



No. 008-17

The Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva hereby transmits to the Secretariat of the Committee Against Torture the attached Joint Observations of Canada, Denmark, the United Kingdom, and the United States of America on Paragraphs 19-20 of the Committee Against Torture's Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22.

The Permanent Mission of the United States of America takes this opportunity to renew to the Committee Against Torture, and its Secretariat, the assurances of its highest consideration.

Enclosures: as stated

The Permanent Mission of the  
United States of America,

Geneva, March 31, 2017



**Joint Observations of Canada, Denmark, the United Kingdom,  
and the United States of America  
on Paragraphs 19-20 of the Committee Against Torture’s  
Draft General Comment No. 1 (2017)  
on Implementation of Article 3 in the Context of Article 22  
March 31, 2017**

1. Canada, Denmark, the United Kingdom, and the United States appreciate the opportunity to respond to draft General Comment No. 1 regarding the implementation of Article 3 in the context of Article 22 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (“the CAT”), and thank the Committee for its significant work on this project. We are firmly committed to fulfilling our obligations under the CAT, and we believe that the obligations of States Parties under Article 3 provide important protections for persons around the world.

2. Canada, Denmark, the United Kingdom, and the United States in particular welcome the Committee’s invitation set out in its footnote 11 for relevant stakeholders to provide comments on paragraphs 19 and 20.<sup>1</sup> This Joint Submission provides the views of the aforementioned States Parties on paragraphs 19-20, to the extent that our views are consistent, without prejudice to other comments that each of these States Parties may provide individually on the rest of the draft General Comment, or on paragraphs 19-20.

3. It is the view of these States Parties that paragraphs 19 and 20 of the draft General Comment do not reflect the current practice of many States Parties to the CAT, and that the treatment of diplomatic assurances in the draft General Comment should take into consideration the many circumstances in which States Parties may use them to promote respect for the prohibition on torture and consistent with their obligations under Article 3.

4. Regarding paragraph 20, these States Parties also do not agree with, and are not aware of an accepted basis for, the assertion that diplomatic assurances are inherently “contrary” to the principle of non-refoulement provided for in Article 3. Although we agree with the Committee that assurances must not be used as a loophole to undermine the principle of non-refoulement, we note that when used appropriately, diplomatic assurances have served as an effective tool for States Parties to help ensure compliance with Article 3, including as a means of confirming that an individual would not face torture in a receiving State.

5. First, paragraph 20 refers specifically to assurances *provided by a State Party to the CAT*. Although the circumstances of every case must be assessed individually, it cannot as a logical matter be *per se* unlawful for a State Party to transfer<sup>2</sup> an individual to another State Party with an assurance that the receiving State Party will comply with its preexisting CAT obligations.

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<sup>1</sup> Footnote 11 states that “The Committee intends to further elaborate on the issue of diplomatic assurances in future sessions after receiving comments from relevant stakeholders on this issue.”

<sup>2</sup> For purposes of this document, we refer to “expel, return (‘refouler’) or extradite” as used in Article 3 collectively as “transfer” for ease of reading.

Reaffirming CAT obligations is consistent with the object and purpose of the CAT, which is to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”<sup>3</sup> The Committee’s recommendation as it stands may actually undermine the efforts of States Parties in certain situations to promote respect for the prohibition on torture in the context of transfers, both in an individual case and by encouraging improved standards more generally.

6. Second, as matter of practice, some States Parties might seek diplomatic assurances as a purely prudential matter, even in the absence of particular concerns that the individual in question is at risk of torture. This may be done for a variety of policy reasons, including to emphasize to a receiving State the importance that the transferring State Party places on humane treatment generally, independent of whether the transferring State Party has reached the conclusion that the specific individual in question may be in danger of being subjected to torture.

7. Third, as noted above, we agree with the Committee that diplomatic assurances cannot be used as a “loophole” to undermine the principle of non-refoulement, and we do not view them as appropriate in all cases. We strongly reject the suggestion that all transfers accompanied by such assurances are contrary to Article 3. Indeed, diplomatic assurances can be used precisely so as to avoid breaching the principle of non-refoulement. Article 3 itself states that “[f]or the purpose of determining whether there are [substantial] grounds, the competent authorities shall take into account *all relevant considerations*” (emphasis added). We do not agree that the commitments of a receiving State with regard to humane treatment of the individual or individuals to be transferred cannot constitute a “relevant consideration” for the purposes of Article 3. The essential question in evaluating any particular use of diplomatic assurances is whether, taking into account the content of the assurances, their credibility and reliability, and the totality of other relevant factors relating to the individual and the government in question, there are substantial grounds for believing that the individual would be in danger of being tortured in the country to which he or she is being transferred.<sup>4</sup>

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<sup>3</sup> See, e.g., CAT Preamble.

<sup>4</sup> In this context, we note that several courts have accepted the use of diplomatic assurances with respect to compliance with Article 3 of the CAT and similar treaty provisions, even if, in individual cases, they have determined the specific assurances provided to be insufficiently reliable. For example, the European Court of Human Rights, in applying Article 3 of the European Convention on Human Rights, has relied upon assurances from receiving States in assessing the risk of torture or ill-treatment for a particular individual post-transfer. See, e.g., *Othman (Abu Qatada) v. United Kingdom*, App. No. 8139/09, ¶¶ 183-207 (Eur. Ct. H.R. 2012) (describing the factors to assess whether particular assurances may be relied upon in discharging obligations under Article 3 of the European Convention); *Babar Ahmad and Others v. the United Kingdom* - 24027/07, Judgment 10.4.2012 (finding that the United Kingdom would not violate Article 3 of the European Convention by transferring certain individuals to the United States, based in part on information and assurances provided to the United Kingdom by the United States concerning the treatment those individuals would receive upon transfer); see also *RB (Algeria) and OO (Jordan) v. Sec’y of State for the Home Dep’t* [2009] UKHL 10 (describing criteria used in United Kingdom for determining reliability of assurances); *BB v. Sec’y of State for the Home Dep’t*, SIAC, SC/39/2005 (2006) (same); *Khouzam v. U.S. Att’y Gen.*, 549 F.3d 235, 254-55 (3d Cir. 2008) (“We do not find it unreasonable for the [U.S. Department of Justice] to create a procedure for making an individualized determination, in every case, as to whether particular diplomatic assurances are sufficient to permit removal under [a U.S. statute giving domestic legal effect to Article 3 of the CAT]. If, in fact, a particular country under consideration has an egregious record of torture, the regulations would require the Government to take such factors into account. Thus, we reject Khouzam’s argument that the diplomatic assurances from Egypt are categorically insufficient under [the statute] and its implementing regulations.”). Moreover, in the cases that the Committee cites in footnote 12, the Committee itself

8. With respect to the definition of diplomatic assurances in paragraph 19, the Committee should account for the fact that, in practice, such assurances may include an express commitment by the receiving State to permit monitoring by the transferring State Party or by an independent third party for the purpose of verifying that the individual is being treated humanely, rather than simply an “undertaking” by the receiving State. Such monitoring mechanisms are intended to ensure that any diplomatic assurances can be verified as a safeguard against torture. Diplomatic assurances may be relied upon by a transferring State Party as one consideration in determining whether there are substantial grounds for believing that an individual would be in danger of being subjected to torture in the receiving State.

9. In light of these observations, these States Parties recommend that the Committee reconsider its sweeping conclusion in paragraph 20, and focus instead on the risk that diplomatic assurances could be used to undermine the principle of non-refoulement in certain circumstances. We urge the Committee to acknowledge that diplomatic assurances that are used properly and that are assessed to be credible and reliable can appropriately be considered as one factor in the analysis conducted by the transferring State Party as to whether there are substantial grounds for believing that an individual would be in danger of being subjected to torture in the receiving State.

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did not prohibit the use of diplomatic assurances altogether, but instead determined that the assurances provided in those cases were insufficiently reliable to ensure compliance with the respective States Parties’ Article 3 obligations. The Committee adopted that approach in subsequent communications. *See, e.g., Abichou v. Germany*, Communication No. 430/2010, ¶ 11.7 (U.N. Comm. Against Torture) (May 21, 2013) (“The fact that diplomatic assurances were obtained was not sufficient grounds for the State party’s decision to ignore this obvious risk, especially since none of the guarantees that were provided related specifically to protection against torture or ill-treatment.”).