The Open Society Justice Initiative respectfully submits these comments and recommendations in response to the Committee against Torture’s draft *General Comment on the implementation of article 3 of the Convention in the context of article 22 (Doc. CAT/C/60/R.2)*. The Open Society Justice Initiative promotes and advances human rights and the rule of law around the world through a combination of litigation, legal advocacy, access to justice and legal empowerment work, research, and communications.

Our submission addresses the following three parts of the Committee’s draft: (1) Section II: “General principles”; (2) Section III: “Preventive measures to guarantee the principle of ‘non refoulement;’” and (3) Section X: “Specific requirements for the submission of individual communications under Article 22 of the Convention and interim measures of protection.” For each section, we suggest where the Committee should clarify existing language in the draft Comment, and where it should expand on substantive rights that the draft does not currently address.

**Section II. General principles**

**1. As drafted, this section does not sufficiently address the scope of non-refoulement protections.** Specifically, the General Comment should specify that the principle of non-refoulement applies to *any* obligatory departure of an individual to the *de facto* or *de jure* jurisdiction of another State.[[1]](#footnote-1) This reflects U.N. General Assembly and Human Rights Council resolutions that urge States not to “expel, return (‘refouler’), extradite or in *any other way transfer* a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.”[[2]](#footnote-2)

**2. The Committee should further clarify [immediately following paragraph 10 of the draft Comment] that an individual being forcibly transferred need not cross an international border for non-refoulement protections to apply.[[3]](#footnote-3)** The Committee raised Article 3 concerns with regard to foreign coalition forces in Afghanistan handing people they detained to Afghan authorities. These transferred persons never crossed an international border, yet they were transferred from the *de jure* or *de facto* control of one State to the *de jure* or *de facto* control of another State. In its Concluding Observations on Canada, this Committee said that Canada should “adopt a policy for future military operations that clearly prohibits the prisoner transfers to another country when there are substantial grounds for believing that he or she would be in danger of being subjected to torture.”[[4]](#footnote-4) The Committee made a similar recommendation in its Concluding Observations on the United Kingdom.[[5]](#footnote-5)

**3. The Committee should include as an additional general principle that States have a duty to comply with its decisions in good faith.** By making a declaration under Article 22 (1), States accepted a duty to implement and respect the legal obligations set out in therein. These include an implied obligation to comply with Committee’s decisions in good faith.[[6]](#footnote-6)

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

**4. The measures listed in this part of the Comment are legal obligations rather than “best practices.”** Insofar as the measures listed in Section III are supported by the Committee’s jurisprudence and concluding observations, other authoritative human rights bodies, and general principles of human rights law, it would undermine the Convention if the Comment inaccurately described the measures merely as “recommended best practices.” The Comment should instead describe them as legal obligations.

**5. Section III of the Comment lists measures that are part of the right to an effective remedy to prevent refoulement. This section should be expanded to cover the full scope of that right.** Section III lists types of measures that the Committee has regularly regarded as legal obligations under Article 3’s right to an effective remedy to prevent refoulement. Section III, therefore, should be described as such. However, the draft Comment’s list is not complete and it would be disadvantageous to provide an incomplete list of what this right to an effective remedy contains under Article 3. To best ensure compliance with this right, the Committee should supplement paragraph 18 with its views on effective remedies contained elsewhere in the draft General Comment, in particular in paragraphs 37 and 41 – 44.

Additionally:

* Paragraph 18(a) should clarify that a non-refoulement claim must be examined in advance of the transfer,[[7]](#footnote-7) the examination must be thorough,[[8]](#footnote-8) and it must be conducted by an effective and impartial[[9]](#footnote-9) judicial or administrative body.
* The Committee should recognize in paragraph 18(a) that an individual may not have sufficient knowledge or awareness of the real risk that her transfer might entail or have the ability or willingness to disclose information relevant to an effective examination. For that reason, the Committee might consider adopting an approach similar to the European Court of Human Rights and hold that when a State is made aware of facts that could expose an individual to a risk of transfer, including but not limited to knowledge of a pattern of gross, flagrant, or mass violations of human rights in the destination country, it must carry out an assessment of that information of its own motion.[[10]](#footnote-10)
* Paragraph 18(e) should clarify that the appeal procedure must be *judicial*[[11]](#footnote-11) and include the ability to review the legality of the transfer on substantive and procedural grounds.[[12]](#footnote-12)

In addition, the Committee should clarify under paragraph 18 that States have the following obligations:

* *Notification of rights:* A person must be promptly informed of her rights to challenge a transfer decision in a language she understands.[[13]](#footnote-13)
* *Adequate time and facilities:* Those making a non-refoulement claim must have the right to access information and provide evidence that supports refoulement concerns (including information about gross human rights violations).[[14]](#footnote-14) The individual should also be provided with the right to examine and challenge evidence that disputes her refoulement claim.[[15]](#footnote-15)
* *Notification of decision:* An individual must be provided with a decision and reasons for the decision to transfer or not to transfer in a language they understand.[[16]](#footnote-16)
* *Automatic suspensive effect:* When any non-refoulement application is lodged, it must have an immediate and automatic suspensive effect.[[17]](#footnote-17)
* *Non-discrimination:* Non-refoulment decisions, and the procedures in place to examine those decisions, must be applied in a non-discriminatory manner;[[18]](#footnote-18)
* *Confidentiality:* Individuals making a refoulement claims must have their confidentiality respected to ensure they and their families and dependents do not fear reprisals or other harms, especially from the place to which they fear returning;[[19]](#footnote-19)
* *Needs of juveniles:* Juveniles must have the right to an effective remedy to prevent refoulement under Article 3, taking into account the legal rights and best interests and vulnerabilities of the child.[[20]](#footnote-20)

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

**6. The Committee should clarify that States parties “must” comply with the Committee’s request for interim measures in good faith.** Paragraph 38 currently reads, “the State party *should* comply with the Committee’s request;” however, this language diminishes the legal obligation to comply. If the Committee’s interim measures instructions are breached, it nullifies the effective exercise of the right conferred by article 22, and would render the Committee’s final decision on the merits futile.[[21]](#footnote-21)

**7. In paragraph 39, the draft Comment should refer to the established practice of the Committee.** The Justice Initiative notes that, notwithstanding the language of the draft Comment in paragraph 39 (non-compliance “would constitute a serious damage and obstacle to the effectiveness of the Committee’s deliberations and would shed serious doubt on the willingness of the State party to implement Article 22 ... in good faith”), this formulation draws from the dissenting opinion in *Tursunov v. Kazakhstan*, rather than the majority opinion. Quoting the dissenting opinion risks confusion as the draft Comment should affirm the majority’s view in *Tursunov* that both articles 3 and 22 of the Convention were violated by the State party’s unlawful extradition.[[22]](#footnote-22)

**8. In Section X(B) (“Interim measures of protection”), the draft Comment should clarify the remedy for violating an interim measure of protection, which it currently does not do.** In case of violation of interim measures and a transfer of an individual to another State despite the Committee’s request for interim measures, a safe return of a complainant and the grant of a residence permit might be assessed by the Committee as a remedy to a violation of Article 22.[[23]](#footnote-23)

**9. The draft Comment should elaborate on the Committee’s practice related to the intimidation of complainants and receiving withdrawal of the claims, which it currently does not do.** It is important to reaffirm that within the framework of the procedure for individual communications set out in article 22, State parties are required to abstain from any acts of intimidation or reprisal against complainants, their families and/or authorized representatives. Such acts may include, but are not limited to, any forms of direct or indirect threats, coercion and other improper acts aimed at dissuading or discouraging complainants or potential complainants or at pressuring them to withdraw or modify their claims.[[24]](#footnote-24) If the Committee receives withdrawal from communication produced under suspicious circumstances, it might find a violation of article 13 of the Convention as well as a State party’s interference with the complainant’s right of petition, which might also amount to a violation of article 22 of the Convention.[[25]](#footnote-25)

**10. The draft Comment should specify the obligation of State parties to comply with decisions of the Committee, which it does not currently do.** By ratifying the Convention and making a declaration under its Article 22 (1), States have accepted a duty to implement and respect the legal obligations set out therein. These include an implied obligation to comply with Committee’s decisions in good faith.[[26]](#footnote-26)

**11.** In addition to highlighting the obligation of State parties to comply with the decisions of the Committee, **the draft Comment should encourage States to institutionalize the implementation of decisions at the national level.** [[27]](#footnote-27)

1. Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (2008), p.195-196. [↑](#footnote-ref-1)
2. U.N. Human Rights Council, A/HRC/16/L.12, 21 March 2011, para. 7(d); U.N. General Assembly, A/RES/62/148, 4 March 2008, para. 12. [↑](#footnote-ref-2)
3. See, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/70/303, 7 August 2015, para. 38 (“the individual being transferred need not cross an international border for [the non-refoulement] obligation to apply.”) [↑](#footnote-ref-3)
4. UNCAT, CAT/C/CAN/CO/6, para. 11. [↑](#footnote-ref-4)
5. UNCAT, CAT/C/GBR/CO/5, para. 19. [↑](#footnote-ref-5)
6. CAT, Rapporteur on Follow-Up, CAT/C/SR.717 at para 60; see also Dar v Norway, at para 16.3. [↑](#footnote-ref-6)
7. UNCAT, *Agiza v. Sweden*, Communication No. 233/2003, 20 May 2005, para. 13.7; UNCAT, *Tebourski v. France*, Communication No. 300/2006, 11 May 2007, para 7.3; UNCAT, *Concluding observations on the sixth periodic report of Ukraine*, CAT/C/UKR/CO/6, 12 December 2014, para. 17(c). See, also, ECtHR, *Čonka v B*similar to fonsider adopting theas such.der Article 3 e remedy.us f this right.an Rights, whihc by a competent, effective and ac*elgium*. Application no. 51564/99, 5 February 2002, para. 79 & 83. [↑](#footnote-ref-7)
8. ##  UNCAT, *X. v. Kazakhstan*, Communication No. 554/2013, 3 August 2015, para. 12.7; UNCAT, *Concluding observations on the fifth periodic report of Israel*, CAT/C/ISR/CO/5, 3 June 2016, para. 47(a); UNCAT, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 3 February 2016, para. 48. The ECtHR similarly requires “rigorous scrutiny.” ECtHR, *Abdolkani and Karimnia v. Turkey*, Application no. 30471/08, 22 September 2009, para. 113.

 [↑](#footnote-ref-8)
9. UNCAT, *Agiza v. Sweden*, Communication No. 233/2003, 20 May 2005, para. 13.7; UNCAT, *Concluding observations on the third periodic report of Slovakia*, CAT/C/SVK/CO/3, para. 17(a). [↑](#footnote-ref-9)
10. ECtHR, *F.G. v. Sweden*, Application no. [43611/11](http://hudoc.echr.coe.int/eng#{"appno":["43611/11"]}), 23 March 2016, paras. 127 and 156. [↑](#footnote-ref-10)
11. UNCAT, *Concluding observations on the third periodic report of Jordan*, CAT/C/JOR/CO/3, 29 January 2016, para. 14(d); UNCAT, *Concluding observations on the second periodic report of Saudi Arabia*, CAT/C/SAU/CO/2, 8 June 2016, para. 47(b); UNCAT, *Concluding observations on the initial report of Iraq*, CAT/C/IRQ/CO/1, 7 September 2015, para. 26(b).. [↑](#footnote-ref-11)
12. UNCAT, *Nirmal Singh v. Canada*, Communication No. 319/2007, 30 May 2011, para. 8.8 & 8.9. See, also, ECtHR, *Muminov v. Russia*, Application no. 42502/06 11 December 2008, para. 102; ECtHR, *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000, para. 40. [↑](#footnote-ref-12)
13. UNCAT, *Concluding observations on the combined sixth and seventh periodic reports of Norway, adopted by the Committee at its forty-ninth session (29 October to 23 November 2012)*, CAT/C/NOR/CO/6-7, 13 December 2012, para. 16. See, also, European Parliament, Directive 2013/32EU, 26 June 2013, Article 12(1)(a). [↑](#footnote-ref-13)
14. UNCAT, *Concluding observations on the combined fifth and sixth periodic reports of the Netherlands, adopted by the Committee at its fiftieth session (6-31 May 2013),* CAT/C/NLD/CO/5-6, 20 June 2013, para. 11(a) and (c);

UNCAT, *Conclusions and recommendations of the Committee against Torture: Tajikistan*, CAT/C/TJK/CO/1, 7 December 2006, para. 13. See, also, European Parliament, Directive 2013/32EU, 26 June 2013, Article 12(1)(d). [↑](#footnote-ref-14)
15. UNCAT, *Concluding observations of the Committee against Torture: New Zealand*, CAT/C/NZL/CO/5, 14 May 2009, para. 6. [↑](#footnote-ref-15)
16. ECtHR, *Abdolkani and Karimnia v. Turkey*, Application no. 30471/08, 22 September 2009, para. 116; European Parliament, Directive 2013/32EU, 26 June 2013, Articles 12(1)(e) and (f), and Article 11. [↑](#footnote-ref-16)
17. ###  UNCAT, *Concluding observations of the Committee against Torture: Greece*, CAT/C/GRC/CO/5-6, 27 June 2012, para. 19; UNCAT, *Concluding observations of the Committee against Torture: Austria*, CAT/C/AUT/CO/4-5, 20 May 2010, para. 13; UNCAT, *Arana v. France*, Communication No. 63/1997, 5 June 2000, para. 6.1; ECtHR, *Čonka v Belgium*. Application no. 51564/99, 5 February 2002, para. 82.

 [↑](#footnote-ref-17)
18. UNCAT, *Concluding observations on the third to fifth periodic reports of United States of America*, CAT/C/USA/CO/3-5, 19 December 2014, para. 18(b). UNCAT, *Concluding observations on the third periodic report of Kazakhstan*, CAT/C/KAZ/CO/3, 12 December 2014, para. 16(b); UNCAT, *Conclusions and recommendations of the Committee against Torture: Qatar*, CAT/C/QAT/CO/1, 25 July 2006, para. 14. [↑](#footnote-ref-18)
19. UNCAT*, Concluding observations on the combined third to fifth periodic reports of the United States of America*, CAT/C/USA/CO/3-5, 19 December 2014, para. 18(b); UNCAT, *Concluding observations on the third periodic report of Uruguay*, CAT/C/URY/CO/3, 10 June 2014, para. 18(b); UNCAT, *Nasirov v. Kazakhstan*, Communication No. 475/2011, 14 May 2014, para. 11.9**.** See, also, European Parliament, Directive 2013/32EU, 26 June 2013, Article 30. [↑](#footnote-ref-19)
20. Committee on Rights of the Child, General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005 – page 7, para 27; European Parliament, Directive 2013/32EU, 26 June 2013, Article 7. [↑](#footnote-ref-20)
21. UNCAT, *Mafhoud Brada v. France*, Communication No. 195/2002 CAT/C/34/D/195/2002 (2005), para 8.2; UNCAT *Elif Pelit v Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005 (2007), para. 10.2. [↑](#footnote-ref-21)
22. UNCAT, *Kalinichenko v Morocco*, Communication No. 428/2010, CAT/C/47/D/428/2010 (2012), para 13.1, 13.2; *Tursunov v* *Kazakhstan,* Communication No. 538/2013, CAT/C/54/D/538/2013, para. 7.1, 7.2; UNCAT *Mafhoud Brada v. France*, Communication No. 195/2002 CAT/C/34/D/195/2002 (2005), para. 8.2; UNCAT, *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003 (2005), para. 13.9; *Nadeem Ahmad Dar v. Norway*, Communication No. 249/2004, CAT/C/38/D/249/2004 (2007) para. 6.7, 16.3, 17; UNCAT *Elif Pelit v Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005 (2007) para 10.2; *Adel Tebourski v. France*, Communication No. 300/2006, CAT/C/38/D/300/2006 (2007). The language in the current draft uses the formulation of the dissenting opinion in Tursunov v Kazakhstan, Communication No. 538/2013, CAT/C/54/D/538/2013 (2015), see Appendix, page 11, para. 1-3. [↑](#footnote-ref-22)
23. UNCAT, *Nadeem Ahmad Dar v. Norway*, Communication No. 249/2004, CAT/C/38/D/249/2004 (2007) para 16.7. [↑](#footnote-ref-23)
24. UNCAT, *Gerasimov v Kazakhstan*, Communication No.433/2010, CAT/C/48/D/433/2010 (2012) para 12.9. [↑](#footnote-ref-24)
25. UNCAT, *Gerasimov v Kazakhstan*, Communication No.433/2010, CAT/C/48/D/433/2010 (2012) para. 12.10. [↑](#footnote-ref-25)
26. CAT, Rapporteur on Follow-Up, CAT/C/SR.717 at para 60; UNCAT Concluding Observations on the sixth periodic report of Canada, CAT/C/CAN/CO/6, 25 June 2012, para. 10; Human Rights Committee, *General Comment No. 33*, paras. 11 and 13. The Human Rights Committee has stated that its views on individual communications constitute “authoritative” interpretations of the treaty and as such are “determinative” of states’ rights and obligations; States Parties therefore have an obligation to “use whatever means lie within their power in order to give effect to the views issued by the Committee”. CEDAW, General Recommendation No. 28. para. 7, states that “the scope of the general obligations contained in article 2 should also be construed in the light of the general recommendations, concluding observations, views and other statements issued by the Committee, including the reports on the inquiry procedures and the decisions of individual cases.” UN Human Rights Committee, *General Comment No. 31*, para. 4 states that ‘All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.”

*See also* UNCAT, *General Comment No. 3*, para. 38 (“States parties to the Convention have an obligation to ensure that the right to redress is effective.”) See further Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (2008), para 199, page 796. [↑](#footnote-ref-26)
27. UNCAT *Concluding Observations on the third periodic report of Kazakhstan*, CAT/C/KAZ/CO/3, 12 December 2014, para. 22 (b); Similar recommendations were made by the UN Human Rights Committee in its Concluding Observations on the second periodic report of Kyrgyz Republic, CCPR/C/KGZ/CO/2, 25 March 2014, para. 3-7. [↑](#footnote-ref-27)