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THE PRINCIPLE OF NON-REFOULEMENT:

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties

David Weissbrodt and Isabel Hörtreiter***

I. INTRODUCTION

Because of persecution, civil war, and economic despair, millions of people flee from their homes and go to live in other countries where they can stabilize their lives and find a safe place for themselves and their families. In 1998, the United Nations High Commissioner for Refugees estimated the number of people fleeing their home countries to exceed 22 million.¹ The right to seek and enjoy asylum is a well established principle in international law.² It has, however, been interpreted consistently as the right of the sovereign state to grant or deny asylum to those within its territory,

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¹ *UNHCR & Refugees: UNCHR by Numbers* (visited Nov. 13, 1998) <<http://www.unhcr.ch/un&ref/numbers/table1.html>>.

² Universal Declaration of Human Rights, Art. 14, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess. (Resolution, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter Universal Declaration].

rather than the absolute right of the individual to be granted asylum.³

At the same time, the principle of "non-refoulement" guarantees that individuals have the right not to be forcibly returned to countries where they face persecution.⁴ The idea of non-refoulement was expressed for the first time in Article 3 of the 1933 Convention Relating to the International Status of Refugees.⁵ The parties to that treaty committed themselves not to return refugees "across the frontiers of their country of origin . . . unless dictated by national security or public order."⁶

In 1951, the principle of non-refoulement was adopted in Article 33 of the Convention Relating to the Status of Refugees (Convention on Refugees).⁷ That provision has served both as a model and textual basis for many subsequent human rights treaties that have incorporated the principle of non-refoulement. Today nearly all countries are party to at least one international agreement that binds them to the principle of non-refoulement.⁸

³ For example, 2 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 99 et seq. (Leiden : A. W. Sijthoff, 1972); see also Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J.C.I.L.1, 4 (1994).

⁴ The term "refouler" was adopted from the French and it means literally to drive back or to repel. "Refoulement" originally only referred to the return of people who entered the territory of the receiving state illegally, GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 118 (2nd ed. Oxford : Clarendon Press ; New York : Oxford University Press, 1996). In the sense used in this article, however, it covers all measures by which a person is physically transferred to another country in which he or she faces persecution.

⁵ See GOODWIN-GILL, *supra* note 4, at 118.

⁶ 159 L.N.T.S. 199 (*entered into force* July 26, 1935) [official text in French].

⁷ Convention Relating to the Status of Refugees, *adopted* 28 July 1951, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (*entered into force* 22 April 1954) [hereinafter *Convention on Refugees*].

⁸ To date only 19 of the 185 Member States of the United Nations are not party to any agreement that provides for non-refoulement. These States are: Bangladesh, Bhutan, Brunei Darussalam, Eritrea, Kazakhstan, Lao People's Democratic Republic, Malaysia, Marshall Islands, Micronesia, Myanmar, Oman, Pakistan, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, Singapore, United Arab Emirates, and Vanuatu.

Although the principle has been recognized in many international human rights treaties and several scholars have considered it a norm of customary international law,⁹ the precise scope of protection afforded by the different provisions has not been well defined. Variants include the characteristics of the individual to be granted protection, the criteria for assessing the risk of persecution the applicant faces in the country of return, and the limits of protection from refoulement. Since some of the provisions are more protective on certain points than others, an individual's claim for protection from refoulement depends greatly on the treaties to which the receiving country is a party. Ideally, the merits of the claim should depend mainly on the risk the applicant would face in the country of return. In the current situation, the applicant's fate often depends more on which treaty the receiving country has ratified. The claims of two persons in different countries may have different outcomes, even if they face the same degree of risk in their countries of return.

The specific non-refoulement provision in Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment¹⁰ (Convention Against Torture) is the main focus of this

⁹ Patricia Hyndman, *Asylum and Non-Refoulement: Are These Obligations Owed to Refugees Under International Law?*, 57 PHILLIPINE L.J. 50 (1982); GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 188 (Uppsala: Iustus Forlag, 1989). Walter Kälin suggests that the principle of non-refoulement has become a norm of regional customary international law in Europe, Africa, and the Americas. WALTER KÄLIN, DAS PRINZIP DES NON-REFOULEMENT, DAS VERBOT DER ZURUECKWEISUNG, AUSWEISUNG UND IM SCWEIZERSCHEN LANDESRECHT [*THE PRINCIPLE OF NON-REFOULEMENT, THE PROHIBITION FROM REJECTION, EXPULSION AND EXTRADITION OF REFUGEES IN THE COUNTRY OF PERSECUTION IN INTERNATIONAL LAW AND IN SWISS LAW*] 83 (1982). Professor Goodwin-Gill, however, has questioned even on the regional level whether the practice regarding non-refoulement has been sufficiently consistent and has been accompanied by the *opinio juris* necessary to form a rule of customary international law, GOODWIN-GILL, *supra* note 4, at 171.

¹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (*entered into force* 26 June 1987),

article. Article 3(1) reads:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.¹¹

The aim of this article is to compare Article 3 with the non-refoulement provisions of the following instruments:

- (a) the Convention on Refugees (1951) and the Protocol Relating to the Status of Refugees (1967);¹²
- (b) the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) (1953);¹³
- (c) the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) (1974);¹⁴
- (d) the International Covenant on Civil and Political Rights (Covenant) (1976);¹⁵
- (e) the American Convention on Human Rights

reprinted in 23 I.L.M. 1027 (1984), substantive changes noted in 24 I.L.M. 535 (1985) [hereinafter Convention Against Torture].

¹¹ See *id.* art. 3.

¹² The Refugee Convention and the Protocol Relating to the Status of Refugees, *adopted* 1951, 606 U.N.T.S. 267 (*entered into force* Oct. 4, 1967).

¹³ European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953), as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

¹⁴ The Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted* 1974, 1001 U.N.T.S. 45 (*entered into force* June 20, 1974).

¹⁵ International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/63616 (1966), 999 U.N.T.S. 171, (*entered into force* Mar. 23, 1976) [hereinafter Civil and Political Covenant].

(American Convention) (1978);¹⁶ and
 (f) the African [Banjul] Charter on Human and
 Peoples' Rights (African Charter) (1981).¹⁷

By analyzing Article 3 and comparing its criteria to those of the analogous provisions, guidelines for interpreting Article 3 in accordance with those instruments can be developed. Governments that have ratified several of the above treaties complain that they are subject to confusion and somewhat contradictory responsibilities.¹⁸ This article tries to ascertain how the inconsistencies can be understood, and proposes, whenever possible, to identify common attributes in the relevant treaties. This article contains six parts. Following the present introduction, Part II provides a detailed analysis of the non-refoulement provision of the Torture Convention with regard to its scope of protection, limitations, and its means of implementation. Part III sets forth a similar analysis for the analogous non-refoulement provisions in other treaties. Part IV contains a topical comparison of the treaty provisions. On November 21, 1997, the Committee Against Torture, which is responsible for supervising the implementation of the Convention Against Torture, adopted its first General Comment interpreting Article 3.¹⁹ Part V evaluates that General Comment on Article 3 taking into account the provision's wording, context, objective, and interpretation, but also the variegated patterns of non-refoulement protections in other treaties, and suggests ways in which that General Comment might be improved. Part VI proposes a revised General Comment on Article 3.

¹⁶ The American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/SER. L. V/II. 82 DOC.6REV.1 at 25 (1992).

¹⁷ Adopted 26 June 1981, OAU Doc. CAB/LEG/67/3, Rev. 5 (*entered into force* Oct. 21, 1986), *reprinted in* 21 I.L.M. 58 (1982).

¹⁸ B.I.A. Interim Decision 3365, 1998 WL 611753 (August 25, 1998).

¹⁹ See CAT/C/XX/Misc.1 (1997).

II. PROTECTION FROM REFOULEMENT UNDER ARTICLE 3 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides protection against a very severe form of persecution; it prohibits the return of applicants to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture.²⁰

The Convention entered into force in June 1987 and has 113 States parties to date.²¹ Its principal basis is Article 5 of the Universal Declaration of Human Rights²² and Article 7 of the Covenant of Civil and Political Rights²³ -- both of which proclaim that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This idea was elaborated in the Declaration Against Torture, which was adopted in 1975 and many of its provisions served as a textual basis for the language of the Torture Convention.²⁴ The prohibition from refolement in Article 3 of the Torture Convention, however, does not have any counterpart in the

²⁰ Convention Against Torture, *supra* note 10, at art. 3 (1). Article 3 (2) reads:

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Id. art. 3 (2).

²¹ See Convention Against Torture Signatory Status (visited Nov. 13, 1998) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html>.

²² Universal Declaration, *supra* note 2, art. 5.

²³ Covenant of Civil and Political Rights, *supra* note 15, art. 7.

²⁴ See David Weissbrodt, *Prospects for U.S. Ratification of the Convention against Torture*, 83 AM. SOC'Y INT'L L. PROC. 529, 530 (1983).

Declaration. The principle was inspired by the case law under the European Convention of Human Rights,²⁵ which in turn reflected Article 33 of the Convention on Refugees. Non-refoulement was viewed as a necessary addition to the protections provided by the Torture Convention.

A. Expulsion, Refoulement, and Extradition

The wording of Article 3 of the Torture Convention is based on Article 33 (1) of the Convention on Refugees.²⁶ The Torture Convention forbids the expulsion, return (refoulement), or extradition of individuals who face the danger of a specific sort of persecution, that is, torture. Expulsion refers to persons who have entered the receiving country *legally* and who are then removed.²⁷ Professor Goodwin-Gill notes that "return (refouler)" refers to the transfer of persons who have entered the territory of a state *illegally* and who face persecution in the country of return.²⁸ Hence, in addition to the expulsion of persons who entered the country legally, which is mentioned first in the provision, Article 3 also covers the return of those persons who have entered illegally.

The Torture Convention adds to the terms of Article 33(1) of the Convention on Refugees that a state should refrain not only from "expelling" or "returning" persons, but also from "extradition." Extradition was included with the intention to cover all possible measures by which a person is physically transferred to another

²⁵ See HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE : A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 125 (1988).

²⁶ Convention on Refugees, *supra* note 7, art. 33 (1). Article 33 (1) reads, "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.*

²⁷ GOODWIN-GILL, *supra* note 4, at 117.

²⁸ *Id.*

State.²⁹ This inclusion gives rise to potential conflicts between Article 3 and obligations that the States parties have assumed under extradition treaties. On this issue two of the principal drafters of the Torture Convention -- Herman Burgers and Hans Danelius -- suggest that when entering into such extradition treaties after ratifying the Torture Convention, it is clear that governments must refrain from assuming obligations contrary to the objectives of the Convention. Burgers and Danelius further contend that even previously ratified extradition treaties may well be construed to have been supplemented by the non-refoulement exception provided in Article 3. In addition, however, a reservation or declaration would be permissible as to Article 3 for a State that does not consider itself bound by the prohibition of extradition in the Torture Convention, as to previously concluded extradition treaties.³⁰

The Committee Against Torture has concluded that the principle of non-refoulement under Article 3 applies not only to direct expulsion, return, or extradition, but also to indirect transfer to a third country from which the individual might be returned to a country where s/he would be in danger of being subjected to torture.³¹

B. The Scope of Protection

As contrasted with Article 33 of the Convention on Refugees, that includes various forms of persecution, Article 3 of the Torture Convention provides for protection from refoulement only for people who are in danger of becoming victims of torture. Even the prospect of cruel, inhuman or degrading treatment does not protect the applicant from refoulement under the Torture Convention.³² The original Swedish draft included inhuman and degrading treatment in

²⁹ *Id.* at 126.

³⁰ *Id.* at 126-127.

³¹ *Mutombo v. Switzerland*, Committee Against Torture, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994).

³² Kristen Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers* 74 Interpreter Releases 1773, 1774 (1997).

its non-refoulement provision.³³ The drafting committee for the Convention then expressly limited the protection of Article 3 to torture, as the most severe form of cruel, inhuman or degrading treatment. It found that while torture could be defined in reasonably specific terms, the drafters were concerned that they lacked a precise definition for the latter phrase. They wanted to create a legally binding norm that could be precisely implemented in the respective domestic legal systems of the States parties and it was more difficult to create such obligations with less precise terms such as cruel, inhuman or degrading treatment.³⁴

Torture is defined in Article 1 of the Convention Against Torture as the intentional infliction of severe physical or mental suffering by a person in an official capacity.³⁵ Although many earlier

³³ BURGERS & DANIELIUS, *supra* note 25, at 49.

³⁴ *Id.* at 149. Since the General Assembly requested the Commission on Human Rights to prepare a convention against torture, inhuman and degrading treatment, however, the drafting committee reached a compromise with the creation of Article 16(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *id.* Article 16(1) provides:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity

Convention Against Torture, *supra* note 10, art. 16(1).

³⁵ Convention against Torture, *supra* note 10, art. 1(1) reads:

For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on

instruments, including the Universal Declaration of Human Rights, the European Convention, the Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter, include a clear prohibition of torture, the Convention Against Torture is the first one which defines the act of torture. The definition was inspired by the case law under the European Convention of Human Rights.³⁶

Three elements must be shown to make a finding of "torture."³⁷ First, the person must be subjected to the infliction of severe physical pain or mental suffering. To qualify as torture, the pain suffered by the victim must have sufficient gravity to be "severe." Mental suffering may be caused by acts such as threats of future harm to the victim or its family; the forceful attendance of the execution or torture of other persons; prolonged isolation; or deprivation of food, water, or sleep.³⁸ Similar to physical suffering, mental suffering must also be "severe" in order to qualify as torture.

Second, the torturous act must have an objective; hence, there must be a certain intent. The list of purposes in Article 1,³⁹ is not exhaustive, but rather an enumeration of the most common purposes.⁴⁰ One might inquire whether the infliction of pain for purely sadistic motives but without any interest of the State could qualify as torture. Burgers and Danelius note that even in these circumstances there is usually also an element of punishment or humiliation which would bring the act under the definition of Article

discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. Art. 1(1).

³⁶ BURGERS & DANIELIUS, *supra* note 25, at 114-174. For the case law under the European Convention of Human Rights on torture and inhuman or degrading treatment, *see infra* Part II.C.

³⁷ Rosati, *supra* note 32, at 1775.

³⁸ BURGERS & DANIELIUS, *supra* note 25, at 118.

³⁹ See Convention Against Torture, *supra* note 35, art. 1.

⁴⁰ BURGERS & DANIELIUS, *supra* note 25, at 118.

1.⁴¹

Third, the Convention applies only to acts committed by or with the consent or acquiescence of an official. Persons who are in danger of being subjected to intentionally inflicted pain by private actors are not generally protected from refoulement under the Convention Against Torture, unless a government official consented or acquiesced to that abuse. Accordingly, the Convention Against Torture has a more limited scope of application than other instruments prohibiting torture and/or refoulement. Part IV of this article discusses this issue in more depth.

The last sentence of Article 1(1) of the Convention Against Torture provides that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”⁴² At first glance this provision might appear to allow States to legalize forms of punishment that would otherwise be regarded as torture.⁴³ The drafters intended the word “lawful” to include both national and international law.⁴⁴ Hence, a State party may not impose a punishment that violates national or international law. For example, the Standard Minimum Rules for the Treatment of Prisoners forbids

⁴¹ *Id.* at 119. For this reason Ralf Alleweldt suggests that intent should not be regarded as a prerequisite to establish torture. RALF ALLEWELDT, SCHUTZ VOR ABSCHIEBUNG BEI DROHENDER FOLTER ODER UNMENSCHLICHER ODER ERNIEDRIGENDER BEHANDLUNG ODER STRAFE: REFOULEMENT-VERBOTE IM VOLKERRECHT UND IM DEUTSCHEN RECHT UNTER BESONDERER BERUICKSICHTIGUNG VON ARTIKEL 3 DER EUROPAISCHEN MENSCHENRECHTSKONVENTION UND ARTIKEL 1 DES GRUNDGESETZES [PROTECTION AGAINST EXPULSION IN THE CASE OF THREAT OF TORTURE OR INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT] 19 (1996).

⁴² See Convention Against Torture *supra* note 10; see also *supra* text accompanying note 35.

⁴³ Burgers and Danelius note that the Convention was intended to strengthen the already existing prohibition of torture in international law, but not to lead to a reform of the penal systems of the prospective States parties. Accordingly, they observed, without the inclusion of this sentence it would have been unacceptable to a number of States. BURGERS & DANELIUS, *supra* note 25, at 121.

⁴⁴ Nigel S. Rodley, *The Evolution of the International Prohibition of Torture*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 55, 64 (1988).

corporal punishment and keeping prisoners in dark cells.⁴⁵ Similarly, the Human Rights Committee has interpreted the Covenant's prohibition against torture and other ill-treatment to forbid "prolonged solitary confinement."⁴⁶

C. Substantial Grounds for Believing that the Applicant Would be Tortured Upon Return

According to Article 3(1), there must be "substantial grounds for believing" that the individual would be in danger of being subjected to torture. The test of "substantial grounds for believing" contains both a subjective and an objective criterion.⁴⁷ The subjective element reflects the perspective of the Committee Against Torture⁴⁸ in believing that the applicant faces the danger of torture. For example, in *Ismail Alan v. Switzerland*,⁴⁹ the Committee Against Torture observed that "the Committee must decide whether there are substantial grounds for believing that [the applicant] would be in danger of being subjected to torture upon return." The Committee's

⁴⁵ Standard Minimum Rules for the Treatment of Prisoners, *adopted* 30 Aug. 1955, U.N. Doc. A/CONF/611, Annex I, A (1956); E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res. 2076, U.N. ESCOR, 62nd Sess., Supp. No.1 at 35, U.N. Doc. E/5988 (1977).

⁴⁶ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994)(visited Nov. 13, 1998) <<http://www.umn.edu/humanrts/gencomm/hrcom20.htm>>.

⁴⁷ Bostjan M. Zupančič, CAT Art. 3 Criteria for Determining Whether a State Party is Justified in Expelling, Returning, or Extraditing an Individual to Another State in Which There May or May Not be Substantial Grounds to Believe that He or She Will be Tortured (unpublished manuscript, 1997).

⁴⁸ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) (visited Nov. 13, 1998) <<http://www.umn.edu/humanrts/gencomm/hrcom20.htm>>.

⁴⁹ *Ismail Alan v. Switzerland*, Committee Against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D/21/1995 (1996).

belief must be objectively based on substantial grounds.

In reaching the conclusion that there are substantial grounds for believing that the individual faces a danger of torture, the Committee must assess the particular circumstances of each case.⁵⁰ Such conditions include criteria such as the individual's ethnic background, his or her alleged political affiliation, and his or her history of past detention or torture. In addition to the specific situation of every case, the Committee Against Torture also takes into account the general circumstances of the country of return. Article 3(2) provides that "all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"⁵¹ must be considered. While evidence of violations may be an indication that torture is practiced in that country, such evidence does not in itself give rise to an issue under Article 3. The individual must always show that he or she is personally in danger of being tortured.⁵² Hence, a person can be returned to a country even if gross violations of human rights are occurring. Inversely, the Committee may find that an individual faces danger of torture in a country, although there is no pattern of human rights violations.⁵³

In several cases, the Committee has taken into account whether the country of return was a party to the Convention Against Torture. In *Khan v. Canada*,⁵⁴ the Committee found that since Pakistan was not a party to the Convention, Khan's forced return would not only make him subject to a danger of torture, but he would also no longer have the possibility of applying to the Committee for protection. In *Alan v. Switzerland* the Committee noted that although Turkey had ratified the Convention, Turkey's status as a party did not in itself justify the applicant's expulsion to that country, because

⁵⁰ See BURGERS/DANELIUS, *supra* note 25, at 118.

⁵¹ Convention against Torture, *supra* note 10, art 3(2).

⁵² See Mutombo v. Switzerland, Committee against Torture Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994).

⁵³ See BURGERS/DANELIUS, *supra* note 25, at 128.

⁵⁴ *Tahir Hussain Khan v. Canada*, Committee Against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995).

torture was still systematically practiced in Turkey. Accordingly, the Committee concluded that:

[T]he main aim and purpose of the Convention is to prevent torture, not to redress torture once it had occurred, and . . . the fact that Turkey is a party to the Convention and has recognized the Committee's competence under Article 22, does not, in the circumstances of the instant case, constitute sufficient guarantee for the author's security.⁵⁵

It must also be noted that the Committee does not consider whether there are substantial grounds for believing that the applicant would *be tortured if* returned, but rather whether there are substantial grounds for believing that he or she would *be in danger of being tortured*.⁵⁶ The Convention further relies entirely on the likelihood of the danger of torture as a future event.⁵⁷ The applicant does not have to prove that he has been subjected to previous persecution. Past torture alone will not protect the applicant from return, unless there are substantial grounds for believing that danger might reoccur. The applicant to the Committee Against Torture must also show that the torture would be intentionally inflicted. The applicant however, need not specify a reason, however, unlike the Convention on Refugees, which requires that a refugee be persecuted on one of the five enumerated grounds.⁵⁸

Article 3 does not require an applicant to the Committee Against Torture to carry the burden of persuasion in demonstrating a danger of torture. The wording of the provision refers solely to

⁵⁵ *Alan v. Switzerland*, *supra* note 49, ¶ 115.

⁵⁶ The test is thus substantially less exacting than that of (a) a "well-founded fear of persecution" required under Article 1 of the Refugee Convention, *see supra* Part II A (1), and (b) a "real risk of ill-treatment" under the case law of the European Convention, *see supra* Part II B (3).

⁵⁷ *See* Elisa Massimino, *Relief from Deportation under Article 3 of the United Nations Convention against Torture*, in LAWYERS COMMITTEE FOR HUMAN RIGHTS, 1997-98 ANNUAL HANDBOOK 467, 472 (1998).

⁵⁸ *See infra* Part III A(1).

factors that must be considered by the Committee Against Torture or the authorities of the States parties.⁵⁹ The individual merely has the burden of production, that is, to present information about the danger. While the applicant must generally appear credible, it would often be unreasonable and contrary to the intent of Article 3 to require full proof of the truthfulness of the applicant's proffered information.⁶⁰ The Committee has been generous in disregarding contradictions and inconsistencies in the applicants' stories, particularly with applications of individuals who report that they have been victims of previous torture. In several decisions the Committee concluded, in response to statements submitted by the States parties about the applicants' credibility, that:

[C]omplete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the authors' presentation of the facts are not material and do not raise doubts about the general veracity of the authors' claim.⁶¹

In *Khan v. Canada*, the Committee further noted that such contradictions are not uncommon for victims of torture, but "even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not endangered."⁶²

Overall, the test for proving a danger of torture is substantially less exacting than the proof required under the other relevant treaties. This generous approach appears to be necessary, since Article 3 was

⁵⁹ Zupančič, *supra* note 47, at 13.

⁶⁰ BURGERS/DANELIUS, *supra* note 25 at 127.

⁶¹ Pauline Muzonzo Paku Kisoki v. Sweden, Committee Against Torture, Communication No. 41/1996, ¶ 9.5, U.N. Doc. at (1996), *see also* Kaveh Yaragh Tala v. Sweden, Committee Against Torture, Communication No. 43/1996, U.N. Doc. CAT/C/17/D/43/1996 (1996) and Ismail Alan v. Switzerland, Committee Against Torture, Communication No. 43/1996, U.N. Doc. CAT/C/17/D/43/1996 (1996) and Ismail Alan v. Switzerland, Committee against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D21/1995 (1996).

⁶² Tahir Hussain Khan v. Canada, Committee against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 at ¶ 12.3 (1995).

created only as a safeguard against torture, one of the most severe forms of persecution.⁶³

D. Absolute Prohibition from Refoulement

The prohibition of "refoulement" under Article 3 is guaranteed in absolute terms. Although the Convention Against Torture does not contain any provision which expressly confirms the absolute nature of Article 3, Article 2(2) provides, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be a justification for torture." This provision must be interpreted to apply to all the provisions of the Convention Against Torture, including the prohibition of refoulement in Article 3, because Article 3 is intended to prevent torture in the country to which the individual may be returned. Accordingly, no exceptional circumstances justify expelling a person to a country where she or he would be in danger of being subjected to torture.⁶⁴ The fact that Article 33(1) of the Convention on Refugees, which is subject to substantial limitations,⁶⁵ served as a model for Article 3, also suggests that it was a deliberate decision of the drafting committee not to adopt the limitations of the Convention on Refugees.

E. Complaint Procedure

Article 17 of the Convention Against Torture established the Committee Against Torture which, among other functions, provides for an optional individual complaint procedure modeled after the

⁶³ Pauline Muzonzo Paku Kisoki v. Sweden, Committee Against Torture, Communication No. 41/1996, U.N. Doc. at (1996), *see also* Kaveh Yaragh Tala v. Sweden, Committee Against Torture, Communication No. 43/1996, U.N. Doc. CAT/C/17/D/43/1996 (1996) and Ismail Alan v. Switzerland, Committee against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D21/1995 (1996).

⁶⁴ ALLEWELDT, *supra* note 41 at 98; NATAN LERNER, *The U.N. Convention on Torture*, 86 ISRAELI Y.B. HUM. RTS. 16, 126, 135, (1986); BURGERS/DANELIUS, *supra* note 25, at 12.

⁶⁵ *See infra* at Part II A (3).

Optional Protocol to the Covenant on Civil and Political Rights.⁶⁶ According to Article 22, a State party to the Convention may declare that it recognizes the Committee's competence to review and consider communications that are brought by, or on behalf of, individuals who are subject to the State's jurisdiction. In order to lodge an application with the Committee Against Torture the applicant must have exhausted all domestic remedies, unless such remedies are unreasonably prolonged or are deemed unlikely to bring effective relief to the victim.⁶⁷ It is also required that the same application has not been, and is not at present being, reviewed by another international investigation or settlement mechanism.⁶⁸ Applications are further inadmissible if they are anonymous, incompatible with the provisions of the Convention Against Torture, or are considered an abuse of the right of submission of such communications.⁶⁹ The Committee, however, cannot reach binding decisions; it only reviews the petitions and forwards its opinion regarding the merits of the complaint to the State party concerned and the individual.⁷⁰ Primary reliance is thus placed on the exertion of moral persuasion on the State party involved.⁷¹

III. OTHER PROVISIONS RELATING TO NON- REFOULEMENT

A. The 1951 Convention Relating to the Status of Refugees and the Corresponding 1967 Protocol

The historic cornerstone of protection from refoulement can

⁶⁶ Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. Int'l & Comp. L. Rev. 275, 322 (1994). For the complaint procedure under the Covenant on Civil and Political Rights, see *infra* Part III D (3).

⁶⁷ Convention Against Torture, *supra* note 10, Article 22 (5) (b).

⁶⁸ See *id.* art. 22 (5) (a).

⁶⁹ See *id.* art. 22 (2).

⁷⁰ See *id.* art. 22 (7).

⁷¹ See Lippman, *supra* note 66, at 325.

be found in the Convention Relating to the Status of Refugees. The Convention was entered into force in 1954, and has 132 parties to date. A product of two world wars, it was the first instrument to deal specifically with the protection of refugees worldwide.

The Convention's drafters' intention to expand the scope of protection accorded by earlier international agreements relating to the status of refugees is emphasized in the preamble.⁷² The treaty also grants much wider protection from non-refoulement than previous instruments, which were generally designed for specific refugee situations only.⁷³ Article 33(1) of the Convention prohibits the expulsion or return of any person who is recognized as a "refugee" within the meaning of Article 1. According to Article 1A, the term "refugee" applies to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself to the protection of that country⁷⁴

Hence, Article 33 protects not only persons facing torture as under Article 3 of the Convention Against Torture, but also a substantially wider circle of persons facing persecution. The inclusion of the date limitation in Article 1A(2) indicates that the Convention was created for the protection of refugees from both world wars. Persecution, however, did not cease after 1951. Refugees continued to emerge

⁷² In its exact wording the relevant part of the preamble reads, "[c]onsidering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement." Convention on Refugees, *supra* note 7, at Preamble.

⁷³ See, e.g., Provisional Arrangement of 4 July 1936 concerning the Status of Refugees coming from Germany, 171 LNTS 75, (*entered into force* August 3, 1936), *quoted in* STENBERG, *supra* note 9.

⁷⁴ Convention Relating to the Status of Refugees, *supra* note 7, Article 1 (A) (2).

from different parts of the world, so the Protocol Relating to the Status of Refugees was adopted. Article 1(2) of the Protocol provides that the definition of the term "refugee" shall be applied within the meaning of Article 1 of the Convention on Refugees, but the words "as a result of events occurring before 1 January 1951" were omitted. Accordingly, the Protocol expands the definition to include refugees emerging from any event before or after 1951.

Although some countries did not ratify the Convention on Refugees, they became party to the Protocol. Since the Protocol essentially adopted and extended the Convention's protection,⁷⁵ these states have committed themselves to granting the protections provided in the 1951 Convention, including the duty of non-refoulement.

1. The Scope of Protection - Determination of Refugee Status

The Convention on Refugees refers to persecution and does not mention "torture and other cruel, inhuman or degrading treatment," as do most of the other treaties discussed in this article. To be eligible for protection under the Convention on Refugees a person must be recognized as a "refugee." Persons are "refugees" if they meet four requirements: (a) they must have a well-founded fear of persecution; (b) the persecution feared must be based on one of five reasons (race, religion, nationality, membership of a particular social group, or political opinion); (c) they must be outside their country of nationality, or, if they are stateless they must be outside their country of habitual residence; and (d) they must be unable to return or, owing to their fear, unwilling to avail themselves of the protection of that country.

a. Well-Founded Fear of Persecution

The term "well-founded fear of persecution" contains the

⁷⁵ See Protocol Relating to the Status of Refugees, *supra* note 12, art. 1(1); see also Carlos Ortiz Miranda, *Toward a Broader Definition of Refugee: 20th Century Development Trends*, 20 Cal. W. Int'l L.J. 315, 319 (1990).

subjective element of "fear" and the objective criterion of whether this fear is "well-founded."⁷⁶ The subjective element takes into account the individual's frame of mind, which is strongly influenced by his/her personal and family background; his/her membership in a particular racial, religious, or political group; and his/her own interpretation of the situation and personal experience. These factors must be taken into consideration when determining whether the applicant subjectively fears persecution.⁷⁷

The requirement that the fear must be well founded complements the subjective element. It serves the purpose of evaluating whether the applicant's concern has an objective basis, and thus excludes those persons whose fears are obviously exaggerated or irrational.⁷⁸ In determining whether the applicant's fear is well founded, States parties must take into account the personal and family background of the applicant, his or her background, influence, wealth, or outspokenness.⁷⁹ The UNHCR notes that while States parties are required to evaluate the applicant's personal circumstances, the States parties may, at their discretion, take into account the general situation in the country of origin.⁸⁰ The Convention Against Torture is far more explicit in requiring the Committee Against Torture to consider country conditions.⁸¹ Nonetheless, the Convention Against Torture and the Convention on Refugees agree that the individual's application need not be based on his/her own personal experience. Under the Convention on Refugees, past persecution is certainly a strong indication that the applicant's fear is objectively well-founded. Any persecution suffered by friends or relatives, however, may also justifiably raise a fear that the applicant him/herself may soon

⁷⁶ UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 38, U.N. Doc. HCR/1P/4/Eng/REV.2 (1992) [hereinafter UNHCR HANDBOOK].

⁷⁷ See *id.* para. 41.

⁷⁸ See STENBERG, *supra* note 9, at 51.

⁷⁹ See UNHCR HANDBOOK, *supra* note 76 paras. 41, 43.

⁸⁰ *Id.* para. 42.

⁸¹ Convention Against Torture, *supra* note 10, art. 3(2).

become a victim.⁸²

A central issue in the determination of refugee status is how to define what treatment qualifies as persecution. Article 33 of the Convention on Refugees affords some help, in that it provides that threats aimed at the individual's life or freedom on account of the five grounds enumerated in Article 1, constitute persecution. Most States parties have accepted this definition as the necessary core of persecution.⁸³ The UNHCR further suggests that "other serious violations of human rights would also constitute persecution." Since torture often constitutes a threat at the individual's freedom and is otherwise a serious human rights violation, there is no doubt that torture qualifies as one form of persecution.

Neither the Convention on Refugees nor the UNHCR, however, specify the minimum level of severity a treatment or situation must achieve in order to qualify as persecution, as opposed to mere harassment. The task of determining the dividing line between persecution and harassment is left to the States; accordingly, jurisprudence of the different countries lacks coherence and consistency.⁸⁴ Hence, Professor Joan Fitzpatrick criticizes:

Unfortunately, the elasticity of the definition of persecution depends upon the political will of member States implementing the Convention. In an era of retrenchment and fear of incurring unbounded obligations, the pattern at least in Western Europe, is not adaption to new exigencies for forced migrants but an insistence on outdated and restrictive definitions of persecution.⁸⁵

The difficulty in defining the minimum level of severity which treatment must reach to qualify as persecution is similar to the

⁸² UNHCR HANDBOOK, *supra* note 76, para. 43.

⁸³ STENBERG, *supra* note 9, at 48.

⁸⁴ GOODWIN-GILL, *supra* note 4, at 67.

⁸⁵ Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 240 (1996).

task of defining a minimum level for inhuman or degrading treatment. The Convention Against Torture has circumvented the problem regarding non-refoulement since Article 3 applies only to the danger of torture. That problem, however, does arise with regard to the European Convention and the Covenant on Civil and Political Rights.⁸⁶

b. Grounds for Persecution

The Convention on Refugees identifies five reasons for persecution, which would qualify an individual to be considered a refugee. Persecution often arises from a combination of reasons. The Convention on Refugees is far more restrictive in this respect than the Convention Against Torture and other relevant treaties, which forbid torture without any specification of a reason.

The term "race" in the Convention on Refugees is considered to be applicable whenever a person is persecuted because of his ethnic origin. Professor Goodwin-Gill suggests that the broad definition of the 1965 Convention on the Elimination of all Forms of Racial Discrimination, which includes all discrimination based on "race, colour, descent, or national or ethnic origin," should also be applicable for the purposes of the Convention on Refugees.⁸⁷

Persecution for reasons of a person's religion can take forms such as "prohibition of membership of a religious community, of

⁸⁶ See *infra* Part III B (1).

⁸⁷ GOODWIN-GILL, *supra* note 4, at 43. Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination provides:

In this Convention, the term "racial discrimination" shall mean any form of distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

International Convention on the Elimination of all Forms of Racial Discrimination, adopted 21 Dec. 1965, 660 U.N.T.S. 195, (*entered into force* Jan. 4, 1969) *reprinted in* 5 I.L.M. 352 (1966).

worship in private or public, of religious instruction, or serious measures of discrimination imposed on a person because they practice their religion or belong to a particular religious community."⁸⁸

Persecution on grounds of nationality is interpreted to include membership of particular ethnic, religious, cultural, and linguistic communities.⁸⁹ Persecution for lack of nationality, for example, that of stateless persons, would also be included under this ground.⁹⁰

The UNHCR defines a "particular social group" as a number of persons who have similar backgrounds, habits, or social status.⁹¹ Many cases covered by this term also fall under other grounds of persecution. The notion of "a particular social group" is broader than the other grounds for refugee status and, as Professor Goodwin-Gill notes, "possesses an element of open-endedness potentially capable of expansion in favour of a variety of different classes susceptible to persecution."⁹² Reliance on the notion of a "particular social group" has increased considerably over the last decade. For example, Kurdish wives of politically active men were granted asylum in Germany for being members of a particular social group based on family membership.⁹³ These women had not been politically active themselves, so membership of a political group could not be established as a reason for their persecution. In another case a German Court also granted asylum to a Polish operator of a funeral home who had been persecuted by the Polish Government due to his involvement in a private enterprise.⁹⁴ The granting of asylum was

⁸⁸ UNHCR HANDBOOK, *supra* note 76, para. 72; *see also* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

⁸⁹ *See* GOODWIN-GILL, *supra* note 4, at 45.

⁹⁰ *See* GRAHL-MADSEN, *supra* note 3, at 219.

⁹¹ UNHCR HANDBOOK, *supra* note 76, para. 77.

⁹² GOODWIN-GILL, *supra* note 4, at 48.

⁹³ *See* Judgment of July 2, 1985, No. 9 C. 35. 84, Bundesverwaltungsgericht [Federal Administrative Court].

⁹⁴ Judgment of March 29, 1985, No. 17 K 10.343/83 Verwaltungsgericht Gelsenkirchen [Gelsenkirchen Administrative Court] summarized in Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution due to*

based on the applicant's membership to the particular social group of private business owners. A woman from Trinidad who had been abused by her husband for over 15 years, and had received no sufficient protection from the police in Trinidad, was granted asylum in Canada on the basis of her "membership of the social groups of Trinidadian women subject to wife abuse."⁹⁵

Further, persons can obtain refugee status if they are persecuted on account of their expressed or implied political opinion.

c. Outside their Country of Nationality

Persons can obtain international protection from persecution only when they are outside of their country of nationality and thus no longer subject to the jurisdiction of their home country. Stateless persons must be unable or unwilling to return to their country of habitual residence and the persecution feared by the applicant must relate to that country.⁹⁶ Similarly, Article 1(2) provides that persons who have multiple nationalities must show a well-founded fear that they would be persecuted in one of the countries of which he or she is a national.⁹⁷

d. Unavailability of Protection of that Country

Furthermore, applicants for refugee status must be unable or unwilling to avail themselves of the protection of that country. Inability refers to an objective state, for example, if the country concerned is in a state of civil war and cannot guarantee the necessary protection to the applicant.⁹⁸ Unwillingness, although a subjective state of the applicant's mind, is generally justified by the objective finding that the fear of persecution is "well-founded."⁹⁹

Membership in a Particular Social Group, 26 Cornell Int'l L. J. 505, 532 (1993).

⁹⁵ *Meyers v. Canada* (M.E.I.) [1993] 97 D.L.R. 4th 729, 1 F.C. 154.

⁹⁶ Note the difference from all the other conventions: None of these treaties makes it a requirement that the applicant be outside her/his country of nationality. For cases other than those involving extradition the practical relevance of this difference, however, is very small. See discussion *infra* Part IV A (4).

⁹⁷ UNHCR HANDBOOK, *supra* note 76, at para. 106.

⁹⁸ See *id.* para 97.

⁹⁹ *Id.* para 100.

e. Official Persecution

While the Convention Against Torture principally provides for protection from "official" torture, the Convention on Refugees does not mention whether the persecutor has to be an agent of a state or whether persons will also be protected from abuse by private actors. Scholars and States parties have concluded that acts of private groups should also qualify as persecution if governments are unable or reluctant to suppress such acts.¹⁰⁰ In such situations, applicants may be unable to avail themselves of governmental protection, even if the government itself has not been the agent of persecution. Likewise, the UNHCR concluded:

Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.¹⁰¹

2. Expulsion and Refoulement

Article 33(1) of the Convention on Refugees forbids States parties from expulsion or return (refoulement) of refugees. Apart from the inclusion of "extradition" in Article 3(1) of the Convention Against Torture, the wording of Article 33(1) of the Convention on Refugees is nearly identical. This issue is discussed in greater detail in Part II A of this article.

3. Limitations of Protection

The principal difference between the Convention on Refugees and the Convention Against Torture is that Article 33(1) does not provide for absolute protection from refoulement. First, there are certain exceptions that prevent persons from obtaining refugee status and thus qualifying for protection under the Convention, even if such individuals are in fear of persecution for one of the enumerated

¹⁰⁰ GOODWIN-GILL, *supra* note 4, at 73; 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 191 (1966).

¹⁰¹ UNHCR HANDBOOK, *supra* note 76, para 65.

reasons. Article 1F provides that the Convention shall not be applicable to persons for whom there are serious reasons to think that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity . . . ;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes of the United Nations.¹⁰²

The UNHCR notes that when applying this exclusion clause, the authorities must balance the degree of persecution feared by the applicant against the severity of the crime. Exclusion from refugee status of a person who fears persecution that would likely endanger his or her life, would only be justified if he or she had committed a particularly severe crime.¹⁰³

In addition to this general limitation on the recognition of refugee status, Article 33(2) provides for a specific limitation of protection from refoulement. Under this provision even a person who has been recognized as a refugee may not claim the benefit of Article 33(1) if "there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is, or who, having been convicted . . . of a particularly serious crime, constitutes a danger to the community of that country."¹⁰⁴

There is a great disparity between the different treaties regarding the limitations they impose upon the prohibition from refoulement. Article 3 of the Convention Against Torture absolutely forbids refoulement without limitation; Articles 1F and 33(2) of the Convention on Refugees contain numerous substantive limitations. This disparity will be discussed further under Part IV, where the provisions of the other instruments will also be taken into account.

¹⁰² Convention on Refugees, *supra* note 7, art. 1(F).

¹⁰³ UNHCR HANDBOOK, *supra* note 76, para. 156.

¹⁰⁴ Convention on Refugees, *supra* note 7, art. 33 (2).

4. Complaint Procedures

Unlike the Convention Against Torture, the Convention on Refugees does not provide for an international body to supervise its implementation. Although Article 38 of the Convention on Refugees provides that disputes between States parties relating to its interpretation may be brought before the International Court of Justice, no procedure for individual complaints is available. But the provisions of the Convention on Refugees serve in most countries as the primary basis for domestic asylum and refugee law. Hence, despite the lack of an international body, individuals should be able to bring their petitions to domestic courts. Professor Fitzpatrick has pointed out that the degree of protection granted depends largely on the "political will" of the States parties, since the criteria for determining "refugee status" under Article 1(2) are so elastic that much discretion is given to the States parties in implementing the provisions of the Convention on Refugees.¹⁰⁵

While the Convention on Refugees imposes primary obligations on the States parties to comply with the treaty, the UNHCR has a role in advising governments regarding their compliance. Further, the Executive Committee of the High Commissioner's Programme (EXCOM) regularly promulgates conclusions and decisions in regard to the protection of refugees, which may be generally applicable or relevant to situations in particular countries.

B. Protection from Refoulement Under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰⁶

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain any

¹⁰⁵ Fitzpatrick, *supra* note 85, at 240.

¹⁰⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 22, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953).

specific provision granting protection from refoulement, Article 3 of the European Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Based on this provision, the European Court of Human Rights and its Commission have developed a body of case law which has become a strong safeguard against any kind of forced removal of persons who fear that they will be tortured or ill-treated if returned to their home countries.

The European Commission of Human Rights considered the relevance of Article 3 to expulsion for the first time in 1961. In its admissibility decision in *P. v. Belgium*, the Commission stated that "the deportation of a foreigner to a particular country might in exceptional circumstances give rise to the question whether there had been 'inhuman treatment' within the meaning of Article 3 of the Convention."¹⁰⁷ In *X v. the Federal Republic of Germany*, the Commission referred to this principle and stated that

[S]imilar considerations might apply to cases where a person is extradited to a particular country in which, owing to the very nature of the regime . . . or a particular situation in that country, basic human rights, such as those guaranteed by the Convention, might be either grossly violated or entirely suppressed.¹⁰⁸

The question of non-refoulement reached the European Court of Human Rights for the first time in 1989 when it decided *Soering v. United Kingdom*.¹⁰⁹ Jens Soering, a German citizen, was accused of murdering his girlfriend's parents in Bedford County, Virginia, in March 1985. He fled to England where the English police arrested him in July 1986. The U.S. Government requested Soering's extradition and the prosecuting attorney swore an affidavit that should

¹⁰⁷ *P. v. Belgium*, Application No 984/61, 6 Collection of Decisions 39 (1963).

¹⁰⁸ *X v. Federal Republic of Germany*, Application No 1802/62, 6 Y. B. 480 (1963).

¹⁰⁹ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

Jens Soering be convicted of capital murder, the judge would be notified that the United Kingdom did not wish the death penalty to be imposed. Nonetheless, the European Court of Human Rights concluded that, if extradited, there was a real risk that the death penalty would be imposed. It held that Soering would run the real risk of exposure to the "death row phenomenon" which, together with his young age, mental condition, and "the risk of homosexual abuse and physical attack," would constitute inhuman and degrading treatment. In other words, Soering faced the possibility of a long stay on death row, where he would be subjected to the "ever present and mounting anguish of awaiting execution of the death penalty" as well as other extreme conditions, including "the risk of homosexual abuse and physical attack." In its reasoning the European Court of Human Rights emphasized the absolute prohibition of torture and of other inhuman or degrading treatment. The Court held:

It would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. . . . Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intentment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.¹¹⁰

The Court confirmed this decision in two cases in 1991, further extending its rationale to any kind of forced removal of

¹¹⁰ *Id.*

persons who feared ill-treatment in the country of return.¹¹¹

1. The Scope of Protection

The European Court of Human Rights has not provided a precise definition of the different sorts of ill-treatment proscribed by Article 3. Rather, it has applied Article 3 in various circumstances suggesting the meaning of "inhuman and degrading treatment" and indicated that the treatment must reach a certain "minimum-level" of severity in order to fall within the proscription of Article 3. This test was first formulated in *Ireland v. United Kingdom*:

Ill-treatment must attain a minimum-level of severity if it is to fall under the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment and its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the person concerned.¹¹²

Hence, the Court first considers whether under all the circumstances the treatment reaches the "minimum level of severity." Once the Court has found the "minimum level of severity," it determines whether the treatment should be considered "degrading," "inhuman," or "torture."

The main characteristic of degrading treatment or punishment is its humiliating effect on the individual. The Court considered punishments to be degrading when they "aroused in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral

¹¹¹ Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1989); Vilvarajah and Others v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) (1991).

¹¹² Ireland v. United Kingdom, Eur. Ct. H.R., 19 Y.B. European Conv. Hum. Rts. 516, 750 (1976); Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) (1978).

resistance."¹¹³

With regard to the required minimum level of severity, the Court concluded that the humiliation involved must be other than the usual element of humiliation connected with any given form of punishment.¹¹⁴ In the *Tyrer Case*,¹¹⁵ the Court found that the punishment of a fifteen-year-old who was sentenced in a juvenile court to three strokes of a birch rod on his bare posterior was degrading within the meaning of Article 3. A later decision, *Costello-Roberts*, however, held that similar disciplinary measures by the headmaster of a school did not reach the required minimum level of severity.¹¹⁶ In that case, a seven-year-old boy had been "slipperped" three times on his buttocks through his shorts with a rubber-sole gym shoe. In distinguishing *Tyrer*, the Court noted that *Costello-Roberts* was punished in private, with his posterior covered, and no evidence was adduced as to the effects of the punishment. Mr. Tyrer was held by two policemen while a third administered the punishment and the birching caused soreness for at least ten days. Accordingly, publicity and suffering are important criteria for determining whether treatment is "degrading." The Court noted, however, that treatment in absence of publicity could still fit under this category, as it "may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others."¹¹⁷

Although inhuman treatment or punishment is typically "degrading" within the meaning of Article 3, the predominant characteristic is the harm inflicted to the individual's physical integrity. Accordingly, the required minimum level of severity is higher than that for "degrading" treatment. Corporal punishment has been held to be "inhuman" because it was premeditated, was applied for hours, and caused "if not actual bodily injury, at least intense physical and mental suffering to the persons thereto and also led to

¹¹³ *Ireland v. United Kingdom*, Eur. Ct. H.R., 19 Y.B. European Conv. Hum. Rts. 516, 750 (1976) at para. 167.

¹¹⁴ *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978) at para. 30.

¹¹⁵ *Id.*

¹¹⁶ *Costello Roberts v. United Kingdom*, 247-C Eur. Ct. H.R. (ser. A) (1993).

¹¹⁷ *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978) at para 32.

acute psychiatric disturbances during interrogation."¹¹⁸ The Court noted in some circumstances that the mere threat of torture even if not carried out, may constitute "inhuman treatment."¹¹⁹

As the Court observed in *Soering v. United Kingdom*, the death penalty does not constitute inhuman treatment per se, as this view would be inconsistent with the clear wording of Article 2(1) of the Convention. The conditions surrounding the death sentence, such as "the manner in which it is imposed or executed, the personal circumstances of the condemned person . . . as well as the conditions of detention awaiting the death sentence,"¹²⁰ may bring the sentence under the proscription of Article 3.

The distinction between inhuman treatment and torture relates to the difference in the intensity of the suffering inflicted. In *Ireland v. United Kingdom* the Court distinguished between the two concepts; if the Court uses the term "torture," it thereby should "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."¹²¹ In that case the Court came to the conclusion that the

¹¹⁸ *Ireland v. United Kingdom*, Eur. Ct. H.R., 19 Y.B. European Conv. Hum. Rts. 516, 750 (1976) at para 167. In *Tomasi v. France* the applicant produced medical evidence of the physical results of corporal punishment which attested to the presence of bruises and abrasions. In its decision on admissibility the Commission stated:

As far as the injuries are concerned, it should be noted that although they might appear to be relatively slight, they nonetheless constitute outward signs of the use of physical force on an individual deprived of his liberty and thus vulnerable and in a state of inferiority. Such treatment cannot be justified and in the circumstances of the case, may be considered both inhuman and degrading.

Tomasi v. France, 241-A Eur. Ct. H.R. (ser. A) (1992).

¹¹⁹ *Campbell and Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) (1982).

¹²⁰ European Convention, *supra* note 106, art. 2(1).

¹²¹ *Ireland v. United Kingdom*, Eur. Ct. H.R., 19 Y.B. European Conv. Hum. Rts. 516, 750 (1976) at para 167.

combination of the five techniques¹²² used by the British police only constituted “inhuman treatment,” rather than “torture” within the meaning of Article 3. It should be noted, however, that both torture and inhuman or degrading treatment are forbidden by Article 3 and that the European Court has extended the non-refoulement implication of Article 3 to both sorts of ill-treatment.

2. Ill-Treatment by Public Authorities

Article 3 of the European Convention does not specify whether the feared ill-treatment must be carried out by public authorities. In *Ahmed v. Austria*, the Austrian Government took the position that since the state authority of Somalia had ceased to exist, the Somali applicant could no longer fear ill-treatment as prohibited by Article 3 upon return. The Commission rejected that argument and stated, “[i]t is sufficient that those who hold substantial power within the State, even though they are not the Government, threaten the life and security of the applicant.”¹²³

Similarly, in *HLR v. France*¹²⁴ the Commission held that the risk of ill-treatment by a powerful and structured criminal organization in Colombia, against whom it was unlikely that the Government of Columbia would be able to offer adequate protection, was sufficient to qualify under Article 3.

This approach is consistent with the interpretation of the Convention on Refugees that persecution should also include acts of private groups, if Governments are unable or reluctant to suppress such acts,¹²⁵ but may be less consistent with the wording of the Convention Against Torture.¹²⁶

¹²² These techniques consisted of (a) wall-standing for periods of several hours at a time; (b) hooding, *i.e.* covering the detainees’ eyes with dark materials at all times except during interrogation; (c) subjection to hissing noises, (d) deprivation of sleep, and (e) deprivation of food and water; Ireland v. United Kingdom, Eur. Ct. H.R., 19 Y.B. European Conv. Hum. Rts. 516, 750 (1976).

¹²³ *Ahmed v. Austria*, 24 Eur. Ct. H.R. 278 at para 68 (1997).

¹²⁴ *HLR v. France*, App. No. 24573/94, Eur. H.R. Rep. 745 (1995) (Commission Report).

¹²⁵ See *supra* Part III A (1) (e).

¹²⁶ See discussion *infra* Part IV A (2).

3. Real Risk of Ill-Treatment

In *Soering v. United Kingdom*, the European Court of Human Rights held that, "the decision to [return] a person may give rise to an issue under Article 3 . . . where substantial grounds have been shown for believing that the person concerned . . . faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."¹²⁷

The Court has emphasized the assessment of a *real risk*, and has not hesitated to reject applications on the grounds that such risk was lacking. In assessing such risk, the Court found that historical considerations might be taken into account, since they can shed light on the current situation in the country to which the person is sent.¹²⁸ The assessment of such risk must further be made at the time and on the basis of information available when the person is to be sent to the country where she or he may be at risk.¹²⁹ Hence, if the Court receives information that the situation in a country has improved since the time of the applicant's initial claim, these changed conditions must be taken into account.

For example, in *Cruz Varas v. Sweden*,¹³⁰ a Chilean national claimed that expulsion by the Swedish authorities to Chile would constitute a violation of Article 3 because of the risk of torture in his home country. He further contended that he had already experienced torture and would be subjected to inhuman treatment on account of the trauma caused by the expulsion. The applicant reported that he had been tortured in Chile by means of electric shock, sexual attacks, and severe beatings. The Swedish authorities failed to comply with a request from the Commission to withhold expulsion and they deported Mr. Cruz Varas in October 1989. The applicant reported to the Court that after his forced return to Chile he and his relatives had been subjected to "persecution as may lead to torture." The Court acknowledged that the applicant had been treated contrary to Article 3 before he came to Sweden. It also took note of the alleged ill-

¹²⁷ 161 Eur. Ct. H.R. (ser. A) at para 91.

¹²⁸ Ahmed, 24 Eur. Ct. H.R. 278 at para 42.

¹²⁹ Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (1996).

¹³⁰ 201 Eur. Ct. H.R. (ser. A) (1989).

treatment after his return to Chile. Nonetheless, the Court found that at the time of expulsion there were no substantial grounds for believing that Mr. Cruz Varas faced a real risk of being subjected to treatment proscribed by Article 3. In rejecting Mr. Cruz Varas' claim, the Court relied on the changed political situation in Chile and noted that by the time of expulsion in October 1989 the country had taken important steps towards the restoration of democracy and respect for human rights.¹³¹

The Court has also held that the general situation in the country of return, even if massive violations of human rights are reported, does not in itself give rise to a claim under Article 3. The applicant must always show the circumstances which put him or her individually in danger of ill-treatment. In *Vilvarajah and Others v. United Kingdom*,¹³² the Court rejected the application of five Tamils against their expulsion to Sri Lanka by the British Government. All the applicants had experienced torture or other ill-treatment by the Sinhalese forces and subsequently fled to England where they applied for asylum. Three of the applicants reported ill-treatment following their return to Sri Lanka. Applicant Sivakumaran was detained for six months during which time he was tortured every four or five days. Sivakumaran was beaten with an iron bar, subjected to electric shocks, and hung upside down over a chili-fire.¹³³ The Court stated that the ill-treatment derived from "random activities by the security forces and did not indicate that the applicants had been personally singled out for persecution."¹³⁴ The Court further stated that the applicants, like all other Tamils in Sri Lanka, were exposed to the possibility of ill-treatment. The Court relied on a statement by the Office of the United Nations High Commissioner for Refugees that it did not consider Tamils to be refugees under Article 1 of the 1951 UN Convention Relating to the Status of Refugees.¹³⁵ In addition, the Court noted an improvement of the political situation in Sri Lanka.

¹³¹ See *id.* para. 86.

¹³² *Vilvarajah and Others*, 215 Eur. Ct. H.R. (ser. A) (1991).

¹³³ See *id.* para. 43.

¹³⁴ *Id.* para. 141.

¹³⁵ *Id.* para. 140.

Although the Court admitted that there was still general instability, the situation did not create a risk for the applicants, that was greater than for all Tamils. Accordingly, the Court concluded that there had been no violation of Article 3 with respect to the applicants' removal to Sri Lanka.¹³⁶

It is not appropriate, however, to import the standards of the UNHCR into the European Convention, because the criteria for refugee status under the Convention on Refugees differ substantially from the notion of "inhuman or degrading treatment" under the European Convention. In this decision, Article 3 failed to fulfill its primary purpose -- the protection of persons at risk of torture, inhuman or degrading treatment -- because of the Court's reliance on UNHCR standards and its strict requirement that the applicants must be individually singled out for persecution.

It appears that although the scope of the protection from refoulement in the European Convention is much wider than that of the Convention Against Torture, since the European Convention also includes inhuman and degrading treatment, the standard of proof is much stricter under the European Convention. Hence, it seems that some of the applications denied by the European Court of Human Rights, due to a lack of a real risk of torture, could very well have succeeded if they had sought relief from the Committee Against Torture.¹³⁷

4. The Absolute Character of Article 3

Under Article 3 of the European Convention, torture and other inhuman or degrading treatment are prohibited in absolute terms. According to Article 15(2), no derogation may be made from this prohibition, even in times of public emergency threatening the life of the nation.

In *Chahal v. United Kingdom*,¹³⁸ the Court decided that the applicant's deportation to India would constitute a violation of Article

¹³⁶ See *id.* para. 144.

¹³⁷ See e.g., applicant Sivakumaran in *Vilvarajah and Others*, 215 Eur. Ct. H.R. (ser. A)(1991). For further discussion of this issue see *infra* Part IV (5).

¹³⁸ 23 Eur. Ct. H.R. 413.

3. The British authorities had found that Mr. Chahal, a Sikh separatist leader, was a threat to national security; his application for asylum was refused and a deportation order was issued. The Court found that Mr. Chahal, if returned to India, would face a real risk of ill-treatment. In regard to the danger the applicant allegedly posed to Britain's national security, the Court concluded that the absolute nature of Article 3 also applied to expulsion cases. In such situations it determined that, "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nation 1951 Convention on the Status of Refugees."¹³⁹ The European Court confirmed this view in *Ahmed v. Austria*.¹⁴⁰ Mr. Ahmed, a Somali national, was granted refugee status within the meaning of the Convention on Refugees by the Austrian Minister of the Interior in 1992. Two years later, the Austrian authorities ordered the forfeiture of his refugee status, and ordered his deportation based on the applicant's conviction for attempted robbery and the danger he thereby posed to the community in which he lived. The European Court held that as long as the applicant faced a real risk of being subjected to ill-treatment in Somalia, the applicant's criminal record was immaterial as to his eligibility for relief from expulsion under the European Convention.

5. Complaint Procedure

Until recently, the complaint procedure under the European Convention had a tripartite structure. Complaints were directed to the European Commission on Human Rights, which determined admissibility and expressed its views as to whether the alleged activity by a Member State violated the Convention. If it found such a violation, the Commission referred the case to either the Committee of Ministers or to the European Court of Human Rights.¹⁴¹ This

¹³⁹ *Id.* para. 2 (5).

¹⁴⁰ 24 Eur. Ct. H.R. 278.

¹⁴¹ See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 479 et seq. (2nd ed. 1996).

review procedure proved very time-consuming and was amended by Protocol 11 to the European Convention,¹⁴² which entered into force on January 11, 1998. The most significant change under that Protocol is the creation of a single permanent court to which all applications can be brought directly.¹⁴³ Under the new rules it is no longer necessary for the States parties to recognize the jurisdiction of the Court. Rather, Article 34 of the Protocol obliges the States not to hinder in any way the effective exercise of the individual's right to bring claims before the Court.¹⁴⁴

In the first step in the process of bringing a claim, a committee of three judges determines the admissibility of the application. According to Article 35 the applicant must have exhausted all domestic remedies and the complaint must be brought within six months of the date from which the final decision of a domestic court was rendered. The applicant cannot be anonymous and the issue must not be substantially the same as that of any case previously rejected by the European Court of Human Rights or the European Commission. Once a case is declared admissible, it is referred to a chamber of seven judges that encourages friendly settlement between the complainant and the Member State.¹⁴⁵ If such attempts prove unsuccessful, the panel will issue a judgment. The applicant may lodge a further appeal with a grand chamber consisting of 17 judges, the admissibility of which will be decided by a panel of five judges from the grand chamber.¹⁴⁶

While the Commission has been replaced by a larger, single Court under Protocol 11, the Committee of Ministers still performs

¹⁴² Protocol No. 11 to The Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* 9 Oct. 1993, E.T.S. 155 (*entered into force* 11 May 1994).

¹⁴³ *See id.* art. 34.

¹⁴⁴ Article 6 of the Protocol, however, provides that declarations made under former Articles 25 or 46 limiting the recognition of jurisdiction to events after the date when the declaration was made, shall remain valid for the jurisdiction of the new permanent Court, European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 142, Protocol No. 11.

¹⁴⁵ *See id.* art. 38.

¹⁴⁶ *See id.* art. 43.

part of its former duties in that it continues to supervise the enforcement of judgments rendered by the Court. The Committee possesses the authority to decide to expel a Member State from the Council of Europe if that State refuses to comply with the Court's decision. Although it has never exercised this power, it has helped to discourage countries from disregarding the Court's judgments.¹⁴⁷

C. The Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa

The Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) is another regional treaty dealing with the question of refugees and, in particular, the principle of non-refoulement. The OAU Convention entered into force in June 1974 and has been ratified by 41 African States to date.¹⁴⁸ Unlike the other treaties, the OAU Convention was seen by its drafters as a complement to the Convention on Refugees, rather than as an independent instrument.¹⁴⁹ Drafted in response to the increasing number of refugees in Africa,¹⁵⁰ it adopts a much more generous position towards refugees and reflects the ideal of solidarity and cooperation among African States.¹⁵¹ Article 4 (2) of the OAU Convention is particularly unique in that it provides that the States parties take appropriate measures to

¹⁴⁷ See NEWMAN/WEISSBRODT, *supra* note 141, at 480.

¹⁴⁸ Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

¹⁴⁹ Article 8 (2) of the OAU Convention states, "[t]he present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees." *Id.* art. 8 (2).

¹⁵⁰ The Preamble of the OAU Convention states that, "1. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future" *Id.* at Preamble. The Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 14.

¹⁵¹ See Jennifer L. Turner, *Liberian Refugees: A Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 8 GEO. IMMIGR. L.J. 281, 282 (1994).

lighten the burden of asylum granted by other States parties, where such States experience difficulty in granting asylum to refugees.

1. The Scope of Protection

Article 1(1) of the OAU Convention incorporates the refugee definition of the Convention on Refugees¹⁵² and expands it in Article 1(2) to:

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹⁵³

This definition directly addresses the causes of massive refugee influxes and links its broader refugee definition to actual root causes of refugee movements.¹⁵⁴

2. Expulsion, Refoulement, and Non-Rejection at the Border

Article 2(3) of the African Charter states:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity

¹⁵² Article 1 (2) defines a refugee as, "a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable . . . to avail himself to the protection of that country." *See supra* Part III A.

¹⁵³ The Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 14, art. 1.

¹⁵⁴ Turner, *supra* note 151, at 285.

or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.¹⁵⁵

Article 2(3) essentially parallels the non-refoulement provision of the Convention on Refugees.¹⁵⁶ Since the scope of persons qualifying as "refugees" under Article 1 of the OAU is substantially broader than that of the Convention on Refugees, the protection from refoulement applies to more people. Furthermore, Article 1(2) does not encourage the individualized refugee determination approach of the Convention on Refugees. Instead, it takes a group approach to determining refugee status for mass influxes of persons, due to external aggression, occupation, foreign domination, or other events seriously disturbing public order. Accordingly, the OAU Convention makes protection from refoulement no longer dependent on an individualized threat of persecution in the country of return.¹⁵⁷ In addition, the States parties must refrain not only from returning or expelling refugees already in their territory, but also from rejecting them at their borders. Hence, it clearly addresses an issue which has caused some controversy under the Convention on Refugees, and was not specifically mentioned in Article 3 of the Convention Against Torture.¹⁵⁸

Article 2(5) goes a step beyond mere protection from refoulement by providing a right of temporary asylum for persons who have been denied asylum in cases where expulsion would be the only alternative.¹⁵⁹ Article 5 of the OAU Convention further stresses that no refugee may be repatriated against his or her will.

¹⁵⁵ The Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 14, art. 2.

¹⁵⁶ See Convention on Refugees, *supra* note 7, art. 33 (1).

¹⁵⁷ See Turner, *supra* note 151, at 298.

¹⁵⁸ For further discussion of this issue see *infra* Part IV C (2).

¹⁵⁹ Article 2(5) reads, "Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph." Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 14, art. 2 (5).

3. Limitations of Protection

According to Article 1(5), the determination of a person's status as a refugee under the OAU Convention is subject to the same limitations as provided by Article 1F of the Convention on Refugees.¹⁶⁰ In Article 1(4 b), the OAU Convention adds to these restrictions by stating that a person who has committed "a serious non-political crime outside his country of refuge after his admission to that country as a refugee or who has seriously infringed the purposes and objectives of the OAU Convention"¹⁶¹ no longer qualifies for its protection. Significantly, no reference is made to persons who are regarded as "threats to national security" as Article 33(2) of the Convention on Refugees provides.¹⁶²

Because of its wide scope of application, Professor Walter Kälin suggests that the OAU Convention is currently the instrument that affords the greatest protection from refoulement.¹⁶³

4. Complaint Procedure

Like the Convention on Refugees, the OAU Convention does not provide for an international body to which complaints about violations of the Convention can be directed. Therefore, the degree of compliance depends on the "political will" of the States parties in implementing the provisions of the Convention as domestic law.

D. The International Covenant on Civil and Political Rights

Although not specifically expressed in the Civil and Political Covenant, the Human Rights Committee has adopted the principle of non-refoulement in its decisions regarding Article 7. Like the European Court of Human Rights, it has interpreted the prohibition

¹⁶⁰ See *supra* Part III A (3).

¹⁶¹ The Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 14, art. 1 (4).

¹⁶² Since the OAU Convention is intended to be a complement to the Convention on Refugees, however, the individual is entitled to the protection of whichever treaty provides the greater protection.

¹⁶³ KÄLIN, *supra* note 9, at 53.

of torture, cruel and inhuman, or degrading treatment to include the prohibition against forced return of a person to a country where s/he faces such ill-treatment.¹⁶⁴

1. The Scope of Protection

Article 7 provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁶⁵ The Human Rights Committee has issued very few decisions or views on the issue of non-refoulement under this provision. In a number of cases applicants have claimed that their extradition to countries where they potentially faced capital punishment constituted a violation of Article 7.¹⁶⁶ Another applicant alleged that he would be at risk of torture if extradited to the requesting state.¹⁶⁷ The Human Rights Committee, however, has failed to find any of these cases admissible, since the applicants did not sufficiently demonstrate that the anticipated treatment would be in violation of Article 7.

Article 7 of the Civil and Political Covenant contains nearly the same wording as Article 3 of the European Convention. It simply adds the term "cruel" to the prohibition of torture and inhuman or degrading treatment. Since cruel treatment probably always qualifies as "inhuman" or at least "degrading," this addition does not appear to be an extension of the protection granted under Article 3 of the

¹⁶⁴ The Covenant was entered into force in March 1976 and has 140 States parties to date. Civil and Political Covenant, *supra* note 15. For information regarding signatory status, see <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html> (visited Nov. 13, 1998).

¹⁶⁵ Civil and Political Covenant, *supra* note 15, art. 7. Article 37 of the Convention on the Rights of the Child contains the same prohibition and may thus be interpreted in a similar fashion. Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), (*entered into force* Sept. 2, 1990, *reprinted in* 28 I.L.M. 1448 (1989).

¹⁶⁶ *Joseph Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993); *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1993); *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993 (1996).

¹⁶⁷ *Torres v. Finland*, Communication No. 291/1988, 2 Off. Rec. Human Rights Committee, Supp. No. 40, U.N. Doc. A/45/40 (1990).

European Convention. In view of this similarity in wording, it is not surprising that the jurisprudence of the Human Rights Committee regarding non-refoulement closely resembles the approach of the European Court of Human Rights. In *Kindler v. Canada*, the Committee reasoned, "[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."¹⁶⁸ The Committee uses precisely the same terminology as the European Court in determining that the applicant must be at "real risk" of ill-treatment. Accordingly, Alleweldt concludes that it is appropriate to interpret Article 7 of the Civil and Political Covenant in the same way as Article 3 of the European Convention.¹⁶⁹ Similarly, Professor Manfred Nowak in his treatise consistently uses decisions of the European Court of Human Rights in order to interpret

¹⁶⁸ *Kindler v. Canada*, Communication No. 470/1991, Human Rights Committee, U.N. Doc. CCPR/C/48/D/470/1990 at para 13.2 (1993). The Committee relied in this case on the decision of the European Court of Human Rights in *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. B) at 439 (1989) (holding that in the light of the youth and the mental state of the applicant as well as the conditions on death row in the Virginia prison system, the extradition and thus the applicant's exposure to the "death row phenomenon" would constitute inhuman and degrading treatment.) See *supra* part III B. With regard to Mr. Kindler, however, the Committee held that the applicant was an adult and no other distinguishing factors were identified. It further concluded that "prolonged detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the defendant is merely availing himself of appellate remedies" and that the extradition of Mr. Kindler, therefore, did not constitute a violation of Article 7.

¹⁶⁹ ALLEWELDT, *supra* note 41, at 101. The Human Rights Committee can also review States reports as to compliance with the provisions of the Covenant, including prohibitions against non-refoulement and other provisions parallel to the Convention on Refugees. In its General Comment 20 on Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), the Human Rights Committee stated, "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."

Article 7 of the Civil and Political Covenant.¹⁷⁰

2. Limitations of Protection

Like its counterpart in the European Convention, Article 7 of the Civil and Political Covenant is also non-derogable. Article 4(2) of the Covenant forbids derogation from Article 7 even in times of public emergencies.

3. Complaint Procedure

Individuals may submit communications to the Human Rights Committee alleging violations of the Covenant in regard to States that have ratified the Optional Protocol to the Civil and Political Covenant.¹⁷¹ The criteria for admissibility are largely the same as under the European Convention. The Civil and Political Covenant expressly does not require of exhaustion of domestic remedies if those remedies are unreasonably prolonged. That limitation is only found in the jurisprudence, not in the wording of the European Convention. According to Article 5 of the Optional Protocol, if the Committee determines that the communication is admissible and reaches a conclusion on the merits, it forwards its views to the State party concerned and the individual. The decision is not legally binding, but most States comply with the Committee's findings.¹⁷²

¹⁷⁰ MANFRED NOWAK, *THE U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 131 et seq. (1993).

¹⁷¹ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR 21st Sess., Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (*entered into force* 23 March 1976).

¹⁷² ALLEWELDT, *supra* note 41, at 100.

*E. The American Convention on Human Rights***1. The Scope of Protection**

The first phrase of Article 5(2)¹⁷³ of the American Convention contains the same wording as Article 7(1) of the Civil and Political Covenant. Accordingly, like Article 7 of the Civil and Political Covenant, Article 5(2) of the American Convention should be interpreted in accordance with the jurisprudence of the European Court of Human Rights as to violations of Article 3 of the European Convention.¹⁷⁴

In Article 22(8) the American Convention also explicitly prohibits refoulement by stating:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinion.¹⁷⁵

2. Limitations of Protection

Since Article 22(8) of the American Convention states that

¹⁷³ The first phrase of Article 5 (2) provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment," American Convention on Human Rights, *supra* note 16, art. 5 (2). The American Convention entered into force on 18 July 1978 and has 26 States Parties to date. Ratification information is available from Signatures and Current Status of Ratifications (*visited* on March 16, 1999), <<http://www.cidh.oas.org/Basic%20Documents/enbas4.htm#>>.

¹⁷⁴ ALLEWELDT, *supra* note 41, at 102. Richard Wilson has noted that over 300 cases in the Inter-American Commission have referred to the jurisprudence of the European Court of Human Rights. Richard Wilson, *Researching the Jurisprudence of the Inter-American Commission on Human Rights: A Litigator's Perspective*, (*visited* Nov. 13, 1998), <<http://heiwwww.unige.ch/humanrts/iachr/first.html>>. Similarly, the Inter-American Court has interpreted the American Convention in light of European human rights jurisprudence. *See, e.g.*, Advisory Opinion: The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights, Inter-Am.Ct.H.R. OC-2/82 ser. A No. 21982, arts. 74-75 (1982).

¹⁷⁵ American Convention on Human Rights, *supra* note 16, art. 22.

persons who fulfill its criteria may in no case be deported, its protection seems to be guaranteed regardless of offenses the applicant may have committed. On this point, the American Convention's protection is wider than that of the Convention on Refugees and the OAU Convention, but is consistent with the Civil and Political Covenant, the Convention Against Torture, and the European Convention.

Article 27 of the American Convention, however, creates a substantial limitation on the protection against refoulement. It indicates that States parties may derogate from Article 22 and other provisions in times of war or other public emergency that threaten the independence and security of the State party. A government faced with a massive influx of asylum seekers may very well claim that such a population movement threatens its independence or security and thus Article 27 may be used to limit Article 22(8).

3. Complaint Procedure

Article 25 of the American Convention provides that individuals have the right to recourse to a domestic court or tribunal for protection against violations of rights under the Convention. If this domestic recourse proves to be ineffective, the individual may apply to the Inter-American Commission on Human Rights.¹⁷⁶ When the Commission finds a violation of the applicant's rights under the Convention, it may publish the resolution in its annual report to the OAS General Assembly. For States parties to the American Convention which have accepted the contentious jurisdiction of the Inter-American Court of Human Rights the Commission may refer the matter to the Court.¹⁷⁷ For governments which have not ratified the American Convention, individuals may still apply to the Inter-American Commission on Human Rights with respect to the American Declaration of the Rights and Duties of Man.¹⁷⁸

¹⁷⁶ See *id.* art. 44.

¹⁷⁷ See *id.* arts. 33-73; see also NEWMAN/WEISSBRODT, *supra* note 141, at 444.

¹⁷⁸ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). See *infra*

F. The African [Banjul] Charter on Human and Peoples' Rights

Article 5 of the African Charter provides that "all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel or degrading punishment or treatment shall be prohibited."¹⁷⁹

Although the African Charter's wording differs from the provisions of the previous instruments, its content is substantially the same. Article 5 of the African Charter could, therefore, be interpreted in the same way as the European Convention, Civil and Political Covenant, and the American Convention to forbid refoulement of persons at risk of torture or other human rights violations under the African Charter.¹⁸⁰ Article 5 contains no limiting clauses and its rights are not made subject to provisions of national law.¹⁸¹

The protection from refoulement in the OAU Convention on Refugees is far more specific and clear than the general provisions of the African (Banjul) Charter. Hence, the OAU Convention on Refugees may be considered *lex specialis* in this regard, but the two treaties should be read in a consistent fashion. Although the African Charter provides for a review mechanism for individuals, that mechanism has not yet developed sufficiently to protect the rights provided in the Convention.¹⁸²

IV. ANALYSIS OF THE DIFFERENCES BETWEEN ARTICLE 3 OF THE CONVENTION AGAINST TORTURE AND THE OTHER INSTRUMENTS

This section compares the various non-refoulement provisions

notes 204-6..

¹⁷⁹ The African [Banjul] Charter on Human and Peoples' Rights, *supra* note 19. The African Charter entered into force in 1986 and has 49 States parties to date, <http://www.umn.edu/humanrts/instree/ratz1afchar.htm> on November 13, 1998.

¹⁸⁰ ALLEWELDT, *supra* note 41, at 103.

¹⁸¹ But cf. Article 27 of the African [Banjul] Charter on Human and Peoples' Rights, *supra* note 17.

¹⁸² NEWMAN/WEISSBRODT, *supra* note 141, at 465.

of the relevant human rights treaties and, where possible, seeks to provide a uniform approach to protect individuals from torture if they are threatened with forcible return, while at the same time seeking to avoid conflict between governmental obligations. The analysis focuses mainly on three principal provisions which reflect most of the diversity in dealing with the norms of non-refoulement: Article 3 of the Convention Against Torture, Article 33 of the Convention on Refugees, and Article 3 of the European Convention. The other instruments will be mentioned only where they particularly contradict or add to the other provisions. Since Article 3 of the European Convention and Article 7 of the Civil and Political Covenant contain almost the same wording and their interpretation is consistent, this section primarily discusses the European Convention as to which there is a better developed jurisprudence. This section refers to the Civil and Political Covenant only with regard to criteria that distinguish it from the European Convention. Unless otherwise noted, observations about the European Convention are equally applicable to the Civil and Political Covenant.

This section follows the same structure as the earlier parts of the article. It first compares the scope of protection, followed by the terms of refoulement, the limitations of protection, and the means of implementation. This section concludes with the rules that govern if a State is party to several treaties and a question arises as to which one applies.

A. The Scope of Protection

1. The Terms of Ill-Treatment

The principal difference between Article 3 of the Convention Against Torture and the other instruments is its limitation of protection from refoulement exclusively to cases of torture. In contrast, Article 33 of the Convention on Refugees applies to any form of persecution that is based on one of the five grounds

enumerated in Article 1(2).¹⁸³

Article 3 of the European Convention and the other provisions with the same wording, broadly prohibit torture and other inhuman or degrading treatment. Based on this provision, the European Court of Human Rights and the European Commission concluded that this provision also extends to cases in which the individual would face a real risk of being subjected to either torture or other ill-treatment contrary to Article 3 in the country where the person is to be sent. It appears, therefore, that the Convention Against Torture provides a narrower protection from non-refoulement, because the non-refoulement provisions of all of the other instruments include a broader scope of ill-treatment. The drafting committee evidently intended that narrow application of the Convention Against Torture.¹⁸⁴

The Convention Against Torture has a narrow approach which may be justified because the Convention Against Torture applies to one of the most severe forms of persecution and torture. The Convention and the Committee Against Torture have developed a very protective approach to determining whether the individual faces a "danger" of torture, which is easier to establish than either the "real risk" required by the European Court or the "well-founded fear" under the Convention on Refugees. Also, the Convention Against Torture imposes an absolute protection against refoulement in which derogations are not permitted, as contrasted with the limitations under the Convention on Refugees.

These factors require discussion in the following sections, where they can be considered and weighed against each other, so as to determine whether Article 3's restriction to cases of torture is justified as the most straight forward, and thus protective norm of non-refoulement.

¹⁸³ See *supra* Part III A. The OAU Convention has adopted the criteria of the Convention on Refugees for the determination of refugee status in an even more extended form, see *supra* at Part III C (1).

¹⁸⁴ See *supra* Part II (2).

2. Official Acts versus Private Acts

Article 1 of the Convention Against Torture provides that in order to be recognized as torture, an act must either be inflicted by, or with the consent of, a public official or by a person acting in an official capacity.¹⁸⁵ Two of the principal authors of the convention, Burgers and Danelius, justify that decision in the drafting process to include only "official" torture, by suggesting that "[i]f torture is committed without any involvement of the authorities, but as a criminal act by private persons, it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under normal conditions of the domestic legal system."¹⁸⁶

The other instruments contain a similar approach in that they generally require that the threat of "ill-treatment" should stem from the government of the country of return. In Article 1(2) of the Convention on Refugees, this approach is expressed by the requirement that, owing to his fear of persecution, the applicant must be unable or unwilling to avail him/herself of the protection of the country of return. Nonetheless, the UNHCR and most scholars have concluded, "[w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."¹⁸⁷ In *HLR v. France*, the European Commission of Human Rights adopted a similar view in finding that the risk of ill-treatment by a powerful and structured criminal organization in Colombia was sufficient to qualify under Article 3, since it was unlikely that the Colombian Government would be able to offer adequate protection.¹⁸⁸

While the Convention Against Torture places primary emphasis on official acts of torture, it also forbids torture "with the consent or acquiescence of a public official or other person acting in an official capacity." Furthermore, the non-refoulement provisions

¹⁸⁵ *Id.*

¹⁸⁶ BURGERS/DANELIUS, *supra* note 25, at 119 and 120.

¹⁸⁷ UNHCR HANDBOOK, *supra* note 76, at para. 65.

¹⁸⁸ App. No. 24573/94, Eur. H.R. Rep. 745.

generally deal with situations in which the individual will either not be protected by the Convention Against Torture in the country to which he or she is sent, or where the government cannot adequately protect against torture. In such circumstances, Articles 1 and 3 should be given a reading consistent with the broader approach of the Convention on Refugees and the European Convention to protect persons who cannot obtain protection from torture by governmental or private actors in the country where they may be sent.

In the Guidelines for Women's Asylum Claims, Professor Nancy Kelly recommended the use of the following factors for determining whether a government is unable or unwilling to protect the applicant from harm perpetrated by private actors:

1. Whether the applicant sought and was denied protection by the government;
2. Whether the governing institutions and/or governmental agents were aware of the harm to the applicant and did nothing to protect her, or
3. Whether the applicant has other reasons to believe that it would be futile to seek protection of the government.¹⁸⁹

Although originally developed for asylum claims only within the US, these criteria are consistent with the UNHCR guidelines on the protection of refugee women¹⁹⁰ and should be equally applicable to all of these instruments. In particular, the Committee Against Torture should adopt these guidelines as a second step in ascertaining protection against refoulement when a person is in danger of torture, even if the torture would be perpetrated only by private actors "with the consent or acquiescence of a public official."

¹⁸⁹ NANCY KELLY, WOMEN REFUGEES PROJECT OF CAMBRIDGE AND SOMERVILLE LEGAL SERVICES AND HARVARD IMMIGRATION AND REFUGEE PROGRAM, GUIDELINES FOR WOMEN'S ASYLUM CLAIMS 2, 37, 52 (1994) *quoted in* NEWMAN & WEISSBRODT, *supra* note 141, at 657.

¹⁹⁰ Guidelines on the Protection of Refugee Women, Office of the United Nations High Commissioner for Refugees, U.N. Doc. ES/SCP/67 (1991).

3. The Reasons for Ill-Treatment

The Convention on Refugees, the Convention Against Torture, and the European Convention differ as to whether the torture need be perpetrated for a particular reason in order to obtain protection from refoulement. Under Article 3 of the Convention Against Torture *any* person can claim protection from refoulement, if there are grounds for believing that he or she would be subjected to torture upon return without proof that the anticipated torture would be carried out for a certain purpose. Although Article 1 lists some purposes for which torture may be perpetrated, this list is not exhaustive.¹⁹¹ Likewise, the European Convention does not make it a prerequisite that the ill-treatment be inflicted for a particular reason.

In contrast, a person must be recognized as a "refugee" under Article 1(2) of the Convention on Refugees to be entitled to protection from refoulement under Article 33(1). Accordingly, the individual must establish that the anticipated persecution is for at least one of the five reasons enumerated in Article 1: race, religion, nationality, membership in a particular social group, or political opinion. Hence, proof that the applicant will face persecution, including torture, in the country of return does not suffice. Although the five grounds are so broadly drawn as to include most purposes for which persecution -- including torture -- may be committed, the restriction to these five reasons leaves gaps which may be filled by the other treaties.¹⁹²

¹⁹¹ See BURGERS AND DANIELIUS, *supra* note 25, at 118.

¹⁹² For example, in *Canada (M.E.I.) v. Ward*, a member of the Irish National Liberation Army (INLA) was denied refugee status. The INLA had ordered him to guard innocent hostages but he secured their escape when he learned that they were to be executed. The INLA confined and tortured the claimant and sentenced him to death following a court-martial held by a "kangaroo court." The claimant escaped and sought asylum in Canada. The Supreme Court of Canada determined that the claimant's fear was not based on his INLA membership, that is, of a particular social group, but that he rather felt threatened because of what he did as an individual. The decision clearly demonstrates the difference between the non-refoulement provisions of the Convention on Refugees and the Torture Convention. Under the provisions of the latter the applicant would have received protection, irrespective of the reason for which he was in danger of torture. Questionable, however, is whether the treatment the applicant faced, would have

It does not appear that one can find a consistent approach between the Convention on Refugees's limitations to certain reasons and the broader protections of the other human rights treaties against refoulement for torture. This distinction might be justified by the severe nature of the persecution at stake in the Convention Against Torture and similar provisions in other treaties. The individual should be entitled to the protection of whichever treaty regime provides the greatest safeguards against refoulement.

4. Outside the Country of Nationality or Habitual Residence

There is a relatively minor difference between the Convention Against Torture and the Convention on Refugees in regard to persons who might be sent to a country which is not their place of nationality or habitual residence. Under the Convention on Refugees, a person cannot be considered a refugee if s/he lacks a fear of persecution in his/her home country or place of habitual residence. Accordingly, a person who has a fear of persecution in a third country would be disqualified from refugee status, if s/he can return home. Under the Convention Against Torture, however, *any* person who is in danger of being subjected to torture in a country can claim protection from being sent to that country.

This difference is evidenced most clearly in the context of a request for extradition to a third country. The Convention Against Torture might provide protection against extradition of a person to a country where s/he is in danger of torture and would not focus on protections available in the individual's home country. The European Convention¹⁹³ and the Civil and Political Covenant might also provide protection in this context. Since extradition is not covered by the Convention on Refugees, however, the requirement that the individual fear persecution in his/her home country does not create

qualified as "official" torture. *Canada (M.E.I.) v. Ward*, 103 D.L.R. (4th) 1 (1993), summarized in Walter C. Long, *Escape from Wonderland: Implementing Canada's Rational Procedures to Evaluate Women's Gender-Related Asylum Claims*, 4 UCLA WOMEN'S L.J. 179 (1994).

¹⁹³ See e.g., Soering, 161 Eur. Ct. H.R. (ser. B) (1989).

any conflict.

B. The Assessment of Risk

The provisions also apply different standards regarding the level of risk that must be shown by a person in order to qualify for protection.

The Convention Against Torture requires "substantial grounds for believing that the applicant would be in danger of being subjected to torture."¹⁹⁴ As noted earlier, this test contains the subjective element of "belief" by the Committee Against Torture and the objective element that this belief must be based on "substantial grounds." The test under the Convention Against Torture appears to be very inclusive in comparison to the other instruments. First, the analysis focuses on the *danger* of torture. Hence, the applicant does not need to show substantial grounds for believing that he or she *would be subjected* to torture, but only that he or she would be *in danger* of being subjected to torture. The wording of Article 3 is, therefore, clearly less exacting than both Article 33 of the Convention on Refugees, which requires a well-founded fear of persecution, or the test of the European Court of Human Rights under Article 3 of the European Convention, which calls for a "real risk" of torture, inhuman or degrading treatment upon return.

Secondly, the Committee Against Torture has set low standards with regard to the objective evidence that must be submitted as "substantial grounds" for the Committee's belief. It appears that the main criteria would be the applicant's general credibility. The Committee has emphasized that it would be unreasonable and against the intention of Article 3 to require full proof of the truthfulness of the applicant's allegations.¹⁹⁵ It has also noted that since the primary objective of Article 3 is the prevention of torture, "even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not

¹⁹⁴ See *supra* Part II.

¹⁹⁵ See *Khan v. Canada*, Committee Against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995).

endangered."¹⁹⁶

The Convention on Refugees also uses an objective and subjective test for determining the required fear of persecution. The subjective element refers to the individual's fear of persecution. Different individuals may react to situations in quite diverse ways. Hence, the individual must actually possess a fear in order to qualify for refugee status. While the subjective criteria under Article 3 of the Convention Against Torture focuses on the Committee's belief, the Convention on Refugees takes into account the applicant's frame of mind first and determines in a second step whether the individual's fear is objectively well-founded.¹⁹⁷ Hence, the Convention on refugees requires a two-step analysis in which the individual can be denied refugee status at either stage. The Convention Against Torture is less exacting and focuses entirely on the Committee's assessment.

In some of its decisions the European Court of Human Rights appears to have adopted the strictest standard in assessing the risk of ill-treatment. Its analysis focuses solely on the "real risk of ill-treatment." In assessing the "real risk" the Court has at times inappropriately imported into its burden of proof tough refugee standards as to the existence of "persecution" without looking at reasonable fear of that persecution.¹⁹⁸ Indeed, all such imports from refugee law are not appropriate, because they stray too far from the

¹⁹⁶ *See id.*

¹⁹⁷ In *Ponniah v. Canada* (M.E.I) the Canadian Federal Court of Appeal concluded that the applicant has to establish "good grounds for fearing persecution" and defined "good grounds" as being less than a 50 per cent chance but more than a minimal or mere possibility. 68 F.T.R. 149 (1991). The United States Supreme Court, however, found in *I.N.S. v. Cardoza-Fonseca*, that the principal focus of the test of "well-founded fear" was on the applicant's subjective beliefs. Therefore, the Supreme Court concluded that as long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution; but it is enough that persecution is a reasonable possibility. 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). These differences show the scope of discretion the States parties possess in implementing the provisions of the Convention on Refugees. Nonetheless, the tests applied in these refugee decisions appear to be substantially stricter than the test of a danger of torture applied by the Committee Against Torture. *See id.* at 1228.

¹⁹⁸ *See supra* Part III. B. 3.

language of the European Convention itself.

C. Expulsion, Refoulement, and Extradition

1. Lawful Presence

The Convention Against Torture, the Convention on Refugees, and the other treaties discussed in this article deal both with individuals who have entered a country lawfully and those who have entered illegally. The term "refoulement" applies to persons who have entered the country illegally, as opposed to the terms "expulsion" or "deportation" which address lawful residents. Both Article 3 of the Convention Against Torture and Article 33(1) of the Convention on Refugees refer to "expulsion" and "refoulement" and, therefore, include lawful and illegal residents. Likewise, in *Chahal v. United Kingdom*,¹⁹⁹ the European Court of Human Rights decided that the return of the applicant, who had illegally entered the United Kingdom, would constitute a violation of Article 3 of the European Convention.

2. Rejection at the Border and on the High Seas

Professor Christian Tomuschat has suggested the following interpretation of Article 3 with regard to persons who are rejected at the border of a State:

Since the paramount objective is the protection from torture, one will have to conclude here that refoulement is to be interpreted in a broad sense as comprehending any form of State action, including rejection at the border. Article 3 [of the Convention Against Torture] proceeds from the assumption that governmental authorities surrendering a person to the authorities of another State that habitually practices torture would themselves become accomplices of the crime of torture. In that perspective, the subtle legal

¹⁹⁹ *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413.

distinction between returning someone who has already put his foot on the territory of the desired host State, and preventing another person from performing that symbolic act becomes immaterial.²⁰⁰

Precisely the same reasoning applies to the prohibition of refoulement in the Convention on Refugees and the other relevant treaties. Professor Tomuschat's approach, therefore, seems applicable for all of the instruments.

A somewhat more difficult issue arises in regard to the unusual circumstance in which persons are rejected on the high seas. Ordinarily, international law would prevent governments from stopping and searching for intended entrants in the ships of another nation on the high seas. In the wake of political and economic upheavals in Haiti, large numbers of Haitians fled their country and sought admission to the United States. Pursuant to a 1981 agreement between Haiti and the United States, the U.S. Coast Guard intercepted vessels carrying Haitians, interviewed them briefly as to their reasons for wanting to enter the U.S., and forcibly repatriated almost all of them. The interdiction agreement provided that those aliens who apparently qualified for refugee status would not be returned to Haiti. It should be noted that Haiti was the only country with which the U.S. had an interdiction agreement. On April 4, 1994, Haitian President Aristide withdrew his government's agreement to stopping Haitian boats on the high seas and President Clinton ordered that Haitians would no longer be subject to interdiction without individualized inquiry as to whether they qualified for refugee or asylum status.

In the much criticized decision of *Sale v. Haitian Centers Council*, the U.S. Supreme Court interpreted Article 33 of the Convention on Refugees to have no extraterritorial effect with regard to Haitians rejected on the high seas.²⁰¹ Professor Fitzpatrick has

²⁰⁰ Christian Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L. J. 257, 259 (1992).

²⁰¹ 509 U.S. 155, 113 S. Ct. 2549, 125 L.E.2d 128 (1993). For criticism, see, e.g., Andrew G. Pizor, *Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 FORDHAM INT'L L. J. 1062 (1994).

criticized that Supreme Court decision and noted that no other nation appears to have so far used interdiction on the high seas in order to stem a flow of asylum seekers.²⁰² The case was brought to the Inter-American Commission on Human Rights, which noted that Article 33 of the Convention on Refugees is not subject to geographical limitations.²⁰³ The Commission found that the practice of the United States violated Article 27 of the American Declaration of the Rights and Duties of Man,²⁰⁴ which provides for the right to seek and obtain asylum in foreign territory.²⁰⁵

3. Indirect Refoulement

In *Motumbo v. Switzerland*,²⁰⁶ the Committee Against Torture ruled that the principle of non-refoulement also includes the refoulement of persons to third countries in which they would run a real risk of being returned to a country where they would be in danger of being subjected to torture. This view should also apply to Article 3 of the European Convention,²⁰⁷ the Convention on Refugees, and

²⁰² Fitzpatrick, *supra* note 85.

²⁰³ The Haitian Centre for Human Rights v. United States, Case 10.675, Inter-Am. C.H.R. 51/95, OEA/ser.L/V./II.95 doc. 7 rev. at 550 (1997).

²⁰⁴ See O.A.S. Res. XXX, *supra* note 178, art. 27.

²⁰⁵ The Commission did not find any violations of Articles 5 (2) or 22 (8) of the American Convention, because the United States has not ratified that treaty. The Commission, however, also found violations of "the right to life," "the right to liberty," "the right to security of the person" pursuant to Article 1, "the right to equality before the law" as provided by Article II, and "the right to resort to the courts" pursuant to Article 18 of the American Declaration. The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-Am. C.H.R. 51/95, OEA/Ser.L/V./II.95doc.7rev. at 550, para. 183 (1997) *supra* note 203, para. 183 *et seq.*

²⁰⁶ See Communication No. 13/1993, U.N. Doc A/49/44, at 45 (1994).

²⁰⁷ Alleweldt has indicated that this view should also apply to Article 3 of the European Convention. He suggested, however, that the prohibition of indirect refoulement should only apply with regard to those countries that are not States parties of the European Convention. See ALLEWELDT *supra* note 41, at 64. This qualification should probably not apply with regard to other treaties in a global context. Perhaps, Alleweldt was assuming that European countries would not ordinarily violate their treaty responsibilities. Such an assumption may not apply globally and even in Europe; Turkey has a practice of returning Iranians even

other relevant treaties.

4. Extradition

Except for the Convention on Refugees, most of the instruments include protection from extradition if the applicant faces ill-treatment in the requesting countries. Article 3 of the Convention Against Torture explicitly forbids extradition, as well as expulsion and refoulement. The jurisprudence under the European Convention and Civil and Political Covenant also includes extradition.²⁰⁸ Since the Convention on Refugees does not apply to extradition, it is particularly important that States parties to the Civil and Political Covenant are forbidden to engage in refoulement regarding extradition cases. Hence, even if governments are bound only by the non-refoulement provisions of the Convention on Refugees and the Covenant, they may not forcibly return a person at risk of torture in extradition cases.

Since many countries are bound by extradition treaties, their obligations under those treaties may conflict with their responsibilities under the non-refoulement provisions of the Convention Against Torture, the European Convention, and the Civil and Political Covenant. On this issue, Professor John Dugard and Professor Christine Van den Wyngaert suggest that extradition treaties must be "trumped" in favor of human rights norms because of a "two-tier system of legal obligations that recognizes the higher status of multilateral human rights norms arising from notions of *jus cogens*, and the superiority of multilateral human rights conventions that form part of the *ordre public* of the international community or of a particular region."²⁰⁹

though they may be killed or tortured in Iran.

²⁰⁸ See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989); *Joseph Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

²⁰⁹ John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 195 (1998). Burgers and Danelius suggest that governments when entering into such extradition treaties after ratifying the Convention Against Torture clearly must refrain from assuming obligations that would be contrary to the objectives of the convention. Burgers and Danelius

Professor Kälin suggested an alternative approach for UN treaties, with a similar result: Article 103 of the UN Charter provides for the supremacy of the UN Charter over other treaties.²¹⁰ According to Article 55(3) and 56, the Member States are further obliged to respect and observe the protection of human rights and fundamental freedoms. Every request for extradition that contradicts the non-refoulement provision is, therefore, also in conflict with the Member States' obligations under Articles 55 and 56 of the UN Charter. Hence, the principle of non-refoulement must prevail.²¹¹

D. Limitations of Protection

The refugee treaties differ considerably from the other human rights treaties to the extent that they allow limitations on the principle of refoulement. The Convention Against Torture guarantees the principle of non-refoulement as an absolute right granted to any person in danger of being subjected to torture.²¹² Likewise, Article 3 of the European Convention is absolute, and the European Court of Human Rights has expressly noted that the restriction of the Convention on Refugees should not be adopted for the purposes of the European Convention.²¹³ The European Convention and the Civil and Political Covenant contain even broader guarantees than the Convention Against Torture because they apply not only to torture,

further contend that even previously ratified extradition treaties may well be construed to have been supplemented by the non-refoulement exception provided in Article 3. In addition, however, a reservation or declaration would be permissible to Article 3 for a State that considers itself not to be bound by the prohibition of extradition in the Convention Against Torture, with regard to previously concluded extradition treaties. *See supra* note 25, at 126, 127.

²¹⁰ U.N. CHARTER, art 103.

²¹¹ *See* KÄLIN, *supra* note 9, at 58. Kälin also argues that the observance of fundamental human rights has achieved the status of *jus cogens*. Since fundamental human rights include the prohibition of torture and inhuman or degrading treatment, non-refoulement must prevail. *Id.* It appears difficult, however, to establish the precise content of *jus cogens* in this regard.

²¹² *See supra* Part II (D).

²¹³ *See supra* Part III B (4).

but also to inhuman or degrading treatment.

The Convention on Refugees, in contrast, provides under Articles 1F and 33(2) a dual system that may prevent some persons who have a well-founded fear of persecution from obtaining protection from refoulement.²¹⁴ It appears that under the provisions of the Convention Against Torture and the European Convention even a war criminal would be safeguarded from forcible return to a country where he would be in danger of being subjected to torture. A war criminal would be denied protection under the Convention on Refugees. The UN High Commissioner for Refugees, however, suggests with regard to Article 1F:

In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, *e.g.* persecution endangering his life or freedom, a crime must be very grave to exclude him.²¹⁵

As previously noted, torture is such a severe form of persecution that expulsion to a country where the applicant would be in danger of being tortured cannot be justified under any of these instruments.²¹⁶ This result, however, can also be achieved using the balancing test proposed by the UNHCR. One might argue that no crime is serious enough to justify forcibly returning a person to a country where he or she would be in danger of torture or death.

²¹⁴ See *supra* Part III A (3).

²¹⁵ UNHCR HANDBOOK, *supra* note 76, at para. 156. While the UNHCR spoke only about a balancing approach to Article 1F, the same approach should apply to non-refoulement under Article 33(2). Article 33's prohibition of refoulement is at least as significant a treaty obligation as the recognition of refugee status under Article 1A.

²¹⁶ See *supra* Part II (D).

E. Implementation

Seemingly common throughout the treaties is the need for fuller implementation in national law, including legislative measures and procedures for application. Some of the instruments also provide for an international body to review petitions by individuals.

The Convention on Refugees, in particular, requires national implementation for two reasons. First, the Convention on Refugees established the primary source of domestic asylum law. Second, although the UNHCR can urge compliance in some cases, there does not exist an international body to which individuals can routinely complain and which can thereby regularly supervise the implementation of the treaty. It may be that the Inter-American Court and the Human Rights Committee may be used as mechanisms for implementation of the provisions of the Convention on Refugees and its Protocol.

F. The Relationship between the Different Instruments

In cases where one State is party to several treaties, the question may arise as to which non-refoulement provisions should be applied. There are many similarities between the various non-refoulement provisions and relevant interpretations. Hence, a similar result may be achieved under several of the treaties. Indeed, wherever possible, the treaties with the same basic objective should be read consistently with one another. In cases where a different result is mandated, States should implement the treaty which gives the greatest human rights protection to the individual from refoulement.²¹⁷

²¹⁷ Professor Kälén suggests that -- as with any other conflict of law, the principles *lex posterior derogat legi priori* and *lex specialis derogat legi generali* should answer this question. KÄLIN, *supra* note 9 at 58. As a general tendency the later agreements are more protective than the earlier ones. Since these treaties are intended to protect the human rights of individuals, it is more important to give the maximum protection available rather than necessarily to adhere to the *lex posterior* and *lex specialis* approaches.

V. CONCLUSION AND CRITIQUE OF THE GENERAL COMMENT TO
ARTICLE 3 ADOPTED BY THE COMMITTEE AGAINST TORTURE IN
NOVEMBER 1997

The principle of non-refoulement protects persons from involuntary return to countries where they might face torture or other inhuman or degrading treatment. The Convention Against Torture, Convention on Refugees, European Convention, Civil and Political Covenant, and the other treaties discussed in this article incorporate that basic protection, some on a more advanced level than others. A uniform approach of interpretation seems possible on many, but not all, points.

Most of the treaties protect against torture by private actors if the government cannot or will not provide for protection. While the Convention Against Torture might be read to exclude torture by private actors, Article 3 should be construed consistently with the other human rights treaties to protect against refoulement in a country whose government is unable or unwilling to protect against torture, even by private actors.

The various treaties seem to apply different burdens of proof for obtaining relief from refoulement. The different formulations – “danger of torture,” “well-founded fear of persecution,” and “real risk of ill-treatment” – do not necessarily require different levels of proof. They are, however, apparently applied differently by their respective institutions. As a general rule, States parties and international bodies should adopt the following approach: the more severe the ill-treatment the applicant faces, the lower the required degree of probability that the applicant will actually be subjected to such ill-treatment. Hence, if the applicant faces torture or his life is otherwise threatened, then the decision-maker should not require as exacting a standard of proof to protect the individual from such egregious harm as when the individual faces a risk of a less serious injury.

Although most of the instruments do not explicitly refer to

rejection at the border, the uniform interpretation of all non-refoulement provision should be broad, including not only the refoulement of persons who have already entered the territory of the receiving country, but also those persons still at the border or even those interdicted at sea before they reach the shore.

On November 21, 1997, its nineteenth session, the Committee Against Torture adopted a "General Comment on the Implementation of Article 3 in the context of Article 22 of the Convention Against Torture."²¹⁸ The Committee had never previously issued a general

²¹⁸ Convention Against Torture, *supra* note 10, arts. 3 & 22.

In view of the requirements of article 22, paragraph 4, of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that the Committee Against Torture 'shall consider communications received under article 22 in the light of all information made available to it by or on behalf of the individual and by the State Party concerned',

In view of the need arising as a consequence of the application of rule 111, paragraph 3, of the rules of procedure of the Committee (CAT/C/3/Rev.2), and

In view of the need for guidelines for the implementation of article 3 under the procedure foreseen in article 22 of the Convention,

The Committee Against Torture, at its nineteenth session, 317th meeting held on 21 November 1997, adopted the following General Comment for the guidance of States parties and authors of communications:

1. Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.
2. The Committee is of the view that the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.
3. Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, 'a consistent pattern of gross, flagrant or mass violations of human rights' refers only to violations by or at the instigation of or with the

comment interpreting any of the Convention Against Torture provisions.

Considering it is the first comment issued on Article 3, the comment appears surprisingly brief on some points. It does not, for example, contain any definition of the different terms "expulsion, return (refoulement) and extradition."²¹⁹ Since the duties of States parties to refrain from extradition under Article 3 may often conflict with duties under extradition treaties, the inclusion of some guiding principles as to which rule must prevail would have been beneficial. Likewise, a clarification that Article 3 also applies to rejection at the border or on the high seas might have avoided conflicts of the same kind as have arisen under the Convention on Refugees.²²⁰ As previously decided in *Motumbo v. Switzerland*,²²¹ the Committee affirms the important interpretive expansion that Article 3 also applies to indirect refoulement: the expulsion of a person to a country, where he would be at risk of being returned to a country where he would face the danger of torture.²²² With respect to the level of risk involved, the Committee provides that, while the risk of torture "must go beyond mere theory or suspicion, it does not have to meet the test of being highly probable."²²³ In terms of the applicant's credibility, it appears that in its decisions the Committee has been more precise and more protective of the individual than in its General Comment to Article 3.

Furthermore, it may generally be observed that the Committee Against Torture appears to have interpreted Article 3 without considering the need to avoid unnecessary conflict with the relevant non-refoulement provisions of the other treaties. As discussed above,

consent or acquiescence of a public official or other person acting in an official capacity.

The remaining paragraphs of the General Comment, that is points 4-9, are precisely the same as points 12-17 of the Proposed Revision of the General Comment set forth in the next part of this article.

²¹⁹ See *supra* Part II (A).

²²⁰ See *supra* Part IV (c) (2).

²²¹ See Communication No. 13/1993, U.N. Doc. A/49/49 at 45 (1994).

²²² In re H-M-V, Interim Decision (BIA) 3365, at para. 3, 1998 WL 611753.

²²³ *Id.* para. 6.

the Committee should attempt to interpret Article 3 of the Convention Against Torture in the light of the various non-refoulement provisions, so as to avoid imposing potentially contradictory obligations on governments. At the same time it should provide as much protection from refoulement to potential victims of torture. Accordingly, the following section of the article contains a proposal for a revised General Comment to Article 3, which the Committee Against Torture is urged to consider. Where possible, the wording of the previous General Comment and the individual decisions of the Committee Against Torture have been incorporated in the proposal for a revised General Comment, as well as, where applicable, guidelines for interpretation that have been developed for other non-refoulement provisions.

VI. PROPOSED REVISED GENERAL COMMENT TO ARTICLE 3 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

1. Article 3 provides for protection from refoulement to a State in cases where there are substantial grounds for believing that the person concerned would be in danger of being subjected to torture.
2. Article 3(1) refers to "expulsion," "return" (refoulement) and "extradition." The intent of these three terms is to cover all possible measures by which a person may be physically transferred to another country where he or she faces danger of torture. "Expulsion" is the forced transfer of persons who have legally entered the territory of the receiving State. "Return" may refer to persons who have unlawfully entered the territory of the receiving State. Since the primary objective of this convention is to prevent torture and because Article 3 is intended to cover all possible ways by which a person can be sent to a country where she or he is in danger of being subjected to torture, Article 3 should be broadly interpreted as prohibiting the rejection of persons at its borders and on the high seas. The provision likewise includes the refoulement of a person to a third country where he or

she would be in danger of being expelled, returned, or extradited to a country where he or she would be in danger of being subjected to torture.²²⁴

3. The inclusion of "extradition" may give rise to conflicts between Article 3 and obligations that the States parties have assumed under extradition treaties. States are clearly required to refrain from entering conflicting obligations after their ratification of the Convention Against Torture. Obligations, which the States parties have assumed under extradition treaties prior to their ratification of this Convention, should be interpreted as being supplemented by the non-refoulement exception provided in Article 3.

4. According to Article 3, no State shall expel, return, or extradite a person to another State. Article 3 applies to all States and does not distinguish between States as to which the individual may be a national or may have been in habitual residence, and to any other State. Article 3 likewise applies to all States regardless of whether a State to which a person may be returned is party to this Convention.

5. There must be "substantial grounds for believing" that the applicant would be in danger of being subjected to torture upon return; the test contains both a subjective and an objective element. The subjective element refers to the Committee's belief about the existence of such danger. The Committee's belief must be objectively supported by substantial grounds that justify that belief.

6. Article 3(2) provides that the Committee should determine whether there are substantial grounds by taking "into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

²²⁴ Mutombo v. Switzerland, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994).

7. In taking into account all relevant considerations, the Committee should assess the applicant's personal circumstances, *e.g.* his or her background, influence, wealth, and outspokenness. The applicant need not show that he or she would be tortured by reason of any particular belief, race, religion, nationality, membership of a particular social group, political opinion, or other specific characteristic. Nonetheless, these characteristics may help to demonstrate the circumstances that put him/her in danger of torture.

8. In addition to the applicant's personal circumstances the general situation in the country of return must be considered. According to Article 3(2) the general situation includes the existence of a consistent pattern of gross, flagrant or mass violations of human rights:

The aim, however, is to establish whether the individual at risk would be personally at risk of being subjected to torture. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.²²⁵

9. Article 3 does not place the burden of proof on the individual who seeks relief from refoulement. The wording of the provision refers solely to the belief of and factors that must be considered by the Committee Against Torture or the authorities of States parties. The

²²⁵ *Id.*

individual merely has the burden of presenting sufficient information from which the Committee or the authorities can establish a belief that there are substantial grounds for a danger of torture. While the applicant's information must generally appear credible, complete accuracy is not expected. It is not uncommon for victims of torture to be reluctant to provide information about their experiences of torture. They may, for example, need to be interviewed several times in order for the interviewer to develop sufficient rapport to encourage the victim to tell what happened to him or her. Similarly, torture victims may be reluctant to come forward until they are at great risk of refoulement, for example, until a deportation order has been issued. Hence, late allegations and inconsistencies should not raise doubts about the general veracity of the individual's claim. Accordingly, "even if there could be some doubts about the facts as adduced by an applicant and the Committee Against Torture must ensure that his security is not endangered."²²⁶

10. While Article 1 of the Convention Against Torture places primary emphasis on official acts of torture, it also forbids torture "with the consent or acquiescence of a public official or other person acting in an official capacity." Articles 1 and 3 should forbid refoulement of persons who cannot obtain protection from torture by governmental or private actors in the country where they may be sent, because such lack of protection from torture constitutes acquiescence of a public official. In order to assess whether an individual qualifies for protection under Article 3 in such a situation, the following factors should be applied: (a) whether the applicant sought and was denied protection by the government; (b) whether the government institutions were aware of the danger of torture and did nothing to protect that person; and © whether the individual has other reason to believe that it would be futile to seek protection of the government from torture.

²²⁶ Tahir Hussain Khan v. Canada, Committee against Torture, Communication No. 15.1994, U.N. Doc. A/50/44 at 46 (1995).

11. The prohibition from refoulement under Article 3 is absolute. States parties may not refer to national security or criminal conduct of the individual to deny that individual protection from refoulement. The prohibition of forcible return (refoulement) of a person in danger of torture is such a fundamental principle, there cannot be any limitation or derogation.

Admissibility²²⁷

12. The Committee is of the opinion that it is the responsibility of the author to establish a *prima facie* case for the purpose of admissibility of his or her communication under Article 22 of the Convention by fulfilling each of the requirements of rule 107 of the rules of procedure of the Committee.

Merits

13. With respect to the application of Article 3 of the Convention to the merits of a case, 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.

14. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.²²⁸

²²⁷ The remaining paragraphs reproduce the Committee Against Torture's General Comment. See *supra* notes 19, 218; see also *supra* text accompanying note 213.

²²⁸ This paragraph of the General Comment would be improved if it is reformulated as: Article 3 only requires that the Committee Against Torture or the authorities of a State Party find that there are substantial grounds for believing that a person would be in *danger* of being subjected to torture. Future events can only be assessed in terms of probability. The Committee Against Torture does not

15. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter.

16. The following information, while not exhaustive, would be pertinent:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see article 3, par. 2)?;

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?;

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had aftereffects?;

(d) Has the situation referred to in (a) above changed? Has the internal situation with respect to human rights been altered?;

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?;

(f) Is there any evidence as to the credibility of the author?;

(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?

17. Bearing in mind that the Committee Against Torture is not an

assess the probability that an individual will be tortured, but only whether the person is in danger of being tortured. The more severe the ill-treatment the applicant faces, the lower the required degree of probability that the applicant will be in danger of such ill-treatment. Since torture is a very severe form of ill-treatment, the probability of the danger of torture need only be relatively low in order to qualify for relief under Article 3.

appellate, a quasi-judicial, or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only, it follows that:

(a) Considerable weight will be given, in exercising the Committee's jurisdiction pursuant to Article 3 of the Convention, to findings of fact that are made by organs of the State party concerned; but

(b) The Committee is not bound by such findings and instead has the power, provided by Article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

