



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 428/2010

Decision adopted by the Committee at its forty-seventh session, 31 October to 25 November 2011

Submitted by:

Alexey Kalinichenko (represented by
counsel, Anton Giulio Lana and Andrea
Saccuci)

Alleged victim:

The complainant

State party:

Morocco

Date of complaint:

12 August 2010 (initial submission)

Date of present decision:

25 November 2011

Subject matter:

Extradition of the complainant to the Russian
Federation

Substantive issue:

Risk of torture upon return to the country of
origin

Procedural issue:

Non-exhaustion

Articles of the Convention:

3; 22, para. 5 (b)

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-seventh session)

concerning

Communication No. 428/2010

<i>Submitted by:</i>	Alexey Kalinichenko (represented by counsel, Anton Giulio Lana and Andrea Saccuci)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Morocco
<i>Date of complaint:</i>	12 August 2010 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 25 November 2011,

Having concluded its consideration of complaint No. 428/2010, submitted to the Committee against Torture by Anton Giulio Lana and Andrea Saccuci on behalf of Alexey Kalinichenko under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant of the communication, dated 12 August 2010, is Alexey Kalinichenko, a Russian national, born on 13 July 1979. He claims that his extradition to the Russian Federation would constitute a violation by Morocco¹ of article 3 of the Convention. He is represented by counsel, Anton Giulio Lana and Andrea Saccuci.

1.2 Under rule 114 (former rule 108) of its rules of procedure (CAT/C/3/Rev.5), the Committee requested the State party, on 13 August 2010, not to extradite the complainant to the Russian Federation while his communication is under consideration by the Committee. On 20 October 2010, 4 January 2011 and 11 May 2011 the request for interim measures was reiterated.

¹ On 19 October 2006, Morocco accepted the competence of the Committee against Torture to receive individual complaints under article 22 of the Convention.

1.3 On 4 January 2011, the Rapporteur on new complaints and interim measures acting on behalf of the Committee decided that the admissibility should be examined together with the merits. Pursuant to rule 115 (former rule 109), paragraph 9, of the Committee's rules of procedure, the State party was requested to give details of the effective remedies available to the alleged victim in the particular circumstances of the case and in accordance with the provisions of article 22, paragraph 5 (b), of the Convention.

1.4 On 15 May 2011, counsel informed the Committee that the complainant had been extradited to the Russian Federation on 14 May 2011. On 11 June 2011, the State party confirmed the complainant's extradition to the Russian Federation.

The facts as presented by the complainant

2.1 In 2002, the complainant opened his own company and worked as a financial advisor and analyst in Yekaterinburg, the Russian Federation. In 2003, due to a significant increase in transactions and clients, the complainant associated himself with three well-known businessmen of the region, Alexander Habarov, Alexander Varaksin (both members of the Duma) and Andrei Shatov. From 2003 to 2005, the complainant collaborated professionally with a local bank "Bank24.Ru" and his financial advice and management significantly increased the bank's financial capacity and ranking among regional banks. In exchange for his services, the complainant was entitled to a "stock option" on 20 per cent of the share capital if specific results were met. As of 2004, the complainant noticed that the bank's economic growth had attracted the interest of local organized crime. A local organized crime group, in complicity with two members of the bank's board of directors, a body the complainant was not part of, managed to gain control over several local companies, including some which belonged to the complainant's partners. Such acquisitions were performed according to the traditional pattern employed by the organized crime group, notably, small shareholders were compelled to transfer their shares to companies under the control of the organized crime group until the latter had enough financial power to gain control of the target company. Having become aware of such criminal conduct, the complainant informed his partners thereof. The complainant's partners reported the facts to the authorities; however their complaints were either dismissed or never investigated. In December 2004, the complainant's partner, Mr. Habarov, was arrested on charges which turned out to be ill-founded. He allegedly committed suicide in prison.

2.2 In January 2005, the complainant moved to St. Petersburg, fearing that he could be in serious danger if his relationship to his three dormant partners would become known to the organized crime group. In St. Petersburg, the complainant founded a trading school and a charity. He maintained contacts with the bank because he had to exercise control over the fulfilment of the stock option agreement. In April 2006, the complainant returned to Yekaterinburg, with the intention to further investigate the financial transactions of the bank, and discovered that the bank had gained control over Global Gamin Expo, a company of small and medium investors, for the purpose of collecting the cash flow needed to fund the unlawful operations of acquisition carried out by the local organized crime group. The complainant tried to slowly reduce the investment flow of the bank to prevent cash from flowing into criminal activities; however those officers from the bank involved with the organized crime group continued their activities by diverting funds from small and medium investors. The complainant informed his partner, Mr. Varaskin, who decided to report the facts to the judiciary and to make clear his real relationship with the complainant. After a few weeks, the complainant received a warning from a high-ranking officer in the bank, who told him that the organized crime group planned to kill him and his partner, Mr. Varaskin. The complainant decided to report the facts to the judicial authorities in Yekaterinburg and set up a website containing a description of the facts and documents.

2.3 On 7 July 2006, the complainant entered Italy on a regular entry visa. Meanwhile, his criminal complaint had been discontinued. In his absence and without his agreement or signature, on 12 August 2006, the complainant's shares of the Bank24.Ru were transferred to an unknown buyer.² On 23 August 2006, someone faked the data concerning the shares of the Global Gamin Expo company and registered the complainant as the 100 per cent owner, as well as its sole director in chief. Thereafter, executive officers of the bank reported the complainant to the police for having embezzled the client's funds from their personal accounts in Global Gamin Expo.³ The police opened an investigation and requested an international arrest warrant for the complainant on charges of fraud, without however providing any specific indications or documents to support the accusation, such as for example the complainant's personal accounts to which he would have transferred the money of Global Gamin Expo clients or the timing and modalities of the operations carried out on the clients' accounts.

2.4 In July 2007, the complainant's business partner Mr. Varaskin disappeared when he entered the prison facilities in Yekaterinburg to testify before the investigative authorities. In August 2008, the complainant's business partner Mr. Shatov survived a car bomb, but was killed by machine-gun fire in September 2008.

2.5 On 4 June 2008, the complainant was arrested in Italy pursuant to the international arrest warrant, which had been issued on 27 February 2007 for charges of embezzlement to the detriment of over 600 individuals and a total amount of 200 million roubles. However, in a separate decree of committal for trial dated 2 February 2007, the complainant had only been charged for embezzlement to the detriment of 100 individuals, for a total amount of 70 million roubles. On 6 June 2008, the Florence Court of Appeal ordered the complainant's detention on remand. On 8 June 2008, the complainant was released into home detention. On 5 November 2008 and 23 January 2009, the Florence Court of Appeal requested further information from the Russian authorities, as to the exact number of fraud charges and their substantiation, as well as the conduct imputable to the complainant with regard to his capacity to dispose of the clients' money. On 24 April 2009, the Florence Appeal Court held that conditions for the complainant's extradition had not been met, as neither the arrest warrant nor the decree of committal to trial indicated in a sufficiently precise manner the criminal conduct allegedly committed by the complainant. The Court lifted all restriction measures on the complainant. On 27 October 2009, the Supreme Court quashed the Florence Appeal Court judgement and found that the conditions for the complainant's extradition had been met and ordered the complainant's detention on remand until further decision by the Ministry of Justice. According to the Supreme Court, the information provided by the Russian authorities was sufficient to overcome the divergent indications as to the number and nature of the charges. The Russian authorities had explained that criminal proceedings had been instituted on charges of fraud to the detriment of 104 persons and the investigating authorities were still establishing the complainant's involvement in embezzling currency instruments to the detriment of over 2,000 other individuals. The complainant addressed a letter to the Minister of Justice explaining the background of the criminal proceedings for financial fraud, as well as the reasons for his fear of being killed or subject to torture or cruel, inhuman or degrading treatment if extradited to the Russian Federation.

² The complainant notes that according to the Russian legal system, any share transfer requires the physical presence of the two contractors, the local agent of the Central Bank of the Russian Federation and a notary.

³ The complainant underlines that if he had actually embezzled the Global Gaming Expo clients' money, there would be no logical reason to become sole director and shareholder of that company.

2.6 On 13 October 2009, 14 days prior to the Supreme Court decision, the complainant moved to Morocco and on 16 January 2010, he was arrested in Tangiers and was placed in detention for the purpose of his extradition to the Russian Federation. On 10 March 2010, the Supreme Court of Morocco authorized the complainant's extradition, despite the lack of any bilateral or multilateral agreement. The complainant was detained waiting for the final decision by the Minister of Justice, against which, however, he would not have any effective remedy. He further feared that he would not be informed in a timely fashion of the Minister of Justice's decision. Media information stated that the State party was willing to extradite the complainant and that they were preparing his hand-over.

The complaint

3.1 The complainant submits that if extradited to the Russian Federation, he would be exposed to a real risk of being subjected to torture in breach of article 3, of the Convention. He refers to the Committee's concluding observations on the fourth periodic report of the Russian Federation, which speaks of numerous, ongoing and consistent allegations of acts of torture committed by law enforcement personnel, including in police custody, and the insufficient level of independence of the Procuracy, in particular due to the problems posed by the dual responsibility for prosecution and for oversight of the conduct of the investigations (CAT/C/RUS/CO/4, paras. 9 and 12). In 2003, the European Committee for the Prevention of Torture found that it received a disturbing number of allegations of physical ill-treatment by members of the police. It further noted that the investigating officers were fully aware of the ill-treatment and acquiesced in it. The complainant submits that in the light of the specific background of his criminal proceedings, he has a well-founded fear to believe that he would be exposed to torture or even killed in prison or outside with the consent or acquiescence of the Russian authorities, if extradited to the Russian Federation.

3.2 The complainant further submits that the existence of a personal risk to his life is substantiated, *inter alia*, by the fact that his three business partners, who had reported the facts to the judicial authorities on the unlawful attempt by the organized crime group to acquisition their companies, died or disappeared shortly after their reports.

3.3 The complainant also underlines that his well-founded fear has been acknowledged by the Office of the United Nations High Commissioner for Refugees (UNHCR) representative in Rabat, who clearly stated that if extradited to the Russian Federation, the complainant would be exposed to a real risk of torture in breach of article 3.

State party's observations on admissibility

4.1 On 24 September 2010, the State party submitted its observations on the admissibility indicating that the author failed to exhaust domestic remedies. The State party explained that under Act No. 90-41 establishing administrative tribunals pursuant to Dahir No. 225 of 22 Rabi` I 1414 (10 September 1993) and, in particular, article 9 thereof, the Moroccan legislature granted the Administrative Chamber of the Supreme Court jurisdiction over first instance and final decisions concerning requests to overturn organizational and individual decisions of the Prime Minister on grounds of abuse of power. In accordance with article 109 of the Committee's rules of procedure (CAT/C/3/Rev.4), the State party requested that the complaint be declared inadmissible.

4.2 On 17 January 2010, the complainant was taken into temporary detention by the Moroccan authorities, based on an international arrest warrant issued by the Russian judicial authorities, for the misappropriation of large sums of money by means of deception and breach of trust on a broad scale. The complainant was brought before the Crown Prosecutor at the Tangiers Court of First Instance, who notified him of the authority under which he had been detained. The Russian authorities submitted an official request for his

extradition based on the principle of reciprocity according to which, under Moroccan law, criminals may be extradited in the absence of an agreement.

4.3 In the extradition request, the Russian authorities reported that Mr. Kalinichenko had published a false statement on the Internet in which he claimed to be a successful negotiator on the international currency markets who had been working on the foreign exchange market for some time. He proposed to an unspecified number of people that he would manage their funds, on which they would earn over 80 per cent in interest. A number of investors sent him their funds, which the complainant misappropriated by fraud, deception and breach of trust. The amount misappropriated was some 700 million Russian roubles, the total amount paid to him by the victims of these acts.

4.4 The extradition request was accompanied by an undertaking from the Russian authorities that Mr. Kalinichenko's rights to a defence, including to the assistance of lawyers, would be guaranteed when he was on Russian soil, in accordance with the principles of international law. In addition, they pledged that he would not be subjected to torture or degrading treatment, in accordance with article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations and Council of Europe Conventions and related protocols. Moreover, they undertook that he would be able to leave the Russian Federation once the initial search and investigation procedure was concluded or, should he be convicted, once he completed his sentence.

4.5 Having considered the extradition request and heard Mr. Kalinichenko's defence, presented by his lawyers, the Criminal Chamber of the Supreme Court issued decision No. 262/1 on 10 March 2010 approving his extradition. Once the judicial extradition procedures are completed, the Government of Morocco can issue a decree authorizing his extradition to the Russian authorities.

4.6 The State party notes that when Mr. Kalinichenko appeared before the Crown Prosecutor at the Tangiers Court of First Instance and before the Criminal Chamber of the Supreme Court, neither he nor his defence had previously mentioned the likelihood that he would be subjected to torture or harsh or inhumane treatment if he were extradited to the Russian authorities. The State party submits that the complainant was granted all legal and judicial safeguards before the Government decree authorizing his extradition was issued. The Moroccan authorities found no evidence that he would be subjected to torture if he were extradited. The decision to extradite him to the authorities in his country was made in the context of respect for the law and for the fundamental principles of human rights, which are at the core of the agreements that Morocco has ratified, and consequently the Moroccan authorities are unwilling to accept the author's appeal against his extradition to the Russian authorities.

The complainant's comments on admissibility

5.1 On 22 November 2010, the author submitted his comments on the State party's observations on admissibility. The author submits further factual information to his case. The complainant claims that he has been falsely accused by the Russian authorities of swindling and embezzlement of 200 million roubles (about US\$ 6.5 million) by carrying out fraudulent operations affecting around 600 Russian residents. He explains that when he got access to the bank's internal information in early 2006, he discovered that money was missing and that this money was used to gain control over the companies of his three business partners, now deceased. He notes that on 7 November 2006, contrary to the internal legislation, the Ministry of Interior, instead of the competent court or the Ministry of Justice, issued an international arrest warrant against him. In response to the charges against him, the complainant has submitted various documents explaining the supposed conspiracy around his case and how charges have been fabricated. He further argues that his signature has been forged, as documents, whereby he became the General Director of

the Global Gamin Expo, were signed with his name on 16 August 2006 when he had already left the country on 2 July 2006.⁴ The complainant maintains that a local business man, Sergey Lapshin and the General Prosecutor of Yekaterinburg, Iury Zolotov are probably responsible for the actions, as Mr. Lapshin acquired the totality of the complainant's shares of the bank presumably by forging his signature, as according to Russian legislation the potential buyer needs to be introduced to the bank and receive consent from the Central Bank to acquire shares.

5.2 With regard to the criminal plot in which the complainant was trapped, he claims that four persons linked to him have been killed: Alexander Khaparov, Andrey Shatov, Vladimir Sevastianov and Jaly Haliev, and that his business partner, Alexander Varaskin, had disappeared without any further information about his whereabouts. The complainant submits that these killings have been committed in order for the new owners, Mr. Lapshin and Mr. Zolotov, to take possession of the deceased's companies.

5.3 Moreover, the complainant notes that he has never been a general director of Global Gamin Expo, has never signed any agreements with the clients on opening margin trading accounts and can therefore not be held liable for the obligations undertaken by the two directors, Felix Alexandrovich Porin and Ekaterina Andreevna Demesh, as all asset entry or withdrawal to/from the margin trading accounts were performed by them.

5.4 The complainant submits that in violation of the Code of Criminal Procedure,⁵ criminal proceedings started in Yekaterinburg when he had his permanent residence in St. Petersburg. Despite a motion to the General Prosecutor's Office, proceedings were not moved. In contravention to the Code of Criminal Procedure,⁶ the complainant's counsel did not have access to expert reports. On 2 February 2007, the investigating authorities issued an indictment against the complainant under article 159, part 4, of the Criminal Code, without however notifying him of this warrant, despite the fact that the authorities knew his registration address and actual place of residence. On 27 February 2007, the district court imposed a preventive measure of detention in the complainant's absence, without previously having searched for him and without an arrest warrant, which is needed for this measure. On 16 November 2006, the complainant filed an application to the Deputy Prosecutor General for the institution of criminal proceedings against the management of Global Gamin Expo and the owner of Bank24.Ru. A criminal case was instituted but investigations have since been suspended. On 13 January 2010, in the complainant's absence, the Sverdlovsk District Court quashed earlier decisions and found that there was no need to prolong the complainant's custody on remand.

5.5 A number of civil proceedings against the complainant and Global Gamin Expo were started by the victims of the alleged fraud; all of them however have been decided in the complainant's favour, holding that the complainant held no responsibility for the alleged embezzlement. The author further notes that according to article 90 of the Code of Criminal Procedure, facts established by a civil court decision should be taken as true by any other court and therefore the investigation should have suspended the criminal case against him.

5.6 Following the complainant's arrest in Morocco, his parents started facing problems with the administration. On 25 July 2010, the author's parents were both denied renewal of their passports due to the need to carry out additional investigations on the basis of the legislation on the protection of State secrets. The complainant claims that he has a well-founded fear of reprisals against his parents, based on other cases, in which an individual

⁴ Date stamped in his passport by the Italian authorities.

⁵ Article 152.

⁶ Article 198.

left the country due to fear of persecution. His parents had to move to another city, as they were being intimidated by anonymous phone calls. Moreover, his lawyer received threats to her life and consequently had to cease representing him.

5.7 With regard to his well-founded fear of torture and irreparable harm in case of extradition to the Russian Federation, the complainant maintains that he is at serious risk of facing arbitrary arrest, torture and denial of a fair and public trial, as he has survived two murder attempts and is in possession of information that could be detrimental to public figures in the Russian Federation, in particular to the General Prosecutor of Yekaterinburg. He further submits that evidence supports his statements about organized crime and impunity, corruption of public officials and politically motivated killings in the Russian Federation.⁷ Furthermore, it has been reported that judges are often intimidated and constrained by the executive branch to convict persons who are innocent. The complainant further underlines that he is already considered guilty rather than innocent and would experience threats to his life by Russian authorities and persons acting on behalf of the authorities or criminal groups. He further notes that in the light of his complaint to the Prosecutor General of Moscow about the climate of corruption and impunity, his life is at great risk.⁸ The complainant notes that the detention conditions in the Russian Federation are life threatening due to overcrowding, poor living conditions and poor treatment of detainees. According to figures by the Federal Penal Service, of the 900,000 detainees, 795,000 are suffering from various diseases.⁹

5.8 The complainant notes that UNHCR considered that the persecution of the complainant, who as a financial trader is apolitical and not associated to any social group, did not relate to one or more of the grounds listed in article 1 of the 1951 Convention relating to the Status of Refugees. He however submits that the fact that he does not qualify for refugee status does not mean that he cannot rely on the protection of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as the persecution is not dependent on the existence of a particular ground. Despite refusing the complainant refugee status, UNHCR concluded that he might face arbitrary or unlawful deprivation of his life, arbitrary arrest or detention, and/or denial of a fair and public trial.

5.9 Recalling the Committee's jurisprudence,¹⁰ the complainant submits that neither himself nor the lawyer representing him before the Supreme Court have been officially served with the final decision by the Minister of Justice to authorize the extradition. It is not clear if a formal decision has been adopted, as the State party does not provide a copy of the decree by the Minister of Justice. Therefore, the complainant submits that he cannot be held responsible to file an appeal against an extradition decree which has not been served to him. The complainant further submits that even if the appeal had been formally served to him, an appeal for abuse of power before the Administrative Chamber of the Supreme Court falls

⁷ See United States Department of State, 2009 Country Reports on Human Rights Practices – Russia (11 March 2010); Council of Europe, Commissioner for Human Rights, report by Thomas Hammarberg following his visit to the Russian Federation on 2-11 September 2009 (24 November 2009); United Kingdom of Great Britain and Northern Ireland, Home Office, Country of Origin Information Key documents: Russia (19 January 2007).

⁸ The complainant cites two similar cases, one reported by the World Organisation against Torture ("Violent assault and judicial harassment against Mr. Vadim Karastelev", 16 March 2010) and one reported by the United States Department of State.

⁹ See United Kingdom, Foreign and Commonwealth Office, *Annual Report on Human Rights 2009* (March 2010), pp. 136-141.

¹⁰ See communication No. 233/2003, *Agiza v. Sweden*, decision adopted on 20 May 2005, paras. 13.6-13.7.

short of the requirement of effectiveness under article 22, paragraph 5 (b), and would not offer him any effective relief in respect to a violation of article 3, since it would not have effect of suspending the execution of the extradition order and would therefore not prevent the occurrence of irreparable harm if he was returned.¹¹

5.10 With regard to the diplomatic assurances of the Russian Federation, the complainant notes the Committee's jurisprudence, according to which it would not be sufficient to ensure compliance with the absolute prohibition of refoulement set out in article 3.¹² It is therefore clear that the general pledge by the Russian authorities to comply with international human rights standards cannot overturn the substantial, consistent and reliable evidence indicating on the one hand, the existence of a pattern of gross, flagrant and mass violations of human rights, and on the other hand, the existence of a well-founded fear of being exposed to a risk of torture or other ill-treatment by local authorities of Yekaterinburg or other public officials or private individuals acting on behalf of public authorities. Given that the Russian authorities felt the need to join to their extradition request diplomatic assurances may be seen in itself as evidence of the existence of a risk of torture.¹³

5.11 With regard to the State party's allegation that the complainant failed to raise the risk of torture in the course of the procedure of the Supreme Court, the complainant notes that this allegation is manifestly untrue, as his counsel extensively argued that the extradition would expose the complainant to a serious risk of being subject to torture or even being killed. The Supreme Court however did not take into consideration the complainant's counsel's arguments, since the relevant provision of the Code of Criminal Procedure stipulates that the extradition should be denied only if there are serious reasons to believe that the request has been filed with the sole purpose of prosecuting or punishing a person for discriminatory or religious considerations or for reasons relating to his nationality or his political beliefs. The complainant therefore submits that the domestic law of Morocco does not fully comply with the requirement of article 3 of the Convention. The State party's contention further contradicts its final statement, according to which domestic authorities found no evidence of the existence of a possibility that the applicant would likely be subjected to torture.

The State party's observations on the merits

6.1 On 18 February 2011, the State party submitted its observations on the merits and noted that the jurisdiction of the national judiciary in cases of extradition of offenders consists solely in handing down a decision on the extradition request by ascertaining whether the formal and objective conditions set forth in bilateral and multilateral agreements or in domestic legislation have been met and whether there exists dual criminal liability and a minimum penalty. It also establishes that the offence is not of a political or military nature, that the request is not based on racial or discriminatory grounds, and that it will not expose the wanted person to danger or to the risk of torture.

6.2 The State party reiterates that the complainant failed to exhaust domestic remedies, as he did not raise the issue of torture before the Supreme Court. It notes that defence

¹¹ See communications No. 63/1997, *Arkauz Arana v. France*, decision adopted on 9 November 1999, para. 6.1; No. 99/1997, *T.P.S. v. Canada*, Views adopted on 16 May 2000, para. 10.1; see also Human Rights Committee communication No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, para. 8.2.

¹² See *Agiza v. Sweden* (footnote 10 above), paras. 13.4-13.5; see also Human Rights Committee communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006, para. 11.5.

¹³ See the report by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Sweden on 21-23 April 2004 (8 July 2004), paras. 17-19.

counsel was present at all stages, from the submission of the defence plea to the Criminal Chamber of the Supreme Court to the filing of an appeal for review of the decision to approve the extradition request issued on 10 March 2010. It notes that article 721 of the Code of Criminal Procedure stipulates that extradition requests shall be refused if the Moroccan authorities have substantial grounds to believe that the extradition request for an ordinary offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinions or that the person's position may be prejudiced for any of those reasons.

6.3 It also notes that the complainant's extradition request was accompanied by diplomatic assurances not to subject him to torture or to assaults on his human dignity following his extradition to the Russian Federation by the State party. It submits that this is a conventional and familiar measure in the context of extradition of offenders, especially in the absence of an extradition treaty, and that cannot under any circumstances be interpreted as evidence of the existence of torture in the requesting State. The State party also notes that the Russian Federation is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and is therefore bound to respect its provisions.

Additional submission by the complainant

7.1 On 9 May 2011, the complainant submitted further information and requested the Committee to reiterate the interim measures. The complainant noted that he continued to be detained at the Zaki civil prison in Salé, near Rabat, notwithstanding the fact that the maximum period of detention pending extradition had expired. His requests for release had been dismissed. Over the previous few months, the State party had increased security measures within the detention facility, restricting drastically his access to telephone calls, which severed his contacts to counsel.

7.2 At the end of April, the complainant was visited by an official of the Ministry of Justice, who asked him to sign some documents in Arabic and French. The complainant could not read the documents and refused to sign them. The official informed him that he was going to be extradited by the end of the month of May.

8. On 15 May 2011, counsel submitted that the complainant had been forcibly returned to the Russian Federation on 14 May 2011, after being unexpectedly released from prison at 6 p.m. Counsel submits that according to the media, the complainant was extradited to the Russian Federation on a flight that left at 11.15 p.m. Recalling the Committee's jurisprudence, counsel submits that compliance with provisional interim measures are essential in order to protect the complainant from irreparable harm and that by voluntarily accepting the competence of the Committee under article 22, the State party undertook to cooperate in good faith in applying the procedure.¹⁴

Additional submission by the State party

9.1 On 10 June 2011, the State party submitted further observations and confirmed that the complainant has been handed over to the authorities of his country on 14 May 2011, pursuant to an extradition order signed by the relevant authorities in Morocco.

9.2 The State party notes that the complainant had been held in Salé prison since 17 January 2010 in connection with the extradition procedures. It states that the Committee against Torture did not inform the State party's authorities about the decision taken on the

¹⁴ See communication No. 110/1998, *Núñez Chipana v. Venezuela*, Views adopted on 10 November 1998, para. 8; and *T.P.S. v. Canada* (footnote 11 above), para. 15.6.

communication, in which counsel for Mr. Kalinichenko expressed concern that his client could be in danger of being subjected to torture if extradited to the Russian Federation. The delay in dealing with the communication harmed his standing in the criminal case, since the search and arrest warrant issued by the Russian courts was the only document justifying his detention. Moreover, the Supreme Court had turned down an application for his temporary release on the ground that the judicial process had run its course.

9.3 The State party notes that it does not have any information since 14 May 2011 about the complainant's whereabouts or his state of health. It notes that the Russian authorities have given an undertaking to ensure the complainant's right to a defence, including the right to receive the assistance of lawyers in the Russian Federation in accordance with international law norms and the right not to be subjected to torture or to inhuman or degrading treatment in accordance with article 3 of the European Convention on Human Rights, together with the other fundamental freedoms provided for under treaties and related protocols adopted by the United Nations and the Council of Europe. The authorities have stated that he will be allowed to leave the Russian Federation after the preliminary inquiry and investigation processes have been completed or after serving his sentence, if convicted. The Russian authorities have also undertaken to allow the Committee against Torture to visit the complainant in the prison where he will be held and to speak to him alone and in private. A representative of the Moroccan Embassy in Moscow will join the Committee when it visits the prison to check on his conditions of detention and to ensure that the necessary guarantees have been provided in this case.

Additional submission by the complainant

10.1 On 23 June 2011, the complainant submitted further information and noted that on 14 May 2011, around 6.30 p.m., he was notified of his liberation from detention; however when he left the prison, he was re-detained in the interior court yard of the prison by four unknown men in plain-clothes. He was handcuffed and brought to the airport in Casablanca. At the airport, he was met by the Russian Consul and an escort. Without any further explanations or official documents, the complainant was put on the plane and flown to the Russian Federation.

10.2 The complainant further noted that he was detained in the remand prison No. 1 of Yekaterinburg and that on 9 June 2011, he was taken to the psychiatric clinic. After he refused to change his clothes for the clinic clothes and following several meetings with the head of the clinic, the complainant was returned to the remand prison; however he continued to be threatened with internment.

10.3 The complainant further shares with the Committee a document addressed to the Russian investigation officials, in which he states that he will refuse to cooperate in any investigation until he is provided with the official documentation by the Ministry and the Moroccan authorities on the legality of his extradition. He submits that his detention is therefore arbitrary.

11. On 30 June 2011, the complainant's parents submitted that, on 27 June 2011, the complainant was forcibly placed in psychiatric care of the Sverdlovsk Regional Clinical Psychiatric Hospital. On 28 June 2011, his lawyer was refused a visit without permission from the investigator. On 30 June 2011, despite the authorization of the investigator to visit the complainant, the lawyer was refused access. The family further highlights that according to the Law on Mental Health, any involuntary hospitalization needs to be authorized by a court; however no court decision has been received by the lawyer or the complainant's parents. The complainant's parents further submit that during his detention on remand, the author was kept in solitary confinement in freezing conditions without appropriate clothing, constant light and that he was ill-treated.

12. On 29 July 2011, the complainant confirmed the information previously submitted by his parents regarding his placement in psychiatric care and added that on 18 July 2011 he was transferred without notice back to the same remand prison, where he was held in the same inhuman conditions previously described. He notes that, 25 days after his transfer to the psychiatric hospital, he was finally able to meet with his Russian attorney.

Issues and proceedings before the Committee

The State party's failure to cooperate and to accede to the Committee's request for interim measures pursuant to rule 114 of its rules of procedure

13.1 The Committee notes that the adoption of interim measures pursuant to rule 114 of its rules of procedure (former rule 108), in accordance with article 22 of the Convention, is vital to the role entrusted to the Committee under that article. Failure to respect that provision, in particular through such irreparable action as extraditing an alleged victim, undermines the protection of the rights enshrined in the Convention.¹⁵

13.2 The Committee observes that any State party that made the declaration under article 22 of the Convention recognizes the competence of the Committee against Torture to receive and consider complaints from individuals who claim to be victims of violations of the provisions of the Convention. By making this declaration, States parties implicitly undertook to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it and, after such examination, to communicate its comments to the State party and the complainant. The Committee notes that the request for interim measures was transmitted to the State party on 13 August 2010 and reiterated on 20 October 2010, 4 January 2011 and 11 May 2011. The Committee observes that by failing to respect this request, the State party violated its obligations under article 22 of the Convention because it prevented the Committee from fully examining a complaint relating to a violation of the Convention, and prevented it from taking a decision which would effectively prevent the complainant's extradition, should the Committee find a violation of article 3 of the Convention.

Consideration of admissibility

14.1 Before considering a claim contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, first, as it is required to do under article 22, paragraph 5 (a), that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

14.2 The Committee has noted that the State party challenged the admissibility of the communication, arguing that the complainant failed to exhaust available domestic remedies, as he failed to appeal the Prime Minister's decision to the Administrative Chamber of the Supreme Court for abuse of power. It also notes the State party's contention that the complainant did not mention before the Crown Prosecutor of the Tangiers First Instance Court or the Criminal Chamber of the Supreme Court the likelihood that he would be subjected to torture or inhumane treatment if he were extradited to the Russian Federation. The Committee considers relevant the complainant's argument that he has never been officially served with the final decision by the Minister of Justice to authorize the extradition. It also notes the complainant's contention that his allegation of a

¹⁵ See communication No. 195/2002, *Brada v. France*, decision adopted on 17 May 2005, paras. 6.1 and 6.2.

risk of torture upon return to the Russian Federation was duly raised before the Supreme Court but it is not reflected in the decision.

14.3 The Committee recalls its jurisprudence to the effect that the principle of exhaustion of domestic remedies requires petitioners to use remedies that are directly related to the risk of torture in the country to which they would be sent.¹⁶ The Committee notes that despite its request pursuant to rule 115, paragraph 9 (former rule 109) of its rules of procedure requesting that the State party give details of the effective remedies available to the alleged victim in the particular circumstances of the case and in accordance with the provisions of article 22, paragraph 5 (b), of the Convention, the State party has not addressed this issue. In the absence of further information by the State party on the effectiveness of the appeal for abuse of power before the Administrative Chamber of the Supreme Court and other domestic remedies, the Committee finds that article 22, paragraph 5 (b), does not preclude it from declaring the communication admissible.

14.4 In the light of the above considerations, the Committee decides that the communication is admissible, as far as it raises issues under article 3 of the Convention, and decides to proceed with its examination on the merits.

Consideration of the merits

15.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

15.2 The Committee must determine whether the forced extradition of the complainant to the Russian Federation violates the State party's obligations under article 3, paragraph 1, of the Convention not to expel or return (*refouler*) an individual to another State, where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee stresses that it must take a decision on the question in the light of the information which the authorities of the State party had or should have had in their possession at the time of the extradition. Subsequent events are useful only for assessing the information that the State party actually had or should have had at the time of extradition.

15.3 In assessing whether the extradition of the complainant to the Russian Federation violated the State party's obligations under article 3, of the Convention, the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture in the country to which he would be extradited. The Committee reiterates that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute 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. Similarly, 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 specific circumstances.

15.4 The Committee recalls its general comment No. 1 (1996) on the implementation of article 3, that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable",¹⁷ but it must be personal and present. In this regard, in previous decisions, the Committee has

¹⁶ Communication No. 170/2000, *A.R. v. Sweden*, decision adopted on 23 November 2001, para. 7.1.

¹⁷ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1)*, annex IX, para. 6.

determined that the risk of torture must be foreseeable, real and personal.¹⁸ By making a determination in the existence of a foreseeable, real and personal risk of torture for the complainant, the Committee expresses no opinion as to the veracity of the criminal accusations against him.

15.5 The Committee recalls 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.¹⁹ The Committee notes the complainant's arguments that, in the light of the death or disappearance of his three business partners and pursuant to the assessment by UNHCR in Morocco, he runs a personal risk of torture or even death in the Russian Federation. It also notes the State party's statement that its authorities found no evidence that the complainant would be subject to torture if extradited to the Russian Federation and that the extradition request was accompanied by diplomatic assurances by the Russian Federation not to subject him to torture or assaults on his human dignity.

15.6 The Committee must take into account the actual human rights situation in the Russian Federation and recalls its concluding observations on the State party's fourth periodic report (CAT/C/RUS/CO/4, para. 9 and 12), according to which acts of torture, and other cruel, inhuman and degrading treatment or punishment continue to be committed by law enforcement personnel, in particular in view of obtaining confessions, as well as the insufficient level of independence of the Procuracy and its failure to initiate and conduct prompt, impartial and effective investigations into allegations of torture or ill-treatment. Nevertheless, additional grounds must be adduced to show that the individual concerned would be personally at risk. In the circumstances of the present case, the Committee observes that the complainant's three close business partners were either found dead or disappeared, two of them while in custody of the authorities of the Russian Federation, after having reported the facts of a criminal plot to the Russian authorities. The Committee also observes that the complainant himself received death threats from organized crime groups, following which he decided to leave the country. In the light of all the above, the Committee concludes that the complainant has sufficiently demonstrated his foreseeable, real and personal risk of torture upon return to the Russian Federation. It is the Committee's opinion that the procurement of diplomatic assurances, in the circumstances of the instant case, was insufficient to protect the complainant against this manifest risk, also in the light of their general and non-specific nature and the fact they did not establish a follow-up mechanism. It follows therefore that the State party's extradition of the complainant was in breach of article 3 of the Convention.

16. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, decides that the facts before it constitute breaches by the State party of articles 3 and 22 of the Convention.

17. In conformity with rule 118 (former rule 112), paragraph 5, of its rules of procedure, the Committee urges the State party to provide redress for the complainant, including compensation and establishing an effective follow-up mechanism to ensure that the complainant is not subjected to torture or ill-treatment. The Committee takes note of the fact that the authorities of the Russian Federation have undertaken to allow the Committee to visit the complainant in prison and to speak to him alone and in private, in accordance

¹⁸ See, inter alia, communications No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005; No. 226/2003, *T.A. v. Sweden*, decision adopted on 6 May 2005; and No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010.

¹⁹ See Committee against Torture general comment No. 2 (2007) on the implementation of article 2 by States parties, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI, para. 5.

with the international standards. The Committee welcomes this undertaking and requests the State party to facilitate the visit of the complainant by two Committee members. The Committee also wishes to be informed, within 90 days, on the steps taken by the State party to respond to the present decision.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
