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COMMITTEE AGAINST TORTURE
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Draft General Comment^{*}

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

GENERAL COMMENT No. 2 Implementation of article 2 by States Parties

I. Introduction

1. This General Comment addresses the three parts of article 2, each of which identifies distinct interrelated and essential principles that undergird the Convention's absolute prohibition against torture. Since the adoption of the Convention against Torture, the non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reflect and reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of this Committee's authority to implement effective means of prevention in response to evolving threats, issues, and practices, including but not limited to those measures contained in the subsequent articles dealing with punishment, prevention, expulsion, extradition, and reparation.
2. Article 2, paragraph 1 obliges each State to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. To ensure that measures are in fact taken that are known to prevent or punish any acts of torture, the Convention outlines in subsequent articles obligations for the State to take measures specified therein.
3. The obligation to prevent torture in article 2 is wide-ranging and includes prevention of cruel, inhuman or degrading treatment or punishment as a measure to prevent torture under article 2, paragraph 1. The obligation under article 16, paragraph 1 to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes "in particular" the measures outlined in articles 10-13, but does not limit effective prevention to these articles. In practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear. Experience demonstrates that the conditions that give rise to cruel, inhuman or degrading

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treatment or punishment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment.

II. Absolute Prohibition

4. Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances, a state of war or threat thereof, internal political instability or any other public emergency. The Committee is deeply concerned at any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies whether in time of peace or armed conflict and regardless of any threat of terrorist acts or violent crimes. The Committee considers that amnesties which include the crime of torture would violate the principle of non-derogability.

5. The Committee has reminded all States parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention. The Committee has specified that the obligations in articles 2 (whereby “no exceptional circumstances whatsoever... may be invoked as a justification of torture”), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that must be observed in all circumstances.¹

6. The Committee also understands that the concept of “territory under its jurisdiction,” linked as it is with the principle of non-derogability, 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 a State party. The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, *de jure* or *de facto*, in the name of, in conjunction with, or at the behest of the State Party. It is a matter of urgency that States Parties should closely monitor those acting with or on its behalf and identify and report to the Committee any incidents of torture or ill-treatment as a consequence of anti-terrorism measures, among others, and the measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the responsibility, by act, omission, or acquiescence of officials in the chain of command.

III. Content of the Obligation to take effective measures to prevent torture

7. States Parties must define and make the offence of torture punishable as a human rights violation in their legal systems, in accordance, at a minimum, with the definition in article 1 of the Convention, and the requirements of article 4.

8. Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation

¹ On 22 November 2001, the Committee adopted a statement in connection with the events of 11 September 2001 which was sent to each State party to the Convention (A/57/44, paras. 17-18)

and thus the Committee calls upon all branches of government to adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of the chain of command as well as that of the direct perpetrator(s). At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain, as a minimum, the standards of the Convention.

9. By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture and cruel treatment or punishment. Naming and defining this crime promotes the Convention's aim, *inter alia*, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture; permitting punishment proportional to the gravity of the offence; improving the deterrent effect of the prohibition itself; and improving the ability of responsible officials to track the specific crime of torture and for the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention through instigation, consent or acquiescence.

10. Article 2, paragraph 1, contains the broad, general mandate that States Parties shall take effective "legislative, administrative, judicial, or other" measures to prevent acts of torture in any territory under its jurisdiction. In addition to this general mandate, the remaining articles enumerate specific types of measures that States Parties must take to prevent acts of torture and cruel, inhuman or degrading treatment or punishment.

11. Through review of successive reports from States parties, the examination of individual communications, and monitoring of developments, the Committee has, in its concluding observations, developed a jurisprudence regarding effective measures, highlights of which we set forth here. In terms of both principles of general application and developments that build upon specific articles of the Convention, the Committee recommends specific actions designed to enhance each State Party's ability swiftly and effectively to implement measures necessary and appropriate to prevent acts of torture and thereby assist States Parties in bringing their law and practice into full compliance with the Convention.

12. States Parties are obligated to eliminate any normative or other obstacles that impede the eradication of torture, thereby ensuring that acts of torture and any recurrences thereof are effectively prevented. States Parties also have the obligation continually to monitor and improve their performance under the Convention. If the measures adopted by each State Party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted. Likewise, the Committee's understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.

13. Certain basic guarantees of human rights apply to all detainees. Some of these are specified in the Convention, and the Committee consistently calls upon State Parties to use them. The

Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact one's family, the need to establish impartial judicial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to defend their rights.

14. Experience since the Convention came into force has enhanced the Committee's understanding of the scope and nature of the prohibition against torture, of the methodologies of torture, of the contexts and consequences in which it occurs, as well as of evolving effective measures to prevent it in different contexts. As new methods of prevention (e.g. videotaping all interrogations, developing new forms of public education, or, when privacy is involved, the importance of having same sex guards) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture.

IV. Scope of State obligations and responsibility

15. The Convention imposes obligations on States Parties and not on individuals. States bear international responsibility for the acts or omissions of their officials and others, as cited in paragraph 6, above. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture under international customary law and other treaties.

a) Applicability of the Convention

16. Article 2, paragraph 1, requires that States Parties must take effective measures to prevent acts of torture not only in the territory of their own State but also "in any territory under its jurisdiction." Article 5 identifies the scope of "territory" over which it must establish jurisdiction over offenses to include on board a ship or aircraft registered in the state. The Committee has recognized that "territory" includes all areas where the State Party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control. The Committee considers that the scope of "territory" under article 2 must also include situations where a State Party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention, since, in such circumstances, the State Party is able to carry out the obligations of this Convention. The Committee notes that this interpretation is consistent with and reinforces article 5, paragraph 1 (b), which requires that a State Party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." It is also consistent with the reiteration of the territorial scope of responsibility in article 2, paragraph 2.

17. Article 16 requires States Parties to "undertake to prevent" ill-treatment in any territory under its jurisdiction and notes, in particular, that the obligations of articles 10 to 13 of the Convention apply with equal force to ill-treatment. Because of the close relationship between torture and ill-treatment and the general mandate in article 16 to prevent ill-treatment, the Committee has consistently held that the right to compensation includes victims of ill-treatment as

well as torture. Accordingly, States Parties should prohibit, prevent and redress cruel, inhuman or degrading treatment or punishment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.

b) Participation in torture by State authorities or others

18. The Convention 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. It thus obligates States Parties to adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture. State parties are in violation of the Convention when they fail to fulfil these obligations. For example, where detention centres are privately owned or run, the Committee considers that personnel are *de facto* officials on account of their responsibility for carrying out the state function without derogation of the obligation of state officials to monitor and take all effective measures to prevent torture and cruel, inhuman or degrading treatment or punishment.

19. The State also bears responsibility, through consent to or acquiescence in torture, where conduct is inflicted by or at the instigation of non-State officials or private actors in circumstances where persons exercising official capacity knew or should have known that the conduct was being or likely to be committed and failed to take reasonable and necessary measures to prevent torture or ill-treatment. Since the failure of the State to intervene to stop, sanction and remedy victims of torture facilitates and may even enable non-State actors to commit acts impermissible under the Convention with impunity, the State's routine indifference or inaction provides a form of encouragement and/or *de facto* permission. For example, if a person is to be transferred or sent to the custody or control of an individual or institution, whether official or private, that is known to have engaged in torture and cruel, inhuman or degrading treatment, or has not implemented adequate safeguards consistent with this Convention, including access by independent monitoring bodies, the act of permitting this transfer/detention is a failure amounting to a violation by the State of its 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. Additionally, if State Party authorities or agents knew or should have known that acts of torture are being committed by private actors and they fail to prevent, investigate, prosecute and punish such private actors consistently with this Convention, the State bears responsibility and its officials are authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. The Committee has applied this principle to States parties' failure to prevent and protect victims against various violent acts within the Convention, including rape, domestic violence, female genital mutilation and trafficking. The State may also be responsible and its officials complicit where it fails to take necessary measures to protect victims from danger of further harm, such as through providing shelter or escape or to minimize the trauma suffered by torture victims.

c) Protection for individuals and groups made vulnerable by discrimination or marginalization

20. The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. Non-discrimination is included within the definition of torture itself in article 1, paragraph 1, of the Convention, which explicitly prohibits specified acts when carried out for “*any reason based on discrimination of any kind...*”. The Committee emphasises that the discriminatory use of mental or physical violence or abuse is an important and independent factor in determining whether an act constitutes torture.

21. The protection of certain minority or marginalized individuals or populations especially at risk of torture is part of the obligation to prevent torture or cruel, inhuman or degrading treatment or punishment. State Parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, gender, sexual orientation, age, religious belief or affiliation, national or social origin, type of crime for which the person is detained, including persons accused of political offences or terrorist acts, asylum seekers or refugees, or other status or adverse distinction. States Parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.

22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor, which intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, etc. to determine the ways that women are subject to or at risk of torture or ill-treatment and the consequences thereof. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States Parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.

23. Continual evaluation is therefore a crucial component of effective measures. The Committee has consistently recommended that States Parties provide data disaggregated by age, gender and other key factors in their reports to enable the Committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the States Parties and the Committee to identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. States Parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific sectors of the population such as juveniles, minorities, victims of torture, and women, taking into account the general and particular forms that such torture and ill-treatment take.

24. Eliminating employment discrimination in contexts where torture or cruel, inhuman or degrading treatment or punishment is likely to be committed is also key to preventing such violations and responding effectively to them. States are encouraged to promote the hiring of persons belonging to minority groups and women, particularly in the medical, prison/detention, law enforcement, judicial and legal fields, within state institutions as well as the private sector. States should include in their reports information on their progress in these matters, disaggregated by gender, race, national origin, and other relevant status.

V. Other Preventive measures required by the Convention

25. Articles 3 to 15 of the Convention constitute specific preventive measures that the drafters and States Parties deemed essential to prevent torture and cruel, inhuman or degrading treatment or punishment, particularly in custody or detention. The Committee emphasizes that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention or the demands of this General Comment. For example, it is important that the populace be educated on the history, scope, and necessity of the non-derogable prohibition of torture and ill-treatment, as well as that law enforcement and other personnel receive education on recognizing and preventing torture and ill-treatment. Similarly, in light of its long experience in reviewing and assessing reporting on officially inflicted or sanctioned torture or ill-treatment, the Committee acknowledges the importance of adapting the concept of monitoring conditions to prevent torture and ill-treatment to situations where violence is inflicted privately. States Parties should specifically include in their reports to the Committee detailed information on their implementation of preventive measures disaggregated by relevant status.

VI. Superior Orders

26. The non-derogability of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that orders of a superior or public authority can never be invoked to justify torture. Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including high-ranking public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any high-ranking officials whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein be fully investigated through competent, independent and impartial prosecutorial and judicial authorities. Persons who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by high-ranking officials, should be protected against retaliation of all kinds.

27. The Committee reiterates that this General Comment is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application, so long as they contain, as a minimum, the standards of the Convention.