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

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

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 absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of this Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3-16, in response to evolving threats, issues, and practices.
2. Article 2, paragraph 1 obliges each State party 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 party to take measures specified therein.
3. The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1 are interdependent, indivisible and interrelated. The obligation 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, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.

Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.

4. States Parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States Parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the 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.

II. Absolute prohibition

5. 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. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.

6. The Committee reminds all States parties to the Convention of the non-derogable nature of the obligations undertaken by them in ratifying the Convention. In the aftermath of the attacks of September 11, 2001, the Committee 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. The Committee considers that articles 3-15 are likewise obligatory as applied to both torture and ill-treatment. The Committee recognizes that States Parties may choose the measures through which they fulfill these obligations so long as they are effective and consistent with the object and purpose of the Convention.

7. The Committee also understands that the concept of "any 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

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

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 each State Party should closely monitor its officials and those acting on its behalf and should 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 legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.

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

8. States Parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4.

9. 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 and thus the Committee calls upon each State party to ensure that all parts of its government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. 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 and are applied in accordance with the standards of the Convention, at a minimum. 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).

10. The Committee recognizes that most States Parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment differs in the severity of pain and suffering and may not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.

11. 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 ill-treatment. Naming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also emphasize the need for a) appropriate punishment that takes into account the gravity of the offence, b) strengthening the deterrent effect of the prohibition itself and c) enhancing the ability of responsible officials to track the specific crime of torture and d) enabling and empowering the public to monitor and, when required, to challenge state action as well as state inaction that violates the Convention.

12. Through review of successive reports from States parties, the examination of individual communications, and monitoring of developments, the Committee has, in its concluding

observations, articulated its understanding of what constitute effective measures, highlights of which we set forth here. In terms of both article 2's principles of general application and developments that build upon specific articles of the Convention, the Committee has recommended 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 ill-treatment and thereby assist States Parties in bringing their law and practice into full compliance with the Convention.

13. Certain basic guarantees apply to all persons deprived of their liberty. 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 relatives, the need to establish impartial 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 have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.

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. For example, the Committee has emphasized the importance of having same sex guards when privacy is involved. As new methods of prevention (e.g. videotaping all interrogations, utilizing investigative procedures such as the Istanbul Protocol of 1999², or new approaches to public education or the protection of minors) 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 and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law. Accordingly, each State Party should prohibit, prevent and redress torture and ill-treatment 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. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.

² Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

16. Article 2, paragraph 1, requires that each State Party shall take effective measures to prevent acts of torture not only in its sovereign territory but also “in any territory under its jurisdiction.” The Committee has recognized that “any territory” includes all areas where the State Party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law. The reference to “any territory” in article 2, like that in articles 5, 11, 12, 13, and 16, refers to prohibited acts committed not only onboard a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation 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.” 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.

17. The Committee observes that States Parties are obligated 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. Thus, States Parties should 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. The Committee has concluded that States 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 acting in an official capacity 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 ill-treatment.

18. The Committee has made clear 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 *de facto* permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.

19. Additionally, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State’s obligation to take effective measures to

prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3.

V. 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 emphasizes that the discriminatory use of mental or physical violence or abuse is an important 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 a part of the obligation to prevent torture or ill-treatment. 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, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum seekers, refugees or others under international protection, or any 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, immigrant status etc. to determine the ways that women are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which women are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls 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 relevant sectors of the population, such as minorities, victims of torture, children and women, taking into account the general and particular forms that such torture and ill-treatment may take.

24. Eliminating employment discrimination and conducting on-going sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations against and building a culture of respect for women and minorities. States are encouraged to promote the hiring of persons belonging to minority groups and women, particularly in the medical, educational, 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.

VI. Other preventive measures required by the Convention

25. Articles 3 to 15 of the Convention constitute specific preventive measures that the States Parties deemed essential to prevent torture and ill-treatment, 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 general population 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 State reports 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.

VII. Superior orders

26. The non-derogability of the prohibition of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that an order of a superior or public authority can never be invoked as a justification of 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 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 superior 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 superior officials, should be protected against retaliation of any kind.

27. The Committee reiterates that this General Comment has to be considered without prejudice to any higher degree of protection contained in any international instrument or national law, so long as they contain, as a minimum, the standards of the Convention.
