



Non-refoulement: Achievements and Challenges

1. Introduction

The fundamental principle that a person cannot be sent, deported, extradited or otherwise transferred to a country where he or she faces a serious risk of torture or cruel, inhuman or degrading treatment is well anchored in human rights law. It has over the years developed alongside and beyond its traditional understanding under international refugee law and is considered to be an absolute prohibition under international human rights law.

In contrast, the protection from refoulement on the ground remains a major challenge as evidenced in the work of the Committee against Torture (Committee). Hostile policies towards migrants, the overriding interest to fight crime or counter real or perceived security risks have resulted in attempts to cut back existing protections. In many parts of the world effective safeguards or remedies, especially suspensive and interim protections, are nonexistent or grossly ineffective or inaccessible. Recent developments in Europe, Africa and Asia in repelling migrants without considerations on the risks they are facing is just one of the many illustrations of an exacerbating problem in the protection of rights.

Other challenges include questions of return to places under the control of non-state or private actors or situations where States are either unwilling or unable to provide the necessary protections. The context of fighting terrorism continues to challenge core notions and interpretations of the right not to be returned in the face of risk of torture. Renditions, informal transfers, assurances or the assertion of regional or universal counter-terrorism obligations superseding legal concepts under Article 3 of the Convention against Torture (Convention) remain a reality today.

Overall, the challenges of protecting against the return to torture are truly global. As of 2014, the Committee raised non-refoulement concerns in 147 concluding observations with regard to 96 State parties. Of these State parties, 49 are western states, 18 Asian states, 19 African states and 11 Latin American states. It can be anticipated that increased migration streams and security concerns in a more and more divisive world will further increase those challenges affecting, in particular, the marginal and poor.

The Committee itself has played an important role with a rich and progressive case law on this issue and with a frequent reflection in its concluding observations. The Committee's jurisprudence and practice is discussed below.

2. Risk assessment

a. Real and foreseeable risk

The wording of Article 3 of the Convention refers to a ‘danger’ of being subjected to torture. Since the very first Article 3 cases that were decided on the merits the Committee has interpreted this as a real and foreseeable risk. In the case of *Aemei v. Switzerland*, the Committee stated that the author’s expulsion to Iran would have the “foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured”.¹ The Committee has specified that a real and foreseeable risk does not need to be highly probable but that it must go beyond mere theory or suspicion.²

b. Personal risk

A complainant must establish that he is under a personal risk of torture upon return. Where a complainant does not produce any evidence of personal persecution or torture and relies solely upon information relating to the general situation in a State, the Committee will most likely not find a breach of Article 3. To establish a situation of personal risk, the complainant’s account of his or her previous personal history or torture by the receiving state will be examined. The Committee has acknowledged that sometimes these accounts will contain inconsistencies or be inaccurate in some ways.³

Determining the existence of a personal risk, the Committee takes into account several factors which have included the complainant’s ethnic background,⁴ political affiliation,⁵ sexual orientation,⁶ desertion from the army,⁷ previous torture,⁸ incommunicado detention,⁹ situation of family members (e.g. political activities of family members¹⁰) religious affiliation and conversion to Christianity,¹¹ risk of expulsion to a third country,¹² and violence against women, including rape.¹³

c. Time of assessment of risk

The time of the risk assessment needs to be ex nunc at the time of removal. The Committee has stated that the risk assessment is undertaken “as presented at the time of its consideration of the complaint, rather than as presented at the time of submission of the complaint”.¹⁴ Consequently, the passing of time between the initial claim and the Committee’s assessment can be of relevance. For instance, the human rights situation in a country could have changed

¹ *Aemei v. Switzerland*, Comm. No. 34/1995, 29 May 1997, para. 9.5.

² General Comment No. 1, UN Doc. A/53/44, 16 September 1998, para. 6.

³ *Tala v. Sweden*, Comm. No. 43/1996, para. 10.23.

⁴ *Hussein Khademi et al. v. Switzerland*, Comm. No. 473/2011, 20 January 2015, para. 7.4.

⁵ *K.N. et al. v. Switzerland*, Comm. No. 481/2011, 24 June 2014, para. 7.7.

⁶ *Uttam Mondal v. Sweden*, Comm. No. 338/2008, 7 July 2011, para. 7.7 (note that the applicant’s homosexuality was one factor among others).

⁷ *A v. the Netherlands*, Comm. No. 91/1997, 13 November 1998, para. 5.5.

⁸ *Boily v. Canada*, Comm. No. 327/2007, 13 January 2012, para. 14.3; *Sathurusinghe Jagath Dewage v. Australia*, Comm. No. 387/2009, 17 December 2013, para. 10.5.

⁹ *Arana v. France*, Comm. No. 63/1997.5 June 2000, paras. 11.4–11.5.

¹⁰ *X. and Z. v. Finland*, Comm. No. 483/2011, 5 August 2014, para. 7.6.

¹¹ See e.g. *Ke Chun Rong v. Australia*, Comm. No. 416/2010, 26 November 2012, para. 7.4 (on religious affiliation); *Abdel Azizi v. Switzerland*, Comm. No. 492/2012, 19 January 2015, para. 8.7 (on conversion to Christianity).

¹² *Amayak Korban v. Sweden*, Comm. No. 88/1997, 16 November 1998, para. 6.5.

¹³ *Njamba v. Sweden*, Comm. No. 322/2007, 3 June 2010, para. 9.5.

¹⁴ *Attia v. Sweden*, Comm. No. 199/2002, 24 November 2003, para. 12.1.

for the better or worse. The Committee's assessment might, consequently, also be different than the assessment of the national authorities.

In cases in which the individual has already been removed, the situation is assessed *ex ante* at the time of removal. The Committee may, however, still take into account subsequent events. In the case of *Tebourski v. France*, the Committee considered that "subsequent events are useful only for assessing the information which the State party actually had or could have deduced at the time of expulsion".¹⁵

Having said this, the Committee's case law is not entirely clear on whether a removal that has already taken place is strictly *ex tunc*. In the case of *T.P.S. v. Canada*, the Committee decided the case several years after the complainant had been removed to India and emphasized that "it is unlikely that the author is still at risk of being subjected to acts of torture". Hence in this case, the risk assessment was done *ex nunc* at the time of the Committee's decision.¹⁶

3. Burden and standard of proof

a. Burden of proof

In individual petitions before the Committee, the initial burden is with the complainant to prove that he or she faces a risk of being tortured if expelled or extradited. General Comment No. 1 states that "the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party".¹⁷ After the complainant has established a *prima facie* case, the burden of proof shifts to the State party. It is upon the State party to investigate the allegations of the individual concerned. Especially, the State party has to verify information that is provided by the individual. In the case of *A.S. v. Sweden*, the author of the communication alleged that she was forced into marriage with an Ayatollah and that she and her Christian partner were sentenced by a Revolutionary Court to death by stoning. The Committee was of the view that "the State party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture".¹⁸

b. Standard of proof and evidence

Regarding the standard of proof, the Committee has noted that there needs to be sufficient facts and circumstances but that there can still be doubts as to the danger of torture. In the case of *Mutombo v. Switzerland*, the Committee considered that "even if there are doubts about the facts adduced by the author, it must ensure that his security is not endangered".¹⁹ Recognizing that it is difficult to prove that someone has been tortured or is under a risk of being tortured, the Committee is usually satisfied with a combination of factors indicating torture and accepting that some facts are doubted.

This benefit of the doubt principle also stems from the Convention's preventing function. In the case of *Alan v. Switzerland*, the Committee reasoned that the "main aim and purpose of the Convention is to prevent torture, not to redress torture once it has occurred." The Committee further stated that complete accuracy is seldom to be expected by victims of torture and some

¹⁵ *Tebourski v. France*, Comm. No. 300/2006, 11 May 2007, para. 8.1.

¹⁶ *T.P.S. v. Canada*, Comm. No. 99/1997, 4 September 2000, paras. 15.4 and 15.5. See also individual opinion by Camara pointing out the *ex nunc* vs. *ex tunc* risk assessment.

¹⁷ General Comment No. 1, UN Doc. A/53/44, 16 September 1998, para. 5.

¹⁸ *A.S. v. Sweden*, Comm. No. 149/1999, 15 February 2001, para. 8.6.

¹⁹ *Mutombo v. Switzerland*, Comm. No. 13/1993, 27 April 1994, para. 9.2.

inconsistencies may exist as long as they are not material and do not raise doubts about the general veracity of the author's claims.²⁰

General Comment No. 1 further lists several types of information a complainant can provide to establish his or her Article 3 case, including evidence that the author has been torture in the past, that the human rights situation in the country where he or she is deported has changed, that the author is engaged in political activities that make him or her particularly vulnerable, or evidence that there is a consistent pattern of gross, flagrant or mass violations of human rights.

Particularly relevant is evidence concerning past experiences of torture and medical evidence as well as evidence about the general human rights situation in the country of origin. The latter could be supported by letters and reports from non-governmental organizations²¹ or UN bodies including reports by Special Rapporteurs.²²

c. Role of the Committee

From the Committee's case law it is unclear how the Committee sees its role in assessing the facts and evidence before it. For instance, in the case of *S.G. v. the Netherlands*, the Committee stated that "it is not in a position to challenge their [the Dutch authorities] findings of fact, nor to resolve the question of whether there were inconsistencies in the complainant's account".²³ The Committee made a similar statement in the case of *S.P.A. v. Canada* where the Committee found that "it is for the courts of the State parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case".²⁴ In a number of other cases, however, the Committee has played an active role in gathering facts on its own and in fully reviewing both facts and law. In the case of *Dadar v. Canada*, for instance, the Committee stated that "while the Committee gives considerable weight to findings of fact made by the organs of the State party, it has the power of free assessment of the facts arising in the circumstances of each state".²⁵ Only such an understanding of the Committee's role provides for an effective complaint mechanism.

4. Domestic safeguards and remedies

It is the primary responsibility of States to realize the rights enshrined in the Convention, including the right to non-refoulement. As the forceful return of individuals can entail severe consequences it is important that there are robust domestic safeguards on refoulement. In its concluding observations and jurisprudence, the Committee developed several safeguards to which states need to adhere to.

a. Legislation

First and foremost, State parties need to adopt a legislative framework that regulates expulsion, refoulement and extradition.²⁶ Since non-refoulement is most relevant in refugee law, it is

²⁰ *Alan v. Switzerland*, Comm. No. 21/1995, 8 May 1996, para. 11.5.

²¹ See e.g. *H.B.H. et al v. Switzerland*, Comm. No. 192/2001, 16 May 2003, para. 6.9.

²² *Mutombo v Switzerland*, Comm. No. 13/199327, April 1994, para. 9.5 (Special Rapporteur on extrajudicial, summary and arbitrary executions, Special Rapporteur on the question of torture, Working Group on enforced and voluntary disappearances).

²³ *S.G. v. the Netherlands*, Comm. No. 135/1999, 14 May 2004, para. 6.6.

²⁴ *S.P.A. v. Canada*, Comm. No. 282/2005, 6 December 2006, para. 7.6.

²⁵ *Dadar v. Canada*, Comm. No. 258/2004, 5 December 2005, para. 8.8. Other cases in which the Committee played an active role in assessing facts and evidence are *V.L. v. Switzerland*, Comm. No. 262/2005, 22 January 2007, para. 8.8; *C.T. and K.M. v. Sweden*, Comm. No. 279/2005, 22 January 2007, para. 7.5.

²⁶ Concluding Observations Benin, UN Doc. CAT/C/BEN/CO/2, 19 February 2008, para. 11; Concluding Observations Cambodia, UN Doc. CAT/C/KHM/CO/2, 20 January 2011, para. 24.

equally important that State parties put a legal regime in place that governs asylum and that establishes a fair and efficient refugee status determination procedure.²⁷

Furthermore, state parties are obliged to enact procedures that establish a competent administrative body that deals with asylum and refoulement procedures.²⁸ Such migration and asylum bodies also need to be allocated with enough monetary resources.²⁹

b. Training

Authorities need to ensure that immigration officials are trained to recognize victims of torture on arrival in order not to send back those victims. To this end, immigration officials and other law enforcement officers need to be provided with clear instructions and trainings on asylum and the protection of refugees.³⁰ Further, law enforcement officers should be given clear guidelines and trainings on the investigation and documentation of torture.³¹

c. Judicial review and legal assistance

The Committee has repeatedly stated that every person who is facing extradition or expulsion has the right to appeal before an effective, independent and impartial judicial body.³² To this end, all persons subjected to refoulement need to be informed about all domestic remedies that are available.³³ The judicial body should thoroughly examine the merits of each individual case, including the overall situation with regard to torture in the country concerned.³⁴ To make a remedy effective, interpretation³⁵ as well as legal assistance³⁶ must be provided to asylum-seekers and other persons facing return.

The possibility of a judicial as opposed to an administrative review needs to be provided to all individuals no matter their status or situation. Thus, the Committee found that the requirements of Article 3 were not satisfied in the case of *Agiza v. Sweden*, where a judicial tribunal relinquished the case to the government because the case involved national security concerns. It was then the executive that took the first and at once final decision to return the individual.³⁷

The Committee has further stated that the lodging of an appeal must be given suspensive effect.³⁸ This also applies to the lodging of a petition before the Committee. The rationale for the suspensive effect of petitions are the same as for interim measures. By accepting the Committee's competence under Article 22, state parties undertake to cooperate with the

²⁷ Concluding Observations China (Hong Kong), UN Doc. CAT/C/HKG/CO/4, 19 January 2009, para. 7.

²⁸ Concluding Observations Egypt, UN Doc. CAT/C/SR.162, 17 November 1993, para. 70; Concluding Observations China, UN Doc. CAT/C/SR.251, 8 May 2008, para. 10; Concluding Observations Namibia, UN Doc. CAT/C/SR.293, 2 September 1997, para. 17.

²⁹ Concluding Observations Sierra Leone, UN Doc. CAT/C/SLE/CO/1, 20 June 2014, para. 20.

³⁰ Concluding Observations Bolivia, UN Doc. CAT/C/BOL/C/2, 14 June 2013, para. 17.

³¹ Concluding Observations Sweden, UN Doc. CAT/C/SWE/CO/6-7, 12 December 2014, para. 11.

³² Concluding Observations Bosnia and Herzegovina, UN Doc. CAT/C/BIH/CO/2-5, 20 January 2011, para. 14; Concluding Observations Algeria, UN Doc. CAT/C/DZA/CO/3, 26 May 2008, para. 9; Concluding Observations Tajikistan, UN Doc. CAT/C/TJK/CO/2, 21 January 2013, para. 18.

³³ *S.H. v. Norway*, Comm. No. 121/1998, 17 April 2000, para. 7.3.

³⁴ Concluding Observations Belgium, UN Doc CAT/C/BEL/CO/3, 3 January 2014, para. 22.

³⁵ Concluding Observations Bulgaria, UN Doc. CAT/C/BGR/CO/4-5, 14 December 2011, para. 14.

³⁶ Concluding Observation France, UN Doc. CAT/C/SR.681, 22 November 2005, para. 30.

³⁷ *Agiza v. Sweden*, Comm. No. 233/2003, 24 May 2005, para. 13.8.

³⁸ Concluding Observations Austria, UN Doc. CAT/C/AUT/CO/4-5, 20 May 2010, para. 13; Concluding Observations Benin, UN Doc. CAT/C/BEN/CO/2, 19 February 2008, para. 11.

Committee in good faith and give full effect to the individual procedure.³⁹ In addition, returning an individual despite a pending complaint renders the Committee's decision on the merits devoid.⁴⁰

d. Reparation in cases of a return in violation of Article 3

When State parties are found to be in breach of Article 3 of the Convention, the Committee has ruled in favour of reparation, usually mentioning measures of compensation for the complainant.⁴¹ In addition, the Committee has asked states to determine the complainant's current whereabouts and well-being.⁴²

More recently, the Committee has included other forms of redress. In the case of *Alexey Kalinichenko v. Morocco*, the Committee required the State party to establish an effective follow-up mechanism to ensure that the complainant is not subjected to torture or ill-treatment. In this context, the Committee also noted that Russia, to where the applicant had been returned, had undertaken to allow the Committee to visit the complainant in prison. The Committee thus asked the State party to the case to facilitate such a visit by two Committee members.⁴³

Further, in the case of *Boily v. Canada*, the Committee referred to Article 14 of the Convention and asked the State party to fully redress the complainant. The Committee requested that

the State party, in accordance with its obligations under article 14 of the Convention, provide effective redress, including the following: (a) compensate the complainant for violation of his rights under article 3; (b) provide as full 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; and (c) review its system of diplomatic assurances with a view to avoiding similar violations in the future.⁴⁴

This demonstrates that the Committee has recognized the importance of full redress in all of its forms for refoulement in violation of Article 3.

5. Article 3 and the Refugee Convention

Claims under Article 3 are often lodged by individuals who are seeking asylum or claiming refugee status. While issues under both Article 3 and the Refugee Convention may overlap, the Refugee Convention is both broader and narrower than Article 3 of Convention. It is broader as a 'refugee', a person with a right to *non-refoulement* under Article 33 of that Convention, is a person who faces a "well founded fear of persecution" on particular grounds (e.g. race, religion) in a receiving State. Persecution may fall short of torture, so the Refugee Convention applies in circumstances where one fears a lesser form of ill-treatment in a receiving State. On the other hand, the reasons why one might face torture are irrelevant to an Article 3 assessment, whereas the reasons why one might face persecution are relevant under the Refugee

³⁹ On interim measures see e.g. Concluding Observations Canada, UN Doc. CAT/C/CAN/CO/6, 25 June 2012, para. 10; *Tebourski v. France*, Comm. No. 300/2006, 11 May 2007, para. 8.7, *Pelit v. Azerbaijan*, Comm. No. 281/2005, 29 May 2007, para. 11.

⁴⁰ On interim measures see e.g. *Brada v. France*, Comm. No. 195/2002, 24 May 2005, para. 13.4.

⁴¹ See e.g. *Mafhoud Brada v. France*, Comm. No. 195/2002, 24 May 2005, para. 15; *Bacham Sinhn Sogi v. Canada*, Comm. No. 297/2006, 16 November 2007, para.12; *Adel Tabourski v. France*, Comm. No. 300/2006, 11 May 2007, para. 10; *Inass Abichou v. Germany*, Comm. No. 430/2010, 16 July 2013, para. 13.

⁴² *Inass Abichou v. Germany*, Comm. No. 430/2010, 16 July 2013, para. 13.

⁴³ *Alexey Kalinichenko v. Morocco*, Comm. No.428/2010, 18 January 2012, para. 17.

⁴⁴ *Boily v. Canada*, Comm. No. 327/2012, 13 January 2012, para. 15.

Convention.⁴⁵ Furthermore, Article 3 rights are absolute. Refugee rights under the Refugee Convention are denied under Article 1(f) for certain categories of people, such as people who have committed war crimes, crimes against humanity, and crimes against peace. In contrast, such people have absolute rights not to be deported in situations where they face a risk of torture under Article 3.⁴⁶

6. Interim measures

A key concern for most litigators on non-refoulement cases is the return of the victim while the petition is still pending before the Committee. Responding to this risk, the Committee can take interim measures asking the respondent State not to extradite or expel the petitioner. The Committee's practice on interim measures has almost exclusively been shaped by cases on non-refoulement. According to the Committee's practice and rules of procedures, a request for interim measures must be submitted in a timely manner and meet the basic admissibility criteria of Article 22, paragraphs 1 to 5 of the Convention. In addition, a complaint must have a reasonable likelihood of success on the merits.⁴⁷

Given the quasi-judicial status of the Committee, State parties have questioned the legally binding nature of interim measures. Canada, for instance, stated that it "takes its international obligation under the Convention seriously, but considers that requests for interim measures are not legally binding."⁴⁸

Despite State parties' reluctance to accept interim measures, the Committee repeatedly recalled that by ratifying the Convention and voluntarily accepting the Committee's competence under Article 22, State parties undertook to cooperate with the Committee in good faith in applying and giving full effect to the procedure of individual complaints established thereunder. The Committee thus considers that Articles 3 and 22 of the Convention are violated if a State party returns a complainant despite a request for interim measures.⁴⁹ The Committee further reasoned that ignoring an interim measure nullifies the effective exercise of the right to a complaint and renders the Committee's final decision on the merits devoid.⁵⁰

In sum, the case law makes clear that adherence to requests for interim measures should be considered as binding by States that have authorized the Committee to receive individual complaints. Non-compliance with interim measures undermines the integrity of the individual complaint system.

7. Diplomatic assurances

The Committee has repeatedly raised concerns over the state parties' practices of seeking diplomatic assurances that the returned individual would not face torture in the receiving state. Diplomatic assurances from states that employ torture are inherently unreliable and do not provide effective safeguard against torture. Diplomatic assurances are typically sought form

⁴⁵ One must be persecuted for a "Convention reason" under Article 1 of the Refugee Convention relating to the status of refugees; one must have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

⁴⁶ See, e.g., *Paez v. Sweden*, Comm. No. 39/1996, 28 April 1997 and *Abdussamatov et al. v. Kazakhstan*, Comm. No. 444/2010, 11 July 2012, para. 13.7; see also Concluding Observations Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 3.

⁴⁷ Report of the Committee against Torture (2012 and 2013), UN Doc. A/68/44, paras. 109 and 110.

⁴⁸ *Sogi v. Canada*, Comm. No. 297/2006, 29 November 2007, para. 7.7.

⁴⁹ See e.g. Concluding Observation Canada, UN Doc. CAT/C/CAN/CO/6, 25 June 2012, para. 10; *Tebourski v. France*, Comm. No. 300/2006, 11 May 2007, para. 8.7, *Pelit v. Azerbaijan*, Comm. No. 281/2005, 29 May 2007, para. 11.

⁵⁰ See e.g. *Brada v. France*, Comm. No. 195/2002, 24 May 2005, para. 13.4.

states that already ignore international and domestic prohibitions against torture. It are usually the States in which torture is an endemic problem that have to provide diplomatic assurances against torture. Assurances are precisely sought because immigration authorities found that there were substantial grounds for believing that the individual would be tortured in the receiving country.

The practice of diplomatic assurances also undermines the broader human rights regime. States from which assurance is sought are already bound by other international norms that prohibit torture, regardless of a diplomatic assurance. Seeking an assurance signals that a bilateral assurance is more important than multilateral human rights treaties or *jus cogens* norms. This can frustrate the purpose and power of the Convention and the Committee.

Monitoring and enforcing of diplomatic assurances also poses a serious problem. First, it is usually diplomatic staff who monitor assurances and who do not necessarily have any experience in uncovering ill-treatment of a detainee. Second, there are barely any review mechanisms in case a diplomatic assurance has been breached. In concluding his 2005 report to the General Assembly, the Special Rapporteur on Torture clearly rejected the use of diplomatic assurances, emphasizing the lack of legal process by stating that

Diplomatic assurances are not legally binding therefore they carry no legal effect and no accountability if breached and the person who the assurances aim to protect has not recourse if the assurances are violated.⁵¹

In fact, several diplomatic assurances proved ineffective. In 1997 the United States returned two Sikhs to India based *inter alia* on diplomatic assurances. Despite the assurance, the petitioners were tortured by the Indian police upon return.⁵² In 2002 the United States returned Maher Arar, a dual Canadian-Syrian citizen accused of terrorism, to Syria based on a diplomatic assurance. Despite several visits from Canadian consular officials, he was repeatedly tortured in prison.⁵³ In the *Boily v. Canada* case before the Committee, the complainant made allegations of having been tortured and that despite the foreseen monitoring visits in the diplomatic assurance, the State party did not visit him or made enquiries as to his safety for several days after his return. The Committee thus concluded that

the diplomatic and consular authorities of [...] were not given due notice of the complainant's extradition and not informed of the need to stay in close and continuous contact with him from the moment he was handed over. In this case the diplomatic assurances and the foreseen consular visits failed to anticipate the likelihood that the complainant had the highest risk of being tortured during the initial days of his detention. This risk proved to be true, as the complainant arrived in Mexico on 17 August 2007 and stated that he was subsequently tortured from 17 to 20 August 2007. However, the State party did not take steps to check on his safety until 22 August 2007.⁵⁴

Against this background, diplomatic assurances can only be accepted exceptionally and under strict requirements. In particular, diplomatic assurances can never suffice alone to out rule 'substantial grounds' for believing that the person would be subject to torture. While almost

⁵¹ Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2005), UN Doc. A/60/316, para. 51.

⁵² Columbia Law School, *Promises to Keep*, p. 35, available at <<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf>>.

⁵³ U.S. Dep't of Homeland Security, Office of Inspector General, The Removal of a Canadian Citizen to Syria 22 (Mar. 2008), available at http://www.oig.dhs.gov/assets/Mgmt/OIGr_08-18_Jun08.pdf; Center for Constitutional Rights, The Story of Maher Arar, Rendition to Torture, 4 (2007), available at <https://ccrjustice.org/files/rendition%20to%20torture%20report.pdf> (last visited Mar. 24, 2015).

⁵⁴ *Boily v. Canada*, Comm. No. 327/2007, 13 January 2012, para. 15.5.

never accepting diplomatic assurances that State parties had put in place, the Committee developed several factors that have to be taken into account when deciding whether a diplomatic assurance can be relied upon: whether the assurance includes follow-up procedures;⁵⁵ whether the assurance is concrete and concise or of mere general nature affirming the state's general commitment to human rights;⁵⁶ whether the country has effective prevention and protection mechanisms against torture;⁵⁷ whether the individual concerned has already been tortured by the receiving state;⁵⁸ whether there are effective post-return monitoring arrangements.⁵⁹ Further factors that should be considered are whether the bilateral relations between the sending and receiving country are strong; whether there is a domestic judicial review mechanism that allows for the examination of diplomatic assurances; and whether the issuing state is cooperating with international monitoring mechanisms as well as non-governmental organisations.

Diplomatic assurances should always be unacceptable from states where torture is practiced systematically or where a 'consistent pattern of gross, flagrant or mass violations of human rights' exists. In its concluding observation on the United Kingdom, the Committee stated that

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.

It is important to add that individuals should be able to challenge diplomatic assurances in a judicial process. The individual concerned must be given the opportunity to present evidence and make submissions as to the value of such assurances.

8. 'The existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights'

According to Article 3, the Committee must take into account the existence of a consistent pattern of gross, flagrant or mass violations of human rights. While the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not as such constitute sufficient reason to determine that a particular person would be in danger of being subject to torture if returned, the absence of such a pattern does not mean that a person can be expelled or extradited. It is rather one factor in the Committee's considerations. Through the Committees vast jurisprudence on Article 3 cases several factors emerged which the Committee considers when determining whether there is a 'consistent pattern of gross, flagrant, or mass violations of human rights'.

a. Widespread and systematic use of torture and impunity

When affirming the existence of a consistent pattern of gross, flagrant or mass violations of human rights, the use of psychological and physical torture in criminal prosecution is usually widespread and systematic.⁶⁰ In many cases the Committee underlined that torture is used systematically to solicit confessions.⁶¹

⁵⁵ *Ibid* para. 14.4.

⁵⁶ *Kalinichenko v. Morocco*, Comm. No. 428/2010, 18 January 2012, para. 15.6.

⁵⁷ *Abdussamatov et al. v. Kazakhstan*, Comm. No. 444/2010, 11 July 2012, para. 13.10.

⁵⁸ *Boily v. Canada*, Comm. No. 327/2007, 13 January 2012, paras. 14.4 and 14.5.

⁵⁹ Concluding Observation China, UN. Doc. CAT/C/CHN/CO/4, 17 December 2008, para. 18.

⁶⁰ *Abed Azizi v. Switzerland*, Comm. No. 492/2012, 19 January 2015, para. 8.5.

⁶¹ *Asghar Tahmuresi v. Switzerland*, Comm. No. 489/2012, 20 January 2015, para. 7.5; *Mumin Nasirov v. Kazakhstan*, Comm. No. 475/2010, 24 June 2014, para. 11.5.

Further indices for widespread and systematic use of torture are frequent deaths in custody.⁶² For instance, in the case of *Harminder Singh Khalsa et al. v. Switzerland*, the Committee referred to reports by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on extrajudicial, summary or arbitrary executions that highlighted death following detention and that reported of attempts by authorities to block investigations or to destroy evidence in such cases.⁶³

b. Sentencing individuals who exercise fundamental freedoms

The Committee found indices for mass human rights violations in countries where individuals were detained for exercising fundamental freedoms such as assembly and expression. In the case of *Said Amini v. Denmark*, the Committee was concerned about the deteriorating situation in Iran since the elections in 2009. Arrests of journalists, human rights defenders, opposition supporters who are legitimately exercising their right to freedom of expression, opinion and assembly were indices of a consistent pattern of mass human rights violations.⁶⁴

Countries with a systematical pattern of mass human rights violations frequently target political opponents, students, journalists and human rights defenders. In the case of *Sathurusinghe Jagath Dewage v. Australia*, the Committee noted that the Sri Lankan government is persistent in hunting down political opponents. After an election, the party that comes to power harasses opposition supporters to punish them for supporting their political opponents.⁶⁵ The Committee expressed similar concerns with regard to the situation in Ethiopia. In the case of *R.D. v. Switzerland*, it was alarmed about “numerous and consistent allegations of torture by government agents against political dissidents, opposition party members, and students”⁶⁶.

c. Systematic harassment and human rights violation towards a minority group

Further indication of a pattern of gross, flagrant or mass violations of human rights is the targeting of minority groups. In the case of *S.M., H.M. and A.M. v. Sweden*, the Committee referred to the hostile attitude of the general public towards ethnic Armenians living in Azerbaijan. Persons of Armenian origin are at risk of discrimination in their daily life, they are harassed, bribes are requested by low-ranking officials when they apply for passports, and they often conceal their identity by legally changing the ethnic designation in their passports. Armenians are also subjected to ethnically motivated persecution and as a result fall victim to beatings and persecution by neighbors as well as police authorities.⁶⁷

Other systematically targeted minority groups that were subject to the Committee’s case law were Christians⁶⁸ and Kurds in Iran.⁶⁹

d. Revolution and (post) conflict situations

As is illustrated in many of the cases mentioned above, the human rights situation in Iran is extremely worrisome, particularly since the elections held in 2009. According to the Committee, repression and arbitrary detention of reformers, students, journalists and human rights defenders, clashes of peaceful demonstrators with security forces, arrests and detention

⁶² *Harminder Singh Khalsa et al. v. Switzerland*, Comm. No. 336/2008, 7 July 2011, para. 11.3.

⁶³ Ibid.

⁶⁴ *Said Amini v. Denmark*, Comm. No. 339/2008, 30 November 2010, para. 9.8. Similarly, *Abolghasem Faragollah et al. v. Switzerland*, Comm. No. 381/2009, 17 January 2012, para. 9.4; *X v. Switzerland*, Comm. No. 470/2011, 19 January 2015, para. 7.8.

⁶⁵ *Sathurusinghe Jagath Dewage v. Australia*, Comm. No. 387/2009, 17 December 2013, para. 10.8.

⁶⁶ *R.D. v. Switzerland*, Comm. No. 426/2010, 17 December 2013, para. 9.6.

⁶⁷ *S.M., H.M. and A.M. v. Sweden*, Comm. No. 374/2009, 17 January 2012, paras. 9.6 and 9.7.

⁶⁸ *Abed Azizi v. Switzerland*, Comm. No. 492/2012, 19 January 2015, para. 8.7.

⁶⁹ *Hussein Khademi et al. v. Switzerland*, Comm. No. 473/2011, 20 January 2015, para. 7.4.

without charge and ill-treatment of detainees, violations of fair trial guarantees, especially in the Revolutionary Courts and widespread use of torture in detention facilities, particularly of those accused of national security-related crimes or trend in Revolutionary Courts happen on a regular basis.⁷⁰

Similarly worrying is the situation in the Democratic Republic of Congo. UN reports noted that serious human rights violations, including violence against women, rape and gang rape by armed forces, rebel groups and civilians continued to take place throughout the country and not only in areas affected by armed conflict. It has especially affected thousands of women and children.⁷¹

The situation in Iran and the Democratic Republic of Congo reveal a consistent pattern of gross, flagrant or mass violations of human rights.

9. Extra-territorial application

The Committee has recognized that Article 3 of the Convention applies to situations in which a State party exercises effective control over a foreign territory or over a person. In its concluding observation on the United States in 2006 the Committee stated that

The State party should recognise and ensure that the provisions of the Convention expressed as applicable to “territory under the State party’s jurisdiction” apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.⁷²

The Committee thus urged the United States to “apply the non-refoulement guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention.” Similarly, in the concluding observation on the United Kingdom the Committee was of the view that Article 3 applies to the detainees who had been transferred from the United Kingdom’s facilities in Iraq and Afghanistan to the Iraqi and Afghani authorities. Hence, the Committee does not interpret the requirement of removal to ‘another State’ literally but teleologically and understands the removal to ‘another state’ as removal from one State jurisdiction to another.⁷³ Such an understanding of Article 3 is not only important in the context of rendition but also for interceptions at the Mediterranean Sea and Indian Ocean. Returning individuals before they reached or entered a State party’s territory at high sea is a circumvention of Article 3 of the Convention.

10. Absolute nature of Article 3 and national security concerns

Non-refoulement is absolute and not subject to the expulsion or derogation clause. It can also not underlie any proportionality considerations. This implies that no one can be expelled or extradited because he or she poses a threat to the national security of the host State⁷⁴ or because he or she has committed a serious crime and is therefore ineligible for asylum.⁷⁵ When

⁷⁰ *Hamid Reza Eftekhar v. Norway*, Comm. No. 312/2007, 11 January 2012, paras. 7.4 and 7.5; *Bakatu-Bia v. Sweden*, Comm. No. 379/2009, 8 July 2011, paras. 10.6 and 10.7.

⁷¹ *Bakatu-Bia v. Sweden*, Comm. No. 379/2009, 8 July 2011, paras. 10.6 and 10.6.

⁷² Concluding Observations United States, UN Doc. CAT/C/USA/CO/2, 25 July 2006 para. 15.

⁷³ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture, A Commentary* (OUP 2008), 199.

⁷⁴ See e.g. Concluding Observations Kazakhstan, UN Doc. CAT/C/KAZ/CO/3, 12 December 2014, para. 16; Concluding Observations Bosnia and Herzegovina, UN Doc. CAT/C/BIH/CO/2-5, 20 January 2011, para. 14.

⁷⁵ See e.g. *V.X.N. and H.N. v. Sweden*, Comm. No. 131/1999, 2 September 2000, para. 14.3.

countering terrorism, State parties have argued that the right to asylum should be balanced against the threat a person poses to the host State. Such considerations might be in line with the Geneva Refugee Convention, but are not permissible under the Convention against Torture. Hence, the Committee has an important gap filling function in refugee law.

It is equally important to mention that the absolute prohibition of returning an individual if he or she faces the risk of torture takes precedence over extradition treaties such as the Shanghai Treaty Cooperation.⁷⁶

11. Danger originating from non-State actors

Over the last years there has been a rapid increase of migrants and asylum seekers that flee from atrocities by non-State actors, notably terrorist groups, militants, traffickers or slavedrivers. This is also reflected in the Committee's work. In the case of *Elmi v. Australia* the Committee held that a Somalian citizen could not be returned to Somalia due to the non-refoulement obligation of Australia. The applicant was a member of the Shikal clan that had a long-lasting dispute with the Hawiye militia that had already killed his father and brother and raped his sister. Australia had argued that the acts of torture the applicant feared he would be subjected to in Somalia would not fall within the definition of torture set out in Article 1 of the Convention. The Committee, however, held that factions, such as the Mawiye militia, were exercising de facto authority and certain prerogatives that are comparable to those normally exercised by legitimate governments. More specifically, the Committee argued that Somalia has been without a government for a number of years, and that the factions have set up quasi-governmental institutions and were aiming for the establishment of a common administration. Therefore, the acts committed by these factions fall under the concept of acts committed by public officials or other persons acting in an official capacity.⁷⁷

It is thus recognized that non-State actors who exercise de facto authority comparable to governmental authority also fall under the definition of torture in Article 1 of the Convention. Consequently, the return of a person to a place where he or she would face torture by non-State actors exercising de facto authority would be contrary to Article 3 of the Convention.

More recently, the Committee has also accepted due diligence responsibility of the State in the context of Article 3. The Committee explained the due diligence responsibility of State parties in its General Comment No. 2 on Article 2 by stating that

where State authorities or others acting in official capacity or under color 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 this 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. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or defacto permission. The Committee has applied this principle to States' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.⁷⁸

⁷⁶ See e.g. Concluding Observations Kazakhstan, UN Doc. CAT/C/KAZ/CO/3, 12 December 2014, CAT/C/KAZ/CO/3, para. 16.

⁷⁷ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture, A Commentary* (OUP 2008), 79.

⁷⁸ General Comment No. 2, UN Doc. CAT/C/GC/2, 24 January 2008.

The Committee has applied this reasoning in the case of *Njamba and Balikosa v. Sweden*. The Committee noted that sexual violence, in particular rape and gang rape is committed systematically by men with guns and civilians throughout the country and not only in areas affected by armed conflict. If sent back, the complainant would face a real risk of torture contrary to Article 3. In its conclusion, the Committee specifically referred to General Comment No. 2. Thus, the complainant would face a real risk if returned back.⁷⁹

12. Internal flight alternative

When assessing the situation in the receiving country, the Committee also considers whether the individual concerned could relocate to a safe region in the receiving country. In the case of *B.S.S. v. Canada*, the Committee reasoned that the risk of torture originated from the Punjabi police, as claimed by the author of the petition. According to the Committee, the complainant did not substantiate that he would be at risk in all parts of India.⁸⁰ The Committee has given little indication on the substantive requirements for an internal flight alternative. It is thus unclear whether the alternative needs to be accessible in law and in practice. In the case of *H.M.H.I. v. Australia*, the Committee accepted that the complainant could be sent back to Kenya, instead of Somalia where he was from, so he could participate in the UNHCR's voluntary repatriation program and return to a safe area in Somalia.⁸¹ However, it was unclear whether the complainant would actually be accepted into this program. Thus, it would also be unclear how the Committee would weigh factors such as support by family members, the existence or non-existence of a social network, language skills etc.

In more recent cases, the Committee referred to the notion of 'local danger' arguing that the mere fact that the danger is of 'local character' is not sufficient to rule out a risk of torture. In the case of *Mondal v. Sweden*, the complainant claimed that he would face a high risk of being subject to torture if returned to Bangladesh because of his sexual orientation and political activities. The government argued that this risk only exists in his home province but not in the entire country and could thus be returned back. The Committee refuted this argument by stating "the notion of "local danger" does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured".⁸² Through the notion of 'local danger' the Committee has given a negative requirement for the internal flight alternative. Accordingly, an internal flight alternative is not acceptable on the sole basis that the danger is of local character.

While the internal flight alternative can be an option especially if the risk is emanating from non-State actors, it needs to underlie strict requirements. The threshold for reliance on it should be at the level of a 'guarantee'.⁸³ Only if safe transit, admittance and settlement can be guaranteed is the internal flight alternative compatible with the principle of non-refoulement.

13. Risk of further deportation if returned to the receiving State

In assessing whether it is safe for an individual to be deported to the receiving State, the Committee will consider whether there is a risk of subsequent deportation to a country where the complainant may be subjected to torture.⁸⁴ In *Korban v. Sweden*, the complainant faced

⁷⁹ *Njamba and Balikosa v. Sweden*, Comm. No. 322/2007, 3 June 2010, para. 9.5.

⁸⁰ *B.S.S. v. Canada*, Comm. No. 183/2001, 17 May 2004, para. 11.5.

⁸¹ *H.M.H.I. v. Australia*, Comm. No. 177/2001, 1 May 2002, para. 6.6.

⁸² *Mondal v. Sweden*, Comm. No. 338/2008, 7 July 2011, para. 7.4. Similarly *Kalonzo v. Canada*, Comm. No. 343/2008, 4 July 2012, para. 9.7.

⁸³ The 'guarantee' threshold is recognized by the European Court of Human Rights. See e.g. *Sufi and Elmi v. the United Kingdom*, Appl. No. 8319/07, 28 June 2011, para. 226.

⁸⁴ Committee, General Comment No. 1, UN Doc. A/53/44, 16 September 1998, para. 2.

deportation to Jordan. He feared that once deported to Jordan he would be subsequently deported to Iraq, where he risked being tortured. In assessing the risk of subsequent deportation, the Committee examined reports from a variety of sources. These reports gave evidence that “some Iraqis have been sent by the Jordanian authorities to Iraq against their will”.⁸⁵ On this basis, the Committee found that the risk of subsequent deportation could not be excluded, so the proposed deportation to Jordan would be in breach of Article 3. The Committee further noted that Jordan did not allow individual complaints under Article 22, so, if threatened with deportation to Iraq from Jordan, the complainant would not have the possibility of submitting another communication under the Convention.

14. Non-refoulement and cruel, inhuman or degrading treatment

While the Committee’s jurisprudence so far has applied Article 3 to the situation of torture⁸⁶ but not to cruel, inhuman or degrading treatment (CIDT), its General Comment No. 2 as well as recent concluding observations indicate a change of doctrine.

General Comment No. 2 states that “articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment.” The Committee derived this reasoning from the absolute and non-derogable nature of torture and CIDT that must be observed in all circumstances.⁸⁷

Further, in its recent concluding observations, the Committee has repeatedly referred to CIDT in the context of Article 3. For instance, in its concluding observation on Syria in 2010, the Committee stated that “under no circumstances should the State party expel, return or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture or ill-treatment.” In 2012, the Committee recommended that Togo respects “the principle of non-refoulement in accordance with article 3 of the Convention, and in particular the obligation to check whether there are substantial grounds for believing that the asylum seeker would be in danger of being subjected to torture or ill-treatment if expelled”. With regard to Cameroon, the Committee regretted “the lack of information on legal remedies aimed at ensuring that such persons are not in real danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment in the receiving country, or subsequently being deported to another country in which they would be in real danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment (art. 3).”⁸⁸

In addition, non-refoulement in the context of CIDT could also directly be derived from Article 16. If a person is returned to a country where he or she faces torture or CIDT, the sending State violates its obligation to prevent CIDT. The CAT itself has put forward such reasoning in the case of *M.M.K. v. Sweden*. Although only accepted in ‘exceptional circumstances’, the CAT acknowledged that a “removal [may] per se constitute cruel, inhuman or degrading treatment.” The Committee did not find such circumstances present if the petitioner was returned to Bangladesh⁸⁹ as “the risk of being exposed to harassment on the part of the authorities instigated by members of that party [Awami League] has diminished. [...] The Committee does not consider that this fact per se justifies the conclusion that the complainant would be at risk of

⁸⁵ *Korban v. Sweden*, Comm. No. 88/1997, 16 November 1998, para. 6.5.

⁸⁶ In the case of *T.M. v. Sweden*, Comm. No. 228/2003, 6 March 2003, para. 4.1, the Committee stated that “the obligation of non-refoulement does not extend to situations where a risk of cruel, inhuman or degrading treatment may exist”.

⁸⁷ General Comment No. 2, UN Doc. CAT/C/GC/2, 24 January 2008, para. 6.

⁸⁸ Other concluding observations referring to CIDT in the context of Article 3: CAT/C/KAZ/CO/3;

⁸⁹ CAT, *M.M.K. v. Sweden*, Comm. No. 221/2001, UN Doc. CAT/C/34/D/221/2002, 18 May 2005, para. 7.3.

persecution and torture at the hand of supporters of the government faction of the Jatiya party or the BNP”.⁹⁰

Furthermore, in more recent cases the Committee considered the argument by complainants that they would not receive the necessary medical treatment for their diseases if returned to their country of origin and thus would be subject to CIDT.⁹¹ Although the Committee ultimately disagreed with the complainants and found necessary treatment to be available in the respective receiving countries, it indicates that the Committee is considering applying Article 16 to cases where an individual would risks CIDT.

Finally, the Committee has also accepted that the way in which an individual is expelled can amount to a violation of Article 16. In the case of *Barry v. Morocco*, the petitioner, together with approximately 40 other individuals, was escorted to the border of Mauritania without the opportunity of submitting an asylum request. The group was then abandoned without adequate equipment and with minimal supplies of food and water. They were forced to walk approximately 50 kilometers through an area containing anti-personnel mines in order to reach the first inhabited areas on the Mauritanian side. The Committee, hence, considered that the circumstances of the complainant’s expulsion constitute the infliction of severe physical and mental suffering on the complainant by public officials and thus amounts to cruel, inhuman or degrading treatment as defined in Article 16 of the Convention.⁹²

However, it is not only ‘exceptional circumstances’ or an especially cruel way of returning an individual, that should trigger the application of Article 16, but all returns to a country where an individual would face CIDT. Knowingly sending someone to a country where he or she faces CIDT make the sending State complicit in the human rights violation. To prevent such situations, the Convention provides for State responsibility through consent or acquiescence in both Article 2 and Article 16.

Only such an understanding of non-refoulement is in line with the rationale of the Convention. Non-refoulement is rooted in the absolute nature of torture and other ill-treatment. It reflects the idea that a State cannot circumvent the absolute nature of the prohibition of torture and CIDT by transferring a person to another State. This has also been recognized by other international human rights bodies. The Human Rights Committee and the European Court of Human Rights derive non-refoulement directly from the prohibition of torture and CIDT and consequently apply it to all situations of ill-treatment.⁹³ Also, the Inter-American Convention to Prevent and Punish Torture requires States not to return an individual “when there are grounds to believe that his life is in danger, [or] that he will be subjected to torture or to cruel, inhuman or degrading treatment”.⁹⁴

⁹⁰ *Ibid* para. 8.6.

⁹¹ *N.B-M. v. Switzerland*, Comm. No. 347/2008, 17 January 2012, para. 9.8; *E.L. v. Canada*, Comm. No. 370/2009, 22 June 2012, para. 8.6.

⁹² CAT, *Barry v. Morocco*, Comm. No. 372/2009, UN Doc. CAT/C/52/D/372/2009, 8 July 2014, paras. 7.1 and 7.2.

⁹³ See e.g. General Comment No. 20, Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, Article 7 (Replaces general comment No. 7), 30 September 1992, para. 9.

⁹⁴ Article 13 of the Inter-American Convention to Prevent and Punish Torture.