



**Joint Observations regarding Revised General Comment No. 1 (2017) on the implementation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

March 2017

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## **I. Introduction**

1. The Alkarama Foundation, Amnesty International, the Association for the Prevention of Torture (APT), DIGNITY - Danish Institute Against Torture, the International Federation of Action by Christians for the Abolition of Torture (FIACAT), the International Commission of Jurists (ICJ), the International Rehabilitation Council for Torture Victims (IRCT), the World Organisation Against Torture (OMCT) and the Redress Trust (REDRESS) provide these comments to the Committee on the draft revised 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 6 December 2016 (CAT/C/60/R.2, 2 February 2017 referred to as the “draft” or the “draft General Comment”). (Information regarding the organizations making this submission is available in Appendix 1.)
2. We welcome the decision by the Committee against Torture (“the Committee” or “this Committee” or “CAT”) to revise its General Comment No. 1 on article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention” or “UNCAT”). We consider that a revised General Comment will be a critically important tool for States parties in implementing Article 3 by providing guidance on the full scope of their obligations in relation to the prohibition of *refoulement* under the Convention. The topic of this General Comment is of particular relevance to the work of our organisations and we welcome the Committee’s decision to hold a General Discussion on the draft revised General Comment as well as seeking written contributions.
3. We note that in this joint submission we have proposed textual changes under the heading “Recommended textual change/addition” in each section and sub-section. Proposed additional text is formatted in bold. Proposed deletions are identified with a “~~strikethrough~~”.

## **II. Detailed comments on specific sections and paragraphs of the draft**

### **a) Section I: Introduction, paragraphs 1-3**

4. We welcome the fact that the draft is significantly more ambitious, both in content and scope, than a mere revision of the Committee’s original General Comment No. 1 of 1997. Rather than being limited to issues relating to Article 22, it covers the substance of Article 3 extensively, including States parties’ obligations under it. Since the prohibition of *refoulement* binds all States parties – whether or not they have made a declaration under Article 22 recognizing the competence of the Committee to receive individual communications – we urge the Committee to emphasize that at least sections I. to IX. inclusive, of the present draft are of general application, and identify measures required for the effective implementation of the prohibition of *refoulement* by all States parties. Indeed, even section X. – seeking to exclusively address individual communications under Article 22 – discusses the substance of Article 3 as a whole at length.
5. We further recommend that the General Comment should expressly identify that this Committee’s: a) highly regarded Concluding Observations and recommendations following its review of States parties’ reports under Article 19; b) decisions on individual communications; and c) previous General Comments, represent authoritative sources of the standards set out in the present General Comment.

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**Recommended textual changes and additions:**

- 1) in the title: “General Comment No. 1 (2017) on the implementation of article 3 of the Convention, **including** in the context of article 22”;
- 2) in para. 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, **along with its Concluding Observations upon consideration of States parties’ reports under Article 19 of the Convention, as well as its previous General Comments, ...**”
- 3) in para. 3, or in a separate paragraph, add: “**Except for explicit references to communications under Article 22, especially in section X., the General Comment applies to all States parties.**”

**b) Terminology**

6. Footnote 6 of the draft explains that, for the purpose of the revised General Comment, the term “deportation” covers “the expulsion, return or extradition of a person or group of individuals from a State party to another State.” We understand and support the use of an appropriate term as shorthand to denote every and any means of transferring individuals in circumstances giving rise to *refoulement* concerns under the Convention. Deportation, however, is a term strongly associated with transfers across international borders, thus effectively excluding consideration of those occurring within the same country, which could, nonetheless, constitute prohibited *refoulement* in violation of the Convention. Therefore, we recommend that the term “involuntary transfer” be used instead; that its choice be explained prominently and expansively in the introduction, as suggested below, so as to ensure that anyone reading the General Comment be in no doubt as to the fact that it is capable of encompassing every and any means of transferring individuals against the *refoulement* prohibition; and that it be applied consistently and exclusively throughout the text – except where specific, discrete means of transferring individuals, such as extradition, are discussed.

**Recommended textual changes and additions:**

- 1) Throughout the General Comment the term “**involuntary transfer**” should be used instead of “deportation” as the catchall term for any transfer;
- 2) add the following text, as paragraph 3.bis: “**For the purpose of this General Comment, the term “involuntary transfer” includes, but it is not limited to, extradition, deportation, expulsion, forcible return, forcible transfer, rendition, rejection at the frontier, pushback operations (including at sea)**”;
- 3) delete footnote 6.

**c) Section II: General principles, paragraphs 4-17**

**i) Paragraph 7**

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7. In line with customary international law, international human rights treaties, and as a matter of established international jurisprudence, this Committee has held that the prohibition of cruel, inhuman or degrading treatment or punishment (hereinafter “other ill-treatment”) is, like the prohibition of torture itself, absolute and non-derogable under the Convention.<sup>1</sup> Thus, an express reference to the fact that, under the Convention, certain acts of ill-treatment falling short of torture are, like acts of torture themselves, equally and absolutely prohibited would strengthen paragraph 7 significantly. We therefore recommend that the text in bold below be inserted at the end of paragraph 7 of the draft.

**Recommended textual addition**

(at the end of paragraph 7)

**7. The Committee also recalls that other acts of ill-treatment, which do not amount to torture as defined in Article 1, are equally and absolutely prohibited under the Convention by virtue of Article 16, paragraph 1, read in conjunction with Article 2. [Footnote: General Comment No. 2, CAT/C/GC/2, paragraphs 3 and 6.]**

*ii) Paragraph 8*

8. Paragraph 8 of the draft could be further strengthened through an explicit reference to the prohibition of *refoulement* as a *jus cogens* or peremptory norm of international law. Thus, we recommend the insertion of the following text at the end of paragraph 8.

**Recommended textual addition**

(at the end of paragraph 8, after footnote 3 of the current draft)

**8. Article 3 is an iteration of a wider non-*refoulement* principle, which is a *jus cogens*, or peremptory, norm of international law. [Footnote: “See for instance J. Allain, “The *jus cogens* nature of the non-*refoulement*,” 13 (4): *Int’l J Refugee Law* (2001), pp. 533-558; E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-*refoulement*’ in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 78-177; A. Farmer, “Non-*Refoulement* and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection,” 23:1 *Georgetown Immigration Law J* (2008), pp. 1-38; C. Costello and M. Foster, “Non-*refoulement* as custom and *jus cogens*? Putting the prohibition to the test,” 46 *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?*, pp. 273-327.”]**

*iii) Paragraphs 8, 15 and 16*

9. We consider that the draft would be enhanced by building on this Committee’s previous explicit recognition of the fact that a real risk of acts of ill-treatment falling short of torture, by definition, may give rise to a real risk of torture itself. For example, in General Comment No. 2,<sup>2</sup> this Committee has emphasized:
- “[i]n practice, the definitional threshold between ill-treatment and torture is often not clear”;<sup>3</sup>
  - “[e]xperience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment”;<sup>4</sup>

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<sup>1</sup> See e.g., CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 Jan. 2008, paras 3 and 6.

<sup>2</sup> *Ibid*, paras 3, 6, 19 and 25.

<sup>3</sup> *Ibid*, para. 3.

<sup>4</sup> *Ibid*.

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- “[t]he obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture”;<sup>5</sup>
  - “Article 16, identifying the means of prevention of ill-treatment, emphasizes “*in particular*” the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles”;<sup>6</sup>
  - “[t]he obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment [...] under article 16, paragraph 1, are indivisible, interdependent and interrelated”;<sup>7</sup>
  - “Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment”;<sup>8</sup>
  - “articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment”;<sup>9</sup> and
  - “if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State’s obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3.”<sup>10</sup>
10. Furthermore, a plain reading of the obligations under Article 16 of the Convention, namely that States shall undertake to prevent any acts of ill-treatment not amounting to torture, requires that States parties’ *non-refoulement* obligations under the Convention be triggered whenever an involuntary transfer would entail a real risk of such ill-treatment. Desisting from transferring people in circumstances where they would face a real risk of ill-treatment other than torture would be among the simplest and most straightforward means of preventing such acts.<sup>11</sup>
11. In light of the above, we recommend the insertion of the following text as a new paragraph, paragraph 8*bis* and concomitant deletion of paragraphs 15 and 16 of the current draft.

**Recommended textual addition**

(new paragraph 8*bis*)

**The Committee recalls that, as stated in its General Comment No. 2, paragraph 3, the prohibition of cruel, inhuman or degrading treatment or punishment (hereinafter other “ill-treatment”) under the Convention is, like the prohibition of torture itself, absolute and non-derogable. The prohibition of *refoulement* with respect to a real risk of other ill-treatment is hence similarly absolute. In General Comment No. 2, the Committee further clarified that the obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture; that, in practice, the threshold between ill-treatment and torture is often difficult to establish; and that, since the conditions that give rise to ill-treatment frequently facilitate torture, States parties must apply the measures required to prevent torture, including effective compliance with the prohibition of *refoulement*, equally to prevent ill-treatment. [Footnote: “CAT, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, paragraphs 3, 6, 19 and 25.”]**

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid*, para. 25.

<sup>9</sup> *Ibid*, para. 6.

<sup>10</sup> *Ibid*, para. 19.

<sup>11</sup> While Article 16 of the Convention refers to acts “in any territory under [the State Party’s] jurisdiction”, this Committee has previously held that jurisdiction extends extraterritorially when there is complicity or otherwise participation in an act on another territory, which *refoulement* arguably entails (see also additional comments about the extraterritorial application of *non-refoulement* obligations under the Convention below).

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iv) **Paragraphs 9 and 10**

12. The guidance value and clarity of paragraphs 9 and 10 of the draft would be enhanced by making them even more consistent with this Committee’s authoritative guidance in its previous General Comment No. 2, as well as Concluding Observations, regarding the circumstances in which States parties are deemed to exercise jurisdiction for Convention purposes. For instance, as this Committee has already authoritatively held:

“[t]he reference to “any territory” in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control.”<sup>12</sup>

13. Similarly, the draft’s clarity would be enhanced by expressly stating that *non-refoulement* obligations under the Convention apply to all areas over which a State party exercises “effective control”, not only those controlled “as a governmental authority” and that the State party’s jurisdiction, and thus State responsibility, is engaged where the State in any manner exercises or engages in conduct, i.e. actions and/or omission, pursuant to its authority (State agent authority) on the territory of another State. Such a position has been endorsed by this Committee in General Comment No. 2, the International Court of Justice,<sup>13</sup> the European Court of Human Rights,<sup>14</sup> and the Inter-American Commission on Human Rights (IACHR).<sup>15</sup>
14. Furthermore, we recommend that the General Comment should address the potential that the term “another State” in Article 3 may be misunderstood or interpreted narrowly, as requiring that the prohibition of *refoulement* be restricted solely to involuntary transfer from one State to the territory of another. In fact, involuntary transfers in violation of the prohibition of *refoulement* may also occur – and in fact have occurred – between different jurisdictions *within* the territory of one State, a practice

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<sup>12</sup> CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 Jan. 2008, para. 16, see also para. 7.

<sup>13</sup> Provisional Measures in the case of *Georgia v. Russian Federation*, 2008, No. 35/2008, where the International Court of Justice held: “there is no restriction of a general nature in CERD [Convention on the Elimination of Racial Discrimination] relating to its territorial application [...] [T]he Court consequently finds that these provision of CERD generally appear to apply, **like the other provisions of instruments of that nature**, to the **actions** of a State party **when it acts beyond its territory**”, ICJ. para. 109 (15 October 2008). The International Court of Justice had of course previously discussed and affirmed the extraterritorially application of the International Covenant on Civil and Political Rights in other cases, see, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ. 136, para. 109 (9 July 2004); *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 26 (19 December 2005).

<sup>14</sup> See, *inter alia*, European Court of Human Rights (hereinafter ECtHR), *Issa and Others v Turkey*, App. no. 31821/96, 30 March 2005; ECtHR, *Hirsi Jamaa and Others v Italy*, App. no. 27765/09, 23 February 2012.

<sup>15</sup> IACHR, *Detainees in Guantánamo Bay, Cuba, Request for Precautionary Measures*, MC 259-02, March 13, 2002; IACHR, *Djamel Ameziane v. United States*, Report No. 17/12, 20 March, 2012, para. 33; IACHR, *Decision of the Commission as to the admissibility [of Haitians to the United States]*, Report No. 28/93, 13 October 1993.

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about which this Committee has authoritatively and consistently expressed concern<sup>16</sup> (as have other human rights monitoring bodies).<sup>17</sup>

15. Consequently, the guidance value provided by the General Comment would be enhanced by expressly clarifying that the prohibition of *refoulement* protects individuals against involuntary transfer across international borders, as well as within a State's borders. *Non-refoulement* obligations under the Convention bind States parties in respect of prohibited transfers to any place whatsoever, including within their own territory or within the territory of a third state. In its Concluding Observations this Committee has similarly recommended that a State 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."<sup>18</sup> In light of the above, we recommend the following revisions of the text of paragraphs 9 and 10.

### **Recommended textual changes and additions.**

9. As with all obligations under the Convention, each State party must apply the principle of non-refoulement in any territory under its jurisdiction. **The reference "any territory" refers to prohibited acts committed not only** 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, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. [Footnote: General Comment No. 2, paragraph 16; 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.].~~ 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]. **Furthermore, a State party must respect the prohibition of refoulement in respect of anyone within its power or effective control, even if not situated within the territory of the State Party. [Footnote: Human Rights Committee, General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10; CAT, Concluding observations: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20]** The prohibition of *refoulement* proscribes involuntary transfers across international borders, as well as such transfers between jurisdictions within a State's borders, including transfers to any receiving State, territory or place and to any law enforcement agency, security force or other agency or institution where, or in the custody of which, the person

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<sup>16</sup> See for instance, CAT, Concluding observations: Canada, UN Doc. CAT/C/CAN/CO/6, 25 June 2012, para. 11; CAT, Concluding observations: Denmark, UN Doc. CAT/C/DNK/CO/6-7, 4 February 2016, para. 18. See also CAT, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 20 May 2005 (a case where ill-treatment began within the territory of the sending state).

<sup>17</sup> See for instance See UN Human Rights Committee (hereinafter HRC), *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006; ECtHR, *El Masri v Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 13 Dec. 2012.

<sup>18</sup> The Committee had expressed concern "about several reports that some prisoners transferred by Canadian Forces in Afghanistan into the custody of other countries have experienced torture and ill-treatment (art. 3)" CAT, Concluding Observations: Canada, UN. Doc. CAT/C/CAN/CO/6, 25 June 2012, para. 11; see also the Committee's Concluding Observations on the United Kingdom, CAT, Concluding Observations: UK, UN Doc. CAT/C/GBR/CO/5, 24 June 2013, para. 19.

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concerned would face a real risk of torture or other ill-treatment. [Footnote: UNCAT, CAT/C/CAN/CO/6, para. 11; UNCAT, CAT/C/GBR/CO/5, para. 19; CAT/C/DNK/CO/6-7, para. 18].

10. The principle of “non-refoulement” applies 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, civilian or military law; it protects anybody: citizens, e.g. facing extradition, or non-citizens, e.g., refugees, asylum-seekers, stateless people, migrants, whether in a ‘regular’ or ‘irregular’ situation, including those who have overstayed or otherwise breached the terms of their visas. ~~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.~~<sup>4</sup>

v) **Paragraph 11**

16. We consider that paragraph 11 would be enhanced by reiterating this Committee’s guidance expressed in its first General Comment, namely, that “[t]he risk of torture must be assessed on grounds that go beyond *mere theory or suspicion*. However, the risk does not have to meet the test of being highly probable.”<sup>19</sup> [emphasis added]. It is our view that this full test should be retained, in order to indicate the level of proof against which any non-*refoulement* claim must be assessed and to ensure that the State party does not place too high a burden on any claimant.

17. Further, in light of our comments above, we also recommend deleting footnote 6 and replacing “deportation” with “involuntary transfer”.

**Recommended textual changes:**

11. The non-refoulement obligation in article 3 of the Convention exists whenever there are “substantial grounds”<sup>5</sup> 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 **involuntary transfer** ~~deportation~~.<sup>6</sup> The Committee’s practice has been to determine that “substantial grounds” exist whenever the risk of torture is “personal, present, foreseeable and real.”<sup>7</sup> As the Committee has found, “the risk of torture must be assessed on grounds that go beyond **mere theory or suspicion**. However, the risk does not have to meet the test of being highly probable – and indeed it needs only to be real.”<sup>8</sup> [add the following to the text of footnote 8: “General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, para. 6]

vi) **Paragraph 12**

18. Paragraph 12 provides that in the case of a decision that a person may not be removed, they “should be allowed to remain in the territory [...] of the State party”. In this regard, the Committee has previously stated that if a State recognizes the risk of torture and provides a person with non-*refoulement* protection, it must provide that person with legal personality and status, and also help the person find a durable solution. Such a durable solution goes beyond merely allowing the person to remain in the territory and may include positive steps to facilitate local integration or resettlement in another State.<sup>20</sup> We recommend express inclusion of those points by adding an extra sentence to

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<sup>19</sup> See also CAT, *Mukerrem Guclu v. Sweden*, UN Doc. CAT/C/45/D/349/2008, 16 December 2010, para. 6.4.

<sup>20</sup> Local integration is an integration of refugees/persons under international protection in the host community. Resettlement is a process of finding the State willing to accept the person under protection when a State granting protection cannot provide local integration. See CAT, Concluding Observations: Cuba, UN Doc. CAT/C/CUB/CO/2, 25 June 2012, para. 9; CAT, Concluding Observations: Monaco, UN Doc. CAT/C/MCO/CO/4-5, 17 June 2011, paras 9-

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paragraph 12 as suggested in bold below. We also reiterate our recommendation that the term “deportation” be replaced with “involuntary transfer”.

### **Recommended textual changes:**

12. Any person found to be at risk of torture if ~~deported~~ **involuntarily transferred** to a given State should be allowed to remain in the territory under the jurisdiction or actual control and authority of the State party concerned so long as the risk persists.<sup>9</sup> **If the person remains in its territory, the State party has a duty to provide that person with legal personality and status, and to take positive steps to facilitate local integration. [Move the rest to paragraph 12bis as set out below]**

19. The clarity of paragraph 12 would be further enhanced by referencing the practice known as chain or indirect *refoulement* expressly and by providing specific guidance on this issue in a separate paragraph, namely paragraph 12bis. As currently formulated, although paragraph 12 addresses the issue, it does not explicitly state that the *refoulement* prohibition also applies in the context of so-called chain or indirect *refoulement*.<sup>21</sup> In contrast, this Committee has expressly referred to chain *refoulement* in its Concluding Observations.<sup>22</sup>

20. In addition, we note that the current formulation in paragraph 12 asserts that the applicable threshold for indirect/chain *refoulement* is a certainty, namely, that a person “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” (**emphasis added**). We respectfully recommend that this oversight be corrected as the threshold in cases involving chain *refoulement* remains the same as in cases of *refoulement*, i.e. ‘substantial grounds for believing that he would be in danger of being subjected to torture’, more simply put, the threshold is and remains ‘a real risk’.<sup>23</sup> In light of the above, we recommend that the text in bold below be inserted in the draft.

### **Recommended textual addition**

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13(e); CAT, Concluding Observations: Cambodia, UN Doc CAT/C/KHM/CO/2, 20 Jan. 2011, para. 24. *See also*, CAT, *Tebourski v. France*, UN Doc CAT/C/38/D/300/2006, 11 May 2007, para. 8.5; CAT, *Aemei v. Switzerland*, UN Doc CAT/C/18/D/34/1995, 29 May 1997, para. 11; CAT, *M.B.B. v. Sweden*, UN Doc. CAT/C/22/D/104/1998, 21 June 1999, para. 6.4; and CAT, *E.H. v. Hungary*, UN Doc CAT/C/22/D/62/1996, 11 June 1999, para. 6.2.

<sup>21</sup> This Committee has repeatedly held as much and the concept of indirect/chain *refoulement* is recognized in its original General Comment No. 1, which, *inter alia*, states “2. The Committee is of the view that the phrase “another State” in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.” See CAT, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), para. 2; see also, *inter alia*, CAT, *Korban v. Sweden*, UN Doc. CAT/C/21/D/1997, 16 Nov. 1998, para. 7; and CAT, *Z.T. v. Australia*, UN Doc. CAT/C/31/D/153/2000, 11 Nov. 2003, para. 6.4.

<sup>22</sup> For example, CAT, Concluding Observations: Greece, UN Doc. CAT/C/GRC/CO/5-6, 27 June 2012, “The Committee is concerned that these individuals are at a heightened risk of *refoulement*, including chain refoulement (art. 3)” where it recommended that the “State party should ensure full protection from *refoulement* by establishing the necessary safeguards in forced return procedures and thereby guarantee at all times that no person in need of international protection is returned to a country where he or she fears persecution or is in danger of being subjected to acts of torture or cruel, inhuman or degrading treatment or punishment, as well as chain refoulement.” (**emphasis added**), para. 19.

<sup>23</sup> See for example, CAT, *Z.T. v. Australia*, CAT/C/31/D/153/2000, 11 November 2003, where the Committee found “for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned or, as in this case, a third country where it is foreseeable that he subsequently may be expelled”, para. 6.4 (**emphasis added**).

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(insertion of a new paragraph, paragraph 12*bis*, using text that is currently in the last sentence of paragraph 12)

“Furthermore, he or she should never be ~~deported~~ **involuntarily transferred** to another State where he/she ~~would~~ **may subsequently face onward involuntary transfer** to a third State ~~where in which~~ he/she would be **at real risk of subjected to torture (known as ‘chain’ or ‘indirect’ refoulement)**. [Footnote: General Comment No. 1, paragraph 2; *Avedes Hamayak Korban v. Sweden*, CAT/C/21/D/1997, 16 November 1998, paragraph 7; and *Z.T. v. Australia*, CAT/C/31/D/153/2000, 11 November 2003, paragraph 6.4; and CAT/C/GRC/CO/5-6, paragraph 19]”

*vii) Paragraph 13*

21. We recommend inserting the following text at the end of paragraph 13, which would refer to the changes that we have proposed below in relation to paragraph 18(e): “**All involuntary transfer decisions must be subject to appeal to a judicial body as outlined in paragraph 18(e).**”

**Recommended insertion of a new paragraph, paragraph 13bis**

The resort to immigration detention as tool to deter irregular migration has become increasingly widespread and institutionalized over the past fifteen years. In this context, the Committee has held that States parties should ensure that: “detention is used only as a last resort, in accordance with the requirements of international law, and not for administrative convenience”,<sup>24</sup> and has recommended the repeal of provisions establishing mandatory detention of persons entering their territory irregularly.<sup>25</sup> The Committee has also stated that persons in need of international protection, including “vulnerable people, in particular children, torture survivors, victims of trafficking, and persons with serious mental disability should not be detained” while their asylum, deportation or extradition cases are being examined.<sup>26</sup>

According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, children’s deprivation of liberty solely based on their or their parents’ migration status is never in the best interests of the child and may constitute cruel, inhuman or degrading treatment.<sup>27</sup> The Committee on the Rights of the Child has held that immigration detention – even for relatively limited duration or in contexts that are relatively “child friendly” – is never appropriate for children. The CRC Committee and a number of international and regional experts have therefore called upon States to “expeditiously and completely cease” the immigration detention of children, and to adopt alternatives to detention.<sup>28</sup> In light of the above, we recommend the insertion of a new paragraph, paragraph 13*bis*, as set out below.

**Recommended textual addition**

(insertion of a new paragraph 13*bis*)

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<sup>24</sup> CAT, Concluding Observations: United Kingdom, UN Doc. CAT/C/GBR/CO/5, 24 June 2013, para. 30; CAT, Concluding Observations: Sweden, UN Doc. CAT/C/SWE/CO/6-7.

<sup>25</sup> CAT, Concluding Observations: Australia, UN Doc. CAT/C/AUS/CO/4-5, 23 Dec. 2014, para. 16.

<sup>26</sup> CAT, Concluding Observations: United Kingdom, UN Doc. CAT/C/GBR/CO/5, 24 June 2013, para. 30; CAT, Concluding Observations: Finland, UN Doc. CAT/C/FIN/CO/7, 20 Jan. 2017, para. 13.

<sup>27</sup> Human Rights Council, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, *Report on Children Deprived of Liberty*, 5 March 2015, UN Doc. A/HRC/28/68, 1 Feb. 2013, para. 80.

<sup>28</sup> Summary of normative standards and recommendations on ending child immigration detention, Interagency Working Group on Ending Child Immigration Detention (IAWG), 2016.

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States parties should take all necessary measures to ensure that detention pending asylum, immigration or extradition proceedings is used only as a last resort, when determined to be strictly necessary and proportionate in each individual case, and for as short a period as possible. States parties should also take all necessary steps to prevent cases of *de facto* indefinite detention and should give particular consideration to the continuing detention of individuals awaiting their transfer to another State, both whenever the Committee has granted interim measures pending its examination of the case and when the Committee has issued a decision holding that the involuntary transfer of the individual concerned would violate Article 3. States parties should also ensure that victims of torture and persons in need of international protection are only detained, if at all, after alternatives to detention have been exhaustively examined and found to be insufficient. States should cease detention of children solely for immigration purposes, as it can never be construed as a measure in the child's best interests.

*viii) Paragraph 14*

22. We commend the Committee for holding that States parties should refrain from adopting policies or taking measures that, in practice, lead to constructive *refoulement*. Indeed, States often use less direct means than those listed in the General Comment in their attempts to circumvent the prohibition of *refoulement*.<sup>29</sup> As found by this Committee, States' tactics may include: reducing or totally cutting off the aid that refugees receive leaving them destitute; using indefinite detention; refusing to process any claims for asylum; or otherwise making life so difficult – deliberately or otherwise – that the individuals feel compelled to leave, even if it means returning to the country from which they fled and where they continue to face a real risk of torture. Such practices are commonly referred to as constructive *refoulement*.
23. The clarity of paragraph 14 would be enhanced by an express reference to constructive *refoulement*, followed by an explanation of the same through the examples already featured in paragraph 14 as currently formulated. We recommend that the General Comment make it clear that States parties' *non-refoulement* obligations under the Convention enjoin them from acting or failing to act – whether deliberately or otherwise – in any way that would result in constructive *refoulement*, thereby exposing the individuals concerned to a real risk of torture or other ill-treatment.
24. We note further that paragraph 14 calls on States not to adopt “detention in poor conditions **for** indefinite periods” (emphasis added), thus reproaching the use of such measures only when they are adopted concurrently. In keeping with international standards, the General Comment should specify that States should not adopt policies of detention in poor conditions **or** for indefinite periods. In light of the above, we recommend the following textual changes in bold to text of paragraph 14.

**Recommended textual change:**

14. States parties should not take measures or adopt policies **that, in practice, lead to constructive *refoulement***, such as detention in poor conditions **or** for indefinite periods;; refusing to process claims for asylum or unduly prolonging them;; cutting funds for assistance programs to asylum seekers;; ~~which would~~ **compelling** persons in need ~~for~~ **of** protection under Article 3 of the Convention to return to their country of origin **or to go to a third country where they would in spite of face a their personal real** risk of being subjected ~~there~~ to torture ~~and~~ **or** other cruel, inhuman or degrading treatment or punishment. **States parties'**

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<sup>29</sup> See for example ECtHR, *M.S.S. v Belgium and Greece*, App. no. 30696/09, 21 Jan. 2011; ECtHR, *M.S. v Belgium*, App. no. 50012/08, 31 Jan. 2012.

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***non-refoulement* obligations under the Convention enjoin them from acting or failing to act – whether deliberately or otherwise – in any way that would result in constructive *refoulement*, thereby exposing the individuals concerned to a real risk of torture or other ill-treatment.**

***ix) Paragraphs 15 and 16***

25. In light of our comments above, and our proposal that a new paragraph 8*bis* be inserted, we recommend the deletion of both paragraph 15 and paragraph 16 of the draft as currently formulated.

***x) Paragraph 17***

26. We note that the wording of paragraph 17 in the draft General Comment, that “severe pain or suffering cannot objectively be measured,” strongly implies that only the victim can legitimately determine whether his or her pain or suffering was severe. While clearly pain and suffering have subjective elements, “severe pain or suffering” are key elements of the definition of torture in Article 1(1) of the Convention. Therefore, the above-cited statement risks implying that courts, human rights bodies, or other official institutions, including the Committee itself, would be incapable of determining whether or not a person has been tortured. Furthermore, the term “violent acts”, as used in this section of the draft, may be understood as being restricted exclusively to physical acts. The guidance value of the paragraph would thus be enhanced by mentioning the cumulative effect of ill-treatment, which is seldom limited to a single method. In light of the above, we recommend the following textual changes to paragraph 17.

**Recommended textual change:**

17. “The Committee considers that ~~severe~~ **the qualification of** pain or suffering ~~as severe cannot objectively be measured. It depends on the negative physical or mental repercussions that the infliction of violent abusive acts has on each individual, taking into account all relevant circumstances of each case, including the duration of the treatment,~~ **the cumulative effect of such acts,** the physical and/or mental effects, the sex, **gender,** age and state of health and vulnerability of the victim. **It is therefore well-nigh impossible to determine in advance whether the pain or suffering that would result from exposing an individual to certain forms of ill-treatment through involuntary transfer would be severe or not.**”

**Insertion of a new paragraph, paragraph 17*bis***

27. We note that the draft does not include guidance or recommendations regarding the need to put in place measures to avoid the re-victimization of survivors of torture or other ill-treatment in the course of administrative and judicial proceedings that could lead to involuntary transfer. Ensuring that survivors be protected against re-victimization during such proceedings is a fundamental principle underlined by this Committee in its dialogue with States parties, as well as in its General Comment 3

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on Article 14 of the Convention.<sup>30</sup> The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also include this important principle with respect to legal and administrative procedures designed to provide justice and reparation.<sup>31</sup> The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has called for the same in his General Recommendations.<sup>32</sup> The particular vulnerability survivors of torture and other ill-treatment who are asylum-seekers, refugees or otherwise seeking or entitled to international protection, which has been the subject of extensive research, underscores the need for the General Comment to call for States parties to apply measures aimed at preventing their re-victimization.<sup>33</sup> The General Comment should thus include clear guidance for States parties to ensure that protective measures to avoid re-victimization of survivors of torture or ill-treatment are put in place during judicial and administrative proceedings that could result in involuntary transfer. To this end, we are recommending the insertion of a new, additional paragraph to the General principles section of the draft.

### **Recommended textual addition**

(Insertion of a new paragraph, paragraph 17bis)

**States parties must ensure the adoption and application of victim-centred, trauma-informed approaches to ensure that survivors of torture or other ill-treatment are protected against re-traumatization in the course of all judicial and administrative proceedings that could lead to their involuntary transfer. Special sensitivity must be exercised towards any survivors in the course of such proceedings. Special measures should take into account the particular circumstances of the individual, including marginalisation or particular risk due to discrimination, and may include but are not limited to: a non-traumatizing mode of operation and special sensitivity towards survivors of torture in the course of judicial and administrative proceedings, including during asylum interviews; gender-sensitive procedures; preventing the introduction of discriminatory evidence and harassment of survivors and witnesses; specific training for judicial and administrative personnel on the various impacts of torture and other ill-treatment and resulting trauma, including the specific impacts on survivors from marginalized or at-risk groups; and specific training on how to exercise sensitivity towards survivors of torture and other ill-treatment, in order to prevent re-victimization and stigmatization, and resulting re-traumatization.**

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<sup>30</sup> CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012, paras 33 and 34.

<sup>31</sup> “The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.” UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Annex, VI. Treatment of victims, para. 10.

<sup>32</sup> “General Recommendations of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” UN Doc. E/CN.4/2003/68, para. 1.

<sup>33</sup> See for example, *European Journal of Psychotherapy*, “Impact of asylum interviews on the mental health of traumatized asylum seekers” Vol. 6, 2015; Zoran Ilic, “Psychological Preparation of Torture Victims as Witnesses toward the Prevention of Retraumatization” in International Aid Network, *Torture in War: Consequences and Rehabilitation of Victims*, 2004.

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d) **Section III: Preventive measures to guarantee the principle of “non refoulement”, paragraph 18**

i) **Recommended formatting change**

28. We recommend that each positive obligation should be assigned its own paragraph for greater clarity and emphasis.

ii) **Paragraph 18, introductory paragraph**

29. Paragraph 18 of the draft General Comment unwittingly omits any reference to judicial measures. However, the Committee has previously held that positive obligations under article 3 are: “to take all legislative, *judicial* and administrative measures to comply with the obligations under article 3”<sup>34</sup> (emphasis added). This paragraph includes a number of measures that States parties are legally obliged to take in order to ensure effective protection against *refoulement* that the Committee has already recognized as binding on States parties, under the Convention. In light of this, those obligations should be identified as such as opposed to referring to them as “recommended best practice”, as the current formulation of this paragraph does.

**Recommended textual change:**

~~For the purpose of fully implementing~~ **Under Article 3 of the Convention, States parties should be required to take legislative, administrative, **judicial and** other preventive measures against possible violations of the principle of “*non-refoulement*”. Such measures should at least include:**

~~Recommended best practices are:~~

iii) **Paragraph 18(a) and 18(c)**

30. The value and clarity of paragraph 18(a) would be enhanced by setting out an express procedure for the assessment of non-refoulement claims. This duty is described in current paragraph 18(c), which we recommend should be listed first, before other sub-sections. If a claim for protection under article 3 of the Convention is made, a State has an obligation to assess that claim and determine whether there are substantial grounds for believing that the claimant would be in danger of being subjected to torture or other ill-treatment upon transfer. In all cases the essence of this positive obligation is that there must be an assessment procedure, established by the law and conducted in full compliance with procedural guarantees. This obligation applies to every non-refoulement claim, even in situations of mass influx.<sup>35</sup> The duty to establish a procedure for the assessment of each claim should therefore be listed after the duty to adopt legislation (as described above).

**Recommended formatting change - paragraph 18(a) and (c).**

Move paragraph 18(c) up and place it before current paragraph 18(a).

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<sup>34</sup> CAT, Concluding Observations: Mongolia, UN Doc. CAT/C/MNG/CO/1, 20 Jan. 2011, para. 13.

<sup>35</sup> CAT, Concluding Observations: Hong Kong, China, UN Doc. CAT/C/CHN-HKG/CO/5, 3 Feb. 2016, para. 7 (b); CAT, Concluding Observations: Finland, UN Doc. CAT/C/FIN/CO/7, 20 Jan. 2017, para.13 (b).

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31. The Committee has held that each claimant is entitled to a thorough and individual examination, on a case-by-case basis, of his or her *non-refoulement* claims.<sup>36</sup> The claimant should be heard and granted the opportunity to provide evidence in proceedings guaranteeing all necessary legal safeguards.<sup>37</sup>

**Recommended textual change paragraph 18(a):**

18 (a) Ensuring the right of each person concerned to have his/her case examined individually and not collectively, **with an individualised and rigorous scrutiny of the claims and circumstances presented and substantiated**, and to be fully informed, **orally and in writing in a language that he or she understands**, of the reasons why he/she is the subject of a procedure which may lead to a decision of ~~deportation~~ **involuntary transfer**.

**Recommended textual addition paragraph 18(a) bis (right to information and notification of rights):**

32. Lack of information on available domestic remedies may result in *de facto* limitations on the right to access remedies.<sup>38</sup> The draft General Comment does not refer to the requirement that a person be notified of their rights - including but not limited to those listed in this paragraph - during the assessment of their non-refoulement claim. The notification of rights is the first requirement to ensure practical and effective enjoyment of those rights. This Committee has previously required States parties to ensure that foreign nationals threatened with transfer are informed of their rights in a language that they understand, including of the right to appeal.<sup>39</sup>

**Recommended textual addition: paragraph 18(a) bis:**

**18 (a) bis: States parties should ensure that any person threatened with involuntary transfer is provided with necessary information on their rights in a language he or she understands. Such information should be provided at the earliest possible opportunity and should include clear explanations of the relevant procedures and the person's rights to: a lawyer, legal aid, to have his/her case examined individually and not collectively, to be informed of the reasons why s/he is subject to a procedure that might lead to involuntary transfer, the right to assistance of interpreters and translators, the right to an independent medical examination free of charge, and the right to appeal a deportation or removal order to a judicial body that meets the criteria set out at paragraph 18(e) below.**

*iv) Paragraph 18(b)*

33. The Committee has repeatedly expressed concern that individuals who are at risk of *refoulement* do not enjoy effective procedural guarantees to access legal remedies, including due to the lack of access to free legal aid. Consequently, they are not able to effectively present and substantiate their claims, including in appeals against deportation orders.<sup>40</sup> In this regard, the Committee has recommended that State parties should “guarantee access to independent, qualified and free-of-charge legal assistance for asylum seekers during the entire asylum procedure, at first instance level and during the judicial

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<sup>36</sup> CAT, Concluding Observations: Hong Kong, China, UN Doc. CAT/C/CHN-HKG/CO/5, 3 Feb. 2016, para. 7 (b); CAT, Concluding Observations: Finland, UN Doc. CAT/C/FIN/CO/7, 20 Jan. 2017, para 13(b); CAT, Concluding Observations: France, UN Doc. CAT/C/FRA/CO/4-6, 20 May 2010, para. 15.

<sup>37</sup> CAT, Concluding Observations: Norway, UN Doc. CAT/C/NOR/CO/6-7, 13 Dec. 2013, para.16; CAT, Concluding Observations: Hungary, UN Doc. CAT/C/HUN/CO/4, 6 Feb. 2007, para. 10; CAT, Concluding Observations: Bosnia and Herzegovina, UN Doc. CAT/C/BIH/CO/1, 15 Dec.2005, para. 12.

<sup>38</sup> CAT, *S.H. v. Norway*, UN Doc. CAT/C/23/D/121/1998, 19 Nov. 1999, para. 7.4; CAT, *Z.T. v. Norway*, U.N. Doc. CAT/C/23/D/127/1999, 19 Nov. 1999, para. 7.4.

<sup>39</sup> CAT, Concluding Observations: Norway, UN Doc. CAT/C/NOR/CO/6-7, 13 Dec. 2013, para.16.

<sup>40</sup> CAT, Concluding Observations: Greece, UN Doc. CAT/C/GRC/CO/5-6, 27 June 2012.

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review”,<sup>41</sup> including after a negative decision,<sup>42</sup> as well as for undocumented immigrants, including unaccompanied minors, in addition to the appointment of a guardian, in order to challenge the lawfulness of their deportation.<sup>43</sup> Legal aid should be free of charge, both in administrative and judicial procedures against *refoulement*, whenever its lack would render the remedy inaccessible and unavailable and thus ineffective. In addition, court fees waivers should be considered when fees are high enough to bar effective access to judicial or independent administrative review.<sup>44</sup> As the Committee has observed in various decisions under article 22,<sup>45</sup> requiring complainants to actively seek free legal aid services and to prove the absence of sufficient financial means, could create a disproportionate burden on migrants, already in a situation of heightened vulnerability, particularly if they claim to have been tortured in the past.

34. States parties frequently forcibly transfer persons without giving them time to mount an effective challenge to their transfer. This concern has grown as a result of recent efforts by States to streamline, or fast-track, removal proceedings in some countries. The current draft does not require States parties to give a person reasonable time to prepare a defence against their involuntary transfer. The Committee has previously been critical of States parties that have failed to afford persons minimum fair trial guarantees, including ensuring adequate time to prepare a defence.<sup>46</sup>

**Recommended textual change paragraph 18(b):**

**Guaranteeing access to independent, qualified and free-of-charge legal assistance, including sufficient time to prepare a defence.** ~~Providing access of the person alleging previous torture that might be deported to a lawyer and free legal aid when necessary;~~

**Proposed textual addition:**

(new paragraph 18(b) *bis*)

35. One of the principal obligations of States parties is to incorporate the *non-refoulement* principle into national law and policy. This obligation is not included in the draft General Comment. Previously, the Committee has detailed the legislative steps States parties must take to prohibit and prevent any kind of *refoulement* in violation of the Convention. It has stated that the adoption of a law is not enough to implement the *non-refoulement* principle. In addition there must to be “a legislative framework

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<sup>41</sup> CAT, Concluding Observations: Cyprus, UN Doc. CAT/C/CYP/CO/4, 16 June 2014; CAT, Concluding Observations: Switzerland, UN Doc. CAT/C/CHE/CO/7, 7 Sept. 2015; CAT, Concluding Observations: Australia, UN Doc. CAT/C/AUS/CO/4-5, 23 Dec. 2014.

<sup>42</sup> CAT, Concluding Observations: Switzerland, UN Doc. CAT/C/CHE/CO/7, 7 Sept. 2015.

<sup>43</sup> CAT, Concluding Observations: Cyprus, UN Doc. CAT/C/CYP/CO/4, 16 June 2014.

<sup>44</sup> CAT, Concluding Observations: Netherlands, UN Doc. CAT/C/NLD/CO/5-6, 20 June 2013.

<sup>45</sup> CAT, *S.H. v. Norway*, UN Doc. CAT/C/23/D/121/1998, 19 Nov. 1999, para. 7.4; CAT, *Z.T. v. Norway*, U.N. Doc. CAT/C/23/D/127/1999, 19 Nov. 1999, para. 7.4. See also, HRC, *G.T. v. Canada*, UN Doc. CCPR/C/46/D/420/1990, 23 Nov. 1992; HRC, *Warsame v. Canada*, UN Doc. CCPR/C/102/D/1959/2010, 1 Sept. 2011.

<sup>46</sup> CAT, *Abdussamatov et al. v. Kazakhstan*, UN Doc. CAT/C/48/D/444/2010, 7 June 2012, para. 13.9; CAT, *X. v. Netherlands*, UN Doc. CAT/C/16/D/36/1995, 8 May 1996, para. 6.3.

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regulating expulsion, refoulement and extradition.”<sup>47</sup> The Committee has specifically required non-refoulement to be included in all laws regulating asylum or asylum-related matters,<sup>48</sup> extradition,<sup>49</sup> aliens,<sup>50</sup> as well as other more general anti-torture laws.<sup>51</sup> The Committee has considered that such legislative acts are mutually reinforcing, and should all reference the *non-refoulement* obligation.<sup>52</sup> Moreover, in its Concluding Observations on Sri Lanka the Committee further recommended that a national policy concerning *refoulement* could be required.<sup>53</sup>

**Recommended textual addition paragraph 18 (b) bis:**

**States parties should adopt a comprehensive legislative framework regulating any form of involuntary transfer to exclude the possibility of *non-refoulement*.**

v) **Paragraph 18 (d)**

36. As the internationally accepted standard for effective investigation and documentation of allegations of torture and other ill-treatment, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) is a relevant and applicable standard and should be integrated into the General Comment. Though the Protocol is mentioned in paragraph 18(g) of the draft, it is not currently referenced in para 18(d).
37. Furthermore, in keeping with this Committee’s previous determinations, the General Comment should provide additional detail of requisite examinations in order to effectively address the circumstances experienced by victims of torture or other ill-treatment. Since many victims exhibit psychological symptoms, the General Comment should specify that efforts to document torture and other ill-treatment should include both a physical and a psychological evaluation.<sup>54</sup> Further, the purpose of the evaluation should be to determine the consistency of torture allegations with physical and psychological findings (rather than establishing the general health of the person) and should be carried out as early as possible.<sup>55</sup>

**Recommended textual change:**

18 (d) The referral of the person alleging previous torture to an independent medical **and psychological examination at the earliest opportunity, to detect signs or symptoms of past torture or other ill-treatment. The evaluation should be offered free of charge and be carried out according to the standards provided**

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<sup>47</sup> CAT, Concluding Observations: Chad, UN Doc. CAT/C/TCD/CO/1, 4 June 2009, para. 23; CAT, Concluding Observations: Kazakhstan, UN Doc. CAT/C/KAZ/CO/2, 12 Dec. 2014, para. 1.

<sup>48</sup> CAT, Concluding Observations: Belarus, UN Doc. CAT/C/BLR/CO/4, 7 Dec. 2011, para. 26.

<sup>49</sup> CAT, Concluding Observations: Rwanda, UN Doc. CAT/C/RWA/CO/1, 26 June 2012, para. 18.

<sup>50</sup> CAT, Concluding Observations: Ireland, UN Doc. CAT/C/IRL/CO/1, 17 June 2011, para. 10; CAT, Concluding Observations: Slovenia, UN Doc CAT/C/SVN/CO/3, 20 June 2011, at para. 17.

<sup>51</sup> CAT, Concluding Observations: Madagascar, UN Doc. CAT/C/MDG/CO/1, 21 Dec. 2011, para. 19.

<sup>52</sup> CAT, Concluding Observations: Madagascar, UN Doc. CAT/C/MDG/CO/1, 21 Dec. 2011, para. 19; CAT, Concluding Observations: Turkmenistan, UN Doc CAT/C/TKM/CO/1, 15 June 2011, para. 23.

<sup>53</sup> CAT, Concluding Observations: Sri Lanka, UN Doc. CAT/C/LKA/CO/3-4, 8 Dec. 2011, para. 27.

<sup>54</sup> See for example, CAT, Concluding Observations: Netherlands, UN Doc. CAT/C/NLD/CO/5-6, 20 June 2013. para. 12(b); CAT, Concluding Observations: Israel, UN Doc. CAT/C/ISR/CO/5, 3 June 2016, para. 47.

<sup>55</sup> See for example, CAT, Concluding Observations: Netherlands, UN Doc. CAT/C/NLD/CO/5-6, 20 June 2013. para. 12(a); CAT, Concluding Observations: Israel, UN Doc. CAT/C/ISR/CO/5, 3 June 2016, para. 47.

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by the Istanbul Protocol. Where required, an interpreter -- who should be independent, professional, and gender appropriate -- must be available for the examination;

vi) Paragraph 18 (e)

38. The Committee has consistently held that the prohibition on *refoulement* in Article 3 encompasses a right to an effective remedy. Access to such a remedy is a key safeguard against *refoulement*.<sup>56</sup> In *Agiza v. Sweden*, this Committee held that, in *refoulement* cases, the right to an effective remedy requires “an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.”<sup>57</sup> In addition to recognising State parties’ obligations to ensure that a person has a right to appeal against a transfer decision/order and that such appeal should have suspensive effect, the General Comment should provide clear guidance to States on the characteristics required of such an appeal process. This Committee has previously stated that such an appeal must be judicial in character.<sup>58</sup> In addition, the Committee’s jurisprudence indicates that the body in charge of the review of the *refoulement* decision should be: a) effective; b) independent;<sup>59</sup> c) impartial;<sup>60</sup> d) should provide for a full review of rejected applications, including the possibility to present new evidence and review of the merits;<sup>61</sup> and e) should have suspensive effect.<sup>62</sup> Furthermore, the State party should guarantee all necessary legal safeguards to ensure the rights of persons facing removal.<sup>63</sup>

**Recommended textual change:**

18 (e) The right of appeal by the person concerned against a **transfer deportation** order to an **competent, independent and impartial administrative or judicial body on refoulement grounds**, within a reasonable period of time from the notification of that order [Footnote: CAT, Concluding Observations: Hungary, UN Doc. CAT/C/HUN/CO/4, 6 Feb. 2007, para. 10; CAT, Concluding Observations: Finland, UN Doc. CAT/C/FIN/CO/7, 20 Jan. 2017, para. 13; Human Rights Committee, Concluding observation on the seventh periodic report of Ukraine, UN Doc. CCPR/C/UKR/CO/7, 22 August 2013, para. 18] and with

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<sup>56</sup> CAT, *Singh v. Canada*, UN Doc. CAT/C/46/D/319/2007, 8 July 2011, paras 7.3 and 9; CAT, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 20 May 2005, paras 13.6 and 13.7; CAT, Concluding Observations: Djibouti, UN Doc. CAT/C/DJI/CO/1, 22 December 2011, para. 14.

<sup>57</sup> CAT, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 20 May 2005, para. 13.7

<sup>58</sup> See for example, CAT, Concluding Observations: Slovenia, UN Doc CAT/C/SVN/CO/3, 20 June 2011, at para.17(b); CAT, Concluding Observations; Bosnia and Herzegovina, UN Doc. CAT/C/BIH/CO/2-5, 20 Jan. 2011, para. 14(a); CAT, Concluding Observations: Finland, UN Doc. CAT/C/FIN/CO/7, 20 Jan. 2017, para. 13(b).

<sup>59</sup> See for example, CAT, Concluding Observations: Slovenia, UN Doc CAT/C/SVN/CO/3, 20 June 2011, at para. 17(b).

<sup>60</sup> CAT, Concluding Observations: Hungary, UN Doc. CAT/C/HUN/CO/4, 6 Feb. 2007, para. 10.

<sup>61</sup> CAT, Concluding Observations: Netherlands, UN Doc. CAT/C/NLD/CO/5-6, 20 June 2013. para. 11(c); CAT, Concluding Observations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 5(c); CAT, *Singh v. Canada*, UN Doc. CAT/C/46/D/319/2007, 8 July 2011, paras 8.8, 8.9 and 9.

<sup>62</sup> See for example, CAT, Concluding Observations: Djibouti, UN Doc. CAT/C/DJI/CO/1, 22 Dec. 2011, para. 14; CAT, Concluding Observations: Slovenia, UN Doc. CAT/C/SVN/CO/3, 20 June 2011, para. 17(c); CAT, Concluding Observations: Bosnia and Herzegovina, UN Doc. CAT/C/BIH/CO/2-5, 20 Jan. 2011, para. 14(b).

<sup>63</sup> CAT, Concluding Observations: Norway, UN Doc. CAT/C/NOR/CO/6-7, 13 Dec.2012, para.16; CAT, Concluding Observations: Hungary, UN Doc. CAT/C/HUN/CO/4, 6 Feb. 2007, para. 10; CAT, Concluding Observations: Bosnia and Herzegovina, UN Doc. CAT/C/BIH/CO/1, 15 Dec.2005, para. 12; CAT, Concluding Observations: France, UN Doc. CAT/C/FRA/CO/4-6, 20 May 2010, para. 15; CAT, Concluding Observations: Bulgaria, UN Doc. CAT/C/BGR/CO/4-5, 14 December 2011, para. 16.

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suspensive effect of its enforcement.

**vii) Paragraph 18(f)**

39. The wording of paragraph 18(f) calling for “training of all officials dealing with persons under procedures of deportation” could be interpreted more narrowly than the requirements outlined by this Committee in previous Concluding Observations and jurisprudence. The current draft thus risks excluding relevant persons, for example, members of the judiciary who adjudicate over claims against decisions for the involuntary transfer of persons.<sup>64</sup> Para 18(f) in the General Comment should therefore be expanded to include officials involved in extradition and other proceedings and to reflect the Committee’s calls for effective training for officials.<sup>65</sup>

**Recommended textual changes:**

**States parties should disseminate information and provide an effective training about the respect of the provisions of Article 3 of the Convention in order to avoid decisions contrary to that Article of to all officials - including members of the judiciary, executive agencies and law enforcement, military and healthcare professionals - dealing with persons under procedures of deportation threat of involuntary transfer about the respect of the provisions of Article 3 of the Convention in order to avoid decisions contrary to that Article; and**

**viii) Paragraph 18 (g)**

40. This Committee’s consistent references to the Istanbul Protocol recognise its authoritative nature, leading the Committee to express concern where “medical personnel who come into contact with persons deprived of their liberty, asylum-seekers and other aliens are not systematically trained in [its] provisions.”<sup>66</sup> The wording of the draft General Comment does not fully reflect the recommendations previously adopted by this Committee in this regard.<sup>67</sup> The General Comment should thus be revised to make clear the range of officials who should be provided with effective training and to specify that this training must reflect the standards identified in the Istanbul Protocol.

**Recommended textual change:**

18 (g) **An e Ensuring effective training of medical health professionals – including medical and psychological personnel - and other personnel dealing with vulnerable persons, including detainees, migrants and asylum seekers, children and victims of sexual or other gender-based violence in identifying and documenting signs of torture, taking into account based on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).**

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<sup>64</sup> CAT, Concluding Observations: Paraguay, UN Doc. CAT/C/PRY/CO/4-6, 14 Dec. 2011, para. 17; CAT, Concluding Observations: Bulgaria, UN Doc CAT/C/BGR/CO/4-5, 14 Dec. 2011, para. 16; CAT, Concluding Observations: France, UN Doc. CAT/C/FRA/CO/4-6, 20 May 2010, para.14.

<sup>65</sup> See for example, CAT, Concluding Observations: Portugal, UN Doc. CAT/C/PRT/CO/5-6, 23 Dec. 2013, para. 20; CAT, Concluding Observations: Italy, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, para. 15; CAT, Concluding Observations: Spain, UN Doc. CAT/C/ESP/CO/6, 29 May 2015, para. 23.

<sup>66</sup> CAT, Concluding Observations: Finland, UN Doc. CAT/C/FIN/CO/7, 20 January 2017, para. 13; CAT, Concluding Observations: Spain, UN Doc. CAT/C/ESP/CO/6, 29 May 2015, para. 23.

<sup>67</sup> See for example, CAT, Concluding Observations: Netherlands, UN Doc. CAT/C/NLD/CO/5-6, 20 June 2013. para. 12(b); CAT, Concluding Observations: Norway, UN Doc. CAT/C/NOR/CO/6-7, 13 Dec. 2013, para.18; CAT, Concluding Observations: Portugal, UN Doc. CAT/C/PRT/CO/5-6, 23 Dec. 2013, para. 20.

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***ix) Proposed new paragraph 18 ter:***

41. The draft General Comment does not reference that persons under threat of involuntary transfer who are detained are at increased risk of being subjected to torture or other ill-treatment, including by being held in conditions that themselves may amount to cruel, inhuman or degrading treatment or punishment.<sup>68</sup> Furthermore, removals can entail “a manifest risk of inhuman and degrading treatment.”<sup>69</sup> The General Comment should provide recommendations to monitor the situation of persons under threat of involuntary transfer to reduce the risk that they are tortured or ill-treated either during their pre-removal detention, in transit, or on arrival.

**Recommended textual addition:**

(new paragraph 18 *ter*)

**In order to reduce the risk of torture or other ill-treatment in detention and during transit to the destination State, States parties should give full access to independent monitors, and establish a system of regular monitoring if such system does not exist, including those foreseen under the Optional Protocol to the Convention.**

**e) Section IV: Diplomatic assurances, paragraphs 19-20**

***i. Paragraphs 19-20***

42. We respectfully suggest that paragraph 19 is unnecessary and thus recommend its deletion. With respect to paragraph 20, in light of our comments above, we repeat our recommendation that the term involuntary transfer be used instead of deportation. Further, we consider that the guidance value and clarity of paragraph 20 would be enhanced by more expressly stating that diplomatic assurances are contrary to the prohibition of *refoulement* in the Convention and thus should not be used, reflecting the Committee’s own jurisprudence as well as that of other human rights bodies and experts.<sup>70</sup> We

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<sup>68</sup> See for example, CAT, Concluding Observations: Australia, UN Doc. CAT/C/AUS/CO/4-5, 23 Dec. 2014, para. 17; ECtHR, *M.S.S. v Belgium and Greece*, App. no. 30696/09, 21 Jan. 2011; ECtHR, *Khlaifia and Others v Italy* [GC], App. no. 16483/12, 15 Dec. 2016, paras 171-177.

<sup>69</sup> Committee for the Prevention of Torture, Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 24 October 2012, para. 9. See also, HRC, *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 25 Oct. 2006, para. 11.6.

<sup>70</sup> CAT, Concluding Observations: United Kingdom, UN Doc. CAT/C/GBR/CO/5, 24 June 2013, “Reliance on diplomatic assurances, 18. The Committee notes with concern the State party’s reliance on diplomatic assurances to justify the deportation of foreign nationals suspected of terrorism-related offences to countries in which the widespread practice of torture is alleged (arts. 3 and 13). The Committee calls on the State party to ensure that no individual – including persons suspected of terrorism, who are expelled, returned, extradited or deported – is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment. It urges the State party to refrain from seeking and relying on diplomatic assurances “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture” (art. 3). The more widespread the practice of torture or other cruel, inhuman or degrading treatment, the less likely the possibility of the real risk of such treatment being avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.” See also, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/10/44/Add.2, 18 February 2009, para. 69; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/13/39, 9 February 2010, para. 67.

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would also strongly advise against any “further elaborat[ion] on the issue” as indicated in footnote 11 of the current draft, to the extent that any such elaboration would weaken the position set out.

**Recommended textual changes:**

19. Delete paragraph 19 in its entirety.

20. **Whenever there are substantial grounds for believing that anybody facing an involuntary transfer would be in danger of being subjected to torture or other ill-treatment upon such transfer,** ¶the Committee considers that diplomatic assurances from ~~the a State party to the Convention~~ to which a person is to be **transferred** ~~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.~~<sup>12</sup>

**f) Section V: Redress and compensation, paragraphs 21-22**

**i) Paragraph 21**

43. The clarity and guidance value of paragraph 21 would be enhanced by ensuring that the language used regarding the right of a survivor of torture to rehabilitation be consistent with that used in other interpretative guidance issued by the Committee on the issue.<sup>71</sup> In particular the holistic nature of rehabilitation and the criteria against which a State’s obligations to provide rehabilitation are measured – i.e. on the basis that rehabilitation services are available, appropriate and readily accessible – could be addressed more clearly. In addition, the draft should state expressly that a State that has transferred individuals in violation of the *refoulement* prohibition is obliged to repair the harm it has caused to those persons, including by providing them with access to an independent medical and psychological evaluation to assess the extent of harm suffered and their rehabilitation needs. Further to this, the person should be provided immediately with access to holistic rehabilitation services. In light of the above, we recommend the following textual changes to paragraph 21.

**Recommended textual changes:**

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 **support from** sustained specialized **holistic rehabilitation services**, treatment including **medical and psychological care, as well as legal and social services**. ~~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.~~ **Where the person has been evaluated physically or psychologically and signs of torture or other ill-treatment have been identified, they are entitled to rehabilitation and therefore should not be removed to a State where specialized holistic rehabilitation services are not available, accessible or appropriate, and are not guaranteed at the earliest point in time after the person’s return.**

**ii) Paragraph 22**

44. States parties are obligated to afford reparation when Article 3 is breached, as previously identified by the Committee in its jurisprudence and Concluding Observations. This obligation flows directly from the breach of the international obligation owed by States parties and should be set out clearly and authoritatively in the General Comment. The language in paragraph 22 uses terms such as

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<sup>71</sup> In particular paras 11-15 CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012.

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“alternatively” and “when necessary”, which are inconsistent with the binding nature of the obligation to afford reparation when an international legal obligation is breached. When Article 3 is breached, there is an obligation to afford reparation, in cases where *refoulement* has resulted in torture or other ill-treatment, as well as instances where ill-treatment has not actually materialized.<sup>72</sup> This Committee has observed that the right to an effective remedy underpins the entire Convention “for otherwise the protections afforded by the Convention would be rendered largely illusory.”<sup>73</sup> It has thus held that “in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on *refoulement* contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.”<sup>74</sup>

45. In its General Comment 3, this Committee articulated that the appropriate forms of reparation depend on the nature of the breach and the consequences for the victim. Reparation must be adequate, effective and comprehensive.<sup>75</sup> A breach of Article 3 is sufficient to establish an obligation on the State party to afford reparation. The ultimate consequences for the victim are thus relevant not on whether reparation should follow, but on what forms of reparation would be most appropriate.

46. The ‘nature’ of the breach of Article 3 concerns the actions or inactions by the State party leading to the *refoulement*. The consequences for the victim after the breach are immaterial to the determination of the ‘nature’ of the breach, given that Article 3 is preventative; there is no need for actual torture to have subsequently occurred for Article 3 to have been breached or for the risk to be re-confirmed post-*refoulement*. Thus, any breach of Article 3, regardless of the ultimate consequences for the victim, constitutes a breach of the State party’s international obligations and results in an obligation to afford reparation. The reference in paragraph 22 of the draft to “persons deported where they have subsequently faced a substantial risk of being tortured or they have been tortured in the receiving State...” therefore inappropriately narrows the categories of persons to whom reparation should apply, namely:

- “persons deported” is a subset of the multitude of individuals who may be victims of a violation of Article 3. Any victim of a violation of Article 3 is entitled to reparation;
- “where they have subsequently faced a substantial risk of being tortured or they have been tortured in the receiving State” is a similar limitation on the categories of individuals who may be a victim of a violation of Article 3. The reference to “substantial risk” imposes a higher test than what is set out for a breach of Article 3. Furthermore, the reference to torture in the receiving State is immaterial to the breach of Article 3 and concomitant obligation to afford reparation.

47. The consequences for the victim of an Article 3 breach can vary considerably and include: 1) individuals who are at real risk of torture or other ill-treatment but have not yet suffered such abuse; 2) individuals who have been subjected to torture or other ill-treatment and continue to face a real risk; 3) individuals who have been subjected to torture or other ill-treatment but are no longer at risk (e.g. they may now be

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<sup>72</sup> See e.g., CAT, *Tebourski v. France*, UN Doc. CAT/C/38/D/300/2006, 11 May 2007, para. 10; CAT, *Bachan Singh Sogi v. Canada*, UN Doc. CAT/C/39/D/297/2006, 29 November 2007, para. 12.

<sup>73</sup> See e.g., CAT, *Agiza v Sweden*, UN Doc. CAT/C/34/D/233/2003, 24 May 2005, para. 13.6.

<sup>74</sup> *Ibid.*

<sup>75</sup> CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012, para. 6.

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in a safe country); and 4) individuals who are no longer at risk. These consequences should be factored into what may be understood as adequate and effective reparation for the Article 3 violation in any particular case.

48. This Committee has already identified that at least in cases where a victim has been subjected to torture or other ill-treatment following a violation of Article 3, the expelling State must comply with Article 14, as interpreted by General Comment 3. In this new General Comment, the Committee should further recognize that General Comment 3 provides essential guidance regarding the elements of the right to reparation in all cases where Article 3 has been violated. While the Committee's early jurisprudence provided limited detail on the forms of reparation a victim is entitled to when Article 3 is violated,<sup>76</sup> more recent Committee decisions and observations recognize the importance of reparation in all its forms in such cases.<sup>77</sup> For example, in *Boily*, the Committee called on the State to "provide effective redress, including": compensation, rehabilitation, guarantees of non-recurrence, and determining the complainant's whereabouts and state of wellbeing.<sup>78</sup>

**(1) Access to an effective remedy – pre and post-return**

49. Access to an effective remedy pre-return is a key safeguard against *refoulement*. Where an allegation of a potential violation of Article 3 is raised pre-return this Committee has confirmed that the right to an effective remedy contained in Article 3 requires "an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made."<sup>79</sup> This obligation is considered at paragraph 18(e) of the draft General Comment and in our comments on that paragraph (see above).
50. States Parties are also obligated to afford victims of Article 3 violations access to an effective remedy, post-return. This obligation arises in direct consequence of the breach of Article 3 and is also a precondition for the fulfilment of victims' right to reparation. Victims face significant difficulties in accessing redress from the sending State when they are no longer on that State's territory, including challenges to instruct lawyers, difficulties to lodge legal actions and to communicate with judicial or administrative bodies in the sending State as well as in obtaining evidence. In light of this, the General Comment should explain the obligation on States Parties to put in place accessible remedial mechanisms so that victims no longer in the territory can engage effectively with them. Paragraph 22 of the draft refers to "access to judicial procedures to put an end to that risk or that offence" however this phrase is ambiguous. The Committee should affirm that the sending State must take positive actions to adapt its procedures as necessary to ensure that these are fully accessible to all victims of Article 3 violations, including persons outside the jurisdiction.<sup>80</sup>

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<sup>76</sup> See e.g., CAT, *Pelit v. Azerbaijan*, UN Doc. CAT/C/38/D/281/2005, 5 June 2007, para. 13.

<sup>77</sup> See e.g., CAT, *Boily v. Canada*, UN Doc. CAT/C/47/D/327/2007, 13 January 2012, paras 14-16; CAT, Concluding Observations: Djibouti, UN Doc. CAT/C/DJI/CO/1, 22 Dec. 2011, para. 14.

<sup>78</sup> CAT, *Boily v. Canada*, UN Doc. CAT/C/47/D/327/2007, 13 January 2012, paras 14-16.

<sup>79</sup> CAT, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 24 May 2005, para. 13.7.

<sup>80</sup> See e.g., ECtHR, *Savridin Dzhurayev v. Russia*, App no. 71386/10, 25 April 2013, para. 253; ECtHR, *Muminov v. Russia*, App. no. 42502/06, 4 November 2010, para. 19; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, App. no. 7511/13, 16 February 2015.

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## (2) *Forms of Reparation*

### *Restitution*

51. Restitution is designed to re-establish the victim's situation prior to the violation.<sup>81</sup> For violations of Article 3, restitution will typically require return to the expelling country. Where a State Party violates Article 3 it must take all possible steps to enable the victim(s) to return to its jurisdiction.<sup>82</sup> Positive actions to enable the return of the victim may include: the provision of travel expenses;<sup>83</sup> free legal assistance;<sup>84</sup> provision of travel documents, for example a humanitarian visa;<sup>85</sup> and review of any previous request for asylum.<sup>86</sup>
52. If the victim is in detention or is otherwise made inaccessible in the receiving State, effectuating a return may only be possible once he or she has been released or is again accessible. In such cases the State party should monitor the welfare and treatment of the victim in the receiving State.
53. The draft General Comment stipulates that States parties should provide financial and legal assistance to persons who have been deported in violation of Article 3. However, additional measures are required while the victim remains in the receiving State.<sup>87</sup> The sending State should also determine the individual's "current whereabouts and state of well-being"<sup>88</sup> and establish "an effective follow-up mechanism to ensure that the complainant is not subjected to torture or ill-treatment,"<sup>89</sup> such as "regular visits and effective monitoring to ensure that he is not subjected to treatment contrary to article 3 of the Convention."<sup>90</sup> The draft refers to requests to international experts and others; however it should be made clear that the obligation is on the violating State to put adequate measures in place. Requests to third parties do not absolve a violating State of its obligations.

### *Compensation*

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<sup>81</sup> CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012, para. 8.

<sup>82</sup> CAT, *Abdussamatov v. Kazakhstan*, UN Doc. CAT/C/48/444/2010, 11 July 2012, para. 15; See also, CAT, Concluding Observations: Kazakhstan, UN Doc. CAT/C/KAZ/CO/3, 12 Dec. 2014, para. 16(g); HRC, *AH v. Denmark*, UN Doc. CCPR/C/114/D/2370/2014, 7 September 2015, para. 10 and follow up at HRC, 118<sup>th</sup> Session (17 Oct 2016-04 Nov 2016); CAT, *X v. Kazakhstan*, UN Doc. CAT/C/55/D/554/2013, 9 October 2015, para. 14.

<sup>83</sup> See e.g., ECtHR, *X v. Switzerland*, App. no. 16744/14, 26 Jan. 2017.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> See e.g., CAT, Concluding Observations: Sweden, UN Doc. CAT/C/SWE/CO/6-7, 12 Dec. 2014, para. 11; HRC, *AH v. Denmark*, UN Doc. CCPR/C/114/D/2370/2014, 7 September 2015, para. 10 and follow up at HRC, 118<sup>th</sup> Session (17 Oct 2016-04 Nov 2016); ECtHR, *X v. Switzerland*, App. no. 16744/14, 26 January 2017.

<sup>87</sup> See e.g., ECtHR, *Hirsi Jamaa v. Italy*, App. no. 27765/09, 23 February 2012, para. 211.

<sup>88</sup> CAT, *Mafhoud Brada v. France*, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 15; See also, CAT, *Tebourski v. France*, UN Doc. CAT/C/38/D/300/2006, 11 May 2007, para. 10; CAT, *Bachan Singh Sogi v. Canada*, UN Doc. CAT/C/39/D/297/2006, 29 November 2007, para. 12; CAT, *Boily v. Canada*, UN Doc. CAT/C/47/D/327/2007, 13 January 2012, para. 16.

<sup>89</sup> CAT, *Alexey Kalinichenko v. Morocco*, UN Doc. CAT/C/47/D/428/2010, 18 January 2012, para. 17.

<sup>90</sup> CAT, *Tursonov v. Kazakhstan*, UN Doc. CAT/C/54/D/538/2013, 3 July 2015, para. 11. See also, CAT, *X v. Kazakhstan*, UN Doc. CAT/C/55/D/554/2013, 9 October 2015, para. 14; HRC, *Valetov v. Kazakhstan*, UN Doc. CCPR/C/110/D/2104/2011, 29 April 2014, para. 16.

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54. This Committee has consistently upheld the right to compensation for individuals whose rights under Article 3 have been violated,<sup>91</sup> as does the Human Rights Committee and European Court of Human Rights.<sup>92</sup> Despite this, the draft General Comment refers to compensation only in the title of the Section “Redress and compensation.” Reference to “mechanisms of financial and legal assistance” is a poor substitute for compensation, though it is required for victims to pursue compensation claims.<sup>93</sup>
55. The General Comment should make clear that victims of Article 3 violations are entitled to adequate compensation, in line with the criteria set out in General Comment 3. There are challenges for victims outside the sending State to enforce compensation awards.<sup>94</sup> For example, the complainant in *Valetov* was unable to make a court application for compensation for several years after the Human Rights Committee’s decision.<sup>95</sup> In *X v Switzerland* the European Court of Human Rights observed that the deadline to claim compensation in relation to expulsion and subsequent ill-treatment had expired while the Applicant was in prison in Sri Lanka.<sup>96</sup>

### **Rehabilitation**

56. In General Comment No. 3 this Committee affirmed that “the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services.”<sup>97</sup> The standards outlined in General Comment 3 should be reflected - or cross-referenced – where relevant to this General Comment. In previous cases, the Committee has recognized that the expelling State’s obligation to provide redress where Article 3 has been violated included the requirement to “provide as full

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<sup>91</sup> CAT, *Mafhoud Brada v. France*, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 15; CAT, *Boily v. Canada*, UN Doc. CAT/C/47/D/327/2007, 13 January 2012, para. 15; CAT, *Alexey Kalinichenko v. Morocco*, UN Doc. CAT/C/47/D/428/2010, 18 January 2012, para. 17; CAT, *Abdussamatov v. Kazakhstan*, UN Doc. CAT/C/48/D/444/2010, 11 July 2012, para. 15; CAT, *Inass Abichou v. Germany*, UN Doc. CAT/C/50/D/430/2010, 16 July 2013, para. 13; CAT, *Tursonov v. Kazakhstan*, UN Doc. CAT/C/54/D/538/2013, 3 July 2015, para. 11; CAT, *X v. Kazakhstan*, UN Doc. CAT/C/55/D/554/2013, 9 October 2015, para. 14; CAT, Concluding Observations: Djibouti, UN Doc. CAT/C/DJI/CO/1, 22 December 2011, para. 14.

<sup>92</sup> HRC, *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para. 13; HRC, *Valetov v. Kazakhstan*, UN Doc. CCPR/C/110/D/2104/2011, 29 April 2014, para. 16; HRC, *AH v. Denmark*, UN Doc. CCPR/C/114/D/2370/2014, 7 September 2015, para. 10; HRC, *Ali Aarrass v. Spain*, UN Doc. CCPR/C/111/D/2008/2010, 30 September 2014, para. 12. See e.g., ECtHR, *X v. Switzerland*, App. no. 16744/14, 26 January 2017, para. 70; ECtHR, *Iskandarov v. Russia*, App. no. 17185/05, 23 September 2010, para. 156; ECtHR, *Hirsi Jamaa v. Italy*, App. No. 27765/09, 23 February 2012, para. 215; ECtHR, *El Masri v. FYRoM*, App. no. 39630/09, 13 December 2012, para. 270; ECtHR, *Muminov v. Russia*, App. no. 42502/06, 4 November 2010, para. 18.

<sup>93</sup> CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012, para. 10.

<sup>94</sup> See e.g., HRC, *Ali Aarrass v. Spain*, UN Doc. CCPR/C/111/D/2008/2010, 30 September 2014, para., follow up at HRC 115<sup>th</sup>, 116<sup>th</sup>, and 118<sup>th</sup> sessions; CAT, *Inass Abichou v. Germany*, UN Doc. CAT/C/50/D/430/2010, 16 July 2013, follow up.

<sup>95</sup> HRC, *Valetov v. Kazakhstan*, UN Doc. CCPR/C/110/D/2104/2011, 29 April 2014, follow up, 113<sup>th</sup>, 115<sup>th</sup>, and 118<sup>th</sup> sessions.

<sup>96</sup> ECtHR, *X v. Switzerland*, App. no. 16744/14, 26 January 2017, para., 54. See also, para. 43.

<sup>97</sup> CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012, para. 11.

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rehabilitation as possible by providing, inter alia, medical and psychological care, social services, and legal assistance, including reimbursement for past expenditures, future services, and legal expenses...<sup>98</sup>

### ***Satisfaction and the Right to the Truth***

57. In some cases, particularly where a person was returned to a risk of torture or other ill-treatment outside ordinary judicial processes, a vital component of the right to redress will be an effective investigation that would determine the truth of what happened capable of leading to prosecution of the perpetrators.<sup>99</sup> Public inquiries are particularly important in order to ensure public scrutiny of, and accountability for, acts that have occurred away from public view, in order to prevent further violations of the Convention.<sup>100</sup>

### ***Guarantees of Non-Repetition***

58. Guarantees of non-repetition, identified as an essential component of the right to reparation in General Comment 3, are equally significant for violations of Article 3. Both this Committee and the Human Rights Committee have regularly called on States to prevent similar violations in the future.<sup>101</sup>

59. Appropriate forms of guarantees will depend upon the context but may include: revising law and policy guidance that led to the offensive decision to return; training competent officials to better implement existing guidance and relevant international law as set out in the Convention; convening governmental inquiries and improving parliamentary scrutiny and oversight in order to improve transparency.

60. Given the countless instances of individuals being subjected to lengthy detention periods while awaiting transfer, the Committee should consider recommending that States parties provide redress and reparation to the individuals concerned when their transfers are found to be in violation of Article 3 and the States parties were responsible for unnecessarily prolonging the detention of the complainant.

#### ***(3) Follow-up monitoring by human rights bodies***

61. The second sentence of paragraph 22 broadly recommends that states parties request “independent international experts or organizations or national experts and institutions to carry out monitoring and follow-up visits to the persons concerned...”

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<sup>98</sup> CAT, *Boily v. Canada*, UN Doc. CAT/C/47/D/327/2007, 13 January 2012, para. 15. See also, CAT, Concluding Observations: Djibouti, UN Doc. CAT/C/DJI/CO/1, 22 Dec. 2011, para. 14

<sup>99</sup> CAT, Concluding observations: Kenya, UN Doc. CAT/C/KEN/CO/1, 19 Jan. 2009, para. 17; CAT, Concluding Observations: Syria, UN Doc. CAT/C/SYR/CO/1, 25 May 2010, para. 18; CAT, Concluding Observations: Djibouti, UN Doc. CAT/C/DJI/CO/1, 22 Dec. 2011, para. 14; HRC, Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 Dec. 2006; ECtHR, *El Masri v. FYRoM*, App. no. 39630/09, 13 December 2012, paras 191-2.

<sup>100</sup> ECtHR, *El Masri v. FYRoM*, App. no. 39630/09, 13 December 2012, para. 11

<sup>101</sup> See e.g., CAT, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 20 May 2005, para. 15; CAT, *Boily v. Canada*, UN Doc. CAT/C/47/D/327/2007, 13 January 2012, para. 15; HRC, *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para. 13; HRC, *Valetov v. Kazakhstan*, UN Doc. CCPR/C/110/D/2104/2011, 29 April 2014, para. 16; HRC, *AH v. Denmark*, UN Doc. CCPR/C/114/D/2370/2014, 7 September 2015, para. 10; HRC, *Ali Aarrass v. Spain*, UN Doc. CCPR/C/111/D/2008/2010, 30 September 2014, para. 12; HRC, Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 Dec. 2006, para. 16.

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62. Whereas sending States parties must indeed provide assistance to persons involuntarily transferred who subsequently face a risk of or actual torture or other ill-treatment, we would caution that such “follow-up visits” would necessarily entail visiting one or a few, named detainees to ensure they are not tortured or otherwise ill-treated while ignoring, or being barred from monitoring, others who may be tortured within the same facility. For human rights “experts and institutions,” be they international or national, to carry out visits of such a nature would undermine their human rights mission and the universality of the prohibition on torture and other ill-treatment, as well as compromise the principle of non-discrimination – which is precisely why “diplomatic assurances” against torture must never be resorted to. As early as the turn of the century, the International Committee of the Red Cross (ICRC) refused a request by the UK government to monitor the treatment of four individual which it tried to forcibly transfer to Egypt under “diplomatic assurances.” The ICRC “would not visit particular prisoners without a general agreement allowing it access to all prisoners”.<sup>102</sup> We would therefore strongly recommend that the second sentence of paragraph 22 be deleted. This exclusion need not rule out measures such as visits being undertaken by diplomatic missions of the sending State.

63. Should the Committee choose to include references to monitoring bodies in paragraph 22, it should be explicit that the holistic system of preventive monitoring described by the OPCAT can never fulfil the requirements of post-return protection-focussed individual monitoring.

In light of the above comments, we recommend the following comprehensive revision of paragraph 22.

#### **Recommended textual changes and additions:**

**Para 22:** States parties should ~~envisage mechanisms of financial and legal assistance to persons deported~~ **ensure that victims of Article 3 violations can access redress mechanisms which are capable of affording adequate, effective and comprehensive reparation to persons who are victims of a violation of the State’s Article 3 obligations.**

**The sending State is obliged to ensure that its redress mechanisms are available and accessible to victims of Article 3 violations, regardless of their location. States parties should adapt their procedures as required in order to make them fully accessible to victims who may be outside their jurisdiction.**

**Any breach of Article 3 gives rise to an obligation on the responsible State party to afford an effective remedy and reparation to the victim(s) of that breach. The appropriate forms of reparation will depend on the nature of the breach and the consequences for the victim(s) and must be adequate, effective and comprehensive. As recognised in General Comment 3, redress encompasses the concepts of “effective remedy” and “reparation”, which entail: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>103</sup>**

**Where a State party has failed to comply with its obligations under Article 3 it should make every effort to ensure that affected individuals may be returned to its jurisdiction.<sup>104</sup> ~~When necessary –~~ The sending**

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<sup>102</sup> *Hani El Sayed Sabei Youssef v. The Home Office*, [2004] EWHC 1884 (QB), July 30, 2004, para. 26.

<sup>103</sup> CAT, General Comment No. 3, UN Doc. CAT /C/GC/3, 19 November 2012, para. 2.

<sup>104</sup> CAT, *Abdussamatov et al. v. Kazakhstan*, UN Doc. CAT/C/48/D/444/2010, 7 June 2012, para. 15. CAT, Concluding Observations: Kazakhstan, UN Doc. CAT/C/KAZ/CO/2, 12 Dec. 2014, para. 16(g); HRC, *AH v. Denmark*, UN Doc. CCPR/C/114/D/2370/2014, 18 March 2014, para. 10 (and follow up at HRC, 118<sup>th</sup> Session); CAT, *X v. Kazakhstan*, UN Doc. CAT/C/55/D/554/2013, 3 Aug. 2015, para. 14.

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State should undertake legal and administrative or other (diplomatic) procedures for the return of the persons concerned to its territory, **should the persons so wish. The return of the affected individuals to the State party's jurisdiction may require measures including the provision of travel expenses;<sup>105</sup> free legal assistance;<sup>106</sup> provision of travel documents, for example a humanitarian visa<sup>107</sup> and review of any previous request for asylum.<sup>108</sup> If the affected individual is not immediately returned to the sending State, that State should determine the individual's current whereabouts and state of well-being and ensure that the individual is not subjected to torture or other ill-treatment.**

~~where they have subsequently faced a substantial~~ **Where the victim continues to face a risk of being tortured or they have been tortured in the receiving State the sending State should provide all possible assistance, including legal, financial and diplomatic,** in order to ~~enable them to get access to judicial procedures empowered to put an end to the risk or that offence.~~

~~To complement these measures, States parties 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.<sup>109</sup>~~

**g) Section VI: Article 3 of the Convention and extradition treaties (paragraphs 23-25)**

64. The current formulation of this section may be understood as implying that for those States parties that concluded extradition treaties or agreements before ratifying the Convention, such treaties or agreements may take precedence and prevail over States parties' *non-refoulement* obligations under the Convention. Such an understanding would ignore the *jus cogens* nature of the *non-refoulement* principle, as reflected in Article 3, and elaborated in our comments above. In light of this, the clarity and guidance value of this section would be enhanced by the following textual revisions:

**Recommended textual changes:**

**i) Paragraph 23**

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. **The Committee recalls that, under the Convention, States parties are required to give effect to their *non-refoulement* obligations, including, whenever necessary, by giving precedence to the said obligations and ensuring that they prevail over and above any obligation under any extradition treaty or agreement, whether multilateral or bilateral, and irrespective of the date of entry into force of the latter treaty or agreement, including when such a date precedes the signing, ratification of or accession to the Convention. Further, States parties should ensure that any extradition agreement or treaty, whether bilateral or multilateral, they wish to enter into must expressly provide for an exception to their obligations under such agreements or treaties based on *non-refoulement* grounds, consistent with the Convention. This exception should explicitly state that**

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<sup>105</sup> See e.g., ECtHR, *X v Switzerland*, App. No. 16744/14, 26 Jan. 2017.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> See e.g., CAT, Concluding Observations: Sweden, UN Doc. CAT/C/SWE/CO/6-7, 12 Dec. 2014, para.11; HRC, *H v. Denmark*, UN Doc. CCPR/C/114/D/2370/2014, 18 March 2014, para. 10 (and follow up at HRC, 118<sup>th</sup> Session); ECtHR, *X v Switzerland*, App. No. 16744/14, 26 Jan. 2017.

<sup>109</sup> CAT, *Kalinichenko v. Morocco*, UN Doc. CAT /C/ 47 /D/ 428 / 2010, 25 Nov. 2011, para. 17.

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whenever States parties' *non-refoulement* obligations under the Convention are engaged, they will take precedence and prevail over any other obligation under the extradition agreement and/or treaty. States parties should seek to amend or make an interpretative declaration or enter a reservation into any extradition treaty or agreement, whether bilateral or multilateral, which they have already entered into, with a view to providing for an express exception to their obligations under such agreements or treaties based on *non-refoulement* grounds, consistent with the Convention, whenever such agreements or treaties omit such an exception.

*ii) Paragraph 25*

25. Furthermore, those States parties to the Convention which, subsequently, ....”

**h) Section VII: Article 3 in the context of Article 16, paragraph 2, of the Convention, paragraphs 26-27**

65. In light of our comments at paragraphs 7 and 9-11 above, we respectfully recommend the deletion of paragraphs 26 and 27.

**i) Section VIII: Duties of States parties to consider specific human rights situations in which the right of “non-refoulement” applies, paragraphs 28-30**

*i) Paragraph 29*

66. We welcome the inclusion of the important standards outlined at paragraph 29. For greater clarity, we recommend the following textual revisions.

**Recommended textual revisions to paragraph 29**

29. In this regard, the Committee observes that ~~the infliction~~ **past evidence** of cruel, inhuman or degrading treatments or punishments, whether **or not** amounting ~~or not amounting~~ to torture, ~~to which~~ **of** an individual or his/her family ~~were exposed in their State of origin or would be exposed in the State~~ **where the person is to be transferred** ~~of deportation,~~ constitutes an **strong** indication that the person is **would be** in danger of being subjected to torture **upon transfer.** ~~if he/she is expelled, returned or extradited to one of those States.~~  
....

*ii) Paragraph 30*

67. For greater clarity we recommend that “an indication” in the current draft be replaced with the term “evidence”.

**Recommended textual changes and additions:**

30. In this connection, the Committee... which may constitute ~~an indication~~ **evidence** of a risk of torture...

**(1) Paragraph 30(b)**

68. Paragraph 30(b) appears to restrict abuse to the physical, and restrict the scope of protection to those ill-treated on the basis of discrimination, which is not a requirement under Article 3. Further, and in view of the fact that risks associated with Article 3 may be posed by non-state actors, as the draft General Comment itself explains, there is no reason to restrict the scope of protection to acts by public officials.

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**Recommended textual change:**

“Whether the person has been a victim of ~~brutality or excessive use of force by public officials based on any form of discrimination~~ **physical or mental ill-treatment** in the State of origin or would be exposed to such ~~brutality ill-treatment~~ in the State of **transfer deportation**.”

***(2) Paragraph 30 (c)***

69. In order to ensure that women and girls enjoy equal protection against *refoulement* without discrimination based on sex and/or gender, its application should take into account the specific disadvantages, harms and risks thereof women and girls face and are more likely to face than men and boys. Although women and girls are also victims of torture and other ill-treatment committed by State officials, they are at greater risk of violence at the hands of non-state actors, such as private persons, e.g. intimate partners, parents, siblings and other family members and neighbours. They are also at greater risk of human trafficking and/or violence perpetrated by organized criminal groups. Especially along migration routes women and girls are particularly vulnerable to sexual violence, exploitation and slavery.
70. In its General Comment No.2, this Committee held that the “where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”<sup>110</sup>The Committee further emphasized that, “gender is a key factor”.<sup>111</sup>
71. In *Njamba and Balikosa v. Sweden*, the Committee reaffirmed the due diligence obligation of the State to prevent rape and sexual violence by private actors under the Convention. It concluded that there were substantial grounds for believing that the complainants faced a real risk of being subjected to torture (in the form of rape) if returned to the DRC.<sup>112</sup>
72. Thus a gendered interpretation of the prohibition against *refoulement* under the Convention should include the obligation of States to ensure that women and girls are not transferred to country where there are substantial grounds for believing that they would be in danger of being subjected to violence by non-state actors and where the authorities of that country are unable or unwilling to exercise due diligence to effectively prevent such violence. If in the face of that known danger the transferring State goes ahead with the transfer, it bears responsibility and its officials should be considered as perpetrators, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.

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<sup>110</sup> CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 Jan. 2008 para. 18.

<sup>111</sup> CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 Jan. 2008 para. 22.

<sup>112</sup> CAT, *Njamba and Balikosa v. Sweden*, UN Doc. CAT /C/44/D/322/2007, 3 June 2010.

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73. However, paragraph 30(c), as currently formulated, restricts protection against *refoulement* to cases of violence where the State authorities failed to intervene, which is too narrow a scope for that protection, not least in view of the clear obligation on States parties to exercise due diligence to prevent, stop and punish such violence, as acknowledged by the Committee.<sup>113</sup>

**Recommended textual change:**

Whether, in the State of origin or in the State of deportation, the person has been or would be the victim of abuse or violence including gender based violence/ ~~sexual violence, in public or in private~~, or gendered-based persecution, whether **committed by State actors or by private persons** ~~genital mutilation, amounting to torture without the intervention of the competent authorities of the State concerned for the protection of the victim, when the State fails to exercise due diligence to prevent, investigate, prosecute, punish or redress the harm caused by such private persons leading to a violation of the prohibition of torture and other ill-treatment;~~

**(3) Proposed new Paragraph 30 (d)**

74. Paragraph 30 of the draft omits to mention the criminalization of same-sex conduct as an indication of a risk of torture or other ill-treatment. This is of particular concern, among other reasons, in light of the evidence that in certain countries where consensual same-sex relations are criminalized the authorities often use non-consensual anal examinations purportedly as a method of obtaining “evidence” of such relations. This practice amounts to torture or other ill-treatment. Therefore, in keeping with the Committee’s own jurisprudence, we recommend that the General Comment address explicitly the existence of laws criminalizing consensual same-sex sexual conduct as presumptively triggering States parties’ non-*refoulement* obligations under the Convention in respect of the involuntary transfer of those individuals whose real or perceived sexual orientation and/or gender identity would place them in conflict with the above-mentioned laws. We further urge the Committee to adopt the view that, in those circumstances, the burden is on State authorities wishing to transfer the concerned individuals to rebut that presumption by proving conclusively the absence of a real risk of violations of the Convention upon removal, and as well as that a State party’s non-*refoulement* obligations would be breached should it forcibly transfer people to a place where they would be forced to conceal their sexual orientation or gender identity upon removal.

We would recommend addressing this issue in a sub-paragraph inserted in paragraph 30 of the General Comment.

**Recommended textual addition**

(Paragraph 30(d))

**The existence of laws criminalizing consensual same-sex relations constitutes a presumption that *non-refoulement obligations* under the Convention are engaged in respect of the involuntary transfer of individuals whose real or perceived sexual orientation and/or gender identity would place them in conflict with the said laws, including whenever the people concerned would be forced to conceal their sexual orientation or gender identity upon removal. In those circumstances, the burden shifts to the State party, requiring rebuttal of that presumption by proving conclusively the absence of a real risk of violations of the Convention upon transfer. [FOOTNOTE to add See, e.g., CAT, *Uttam Mondal v. Sweden*, Communication No. 338/2008, 7 July 2011, CAT/C/46/D/338/2008, “As for his sexual orientation, the State party acknowledged that homosexual acts are illegal under the Penal Code and**

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<sup>113</sup> CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 Jan. 2008 para. 18.

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can entail imprisonment for life in Bangladesh. In this regard, the Committee notes that the State party's argument that Bangladeshi authorities are not actively persecuting homosexuals does not rule out that such prosecution can occur", (para. 7.3); in light of, *inter alia*, "the risk of persecution on the basis of his homosexuality" (para. 7.7) the Committee found that, "the expulsion of the complainant to Bangladesh would constitute a violation of the State party's obligations under article 3 of the Convention", (para. 7.7)].

**(4) Paragraph 30(f)**

75. The current wording of paragraph 30(f) could be understood as suggesting that corporal punishment may or may not amount to torture or other cruel, inhuman or degrading punishment, whereas clearly all corporal punishment amounts to at least cruel, inhuman or degrading punishment and in some cases to torture.<sup>114</sup>

**Recommended textual changes to paragraph 30(f)**

"... if **involuntarily transferred** ~~deported~~ to a State; in which, ~~although~~ corporal punishment is permitted by national law, **in view of the fact that such punishment would** amounts to torture or cruel, inhuman or degrading ~~treatment or punishment...~~"

**(5) Paragraphs 30(i)-(j)**

76. Paragraphs 30(i)-30(j) refer to provisions of the Geneva Conventions prohibiting torture and other ill-treatment in non-international armed conflicts and to prohibitions applicable in international armed conflicts. However, they omit to refer to provisions prohibiting torture and other ill-treatment in international armed conflicts, including the Geneva Conventions' "grave breaches" provisions.

**Recommended textual change:**

Add sub-paragraph 30(h)(iii) as follows: "**Articles 12 and 50 of the First Geneva Convention; Articles 12 and 51 of the Second Geneva Convention; Articles 17, 87 and 130 of the Third Geneva Convention; Articles 32 and 147 of the Fourth Geneva Convention.**"

**(6) Paragraph 30(k)**

77. The relevant language in the first sentence of paragraph 30(k) – i.e., "...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" – may inadvertently have the effect of narrowing the applicability of the considerations detailed further in paragraph 30(k), whereas these considerations should be taken into account by a broader range of prospective deporting State parties as indicated in the proposed textual changes below.

**Recommended textual change:**

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<sup>114</sup> See for instance CAT, Concluding Observations: Namibia, UN Doc. A/52/44, 10 Sept. 1997, para. 250; CAT, Concluding Observations: Saudi Arabia, UN Doc. CAT/C/CR/28/5, 12 June 2002, para. 8(b); HRC, General Comment 20, Article 7 (Forty-fourth session, 1992), UN Doc. HRI/GEN/1/Rev.1,30, para. 5; HRC, *Osbourne v. Jamaica*, UN Doc. CCPR/C/68/D/759/1997, 13 Apr. 2000, para. 3.3.

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“...where the death penalty is in force ~~and considered a form of torture or cruel, inhuman or degrading treatment or punishment by the deporting State party~~, **in particular if the transferring State has abolished the death penalty or established a moratorium on its execution. States Parties would be in violation of their non-refoulement obligations if they transferred a person to a country where he or she faces the death penalty:...**” [then continue with sub-paragraphs (ii) and (iii), with necessary technical changes]

**(7) Paragraph 30(l)**

78. The current language of paragraph 30(l) may be inadvertently understood as indicating that whether prolonged periods on death row amount to cruel, inhuman or degrading treatment or punishment or not is a matter for States parties to consider. However, human rights bodies have consistently considered prolonged periods on death row to constitute ill-treatment.<sup>115</sup>

**Recommended textual change:**

“...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...”

**(8) Paragraph 30(n)**

79. In the current formulation of paragraph 30(n), slavery and forced labour appear cumulative rather than separate.

**Recommended textual change:**

“...risk of being subjected to slavery, ~~and~~ forced labour or trafficking in human beings...”

**j) Proposed new Section X.bis, to be inserted after current Section IX**

80. This Committee has previously recognized that there is an obligation to establish a system for collecting and sharing statistical and other information on asylum-seekers, including those in detention, as well as on persons extradited, expelled or returned by the State party.<sup>116</sup> This information should be provided to the Committee in advance of initial and periodic reviews.

81. The collection of statistical and other information can allow States parties to assess their own compliance with their *non-refoulement* obligations under the Convention and encourages the taking of corrective actions as appropriate.

**Proposed new Section X.bis, and new paragraph, paragraph 33bis, to be inserted after current Section IX**

**X.bis Specific requirement for the collection and sharing of statistical data**

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<sup>115</sup> See for instance CAT, Concluding Observations: Zambia, UN Doc. CAT/C/ZMB/CO/2, 15 May 2008, para. 19; CAT, Concluding Observations: United States of America, UN Doc. CAT/C/USA/CO/3-5, 19 Dec. 2014, para. 25. See also Report on the visit of the Special Rapporteur on torture: Mongolia, UN Doc. E/CN.4/2006/6/Add.4, 20 Dec, 2005, para. 53; *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), para. 78.

<sup>116</sup> CAT, Concluding Observations: Turkmenistan (15 June 2011) UN Doc CAT/C/TKM/CO/1, at para. 23; CAT, Concluding Observations: Liechtenstein, para. 14 (31 May 2010) UN Doc CAT/C/LIE/CO/3, para. 15.

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**33.bis** The Committee recognizes that the collection of data and statistics is a critical tool to enable a State party to consider its own compliance with the obligations under article 3. States parties should collect and share information on asylum-seekers, including those in detention, as well as on persons involuntarily transferred by the State party.

**k) Section X: Specific requirements for the submission of individual communications under Article 22 of the Convention and interim measures of protection, paragraphs 33-53**

**i) Paragraph 35**

82. We suggest that the General Comment should expressly clarify that the United Nations Human Rights Council's Special Procedures do not constitute "another procedure of international investigation or settlement", for the purposes of Article 22(4)(a).

**ii) Paragraph 36**

83. The draft does not currently reflect the obligation on States parties to act *ex officio* in cases where the authorities know, or are in a position to know, of the existence of a real and foreseeable risk of torture and the resulting implications regarding exhaustion of domestic remedies. For greater clarity and more specific guidance we thus recommend the textual changes below.

**Recommended textual addition:**

**(Paragraph 36bis)**

**When the authorities of the State party know the existence of a real and foreseeable risk of torture for an individual, or when this risk is so obvious that the authorities ought to know its existence, they must raise this risk *ex officio* and reject the relevant order for involuntary transfer.**

**Thus, in cases where the risk of torture to the complainant was so obvious that the State party's authorities should have been aware of it and raised it *ex officio*, subparagraph *b* of article 22 paragraph 5 should not be an obstacle to the admissibility of the communication.<sup>117</sup>**

**iii) Paragraphs 38 and 39**

84. Interim measures are a cornerstone mechanism to protect the rights of victims and avoid irreparable harm, while a complaint is being considered. The vast majority of requests for interim measures issued by the Committee have arisen in cases concerning the implementation of *non-refoulement* obligations under Article 3 of the Convention. Interim measures can be the last resort lifeline to prevent the complainant's involuntary transfer, thereby ensuring the effectiveness of articles 3 and 22 of the Convention.

85. The legal consequences of the failure to implement interim measures, as well as its effects, have been addressed consistently in various decisions of this Committee, where it has held that by failing to

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<sup>117</sup> See for example: CAT, *Abdul Rahman Alhaj Ali v. Morocco*, UN Doc. CAT/C/58/D/682/2015, 13 Sept. 2016, para. 7.3. and 7.4.

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respect a request for interim measures, the State party violates,<sup>118</sup> breaches<sup>119</sup> and/or seriously fails to comply<sup>120</sup> with its obligations under article 22 of the Convention. However, by making a much weaker statement, namely that “[i]t 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”, the draft appears to depart from this case-law and to unwittingly underplay the gravity of non-compliance with an interim measure request and its serious implication. This shift is not consistent with the approach developed and consistently restated by the Committee in its decisions.<sup>121</sup>

86. States parties that have authorized the Committee to consider individual complaints are obliged to refrain from interfering with the processing of such complaints. Non-compliance with interim measures hampers the processing of petitions as it nullifies the subject matter of a complaint and makes it impossible for an individual to obtain a remedy preventing the violation before the Committee. As stated by the Committee, by making the declaration under article 22, “States parties implicitly undertake to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it”.<sup>122</sup>

87. To bring the current draft into line with the Committee’s established case law on the legal consequences of non-compliance with interim measures, we recommend that the draft provide clearly that interim measures are legally binding on States parties that have made a declaration under Article 22.

#### **Recommended textual changes:**

**38. States parties that have made a declaration under Article 22 undertake to comply with interim measures issued by the Committee.** 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 **must** ~~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.<sup>30</sup> ~~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.~~ **The failure to respect a request for interim measures constitutes a breach of the State party’s obligations under article 22 of the Convention as it nullifies the effective exercise of the right to complain conferred by article 22, thus**

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<sup>118</sup> CAT, *Kalinichenko v. Morocco*, UN Doc. CAT /C/ 47 /D/ 428 / 2010, 18 Jan. 2012; CAT, *Boily v. Mexico*, UN Doc. CAT /C/47/D/327/2007, 13 Jan. 2012; CAT, *R.S. et al. v. Switzerland*, UN Doc. CAT/C/53/D/482/2011, 19 Jan. 2015.

<sup>119</sup> CAT, *Tursunov v. Kazakhstan*, UN Doc. CAT/C/54/D/538/2013, 3 July 2015; CAT, *Singh v. Canada*, UN Doc. CAT/C/46/D/319/2007, 8 July 2011.

<sup>120</sup> CAT, *P.S.B. and T.K. v. Canada*, UN Doc. CAT/C/55/D/505/2012, 1 Oct. 2015; CAT, *X. v. Kazakhstan*, UN Doc. CAT/C/55/D/554/2013, 9 Oct. 2015; CAT, *X. v. Russian Federation*, UN Doc. CAT/C/54/D/542/2013, 30 June 2015; CAT, *Abdussamatov et al. v. Kazakhstan*, UN Doc. CAT/C/48/D/444/2010, 7 June 2012.

<sup>121</sup> See e.g. CAT, *P.S.B. and T.K. v. Canada*, UN Doc. CAT/C/55/D/505/2012, 1 Oct. 2015, para. 9.

<sup>122</sup> CAT, *Tursunov v. Kazakhstan*, UN Doc. CAT/C/54/D/538/2013, 3 July 2015, para 7.2.

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**rendering the Committee’s final decision on the merits futile and devoid of object.**

*iv) Paragraphs 40-53*

88. The guidance value and clarity of these paragraphs would be enhanced by making the following points explicit in the draft:

- while applicable to communications under Article 22 of the Convention alleging violations of the prohibition of *refoulement*, the content of this section, entitled Merits, is of wider application, going beyond Article 3 exclusively in the context of individual communication under Article 22. Indeed, this section of the present General Comment provides critical guidance to States parties on the effective implementation of their *non-refoulement* obligations under the Convention as a whole. See also our comments at the very outset of the present submission;
- where an individual makes an arguable case of past torture or other ill-treatment as evidence of a prospective real risk of such treatment upon transfer, the burden of proof would ordinarily shift to the State party to credibly assert why in the face of such evidence the transfer would not violate the prohibition of *refoulement* in the Convention;
- given States parties’ obligation to adapt the process and procedures used to assess *refoulement* claims to take account of any particular circumstances of vulnerability of – and/or specific risks faced by – the person concerned, the draft should more clearly outline the relevant and appropriate guarantees and safeguards that should be afforded to vulnerable persons, including survivors of torture or other ill-treatment;
- survivors of torture must have access to rehabilitation services to enable them to engage effectively in the proceedings and to avoid re-traumatization. Further, the specific psychological trauma that survivors of torture may suffer and how this impacts on their ability to present a coherent and consistent account should be expressly addressed in the draft.

89. Defending and promoting respect for human rights is often a high-risk activity, and groups and individuals who commit themselves to protecting human rights and fundamental freedoms are often targeted by State authorities and private groups. Every year, hundreds of human rights defenders are victims of threats, attacks, arrests, arbitrary detentions, imprisonment, torture and even murder, in retaliation for their activities to defend and promote human rights enshrined in the Universal Declaration of Human Rights and other international and regional instruments. When preventive and protection measures for personal security are not enough, relocation outside the country of origin sometimes emerges as a necessary measure to protect human rights defenders, and enable them to continue their work. In this context, it is important that in asylum and deportation proceedings previous or ongoing human rights work of the person concerned and the situation of human rights defenders be included among the risk factors that States parties are required to consider.<sup>123</sup> Harassment and persecution of human rights defenders may also continue when they are abroad, often taking the form of trials in absentia leading to requests for extradition, which, in turn, aim at securing jurisdiction over defenders who reside abroad.

90. Human rights defenders who are forcibly returned to their countries of origin or habitual residence have a heightened risk of exposure to torture or other ill-treatment.

In light of the above, we recommend the following textual changes to paragraphs 40, 42, 43, 47, 48, 52, 53(c), (d), (h) and (i)

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<sup>123</sup> Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/31/55 (1 February 2016), para. 75.

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## Recommended textual changes and additions

### Paragraph 39

Insert a new paragraph, paragraph 39bis, as follows:

**39.bis** While directly applicable to individual communications under Article 22 of the Convention alleging violations of the prohibition of *refoulement*, the content of this section of the General Comment further provides critical guidance to States parties on the effective implementation of their *non-refoulement* obligations under the Convention as a whole. [Footnote to reference para. 3 of the draft as amended by our recommended textual changes]

### Paragraph 40

40. ~~With respect to the application of Article 3 of the Convention to the merits of~~ **Whether before the States parties' authorities when making a claim to protection against *refoulement* under the Convention or before this Committee in the context 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 case<sup>31</sup> – i.e. to submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, **where an arguable case of past torture or other ill-treatment is made as evidence that a prospective real risk of such treatment upon transfer exists, the burden of proof shifts to the State party to credibly refute that risk. In practice, this places a specific obligation on the State party to effectively investigate the claim, including the veracity of the allegations of past torture or other ill-treatment, as well as the bearing that they may have, if any, on the real risk of torture or other ill-treatment upon transfer.** ~~When the complainant is ... the burden of proof is reversed<sup>32</sup> and it is up to the State concerned to investigate the allegations and verify the information on which the communication is based. The Istanbul Protocol, and in particular its principles guiding forensic medical evaluations, are among the applicable standards for such an investigation."~~

### Paragraph 42

42. In its procedure of assessment, ... especially if the person is deprived of his/her liberty or the person is ~~in~~ **a particularly considered to be vulnerable and/or particularly at risk situation such as the situation of, including if they are an asylum seeker, a person with disabilities, a mentally ill person, a pregnant woman, a victim of torture or other ill-treatment,** an unaccompanied minor or a ~~woman~~ **person** who has been subjected to violence of a sexual **or other gender-based** nature.

### Paragraph 43

43. Guarantees and safeguards should include linguistic, legal, medical, **psychological**, social and, when necessary, financial assistance... In particular, **an independent medical and psychological examination requested by a complainant according to the standards in the Istanbul Protocol to prove the torture that he/she has suffered** allegations should always be ensured,... so that the authorities deciding on a given case of involuntary **transfer deportation** are able to complete the assessment of the risk of torture on the basis of the result of that **independent medical and psychological** examination, without any reasonable doubt. ”

### Paragraph 44

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.~~ **Torture victims and other vulnerable persons frequently suffer from Post-Traumatic Stress Disorder (PTSD), which can result in a broad range of symptoms, including involuntary avoidance and dissociation. These symptoms**

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may affect the ability of the person to disclose all relevant details or to relay a consistent account of their past torture throughout the proceedings. In order to ensure that victims of torture or other vulnerable persons are afforded an effective remedy, States parties should ensure that credibility assessment procedures take into account their specific circumstances and conditions, as it will often not be appropriate to follow a standardised credibility assessment process to determine the validity of a *refoulement* claim.

#### Paragraph 45

“45. ~~At the international level,~~ **Both for the State Party concerned and the Committee, the existence in the State where the individual is to be transferred of a consistent pattern of gross, flagrant or mass violations of human rights referred to in Article 3, paragraph 2, of the Convention is** ~~considers crucial,~~ to determine whether there are substantial grounds for believing that a person would be in danger of being subjected to torture **or other ill-treatment upon transfer to such a State.** ~~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.... **and (g) the use of corporal punishment.**”

#### Paragraph 47

47. ...., expulsion or extradition when the complainant presents credible facts that demonstrate that a substantial risk exists **and where the State party fails to refute an arguable case of past torture or other ill-treatment.**”

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; (c) **peaceful activities of the complainant and/or his family members related to the protection and promotion of internationally recognised human rights;** (d) arrest warrant without guarantee of a fair treatment and trial; (e) sentence in absentia; (f) sexual orientation and gender identity; (...)

#### Paragraph 49

91. In light of our comments above, including on paragraphs 15 and 16, and our recommendation for the insertion of a new paragraph *8bis*, underscoring that States parties are obligated to apply the measures required to prevent torture, including effective compliance with the prohibition of *refoulement*, equally to prevent other ill-treatment, as well as our recommended textual revisions to paragraph 29, we would advise that paragraph 49 be deleted in its entirety. It is beyond contention that past evidence of ill-treatment is a strong indicator of a prospective real risk of ill-treatment, including torture.

#### Recommended textual change:

Delete paragraph 49 of the draft in its entirety.

#### Paragraph 53

53. (c) Is there medical, **psychological** 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? **Does the complainant need rehabilitation as a result of the past torture or ill-treatment?**

(d) ... , in particular, to an independent medical **and psychological** examination **according to the standards of the Istanbul Protocol and provided free of charge** to assess his/her claims that he/she has previously suffered torture or ill-treatment in his/her country of origin?

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We suggest that 53 (h) and (i) are merged and the following wording is considered: **“Whether the complainant has a history of PTSD or other similar symptoms that may result in their inability to disclose all relevant details of their case or cause the person to present incomplete or inconsistent accounts.”**

v) **Paragraphs 50, 51 and 52: internal flight/relocation alternative**

92. We consider that paragraphs 50-52 provide critical guidance on the approach that the Committee takes to the question of internal flight alternative. This is another instance where the Committee’s guidance is clearly applicable and relevant beyond individual communications under Article 22; the Committee authoritatively and helpfully addresses a question pertaining to States parties’ effective implementation of their *non-refoulement* obligations under the Convention as a whole (see also our comment at the beginning of this section). We note that the explanation in paragraph 51 of internal flight alternative, namely, “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 unwittingly too narrow since in many instances the actual place where individuals are transferred may well be the same place from which they have fled -- and where they would face a real risk -- but they are expected to safely travel to, access, and establish themselves in another area, constituting a viable internal flight alternative. We also note that often the term “internal relocation alternative” is used instead of internal flight alternative. Further, there are criteria developed under international refugee law, including with respect to safety *en route*, actual accessibility of the area, and reasonableness in terms of expecting the individual concerned to actually reach and stay in the said area. In practice this means that if the individual concerned would in fact be compelled to return to the site where there is a real risk of ill-treatment or to another part of the country where serious harm may be a possibility, then the internal flight/relocation alternative is not viable because it would result in constructive *refoulement*. If the individual cannot in practice reach the proposed site of relocation then internal flight will not be a reasonable option. This would include: cases where the person was being transferred to or through the place where they have a well-founded fear of persecution; logistical or safety impediments; travelling through minefields or risking attack or banditry; extortion; etc. Thus, some critical questions concern the following: is the area of relocation practically, safely and legally accessible to the individual? Does the risk emanate from State or non-State actors? Can the individual lead a relatively normal life without facing undue hardship in the alternative location concerned? States parties should take those criteria into account when ascertaining the viability of a potential internal flight alternative.

We therefore recommend the following textual revisions.

**Recommended textual changes:**

**Paragraph 50**

Paragraph 50: replace “expelled, returned or extradited” with “involuntarily transferred”

**Paragraph 51**

51. The Committee considers that the so called “internal flight alternative” (also referred to as “internal relocation 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~~ **requires consideration of at least the following questions in order to ascertain whether the individuals concerned would be able to avail themselves of a viable internal flight/relocation alternative: is the area of relocation practically, safely**

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and legally accessible to the individuals? Does the risk emanate from State or non-State actors? Can the individuals lead a relatively normal life without facing undue hardship in the alternative location concerned? If the individuals concerned would in fact be compelled to return to, including transiting through, the site where they face a real risk of torture or other ill-treatment in the State of transfer or to another part of the country where serious harm may be a possibility, then the internal flight/relocation alternative is not viable because it would result in constructive *refoulement*. ~~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.~~ **The duty is on the States parties wishing to forcibly transfer the individual to identify the proposed site of relocation. The individual concerned is entitled to put forward reasons he or she may have that indicate that either: a) the internal flight alternative in fact would not be viable in the sense that they would still face a real risk of torture or other ill-treatment (original, new or both) at the proposed internal location, or b) that relocation to the site identified would nonetheless be unreasonable. The safety and security in the site of relocation must be durable, predictable and stable.**

**Paragraph 52**

52. The State of ~~deportation~~ **transfer** referred to in the previous paragraph should in particular have taken measures to prevent torture, throughout the territory under its jurisdiction and control, such as **implementing** 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.

***j) Section XI: Independence of assessment of the Committee***

***i) Paragraph 55***

93. We commend the inclusion in paragraph 55 of the principle of the benefit of the doubt. We recommend that the General Comment make an express reference to the benefit of the doubt as a principle that States parties are required to apply in considering *non-refoulement* claims under the Convention, as opposed to confining its consideration exclusively to the context of Article 22 communications.

***III. Additional Issue the General Comment should address***

***a) Obligations to prevent *refoulement*, including transfers outside judicial processes***

94. The General Comment should explicitly state that *non-refoulement* obligations arise whenever States parties know – or ought to know - that their action or inaction places an individual at risk of torture or other ill-treatment in violation of Article 3. Examples of such situations include: patterns of renditions within a State’s territory by another state or other actors; the use of airports as transit points for renditions, and renditions following the provision of intelligence information to a third party.

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95. This Committee and others have identified patterns of abduction and forcible transfers in a number of States parties that exposed individuals to torture.<sup>124</sup> In such situations a State party's obligations under Article 3 may be positive as well as negative – thus requiring not only that the State does not assist but also that it takes concrete action to prevent such abductions and transfers.<sup>125</sup> Under Article 2 of the Convention, the obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture also requires States parties “to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention”.<sup>126</sup>
96. The European Court of Human Rights has identified that in cases of transfer of an individual by means of “extraordinary rendition,” the possibility of torture and other ill-treatment is “particularly strong” and in those cases “should have been considered intrinsic in the transfer.”<sup>127</sup> In such circumstances enabling another State to transfer the individual was held to have “exposed him to a foreseeable serious risk of further ill-treatment...”<sup>128</sup>
97. Both this Committee and the Human Rights Committee have expressed concern regarding allegations that States parties' airports were used as transit points for rendition flights, as well as the use of airspace by flights involved in “extraordinary rendition.”<sup>129</sup> In such cases States parties have been called upon to investigate allegations, to establish inspection systems to prevent the use of airports for such purposes and to “take steps to ensure that such cases are prevented”.<sup>130</sup> This Committee has reminded States parties that “the transfer and *refoulement* of persons, when there are substantial grounds for

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<sup>124</sup> See for example, CAT, Concluding Observations: Kyrgyzstan, UN Doc. CAT/C/KGZ/CO/2, 20 Dec. 2013, para 23; CAT, Concluding Observations: Tajikistan, UN Doc. CAT/C/TJK/CO/2, 21 Jan. 2013, paras 13, 18.

<sup>125</sup> See e.g., ECtHR, *Mukhtidinov v. Russia*, App. no. 20999/14, 19 Oct. 2015, para 63; ECtHR, *Mamazhonov v Russia*, App. no. 17239/13, 23 March 2015; ECtHR, *Rakhimov v. Russia*, App. no. 50552/13, 15 Dec. 2014; ECtHR, *Iskandarov v. Russia*, App. no. 17185/05, 23 September 2010.

<sup>126</sup> *Ibid* para.17

<sup>127</sup> ECtHR, *Husayn (Abu Zubaydah) v Poland* (App. No. 7511/13, 16 Feb. 2015), para 513; ECtHR, *El Masri v FYRoM* (App. no. 39630/09, 13 Dec. 2012), para 221. See, CAT, Concluding Observations: Kenya, UN Doc. CAT/C/KEN/CO/1, 19 Jan. 2009, para. 17; CAT, Concluding Observations: Jordan, UN Doc. CAT/C/JOR/CO/2, 25 May 2010, para. 23; CAT, Concluding Observations: Syria, UN Doc. CAT/C/SYR/CO/1, 25 May 2010, para. 18; CAT, Concluding Observations: Morocco, UN Doc. CAT/C/MAR/CO/4, 21 Dec. 2011, para. 11; HRC, Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 Dec. 2006, para. 16; HRC, Concluding Observations: Kenya, UN Doc. CCPR/C/KEN/CO/3, 31 Aug. 2012, para. 14; CAT, Conclusions and recommendations: USA, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para 20.

<sup>128</sup> ECtHR, *Husayn (Abu Zubaydah) v Poland* (App. No. 7511/13, 16 Feb. 2015), para 513.

<sup>129</sup> HRC, Concluding Observations: Czech Republic, UN Doc. CCPR/C/CZE/CO/2, 9 Aug. 2007, para. 8; CAT, Concluding Observations: Iceland, UN Doc. CAT/C/ISL/CO/3, 8 July 2008, para 11; CAT, Concluding Observations: Ireland, UN Doc. CAT/C/IRL/CO/1, 17 June 2011, para. 9; CAT, Concluding Observations: Czech Republic, UN Doc. CAT/C/CZE/CO/4-5, 13 July 2012, para. 8; CAT, Concluding Observations: Romania, UN Doc. CAT/C/ROU/CO/2, 5 June 2015, para. 15; CAT, Concluding Observations: Azerbaijan, UN Doc. CAT/C/AZE/CO/4, 27 Jan. 2016, para. 34.

<sup>130</sup> CAT, Concluding observations: Ireland, UN Doc. CAT/C/IRL/CO/1, 17 June 2011, para 9. See also, HRC, Concluding observations: Czech Republic, UN Doc. CCPR/C/CZE/CO/2, 9 Aug. 2007, para. 8; CAT, Concluding Observations: Iceland, UN Doc. CAT/C/ISL/CO/3, 8 July 2008, para. 11.

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believing that these persons would be at risk of being subjected to torture, is in itself a violation of Article 3 of the Convention.”<sup>131</sup>

98. As illustrated through the cases of Canadian citizen Maher Arar, rendered to Syria (following the sharing of intelligence information by Canadian authorities) and of Abdul-Hakim Belhaj, rendered to Libya (following the provision of information by UK authorities), the provision of information by State authorities can equally violate States’ obligations under Article 3, by facilitating transfers exposing individuals to torture or other ill-treatment.<sup>132</sup>
99. Certain recommendations of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*<sup>133</sup> are applicable to other States parties and, we believe, should be endorsed by the Committee. The Committee should urge States parties to ensure that whenever they provide information to other States, they do so in accordance with clearly established policies concerning screening for relevance, reliability and accuracy and with relevant laws in place concerning personal information and human rights and ensuring accountability (Recommendation 8). Further, information-sharing practices and arrangements should be subject to review by an independent, arms-length review body (Recommendation 10). In particular, the Committee should endorse Recommendation 14, that information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture and that policies should include specific directions aimed at eliminating any possible complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.<sup>134</sup>

#### **Recommended Textual addition:**

**Non-refoulement obligations arise whenever States parties know or ought to know of the risk of transferring a person from their jurisdiction, in whatever manner, including when carried out by third parties (e.g. operatives of other states or private individuals) which they know or ought to know would expose the concerned individual to a real risk of torture or other ill-treatment, whether the risk emanates from States or non-state actors.**

**States Parties must take all necessary measures to prevent *refoulement*, including concrete measures to prevent third parties (be they State or non-State) from subjecting individuals under their jurisdiction to kidnappings and involuntary transfer from their territory, and must not assist in any way other States or other third parties who plan to render or otherwise forcibly transfer individuals to a country where they would face a real risk of torture or other ill-treatment.**

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<sup>131</sup> CAT, Concluding Observations: Portugal, UN Doc. CAT/C/PRT/CO/5-6, 23 Dec. 2013, para 13.

<sup>132</sup> See also, CAT, Concluding Observations: Canada, UN Doc. CAT/C/CAN/CO/6, 25 June 2012, para.16.

<sup>133</sup> *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* ‘Report of the Events Relating to Maher Arar: Analysis and Recommendations’, 2006, Available at: <http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf>

<sup>134</sup> *Ibid*, Recommendation 14.

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## Appendix I : Information about the organisations making this submission

### Alkarama Foundation

Alkarama Foundation is a Geneva-based non-governmental human rights organisation established in 2004 to assist all those in the Arab world subjected to or at risk of extrajudicial execution, enforced disappearance, torture, and arbitrary detention. Acting as a bridge between individual victims and international human rights mechanisms, and supporting local civil society, Alkarama works towards an Arab world where all individuals live in freedom and dignity, and are protected by the rule of law. [www.alkarama.org](http://www.alkarama.org).

### Amnesty International

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards, including the prohibition of torture and cruel, inhuman, or degrading treatment or punishment. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, social, cultural and economic. Amnesty International is funded mainly by its membership and public donations. No funds are sought or accepted from governments for investigating and campaigning against human rights abuses. Amnesty International is independent of any government, political ideology, economic interest or religion. [www.amnesty.org](http://www.amnesty.org).

### The Association for the Prevention of Torture (APT)

The Association for the Prevention of Torture (APT) is an independent NGO based in Geneva, Switzerland. Since 1977, we have worked to promote a world free from torture where the rights and dignity of all persons deprived of liberty are respected. To achieve this vision, we lead and support endeavours to prevent torture and ill-treatment, through: Strengthening legal and policy frameworks; improving detention practices; and strengthening public oversight. [www.apr.ch](http://www.apr.ch).

### DIGNITY

Danish Institute Against Torture is a Copenhagen-based NGO working in the areas of prevention of torture and ill-treatment, supporting survivors of torture and ill-treatment through rehabilitation, and generating new knowledge about the causes and consequences of torture, ill-treatment and organised violence. DIGNITY's vision is a world without torture and other forms of organised violence. Our work builds on the respect for human rights and on the respect for the dignity and integrity of each individual human being. We have offices in Tunisia and Jordan and are represented in 20 countries where we cooperate with partner organisations to support survivors and combat torture. [www.dignityinstitute.dk](http://www.dignityinstitute.dk).

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## FIACAT

The International Federation of Action by Christians for the Abolition of Torture, FIACAT, is an international non-governmental human rights organisation, set up in 1987, which works towards the abolition of torture and the death penalty. The Federation brings together some thirty national associations, the ACATs, present in four continents. FIACAT's main missions are to represent its members in international and regional organisations (in particular before the United Nations, the European Union, the Council of Europe and the African Commission on Human and Peoples' Rights) and to build up the capacities of the ACAT network. [www.fiacat.org](http://www.fiacat.org).

## The International Commission of Jurists (ICJ)

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. [www.icj.org](http://www.icj.org).

## IRCT

With more than 150 torture rehabilitation centres in over 70 countries working in the field of rehabilitation for torture victims, IRCT is the world's largest membership-based civil society organisation working with rehabilitation. The organisation is governed by its members through democratic processes and has as its objective that effective rehabilitation services are provided for all torture victims. [www.irct.org](http://www.irct.org).

## OMCT

OMCT is short for the World Organisation Against Torture – in French, as the organization created in 1985 is headquartered in Geneva, Switzerland. OMCT works for, with and through an international coalition of over 200 non-governmental organizations – the SOS-Torture network – fighting torture, summary executions, enforced disappearances, arbitrary detentions, and all other cruel, inhuman and degrading treatment or punishment in the world. [www.omct.org](http://www.omct.org)

## The Redress Trust (REDRESS)

REDRESS is an international human rights organisation based in the United Kingdom and The Netherlands with a mandate to assist survivors of torture and related international crimes to seek justice and other forms of reparation, hold accountable the governments and individuals who perpetrate torture, and develop the means of ensuring compliance with international standards and securing remedies for victims. REDRESS was established in 1992 and has been in consultative status with the Economic and Social Council since 2011. [www.redress.org](http://www.redress.org).