibility for the receiving State.
14. With respect to paragraph 51, Canada has serious concerns about the call for "reliable information before the deportation that the State of return has taken effective measures to guarantee the full and sustainable protection of rights of the person concerned." A literal interpretation of this statement would raise serious concerns for the privacy of the author of the communication.
15. Moreover, paragraph 51 describes an absolutist approach to the "admissibility" of such arguments, which is inconsistent with the contextual and fact-dependent nature of the Article 3 obligation. It is also confusing from a procedural perspective: the concept of admissibility applies to authors' communications, and not to particular arguments made by authors or States Parties.
16. Canada would suggest a more nuanced approach to outlining the kind of information that is useful to the Committee where an internal flight alternative is at issue. Canada recommends redrafting paragraph 51 as follows:
 - "In order to support the position that an individual has an 'internal flight alternative' in the receiving State, the removing State should provide to the Committee reliable (recent and objective) information to support its conclusion that the individual can access a specific area of the country where he or she would not be in danger of being subjected to torture. This can include information relevant to the specific circumstances of the individual's case, along with up to date reports on actual country

conditions. Ultimately, the question is whether the removal would foreseeably expose the individual to a danger of being subjected to torture, in all the facts of the case, including information on variations in rights protection within the receiving State.”

(2) Comments concerning the legal content of Article 3

Paragraph 8, 9 and 10: On the absolute nature of Article 3 and its scope

17. Canada has concerns regarding paragraph 8 of the Draft Revised General Comment, which addresses the absolute nature of Article 3 of the Convention. Rather than referring to the “principle of non-refoulement”, paragraph 8 should be more precise and based in the obligations of the Convention itself, and thus make clear that it is the Article 3 prohibition that is absolute.
18. Canada would therefore suggest the following rephrasing of paragraph 8: “The Article 3 prohibition, embodying the principle of ‘non-refoulement’ of persons in danger of being tortured, is similarly absolute.”
19. Canada’s next comment is on paragraphs 9 and 10 of the Draft Revised General Comment, which discuss the scope of a State Party’s obligations under Article 3. Canada notes that while Article 2(1) of the Convention establishes an obligation for each State Party to take effective measures to prevent torture “in any territory under its jurisdiction”, the other provisions of the Convention are specific obligations that do not necessarily have the same scope as the general Article 2(1) obligation. For example, Articles 5(2), 6(1), 7(1), 12, 13, and 16 all contain their own language with respect to scope.
20. Turning to Article 3, the application of this provision is factual in nature: it applies whenever a State Party seeks to “expel, return (*refouler*) or extradite a person to another State.” Canada agrees this provision may be applicable outside the territory of the State in narrow and specific circumstances.
21. Canada would therefore suggest that paragraphs 9 and 10 should be replaced by the following text:

“Each State party must apply the principle of non-refoulement, as set out in Article 3, whenever it seeks to ‘expel, return (*refouler*) or extradite a person to another State’.”

Paragraphs 14 and 18: best practices for preventing refoulement

22. Paragraphs 14 and 18 of the Draft Revised General Comment overlap in their content, and both essentially describe best practices for preventing refoulement to a danger of being subjected to torture. The measures set out in paragraph 14 are not necessarily obligations that flow from Article 3 of the Convention. Thus, Canada recommends moving the guidelines in paragraph 14 to the list in paragraph 18.
23. Canada does not agree with the statement in paragraph 18(e) of the Draft Revised General Comment that, as a best practice to prevent Article 3 violations, the individual should have a “right of appeal ... with the suspensive effect of [the deportation order’s] enforcement”. Canada has two suggestions to add nuance, and reflect the range of ways in which States Parties can effectively ensure respect for Article 3.

24. First, in Canada's view, the reference to an appeal must take into account different domestic legal systems around the world including those countries, like Canada, that have administrative law systems. Canada understands a "right of appeal" in this context to be intended to mean an independent review of the decision at first instance. This includes judicial review as practised in Canada. As this Committee has recognized in several individual communications involving Canada, judicial reviews "are not mere formalities" because the reviewing court "may, in appropriate cases, look at the substance of a case", for example to review the substantive reasonableness of the decision.³
25. A court performing judicial review will properly show some degree of deference to the expert administrative tribunal's decision. But if it finds an error of law or an unreasonable finding of fact in the decision under review, it has the authority to set the administrative decision aside and send it back for re-determination by a different decision-maker, in accordance with such directions as the court considers to be appropriate. Therefore, judicial review of administrative decisions is an effective remedy that can scrutinize the substance of a decision.
26. Second, the draft text is unclear in its reference to "suspensive effect". It is not necessary for a review application to have "automatic" suspensive effect (i.e., immediately upon an application being made), as long as accessible mechanisms exist to consider whether suspension of removal is warranted in the individual's case, pending review of the decision. This precision should be reflected in the text. (Canada notes that the Committee follows a similar approach under the Article 22 procedure, to the extent that it considers the information available before deciding whether to make a request for interim measures.)
27. Therefore, Canada recommends that paragraph 18(e) should be rephrased as follows:
"The right of review by the person concerned against a deportation order to an independent administrative or judicial body, within a reasonable period of time after the individual is notified of the order, and with the potential for suspensive effect of the order's enforcement pending review."

Paragraph 20: Diplomatic assurances

28. Canada has joined in a joint submission with the United States, United Kingdom, and Denmark on the subject of diplomatic assurances⁴. Canada does not agree with the suggestion that "diplomatic assurances from a State Party to the Convention to which a person is to be deported" are inherently contrary to the principle of non-refoulement.
29. Canada therefore recommends rephrasing paragraph 20 as follows:
"The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported or extradited should not replace the individualized risk assessment necessary to determine if there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State."

³ *Aung v. Canada*, CAT Communication No. 273/2005 (2006) at para. 6.3; *L.Z.B. v. Canada*, CAT Communication No. 304/2006 (2007) at para. 6.6.

⁴ Joint Observations of Canada, Denmark, the United Kingdom, and the United States of America of 31 March 2017 in relation to paragraph 19 and 20 of the draft General Comment.

Diplomatic assurances cannot be used in such a way as to avoid States parties' obligations to respect Article 3.”

Paragraphs 21 and 22: Redress and compensation

30. Canada recommends clarification of paragraphs 21 and 22, concerning redress and compensation. Paragraph 21 addresses the rehabilitation needs of victims of torture, including where the individuals are subject to removal. This paragraph is not clear, especially because it does not distinguish between what is an obligation under Article 3 and what is more relevant to rehabilitation obligations under Article 14. In Canada's view, the measures discussed in paragraph 21 may arise in the context of fulfilling a State Party's obligations under Article 14 of the Convention. The measures are not obligations arising from Article 3 itself. Canada recommends clarifying this in the text.
31. Similarly, paragraph 22 describes redress and compensation measures that may function as remedies for individuals who have suffered a violation of Article 3. To better reflect the context-specific nature of remedial obligations, Canada would rephrase paragraph 22 as follows:
- “Where an individual has suffered a violation of Article 3 as a result of a deportation or other removal, the removing State may consider one or more of the following as potential effective remedies to extend to the individual:
- a) Financial and/or legal assistance, in order to enable the individual to access judicial procedures empowered to put an end to individual's risk of torture or any ongoing torture;
 - b) Requests to independent international experts or organizations or national experts and institutions to carry out monitoring and follow-up visits to the individual concerned and facilitate their access to judicial remedies; and
 - c) When necessary, legal, administrative, and/or diplomatic procedures for the return of the individual to its territory, as long as any such measures are in accordance with the human rights of the individual (including his or her right to liberty and security of the person) and the rights of the receiving State and any other implicated States.”

Sub-paragraphs 30(h), (k) and (l): Specific human rights situations

32. Canada's next area of comment concerns paragraph 30 (h), which relates to the application of the Geneva Conventions. Canada recommends that this paragraph should insert the caveat: “Whether the person concerned would be deported to a State party to the Geneva Conventions and their Protocols where, in the context of a non-international armed conflict, ...” Further, Canada recommends for the footnotes for this section that the actual text of the Convention be used for clarity and, for Protocol II Article 4, paragraph 2 is sufficient for citation as paragraph 1 does not speak to the underlying issue of torture.
33. Paragraphs 30 (i) and (j) also relate to the application of the Geneva Conventions. Canada recommends that both paragraphs insert the caveat: “Whether the person concerned would be deported to a State where, in the context of an international armed conflict, ...”

34. Paragraphs 30 (k) and (l) raise the potential infliction of the death penalty in the receiving State. Canada notes that such issues can sometimes be relevant to assessing risk for the purpose of Article 3 of the Convention, but they are most directly addressed by Article 6 of the *International Covenant on Civil and Political Rights* and the non-refoulement obligations associated with that provision. Canada recommends that the language relating to the death penalty in paragraph 30(k) be deleted, but that paragraph 30(l) be retained. The language in paragraph 30(l) would be adequate to fully and elegantly address these issues to the extent they are relevant to Article 3 of the Convention.

Paragraphs 31 and 32: Non-State actors

35. Paragraph 31 discusses potential risks from non-State actors in the receiving State. Canada notes that Article 3 applies where the individual is in danger of being subjected to “torture”, as defined by Article 1. Paragraph 31 goes beyond the scope of Article 3, to the extent it refers to risks “at the hands of non-State actors over which the [receiving State] has no or only partial de facto control or is unable to counter their impunity”. In other words, paragraph 31 refers to human rights abuses by non-State actors that lack the kind of connection to the State that is required for abuses to amount to “torture” under Article 1.⁵ The draft appears to recognize this by framing this paragraph as a recommendation (“should”) rather than an obligation.

36. Canada recommends that the Committee should clarify in the text that paragraph 31 goes beyond the scope of States Parties’ binding obligations under Article 3.

37. As for paragraph 32, Canada recommends clarifying what is intended by the phrase “military operation programs”. This is not a term familiar to Canada, and therefore we are unable to comment.

(3) Comments to strengthen the drafting

Paragraph 5: Competence to consider individual complaints

38. Canada’s next comment is with respect to paragraph 5, which addresses the competence of the Committee to consider communications from or on behalf of individuals. Pursuant to Article 22, these individuals must be subject to the jurisdiction of the State Party concerned. However, the way that Article 22 is quoted in the Committee’s draft mistakenly implies that the communication procedure is open to individuals subject to the Committee’s jurisdiction.

39. Canada therefore recommends rephrasing as follows:

“Pursuant to Article 22 of the Convention, the Committee ‘receives and considers communications from or on behalf of individuals’ subject to a State party’s jurisdiction ‘who claim to be victims of a violation by a State party of the provisions of the Convention.’ As Article 22 makes clear, such communications may only concern a State Party that has declared that it recognizes the Committee’s competence in this regard.”

⁵ See e.g. Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008) at 200 (as illustrated by views of the Committee against Torture, “threats of torture by non-State actors without the consent or acquiescence of the government fall outside the scope of Article 3.”).

Paragraph 17: The definition of torture

40. With respect to the second sentence of paragraph 17 of the Draft Revised General Comment, Canada expresses concern about the reference to “infliction of violent acts”. This reference is too narrow an articulation of the forms that torture can take, as per the definition at Article 1 of the Convention. Torture may be inflicted through a single act or through a series of actions that may not necessarily qualify as “violent”.
41. To more closely track Article 1 of the Convention, Canada recommends rewording the second sentence of paragraph 17 as follows:
“It depends on the negative physical or mental repercussions that are or may be experienced by the individual in question, taking into account all relevant circumstances of each 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.”

Paragraph 24: Article 3 of the Convention and extradition treaties

42. In paragraph 24, Canada recommends a more explicit recognition of the important objectives pursued by extradition treaties. The Convention itself includes provisions that rely for their effectiveness on timely extradition and mutual legal assistance between States Parties.
43. Canada recommends adding the following text for paragraph 24:
“The Committee also acknowledges that as crime continues to become increasingly transnational in nature, extradition has become an increasingly critical tool to ensure that serious crime can be effectively prosecuted. In order to be effective extradition proceedings must be efficient; significant delays in the extradition process can seriously undermine the criminal proceedings that underlie a request for extradition. The crucial role of extradition in combating impunity and facilitating law enforcement is recognized by the CAT itself.”

Paragraph 29: Article 3 in the context of Article 16(2)

44. Canada’s final area of comment relates to the indication of a danger of torture described in paragraph 29. Canada agrees that past incidents where cruel, inhuman or degrading treatment or punishment was inflicted on the individual or their family in the receiving State are a relevant consideration when assessing the individual’s danger of being subjected to torture, in the receiving State post-removal. This would apply where the receiving State is the individual’s State of origin. However, past infliction of cruel, inhuman or degrading treatment or punishment in the State of origin is not necessarily a relevant consideration if the receiving State is not the State of origin. Similarly, the treatment or punishment inflicted on a family member in the past would not necessarily establish substantial grounds that the individual facing removal will be subjected to a danger of torture.
45. Canada would therefore rephrase paragraph 29 as follows:
“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 a person or his/her family were exposed or would be exposed in the receiving State,

constitutes an indication that the person may be in danger of being subjected to torture if he/she is expelled, returned or extradited to the receiving State. States parties should consider this factor when determining whether the person would be in danger of being subjected to torture in the receiving State, post-removal.”

Conclusion

46. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft Revised General Comment, and more generally its support for the work of the Committee. Canada avails itself of the opportunity to renew to the Committee the assurances of its highest consideration.

Ottawa
26 April 2017