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ECRE/ELENA LEGAL NOTE ON ASYLUM AND THE UN TREATY SYSTEM

SECURING AND ADVANCING ACCESS TO ASYLUM THROUGH THE INDIVIDUAL COMMUNICATIONS PROCEDURES OF THE UN TREATY BODIES

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I. INTRODUCTION

The principle of non-refoulement is a core principle of international human rights and refugee law, protecting individuals from exposure to acts of persecution and serious human rights violations. Enshrined in Article 33 of the Geneva Convention Relating to the Status of Refugees,[1] and expressed implicitly or explicitly in numerous universal and regional human rights instruments,[2] the principle prohibits states from returning individuals in any manner whatsoever to countries where they will face treatment of such nature and ensures that all claims alleging such risks will be thoroughly assessed by states.

The note aims to analyse how access to asylum can be advanced via international legal avenues, especially by focusing on **the prohibition of *refoulement* as an imperative element of an accessible, effective and fair asylum procedure**. To this end, it will explore the meaning of the principle of non-refoulement under international human rights law and, in particular under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of People with Disabilities (CRPD), the International Convention for the Protection of All Persons from Enforced Disappearances (CED) and the International Convention on the Elimination of all forms of Racial Discrimination (CERD).[3]

The note focuses on the standards that the monitoring body[4] responsible for the implementation of each Treaty has developed in their jurisprudence,[5] as well as through their General Comments and Recommendations. The interpretation of Treaties and general standards ensured by the UN Treaty bodies may only be limited by the level of ratification of each treaty or any reservations made by states.[6] An analysis of these standards can therefore assist in applying them in national litigation, as well as in invoking them in domestic proceedings to ensure compliance with international law both in policy and decision-making. The analysis has not included elements of admissibility, except in cases where the decisions[7] adopted include important clarifications on *non-refoulement*; for more information on admissibility issues before the UN treaty bodies you can consult the relevant modules of the International Commission of Jurists.[8]

The content of this note is the result of desk research conducted at the ECRE Secretariat using the jurisprudence search engine of the Office of the High Commissioner for Human Rights (OHCHR),[9] and

1. UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, September 2011.
2. See, inter alia, Article 5 and Article 14, UN General Assembly, Universal Declaration on Human Rights, 10 December 1948, 217 A (III); Article 3, Council of Europe, European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5; Article 5 (2) and Article 22 (7) and (8), Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969; Article 5 and Article 12, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
3. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85; Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106; UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
4. The respective monitoring bodies for each treaty are: The Human Rights Committee (CCPR), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on the Rights of the Child (CRC), Committee on the Rights of Persons with Disabilities (CRPD), the Committee on Enforced Disappearances (CED) and the Committee on the Elimination of Racial Discrimination (CERD).
5. The jurisprudence refers to the adjudication of individual cases through individual communications procedure to each monitoring body, as established under the following instruments: CCPR - Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR), CEDAW - the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW), CRPD - the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), CRC - the Optional Protocol (on a communications procedure) to the Convention on the Rights of the Child (OPIC-CRC). For the Committee against Torture, the Committee on Enforced Disappearances and the Committee on the Elimination of all forms of Racial Discrimination, the procedure for individual communications can be found in Articles 22, 31 and Article 14 of the respective Conventions. The terms "jurisprudence" and "case law" are used interchangeably throughout the text.
6. You can consult the status of ratification or accession for each state/instrument at the UN Treaty Body Database. For information on declarations and reservations to the instruments, you can consult the United Nations Treaty Collection.
7. For the purpose of this note, the term "decisions" will be used referring to the case law of every treaty body.
8. International Commission of Jurists, Redress Through International Human Rights Bodies and Mechanisms, FAIR Project, April 2018.
9. OHCHR, Jurisprudence Database.

academic publications providing extensive analysis on UN jurisprudence.[10] This note also capitalises on the experience and helpful contributions of the national coordinators of the European Legal Network on Asylum (ELENA).[11] The case law included in this note is not exhaustive; cases are selected to illustrate approaches and issues and do not aim to present an exhaustive overview of the communications decided by the Committees.

II. THE PRINCIPLE OF NON-REFOULEMENT IN THE UN HUMAN RIGHTS SYSTEM

1. ACCESS TO ASYLUM AND THE PRINCIPLE OF NON-REFOULEMENT

As construed in Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees (the Geneva Convention),[12] the principle precludes states from returning refugees in any manner whatsoever to territories where they would face risk of persecution on the basis of any of the grounds referred to in the Convention. However, the prohibition of *refoulement* does not extend to situations where the refugee is considered to be a danger to the security of the host state. It is important to note that the recognition and granting of refugee status is a declaratory act.[13]

Non-refoulement under other instruments of international law offers a broader form of protection extending beyond the *stricto sensu* prohibition of the Geneva Convention and is linked with the prohibition of exposure of individuals to serious human rights violations, regardless of whether these are committed on the basis of specific grounds, or persecution, and irrespective of national security considerations. An example of the broader scope of non-refoulement under international law can be found in the jurisprudence of the Committee on Civil and Political Rights (CCPR), which has condemned the strict focus of national authorities on the applicability of the Geneva Convention and their inadequate consideration of "*the specific rights of the author under the Covenant and such other instruments as the Convention Against Torture.*"[14] It should be noted that the obligation that the principle imposes on states is absolute: it cannot be derogated from[15] and is not limited to refugees but applies to everyone under the jurisdiction of the state.[16]

The principle of *non-refoulement* under international human rights law prohibits States from expelling, deporting, returning,[17] or otherwise transferring an individual to another country when there are substantial grounds to believe that they are at real risk of being subject to a serious violation of human rights.[18] **Although asylum, and the possibility of accessing it, is not explicitly provided in the UN treaties, it may stem from States parties positive and negative obligations under the principle of *non-refoulement*.** Not all UN treaties contain explicit *non-refoulement* provisions but, as it will be analysed in the following section, the principle is implied in the prohibition of torture, and cruel or inhuman treatment or punishment, as well as the general requirement for effective respect for the other rights enshrined in those treaties.

10. De Weck Fanny, Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT, Brill Nijhoff, Leiden - Boston, 07 Oct 2016; Wouters Kees, International Legal Standards for the Protection from Refoulement, Intersentia, April 2009; Çalı, B., Costello, C., & Cunningham, S. (2020). Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies. German Law Journal, 21(3), 355-384.
11. You can find more information on the ELENA Network here.
12. See *supra*, note 1.
13. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, para. 28.
14. CCPR, Hamida v. Canada, Communication No. 1544/2007, 18 March 2010, 8.5.
15. Including in the context of the fight against terrorism or during wartime: CAT, Agiza v. Sweden, Communication No. 233/2003, 20 May 2005; CAT, Adel Tebourski v. France, Communication No. 300/2006, 1 May 2007.
16. UN High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 20.
17. For the purposes of this analysis, the term "return" will be used throughout the document to describe situations of forced international movement by way of expulsion, extradition, removal, or any other form of state action compelling a person to leave the territory, unless the text of a Treaty Body's decision is cited verbatim and uses different terminology.
18. See *supra*, note 16, para. 7; See also, Article 2, United Nations, Draft articles on the expulsion of aliens, with commentaries, 2014.

That said, it is important to note that the right to asylum is not entirely absent from the international legal order established by the United Nations as such, nor is it only codified in the 1951 Geneva Convention: it is also enshrined in Article 14 of the 1948 Universal Declaration of Human Rights.[19] The importance of the latter has been underlined by the Working Group on Arbitrary Detention on multiple occasions.[20] The Committee Against Torture links an examination of Article 3 CAT with the question of "[…] whether the "State party has ensured that the complainant[21] facing deportation from the territory under its jurisdiction, control or authority has had access to all legal and/or administrative guarantees and safeguards provided by law […]," in order to assess claims of ill-treatment in the country of origin.[22] The Committee on the Rights of the Child (CRC) has explicitly connected access to territory with the protection against refoulement guaranteed under Article 37 of the CRC.[23] The CEDAW has equally addressed the issue of non-refoulement in connection with the right of women to "have access to asylum procedures without discrimination or any preconditions", as well as their right to be informed on "the status of the determination process and how to gain access to it".[24]

Therefore, the consideration of asylum related cases by the treaty bodies and the protection they aim to ensure is broader than the one that international refugee law would permit: *non-refoulement* applies to everyone, including to people excluded from refugee status recognition, derogations are not permissible and the harm that individuals are protected from is linked to risks stemming from serious human rights violations, rather than specifically defined persecution acts and grounds. As it will be discussed below, the protection must be effective in that it should not be theoretical or illusory. In addition, the thematic scope and mandate of some of these instruments (e.g., women, children, disability, or race) aim to ensure "enhanced" forms of access to specialised procedures of protection against *refoulement* on the basis of these specific characteristics or vulnerabilities.

2. THE LEGAL BASIS AND THE QUALIFICATION OF HARM FOR NON-REFOULEMENT CLAIMS IN THE UN TREATIES

International Covenant on Civil and Political Rights – ICCPR

The ICCPR's non-*refoulement* provisions under Articles 6 and 7 protect the right to life and prohibit torture and inhuman and degrading treatment or punishment respectively. Exposure to "irreparable harm" in the meaning of those two articles bars States parties from returning persons to a place where that harm might materialise, whether in the country of return or in a third country they may be subsequently removed to (indirect or chain *refoulement*).[25] Although the notion of irreparable harm is not mentioned in the articles *per* se, it is crucial in the Committee's jurisprudence underlining the level of severity that will lead to a finding of a breach of these articles. Both articles apply to all individuals under the jurisdiction of a State party in a variety of situations.[26]

In the asylum context, the General Comment no. 36 on the right to life under **Article 6** clarified the latter's connection with non-refoulement obligations, which emanate from the duty to respect and ensure the right to life, and confirmed the wider scope of protection, which is not exclusively linked to specific grounds of persecution but can extend to "aliens not entitled to refugee status."[27] The assessment of protection needs will consider the existence of a *personal* risk, public or private actors of harm, as well as protection alternatives and effective assurances. Article 6 covers situations where there is a threat to the person's life, regardless of the likelihood of torture or inhuman treatment; the threat to a person's life may be associated with extreme violence in the country of return or, in the case of the death penalty, an arbitrary deprivation of life.[28] Although the death penalty is not prohibited by the Covenant, the strictest possible limitations are to be

19. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
20. Among others, see Human Rights Council, Working Group on Arbitrary Detention (WGAD), Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, para. 9; WGAD, Preliminary Findings from its visit to Greece (2 - 13 December 2019); WGAD, Opinion No. 22/2020 concerning Saman Ahmed Hamad (Hungary), 87th session, 27 April–1 May 2020, para. 75.
21. Some Committees use the term complainant, while others refer to the author of the communication; for the purposes of this note, the terms applicant, complainant and author are used interchangeably.
22. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 49 (d).
23. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019, 14.4.
24. CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, paras. 45 and 50 (b).
25. CCPR, General Comment no. 31 on the Nature of the General Legal Obligation Imposed on States parties to the Covenant, para. 12.
26. ICCPR, Article 2 (1).
27. CCPR, General Comment no. 36 on the Right to Life, 3 September 2019, paras. 30 and 31.
28. *Idem*, paras. 4 - 7.

applied in the States parties where it is allowed;[29] serious flaws in a procedure imposing capital punishment,[30] or the abolition of the death penalty by the sending State party,[31] can engage Article 6 in return cases.

The relevance of **Article 7** in *refoulement* cases is self-evident as the article contains a straightforward prohibition of torture and inhuman and degrading treatment or punishment. According to General Comment no. 20, States parties are prohibited from returning an individual to a country where they might be subjected to this treatment or punishment.[32] The obligation, however, is not limited to merely prohibiting this treatment but States parties are required to take all appropriate measures to ensure the prevention of acts that are prohibited under this article,[33] including putting in place a legal framework that will allow access to effective forms of remedy and redress to victims of such treatment.[34]

The treatment itself is not defined by the Covenant or the Committee but it will depend on its nature, purpose and severity, encompassing both physical pain and mental suffering,[35] and on whether it will reach the threshold of "irreparable", including by association with the general human rights situation in the place of return.[36] The CCPR has confirmed this interpretation in its jurisprudence,[37] finding violations on account of, *inter alia*, religion-related ill-treatment,[38] ethnicity,[39] political activities,[40] destitution or extremely precarious living conditions,[41] arbitrary or cruel manner of execution,[42] gender-related risks,[43] ill-treatment of terrorism-related criminal suspects,[44] sexual orientation,[45] and draft evasion.[46] In the recent case of *Ioane Teitiota v. New Zealand*, the Committee found that the consequences of climate change "may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states".[47]

The relationship between Articles 6 and 7

It is possible that situations that give rise to non-refoulement obligations will include both a threat to life and a risk of torture, in which case the CCPR will examine both articles together, often in a manner that does not separate the two provisions.[48] The Committee's reasoning does not usually clarify why the two articles are considered together but it routinely refers to paragraph 12 of General Comment no. 31,[49] where the articles

29. *Idem*, para. 5.
30. *Idem*, para. 42.
31. *Idem*, para. 34.
32. CCPR, General Comment no. 20 on Article 7, 10 March 1992, para. 9.
33. *Idem*, para. 8.
34. *Idem*, para. 14.
35. *Idem*, paras. 4 and 5.
36. See *supra*, note 27.
37. See among others, CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.3; CCPR, Z. v. Australia, Communication no. 2049/2011, 18 July 2014, 9.3; CCPR, S.F. v. Denmark, Communication No. 2494/2014, 14 March 2019; CCPR, F.A. v. Russia, Communication No. 2189/2012, 27 July 2018, 9.3; CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017, 8.3.
38. CCPR, C. v. Australia, Communication no. 900/1999, 28 October 2002; CCPR, K.H. v. Denmark, Communication No. 2423/2014, 16 July 2018.
39. CCPR, Rasappu v. Denmark, Communication no. 2258/2013, 4 November 2015; CCPR, Pillai v. Canada, Communication no. 1763/2008, 25 March 2011.
40. CCPR, X. v. Denmark, Communication no. 2389/2014, 22 July 2015; CCPR, Mohammed Alzery v. Sweden, Communication No. 1416/2005, 25 October 2016.
41. CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017; CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016; CCPR, Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark, Communication no. 2409/2014, 29 March 2016; CCPR, Jasin v. Denmark, Communication No. 2360/2014, 22 July 2015.
42. CCPR, Merhdad Mohammad Jamshidian v. Belarus, Communication No. 2471/2014, 8 November 2017; CCPR, Kwok v. Australia, Communication No. 1442/2005, 23 October 2009; CCPR, Judge v. Canada, Communication no. 829/1998, 5 August 2003; CCPR, NG v. Canada, Communication no. 469/1991, 5 November 1993.
43. CCPR , Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015; CCPR, Kaba v. Canada, Communication no. 1465/2006, 25 March 2010.
44. CCPR, Merhdad Mohammad Jamshidian v. Belarus, Communication No. 2471/2014, 8 November 2017; CCPR, Ali Aarass v. Spain, Communication No. 2008/2010, 21 July 2014;
45. CCPR, M.I. v. Sweden, Communication no. 2149/2012, 25 July 2013.
46. CCPR, X. V. Denmark, Communication No. 2007/2010, 26 March 2014.
47. CCPR, Ioane Teitiota v. New Zealand, Communication no. 2728/2016, 24 October 2019, 9.11.
48. CCPR, S.F. v. Denmark, Communication No. 2494/2014, 14 March 2019; CCPR, K.H. v. Denmark, Communication No. 2423/2014, 16 July 2018; CCPR, H.A. v. Denmark, Communication No. 2328/2014, 9 July 2018; CCPR, Mansour Ahani v. Canada, Communication No. 1051/2002, 29 March 2004.
49. See *supra*, note 25.

are jointly discussed. It does not appear, however, that these two articles are never considered separately.[50]

In the same line, a violation of both articles has been found on the basis of separate grounds following a specific reasoning for each article: *inter alia*, in *Merhdad Mohammad Jamshidian v. Belarus,*[51] a case of expulsion to Iran, the Committee concluded that Article 6 would be violated on account of arbitrary execution (para. 9.4), while Article 7 was triggered by the risk of torture in detention for individuals involved in national security cases (para. 9.5).

Convention against Torture – CAT

The CAT is the only UN Treaty specifically created to prevent torture and its **Article 3** explicitly prohibits refoulement when a risk of torture exists, whether in the country to which the person is being expelled or any other country they may be subsequently removed to.[52] General comment no. 4 extensively elaborates on the implementation of this Article and provides a clear guidance on the assessment of refoulement claims.[53] As it will be discussed in more detail in the next sections, the Committee against Torture consistently refers to the standards contained in this Comment when examining individual communications of refoulement claims.[54]

The definition of torture according to Article 1 of the Convention is constructed on the premise of intent, in the meaning that the act of physical pain or mental suffering should be inflicted on purpose; if the act is perpetrated by non-private actors, there should be an element of consent or acquiescence on behalf of the state, otherwise the treatment will fall outside the scope of Article 3.[55] The element of discrimination is also very important as an act may be classified as torture when conducted for "any reason based on discrimination of any kind", according to the wording of Article 1. The Committee has noted that "the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture."[56] The Committee has found a violation of Article 3 on a variety of grounds/situations creating a torture risk, including in connection with political activities,[57] religious expression,[58] ethnicity,[59] sexual orientation,[60] precarious living conditions,[61] manner of return,[62] generally precarious human rights situation,[63] gender-based violence.[64]

Article 16 is not as unequivocally formulated, since it requires that States parties prevent cruel, inhuman and degrading treatment which does not amount to torture in any territory under their jurisdiction and has no *refoulement* clause. This provision has been mainly examined in *refoulement* cases in the context of inhuman detention conditions pending return,[65] or where the return itself was conducted using excessive

50. CCPR, A.A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 6.4; CCPR, J.D. v. Denmark, Communication No. 2204/2012, 26 October 2016, 10.4; CCPR, Hamida v. Canada, Communication No. 1544/2007, 18 March 2010, 8.6 and 8.7.
51. CCPR, Merhdad Mohammad Jamshidian v. Belarus, Communication No. 2471/2014, 8 November 2017.7.
52. CAT, General Comment No. 1, 1997, Implementation of Article 3 of the Convention in the Context of Art. 22, point 2.
53. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22.
54. General Comment 4 has superseded the previous comment on Article 3: CAT, General Comment No. 1, 1997, Implementation of Article 3 of the Convention in the Context of Art. 22.
55. CAT, G.R.B. v. Sweden, Communication No. 83/1997, 15 May 1998, 6.5.
56. CAT, General Comment No. 2, 2008, Implementation of Article 2 by States Parties, para. 20.
57. CAT, Abed Azizi v. Switzerland, Communication No. 492/2012, 27 November 2014; CAT, Cevdet Ayaz v. Serbia, Communication No. 857/2017, 2 August 2019; CAT, Hanny Khater v. Morocco, Communication No. 782/2016, 22 November 2019; CAT, Ismet Bakay v. Morocco, Communication No. 826/2017, 20 December 2019; CAT, Flor Agustina Calfunao Paillalef v. Switzerland, communication No. 882/2018, 5 December 2019.
58. CAT, G.I. v. Denmark, Communication No. 625/2014, 10 August 2017; CAT, Tursunov v. Kazakhstan, Communication No. 538/2013, 8 May 2015; CAT, Mumin Nasirov v. Kazakhstan, Communication No. 475/2011, 14 May 2014.
59. CAT, M.K.M. v. Australia, Communication No. 681/2015, 10 May 2017; CAT, N.A.A. v. Switzerland, Communication No. 639/2014, 2 May 2017; CAT, H.Y. v. Switzerland, Communication No. 747/2016, 9 August 2017; CAT, R.G. et al. v. Sweden, Communication No. 586/2014, 25 November 2015; CAT, S.M., H.M. and A.M. v. Sweden, Communication No. 374/2009, 21 November 2011.
60. CAT, J.K. v. Canada, Communication No. 562/2013, 23 November 2015 ; CAT, Uttam Mondal v. Sweden, Communication No. 338/2008, 23 May 2011.
61. CAT, Adam Harun v. Switzerland, Communication No. 758/2016, 6 December 2018; CAT, A.N. v. Switzerland, Communication No. 742/2016, 3 August 2018.
62. CAT, Arkauz Arana v. France, Communication No. 63/1997, 9 November 1999.
63. CAT, E.K.W. v. Finland, Communication No. 490/2012, 4 May 2015; CAT, Sylvie Bakatu-Bia v. Sweden, Communication No. 379/2009, 3 June 2011; Njamba and Balikosa v. Sweden, Communication No. 322/2007, 14 May 2010.
64. CAT, F.B. v. The Netherlands, Communication No. 613/2014, 20 November 2015; CAT, V.L. Switzerland, Communication No. 262/2005, 20 November 2006.
65. CAT, Hanny Khater v. Morocco, Communication No. 782/2016, 22 November 2019, 10.10; CAT, S.A.M. v. Denmark, Communication No. 693/2015, 3 August 2018, 7.3.; CAT, F.K. v. Denmark, Communication No. 580/2014, 23 November 2015, 7.7; CAT, A.A. v. Denmark, Communication No. 412/2010, 13 November 2012, 7.3.

force or in an otherwise cruel manner.[66] Only in very exceptional circumstances, however, will the return *per se* constitute cruel, inhuman or degrading treatment.[67] Although it is often argued, the aggravation of the complainant's health for reasons related to the forced return was not found to meet a threshold of a violation of Article 16.[68]

The relationship between Articles 3 and 16

Generally, the absence of cruel, inhuman and degrading treatment from the *refoulement* clause of Article 3 makes the connection of this Article with return cases more difficult. General Comment no. 2, however, states that "[t]he obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture", further explaining that the situations that create risk of ill-treatment often create risk of torture too.[69]

In a number of its decisions including *Adam Harun v. Switzerland*,[70] the Committee relied on the aforementioned comment to confirm **the definitional overlap of torture and other forms of ill-treatment under the CAT, including in the context of *non-refoulement***. In this case, which concerned the return of a beneficiary of international protection to Italy, the complainant argued that the living conditions in Italy would give rise to an Article 16 risk, if he were returned there, and Switzerland objected that the treatment alleged fell outside the scope of Article 3 of the Convention (para. 8.4). The Committee stated that "obligations under the Convention, including with regard to article 3, extend to both torture and other acts of cruel, inhuman or degrading treatment or punishment" and concluded that "international law now extends the principle of *non-refoulement* to persons exposed to risks other than torture." (para. 8.6). The State party's objection was dismissed although the Article 16 part of the complaint was eventually declared inadmissible due to lack of substantiation.

Similarly, in A.N. v. Switzerland, the Committee reiterated that the "definitional threshold between ill-treatment and torture is often not clear" and noted that additional vulnerabilities are important for the assessment of the torture threshold.[71] More specifically, the Members recalled that "[…] States parties should consider whether other forms of ill-treatment that a person facing deportation is at risk of experiencing might change so as to constitute torture before making a non-refoulement assessment"; in the context of that specific case, it was found that the lack of access to rehabilitation services for victims of torture can per se constitute violation of Article 16.[72] Lastly, in M.G. v. Switzerland, it examined Article 3 and 16 and opined that a finding of a procedural violation of Article 3 rendered the further examination of Article 16 unnecessary.[73]

Convention on the Elimination of All Forms of Discrimination against Women – CEDAW

The CEDAW does not contain an explicit non-refoulement clause but the Committee has addressed the issue both in its General Recommendations and through its case law. General Recommendation no. 32 refers to the international law duty on States to refrain from returning a person to a country where they may face serious violations of human rights and connects it with **Article 2 (d)** CEDAW. According to the Committee, the non-refoulement obligation includes the protection of women from being exposed to irreparable harm, "irrespective of whether such consequences would take place outside the territorial boundaries of the sending State Party".[74] General Recommendation no. 28 has also confirmed the application of state obligations to "[…] non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory".[75]

The Committee has reiterated the aforementioned interpretation on the obligation of non-refoulement under

66. CAT, Sonko v. Spain, Communication No. 368/2008, 25 November 2011, 10.4; CAT, Kwami Mopongo and others v. Morocco, Communication No. 321/2007, 7 November 2014, 6.2.
67. CAT, M.M.K. v. Sweden, Communication No. 221/2002, 3 May 2015, 7.3; CAT, A.N. v. Switzerland, Communication No. 742/2016, 3 August 2018, 8.8.
68. CAT, B.S.S. v. Canada, Communication No. 183/2001, 12 May 2004, 10.2; CAT, A.A.C. v. Sweden, Communication No. 227/2003, 16 November 2006, 7.3; CAT, G.R.B. v. Sweden, Communication No. 83/1997, 15 May 1998, 6.7.
69. CAT, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para. 3.
70. CAT, Adam Harun v. Switzerland, Communication No. 758/2016, 6 December 2018.
71. CAT, A.N. v. Switzerland, Communication No. 742/2016, 3 August 2018, para. 8.9.
72. Ibid, 8.8 and 8.10.
73. CAT, M.G. v. Switzerland, Communication No. 811/2017, 7 December 2018, 7.2.
74. CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, paras. 21 and 22.
75. CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, para. 12.

Article 2 (d) in several cases before it,[76] and has expanded the scope of non-refoulement obligation to also consider that a deportation can violate **Article 2 (c)**,[77] **and 2 (e) and (f).**[78] The Committee's jurisprudence by definition covers gender-related situations that create risk to women, including cases of domestic violence (violation),[79] trafficking (violation),[80] female genital mutilation (inadmissible due to lack of substantiation).[81]

Convention on the Rights of the Child – CRC

Article 37 of the CRC stipulates that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment, while **Article 19** requires that States parties take all measures to protect the child from all forms of physical or mental violence, as well as other forms of harm. There is, however, no explicit provision regarding non-refoulement obligations for children. The Committee has provided guidance in this respect in its General Comment no. 6, which prohibits the return of a child to a country where they will face irreparable harm or further risk of refoulement; the harm does not have to be limited to the one contemplated in Articles 6 and 37.[82]

The case law of the Committee has made use of this interpretation in a few cases consistently noting that the best interests of the child principle enshrined in **Article 3** requires robust r*efoulement* assessment procedures.[83] The Committee has examined cases of *refoulemen*t risks on the basis of the lack of child-specific guarantees in the assessment of a child's risk of female genital mutilation (violation),[84] precarious living conditions in the return state (violation),[85] family feuds (inadmissible decisions due to lack of substantiation),[86] threat of domestic violence (inadmissible due to lack of substantiation),[87] lack of protection against refoulement due to the lack of a guardian and on account of an inadequate age assessment procedure (violation),[88] and disproportionate administrative obstacles that render a child's access to basic services ineffective and hamper the development of their identity.[89]

Convention on the Rights of Persons with Disabilities – CRPD

The CRPD does not contain an explicit refoulement provision but **Article 15** prohibits torture and cruel, inhuman or degrading treatment. Refoulement obligations have not been analysed in any of the Committee's General Comments and, although the Committee has affirmed its concern with the additional vulnerability of migrants and asylum seekers with disabilities,[90] its case law on the matter is very limited. In *O.O.J. v. Sweden*, the Committee noted that "the removal by a State party of an individual to a jurisdiction where he or she would risk facing violations of the Convention may, under certain circumstances, engage the responsibility of the removing State under the Convention which has no territorial restriction clause."[91] Despite a strong finding on the extraterritorial applicability of Sweden's *non-refoulement* obligations under the CRPD, the case was considered inadmissible due to non-exhaustion of domestic remedies on specific points of the complaint, as well as due to the expulsion becoming statute-barred and no longer enforceable.

76. CEDAW, N. v. the Netherlands, Communication No. 39/2012, 17 February 2014, 6.4; CEDAW, Y.W. v. Denmark, Communication No. 51/2013, 2 March 2015, 8.7; CEDAW, A v. Denmark, Communication No. 53/2013, 19 November 2015, 8.6; CEDAW, M.N.N. v. Denmark, Communication No. 33/2011, 15 July 2013, 8.10.
77. CEDAW, A v. Denmark, Communication No. 53/2013, 19 November 2015, 11.
78. CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 9.
79. *Ibid*, See also CEDAW, A.M. v. Denmark, Communication No. 77/2014, 21 July 2017.
80. CEDAW, Zheng v. The Netherlands, Communication No. 15/2007, 27 October 2008.
81. CEDAW, M.N.N. v. Denmark, Communication No. 33/2011, 15 July 2013.
82. CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 27.
83. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019, 14.3; CRC, E.P. and F.P. v. Denmark, 25 September 2019, 8.6; CRC, A.S. v. Denmark, Communication No. 36/2017, 26 September 2019, 9.5; CRC, A.Y. v. Denmark, Communication No. 7/2016, 31 May 2018, 8.7.
84. CRC, I.A.M. v. Denmark, Communication No. 3/2016, 25 January 201.
85. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019.
86. CRC, E.P. and F.P. v. Denmark, 25 September 2019; CRC, K.H., E.H. and M.H., Communication No. 32/2017, 18 September 2019.
87. CRC, A.S. v. Denmark, Communication No. 36/2017, 26 September 2019.
88. CRC, M.T. v. Spain, Communication No. 17/2017, 18 September 2019; CRC, R.K. v. Spain, Communication No. 27/2017, 18 September 2019; CRC, J.A.B. v. Spain, Communication No. 22/2017, 31 May 2019; CRC, M.B. v. Spain, Communication No. 28/2017, 28 September 2020.
89. CRC, W.M.C. v. Denmark, Communication No. 31/2017, 28 September 2020.
90. Declaration by the Committee: "Committee on the Rights of Persons with Disabilities: Looking forward", Annex IX to the UN Committee on the Rights of Persons with Disabilities (CRPD), Report of the Committee on the Rights of Persons with Disabilities: First session (23-27 February 2009), Second session (19-23 October 2009), Third session (22-26 February 2010), Fourth session (4-8 October 2010), 2011, A/66/55.
91. CRPD, O.O.J. v. Sweden, Communication no. 28/2015, 18 August 2017, 10.3.

In its decision in *N.L. v. Sweden*, the Committee further elaborated on obligation regarding return and found a violation of Sweden's *non-refoulement* obligation under Article 15, considering that the finding of a violation under that provision rendered further examination of the case under Article 10 unnecessary.[92] It is worth noting the Committee's extensive reliance on the CCPR's General Comment No. 31, as well as on that body's jurisprudence in cases involving risk of irreparable harm following return.[93]

The absence of *refoulement* case law could be explained by the Optional Protocol's entry into force only in 2008[94] and its highly specialised scope. It is possible that cases with strong *refoulement* claims will reach the CAT or the CCPR due to the perceived relevance of the protection offered by those bodies to third-country nationals facing return. For example, cases with elements of severe mental health disorders have been presented before the CAT.[95] The CRPD, however, seems to be open to such cases too, as we see in the case mentioned above, *N.L. v. Sweden*, where the CRPD heard and accepted the applicant's claim that his mental illness constituted "long-term mental impairment" that precluded return to Iraq.[96]

International Convention on the Protection of All Persons from Enforced Disappearance – CED

Article 16 of the CED prohibits the return of a person to a country where there are substantial grounds for believing that there is a risk of enforced disappearance. Moreover, Principle 9 of its Guiding principles for the search for disappeared persons[97] requires states to take into account the particular vulnerability of migrants and to conduct procedures that allow for an individual examination of all application for entry at the border, in compliance with the principle of *non-refoulement*.

International Convention on the Elimination of All Forms of Racial Discrimination – CERD

The CERD does not contain any provisions specific to torture or non-refoulement but **Article 5 (b)** guarantees the right of individuals to security and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution. The issue has not been yet considered in the Committee's case law.[98] However, General Recommendation XXII states that "States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of *non-refoulement* and non-expulsion of refugees."[99] In addition, according to General Recommendation XXX states are required to ensure that non-citizens implicated in terrorism-related criminal proceedings are protected by domestic law that complies with refugee law.[100] Lastly, the Committee has expressed its concerns on the lack of compliance with Articles 1, 2 and 5, when States do not have comprehensive asylum procedures that ensure observance of the principle of *non-refoulement*.[101]

III. RISK OF HARM: THE REQUIRED CHARACTERISTICS AND THRESHOLD

All treaty bodies require a sufficiently personalised risk of harm for a *non-refoulement* obligation to be triggered. The analysis will focus on the level of personalization of the risk, its relationship with the general situation in the country of origin/return, as well as its source, i.e. the actors of harm.

92. CRPD, N.L. v. Sweden, Communication no. 60/2019, 28 August 2020, para. 3.1.
93. *Idem*, paras. 7.3 and 7.4.
94. Entry into force: 3 May 2008, United Nations Treaty Collection.
95. See, for example, cases where the disability component formed part of vulnerability-related argumentation in: CAT, H.Y. v. Switzerland, Communication No. 747/2016, 9 August 2017 (PTSD-related partial disability), CAT, G.E. v. Australia, Communication No. 725/2016, 11 August 2017 (major depressive disorder and cognitive impairment) and CAT, S.V. et al. v. Canada, Communication No. 49/1996, 15 May 2001, (torture-related disability).
96. See *supra*, note 92, para. 3.1. It is interesting to note that, in this case, the Committee dedicated a good part of its reasoning on the findings of the European Court of Human Rights in Paposhvili v. Belgium (see para. 7.5).
97. CED, Guiding Principles for the search for disappeared persons, 8 May 2019.
98. ECRE has not been able to find CERD case law on the issue of non-refoulement.
99. CERD, General recommendation XXII on article 5 of the Convention on refugees and displaced persons, 1996, para. 2 (b).
100. CERD, General Recommendation XXX on Discrimination Against Non Citizens, 2002, para. 20.
101. CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia, 13 September 2010, para. 24; CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Lebanon, 26 August 2016, paras. 27-32.

1. THE INDIVIDUAL CHARACTER OF THE RISK AND THE GENERAL SITUATION IN THE COUNTRY OF ORIGIN/RETURN

The **CCPR** consistently refers to its General Comment no. 31 on the need for a "real risk of irreparable harm" adding that "**the risk must be personal**",[102] the evidence and claims should relate to the complainant's "specific case",[103] while also relying on the existence of "personal information" relating to the risk[104] and the "context and particular circumstances of the case at hand."[105] Where the claims of the applicant emanate from their "personal experience", the domestic authorities should take them adequately into account.[106] In *A.G. and others v. Angola*, a case concerning the deportation proceedings against numerous Turkish nationals working in a Gülen-associated school in Angola, the Committee noted that the acts of the Angolan authorities approached the cases of these Turkish citizens in a collective manner, without a sufficient degree of individualization nor an adequate examination of refoulement risks: the Committee members concluded that their deportation would violate Articles 7 and 13 of the Convention.[107]

The individual risk, however, is not only assessed on the basis of person-specific evidence: authorities must consider "all relevant facts and circumstances", including **background information of the general human rights situation** in the country.[108] The consideration of all facts and circumstances will also be associated with the particular human rights aspect of the case.[109] The risk of ill-treatment "which reasonably follows from [the claimant's] individual circumstances including his past ill-treatment" may also affect the Committee's assessment.[110] In a similar approach to that of the European Court of Human Rights in *N.A. v. the United Kingdom,*[111] the Committee considers that "extreme cases" may also justify a finding of risk of harm solely on the basis of the general conditions in the country of return.[112]

Being the treaty body with a specific mandate to prevent torture and an explicit prohibition of non-refoulement, the **CAT** has developed a more elaborate approach on the examination of return risks. Relying on General Comment no. 4, the Committee seeks to ascertain whether the risk alleged "**foreseeable, personal, present and real**".[113] In investigating the "specific circumstances", the Committee also takes into account the "**the existence of a consistent pattern of gross, flagrant or mass violations of human rights**".[114] The Committee is also very clear on the relationship between these two elements, repeatedly stating that "[…] the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute a sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; **additional grounds must be adduced to show that the individual concerned would be personally at risk**. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specificcircumstances."[115]

The **CEDAW** uses a definition almost identical to that of the CAT describing the refoulement risk as "**real,**

102. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.3; CCPR, A.A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 7.4; CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016, 7.3; CCPR, A.S.M. and R.A.H. v. Denmark, Communication No. 2378/2014, 7 July 2016, 8.3; CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017, 8.3; CCPR, Z. v. Denmark, Communication No. 2329/2014, 15 July 2015, 7.2;
103. CCPR, N.S. v. Russian Federation, Communication No. 2192/2012, 27 March 2015, 10.4.
104. CCPR, A.A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 7.6.
105. CCPR, Kaba v. Canada, Communication no. 1465/2006, 25 March 2010, 10.2.
106. CCPR, Abubakar Ali. v. Denmark, Communication No. 2409/2014, 29 March 2016, 7.7.
107. CCPR, A.G. and others v. Angola, Communication Nos. 3106/2018, 3107/2018, 3108/2018, 3109/2018, 3110/2018, 3111/2018, 3112/2018, 3113/2018, 3114/2018, 3115/2018, 3116/2018, 3117/2018, 3118/2018, 3119/2018, 3120/2018, 3121/2018 and 3122/2018, 21 July 2020, 7.6 and 7.9.
108. CCPR, R.M. and F.M. v. Denmark, Communication No. 2685/2015, 24 July 2019, 9.3; CCPR, X. v. Denmark, Communication no. 2389/2014, 22 July 2015, 7.3; CCPR, Pillai v. Canada, Communication no. 1763/2008, 25 March 2011, 11.4, where the Committee examined the case "[…] in the light of the documented prevalence of torture in Sri Lanka".
109. See, for example, CCPR, M.I. v. Sweden, Communication no. 2149/2012, 25 July 2013, 7.5, where the Committee examines the complainant's risk "[a]gainst the background of the situation faced by persons belonging to sexual minorities".
110. CCPR, A.B.H. v. Denmark, Communication No. 2603/2015, 8 July 2019, paras. 9.10 and 9.13.
111. European Court of Human Rights, N.A. v. United Kingdom, Application No. 25904/07, 6 August 2008.
112. CCPR, General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, para. 30.
113. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 11.
114. CAT, T.M. v. Sweden, Communication no. 860/2018, 6 December 2019, 12.3; CAT, Susith Wasitha Ranawaka v. Australia, 5 December 2019, 9.3; CAT, Ismet Bakay v. Morocco, Communication No. 826/2017, 20 December 2019, 7.3; CAT, I.A. v. Sweden, Communication No. 729/2016, 23 April 2019, 9.3; CAT, Aref Mohammed Abdulkarim v. Switzerland, Communication No. 710/2015, 6 November 2017, 10.2; CAT, T.Z. v. Switzerland, Communication No. 688/2015, 22 November 2017, 8.3.
115. Ibid.

personal and foreseeable", in accordance with its General Recommendation no. 32,[116] and examining any claims of gender-related risks on the basis of "the circumstances of each case".[117] The Committee does not routinely refer to the general human rights situation in the way that the two aforementioned bodies do, but in some cases, where a violation was found, it emphasised on "**the level of tolerance towards violence against women and the pattern of failure in responding to women's complaints of abuse**" in the country of origin.[118]

In accordance with its General Comment no. 6,[119] the **CRC** non-refoulement obligation is triggered by the existence of "**a real risk of irreparable harm**", without any further characterization on its personality. In its jurisprudence, however, the Committee looks into the "specific and personal context"[120] and the "personal circumstances".[121] The risk does not have to only concern the rights enshrined in Articles 6 and 37 of the Convention: in *W.M.C. v. Denmark*, the Committee found violations of Articles 3, 6 and 8 of the Convention, on account of the problems that children of single mothers face in China and the consequences these problems would have on their well-being and the development of their identity.[122] Regarding the general situation in the country of origin, there is usually not an explicit reference to it but the Committee has emphasised that "the particularly serious consequences for children of the insufficient provision of food or health services" are of importance in the assessment of the child's risk upon return.[123] Similarly, administrative problems that effectively deny access to basic services have been referred to as a ground that precludes return.[124]

The **CRPD** borrows from the jurisprudence of the CCPR to confirm that persons should not be returned to a place where there is a risk of **irreparable harm** and that **the risk must be personal; considerations** should encompass **all relevant facts and circumstances**, including the situation at the country of origin/return.[125]

The **CED** appears to have issued one *refoulement*-related decision at the time of writing: in *E.L.A. v. France*, the Committee relied on established CAT jurisprudence to clarify that **the risk of enforced disappearance at the country of origin/return should be linked to the personal circumstances** of the complainant.[126] In the same case, the Committee referred to Article 16 (2) of the Convention to declare that the existence of serious violations of human rights or international humanitarian law in the country of return must be taken into account when States assess the existence of situations that preclude a return, i.e. "the context of enforced disappearances in Sri Lanka".[127]

2. THE SOURCE OF THE HARM AND THE AVAILABILITY/NATURE OF PROTECTION

In its General Comment no. 20, the **CCPR** made it clear that Article 7 protects persons from torture "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[128] General Comment no. 36 includes several mentions to the duty of states to protect persons from threats to their lives in multiple occasions involving private individuals or entities;[129] regarding non-refoulement, however, the Comment refers to the options of obtaining credible and effective protection of assurances or considering internal protection alternatives when the risks are attributed to non-state actors; both issues are more extensively discussed below.[130]

116. CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, para. 22.
117. CEDAW, Y.W. v. Denmark, Communication No. 51/2013, 2 March 2015, 8.7; CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 8.6; CEDAW, N. v. the Netherlands, Communication No. 39/2012, 17 February 2014, 6.4; CEDAW, M.N.N. v. Denmark, Communication No. 33/2011, 15 July 2013, 8.12.
118. CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 8.7; CEDAW, A v. Denmark, Communication No. 53/2013, 19 November 2015, 9.4.
119. CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 27.
120. CRC, I.A.M. v. Denmark, Communication No. 3/2016, 25 January 2018, 11.8 (a).
121. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019, 14.6.
122. CRC, W.M.C. v. Denmark, Communication No. 31/2017, 28 September 2020, 8.3.
123. See *supra*, note 121, 14.4.
124. CRC, W.M.C. v. Denmark, Communication No. 31/2017, 28 September 2020, 8.3.
125. CRPD, N.L. v. Sweden, Communication no. 60/2019, 24 August 2020, paras. 7.3.
126. CED, E.L.A. v. France, Communication no. 3/2019, 25 September 2020, para. 7.2.
127. *Idem*, 7.5.
128. CCPR, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, paras 2 and 13.
129. CCPR, General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, see paras. 15, 18, 21, 25, 62.
130. *Ibid*, para. 30.

In *R.M. and F.M. v. Denmark*, the Committee considered the serious consequences of harm by family acts in a case concerning an extramarital sexual relationship and concluded that the authorities had not adequately assessed these consequences.[131] In *Osayi Omo-Amenaghawon v. Denmark*, the Committee provided a clear and strong reasoning on the protection from harm emanating from private actors, and the obligation of the sending State to ensure effective protection by authorities in the country of return. Despite Denmark's assertions on Nigeria's (the state of return) efforts "to combat human trafficking and its consequences", as well as the existence of "several organizations in Nigeria [that] provide assistance to victims of human trafficking and prostitution",[132] the Committee considered that Denmark's assessment did not sufficiently examine the "specific capacity" of Nigerian authorities to protect the applicant from human trafficking networks.[133] This represents a strict requirement for the examination of effective state protection but it should be noted that the Committee placed a lot of weight on the complainant's particular circumstances, including a strong vulnerability profile.[134]

The **CAT** has developed a clear approach when it comes to the source of the harm that will engage the State's refoulement responsibility. In its General Comment no. 4, it has clarified that states should refrain from deporting individuals in cases where "**they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities**".[135] This interpretation has been further elaborated in the Committee's General Comment no. 2 on the obligation of the state (of return) to "exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture"; the failure to do so "facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity" and "the State's indifference or inaction provides a form of encouragement and/or de facto permission".[136] The Committee has reiterated in several cases involving risk emanating from acts of private individuals.[137]

The CEDAW refers to its General Recommendation No. 32 regarding the responsibility of the country of origin to protect the individual from harm and clarifying that "only when such protection is not available that international protection is invoked to protect the basic human rights that are seriously at risk."[138] According to its jurisprudence, a violation of the principle of non-refoulement "would also occur when no protection against the identified gender-based violence can be expected from the authorities of the State to which the person is to be returned".[139] The complainant, however, has to substantiate or provide "prima facie evidence" that they sought protection from the authorities but they were unable or unwilling to provide it, or that it would have been unreasonable to seek it anyway.[140]

In General Comment no. 6, the **CRC** clarifies "*non-refoulement* obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention **originate from non-State actors** or whether such violations are directly intended or are the indirect consequence of action or inaction."[141] In *I.A.M. v. Denmark*, where the alleged risk was family practices of female genital mutilation the Committee was clear in saying that "[…] where reasonable doubts exist that the receiving State cannot protect the child against such practices, States parties should refrain from deporting the child."[142]

The **CRPD** has not engaged with the issue in the context of *refoulement*, but it has provided some useful guidance on the assessment of harmful acts committed by private persons. In *X v. Tanzania*, a case concerning acts of inhuman treatment against a person with albinism, the Committee stated that the obligation of states to prevent such acts also "applies to acts committed by both State and non-State

131. CCPR, R.M. and F.M. v. Denmark, Communication No. 2685/2015, 24 July 2019, paras. 9.6 – 9.9.
132. CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 4.4.
133. *Ibid*, 7.5.
134. *Idem*.
135. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 30.
136. CAT, General Comment No. 2, 2008, Implementation of Article 2 by States Parties, para. 18.
137. CAT, Flor Agustina Calfunao Paillalef v. Switzerland, communication No. 882/2018, 5 December 2019, 8.9; CAT, I.A. v. Sweden, Communication No. 729/2016, 23 April 2019, 9.7; CAT, H.I., L.I., S.I., A.I. v. The Netherlands, Communication No. 685/2015, 10 November 2017, 8.6.
138. See *supra*, note 116, para. 29 and CEDAW, A v. Denmark, Communication No. 53/2013, 19 November 2015, 9.4.
139. CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 7.8; See also, CEDAW, J.I. v. Finland, Communication No. 103/2016, 5 March 2018, para. 8.8, where the Committee underlines the obligation of due diligence in adopting diverse measures to combat gender-based violence by non-State actors and states that the failure to take such measures "provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations".
140. CEDAW, Y.W. v. Denmark, Communication No. 51/2013, 2 March 2015, 8.8; CEDAW, Y.C. v. Denmark, Communication No. 59/2013, 24 October 2014, 6.4.
141. CRC, W.M.C. v. Denmark, Communication No. 31/2017, 28 September 2020, 8.3.
142. See *supra*, note 84, 11.8 (c).

actors".[143] In assessing the state's responsibilities, the Committee seems to follow a strict approach on the effectiveness of remedies and the support that the victim of such treatment has received. In this vein, it found that the mere existence of a pending judicial procedure to remedy the violation will not absolve the state from its responsibilities under the Convention, unless the remedy is swift and effective and measures are taken to support the victim.[144]

As said, the case is not concerned with *refoulement* obligations but the protection standards of the Committee can be considered applicable in the context of an assessment of a country's ability to protect victims of ill-treatment based on disability, or in the context of evaluating the seriousness of harm in light of a specific disability. What is more, albinism can be relevant to *non-refoulement* claims, as social perceptions that are prevalent in certain countries may increase chances of exposure to serious harm on account of this genetic condition, potentially also in the context of membership of a particular social group.[145]

IV. ASSESSMENT OF REFOULEMENT RISKS: STANDARDS AND GUARANTEES

Following the analysis of the qualifying elements of the harm that the Treaty Bodies may consider as activating protection against return, the next section will focus on the assessment of such risks by the Committees, including specific points of considerations in that assessment.[146]

1. STANDARD OF PROOF, CREDIBILITY AND EVIDENCE ASSESSMENT BEFORE THE COMMITTEES

1.1. Standard of proof/burden of proof

The **CCPR** has established "a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists".[147] Where the return has already taken place, the Committee has observed that "the existence of such a real risk […] does not require proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk […]" and the Committee "[…] must consider all relevant elements."[148]

In this attempt to establish the risk, the Committee largely refers to the State's assessment, as previously discussed, and the complainant has to substantiate their claim that the domestic assessment was arbitrary and erroneous. "Generally contesting" the domestic findings is not sufficient, the complainant has to put forward specific evidence both regarding the risk of harm and the irregularities in the domestic procedure while the information submitted should be personal.[149] Complaints may be rejected due to the complainant's lack of substantiation either because the information provided was not pertinent or sufficiently indicative of risk, the state's arguments were not specifically challenged,[150] or the national procedure was

143. CRPD, X. v. Tanzania, Communication No. 22/2014, 18 August 2017, 8.6.

144. *Ibid*, 8.4; See also, CRPD, Z. v. United Republic of Tanzania, Communication no. 24/2014, 19 September 2019, para. 8.4.

145. For example, see the reported risks that people with albinism may be exposed to in Côte d'Ivoire (UN High Commissioner for Refugees (UNHCR), UNHCR Submission on Côte d'Ivoire: 33rd UPR Session, May 2019, p. 7; Malawi (Malawi: refugees with albinism find succour in camp, Press Release, Jesuit Refugee Service, 28 January 2015) and Nigeria (EASO, Country Guidance: Nigeria, February 2019, p. 56).

146. The list of specific issues of consideration in Section 4.2.2 is not exhaustive but reflects the most common issues that were brought to our attention by the ELENA Network.

147. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.3; CCPR, A.A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 7.4; CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016, 7.3; CCPR, A.S.M. and R.A.H. v. Denmark, Communication No. 2378/2014, 28 October 2017, 8.3; CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017, 8.3; CCPR, Z. v. Denmark, Communication No. 2329/2014, 15 July 2015, 7.2.

148. CCPR, Maksudov et al. v. Kyrgyzstan, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 16 July 2018, 12.4.

149. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.8; CCPR, A.A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 7.6; CCPR, M.A.S. and L.B.H., Communication No. 2585/2015, 8 November 2017, 8.10 and 8.11; CCPR, M.Z.B.M. v. Denmark, Communication No. 2593/2015, 20 March 2017, 7.4; CCPR, A.S.M. and R.A.H. v. Denmark, Communication No. 2378/2014, 7 July 2016, 8.6.

150. CCPR, S.F. v. Denmark, Communication No. 2494/2014, 14 March 2019, 8.8. and 8.9.

found to be particularly robust.[151] The examination of the complainant's claims in the context of a national asylum procedure is also considered by the Committee to indicate an adequate level of protection against *refoulement.*[152]

However, the Committee has clarified that "the burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information".[153] A combination of "concrete" refoulement claims at the domestic level and the absence of an explanation by the State regarding their disregard towards these claims is indicative of a flawed national procedure calling for more explanations on behalf of the state.[154] Moreover, where the State has assessed the situation in the country of return in "a general fashion", the Committee may be keener to refer to the complainant's allegations, especially where there are vulnerabilities involved.[155] In *Byahuranga v. Denmark*, the Committee pointed to a reversal of the burden of proof where the complainant has provided a "detailed account of the existence of a risk of treatment contrary to article 7" and found that the State party should comment on the complainant's detailed account rather than "merely [by] referring to the outcome of the assessment made by its own authorities".[156]

Before the **CAT,** a *non-refoulement* obligation exists when there are "substantial grounds" for believing that the person would be in danger of being subjected to torture.[157] The burden of proof according to its jurisprudence and General Comment no. 4 lies with the complainant who has to bring "an arguable case" and prove the risk with "circumstantiated arguments."[158] However, the burden is reversed where the complainant is unable to elaborate on their case, such as when they are in detention, or they are otherwise able to demonstrate that they cannot obtain documentation.[159] A reversal of the burden of proof can also be the result of the submission of strong and detailed evidence on behalf of the complainant.[160] Moreover, in *G.I. v. Denmark*, the Committee noted that the burden of proof on the complainant "does not exempt the State party from making substantial efforts to determine" refoulement risks;[161] the Committee's strong statement in this case could be related to the inadequate domestic asylum procedure and medical documents that were submitted but not considered.

Although the standard of proof according to the Committee requires that the risk of torture be assessed on grounds that go beyond mere theory or suspicion but that does not have to be "highly probable",[162] the complaint will be rejected as not substantiated if the allegations of refoulement risk are hypothetical, merely suspected, or speculative, without invoking any factual elements and submitting explanations thereof.[163]Although the risk of torture must be assessed on a basis that goes "beyond mere theory or suspicion" and the burden of proof generally falls on the complainant, the risk "does not have to meet the test of being highly probable".[164]

In this connection, the Committee will note whether the complainant has had "ample opportunity" to submit evidence of his claims and whether they did give an opportunity to the authorities to consider this evidence.[165] It should be noted, however, that the Committee considers the principle of the benefit of the doubt to be an important element when adopting decisions on individual communications, as this principle can be seen as "a preventive measure against irreparable harm" and is in line with the spirit of the Convention which "[…] is

151. CCPR, X v. Norway, Communication No. 2474/2014, 5 November 2015, 7.6; CCPR, J.D. v. Denmark, Communication No. 2204/2012, 26 October 2016, 10.4.
152. CCPR, H.A. v. Denmark, Communication No. 2328/2014, 9 July 2018, 9.5.
153. CCPR, Mukong v. Cameroon, Communication No. 458/1991, 21 July 1994, para. 9.2.
154. CCPR, F.A. v. Russia, Communication No. 2189/2012, 27 July 2018, 9.9.
155. CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5.
156. CCPR, Byahuranga v. Denmark, Communication No. 1222/2003, 1 November 2004, paras. 11.3 and 11.4.
157. CAT, J.M. v. the Netherlands, Communication No. 768/2016, 16 May 2019, 10.4.
158. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 38. See also, CAT, T.M. v. Sweden, Communication no. 860/2018, 6 December 2019, 12.5.
159. Ibid. See also, CAT, X. v. Switzerland, Communication No. 775/2016, 5 August 2019, 8.5; CAT, A.M. v. Switzerland, communication No. 841/2017, 15 November 2019, 7.4; CAT, Ismet Bakay v. Morocco, Communication No. 826/2017, 20 December 2019, 7.4.
160. CAT, A.S. v. Sweden, Communication No. 149/1999, 24 November 2001, 8.6.
161. CAT, G.I. v. Denmark, Communication No. 625/2014, 10 August 2017, 8.8.
162. CAT, T.Z. v. Switzerland, Communication No. 688/2015, 22 November 2017, 8.4; CAT, S.A.M. v. Denmark, Communication No. 693/2015, 3 August 2018, 8.4;
163. See *supra*, note 159, X. v. Switzerland, 8.10; CAT, S. v. Sweden, Communication No. 691/2015, 16 November 2018, 9.8; CAT, Sami Gharshallah v. Morocco, Communication No. 810/2017, 3 August 2018, 8.6.
164. CAT, S.A.M. v. Denmark, Communication No. 693/2015, 3 August 2018, para. 8.4.
165. CAT, B.N.T.K. v. Sweden, Communication No. 641/2014, 9 August 2018, 8.7.

to prevent torture, not to redress it once it has occurred."[166]

The **CEDAW** will examine the risk of the complainant "not against the probability, but against the reasonable likelihood" that exists.[167] For example, in claims based on gender violence, the complainant has to substantiate their risk of gender-based harm that reaches a specific level of seriousness;[168] many complaints, however, are found to be unsubstantiated at the stage of admissibility, mainly due to the lack of specificity of the complainant's explanations, or due to the lack of sufficient explanation regarding doubts around the complainant'sclaim.[169]

In its General Recommendation No. 33 on women's access to justice, the Committee recommends the revision of rules on burden of proof to ensure equality between the parties "in all fields where power relationships deprive women of fair treatment", including rules that discriminate against women as witnesses and by requiring them to address a higher burden of proof than men.[170] The scope of the recommendation is quite relevant for asylum procedures as it includes "specialised and quasi-judicial mechanisms" encompassing "all actions of public administrative agencies or bodies, similar to those conducted by the judiciary, which have legal effects and may affect legal rights, duties and privileges."[171] Moreover, in the same recommendation it is recognised that migration, asylum seeking and statelessness are factors that can render access to justice for women particularly difficult.[172]

The **CRC** applies a child sensitive standard of proof, heavily relying on vulnerability and the best interests of the child principle to apply less strict proof rules, including the benefit of the doubt. It has clarified that "the burden of proof cannot rest solely on the author of the communication, especially given that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information."[173] In *I.A.M. v. Denmark*, the Committee noted the many objections of the State party but found that the reports that the State looked into were too general to reject the risk that the complainant had alleged,[174] in contravention of the child's best interest. In *D.D. v. Spain*, the Committee applied a similar approach to find gaps in the national reception procedure that created a risk of refoulement.[175] The complaint in that case was substantiated with very specific arguments and extensive allegations, yet the CRC relied equally strongly on its own principled approach regarding assessment procedures for children. However, in *K.H., E.H. and M.H. v. Denmark*, the Committee relied on the domestic assessment, which was "thorough" and "explicitly" considered the best interests of the child, to conclude that the alleged risk was not substantiated enough.[176]

The **CRPD** refers to the standards developed by the CCPR and the "high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists."[177] In *N.L. v. Sweden*, the Committee echoed the approach of the European Court of Human rights, citing the case of Paposhvili v. Blegium, and noted that where the complainant adduces evidence, "it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised […]" regarding the consequences of return.[178]

Similarly, the **CED** seeks to determine whether there are "substantial grounds" for believing that there is a risk of enforced disappearance upon return.[179]

1.2. Credibility assessment

When assessing credibility, the **CCPR** will first consider the findings of the national procedure before checking whether there were any inconsistencies in the complainant's account, or any reasons to justify

166. CAT, Flor Agustina Calfunao Paillalef v. Switzerland, communication No. 882/2018, 5 December 2019, 8.10.
167. CEDAW, A v. Denmark, Communication No. 53/2013, 19 November 2015, 9.3.
168. *Idem*, 8.7 and 8.9; CEDAW, Y.W. v. Denmark, Communication No. 51/2013, 2 March 2015, 8.7 and 8.9.
169. CEDAW, Y.C. v. Denmark, Communication No. 59/2013, 24 October 2014, 6.4 and 6.5; CEDAW, A.R.I. v. Denmark, 25 February 2019, 10.6; CEDAW, M.N.N. v. Denmark, Communication No. 33/2011, 15 July 2013, 8.11.
170. CEDAW, General Recommendation No. 33 on women's access to justice, 3 August 2015, Recommendations 15 (g) and 25 (iii).
171. Ibid, para. 4.
172. Ibid, para. 9.
173. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019, 13.3.
174. CRC, I.A.M. v. Denmark, Communication No. 3/2016, 25 January 2018, 11.8 (a).
175. See *supra*, note 173.
176. CRC, K.H., E.H. and M.H. v. Denmark, Communication No. 32/2017, 18 September 2019, 8.7.
177. CRPD, N.L. v. Sweden, Communication no. 60/2019, 28 August 2020, paras. 7.8. and 7.3.
178. Ibid, para. 7.5.
179. CED, E.L.A. v. France, Communication no. 3/2019, 25 September 2020, para. 7.2.

those. In this assessment, a lot of weight is placed on whether the inconsistencies concern "key" or "core" elements of the complainant's claim, a finding that can seriously compromise credibility.[180] The opposite situation has also been addressed by the Committee, which has found a violation because the national authorities disregarded the complainant's request solely on account of inconsistencies and ambiguities regarding "supporting" facts of the account.[181]

In *X. v. Canada*, the Committee's detailed reasoning on credibility provides some guidance on what the assessment may entail: the members emphasised that the complainant did not *specifically* challenge the authorities' credibility concerns and did not provide explanation regarding documented inconsistencies.[182] In *Z. v. Denmark*, despite the complainant's detailed assertions against specific national findings, the Committee noted that the complaint did not respond to the authorities' concerns regarding "material contradictions" in his account and did not show that the decision-making was arbitrary.[183] The Committee's rationale is even more confusing given the specific arguments of the complaint and the submission of medical documents attesting to the complainant's mental health issues.[184]

In *Hamida v. Canada*, where the complainant's claim was considered non-credible by the national authorities, the Committee relied on the existence of adequate evidence before it and lack of any challenge by the State to make its own decision on credibility.[185] Similarly, where it has found that there are credible sources to support the complainant's claim, the Committee has noted that the State party erred in disregarding the applicant's valid inability to prove parts of their story.[186] In *O.A. v. Denmark*, the Committee followed the same approach noting that the authorities should have addressed the possibility that a minor might lie about their age and should not have discredited the individual's credibility based on inconsistencies in the family book submitted, without first assessing all the available evidence.[187] In *A.B.H. v. Denmark*, the fact that the applicant had been found coherent and credible by the domestic authorities meant that these plausible incidents of past ill-treatment are strong indications of risk that should have been adequately assessed.[188] Lastly, in *R.M. and F.M. v. Denmark*, the Committee emphasised the need to verify facts without letting general considerations on false documentation compromise credibility.[189]

Regarding the risks of over-reliance on negative credibility assessment, the Committee noted in *M.K.H. v. Denmark* that the authorities focused on the assessment of the complainant's credibility, without further evaluating statements made during the procedure, specific allegations, as well as information provided by the author on the criminalization of same-sex relationships in Bangladesh.[190] Similarly, in *E.U.R. v. Denmark*, it was observed that, despite inconsistencies in the complainant's account, the State party did not sufficiently assess refoulement risks: the complainant was able to adequately explain why he had mixed certain dates and his specific risk-related claims were rejected without thorough evaluation and only based on the adverse credibility findings.[191]

The **CAT** has emphasised in its General Comment no. 4 that the existence of Post-Traumatic Stress Disorder (PTSD), which is frequent among torture victims and other vulnerable individuals, can affect a person's inability to submit all the relevant information and to tell their story in a consistent manner. For this reason, States parties should refrain from conducting "a standardised credibility assessment process to determine the validity of a non-refoulement claim".[192]

In its application of this approach, the Committee has reiterated that "complete accuracy is seldom to be expected from victims of torture" but this has not precluded it from expressing concerns on credibility, especially where the complainant's inconsistencies relate to core elements.[193] It may agree with a negative credibility assessment where the national procedure was thorough and the problem concerned the overall

180. CCPR, J.D. v. Denmark, Communication No. 2204/2012, 26 October 2016, 11.5.
181. CCPR, M.I. v. Sweden, Communication no. 2149/2012, 25 July 2013, 7.5.
182. CCPR, X. v. Canada, Communication No. 2366/2014, 5 November 2015, 9.5.
183. CCPR, Z. v. Denmark, Communication No. 2422/2014, 11 March 2016, 7.3;
184. *Idem*, 2.17.
185. CCPR, Hamida v. Canada, Communication No. 1544/2007, 18 March 2010, 8.7.
186. CCPR, X. v. Denmark, Communication no. 2389/2014, 22 July 2015, 9.3; CCPR, M.K.H. v. Denmark, Communication No. 2462/2014, 12 July 2016, 8.8.
187. CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017, 8.11 and 8.12.
188. CCPR, A.B.H. v. Denmark, Communication No. 2603/2015, 8 July 2019, 9.10.
189. CCPR, R.M. and F.M. v. Denmark, Communication No. 2685/2015, 24 July 2019, paras. 9.7.
190. CCPR, M.K.H. v. Denmark, Communication No. 2462/2014, 12 July 2016, 8.8.
191. CCPR, E.U.L. v. Denmark, Communication no. 2469/2014, 1 July 2016, 9.8-9.10.
192. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 42.
193. CAT, X v. The Netherlands, Communication No. 863/2018, 5 December 2019, 8.8.

credibility of the applicant's claim, e.g. it was based on major inconsistencies, or numerous discrepancies.[194] Late submission of claims, or constant modification of the complainant's story, are also more likely to lead to a negative credibility assessment.[195]

However, a plausible explanation by the complainant on any discrepancies in their narrative, or any non-disclosed claims will remedy the initial negative assessment of their credibility. In *Chahin v. Sweden*, it found that the preparation of submissions by a non-lawyer and the lack of funds to obtain certain documents was a satisfactory explanation regarding the delay in submitting them.[196] In *Ke Chun Rong v. Australia*, the examination of the complainant's claim was solely based on his initial application immediately upon arrival and there was no personal interview before the rejection of that application; the Committee noted that the review of the claims was not properly conducted and the omission of the interview deprived the applicant of "the opportunity to clarify any inconsistencies in his initial statement".[197] Similarly, in *G.I. v. Denmark*, the Committee took a lenient approach regarding the lack of detail in the complainant's account, noting that the reason for this lack of detail (i.e. a blow in the head) had been communicated to the authorities.[198] The Committee's rebuttal of domestic findings on credibility may often lack a detailed assessment, which may make the standards applied harder to understand: in *Iya v. Switzerland*, the Committee dismissed the State party's concerns regarding the complainant's credibility by simply stating that the complainant "has provided a coherent version of the facts and the relevant evidence to corroborate these facts."[199]

The Committee has also observed that a lack of detail has to be material enough to raise doubts about the general veracity of the individual's claims.[200] Vulnerability should be considered when assessing credibility,[201] while regardless of a negative credibility assessment, the Committee observes that states should satisfy a complainant's request for medical examination for possible proof of torture.[202] In the same vein, in *M.B. et al v. Denmark*, the Committee recognised the serious credibility concerns but advised against "[…] an adverse conclusion concerning credibility without adequately exploring a fundamental aspect of the first complainant's claim."[203]

Inconsistencies and lack of substantiation will be sufficient indication for a negative assessment of credibility by the **CEDAW**, especially when the complainant makes generalised statements.[204] A combination of contradictions and lack of "independent evidence" to prove persecution of a particular group has also been found to compromise the complainant's credibility.[205] In *N.Q. v. the United Kingdom*, the fact that important details were not provided to the domestic authorities, along with an absence of an objective explanation regarding the delay, rendered the complainant's story non-credible.[206] However, the Committee has also found that the inability to provide exact information on the identity of the persecutors will not undermine the complainant's credibility, especially if the act has been proven to be targeted and personal.[207] In *R.S.A.A. v. Denmark*, the Committee employed strong reasoning against the State's heavy reliance on the finding of non-credibility, which prevented it from ensuring an individualised assessment and impeded the verification of an arrest warrant that the applicant had invoked.[208] Lastly, in *A.M. v. Denmark*, the Committee noted that, due to their difficulty in obtaining documentation, authorities should not reject the credibility of women solely on the basis of lack of documents.[209]

The **CRC** will consider whether the complainant's account is credible and consistent[210] but it has not

194. CAT, G.A. v. Australia, communication No. 680/2015, 9 August 2018, 15.5; CAT, Aref Mohammed Abdulkarim v. Switzerland, Communication No. 710/2015, 6 November 2017, 10.5; CAT, D.Y. v. Sweden, Communication No. 463/2011, 21 May 2013, 9.8;
195. CAT, E.T.B. v. Denmark, Communication No. 146/1999, 30 April 2002, 10.
196. CAT, Chahin v. Sweden, Communication No. 310/2007, 30 May 2011, 9.4.
197. CAT, Ke Chun Rong v. Australia, Communication No. 416/2010, 5 November 2012, 7.5.
198. CAT, G.I. v. Denmark, Communication No. 625/2014, 10 August 2017, 8.7.
199. CAT, Iya v. Switzerland, Communication No. 299/2006, 16 November 2007, 6.5.
200. CAT, K.N., F.W. and S.N. v. Switzerland, Communication No. 481/2011, 19 May 2014, § 7.7; CAT, X. v. Switzerland, Communication, No. 470/2011, 24 November 2014, 7.6.
201. CAT, M.F. v. Switzerland, communication No. 658/2015, 15 November 2016, 7.6.
202. CAT, X. v. Switzerland, Communication No. 775/2016, 5 August 2019, 8.8; CAT, Z.K. and A.K. v. Switzerland, Communication No. 698/2015, 11 May 2018, 9.6.
203. CAT, M.B. et al. v. Denmark, Communication No. 634/2014, 25 November 2016, para.9.8.
204. CEDAW, A.R.I. v. Denmark, 25 February 2019, 10.4. and 10.6.
205. CEDAW, M.N.N. v. Denmark, Communication No. 33/2011, 15 July 2013, 8.11.
206. CEDAW, N.Q. v. the UK, Communication no. 62/2013, 21 March 2016, 6.6.
207. See *supra*, note 167.
208. CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 8.3 and 8.6.
209. CEDAW, A.M. v. Denmark, Communication No. 77/2014, 21 July 2017, 7.5.
210. See *supra*, note 173, 13.3.

developed an extensive credibility assessment reasoning. It seems, however, that the best interests of the child dictate this assessment too. In *I.A.M. v. Denmark*, the Committee noted the fact that the domestic assessment had concluded that the complainant was not credible but immediately referred to the best interests of the child and eventually found a violation.[211] In a series of cases against Spain, where the child's claim of minority was not found to be credible at the domestic level, the Committee elaborated on its principles on the proper conduct of age assessment procedures and the importance of the benefit of the doubt in them; it also emphasised the need for representation by a legal guardian before finding a violation.[212]

1.3. Evidence assessment

The **CCPR** will consider all the evidence put forward by the applicant, both in order to conduct its own assessment and for the identification of an inadequate domestic procedure.[213] The evidence should have a certain level of probative value.[214] Medical documents and their handling by the domestic authorities is important for the Committee.[215] International reports, such as the UNHCR Guidelines, Special Rapporteur documents, or concluding observations of Treaty Bodies, are very often consulted as authoritative country of origin information;[216] at times, the Committee may refer to "country reports" compiled by domestic authorities or international organisations (e.g., United States of America Department of State, Human Rights Watch, Amnesty International, Norwegian Refugee Council).[217]

Where the national authorities have consulted numerous sources, the Committee might point to this as an element of a thorough assessment of the claim, while the opposite can signify erroneous procedures. In *Osayi Omo-Amenaghawon v. Denmark*, the Committee clearly condemned the domestic authorities' general reference to measures undertaken by Nigeria to combat human trafficking, favouring a more individualised and specified reading of country information.[218] In an equally strong decision in *R.M. and F.M. v. Denmark*, the Committee noted the fact that the authorities rejected the author's evidence "without, however, verifying the facts, but rather relying solely on the general observation that false documents are widely available in Afghanistan and that there is a black market for them."[219] It went on to conclude that the Danish Refugee Appeals Board should have conducted an individualised assessment of the risk of the authors and their children upon return "rather than focus on certain inconsistencies in their statements".

On the rejection of evidence, the Committee noted in *M.K.H. v. Denmark* that, given the documents that the complainant had submitted and the available background information, the claims of the complainant were "arbitrarily" dismissed only on the basis of a negative credibility assessment regarding the complainant's sexual orientation.[220] Lastly, in *E.U.L. v. Denmark*, the Committee lamented the fact that the domestic authorities dismissed the complainant's claims as insufficiently substantiated and rejected the evidence he had submitted, without initiating "any investigation as to the veracity and validity of the evidence produced in support of his allegations".[221] However, in *Y. v. Canada*, the Committee rejected a complaint of *refoulement* risk by simply referring to the fact that the evidence submitted by the complainant was "not accepted as reliable" and that the State party's authorities refused the application "after examining the evidence provided by the author."[222]

The **CAT** will freely examine any evidence submitted, in accordance with the scope of review discussed above. All types of evidence pertinent to the complainant's claim will be assessed by the Committee, but the examination will seriously consider the existence of documentary evidence and their probative value.[223]

211. See *supra*, note 174, 11.7 and 11.8.
212. CRC, M.T. v. Spain, Communication No. 17/2017, 18 September 2019; CRC, J.A.B. v. Spain, Communication no. 22/2017, 31 May 2019; CRC, A.D. v. Spain, Communication No. 21/2017, 4 February 2020; CRC, M.A.B. v. Spain, Communication No. 24/2017, 7 February 2020; CRC, H.B. v. Spain, Communication No. 25/2017, 7 February 2020; CRC, L.D. and B.G. v. Spain, Communication Numbers 37/2017 and 38/2017, 28 September 2020; CRC, M.B.S. v. Spain, Communication no. 26/2017, 28 September 2020; CRC, S.M.A. v. Spain, Communication No. 40/2018, 28 September 2020.
213. CCPR, K. v. Denmark, Communication No. 2393/2014, 16 July 2015, 7.4 and 7.5.
214. CCPR, X. v. Canada, Communication No. 2366/2014, 5 November 2015, 9.4.
215. CCPR, Pillai v. Canada, Communication no. 1763/2008, 25 March 2011, 11.3.
216. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.7.
217. CCPR, A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 7.6; CCPR, A.A.S. v. Denmark, Communication No. 2464/2014, 4 July 2016, 7.7; CCPR, H.A. v. Denmark, Communication No. 2328/2014, 9 July 2018, 9.8.
218. CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5; See also, CCPR, Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark, Communication no. 2409/2014, 29 March 2016, 7.8.
219. CCPR, R.M. and F.M. v. Denmark, Communication No. 2685/2015, 24 July 2019, paras. 9.7.
220. CCPR, M.K.H. v. Denmark, Communication No. 2462/2014, 12 July 2016, 8.8.
221. CCPR, E.U.L. v. Denmark, Communication no. 2469/2014, 1 July 2016, 9.10.
222. CCPR, Y. v. Canada, Communication No. 2314/2013, 22 March 2016, 7.5 and 7.6.
223. CAT, S.H. v. Australia, Communication No. 761/2016, 23 November 2018, 9.6.

The low probative value of the evidence can be an issue for the Committee,[224] especially considering the consistent observations on the absence of "tangible evidence" – e.g., court or police documents – that would indicate real persecution.[225] However, in *N.A.A. v. Switzerland*, the State party dismissed the complainant's documentary evidence – a residence confirmation from a local authority and a marriage certificate – stating that such documents can be purchased easily in Sudan.[226] The Committee noted that the state's assertion is not able to affect the complainant's credibility, as they do not provide evidence in this regard and they did not consider "[…] the fact that the author had to escape a conflict area and therefore had no access to other official documents."[227] General information sources are examined in a similar approach to that of the CCPR, with UN documents referred to as credible sources.[228]

Medical reports are also relevant in the assessment of the domestic procedure's lawfulness,[229] including medical documents issued by specialist NGOs: in *M.B. et al v. Denmark*, the Committee observed that the State party had failed "to verify the complainants' claims and evidentiary documentation, including the medical report issued by the Amnesty International Danish Medical Group and the first complainant's other medical records", resulting in a violation of the procedural guarantees under Article 3 CAT.[230] In *F.K. v. Denmark*, although the complainant did not provide documentary evidence in support of his asylum application, a torture report by Amnesty International was found to constitute "evidence in support of a crucial element of his claim", which called for an adequate examination of the claim.[231]

The **CEDAW** has previously required the submission of "independent evidence"[232] but seems to also make a free assessment of the evidentiary elements before it. In *A. v. Denmark*, the Committee takes note of the state's claim that the evidence submitted is not sufficient to establish a r*efoulement* claim, but it also observes that the complainant has submitted "all relevant information" regarding the tensions with her family (the reason for her escape).[233] In *A.M. v. Denmark*, it did not consider that the domestic rejection of the complainant's witness statement was not a procedural irregularity,[234] due to that statement's irrelevance with the complainant's claim; in the same case, however, it confirmed that obtaining documentary evidence for women is often difficult.[235] The Committee considers relevant international reports on the situation of women or the seriousness of gender violence in a particular country often by focusing on UNHCR guidelines and its own Concluding Observations.[236]

The **CRC** considers that birth certificates, passports and consular cards are to be considered authentic unless there is evidence to the contrary.[237] In *M.T. v. Spain*, the Committee reiterated its observation that identity documents should be considered authentic in principle, adding that the authorities should have contacted the consular authorities of the child's country if they were having any doubts regarding the document's validity.[238] Similarly, in *R.K. v. Spain*, the Committee dedicated most of its reasoning criticizing the fact that the authorities did not consider existing documentation when assessing the child's age and concluded with a recommendation towards the authorities "that the documents submitted by these young people are taken into consideration and, where the documents have been issued or verified by the issuing States or by the embassies thereof, they are accepted as genuine."[239] Lastly, in its most recent case in *M.B. v. Spain*, the Committee condemned the lack of adequate consideration of the complainant's documents and emphasised that the requirement for passport documentation cannot be used to reject an original and official

224. CAT, B.N.T.K. v. Sweden, Communication No. 641/2014, 9 August 2018, 8.6;
225. CAT, Y. v. Switzerland, Communication No. 431/2010, 21 May 2013, 7.7; CAT, S.M. v. Switzerland, Communication No. 406/2009, 23 November 2012, , 7.5; CAT, S.P. v. Australia, Communication No. 718/2015, 22 November 2019, 7.7;
226. CAT, N.A.A. v. Switzerland, Communication No. 639/2014, 2 May 2017, 7.5;
227. Ibid.
228. CAT, Gharshallah v. Morocco, Communication No. 810/2017, 3 August 2018, 8.5; CAT, Chahin v. Sweden, Communication No. 310/2007, 30 May 2011, 9.4.
229. CAT, A.N. v. Switzerland, Communication No. 742/2016, 3 August 2018, 8.5 and 8.7; CAT, G.I. v. Denmark, Communication No. 625/2014, 10 August 2017, 8.6. and 8.7.
230. CAT, M.B. et al. v. Denmark, Communication No. 634/2014, 25 November 2016, para.9.8.
231. CAT, F.K. v. Denmark, Communication No. 580/2014, 23 November 2015, 7.6.
232. CEDAW, M.N.N. v. Denmark, Communication No. 33/2011, 15 July 2013, 8.11;
233. CEDAW, A v. Denmark, Communication No. 53/2013, 19 November 2015, 9.2.
234. CEDAW, A.M. v. Denmark, Communication No. 77/2014, 21 July 2017, 8.5.
235. *Idem*, 7.5.
236. See *supra*, note 233, 9.5. and 9.7; CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 8.5.
237. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019, 13.2.
238. CRC, M.T. v. Spain, Communication No. 17/2017, 18 September 2019, 13.4; CRC, L.D. and B.G. v. Spain, Communication Numbers 37/2017 and 38/2017, 28 September 2020, para. 10.14 and 10.15.
239. CRC, R.K. v. Spain, Communication No. 27/2017, 18 September 2019, 10 (a).

birth certificate issued by a sovereign country without being officially challenged.[240] In any case, authorities cannot reject a birth certificate's probative value, "without a prior formal assessment of the data contained in the certificate by a competent authority and without having, alternatively, checked the data contained in the certificate with the authorities of the author's country of origin."[241]

General information reports will be examined by the Committee to determine the concrete risk in the area of return but it has made clear that general reference to reports without contextualization is not sufficient.[242] In *W.M.C. v. Denmark*, the Committee heavily relied on reports by the U.S., U.K. and Canadian immigration services to assess the significant difficulties in registering the children of a single mother upon their return to China.[243]

For the **CRPD**, the practice on evidence assessment is far from consolidated but its approach in *N.L. v. Sweden* indicates a strong reliance towards official medical documents and country reports. In that case, the Committee referred to the European Court of Human Rights findings in Paposhvili v. Belgium,[244] noting that the risk should be assessed on the basis of "general sources such as reports of the World Health Organisation or of reputable nongovernmental organisations and the medical certificates concerning the person in question."[245] Despite the government's arguments that the complainant's health situation was not severe and that it related to the rejection of her application rather than her overall frail mental health, the Committee noted the "several medical certificates" that the complainant submitted and found that, in light of those, the state had failed to properly consider health-related risks upon return.[246]

In *E.L.A. v. France*, the **CED** noted the complainant's submission of medical certificates, as well as other certificates attesting to the disappearance of his brother in Sri Lanka, and emphasised that the decision of domestic authorities to reject this evidence was not reasoned and, thus, the assessment was not adequately conducted.[247]

2. REVIEW OF DOMESTIC PROCEDURES

2.1. Scope of review and assessment standards for national procedures

The **CCPR** considers that "it is generally for the organs of States parties to examine the facts and evidence of the case in question in order to determine whether such a risk exists" and that it will conduct its own review if "it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice."[248] The Committee will examine *refoulement* risks "in the light of the information that was known, or ought to have been known, to the State party's authorities at the time of the extradition".[249] However, when examining a communication, the Committee "must also take into account new developments that may have an impact on the risks that an author subject to removal may face."[250]

240. CRC, M.B. v. Spain, Communication No. 28/2017, 28 September 2020, para. 9.13. See also, CRC, M.T. v. Spain, Communication No. 17/2017, 18 September 2019; CRC, J.A.B. v. Spain, Communication no. 22/2017, 31 May 2019; CRC, A.D. v. Spain, Communication No. 21/2017, 4 February 2020; CRC, M.A.B. v. Spain, Communication No. 24/2017, 7 February 2020; CRC, H.B. v. Spain, Communication No. 25/2017, 7 February 2020; CRC, L.D. and B.G. v. Spain, Communication Numbers 37/2017 and 38/2017, 28 September 2020; CRC, M.B.S. v. Spain, Communication no. 26/2017, 28 September 2020; CRC, S.M.A. v. Spain, Communication No. 40/2018, 28 September 2020.
241. CRC, A.L. v. Spain, Communication No. 16/2017, 31 May 2019, para. 12.10. See also, CRC, M.T. v. Spain, Communication No. 17/2017, 18 September 2019; CRC, J.A.B. v. Spain, Communication no. 22/2017, 31 May 2019; CRC, A.D. v. Spain, Communication No. 21/2017, 4 February 2020; CRC, M.A.B. v. Spain, Communication No. 24/2017, 7 February 2020; CRC, H.B. v. Spain, Communication No. 25/2017, 7 February 2020; CRC, L.D. and B.G. v. Spain, Communication Numbers 37/2017 and 38/2017, 28 September 2020; CRC, M.B.S. v. Spain, Communication no. 26/2017, 28 September 2020; CRC, S.M.A. v. Spain, Communication No. 40/2018, 28 September 2020.
242. CRC, I.A.M. v. Denmark, Communication No. 3/2016, 25 January 2018, 11.8 and 11.8 (a).
243. CRC, W.M.C. v. Denmark, Communication No. 31/2017, 28 September 2020, 8.3.
244. EctHR, Paposhvili v. Belgium [GC], Application no. 41738/10, 13 December 2016.
245. CRPD, N.L. v. Sweden, Communication no. 60/2019, 28 August 2020, para. 7.5.
246. *Idem*.
247. CED, E.L.A. v. France, Communication no. 3/2019, 25 September 2020, para. 7.5.
248. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.4; CCPR, S.F. v. Denmark, Communication no. 2494/2014, 14 March 2019, 8.4; CCPR, K.H. v. Denmark, Communication No. 2423/2014, 16 July 2018; CCPR, A.A. v. Denmark, Communication No. 2595/2015, 22 March 2018, 7.4; CCPR, Y. v. Canada, Communication No. 2314/2013, 22 March 2016, 7.3; CCPR, M.I. v. Sweden, Communication no. 2149/2012, 25 July 2013, 7.4.
249. CCPR, Maksudov et al. v. Kyrgyzstan, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 16 July 2018, 12.4.
250. CCPR, J.I. v. Sweden, Communication 3032/2017, 13 March 2020, 7.8.

The **scope of review** for the **CCPR** is characterised by a strong element of deference to the assessment and findings of the national authorities, to which it attaches "important weight.[251] The Committee mainly seeks to ascertain whether the complainant has demonstrated that there were "irregularities" in the decision making that indicated "manifestly erroneous" or "unreasonable" outcomes.[252] In this vein, the complainant has to specifically address these irregularities and explain how the domestic procedure was improperly conducted.[253] Where the applicant does not sufficiently substantiate their claims, or does not contest the state's arguments, the Committee may reject the complaint without providing extensive reasoning, relying entirely on the national findings.[254] The Committee's subsidiary role is evident in its reasoning in *H.A. v. Denmark*, which declared its inability to conduct an assessment of the complainant's risk on the basis of information in the case files and recalled "that it remains the responsibility of the State party to continuously assess the risk that any individual would face in case of return to another country."[255] However, in many of the cited cases the Committee resorts to brief references to the fact that the applicant has not substantiated their claims, or to the effectiveness of national procedures, without clearly discussing the elements that support this conclusion.

In terms of **the standard of review**, the Committee notes that sufficient weight must be given to the risk the person might face if deported. General conditions in the receiving country and individual circumstances must be assessed together and in association with vulnerability considerations.[256] States cannot rely on general claims and reports to consider themselves exempt from the obligation to provide a thorough examination.[257] In *Ahani v. Canada*, the Committee emphasised that, when the right to be free from torture, "one of the highest values" of the Covenant, is at stake, the closest scrutiny should be applied to refoulement assessment procedures.[258] In an equally protective approach, the Committee has clarified that the absolute nature of the prohibition of torture and cruel, inhuman or degrading treatment precludes any balancing of this principle "with considerations of national security or the type of criminal conduct an individual is accused or suspected of."[259]

The national procedure must foresee an effective remedy to provide for an independent review of a decision of return; the absence of any such opportunity will amount to a breach of Article 7 in conjunction with Article 2 of the Covenant.[260] In *Maksudov et al v. Kyrgyzstan*, the Committee observed that "[…] by the nature of refoulement, effective review of an extradition decision must have an opportunity to take place prior to extradition, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning."[261]

The **scope of review** for the **CAT** is less strictly constructed and follows the interpretation provided in General Comment no. 4.[262] The Committee "gives considerable weight to finds of fact made by organs of the State party concerned; however, it is not bound by such findings, as it can make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case (para. 50)."[263] The Committee always examines whether refoulement risks exist at the time of its consideration of the case.[264] In its assessment, the Committee follows the same approach as the CCPR, examining whether the complainant has sufficiently shown that the domestic

251. CCPR, J.D. v. Denmark, Communication No. 2204/2012, 26 October2016, 11.4;
252. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.8; CCPR, F.A. v. Russia, Communication No. 2189/2012, 27 July 2018, 9.4;
253. CCPR, M.Z.B.M. v. Denmark, Communication No. 2593/2015, 20 March 2017, 7.5.
254. CCPR, Z. v. Denmark, Communication No. 2422/2014, 11 March 2016, 7.3; CCPR, M.Z.B.M. v. Denmark, Communication No. 2593/2015, 20 March 2017, 7.4; CCPR, Z. v. Denmark, Communication No. 2329/2014, 15 July 2015, 7.4; CCPR, P.T. v. Denmark, Communication No. 2272/2013, 1 April 2015, 7.3 and 7.4; CCPR, X v. Norway, Communication No. 2474/2014, 5 November 2015, 7.5; CCPR, R.M. and F.M. v. Denmark, Communication No. 2685/2015, 24 July 2019, paras. 9.7 and 9.8.
255. CCPR, H.A. v. Denmark, Communication No. 2328/2014, 9 July 2018, 9.8.
256. CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017, 8.11; CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016, 7.8; CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5; CCPR, A.A.S. v. Denmark, Communication No. 2464/2014, 4 July 2016, 7.7; CCPR, X. v. Denmark, Communication no. 2389/2014, 22 July 2015, 7.7.
257. CCPR, Jasin v. Denmark, Communication No. 2360/2014 22 July 2015, 8.9; CCPR , Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5.
258. CCPR, Mansour Ahani v. Canada, Communication No. 1051/2002, 29 March 2004, 10.6.
259. CCPR, Maksudov et al. v. Kyrgyzstan, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 16 July 2008, 12.4.
260. CCPR, Mohammed Alzery v. Sweden, Communication No. 1416/2005, 25 October 2016, 11.8.
261. See *supra*, note 259, 12.7.
262. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 50.
263. CAT, X., Y. and others v. Sweden, Communication No. 816/2017, 2 August 2019, 8.4; CAT, X. v. Switzerland, Communication No. 765/2016, 23 November 2018, 7.5;
264. CAT, X v. Switzerland, Communication No. 775/2016, 5 August 2019, 8.8.

procedure suffered from any "irregularities."[265] The Committee has repeatedly observed that "the prohibition against torture is absolute and non-derogable and that no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture",[266] even "in the context of national security concerns".[267]

The **standard of the national assessment** can be found in the Committee's General Comment no. 4, where it is stated that each case needs an individual, impartial and independent examination, possibility for review and an appeal with a suspensive effect.[268] In practice, the Committee noted in *Agiza v. Sweden* that the right to an effective remedy under Article 3 ensures that the Convention's protection is not rendered "illusory"; consequently, the inability to contest a return decision before an independent authority will entail a violation of Article 3.[269] In *Ke Chun Rong v. Australia*, the failure to inform the applicant of the invitation to a hearing reviewing the rejection of his initial application for a Protection Visa amounted to a lack of access to an effective remedy.[270] In *Singh v. Canada*, the Committee found that a remedy that does not guarantee "a review on the merits of the complainant's claim that he would be tortured" upon return is not effective and that "the State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture."[271] Similarly, overly strict application of procedural rules that precludes an effective examination of a refoulement claim has also been found to contravene Article 3 in *Iya v. Switzerland*.[272]

In terms of **scope**, the **CEDAW** follows the same line and gives "important weight to the assessment conducted by the national authorities, unless it was found that the evaluation was clearly arbitrary or amounted to a denial of justice."[273] The national review of the refoulement claim should be free from any form of gender-related discrimination and bias.[274] Generally, the complainant must first raise any gender-related claim of refoulement with the national authorities before claiming deficiencies in the national examination procedure before the Committee.[275] If the national authorities have not been given an opportunity to address the claim, the complaint will not be considered by the Committee. For example, in *H.D. v. Denmark*, the Committee noted the national authorities' refusal of an examination to clarify the possibility of past torture but decided that the lack of substantiation of the complaint rendered the case inadmissible nonetheless.[276]

In its General Recommendation no. 32, the Committee makes an important clarification on **national standards** and the need to ensure that women asylum seekers shall have access to legal representation before their asylum interview, including free legal assistance where necessary; unaccompanied and separated girls should also benefit from a legal representative to guide them through national procedures.[277] In *Rahma Abdi-Osman v. Switzerland*, the Committee stated that "it is for each sovereign State party to determine the nature, structure and procedures of its own asylum system, as long as basic procedural guarantees set down in international law are provided"[278] and rejected the complainant's claims having found no such defects in the assessment of her case by national authorities. In the same line, the Committee's General Recommendation No. 33 provides extensive guidance on gender-inclusive justice.[279]

The **CRC** does not begin its reasoning in asylum-related cases by reference to **the scope of its review** but it has underlined that any national assessment procedure of non-refoulement should be conducted in line with

265. CAT, S. v. Sweden, communication No. 691/2015, 16 November 2018, 10; CAT, I.E. v. Switzerland, Communication No. 683/2015, 14 November 2017, 7.8.
266. CAT, Flor Agustina Calfunao Paillalef v. Switzerland, communication No. 882/2018, 5 December 2019, 8.2; CAT, Hanny Khater v. Morocco, Communication No. 782/2016, 22 November 2019, 10.2; CAT, Ismet Bakay v. Morocco, Communication No. 826/2017, 20 December 2019, 7.2.
267. CAT, Agiza v. Sweden, Communication No. 233/2003, 20 May 2005, 13.8.
268. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 12. See also, CAT, S.H. v. Australia, Communication No. 761/2016, 23 November 2018, 9.7.
269. CAT, Agiza v. Sweden, Communication No. 233/2003, 20 May 2005, 13.6 and 13.7.
270. CAT, Ke Chun Rong v. Australia, Communication No. 416/2010, 5 November 2012, 7.5.
271. CAT, Singh v. Canada, Communication No. 319/2007, 30 May 2011, 8.8 and 8.9.
272. CAT, Iya v. Switzerland, Communication No. 299/2006, 16 November 2007, 6.5.
273. CEDAW, A.R.I. v. Denmark, 25 February 2019, 10.5.
274. CEDAW, N.Q. v. the UK, Communication no. 62/2013, 21 March 2016, 6.6.
275. CEDAW, N.S.F. v. the UK, Communication No. 10/2015, 12 June 2007, 7.3; CEDAW, A.M. v. Denmark, Communication No. 77/2014, 21 July 2017, 8.4; CEDAW, L.O. et al. v. Switzerland, Communication No. 124/2018, 6 July 2020, 6.7.
276. CEDAW, H.D. v. Denmark, 9 July 2018, 7.12.
277. CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, para. 50 (c).
278. CEDAW, Rahma Abdi-Osman v. Switzerland, Communication No. 122/2017, 6 July 2020, 7.4.
279. CEDAW, General Recommendation No. 33 on women's access to justice, 3 August 2015.

the principle of precaution and in conformity with the best interests of the child.[280] In *W.M.C. v. Denmark*, the Committee also referred to the need for any risk assessment to be conducted in an age and gender-sensitive manner.[281]

With these principles also guiding its assessment of national standards, the Committee requires States parties to provide legal representation, in addition to the appointed guardian, where a child is involved in asylum procedures.[282] In cases involving unaccompanied asylum-seeking children, the Committee has emphasised the need for free legal representation as soon as possible following the child's arrival, especially when age assessment procedures are initiated, as the outcome of these will determine the Convention's applicability.[283] The Committee considers these guarantees to form an essential part of the right to be heard and the principle of the best interests of the child.[284] In the same line, a child's experience in return proceedings will have to be particularly considered and their situation has to be assessed separately from that of their parents.[285]

The **CRPD** follows the CCPR's approach attaching considerable weight to the findings of national authorities, unless the evaluation "was clearly arbitrary or amounted to a manifest error or denial of justice."[286]

According to the **CED**, the risk of enforced disappearance following return must be assessed in a comprehensive manner ("*d'une manière exhaustive*"), meaning that domestic courts must genuinely examine the core issues of a case; in *E.L.A. v. France* the Committee specified that mere acknowledgment of a complainant's arguments and a simple confirmation of the lower court's findings does not satisfy this requirement.[287]

2.2. Specific considerations: vulnerability, internal protection/flight alternative, assurances, sur place activities

Vulnerability is a strong component in the UN Committees' jurisprudence, although the interplay between vulnerable circumstances and risk assessment is not consistently clear. Generally, the **CCPR** will consider all elements in its assessment, especially what it has called "vulnerability-increasing factors" such as age,[288] medical conditions,[289] victim of trafficking.[290] The "cumulative effect" of specific vulnerable circumstances in the same case should be given adequate consideration in the national procedure,[291] including the long-term vulnerability that certain traumatic experiences can create (e.g. human trafficking).[292] The approach, however, appears to be highly specific to the situation under examination and has led to contradictory findings.

In *Jasin v. Denmark,* the CCPR heavily relied on the family's vulnerable status to find a violation of the Covenant due to the mother being single with three children and because their residence documents had expired,[293] while in *R.A.A. and Z.N. v. Denmark* and *Abubakar v. Denmark,*[294] the vulnerability finding was mostly the result of a combination of the age of the child and the existence of a medical condition; their valid residence permits also played a role in the assessment as the state had not explained why these permits would protect them.[295] However, in *M.A.S. and L.B.H. v. Denmark,*[296] the complainants were a

280. CRC, I.A.M. v. Denmark, Communication No. 3/2016, 25 January 2018, 11.8 (c) and 11.9.
281. CRC, W.M.C. v. Denmark, Communication No. 31/2017, 28 September 2020, 8.3.
282. CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 36.
283. CRC, M.T. v. Spain, Communication No. 17/2017, 18 September 2019, 13.5; CRC, R.K. v. Spain, Communication No. 27/2017, 18 September 2019, 9.8; CRC, A.L. v. Spain, Communication No. 16/2017, 31 May 2019, paras. 12.3 and 12.8.
284. CRC, L.D. and B.G. v. Spain, Communication Numbers 37/2017 and 38/2017, 28 September 2020, para. 10.14 and 10.15.
285. CRC, V.A. v. Switzerland, Communication No. 56/2018, 28 September 2020, paras. 7.3 and 7.4.
286. CRPD, N.L. v. Sweden, Communication no. 60/2019, 28 August 2020, paras. 7.3.
287. CED, E.L.A. v. France, Communication no. 3/2019, 25 September 2020, para. 7.6.
288. CCPR, O.A. v. Denmark, Communication no. 2770/2016, 7 November 2017, 8.11.
289. CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016, 7.8.
290. CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5.
291. CCPR, A.A.S. v. Denmark, Communication No. 2464/2014, 4 July 2016, 7.7; CCPR, X. v. Denmark, Communication no. 2389/2014, 22 July 2015, 7.7.
292. CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5.
293. CCPR, Jasin v. Denmark, Communication No. 2360/2014 22 July 2015, 8.4 and 8.9.
294. CCPR, Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark, Communication no. 2409/2014, 29 March 2016.
295. CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016, 7.7 and 7.8.
296. CCPR, M.A.S. and L.B.H. v. Denmark, Communication No. 2585/2015, 8 November 2017, 8.5.

family with children and they alleged medical conditions but the Committee did not sufficiently explain why their residence permits would protect them. Similarly, in *J.I. v. Sweden*, the Committee did not consider the multiple vulnerability-related characteristics of the applicant, who was a Christian convert from Afghanistan, without any known network in the country and with claims of westernised elements in his case.[297] The Committee failed to consider the cumulative effect of these characteristics and did not contest the domestic proceedings, where the risk claims were only examined separately and not in an approach that considers the overall situation of the person. The point was also raised by Committee member Gentian Zyberi in his dissenting opinion in that case.

The case of *C. v. Australia* revealed a more positive assessment of mental health-related consequences upon deportation of a person with a protection profile and how these interplay with the situation in the country of origin. A combination of a person's recognised refugee status and the lack of available and effective medication for his mental illness was sufficient to bar his deportation: according to the Committee's reasoning, "In circumstances where the State party has recognised a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant."[298] In another interesting decision, in *M.K.H. v. Denmark*, the Committee ignored the State party's argument that vulnerability and procedural capacity were assessed in accordance with the UNHCR guidelines and stated that the authorities did not properly consider the possibility that the complainant could be a minor and the consequences that this consideration had on the complainant's return.[299]

The **CAT** has addressed the issue of vulnerability in its General Comment no. 4, where it has clarified that it is one of the main factors in assessing the negative physical and/or mental consequences that violent acts will have on the person.[300] Its findings on vulnerability are also highly specific and are often assessed on the basis of combined particular circumstances. The Committee has found violation in cases where the domestic authorities did not consider particular vulnerability factors such as: mental illness and lack of treatment/ destitution,[301] past experience of torture,[302] young age and low level of education/lack of family networks,[303] survivor of gender violence and violence prevalence in return state,[304] and detention.[305]

In *Z.K. and A.K. v. Switzerland*, the Committee noted that the particular vulnerability of a victim of torture entail an obligation on behalf of the state to handle a case of deportation with all fundamental guarantees and safeguards, including a medical examination to verify past experience of torture and to safely identify risks of return.[306] In *M.K.M. v. Australia*, the length of immigration detention was considered to have exacerbated the person's PTSD-related vulnerability and the Committee observed that the Australian authorities "[…] did not adequately assess the mental health condition of the complainant, the actual availability of adequate treatment in Afghanistan and the potential consequences for the complainant's mental health of his forced removal to his country of origin", in violation of Article 3 CAT.[307] In an opposite approach, the Committee considered the medical reports documenting the complainant's serious PTSD-related complications in *M.F. v. Switzerland* but also noted the State party's arguments that there are numerous medical facilities to treat the complainant and a strong family network; as it did not find any personal risk of serious harm, it did not conclude that the complainant's return to Ethiopia would be affected by her vulnerability.[308]

The **CEDAW** is already a body with a specific mandate to address gender-related vulnerabilities; these are further defined in General Recommendation no. 32 to include torture incidents, sexual exploitation and

297. CCPR, J.I. v. Sweden, Communication no. 3032/2017, 13 March 2020.
298. CCPR, C. v. Australia, Communication no. 900/1999, 28 October 2002, 8.5.
299. CCPR, M.K.H. v. Denmark, Communication No. 2462/2014, 12 July 2016, 8.7.
300. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 17.
301. CAT, A.N. v. Switzerland, Communication No. 742/2016, 3 August 2018, 8.10; CAT, M.K.M. v. Australia, Communication No. 681/2015, 10 May 2017, 8.8; CAT, M.F. v. Switzerland, Communication No. 658/2015, 15 November 2016, 7.6.
302. CAT, Adam Harun v. Switzerland, Communication No. 758/2016, 6 December 2018, 9.9 and 9.10; CAT, Khademi v. Switzerland, 14 November 2014, 7.6.
303. CAT, N.A.A. v. Switzerland, Communication No. 639/2014, 2 May 2017, 7.5.
304. CAT, F.B. the Netherlands, Communication No. 613/2014, 20 November 2015, 8.8.
305. CAT, M.G. v. Switzerland, Communication No. 811/2017, 7 December 2018, 7.3; CAT, Khademi v. Switzerland, 14 November 2014, 7.6.
306. CAT, Z.K. and A.K. v. Switzerland, Communication No. 698/2015, 11 May 2018, 9.6.
307. CAT, M.K.M. v. Australia, Communication No. 681/2015, 10 May 2017, 8.8 and 8.9.
308. CAT, M.F. v. Switzerland, communication No. 658/2015, 15 November 2016, 7.6.

abuse.[309] In *Zheng v. the Netherlands,*[310] although the Committee found it inadmissible, some of its members stated in their dissenting opinion that the "very vulnerable" situation of victims of trafficking should be taken into account. In the admissible case of *R.S.A.A. v. Denmark*, the Committee decided that the domestic assessment had not been thorough, as it had failed to consider the vulnerable situation of the woman as a Palestinian refugee, or as a potentially stateless woman in Jordan.[311] However, it seems that the Committee will not consider any claims of vulnerability on its own, if it finds that the domestic procedure did not suffer from any irregularities or that the complainant's "generalised" claims did not point to an inadequate assessment.[312]

Also due to its specific mandate, the **CRC** approach is to put the child's inherent vulnerability at the centre of its decision-making. In this context, the Committee has focused on the "particular vulnerability" of unaccompanied and separated children in its General Comment no. 6.[313] The Committee will examine all the circumstances of the child's return when assessing vulnerability factors, including any vulnerability relating to the parents. In *I.A.M. v. Denmark*, the Committee noted the lack of domestic consideration to the fact that the child would return with her single mother without a male supportive network.[314] In *D.D. v. Spain*, the CRC confirmed that for a refoulement assessment to be in accordance with the best interests of the child and Article 20 of the Convention, it should necessarily include an examination of the child's potential vulnerabilities.[315]

In *L.D. and B.G. v. Spain*, the Committee further noted the "very high degree of vulnerability" of unaccompanied minors and concluded that the complainant's treatment by the state as an adult constituted a violation of Article 20.[316] In *V.A. v. Switzerland*, a case concerning the right of two children involved in Dublin III transfer proceedings, the vulnerability and increased likelihood of trauma for children in return proceedings were emphasised in numerous ways. The Committee found that the denial of an interview, due to the fact that the children were below 14 years old, violated their right to be heard under Article 12 of the Convention, while the disregard towards the traumatic experience of forced displacement for children indicated an improper assessed of the best interests of the child.[317] According to the decision, the traumatic events "may have very different consequences on them from those experienced by their mother" and authorities have to consider this when acting with due diligence.

The **CRPD** has not made specific reference to vulnerability in the context of *refoulement* cases but it has reiterated that the specific conditions of persons with disabilities and additional vulnerabilities, including migrants and asylum-seekers, should always be considered.[318] In *N.L. v. Sweden*, the Committee referred to the health-related vulnerability of the complainant referring to the jurisprudence of the CAT and the CCPR and confirmed the important role of vulnerability in individualised assessment procedures.[319]

The issue of **internal protection/flight alternative** is particularly interesting as the Committees do not share a consistent approach when it comes to the efficacy of this concept, or its actual use. The **CCPR** does not seem to have developed a consistent approach on the issue of internal flight alternative. In *B.L. v. Australia* the Committee merely referred to the complainant's lack of explanation regarding "why he could not relocate within Senegal", without providing any sort of thorough analysis or explanation.[320] This prompted two individual opinions by two of its members, with one confirming that the Committee's reference in para. 7.4 is indeed an assessment of internal flight alternative,[321] and the other asserting that the Committee has never based its decisions on this concept and expressing concerns regarding the consequences of such

309. CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, para. 34.
310. CEDAW, Zheng v. The Netherlands, Communication No. 15/2007, 27 October 2008, Dissenting Opinion of Committee Members Mary Shanthi Dairiam, Violeta Neubauer and Silvia Pimentel, 8.1.
311. CCPR, R.A.A. and Z.N. v. Denmark, Communication No. 2608/2015, 28 October 2016, 8.8.
312. CEDAW, A.M. v. Denmark, Communication No. 77/2014, 21 July 2017, 8.4.
313. CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, paras. 1, 4, 16, 20.
314. CRC, I.A.M. v. Denmark, Communication No. 3/2016, 25 January 2018, 11.8 (a).
315. CRC, D.D. v. Spain, Communication No. 4/2016, 1 February 2019, 14.3.
316. CRC, L.D. and B.G. v. Spain, Communication Numbers 37/2017 and 38/2017, 28 September 2020, para. 10.17.
317. CRC, V.A. v. Switzerland, Communication No. 56/2018, 28 September 2020, paras. 7.3 and 7.4.
318. UN Committee on the Rights of Persons with Disabilities (CRPD), Report of the Committee on the Rights of Persons with Disabilities: First session (23-27 February 2009), Second session (19-23 October 2009), Third session (22-26 February 2010), Fourth session (4-8 October 2010), 2011, A/66/55, p. 75.
319. CRPD, N.L. v. Sweden, Communication no. 60/2019, 28 August 2020, paras. 7.4.
320. CCPR, B.L. v. Australia, Communication No. 2053/2011, 16 October 2014, 7.4.
321. *Idem*, see Individual Opinion of Committee member Dheerujlall B. Seetulsingh.

reasoning.[322] However, in its recent General Comment no. 36, the Committee stated that internal protection alternatives may be considered when the case concerns risks emanating from non-state actors.[323]

The **CAT** does not consider the internal flight alternative to be "reliable or effective",[324] as clearly stated in its General Comment no. 4. In its jurisprudence, it generally follows the same approach although not always very consistently. It does reiterate that it is not a reliable or durable solution but it seems to add a consideration of the context of generalised lack of protection,[325] or where "the persecution of the civilian population by anti-government elements is often random in the complainant's country of origin."[326] However, in *N.S. v. Canada*, the Committee found that the internal flight alternative "is not an admissible option unless the Committee has received reliable information before the deportation that the State of return has taken effective measures able to guarantee full and sustainable protection of the rights of the person concerned."[327] In *B.S.S. v. Canada*, the Committee explicitly referred to the complainant's local risk and considered that the latter did not explain why he would face risks in other parts of India,[328] while *in Mondal v. Sweden* it observed that "the notion of "local danger" does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured."[329]

For **CEDAW**, its General Recommendation no. 32 subjects the concept of flight alternative to strict gender-related requirements, such as a woman's ability to travel, childcare issues, possibility of independent living, and risks of sexual violence.[330] In *S.O. v. Canada*, the Committee did not accept the complainant's argument on lack of a real alternative of internal relocation, finding that she did not adequately explain why she could not move to other regions of Mexico.[331] Although this finding is in stark contrast with the Recommendation's strict requirements, the complainant in this case had submitted arguments only regarding her ability to relocate to Mexico City.[332]

On **assurances**, the **CCPR** does not consider them to be generally effective but requires monitoring and enforcement mechanisms to ensure that the assurances will be effective to prevent the risk of ill-treatment; practical arrangements to ensure implementation should be in place in both states.[333] Diplomatic assurances may be considered when the case concerns risks emanating from non-state actors.[334] In general, the Committee seems to consider that an effective monitoring mechanism would, at a minimum, have to a) begin to function promptly after the arrival of the concerned person in the destination State; b) allow private access to a detainee by an independent monitor; and c) allow for the availability of independent forensic and medical expertise, at any moment.[335]

The **CAT** notes that assurances "cannot be used as an instrument to avoid the application of the principle of non-refoulement", especially when post-expulsion monitoring has not taken place,[336] or when medical factors aggravate the complainant's risk.[337] In *Boily v. Canada,* the Committee elaborated on its requirements for diplomatic assurances and emphasised that they should be approached with strict scrutiny as their request alone means that the state is already in doubts about the return country's human rights record;[338] the

322. *Idem*, see Individual Opinion of Committee member Fabián Omar Salvioli.
323. CCPR, General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, para. 30.
324. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 47.
325. CAT, I.A. v. Sweden, Communication No. 729/2016, 23 April 2019, 9.6.
326. CAT, M.K.M. v. Australia, Communication No. 681/2015, 10 May 2017, 8.9.
327. CAT, N.S. v. Canada, Communication No. 582/2014, 1 December 2016, 9.6.
328. CAT, B.S.S. v. Canada, Communication No. Communication No. 183/2001, 12 May 2014, 11.5.
329. CAT, Uttam Mondal v. Sweden, Communication No. 338/2008, 23 May 2011, 7.4.
330. CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, para. 28.
331. CEDAW, S.O. v. Canada, Communication No. 49/2013, 27 October 2014, 9.6.
332. *Idem*, 3.2.
333. CCPR, Mohammed Alzery v. Sweden, Communication No. 1416/2005, 25 October 2016, 11.5; CCPR, Valetov v. Kazakhstan, Communication No. 2104/2011, 17 March 2014, 14.5; CCPR, Maksudov and others v. Kyrgyzstan, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, 16 July 2018, 12.5 and 12.6.
334. CCPR, General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, para. 30.
335. CCPR, Mohammed Alzery v. Sweden, Communication No. 1416/2005, 25 October 2016, 11.5; CCPR, Zhakhongir Maksudov and Others v. Kyrgyzstan, Communications Nos. 1461, 1462, 1476 & 1477/2006*, 16 July 2008, paras. 12.5-12.6; See also, CCPR, Consideration of reports submitted by States Parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Denmark, 16 December 2008, CCPR/C/DNK/CO/5, para. 10.
336. CAT, Tursunov v. Kazakhstan, Communication No. 538/2013, 8 May 2015, 9.10.
337. CAT, H.Y. v. Switzerland, Communication No. 747/2016, 9 August 2017, 10.7.
338. CAT, Boily v. Canada, Communication No. 327/2007, 14 November 2011, 14.4.

Committee eventually requested the review of Canada's assurances practice.[339] In *Pelit v. Azerbaijan*, it was clarified that any monitoring would have to be, "in fact and in the concerned person's perception, objective, impartial and sufficiently trustworthy."[340]

The risk arising from **sur place activities** has been examined by the **CCPR** in a generally consistent manner although the reasoning is not always extensive enough to draw conclusions. In respect of claims arising from religious conversion in the host country, the Committee considers that, although it "may be reasonable for the States parties to conduct an in-depth examination of the circumstances of the conversion", the test will focus on the existence of serious adverse consequences in the country of origin/return as a result of that conversion, regardless of the sincerity of the person's activities.[341]

In *M.M. v. Denmark*, the Committee referred to UNHCR's Guidelines on Religion-based Refugee Claims[342] to reiterate that "self-serving" activities cannot create a well-founded fear unless serious consequences are found to exist.[343] Despite this reference, which seems to attempt a balance between the need for protection against *refoulement* and the consideration of non-genuine sur place activities, the sincerity of the sur place activity is a rather secondary concern for the Committee. In the case cited above, the Committee's decision focused on the efficiency of the risk assessment conducted by the Danish authorities and the lack of consequences upon return for the complainant, due to "a widespread understanding among Afghans for compatriots who try anything to obtain residence in Europe."[344] Although the finding that the complainant had not substantiated their claims is not clearly or extensively reasoned, the Committee's reliance on non-refoulement obligations is evident; a more robust reasoning on substantiation and quality of national assessment can be found in *X v. Norway*.[345] The Committee's focus on non-refoulement is also decisive in *K.H. v. Denmark*, where it found a violation of Articles 6 and 7 noting that the domestic authority "focused its reasoning on the sincerity of the conversion" and failed to adequately assess the actual risk of *refoulement*.[346]

Lastly, even if insufficient to establish a claim *per se*, sur place activities have been found to "increase" a person's risk of torture or ill-treatment in the country of return: in *Hamida v. Canada*, the complainant's risk of torture was compounded by the fact that he had made an asylum application in Canada "since this makes it all the more possible that the author will be seen as a regime opponent" if returned to Tunisia."[347] In the same line, the participation of a victim of human trafficking in judicial proceedings against the traffickers was found to have created "a particular status" for the complainant to be considered as being at an increased danger if returned to Nigeria.[348]

The **CAT** also examines *sur place* activities in a manner that puts *refoulement* risks at the centre of its assessment. In its General Comment No. 4, the Committee notes the relevance of the question of whether the complainant has "engaged in political or other activities *within or outside* the State concerned which would appear to make him/her vulnerable" to risks of *refoulement*.[349] When assessing political activities that took place in the host country, the Committee seeks to examine whether these attracted the attention of the authorities of the country of origin, especially looking into the public nature of those activities combined with practices of repression of political opponents in the destination country.[350] The political activity has to reach a level of certain "significance" and the complainant is expected to adduce evidence in that regard.[351] In *M.F. v. Switzerland*, the Committee rejected the complaint reiterating the government's arguments that the sur place activities "do not constitute lasting and intense activity that could be considered a serious and real threat to the Government."[352]

339. *Idem*, 15.
340. CAT, Pelit v. Azerbaijan, Communication No. 281/2005, 1 May 2007, para. 11.
341. CCPR, S.F. v. Denmark, Communication No. 2494/2014, 14 March 2019, 8.6; CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.6; CCPR, K.H. v. Denmark, Communication No. 2423/2014, 16 July 2018, 8.5.
342. UNHCR, Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (HCR/GIP/04/06), 28 April 2004.
343. CCPR, M.M. v. Denmark, Communication No. 2345/2014, 14 March 2019, 8.7.
344. *Idem*.
345. CCPR, X. v. Norway, Communication No. 2474/2014, 5 November 2015, paras. 7.5 and 7.6.
346. CCPR, K.H. v. Denmark, Communication No. 2423/2014, 16 July 2018, 8.6.
347. CCPR, Hamida v. Canada, Communication No. 1544/2007, 18 March 2010, 8.7.
348. CCPR, Osayi Omo-Amenaghawon v. Denmark, Communication No. 2288/2013, 23 July 2015, 7.5.
349. CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 49 (f).
350. CAT, Jahani v. Switzerland, Communication No. 357/2008, 23 May 2011, 9.5 & 9.10; CAT, Faragollah v. Switzerland, Communication No. 381/2009, 21 November 2011, 9.5. & 9.6.
351. CAT, I.E. v. Switzerland, Communication No. 683/2015, 14 November 2017, 7.7; CAT, L.P. v. Australia, Communication No. 666/2015, 1 December 2016, 8.12; CAT, S.M. v. Switzerland, Communication No. 406/2009, 23 November 2012, 7.6.
352. CAT, M.F. v. Switzerland, Communication No. 658/2015, 15 November 2016, 7.6.

In *Abdulkarim v. Switzerland*, the Committee repeated the same approach judging that the role that person had with the Justice and Equality Movement-Sudan in Switzerland was limited to "ordinary member" activities and did not pose a risk upon return.[353] The committee made an interesting reference to the judgment of the European Court of Human Rights (ECtHR) in *A.A. v. Switzerland*, to compare and conclude that that case concerned "a much more public political profile that grew in importance over the years",[354] although the Court had actually stated that "not only leaders of political organisations or other high-profile people are at risk of being detained".[355] It is interesting to note that the Committee had correctly interpreted the Court's paragraph and had reached the exact opposite conclusion in *N.A.A. v. Switzerland*[356] a few months before *Abdulkarim*. Although the divergence in the two reasonings may be perplexing, *N.A.A. v. Switzerland* may be the product of the Committee's individualised assessment, where the level of political activity that can support a sur place claim is related to the level of political activity that the specific country of return will tolerate. The reasoning in *Azizi v. Switzerland* further indicates that the level of sur place activity that can trigger protection against refoulement will be assessed on the basis of the destination country's "perception": the Committee found a violation of Article 3 CAT in the event of return since "recent reports indicate that low-level opposition is also closely monitored in the Islamic Republic of Iran".[357]

The **CEDAW** has not engaged with *sur place* claims in a manner that would allow an analysis of its assessment standards. In *A.S. v. Denmark*, the complainant alleged a risk of ill-treatment upon return to Uganda due to her public involvement in LGBTQIA+ matters in Denmark but the Committee found the case to be inadmissible due to lack of sufficient substantiation.[358]

V. CONCLUSION

The Treaty-based Committees have long adjudicated cases that concern the obligations of States parties to prevent exposure of individuals to torture and other forms of ill-treatment by establishing effective domestic procedures before any return, including robust national asylum frameworks. The absence of provisions directly prohibiting *refoulement* from certain UN human rights treaties makes the interpretation adopted by these bodies in their jurisprudence very important. Their case law enriches the international understanding of asylum-related guarantees around the world and widens the scope of non-refoulement by engaging the international responsibility of states to prevent serious human rights violations for every individual concerned.

1. THE IMPACT OF THE COMMITTEES' CASE LAW ON REFOULEMENT CASES

Their **quasi-judicial character and diverse thematic focus provide alternative avenues** for litigants seeking to address or remedy their states' violations of international human rights law. As discussed in Section 2.2, the absence of explicit *non-refoulement* provisions from some treaties, and the specialisation of others, may allow for a broad interpretation of the harm that can trigger *non-refoulement* and can offer different legal bases for applicants to argue prohibition of return.

Threats to life and risk of torture and ill-treatment have been used to support *refoulement* cases before the **CCPR**, while issues of gender-based harm and discrimination in asylum procedures have provided nuanced but equally strong arguments before the **CEDAW**. At the same time, the dedicated *non-refoulement* provision of the **CAT** (Article 3) has contributed to the development of this obligation on the international plane[359] and has produced a body of case law that constantly evolves and consolidates the international principles; the **CAT** stands out with its targeted protective approach, including its wide scope of review and a strict stance on diplomatic assurances, internal flight/protection alternatives. Other treaty bodies provide avenues for cases with specific elements of vulnerabilities or other circumstances and can, as a result, allow for a finding of *non-refoulement* through a more sensitive approach (**CRC**, **CEDAW**, **CRPD**). That same wide scope can also provide a good opportunity to address a variety of human rights violations before one body.

353. CAT, Aref Mohammed Abdulkarim v. Switzerland, Communication No. 710/2015, 6 November 2017.
354. *Ibid*, 10.8.
355. European Court of Human Rights, A.A. v. Switzerland, Application no. 58802/12, 7 January 2014, para. 40.
356. CAT, N.A.A. v. Switzerland, Communication No. 639/2014, 2 May 2017, 7.7.
357. CAT, Azizi v. Switzerland, Communication No. 492/2012, 27 November 2014, 8.6.
358. CEDAW, A.S. v. Denmark, Communication No. 80/2014, 26 February 2018, para. 8.4.
359. Starting, for example, with the extensive and thorough analysis in the Committee's General Comment no. 4 on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018.

However significant, the role of the Committees in adjudicating *refoulement* cases is **not always conducive to consistency and harmonisation**. The same quasi-judicial nature referred to above, as well as the strongly individual character of their assessment, may be the reason behind inconsistent approaches in some issues and a lack of elaborate reasoning of decisions. As noted in several cases throughout this paper, the length and detail of the Committee's reasoning may vary from case to case. In the same vein, a rather consistent approach on deference to national authorities and practice confirms their emphasis on the principle of subsidiarity – perhaps with the exception of the **CAT** –, and may explain the lack of significant detail in the reasoning as emanating from reliance to national findings. Difficulties in securing the implementation (see below) of UN Treaty bodies' decisions should also be considered when assessing the limits of these bodies in international litigation.

Lastly, it should be reminded that the Committees started dealing with asylum-related cases fairly recently and the number of such cases being submitted to them remains low; therefore, their jurisprudence on the topic is not very extensive.

2. THE INDIVIDUALISATION OF RISK

As a result of the aforementioned elements, clear conclusions on these bodies' approach to specific elements or assessment criteria in *refoulement* cases cannot be easily reached. On the contrary, the Committees seem to employ a strongly individualised assessment approach that examines the general background and situation but comes back to the "particular circumstances of the cases". Although an individualised assessment must be at the core of any thorough and fair procedure, the decisions analysed in this note indicate **a high degree of individualisation that makes the existence of concrete circumstances or specific vulnerabilities decisive elements for the case**.

In practice, the **CCPR** and the **CAT** will consider the general situation in the country of origin/return, including by examining reports and country of origin information, but only exceptional general circumstances will justify protection in the absence of an individualised risk. For the **CRC**, the **CRPD** and the **CEDAW** a similar approach is followed but the requirement for individualisation is also inherent to their specialised mandates: age, disability and gender-related circumstances are central to the complaint. In addition, the **CEDAW** requires the existence of discrimination on the basis of the particular gender-related circumstance for the claim to succeed. In its decisions, the Committee focused on whether the claims of inadequate assessment were linked to unequal treatment in the sense of absence of gender-related considerations in the national procedure; what is more, this gender-related discrimination has to be substantially relevant to the *refoulement* claim.

3. SUBSTANTIATING THE CLAIM

In the same line with individualisation and deference to national findings, the Committees seem to apply equally **strict requirements on the level of substantiation** that a complaint must include. It is self-evident that any decision-making procedure can only be based on claims, arguments and observations that are well-substantiated. The problem, however, may lie in the way the Committees reject claims as unsubstantiated without properly constructing the reasoning and substantiating their findings.

In asylum-related cases, the **CEDAW** seems to apply a very high threshold of substantiation for the purposes of admissibility, dismissing many complaints on account of lack of specific explanations or due to unresolved doubts. For the **CCPR**, the requirement for substantiation is also quite high and directly refers to the specificity of the claim/arguments; the threshold may be higher in cases where the national procedure was found to be particularly satisfactory. The **CAT**, however, has provided clear guidance on the relationship between substantiation and the *ability to elaborate on the claim*, as well as on the existence of the benefit of the doubt – both concepts can lead to a reversal of the burden of proof. Similarly, it has emphasised that, along with the requirement for complainants to substantiate their claims, States also have to make "substantial efforts" to determine risks of harm. A child-sensitive approach can be seen in most of the **CRC** decisions, both in terms of the obligation to protect that the state has to comply with, as well as specifically on the benefit of the doubt.

4. IMPLEMENTING THE DECISION[360]

An important element to consider in the assessment of bringing non-refoulement (or asylum-related cases) before the UN Committees is not only the potential for a finding of a violation but also the effect of the finding in the domestic reality, namely the level of impact/implementation of a Committee's decision. Such an impact could take the form of a change in domestic jurisprudence, or an inclusion of the Committees' views in domestic legislation, policies and practices.

Recourse to one of the UN treaty mechanisms may be time and resource-intensive, so the impact of the case on the outcome of the domestic proceedings, or the general legal framework and practice, will be one of the criteria in the choice of a mechanism. Although no official data exists on the implementation of decisions and legislative or policy changes stemming from the individual cases by UN Treaty Bodies by the States parties, the OHCHR maintains a database on state compliance with reporting duties. The database contains information on compliance with reporting obligations in the context of periodic reports but it can also be an indicator of their willingness to comply with follow-up implementation procedures following the conclusion of an individual communication procedure.[361]

A large number of states have introduced a variety of mechanisms to ensure compliance with treaty body jurisprudence, from national bodies with specific implementation duties, to legislative provisions that create a general obligation to implement treaty body decisions in the national legal order; in certain cases, states resort to the reopening of proceedings following a finding of a violation, or to the provision of compensation.[362] The overall level of implementation, however, is reportedly low for different reasons, including failure to apply existing domestic procedures of implementation or generally ineffective national mechanisms.[363]

For cases concerning non-refoulement, states follow different implementation approaches: **Sweden** has introduced legislation guaranteeing automatic implementation of decisions of international bodies, while **Switzerland** has granted international protection or residence rights following UN decisions, or has considered the latter as new evidence that can prompt the reassessment of a case.[364] **Norway and Denmark** have also followed the approach of "reopening proceedings" following findings of violations by treaty bodies.[365] In **Finland**, implementation has been satisfactory, with the authorities either granting asylum where the **CAT** has found a violation, or by granting other forms of protection/residence permits as a sort of friendly settlement in the context of ongoing proceedings before the Committee.[366]

However, the implementation of non-refoulement related decisions is not always automatic, or even if it is, it does not generate wider impact in the country's jurisprudence. In *E.K.W. v. Finland*,[367] the **CAT** found that the domestic assessment was erroneous and failed to give weight to the complainant's vulnerability. Despite **Finland's** initial compliance with the Committee's findings in this specific case, there have been recent cases with very similar elements that followed the assessment that the Committee had previously found to be erroneous.[368] **Denmark** seems to have started considering the reopening of proceedings as a satisfactory element of compliance without any need to necessarily follow the treaty body's finding of violation, to which it has referred as "criticism".[369] In *M.B. et al. v. Denmark*, despite the finding of a violation by the **CAT**, the Danish Refugee Appeals Board merely refers to "criticism" by the UN body and reassessed the case to uphold the previous refusal of the Asylum Service.[370] Similarly, in the CEDAW case of *R.S.A.A. et al v. Denmark* the Danish Refugee Appeals Board reopened the proceedings stating that the case received

360. The scope of this note does not include an analysis of the implementation of decisions by the UN treaty bodies.
361. OHCHR, UN Treaty Body Database, Late and non-reporting States.
362. Kate Fox Principi, Implementation of decisions under treaty body complaints procedures –Do states comply? How do they do it?, paras. 35 – 87.
363. *Idem*, paras. 123-124.
364. *Idem*, paras. 88-91.
365. *Idem*, 93-94.
366. Information obtained by the ELENA Network: Finnish Refugee Advice Centre – Pakolaisneuvonta.
367. CAT, E.K.W. v. Finland, Communication No. 490/2012, 4 May 2015
368. Information obtained by the ELENA Network: Finnish Refugee Advice Centre – Pakolaisneuvonta.
369. See for example, CAT, M.B. et al. v. Denmark, Communication No. 634/2014, 25 November 2016: despite the finding of a violation by the Committee, the Danish Refugee Appeals Board merely refers to "cri/ticism" by the UN body and reassessed the case to uphold the previous refusal of the Asylum Service. You can read the summary and the anonymised version of the judgment here. A similar reasoning following the CEDAW's findings in R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, led to the reopening of proceedings in the domestic context; the outcome is still pending. You can find more information here.
370. CAT, M.B. et al. v. Denmark, Communication No. 634/2014, 25 November 2016. You can read the summary and the anonymised version of the domestic judgment on the website of the Danish Refugee Appeals Board here.

criticism by the Committee, although a final decision has yet to be taken.[371] In certain cases, the Danish Refugee Appeals Board has noted that the statements of the CAT are not legally binding.[372]

Lastly, **Australia** and **Canada** have also refrained from fully implementing treaty body decisions in cases where the state does not agree with the findings of the treaty body, e.g., in cases with serious national security aspects.[373]

371. CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019. You can find more information on the website of the Danish Refugee Appeals Board here.

372. CCPR, M.K.H. v. Denmark, Communication No. 2462/2014, 12 July 2016. You can find more information on the website of the Danish Refugee Appeals Board here.

373. See *supra* note 362, paras. 95 and 96.