

**Submission by the Norwegian Government
Draft General Comment No. 1 (2017) on the Implementation of Article 3 of
the Convention in the Context of Article 22**

The Norwegian Government refers to the invitation from the Committee against Torture to submit written contributions on the draft for a revised General Comment No. 1 (2017) on the implementation of Article 3 in the context of Article 22.

Norway has been a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) since 1986. The Government would first like to underline the importance it attaches to the Convention, and confirm its commitment to fully comply with Norway's treaty obligations.

Norway welcomes the Committee's efforts to formulate General Comments with regard to articles or specific themes concerning the Convention and appreciates this opportunity to submit its observations on the draft for a revised General Comment concerning Article 3. Where Norway has not provided specific comments on issues raised in the draft General Comment, this should not be interpreted as either agreement or disagreement with its substance.

General observations

Norway is concerned that the draft General Comment reflects an interpretation which on certain points goes further and is inconsistent with the widely accepted and longstanding interpretation of Article 3. According to the wording of the provision, the principle of *non-refoulement* applies where there is a risk of "torture", and not where there is a risk of cruel, inhuman or degrading treatment or punishment that does not amount to torture, cf. Article 16 of the Convention. Norway therefore especially invites the Committee to clarify the distinction between "torture" and "cruel, inhuman or degrading treatment or punishment" as regards the States Parties legal obligations in relation to Article 3, and to take this distinction into account throughout the text.

Norway would also, in line with Denmark's comments, encourage the Committee to be attentive to the correlation that may exist between human rights and international humanitarian law during armed conflict in the context of Article 3.

Furthermore, Norway recommends that the Committee uses the terms "the sending State" and "the receiving State" throughout the text, in order to avoid confusion. In for instance paragraphs 51 and 52, it can be unclear which state "the State of deportation" is referring to; the State that is deporting a person or the State that receives a person.

In paragraph 9 of the draft General Comment, the Committee states: “*As with all obligations under the Convention, each State party must apply the principle of non-refoulement in any territory under its jurisdiction 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. 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...”* »

Norway finds the Committee’s statements in paragraph 9 concerning the scope of application of the Convention’s Article 3, in light of the Convention’s Article 2 which limits the general scope of the Convention to “any territory under [the State Party’s] jurisdiction”, unclear. Norway is for instance concerned that the wording of paragraph 9 would expand the scope of application of Article 3 beyond existing practice in regard to private ships or aircrafts registered in a State Party.

In our view, the Committee should express more clearly in paragraph 9 that the principle of *non-refoulement* can only be applied in situations where a State Party exercises a sufficiently degree of authority and control over individuals on board a ship or an aircraft registered in the State Party, and that the principle does not apply to for instance private ships and aircrafts registered in the State Party over which the State Party is not exercising such control. We find it relevant in this regard to refer to the jurisprudence of the European Court of Human Rights (ECtHR) concerning States’ responsibility for events occurring on board ships, for instance the Grand Chamber judgment in the case of *Hirsi Jamaa and others v. Italy* (application no. 27765/09) and the judgment in the case of *Medvedyev and others v. France* (application no.3394/03).

We would also encourage the Committee to take into account relevant rules of general international law, such as those reflected in ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (see for instance Articles 6 and 8).

In paragraph 10, the Committee states: “*The principle of ‘non-refoulement’ applies 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.*”

Norway finds the wording of this paragraph unclear, and is, as Denmark, concerned that it would expand the jurisdictional scope of the Convention beyond the existing scope. We therefore support Denmark’s suggestion to replace the wording “...has a factual control and authority” with the following wording: “in practice exercises effective control. A State party must also observe the principle of ‘non-refoulement’ in relation to persons who are in the territory of another State but who are under the State party’s authority and control through its agents operating – whether lawfully or unlawfully – in the other State.”

Paragraph 11: Norway would encourage the Committee to consider whether “deportation” is the most adequate word to be used as a general term for “expulsion, return or extradition”. In armed conflict, the word “transfer” is often used when a detained person is handed over from one State to another. In these situations the word “deportation” does not seem adequate.

In paragraph 14, the Committee states that “*States parties should not take measures or adopt policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, cutting funds for assistance programs to asylum seekers, which would compel persons in need for protection under Article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected there to torture and other cruel, inhuman or degrading treatment or punishment.*”

Norway would like to point out that there is no reference in the draft to the Committee’s case law to substantiate the Committee’s view on this point. While agreeing that the States Parties should not take measures or adopt policies that would compel a person in need of protection to return, in Norway’s view, however, the threshold must be high for finding that one of the situations that are mentioned as examples would *compel* a person to return.

In paragraph 20, the Committee states that «*The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of “non-refoulement”, provided for by article 3 of the Convention, and that they should not be used as a loophole to undermine the principle, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State*»

Norway would like to ask the Committee to clarify this paragraph, as it seems unclear whether the Committee considers that diplomatic assurances are contrary to the principle of “non-refoulement” *per se*, or whether the Committee’s view is that diplomatic assurances are contrary to the principle of “non-refoulement” only when they are being or intended to “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”.

If the latter understanding is correct, we would encourage the Committee to reformulate paragraph 20 in order to prevent misunderstandings. If the former understanding is correct, Norway holds the view that diplomatic assurances are not as such contrary to the principle of “non-refoulement”. Diplomatic assurances must however be assessed individually on a case-by-case basis. The relevant question is whether the assurances obtained in a particular case are sufficient to remove any real risk of torture, in line with the principles laid down by the ECtHR in the case of *Othman (Abu Qatada) v. the United Kingdom* (application no. 8139/09).

In paragraph 21 and 22, the Committee states that «*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 sustained specialized rehabilitation treatment. 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.*

22. States parties should envisage mechanisms of financial and legal assistance to persons deported where they have subsequently faced a substantial risk of being tortured or they have been tortured in the receiving State in order to enable them to get access to judicial procedures empowered to put an end to that risk or that offence. Alternatively, they 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. When necessary, the sending State should undertake legal and administrative or other (diplomatic) procedures for the return of the persons concerned to its territory.»

It is the Norwegian Government's opinion, that these paragraphs are submitting additional responsibilities upon the States Parties which go beyond the scope of Article 3. As long as the return itself is found not to constitute a breach of Article 3, we cannot find that there is any legal basis for giving the sending State the responsibility for health care or financial or legal assistance in the receiving State, or that the sending State has the responsibility to carry out monitoring and follow-up visits upon return to another State. We have difficulties seeing that the case referred to in footnote 13 provides a basis for the conclusions drawn in paragraph 22. Norway would also like to mention that the ECtHR has established a high threshold for finding that returning a person to a country with less developed systems for medical treatment constitutes a violation of Article 3 of the European Convention on Human Rights, see for instance the case of *N. v. the United Kingdom* (application no. 26565/05).

In paragraph 36, the Committee states that «*According to Article 22, paragraph 5b) the complainant must have exhausted all available effective domestic remedies, available in law and in practice. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of violation of the Convention. In the context of Article 3 of the Convention, the Committee considers that exhaustion of domestic remedies means that the complainant has applied for remedies which are directly related to his/her risk of torture in the country to which he/she would be deported, not for remedies that might allow the complainant to remain in the State party.*»

In the Norwegian Government's view, the Committee should mention that the requirement to exhaust domestic remedies also applies to requests for interim measures.

Furthermore, it is unclear what is meant by the last sentence of paragraph 36. We encourage the Committee to clarify what is intended by the distinction between the two types of remedies described. In Norway, a claim that a person is in risk of torture would be considered as part of the claim for asylum, and in our view, domestic remedies concerning the request for asylum must be exhausted before the Committee can consider the communication.

In paragraph 39, the Committee states that “*Non-compliance by the State party with the Committee’s request [for interim measures] would make evident that the State party failed in fulfilling its obligations to cooperate with the Committee. 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.*”

Norway agrees with the Committee that States Parties are obliged to co-operate with the Committee in good faith in conformity with the Convention. Norway is also of the opinion that the negative part of this obligation must be for the States Parties not to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Convention, or to render examination by the Committee moot and the expression of its views nugatory and futile. However, the draft General Comment does not in Norway’s opinion provide an accurate description of the Committee’s mandate, by inferring a legally binding nature of the Committee’s requests for interim measures.

In a decision of 16 April 2008 (*Dar v the State*) concerning an individual who had forwarded a communication under the Convention, the Norwegian Supreme Court also found that requests for interim measures made by the Committee are not binding under international law. The Supreme Court noted in this context that, distinct from the International Court of Justice and the European Court of Human Rights whose decisions are binding under international law on the parties to the case, the Committee is a monitoring body that issues non-binding opinions in respect of individual communications. The Court thus assumed that Norway was not obliged under international law to comply with the Committee’s request for interim measures to protect the applicant. However, as the Court also noted, the generally held view in Norway is that due weight is to be given to such requests and that they are generally complied with insofar as possible. In the case referred to, Norwegian authorities gave due weight to the request, but did not find that any interim measures were warranted under the circumstances.

While recognizing the powers of the Committee to decide its rules of procedure, Norway does not agree that a request from the Committee for interim measures is as such legally binding under public international law. The terms of the Convention in their context and in the light of their object and purpose do not support the view that the Committee can adopt legally binding interim measures.

In paragraph 40, the Committee states that « *With respect to the application of Article 3 of the Convention to the merits 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 – i.e. to submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when the complainant is in a situation where he/she cannot elaborate on his/her case, for instance, when the complainant has demonstrated that he/she has no possibility of obtaining documentation relating to his/her allegation of torture or is deprived of his/her liberty, the burden of proof is reversed and it is up to the State concerned to investigate the allegations and verify the information on which the communication is based.»

The Norwegian Government would like to ask the Committee to clarify this paragraph, as it is unclear what the legal basis is for reversing the burden of proof as described in the paragraph. In Norway's view, it cannot be sufficient to reverse the burden of proof that the complainant claims that he or she is unable to obtain documentation. If the Committee retains this position, there should in our opinion at least be a reference to case law of the Committee which can substantiate the Committee's view, and it should be clarified what is required from the complainant to demonstrate that he or she has no possibility of obtaining documentation. The case referred to in footnote 32 concerns a situation where the complainant had *not* provided sufficient details to reverse the burden of proof. We cannot see that this case provides a basis for a general rule as described in the last sentence of paragraph 40.

In paragraph 43, the Committee states that *“Guarantees and safeguards should include (...) the right to recourse against a decision of deportation (...) with the suspensive effect of the enforcement of the deportation order”*.

It is Norway's view that a general obligation for the States parties to suspend the effect of an enforcement or deportation order cannot be inferred from the wording of Article 3. There may be cases where the application for asylum is found to be manifestly unfounded and where a return will clearly not be a breach of article 3. In such cases there is no ground for suspending the enforcement of the return decision.

In paragraph 45, the Committee states: *“At the international level, the Committee considers crucial, to determine whether there are substantial grounds for believing that a person would be in danger of being subjected to torture, 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, but they are not limited to: (...) (f) situations of international and non-international armed conflicts.”*

In paragraph 45 (f), situations of international and non-international armed conflict are listed as violations of human rights. Norway would therefore like to point out that situations of armed conflict do not *per se* represent human rights violations or lead to the existence of a 'consistent pattern of gross, flagrant or mass violation of human rights'. Norway therefore proposes a deletion of letter f or that the text is reformulated.

In paragraphs 50 and 51, the Committee states that *“Equally, when assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if he/she is expelled, returned or extradited to another State, the Committee will take into account the human rights situation of that State as a whole and not of a particular area of it. The State party is responsible for any territory under its jurisdiction. The notion of “local danger” does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured.*

51. The Committee considers that the so called “internal flight 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 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.”

Norway recognizes the internal flight alternative. We make reference to the fact that international protection is subsidiary to protection in the foreign national's home country. Foreign nationals who can reside in an area of their home country without risking torture, are therefore not entitled to international protection.

We therefore hold the view that whether there is an internal flight alternative upon return, is part of the assessment of whether a return will constitute a risk of torture for the person concerned. This is assessed individually on a case-by-case basis.

We also note that the Committee's draft text, as we read it, is not in line with the case law of the ECtHR regarding return to a person's home State where safe areas can be found within the State, see for instance the case of *H. and B. v. the United Kingdom* (application no. 70073/10 and 44539/11).

We question the legal basis for the Committee's description that such an alternative (internal flight) upon return can only be applicable *if the Committee has received* reliable information *before* the deportation that full and sustainable protection will be guaranteed. We also question the feasibility of having the States Parties commit to providing evidence of such to the Committee in every case before enforcement of the deportation.

Against the above background, Norway is of the opinion that the draft revised General Comment No. 1 should be carefully reconsidered on several accounts, taking into consideration the prevalent understanding among the States Parties of the obligations assumed under the Convention.

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