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Committee Against Torture

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

8-14 Avenue de la Paix

CH-1211 Geneva 10

SWITZERLAND

Attention: The Secretariat

Dear Sir/Madam

# Draft General Committee No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22—Submission No 2

1. Please consider these supplementary submissions.
2. In my earlier submissions on the topic of “use of terminology” I failed to notice footnote 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.

1. Perhaps that could be made more prominent, and in the text.
2. I note New Zealand, Switzerland, and the Netherlands; have now made a submission on the draft.
3. Additionally, and separately, the opening sentence of your draft General Comment is currently the subject of some discussion in a domestic extradition case for surrender to China for murder. A 3-day hearing commences on Monday, 3 April 2017 in the New Zealand High Court.
4. The status of Draft General Comments is not something that is customarily litigated, and there is little or any law on their use.
5. I have sought unopposed leave to make further submissions on your final General Comment when released to the High Court, and await the final General Comment with interest.
6. This is not an invitation in any way for Your Committee to become engaged with the domestic process, I raise the point as it illustrates what use may be made of your draft or final General Comments, and that detail matters. I also note that Professor Tyagi[[1]](#footnote-1) says:

It [The Human rights Committee] should take greater cognizance of human rights jurisprudence emerging from domestic institutions.

# Diplomatic Assurances

1. The Minister of Justice, and the Attorney-General say in their written submissions to the High Court at footnote 91:

 In understanding the meaning of the General Comment, regard must be had to the Committee Against Torture treatment of assurances cases decided through the Article 22 communications process: the opening sentence the revised draft General Comment No. 1 is “On the basis of its experience in considering individual communications under Article 22 of the Convention...”

1. They also make submissions separately on the concluding observations cited in your footnote 12:

Concluding observations on the combined third to fifth 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.

1. They appear to conclude *While the CAT Committee’s concluding observations on State’s periodic reports are more forceful, they do not indicate an outright ban on assurances.* Given the importance of opening sentences, which set the scene, it would be prudent to amend your opening sentence to include reference to concluding observations.
2. On the substance of what the State party say in their submission:

3. New Zealand shares the Committee’s view that diplomatic assurances should not be used as a loophole to undermine the principle of non-refoulement. However, New Zealand considers that the General Comment does not accurately reflect the current state of international law in this area, or the fact that the practice of seeking diplomatic assurances is well established internationally. Because of this, New Zealand cannot accept the suggestion in paragraph 20 of the draft Comment that diplomatic assurances are *per se* contrary to the principle of non-refoulement.

 The Swiss submissions at 2.4 noting the complexity of the diplomatic assurances dispute appear to support the NZ position. They ask for a fuller description in Article 20, and reference to the 11 points contained in (*Othman [Abu Qatada] V. The United Kingdom.*[[2]](#footnote-2)

1. The single page Netherland’s submission is to the same effect as the Swiss.
2. Whatever, the final General Comment might be, and whether it represents a further welcome advance on the *Othman* principles, the question of such assurances is of crucial importance in the non-refoulement field, and your General Comment will be of profound importance in years to come.
3. Undoubtedly the final version will need a more full description. That the Committee was obviously anticipating that is self evident from footnote 11,[[3]](#footnote-3) and from holding a public discussion day.
4. Whether prominent NGO’s like Amnesty, APT, and HRW submissions are uploaded on your website, and engage in the public discussion remains to be seen, but if they are, I am unable to respond given your deadline of today.
5. I further hope the public discussion day is videoed, and made publicly available, like the discussions of the HRC e.g General Comment 35.
6. The entire purpose of the consultation process is for you to determine for the Convention Against Torture, what the current state of international human rights law is on this topic, and that may include an advance on what the law was previously, such a prospect does not seem to be contemplated by the States party’s submissions. You are not a rubber stamp for what the ECHR says, and are as capable of developing the law in the same way as there influential decisions do.
7. I welcome the Committee’s giving the opportunity for submissions, and public discussion. The process you have adopted is laudable, and in accordance with what should be seen as best practice amongst the UN Treaty bodies as Professor Tyagi says discussing criticism of the Human Rights Committee’s, General Comment process:[[4]](#footnote-4)

The HRCttee should elaborate guidelines for the formulation of its general comments. It should engage States parties more deeply in the process. Besides seeking comments from other treaty bodies, specialized agencies, NGOs and NHRIs, the HRCttee should invite public comments on its draft general comments. It should take greater cognizance of human rights jurisprudence emerging from domestic institutions. Further, for obtaining abundant benefits, the HRCttee should hold public meetings for drafting its general comments.

1. Regrettably, on the 31 March 2017, NZ time (14 hours in front of Geneva) the only State party submissions are from NZ, and Switzerland, and this morning the Netherlands submissions arrived on the website. I do ponder, whether on future occasions two deadlines might be more appropriate, a deadline for State party submissions, and a later deadline for shadow comments from NGO’s, and others.
2. Nevertheless, taking the short opportunity to respond to State party submissions, I respectfully disagree with the State party’s view, and affirm my earlier views expressed on 24 March 2017,and invite the Committee to confirm that *diplomatic assurances are per se contrary to the principle of non-refoulement.*

Yours faithfully



**DR TONY ELLIS**

**BARRISTER**

**31 March 2017**

1. Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge University Press, 2011), p 295. [↑](#footnote-ref-1)
2. No 8139/09, judgment of 17 January 2012, § 183 ff and 190 ff. [↑](#footnote-ref-2)
3. The Committee intends to further elaborate on the issue of diplomatic assurances in future sessions after receiving comments from relevant stakeholders on this issue [↑](#footnote-ref-3)
4. Tyagi, above footnote 1, p 289. [↑](#footnote-ref-4)