



United Nations

Report of the Committee against Torture

**Forty-seventh session
(31 October–25 November 2011)**

**Forty-eighth session
(7 May–1 June 2012)**

**General Assembly
Official Records
Sixty-seventh session
Supplement No. 44 (A/67/44)**

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Note

Symbols of United Nations documents are composed of letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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I. Organizational and other matters

A. States parties to the Convention

1. As at 1 June 2012, the closing date of the forty-eighth session of the Committee against Torture (hereinafter referred to as “the Committee”), there were 150 States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as “the Convention”). The Convention was adopted by the General Assembly in resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

2. The list of States which have signed, ratified or acceded to the Convention is contained in annex I to the present report. The list of States parties that have declared that they do not recognize the competence of the Committee provided for by article 20 of the Convention is provided in annex II. The States parties that have made the declarations provided for in articles 21 and 22 of the Convention are listed in annex III.

3. The text of the declarations, reservations or objections made by States parties with respect to the Convention may be found on the United Nations website (<http://treaties.un.org>).

B. Sessions of the Committee

4. The Committee against Torture has held two sessions since the adoption of its previous annual report. The forty-seventh session (1020th to 1057th meetings) was held at the United Nations Office at Geneva from 31 October to 25 November 2011, and the forty-eighth session (1058th to 1093rd meetings) was held from 7 May to 1 June 2012. An account of the deliberations of the Committee at these two sessions is contained in the relevant summary records (CAT/C/SR.1020-1093).

C. Membership and attendance at sessions

5. The thirteenth meeting of the States parties to the Convention against Torture, which took place in Geneva on 18 October 2011, held elections to replace five members whose term of office expired on 31 December 2011. The list of members with their term of office appears in annex IV to the present report.

D. Solemn declaration by the newly elected members

6. At the 1058th meeting, on 7 May 2012, Mr. Satyabhooshun Gupt Domah and Mr. George Tugushi made the solemn declaration upon assuming their duties, in accordance with rule 14 of the rules of procedure.

E. Election of officers

7. At the forty-eighth session, on 7 May 2012, the Committee elected Mr. Claudio Grossman as Chairperson, Ms. Essadia Belmir, Ms. Felice Gaer and Mr. Xuexian Wang as Vice-Chairpersons and Ms. Nora Sveaass as Rapporteur.

F. Agendas

8. At its 1020th meeting, on 31 October 2011, the Committee adopted the items listed in the provisional agenda submitted by the Secretary-General (CAT/C/47/1) as the agenda of its forty-seventh session.

9. At its 1058th meeting, on 7 May 2012, the Committee adopted the items listed in the provisional agenda submitted by the Secretary-General (CAT/C/48/1 and Corr.1) as the agenda of its forty-eighth session.

G. Participation of Committee members in other meetings

10. During the period under consideration, Committee members participated in different meetings organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR):

(a) The twelfth Inter-Committee Meeting, held in Geneva from 27 to 29 June 2011, was attended by Mr. Alessio Bruni and Mr. Grossman; the latter also participated in the twenty-third Meeting of Chairpersons, held in Geneva on 30 June and 1 July 2011;

(b) An event to mark United Nations International Day in Support of Victims of Torture, held in Ramallah on 27 June 2011, was attended by Ms. Sveaass;

(c) The expert group meeting on gender-motivated killings of women, held in New York on 12 October 2011, was attended by Ms. Gaer;

(d) The regional consultation for the Americas on enhancing cooperation between United Nations and regional human rights mechanisms on prevention of torture and the protection of victims of torture, held in Washington D.C. on 29 and 30 November 2011, was attended by Mr. Grossman;

(e) The regional consultation for Europe on enhancing cooperation between United Nations and regional human rights mechanisms on prevention of torture and the protection of victims of torture, held in Geneva on 15 and 16 December 2011, was attended by Mr. Bruni;

(f) The regional consultation for Africa on enhancing cooperation between United Nations and regional human rights mechanisms on prevention of torture and the protection of victims of torture, held in Addis Ababa on 6 and 7 February 2012, was attended by Ms. Belmir.

11. In the context of the treaty body strengthening process:

(a) Ms. Gaer participated in a seminar, held on 19 and 20 September 2011, in Bristol, United Kingdom of Great Britain and Northern Ireland. This high-level seminar was organized by the Human Rights Implementation Centre of the University of Bristol on the implementation of United Nations treaty body concluding observations, in the context of the treaty body strengthening process. It examined the implementation and follow-up of concluding observations from United Nations treaty bodies, focusing firstly on the role of the treaty bodies themselves and OHCHR in following up concluding observations, and secondly on the implementation methods and strategies adopted by State authorities and follow-up mechanisms adopted by other national actors in the European region;

(b) Ms. Gaer and Mr. Grossman participated in an expert meeting on treaty body petitions organized by OHCHR, held in Geneva on 29 October 2011. This expert meeting was aimed at providing an open space for members of treaty bodies to discuss how to strengthen and harmonize their existing working methods with regard to the consideration

of individual communications, and to identify and reflect upon new proposals that would increase the effectiveness and visibility of treaty body work. It was especially focused on: (a) strengthening the mechanisms to follow up the implementation by States parties of recommendations contained in treaty body findings in individual cases; (b) increasing the effectiveness and systematization of recommendations under the individual communications procedure; (c) increasing the accessibility and visibility of the communications procedures; and (d) reviewing best practices regarding the application of rules of procedure and methods of work;

(c) Mr. Grossman, as the Committee chairperson, participated in a meeting, organized by the University of Nottingham and held in Dublin on 10 and 11 November 2011, which brought together the conveners of the seven previous consultations, namely Dublin, Marrakesh, Poznan, Seoul, Sion, Pretoria and Luzern, as well as representatives of the NGO coalition on the treaty body strengthening process. Six other treaty body chairpersons participated in the meeting. The outcome document of this meeting, known as Dublin II, contains recommendations addressed to treaty bodies, States and OHCHR, respectively. General measures for treaty body strengthening were discussed, including with regard to membership, harmonization of treaty body procedures, promoting knowledge of the treaty body system, reprisals, and resources, as were treaty body functions, such as the State reporting process, general comments, individual communications and follow-up to and implementation of concluding observations and views and opinions. With a view to strengthening membership, the following recommendations were made: that, as a general rule and without prejudice to the existing mandates of treaty body members, membership should be limited to a maximum of two full terms to ensure the renewal and diversity of membership of the treaty bodies; and that States should establish formal consultative and transparent national selection processes involving national human rights institutions (NHRIs) and civil society actors to consider possible nominations of candidates to treaty bodies and make recommendations to Governments. The Dublin II outcome document, and other relevant documents on treaty body strengthening, may be found on the OHCHR website (http://www2.ohchr.org/english/bodies/HRTD/hrttd_process.htm).

(d) Mr. Bruni participated in the consultation on treaty body strengthening with United Nations entities and specialized agencies, held in Geneva on 28 November 2011, and in the consultation with States organized by OHCHR and held in Geneva on 7 and 8 February 2012. The latter event was organized at the request of a large number of States that required more time to continue the discussions that had taken place in Sion in May 2011. OHCHR made a presentation on facts and figures regarding the growth and financing of the treaty body system and the proposals contained in the report of the Secretary-General to the General Assembly (A/66/344). The Division of Conference Management of the United Nations Office at Geneva also expressed the challenges in supporting the treaty bodies and suggested potential alternatives for conference servicing support. In addition, a presentation on a comprehensive reporting calendar was made. The key proposals of the treaty body strengthening process were the following: (i) a comprehensive reporting calendar based on a 100 per cent compliance rate over a five-year cycle; (ii) the list of issues prior to reporting as a tool to foster focused States reports and treaty body recommendations; (iii) guidelines on the independence and expertise of committee members; and (iv) more structured and efficient constructive dialogue between treaty bodies and States parties;

(e) Ms. Gaer and Mr. Grossman participated in the consultation with States organized by OHCHR and held in New York on 2 and 3 April 2012. The consultation, opened by the Secretary-General, was the continuation of the previous consultations with States parties; it focused in particular on the resourcing of the treaty body system, in order to ensure its efficient and effective functioning. OHCHR made a presentation on a proposal

for a comprehensive reporting calendar. Also discussed was the strengthening of: (i) the membership of treaty bodies; (ii) the preparation of States parties' reports; and (iii) the dialogue between States parties and the treaty bodies.

H. Oral report of the Chairperson to the General Assembly

12. Further to the invitation to the Chairperson of the Committee to present an oral report on the work of the Committee and to engage in an interactive dialogue with the General Assembly at its sixty-sixth session under the sub-item entitled "Implementation of human rights instruments" (General Assembly resolution 65/205, para. 28), the Chairperson of the Committee presented an oral report to the General Assembly at its sixty-sixth session on 18 October 2011. The oral report may be found on the OHCHR website (<http://www2.ohchr.org/english/bodies/cat/index.htm>).

I. Activities of the Committee in connection with the Optional Protocol to the Convention

13. As at 1 June 2012, there were 63 States parties to the Optional Protocol (see annex V to the present report). As required by the Optional Protocol to the Convention, on 16 November 2011, a joint meeting was held between the members of the Committee and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter "the Subcommittee on Prevention"). Both the Committee and the Subcommittee on Prevention (membership of the Subcommittee on Prevention is included in annex VI) further discussed the strengthening of the modalities for cooperation, such as the mutual sharing of information, taking into account confidentiality requirements.

14. A further meeting was held between the Committee and the Chairperson of the Subcommittee on Prevention on 8 May 2012 where the latter submitted its fifth public annual report to the Committee (CAT/C/48/3). The Committee decided to include it in the present annual report (see annex VII) and to transmit it to the General Assembly.

J. Joint statement on the occasion of the United Nations International Day in Support of Victims of Torture

15. A joint statement with the Subcommittee on Prevention, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture was adopted to be issued on 26 June 2011, the United Nations International Day in Support of Victims of Torture (see annex VIII to the present report).

K. Informal meeting with the States parties to the Convention

16. At its forty-eighth session, on 14 May 2012, the Committee held an informal meeting with States parties to the Convention, which was attended by representatives of 32 States parties. The Committee and the States parties discussed the following issues: the methods of work of the Committee; the harmonization of working methods between treaty bodies; the optional reporting procedure of the Committee, which consists of lists of issues to be transmitted prior to the submission of periodic reports; and general comments.

L. Participation of non-governmental organizations

17. At its forty-eighth session, on 11 May 2012, the Committee held an informal meeting with representatives of 17 non-governmental organizations (NGOs) that usually provide information to the Committee, and discussed the following issues: the methods of work of the Committee; the harmonization of working methods between treaty bodies; the optional reporting procedure of the Committee; and general comments.

18. The Committee has long recognized the work of NGOs and met with them in private, with interpretation, on the day immediately before the consideration of each State party report under article 19 of the Convention. The Committee expresses its appreciation to the NGOs for their participation in these meetings and is particularly appreciative of the attendance of national NGOs which provide immediate and direct information.

M. Participation of national human rights institutions

19. Similarly, the Committee has recognized the work of NHRIs; Country Rapporteurs, together with any other Committee member wishing to attend, have met with the representative of the NHRI, if required, before the consideration of each State party report under article 19 of the Convention. The Committee expresses its appreciation for the information it receives from these institutions, and looks forward to continuing to benefit from the information it derives from these bodies, which has enhanced its understanding of the issues before the Committee.

N. General comment on article 14 of the Convention

20. At its forty-seventh session, further to the establishment of an informal working group at its forty-fourth session on the right to reparation, composed of Ms. Gaer, Mr. Abdoulaye Gaye, Mr. Grossman and Ms. Sveaass,¹ and the preparation of a draft general comment on article 14 of the Convention and its posting on the OHCHR website for comments (http://www2.ohchr.org/english/bodies/cat/comments_article14.htm), the Committee held a public consultation with all stakeholders, on 22 November 2011. In addition to the numerous written comments submitted, approximately 40 States parties and 15 NGOs attended this consultation, which generated extensive comments to the draft.

21. At its forty-eighth session, the Committee continued to discuss the draft general comment on the implementation of article 14 by States parties and began the process of its adoption, with a final reading of the text.

O. Reporting guidelines

22. At its forty-seventh and forty-eighth sessions, the Committee continued to discuss the revision of its treaty-specific reporting guidelines, in the light of the harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document (as contained in HRI/GEN/2/Rev.6). However, in the light of its continued evaluation of its optional reporting procedure, the Committee discussed the relevance of adopting guidelines for reports submitted under this optional procedure and/or general common guidelines.

¹ *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 44 (A/65/44), chap. I, para. 27.*

P. Decision of the Committee to request approval from the General Assembly for additional meeting time in 2013 and 2014

23. In its resolution 65/204 of 21 December 2010, the General Assembly authorized the Committee to meet for an additional week per session as a temporary measure, with effect from May 2011 until the end of November 2012, further to the Committee's request for appropriate financial support to this effect, adopted at its forty-fourth session.²

24. This additional meeting time, granted for 2011 and 2012, has allowed the Committee to reduce its backlog of pending reports, to consider additional individual communications and to proceed with its optional reporting procedure, thus to improve its efficiency and methods of work.

25. Pursuant to rule 26 of its rules of procedure, with the acknowledgement of the programme budget implications arising from its decision (see annex IX to the present report), the Committee, at its forty-eighth session, decided to request the General Assembly to provide appropriate financial support to enable it to continue to meet for an additional week per each session in 2013 and 2014, i.e. one additional week of sessional meetings in May and in November 2013 and in May and November 2014, for a total of four weeks, bringing its sessions to four weeks each (see annex X to the present report).

26. If granted, this additional meeting time would allow the Committee to continue to consider two additional reports per session, eight for the biennium (2013–2014), keeping to a minimum the number of reports pending consideration.

27. It would also permit the Committee to continue to consider, at a minimum, five additional individual complaints per session, 20 for the biennium (2013–2014), reducing the backlog of 115 individual complaints pending before the Committee.

28. Finally, the additional meeting time would further allow the Committee to continue its optional reporting procedure, enabling it to adopt an average of 10 additional lists of issues per session, 40 for the biennium (2013–2014), thus further assisting States parties in their reporting obligations.

29. At its forty-seventh and forty-eighth sessions, the Committee continued to discuss measures to improve the effectiveness of its working methods and costs in order to better manage its workloads and programmes of work. Along these lines, it decided, *inter alia*, that it will continue its evaluation of the optional reporting procedure (see chap. II, sect. C).

² *Ibid.*, annex IX.

II. Submission of reports by States parties under article 19 of the Convention

30. During the period covered by the present report, 15 reports from States parties under article 19 of the Convention were submitted to the Secretary-General. Initial reports were submitted by Gabon and Mauritania. Second periodic reports were submitted by Bolivia (Plurinational State of), Burundi, Japan and Kyrgyzstan. A fourth periodic report was submitted by Uzbekistan. Fifth periodic reports were submitted by Estonia, Latvia and the United Kingdom. Combined fifth and sixth periodic reports were submitted by Peru and Poland. Sixth periodic reports were submitted by Guatemala and the Netherlands. A combined sixth and seventh periodic report was submitted by Norway.

31. As at 1 June 2012, the Committee had received a total of 332 reports and had examined 310; there were 291 overdue periodic reports and 29 overdue initial reports (see annex XI to the present report).

A. Invitation to submit periodic reports

32. Further to its decision taken at its forty-first session, the Committee continued, at its forty-seventh and forty-eighth sessions, to invite States parties, in the last paragraph of the concluding observations, to submit their next periodic reports within a four-year period from the adoption of the concluding observations, and to indicate the due date of the next report in the same paragraph.

33. In addition, the Committee decided, at its forty-seventh session, to invite States parties to accept, within one year from the adoption of their concluding observations, to report under the optional reporting procedure, or, if a State party has already accepted to report under this procedure, to indicate that the Committee will submit to the State party, in due course, a list of issues prior to the submission of its next periodic report.

B. Optional reporting procedure

34. The Committee welcomes the fact that a high number of States parties have accepted this optional reporting procedure, which consists of the preparation and adoption of a list of issues to be transmitted to States parties prior to the submission of a State party's periodic report (known as the list of issues prior to reporting – LOIPR). This procedure aims at assisting States parties to fulfil their reporting obligations, as it strengthens the cooperation between the Committee and States parties.³ While the Committee understands that the adoption, since 2007, of lists of issues prior to reporting facilitates States parties' reporting obligations, it nonetheless wants to emphasize that this new procedure of drafting lists of issues prior to reporting has increased the Committee's workload substantially, as their preparation requires more work than the traditional lists of issues following the submission of a State party's report. This is particularly significant in a Committee with such a small membership.

35. Further to its decision to continue with this procedure for a new four-year reporting cycle, the Committee decided, at its forty-seventh session, to invite the following 12 States parties to report under this procedure for their report due in 2013: Azerbaijan, Chile,

³ See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 44 (A/66/44)*, paras. 28–35.

Colombia, El Salvador, Honduras, Israel, New Zealand, Nicaragua, the Republic of Moldova, Slovakia, Spain and the Philippines.

36. At its forty-eighth session, the Committee adopted lists of issues prior to reporting with regard to 11 States parties that expressly accepted the invitation to submit their next report, due in 2013, under this procedure: Azerbaijan, Chile, Colombia, El Salvador, Honduras, Israel, New Zealand, the Republic of Moldova, Slovakia, Spain and the Philippines. Nicaragua did not respond to the invitation. The updated information relating to the procedure is available from a dedicated webpage (<http://www2.ohchr.org/english/bodies/cat/reporting-procedure.htm>).

37. At its forty-eighth session, the Committee decided, as regards reports due in 2014, to prepare lists of issues prior to reporting for the following States parties that had already accepted the procedure: Bosnia and Herzegovina, Cambodia, Ecuador and Turkey. It further decided to invite the following States parties to report under this procedure for the reports due in 2014: Austria, Cameroon, Ethiopia, France, Jordan, Liechtenstein, Mongolia, Switzerland, the Syrian Arab Republic and Yemen.

38. Finally, the Committee decided to send reminders to the following States parties indicating that it was expecting to receive their reports under this procedure, as they had accepted to report under it in 2010: Brazil, Hungary and Libya. It also decided to send a reminder to Saudi Arabia to accept to report under the procedure, following the previous invitation sent in 2010.

C. Preliminary evaluation of the optional reporting procedure

39. At its forty-seventh and forty-eighth sessions, the Committee discussed its optional reporting procedure on the basis of the report it requested the secretariat to prepare⁴ on the status of the optional reporting procedure (CAT/C/47/2), which included information on new developments relating to the procedure and possible options for its revision.

40. Taking note of and expressing appreciation for the report of the secretariat, which also contained proposals for the next reporting cycle (2013–2016), the Committee decided to continue to discuss the evaluation of its optional reporting procedure during its next sessions.

D. Reminders for overdue initial reports

41. Further to its decision to send reminders to all States parties whose initial reports were three or more years overdue, taken at its forty-first session, the Committee, at its forty-eighth session, decided to send reminders to all States parties whose initial reports are overdue: Andorra, Antigua and Barbuda, Bangladesh, Botswana, Burkina Faso, Cape Verde, the Congo, Côte d'Ivoire, Equatorial Guinea, Holy See, Lebanon, Lesotho, Liberia, Malawi, Maldives, Mali, Mozambique, Niger, Nigeria, Pakistan, Saint Vincent and the Grenadines, San Marino, Seychelles, Sierra Leone, Somalia, Swaziland, Thailand and Timor-Leste.

42. The Committee drew the attention of these States parties to the fact that delays in reporting seriously hamper the implementation of the Convention in the States parties and the Committee in carrying out its function of monitoring such implementation. The Committee requested information on the progress made by these States parties regarding

⁴ Ibid., chap. I, para. 38.

the fulfilment of their reporting obligations and on any obstacles that they might be facing in that respect. It also informed them that, according to rule 67 of its rules of procedure, the Committee might proceed with a review of the implementation of the Convention in the State party in the absence of a report, and that such review would be carried out on the basis of information that may be available to the Committee, including sources from outside the United Nations.

E. Examination of measures taken by a State party in the absence of a report

43. Further to its decision to send reminders to all States parties whose initial reports are overdue, the Committee decided, at its forty-eighth session, to take action with regard to States parties whose initial reports were long overdue. Noting that the initial report of Guinea had been overdue since 8 November 1990 — at more than 21 years, the most overdue of all initial reports — the Committee decided to inform the State party that, further to previous reminders sent since 2009 that have not been acknowledged by the State party and pursuant to article 67 of its rules of procedure, it would conduct at its fiftieth session in May 2013 an examination, in the absence of a report, of the measures taken by Guinea, if a report is not submitted by 31 December 2012.

III. Consideration of reports submitted by States parties under article 19 of the Convention

A. Examination of reports submitted by States parties

44. At its forty-seventh and forty-eighth sessions, the Committee considered reports submitted by 14 States parties, under article 19, paragraph 1, of the Convention, and adopted 15 sets of concluding observations, considering that the Syrian Arab Republic did not submit the special report requested by the Committee under article 19, paragraph 1, in fine. The following reports were before the Committee at its forty-seventh session and it adopted the respective concluding observations:

<i>State party</i>	<i>Report</i>		<i>Concluding observations</i>
Belarus	Fourth periodic report	CAT/C/BLR/4	CAT/C/BLR/CO/4
Bulgaria	Fourth and fifth periodic reports	CAT/C/BGR/4-5	CAT/C/BGR/CO/4-5
Djibouti	Initial report	CAT/C/DJI/1	CAT/C/DJI/CO/1
Germany	Fifth periodic report	CAT/C/DEU/5	CAT/C/DEU/CO/5
Madagascar	Initial report	CAT/C/MDG/1	CAT/C/MDG/CO/1
Morocco	Fourth periodic report	CAT/C/MAR/4	CAT/C/MAR/CO/4
Paraguay	Fourth to sixth periodic reports	CAT/C/PRY/4-6	CAT/C/PRY/CO/4-6
Sri Lanka	Third and fourth periodic reports	CAT/C/LKA/3-4	CAT/C/LKA/CO/3-4

45. The following reports, with the exception of the special report requested of the Syrian Arab Republic, were before the Committee at its forty-eighth session, and it adopted the following concluding observations:

<i>State party</i>	<i>Report</i>		<i>Concluding observations</i>
Albania	Second periodic report	CAT/C/ALB/2	CAT/C/ALB/CO/2
Armenia	Third periodic report	CAT/C/ARM/3	CAT/C/ARM/CO/3
Canada	Sixth periodic report	CAT/C/CAN/6	CAT/C/CAN/CO/6
Cuba	Second periodic report	CAT/C/CUB/2	CAT/C/CUB/CO/2
Czech Republic	Fourth and fifth periodic reports	CAT/C/CZE/4-5	CAT/C/CZE/CO/4-5
Greece	Fifth and sixth periodic reports	CAT/C/GRC/5-6	CAT/C/GRC/CO/5-6
Rwanda	Initial report	CAT/C/RWA/1	CAT/C/RWA/CO/1
Syrian Arab Republic	Special report	Report not submitted	CAT/C/SYR/CO/1/Add.2

46. In accordance with rule 68 of the rules of procedure of the Committee, representatives of each reporting State were invited to attend the meetings of the Committee when their report was examined. With the exception of the Syrian Arab Republic, all of the

States parties whose reports were considered sent representatives to participate in the examination of their respective reports. The Committee expressed its appreciation for this in its concluding observations.

47. At its forty-seventh session, taking into consideration the situation in the State party, the Committee invited the Syrian Arab Republic to submit a special report to the Committee by 9 March 2012. The State party declined to submit a report and to send representatives to participate in the dialogue with the Committee.

48. Country Rapporteurs and alternate Rapporteurs were designated by the Committee for each of the reports considered. The list appears in annex XII to the present report.

49. In connection with its consideration of reports, the Committee also had before it:

(a) General guidelines regarding the form and contents of initial reports to be submitted by States parties under article 19, paragraph 1, of the Convention (CAT/C/4/Rev.3);

(b) General guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 19 of the Convention (CAT/C/14/Rev.1).

50. The Committee has been issuing lists of issues for periodic reports since 2004. This resulted from a request made to the Committee by representatives of the States parties at a meeting with Committee members. While the Committee understands the wish of States parties to have advance notice of the issues likely to be discussed during the dialogue, it nonetheless must point out that the drafting of lists of issues has increased the Committee's workload. This is particularly significant in a Committee with such a small membership.

B. Concluding observations on States parties' reports

51. The text of concluding observations adopted by the Committee with respect to the above-mentioned reports submitted by States parties, as well as on the Syrian Arab Republic, is reproduced below.

52. Belarus

(1) The Committee against Torture considered the fourth periodic report of Belarus (CAT/C/BLR/4) at its 1036th and 1039th meetings, held on 11 and 14 November 2011 (CAT/C/SR.1036 and 1039), and adopted the following concluding observations at its 1053rd meeting (CAT/C/SR.1053).

A. Introduction

(2) While welcoming the submission of the fourth report of Belarus, the Committee regrets that it was submitted nine years late, which prevented the Committee from conducting an analysis of the implementation of the Convention in the State party following its last review in 2000.

(3) The Committee regrets that no representatives of the State party could come from the capital to meet with the members of the Committee during the current session; however, it notes with appreciation the opportunity to engage in a constructive dialogue covering many areas under the Convention.

B. Positive aspects

(4) The Committee welcomes the fact that the State party has ratified or acceded to the following international instruments:

(a) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (3 February 2004); and

(b) Two Optional Protocols to the Convention on the Rights of the Child (23 January 2002 and 25 January 2006).

(5) The Committee notes the ongoing efforts by the State party to reform its legislation, policies and procedures in areas of relevance to the Convention, including:

(a) Revision of the Criminal Code, Penal Enforcement Code and Code of Criminal Procedure, which entered into force on 1 January 2001;

(b) Adoption of the Detention Procedures and Conditions Act in 2003; and

(c) Adoption of the new Law on Provision of Refugee Status, Complementary and Temporary Protection to Foreign Citizens and Stateless Persons, in 2008.

C. Principal subjects of concern and recommendations

Fundamental legal safeguards

(6) The Committee is seriously concerned about numerous, consistent reports that detainees are frequently denied basic fundamental legal safeguards, including prompt access to a lawyer and medical doctor and the right to contact family members, and this pertains especially to those detainees charged under article 293 of the Criminal Code. Such reports include cases raised jointly by several special procedure mandate holders, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and pertaining to, inter alia, Andrei Sannikov who made an allegation during trial in May 2011 about the denial of his rights to prompt access to lawyer, to contact family and to medical treatment despite injuries caused by the authorities during arrest, and Vladimir Neklyayev (A/HRC/17/27/Add.1, para. 249). While noting the Act No.215-Z of 16 June 2003 on detention procedure and conditions, the Committee expresses its serious concern at the State party's failure in practice to afford all persons deprived of their liberty, including detainees held in pretrial detention facilities of the State Security Committee (KGB) and under administrative detention, with all fundamental legal safeguards, as referred to in paragraphs 13 and 14 of the Committee's general comment No. 2 (2008) on implementation of article 2 by States parties, from the very outset of detention (arts. 2, 11 and 12).

The Committee recommends the State party to:

(a) Ensure that all detainees are afforded, by law and in practice, all fundamental legal safeguards from the very outset of their detention, including the rights to prompt access to a lawyer and a medical examination by an independent doctor, to contact family members, to be informed of their rights at the time of detention, including about the charges laid against them, and to appear before a judge promptly;

(b) Guarantee the access of detained persons, including those under administrative detention, to challenging the legality of their detention or treatment; and

(c) Take measures to ensure audiotaping or videotaping of all interrogations in police stations and detention facilities as a further means to prevent torture and ill-treatment.

(7) The Committee is concerned at the limited access to the central registry of detainees by family members and lawyers of detainees. It further regrets the lack of proper registration of detainees (arts. 2, 11 and 12).

The Committee recommends the State party to ensure prompt registration of all persons deprived of their liberty following apprehension and access to the register by lawyers and relatives of those detained.

(8) The Committee is concerned by numerous allegations that officers in plain clothes carry out arrests, making identification impossible when complaints of torture or ill-treatment were presented. The Committee notes with concern reports that a number of presidential candidates were arrested and detained by men in plain clothing (A/HRC/17/27/Add.1, para. 250) and allegations made by several detainees, including Andrei Sannikov and Vladimir Neklyayev, that they were subjected to torture by masked men while in pretrial detention (arts. 2, 12 and 13).

The State party should monitor compliance with legislation that requires all law enforcement officers on duty, including riot police (OMON), the KGB personnel, to wear identification, provide all law enforcement officers with uniforms that include appropriate visible identification to ensure individual accountability and protection against acts of torture and ill-treatment, and subject law enforcement officers who violate the Convention to investigation and punishment with appropriate penalties.

Enforced disappearances

(9) The Committee notes the information from the representatives of the State party that a database on disappearances is maintained. Nevertheless, the Committee regrets that the State party failed to provide sufficient information about disappearances, in particular the following unresolved cases of disappearances: the former Minister of the Interior, Yuri Zakharenko, the former First Secretary Chairman of the dissolved Belarusian Parliament, Viktor Gonchar and his companion Anatoly Krasovsky, and investigative television journalist Dmitry Zavadsky, raised by the Committee in 2000 (CAT/C/SR.442, para. 29) or submitted by the Working Group on Enforced or Involuntary Disappearances in 1999 (A/HRC/16/48) (arts. 2, 11, 12 and 16).

The State party should ensure investigation into the cases of disappeared persons with the aim of obtaining reliable information of their whereabouts and should clarify what happened to them. In particular, the State party should update the information about the four cases above, inter alia, the outcome of the investigation, any punishments or sanctions imposed on those responsible, any remedies provided for their relatives and the degree of access to the database on disappearances permitted for their lawyers and relatives.

Torture

(10) The Committee is deeply concerned over the numerous and consistent allegations of widespread torture and ill-treatment of detainees in the State party. According to the reliable information presented to the Committee, many persons deprived of their liberty are tortured, ill-treated and threatened by law enforcement officials, especially at the moment of apprehension and during pretrial detention. These confirm the concerns expressed by a number of international bodies, inter alia, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Human Rights Council (resolution 17/24), the United Nations High Commissioner for Human Rights and the Organization for Security and Cooperation in Europe. While noting article 25 of the Constitution which prohibits torture, the Committee is concerned about the substantial gap between the legislative framework and its practical implementation (arts. 2, 4, 12 and 16).

As a matter of urgency, the State party should take immediate and effective measures to prevent acts of torture and ill-treatment throughout the country, including by implementing policies that would produce measurable results in the eradication of torture and ill-treatment by State officials.

Impunity and lack of independent investigation

(11) The Committee continues to be deeply concerned about the persistent and prevailing pattern of failure of officials to conduct prompt, impartial and full investigations into the

many allegations of torture and ill-treatment and to prosecute alleged perpetrators, the lack of independent investigation and complaint mechanisms, the intimidation of the judiciary, the low level of cooperation with international monitoring bodies, which have led to serious underreporting and impunity (arts. 2, 11, 12, 13 and 16). In particular, the Committee is concerned about:

(a) The lack of an independent and effective mechanism for receiving complaints and conducting prompt, impartial and effective investigations into allegations of torture, in particular of pretrial detainees;

(b) Information suggesting that serious conflicts of interest prevent the existing complaints mechanisms from undertaking effective, impartial investigations into complaints received;

(c) The lack of congruence in information before the Committee regarding complaints presented by persons in detention. The Committee notes with serious concern the information about reprisals against those who file complaints and the cases of denial of the complaints made by detainees, including the cases of Ales Mikhalevich and Andrei Sannikov; and

(d) Reports indicating that no officials have been prosecuted for having committed acts of torture. According to information before the Committee, over the last 10 years, only four law enforcement officers have been charged with the less serious offence, “abuse of power or official authority” and “transgression of power or official authority” under articles 424 and 426 of the Criminal Code.

The Committee urges the State party to take all necessary measures to ensure that all allegations of torture and ill-treatment by public officers are promptly investigated in the course of transparent and independent inquiries and that the perpetrators are punished according to the gravity of their acts. To that end, the State party should:

(a) Establish an independent and effective mechanism to facilitate submission of complaints by victims of torture and ill-treatment to public authorities, including obtaining medical evidence in support of their allegations, and to ensure in practice that complainants are protected against any ill-treatment or intimidation as a consequence of their complaint or any evidence given. In particular, as previously recommended (A/56/44, para. 46 (c)), the State party should consider establishing an independent and impartial governmental and non-governmental national human rights commission with effective powers to, inter alia, promote human rights and investigate all complaints of human rights violations, in particular those pertaining to the implementation of the Convention;

(b) Publicly and unambiguously condemn the use of all forms of torture, addressing in particular law enforcement officers, the armed forces and prison staff, and including in its statements clear warnings that any person committing or participating in such acts or acting as an accomplice shall be held personally responsible before the law and liable to criminal penalties;

(c) Ensure that, in cases of alleged torture, suspects are suspended from duty immediately for the duration of the investigation, particularly if there is a risk that they might otherwise be in a position to obstruct the investigation; and

(d) Provide the outcome of the investigation into the allegations raised by the Committee, including cases of Ales Mikhalevich, Andrei Sannikov, Alexander Otroschenkov, Vladimir Neklyayev, Natalia Radina and Maya Abromchick, and the broader allegations of indiscriminate and disproportionate force used by riot police against approximately 300 people in Independence Square on 19 December 2010.

Independence of the judiciary

(12) While noting that article 110 of the Constitution and article 22 of the Code of Criminal Procedure provide for an independent judiciary, the Committee is deeply concerned that other provisions in Belarusian law, specifically those on discipline and removal of judges, their appointment and tenure, undermine these provisions and do not guarantee judges' independence towards the executive branch of Government (arts. 2, 12 and 13). In particular, the Committee is concerned about:

(a) The intimidation and interference in the discharge of the professional functions of lawyers, as noted with concern by the Special Rapporteur on the independence of judges and lawyers (A/HRC/17/30/Add.1, para. 101). The Committee remains concerned that bar associations, although independent by law, are in practice subordinate to the Ministry of Justice and that several lawyers defending individuals detained in connection with the event on 19 December 2010 were disbarred by the Ministry of Justice; and

(b) Cases in which judicial bias in favour of the prosecution was alleged, including the case of Vladimir Russkin, who claimed he was forbidden to call his own witnesses and to question those presenting evidence against him as well as the courts' performance in several trials related to the event of 19 December 2010.

In light of its previous recommendation (A/56/44, para. 46 (d)), the Committee urges the State party to:

(a) **Guarantee the full independence of the judiciary in line with the Basic Principles on the Independence of the Judiciary;**

(b) **Ensure that judicial selection, appointment, compensation and tenure are made according to objective criteria concerning qualification, integrity, ability and efficiency; and**

(c) **Investigate the cases of lawyers who represented individuals detained in connection with the events of 19 December 2010 and were subsequently disbarred, including Pavel Spelka, Tatsiana Aheyeva, Uladsimir Toustsik, Aleh Aleyeu, Tamara Harayeva, and Tamara Sidarenka, and reinstate their licenses, as appropriate.**

Monitoring and inspection of places of deprivation of liberty

(13) While noting the information on the detention monitoring activities by the Office of the Procurator-General, the national public watchdog commission of the Ministry of Justice and local watchdog commissions, the Committee is deeply concerned by the reported lack of independence of the national monitoring system and the lack of information on effective procedures and reporting practices. The Committee also regrets reports on the alleged misuse of psychiatric hospitalization for other reasons than medical ones, and the lack of inspection of psychiatric hospitals (arts. 2, 11 and 16).

The Committee urges the State party to establish fully independent bodies with the capacity to perform independent and effective unannounced visit to places detention and ensure that their members include diverse and qualified legal and medical professionals familiar with the relevant international standards, as well as independent experts and other representatives of civil society. The State party should also ensure that members are afforded an opportunity to inspect all places of detention without prior notice and speak privately with detainees, and that their findings and recommendations are made public in a timely and transparent manner.

Furthermore, the State party should make public detailed information on the place, time and periodicity of visits to places of deprivation of liberty, including psychiatric hospitals, and on the findings and the follow-up on the outcome of such visits. Such information should also be submitted to the Committee.

(14) The Committee is concerned at the lack of access for international monitoring mechanisms, both governmental and non-governmental, to detention facilities in Belarus. The Committee also expresses regret at the outstanding request for a country visit by the five mandate holders of the special procedures, particularly the Special Rapporteur on the question of torture and the Working Group on Enforced or Involuntary Disappearances, and the State party's failure to respond to requests for a visit by the Office of the United Nations High Commissioner for Human Rights (OHCHR) (arts. 2, 11 and 16).

The Committee urges the State party to:

(a) Grant access to independent governmental and non-government organisations to all detention facilities in the country, including police lock-ups, pretrial detention centres, security service premises, administrative detention areas, detention units of medical and psychiatric institutions and prisons;

(b) Strengthen further the cooperation with United Nations human rights mechanisms, particularly by permitting visits by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, as accepted by the State party in the context of the universal periodic review (A/HRC/15/16, para. 97.17), as soon as possible; and

(c) Consider accepting the request by the United Nations High Commissioner for Human Rights for a visit by an OHCHR team.

National human rights institution

(15) In the light of recommendations made by several human rights mechanisms and the State party's commitment made in the context of the universal periodic review to consider establishing a national human rights institution (A/HRC/15/16, para. 97.4), the Committee regrets the lack of progress made to that end (art. 2).

The Committee recommends the State party to work towards establishing a national human rights institution in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).

Definition, absolute prohibition and criminalization of torture

(16) While noting the information provided by the State party that the definition of torture contained in article 1 of the Convention is used for the purpose of criminal prosecution of perpetrators of acts of tortures and the Office of the Procurator-General is preparing a bill on amendments to the criminal legislation, the Committee is concerned that such definition of torture has never been applied by domestic courts. The Committee remains concerned that the national legislation does not contain provisions defining torture and ensuring absolute prohibition of the torture. It is also concerned that articles 128 and 394 of the Criminal Code do not criminalize torture in accordance with article 4, paragraph 2, of the Convention (arts. 1, 2 and 4).

In the light of the Committee's previous recommendation (A/56/44, para. 46 (a)) and the State party's acceptance of the recommendations made in the course of the universal periodic review (A/HRC/15/16, paras. 97.28 and 98.21), the State party should, without delay, define and criminalize torture in its Criminal Code in full conformity with article 1 and 4 of the Convention. Furthermore, the Committee recommends that the State party ensure that the absolute prohibition against torture is non-derogable and that acts amounting to torture are not subject to any statute of limitations.

Applicability of the Convention in the domestic legal order

(17) While welcoming that the international treaties to which Belarus is a party are directly applicable under article 20 of Act on the Laws and Regulations, the Committee notes with concern the lack of information on court decisions in which the Convention has been directly invoked. The Committee regrets the reports that the Convention has never been applied in domestic courts, although this is possible in theory (arts. 2 and 10).

The Committee recommends that the State party take necessary measures to ensure de facto applicability of the provisions of the Convention in its domestic legal order and the practical implementation of article 20 of Act on the Laws and Regulations, inter alia, by providing extensive training to the judiciary and law enforcement personnel in order to make them fully aware of the provisions of the Convention and its direct applicability. Furthermore, the State party should report back on decisions of national courts or administrative authorities giving effect to the rights enshrined in the Convention.

Evidence obtained through torture

(18) While noting that article 27 of the Constitution prohibits the admissibility of evidence obtained through torture and that the State party accepted the recommendation made in the course of the universal periodic review to that end (A/HRC/15/16, para. 97.28), the Committee is concerned at reports of several cases of confessions obtained under torture and ill-treatment and at the lack of information on any officials who may have been prosecuted and punished for extracting such confessions. Information before the Committee states that in some cases, judges relied on pretrial statements of the defendants which were conflicting with their testimony made during the trial, despite allegations of duress and intimidation. The Committee regrets the lack of information about the cases of Nikolay Avtukhovich and Vladimir Asipenka, who were convicted on the basis of witness statements that were later retracted and were alleged to have been obtained through torture (art. 15).

The State party should take the steps necessary to ensure that, in practice, confessions obtained under torture or duress are not admitted in court proceedings in line with relevant domestic legislation and article 15 of the Convention. The State party should ensure that judges ask all detainees whether or not they were tortured or ill-treated in custody and that judges order independent medical examinations whenever a suspect requires one in court. The judge should exclude such statements, in particular if the suspect so requests in court and the medical examination sustains the claim. Prompt and impartial investigations should be conducted whenever there is a reason to believe that an act of torture occurred, especially in cases where the sole evidence presented is a confession. In that regard, the State party should guarantee the access of international governmental or non-governmental organizations to court proceedings.

Furthermore, the Committee requests the State party to submit information on whether any officials have been prosecuted and punished for extracting confessions under torture and, if so, to provide details of the cases and any punishments or sanctions imposed on those responsible.

Conditions of detention

(19) While welcoming efforts made by the State party to improve the living condition of detained persons (CAT/C/BLR/4, paras. 21 ff.) and the State party's acceptance of the recommendation made in the course of the universal periodic review to that end (A/HRC/15/16, para. 97.30), the Committee remains deeply concerned about continuing reports of poor conditions in places of deprivation of liberty, including an appeal by the Special Rapporteur on the question of torture concerning the conditions in several places of

detention such as the SIZO in Minsk (A/HRC/4/33/Add.1, para. 16). This includes the problem of the overcrowding, poor diet and lack of access to facilities for basic hygiene and inadequate medical care (arts. 11 and 16).

The State party should intensify its efforts to bring the conditions of detention in places of deprivation of liberty into line with the Standard Minimum Rules for the Treatment of Prisoners and other relevant international and national law standards, in particular by:

(a) Reducing prison overcrowding and considering the establishment of non-custodial forms of detention in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules);

(b) Ensuring all detainees' access to and receipt of the necessary food and health care; and

(c) Ensuring that all minors are detained separately from adults throughout the whole period of their detention or confinement, and offering them educational and recreational activities.

(20) While noting the information by the delegation that the General Prosecutor's office had received no complaints from women detainees on threats of violence against them, the Committee is concerned about reported acts or threats of violence, including sexual violence, by inmates and public officers, in places of detention (arts. 2, 11 and 16).

The Committee recommends the State party to take prompt and effective measures to combat prison violence more effectively in accordance with the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok rules). The State party should also establish and promote an effective mechanism for receiving complaints of sexual violence and ensure that law enforcement personnel are trained on the absolute prohibition of sexual violence, as a form of torture, and on how to receive such complaints.

Training

(21) The Committee regrets the lack of information on targeted training for medical and law enforcement personnel, security and prison officials, judicial officials and other persons involved with custody, interrogation or treatment of persons under State or official control on matters related to the prohibition of torture and cruel, inhuman or degrading treatment or punishment. The Committee further regrets lack of information evaluation and assessment of the training provided (art. 10).

The Committee recommends the State party to:

(a) Provide all persons charged with the various functions enumerated in article 10 of the Convention with regular training concerning the provisions of the Convention and the absolute prohibition of torture as well as rules, instructions and methods of interrogation, especially in cooperation with civil society organizations;

(b) Provide all relevant personnel, especially medical personnel, with specific training on how to identify signs of torture and ill-treatment and to use the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol);

(c) Implement a gender-sensitive approach for the training of those involved in the custody, interrogation or treatment of women subjected to any form of arrest, detention or imprisonment; and

(d) Regularly assess the effectiveness and impact of such training and educational programmes on the reduction of cases of torture and ill-treatment.

Violence against women and children, including domestic violence

(22) While welcoming measures taken by the State party to combat violence against women and children, the Committee is concerned about the persistence of such violence and the lack of information about (a) prosecutions of persons in connection with cases of violence against women and children, including domestic violence and (b) practical assistance and reparations provided to victims of such violence. The Committee notes with regret the high number of women killed as a result of domestic violence and the absence of separate criminal law provisions on domestic violence and marital rape, as raised by the Committee on the Elimination of Discrimination against Women (CEDAW/C/BLR/CO/7, para. 19) (arts. 2, 14 and 16).

The State party should strengthen its efforts to prevent, combat and punish violence against women and children, in particular domestic violence, inter alia, by amending its criminal legislation and providing victims of violence with the immediate protection and long-term rehabilitation of victims. Furthermore, the State party should conduct broader awareness-raising campaigns and training on domestic violence for judges, lawyers, law enforcement agencies, and social workers who are in direct contact with the victims and for the public at large.

Trafficking in persons

(23) While welcoming efforts by the State party to addressing trafficking in persons and bringing perpetrators to justice, the Committee is concerned at reports that trafficking in persons, particularly women, remains a considerable problem and that Belarus remains a country of origin, transit and destination for victims of trafficking (arts. 2, 10 and 16).

In the light of the recommendations made by the Special Rapporteur on trafficking in persons, especially women and children, following her visit to Belarus in May 2009 (A/HRC/14/32/Add.2, paras. 95 ff.), the State party should undertake effective measures, including through regional and international cooperation, to address the root causes of trafficking in persons, in particular its close link to sexual exploitation, continue to prosecute and punish perpetrators, provide redress and reintegration services to victims, and conduct training for law enforcement officials, particularly border and customs officials.

Redress, including compensation and rehabilitation

(24) The Committee regrets the lack of information on (a) redress and compensation measures, including the means of rehabilitation, ordered by the courts and actually provided to victims of torture, or their dependent, and (b) treatment and social rehabilitation services and other forms of assistance, including medical and psychosocial rehabilitation, provided to victims. The Committee regrets reports that Minsk City court dismisses claims seeking compensation for moral damage caused while in detention (art. 14).

The State party should provide redress and compensation, including rehabilitation to victims in practice, and provide information on such cases to the Committee. Furthermore, the State party should provide information on redress and compensation measures ordered by the courts and provided to victims of torture or their families. This information should include the number of requests made and those granted, and the amounts ordered and actually provided in each case. In addition, the State party should provide the Committee with relevant statistical data and examples of cases in which individuals have received such compensation in its next periodic report.

Human rights defenders

(25) The Committee is deeply concerned by numerous and consistent allegations of serious acts of intimidation, reprisals and threats against human rights defenders and journalists, and the lack of information provided on any investigations into such allegations. The Committee notes with concern several reports on refusal to register independent non-governmental organizations, threats and acts of criminal prosecution, arrests, raids on offices and acts of intimidation, as indicated in the oral report by the United Nations High Commissioner for Human Rights presented to the Human Rights Council in September 2011 and urgent appeals made by the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The Committee regrets that, despite the views of by the Human Rights Committee (communication No. 1296/2004) and several appeals by the Special Rapporteurs (A/HRC/17/27/Add.1, para. 331), the Supreme Court maintained the previous decision by the Ministry of Justice not to register Human Rights Centre Viasna (arts. 2, 12 and 16).

The State party should take all necessary steps to ensure the protection of human rights defenders and journalists from intimidation or violence as a result of their activities and the prompt, impartial and thorough investigation, prosecution and punishment of such acts. In particular, the Committee recommends that the State party:

(a) **Acknowledge the crucial role of non-governmental organizations in assisting the State party in fulfilling its obligations under the Convention, and enable them to seek and receive adequate funding to carry out their peaceful human rights activities;**

(b) **Inform the Committee of the outcome of investigations of alleged threats against and harassment by the authorities of human rights defenders and journalists, including cases of two journalists, Irina Khalip and Andrzej Poczobut; the Chair of the Belarusian Helsinki Committee, Aleh Gulak; and the President of Viasna, Ales Byalyatski; and**

(c) **Update the status of implementation of the aforementioned decision of the Human Rights Committee that the complainants, 11 members of Viasna, are entitled to an appropriate remedy, including the re-registration of Viasna.**

Refugees and asylum seekers

(26) While welcoming the adoption, in 2008, of the new Law on Provision of Refugee Status, Complementary and Temporary Protection to Foreign Citizens and Stateless Persons in Belarus, the Committee notes that the legislation and practice of its implementation need to be further revised in order to be fully in line with international human rights and refugee law (art. 3).

The Committee recommends the State party to revise its current procedures and practices in the area of expulsion, refoulement and extradition in order to fulfil its obligations under article 3 of the Convention. The State party should guarantee better protection for asylum seekers, refugees and other persons in need of international protection, improve the quality of the State's Refugee Status Determination procedure, and consider ratifying the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

Death penalty

(27) The Committee is concerned by reports of the poor conditions of persons sentenced to death, and regarding the secrecy and arbitrariness surrounding the execution of persons

sentenced to death, including reports that the families of persons sentenced to the death penalty are only informed days or weeks after the execution has taken place, that they are not given the opportunity for a last visit to the prisoner, that the body of the executed prisoner is not handed over to the family and the place of burial is not disclosed to them. Furthermore, the Committee is deeply concerned at reports that some death row prisoners are not provided with fundamental legal safeguards and the discrepancy between reports of the authorities and other, various sources on this matter. Although the Committee notes that a parliamentary working group continues to consider the possibility of establishing a moratorium of the death penalty, it regrets the execution of two death row inmates whose cases were being reviewed by the Human Rights Committee, despite its request for interim measures (communication Nos. 1910/2009 and 1906/2009) (art. 16).

The State should take all necessary measures to improve the conditions of detention of persons on death row, and to ensure they are afforded all the protections provided by the Convention. Furthermore, it should remedy the secrecy and arbitrariness surrounding executions so that family members do not have added uncertainty and suffering. The Committee also recommends the State party to consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

Data collection

(28) The Committee regrets the lack of comprehensive and disaggregated data on numerous areas covered by the Convention, inter alia, statistics on complaints, investigations, prosecutions and convictions of cases of torture and ill treatment by law enforcement, security and prison personnel, and enforced disappearances, trafficking and domestic and sexual violence (arts. 12 and 13).

The State party should compile and provide to the Committee statistical data relevant to the monitoring of the implementation of the Convention at the national level, including information on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment, trafficking, domestic and sexual violence, and outcomes of all such complaints and cases, including compensation and rehabilitation provided to victims.

Cooperation with United Nations human rights mechanisms

(29) The Committee recommends that the State party strengthen its cooperation with United Nations human rights mechanisms, including by permitting visits of the special procedure mandate holders who have made a request, inter alia, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Working Group on Enforced or Involuntary Disappearances.

(30) The Committee recommends that the State party consider ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

(31) The Committee recommends that the State party consider making the declarations under articles 21 and 22 of the Convention.

(32) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, inter alia, the Convention for the Protection of All Persons from Enforced Disappearance and the Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the abolition of the death penalty. Noting the commitment made by the State party in the context of the universal periodic review (A/HRC/15/16, paras. 97.1 and 98.3), the Committee recommends that the

State party work towards ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

(33) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(34) The Committee requests the State party to provide, by 25 November 2012, follow-up information in response to the Committee's recommendations related to (a) ensuring or strengthening legal safeguards for persons detained, (b) conducting, prompt, impartial and effective investigations, and (c) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraphs 6, 11 and 14 of the present document, as well as redress and remedies provided to victims as relevant.

(35) The State party is invited to update its common core document (HRI/CORE/1/Add.70), in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(36) The State party is invited to submit its next report, which will be the fifth periodic report, by 25 November 2015. To that purpose, the Committee invites the State party to accept, by 25 November 2012, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report to the Committee.

53. **Bulgaria**

(1) The Committee against Torture considered the combined fourth and fifth periodic reports of Bulgaria (CAT/C/BGR/4-5) at its 1032nd and 1035th meetings, on 9 and 10 November 2011, (CAT/C/SR.1032 and 1035), and adopted concluding observations at its 1054th meeting (CAT/C/SR.1054) on 24 November 2011.

A. Introduction

(2) The Committee welcomes the submission of the fourth and fifth combined periodic reports of Bulgaria, submitted in accordance with its reporting guidelines, regrettably two years late, and the replies to the list of issues (CAT/C/BGR/Q/4-5).

(3) The Committee appreciated the open and constructive dialogue with the State party's high-level diverse delegation and thanks the delegation for its clear, frank and detailed answers to the questions raised by Committee members.

B. Positive aspects

(4) The Committee welcomes that since the consideration of the third periodic report, the State party has ratified or acceded to the following international instruments:

(a) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 2011; and

(b) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, in 2006.

(5) The Committee welcomes the signing of the bilateral agreement on cooperation concluded in June 2010 between Bulgaria and Greece to combat organized crime, including smuggling, human trafficking and drugs.

(6) The Committee notes the State party's ongoing efforts to revise its legislation in areas of relevance to the Convention, including the amendment to the Constitution in 2007 establishing the Supreme Judicial Council, and:

(a) New Civil Procedure Code, in force since 1 March 2008, relating to compensation or rehabilitation provided to victims of torture;

(b) Judicial System Act, in force since 10 August 2007, and Judiciary Reform Strategy 2009–2013, adopted in 2009;

(c) Amendment to the Law on Asylum and Refugees providing a mechanism for the refugee status determination procedure, 2007;

(d) Assistance and Financial Compensation to Crime Victims Act, in force since 2007, and National Strategy for Assistance and Compensation to Crime Victims;

(e) New Administrative Procedure Code, in force since 12 July 2006, relating to prevention and punishment of torture and the possibility of foreigners to challenge expulsion orders;

(f) New Criminal Procedure Code, in force since 26 April 2006, regarding procedural guarantees of prohibition of torture and provisions to prevent torture and regulating police detention;

(g) Legal Aid Act (2006) and the establishment of the National Bureau of Legal Aid;

(h) Amendments to the new Health Act, in force since 1 May 2005, in relation to medical procedures for persons with mental disabilities;

(i) Several amendments to the Penal Code since 2004, especially with regard to article 287 relating to the Convention's requirement for criminalizing the act of torture.

(7) The Committee also welcomes the efforts of the State party to amend its policies, programmes and administrative measures to ensure greater protection of human rights and give effect to the Convention, including:

(a) Adoption of the Strategy for Development of Penitentiary Facilities (2009–2015) and the Programme for Improvement of Conditions at Places of Deprivation of Liberty, 2010;

(b) National Strategy for Children (2008–2018) and the Vision for Children's Deinstitutionalization in the Bulgaria, adopted on 24 February 2010;

(c) Integrated Strategy for Combating Crime and Corruption, 2010;

(d) Strategy for Reforming Places of Detention (2009–2015);

(e) National Action Plan for the Initiative "Decade of Roma Inclusion 2005–2015" and Framework Programme for Integration of Roma in Bulgarian Society (2010–2020);

(f) National Action Plan for Mental Health (2004–2012).

C. Principal subjects of concern and recommendations

Definition, absolute prohibition and criminalization of torture

(8) The Committee is concerned that a comprehensive definition of torture incorporating all the elements of article 1 of the Convention is not included in the Penal Code and that torture is not criminalized as an autonomous offence in law, as required under the Convention. The Committee notes that the working group in the Ministry of

Justice established to elaborate a new Penal Code has not as yet discussed the section with the provisions concerning a new crime incorporating the definition of torture (arts. 1 and 4).

The Committee urges the State party to adopt a definition of torture that covers all the elements contained in article 1 of the Convention. The State party should take effective legislative measures to include torture as a separate and specific crime in its legislation and ensure that penalties for torture are commensurate with the gravity of this crime. It should ensure that the absolute prohibition against torture is non-derogable and that acts amounting to torture are not subject to any statute of limitations.

Fundamental legal safeguards – access to a lawyer and legal aid

(9) The Committee notes that the State party has adopted measures both in law and through the issue of appropriate instructions, guaranteeing the rights of notification of custody, access to a lawyer, access to an independent doctor and being informed of charges from the very outset of detention. The Committee is concerned, however, at information that access to a lawyer during the 24 hours of police custody was not always available in practice and that such access continued to be a reality for only a minority of persons held by the police, namely those who could afford a private lawyer. The Committee is also concerned by allegations that the police are reluctant to grant access to a lawyer from the very outset of detention and that there have been delays in ex officio lawyers being contacted and coming to the police station. The Committee is further concerned that the National Bureau of Legal Aid is understaffed and underresourced, which negatively affects the rights to fair trial of persons with unequal economic or social status by being translated into unequal access to justice and the unequal possibility of defence in trial; in addition to the poor, members of minorities and certain categories of foreigners, such as asylum seekers and irregular migrants, are also denied equal access to justice (art. 2).

The Committee recommends that the Bulgarian authorities re-instruct all police officers on the legal obligation to grant access to a lawyer to all detainees from the very outset of their detention. Further, the Committee recommends that the State party take appropriate measures to remove all obstacles to the right of equal access to justice; and that the State party ensure that the National Bureau of Legal Aid be provided with adequate financial and staffing resources in order to fulfil its role with regard to all categories of detainees.

Police violence and use of firearms

(10) The Committee is concerned by the excessive use of force and of firearms by law enforcement officers, including the eight cases in which the European Court of Human Rights ruled against the State party in 2010, half of which resulted in the deaths of the victims; by the scope of use of firearms allowed in the Ministry of Interior Act (art. 74); that acts of violence attributed to law enforcement officials include torture, inhuman or degrading treatment and refusal to provide victims with lifesaving medical assistance; and that there have been very few prosecutions so far (arts. 2, 12, 13 and 16).

The Committee urges the State party to amend its legislation to ensure that regulations on the use of firearms conform to international standards, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The State party should also take measures to eradicate all forms of harassment and ill-treatment by police during investigations and should promptly, thoroughly and impartially investigate all allegations of violence applied in an unnecessary and disproportionate way by law enforcement officials, prosecute and punish those responsible in proportion to the seriousness of their acts and provide the victims with compensation, including the means for as full rehabilitation as possible.

Independent monitoring of places of detention and other places where people are deprived of their liberty

(11) The Committee welcomes the State party's ratification of the Optional Protocol to the Convention and its intention to establish a national preventive mechanism within one year. The Committee is concerned that independent monitoring by civil society organizations is not allowed in all cases of detention and that non-governmental organizations such as the Bulgarian Helsinki Committee require a prosecutor's permission for access to pretrial detainees (art. 2).

The Committee recommends that the State party ensure independent, effective and regular monitoring of all places of detention by independent non-governmental bodies.

Reform of the judicial system

(12) While taking note of the establishment of the Judiciary Reform Strategy 2009–2013, the Committee is concerned at the lack of progress in judicial reform, including reported misconceptions such as the joint governance of the courts and the prosecution service. It is concerned by the lack of transparency regarding the selection and appointment of judges and members of the Supreme Judicial Council; that the principle of the independence of the judiciary is not respected by the organs outside the judiciary, including high-ranking government officials, nor fully applied within the judiciary; and by allegations of corruption within the justice system and lack of trust in the administration of justice, resulting in lack of public trust in the judiciary (arts. 2 and 13).

The Committee recommends that the State party accelerate judicial reform, taking into account the preliminary conclusions and observations of the Special Rapporteur on the independence of judges and lawyers of 16 May 2011 and international standards – in particular the Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors and the Bangalore Principles of Judicial Conduct. The State party should ensure that the selection and appointment of judges, including to the Supreme Judicial Council, is transparent and that objective criteria provide equal opportunity for candidates. The State party should raise the awareness of judicial and other officials and the public at large about the importance of independence of the judiciary. There should be no external interference in the judicial process. The State party should strengthen efforts to combat corruption and ensure that all incidents of suspected corruption be promptly, thoroughly and impartially investigated and prosecuted, in particular within the framework of the Integrated Strategy for Combating Crime and Corruption 2010.

National human rights institution and national protective mechanism

(13) The Committee is concerned that to date there is no national institution in conformity with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) in the State party, while taking due note of the fact that the Ombudsman and the Commission on Protection against Discrimination of Bulgaria have applied for accreditation to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights as the national institutions for the promotion and protection of human rights (arts. 2, 11 and 13).

The Committee recommends that the Ombudsman and the Commission on Protection against Discrimination conform to the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).

Access to a fair procedure for asylum seekers

(14) The Committee is concerned that the State party has not taken measures to ensure the implementation of all rights of asylum seekers and refugees, including issues such as detention and transfer of asylum seekers, the lack of translation and legal assistance services and the expulsion of foreigners on the basis of national security considerations (arts. 3, 11 and 14).

The Committee recommends that the State party:

(a) Amend article 16 of the Ordinance for the Responsibilities and Coordination between the State Agency for Refugees, the Directorate of Migration and the Border Police – in order to formally remove the rule that allows for the detention of asylum seekers on the basis of illegal entry and ensure that asylum seekers enjoy accommodation, documentation, access to health care, social assistance, education and language training, as provided in articles 29 and 30 (a) of the Law on Asylum and Refugees;

(b) Ensure that the detention of asylum seekers is only used as a last resort, when necessary, for as short a period as possible and that safeguards against refoulement are fully implemented;

(c) Accelerate the long-awaited opening of the Pastrogor transit centre in order to correct the current practice of transferring asylum seekers to detention centres because of inadequate reception facilities;

(d) Ensure interpretation and translation services at all border crossings and centres dealing with asylum seekers;

(e) Ensure that the State Agency for Refugees reinstate its legal assistance programme and make sure that reports, descriptions of evidence presented by asylum seekers, minutes and interviews are established in a professional manner.

Definition of statelessness

(15) The Committee is concerned that the legislation of the State party does not provide for a legal definition of a stateless person and that no legal framework or mechanisms exist to determine the status of such people (arts. 2 and 3).

The Committee recommends that the State party consider introducing the definition of a stateless person in its legislation and establish a legal framework and mechanisms to determine statelessness. It encourages the State party to consider acceding to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

Non-refoulement

(16) The Committee is concerned that the State party does not fully apply its obligation under article 3 of the Convention with regard to the respect the principle of non-refoulement (art. 3).

The Committee recommends that the State party:

(a) Observe the safeguards ensuring respect for the principle of non-refoulement, including consideration of whether there are substantial grounds indicating that the asylum seeker might be in danger of torture or ill-treatment upon deportation;

(b) Amend its legislation to guarantee a suspensive in-country right of appeal and respect for all safeguards and interim measures with regard to asylum and deportation procedures pending the outcome of the appeals;

(c) **Ensure interpretation services for asylum seekers in asylum cases and appeals;**

(d) **Submit situations covered by article 3 of the Convention to a thorough risk assessment, notably by ensuring appropriate training for judges regarding the risks of torture in receiving countries and by automatically holding individual interviews in order to assess the personal risk to applicants; and**

(e) **Follow up cases, in the light of the judgment of the European Court of Human Rights and, in particular, follow up the cases of the two rejected Palestinian asylum seekers, Youssef Kayed who was tortured upon his return to Lebanon on 27 November 2010, and Moussa Kamel Ismael, who was tortured upon his return to Lebanon, also on 27 November 2010, and update the Committee on their situation in its next periodic report.**

Jurisdiction over offences referred to in article 4 of the Convention

(17) The Committee is concerned that current Bulgarian legislation does not provide for jurisdiction over offences referred to in article 4 of the Convention for all acts of torture owing to the absence of a specific and autonomous offence of torture which corresponds to the definition outlined in the Convention (arts. 5, 6 and 7).

The Committee recommends that the State party adopt a definition of torture in accordance with the Convention so as to ensure that all acts of torture, and not only those amounting to war crimes, can be prosecuted under jurisdiction over offences referred to in article 4 of the Convention and that all suspected perpetrators of acts of torture found in Bulgarian territory are either extradited or prosecuted in accordance with article 6 of the Penal Code.

Non-admissibility of evidence as a result of torture

(18) The Committee is concerned about the lack of legislation in the State party ensuring the non-admissibility of evidence obtained as a result of torture (art. 15).

The Committee recommends that the State party enact legislation specifically prohibiting the use of statements obtained under torture as evidence in conformity with the Convention (art. 15) and that the competent authorities of the State party compile statistics and submit to the Committee cases where evidence obtained as a result of torture has been held inadmissible.

Treatment of persons in social institutions, including those with mental disabilities

(19) The Committee is concerned:

(a) That persons with mental disabilities in State and municipal social institutions, particularly in medical institutional settings, do not enjoy adequate legal safeguards and procedural guarantees regarding the respect of their right to mental and physical integrity; that persons deprived of their legal capacity and whose decisions and preference are not taken into account have no means to challenge the violation of their rights; admission procedures and systems of guardianship often include officials from the institutions in which persons with disabilities are confined, which may result in conflict of interest and de facto detention, while the guardians' consent to medical treatment may amount to forced treatment; by the use of restraint and forced administration of intrusive and irreversible treatments such as neuroleptic drugs; and that there is no independent inspection mechanism for mental health institutions; at the competence of staff, frequency of visits by specialists and the material conditions of such institutions, including their remote locations, far from families and large medical centres;

(b) By the current and future situation of institutionalized children with mental disabilities, while noting the envisaged transition from institutional to community-based care similar to a family environment and the closure of all childcare institutions within 15 years; that 238 children with mental disabilities died in the period 2000–2010, three quarters from preventable deaths, without a single indictment being made to date in 166 criminal investigations and that two children died recently in similar circumstances in Medven; that an inspection covering the year 2010 regarding involuntary confinement and treatment under the Health Act and coercive confinement for treatment under the Penal Code found no violation in the application of the legislation; that the necessary upkeep and renovations of existing facilities while the planned deinstitutionalization is being put in place will not be carried out on the assumption that they are being phased out (arts. 2, 11, 12, 13, 14 and 16).

The Committee recommends that the State party:

(a) **Review legislation and policy of depriving persons with mental disabilities of their legal capacity, provide legal and procedural safeguards for their rights and ensure that they have prompt access to effective judicial review of decisions, as well as effective remedy against violations;**

(b) **Evaluate cases on an individual basis and ensure respect for the right to mental and physical integrity of institutionalized persons and in particular during the use of restraint and enforced administration of intrusive and irreversible treatments such as neuroleptic drugs; ensure that their decisions and preferences are taken into account;**

(c) **Take effective measures to regulate the system of guardianship in order to avoid conflict of interest and situations that amount to forced treatment and de facto detention;**

(d) **Establish close monitoring of placements by judicial organs and by independent inspection mechanisms to ensure the implementation of safeguards and international standards, including the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care;**

(e) **Provide sufficient numbers of competent professional staff and carry out the necessary material renovations on facilities, which should be located in large cities that have hospitals and medical centres;**

(f) **Ensure adequate investigation, prosecution, conviction and sanction of those responsible for the deaths of institutionalized children with mental disabilities;**

(g) **Amend and strengthen legislation to enhance accountability and prevent recurrence and impunity and regulate authorized treatment in institutions, in particular of persons with mental disabilities. Attention should be paid to the individual needs of each child and the proper treatment prescribed, in conformity with the provisions of the Convention;**

(h) **Ensure frequent and professional oversight and monitoring by independent mechanisms, including the national human rights institution and civil society organizations of all institutions and of the implementation of the deinstitutionalization, including the acceleration of the deinstitutionalizations in as short a period of time as possible, in order to maintain a sustainable system of care.**

Training

(20) The Committee is concerned that specific training on the provisions of the Convention, and in particular the absolute prohibition of torture, including sexual violence, and on the Manual on Effective Investigation and Documentation of Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) is not part of mandatory training for relevant officials such as judges, law enforcement officials and prison staff (art. 10).

The Committee recommends that the State party:

(a) Prepare and implement training programmes to ensure that judges, prosecutors, law enforcement officials and prison staff are fully aware of the provisions of the Convention, in particular the absolute prohibition of torture, and that breaches will not be tolerated and will be investigated and the perpetrators prosecuted;

(b) Develop training modules with the aim of sensitizing law enforcement officials and other personnel concerned against discrimination based on ethnicity and religion;

(c) Provide medical personnel and others involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment, as well as other professionals involved in the documentation and investigation of torture, training on a regular and systematic basis on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) and ensure that such training is also provided for individuals involved in asylum determination processes;

(d) Develop and implement a methodology to assess the effectiveness and impact of the training and educational programmes on the reduction of cases of torture and ill-treatment.

Conditions of detention

(21) While taking note of the State party's plan to build new detention facilities and renovate existing ones, the Committee is concerned at the continued obsolete, insanitary and overcrowded conditions of detention in Bulgaria, which do not conform to international standards. It is particularly concerned about overcrowding which has reduced the average living space in many prisons to only 1 m² per detainee instead of the recommended standard of 6 m² and that some detainees are forced to sleep on the floor; that no new detention facilities have been built and that few were renovated; that, owing to budgetary restrictions, there is no improvement in the prisoner-staff ratio; that the Ombudsman highlighted in 2009 the need for reform of the prison system, expressing concern that the funds earmarked for renovation of prisons in accordance with the Strategy for Reforming Places of Detention (2009–2015) were drastically reduced in 2009 and 2010; and that material conditions such as access to drinking water, hygiene, electricity, the use of toilets, quality and quantity of food, purposeful activities and exercise do not conform to international standards (arts. 11 and 16).

The Committee recommends:

(a) That the State party strengthen efforts and increase funds in order to bring the living conditions in detention facilities to conform to international standards such as the Standard Minimum Rules for the Treatment of Prisoners;

(b) The accelerated implementation and increase in funds for the Strategy for Reforming Places of Detention (2009–2015) and for the 2010 Programme for Improvement of Conditions at Places of Deprivation of Liberty;

(c) The adoption of specific time frames for the construction of new prisons and renovation of existing ones and increase the number of staff in all facilities;

(d) **The increase in the budgetary allocations for basic amenities provided to detainees, including access to drinking water, food, electricity, hygiene and sanitation, and to ensure sufficient natural and artificial light, as well as heating and ventilation in the cells, and the provision of psychosocial support care for detainees who require psychiatric supervision and treatment.**

The Committee invites the State party to increase the use of alternatives to imprisonment in conformity with the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) and to reduce overcrowding.

(22) The Committee is concerned at the reported continued existence of underground investigative detention facilities in five locations where remand prisoners are held. It is concerned that some cells do not have windows, some have less than 1 m² of living space per detainee while others do not have possibilities for outdoor exercise. Furthermore, the Committee is concerned by conditions of detention in many police stations where cells do not conform to international standards of hygiene and are unsustainable for overnight use, and that in some cases detained persons spend the first 24 hours in an area with bars referred to as the “cage”, at times in full view of visitors to the police station. While noting that handcuffing people to bars and pipes has been prohibited, the Committee is concerned at reports that some detainees were handcuffed to immovable objects such as radiators and piping or to a chair for up to six hours (art. 11).

The Committee recommends that:

(a) **The State party take urgent measures to ensure that the treatment of remand prisoners in investigative detention centres and detainees in police stations conforms to international standards. It urges the State party to build new investigative detention centres or adapt and renovate existing facilities so that all persons are detained above the ground and that they meet minimal international standards. Police detention facilities should have a sufficient number of cells suitable for overnight stay with adequate material conditions such as clean mattresses and blankets and adequate lighting, ventilation and heating; and**

(b) **Handcuffing persons to immovable objects should be forbidden by law and in practice.**

Inter-prisoner violence and deaths in detention

(23) The Committee is concerned that overcrowding and understaffing are conducive to inter-prisoner and violence, including sexual violence, in detention facilities, especially during the night; that of a total of 3,161 cases of violence in the period January 2007–July 2011, investigation procedures were opened only with regard to 22 cases. The Committee is also concerned about reports of increased inter-prisoner violence since 2008 and especially in 2011. It is concerned by the incidence of sexual violence, which is rarely reported, including rape, and of harassment and beatings which have on occasion resulted in suicide, as well as the large number of deaths in custody which varies between 40 and 50 annually (arts. 2, 11 and 16).

The Committee recommends that the State party:

(a) **Enhance efforts to prevent inter-prisoner violence by addressing the factors which contribute to it such as overcrowding, lack of sufficient staff, lack of space and poor material conditions, lack of purposeful activities, availability of drugs, and feuding gangs;**

(b) **Pay attention to protection of prisoners from inter-prisoner violence, in particular those belonging to the lesbian, gay, bisexual and transgender group, and to**

the psychosocial profile of the prisoners and those who engage in violence, investigate and sanction incidents;

(c) Increase the number of staff, including those with training in the management of inter-prisoner violence;

(d) Increase the quality and frequency of supervision and monitoring, especially at night, including through the introduction of additional video surveillance equipment; and

(e) Impartially, thoroughly and promptly investigate all incidents of death in custody, including suicide, make the results of investigations public and prosecute the persons responsible for committing violations leading to deaths.

Solitary confinement and prisoners serving life sentences

(24) The Committee is concerned that detainees continue to be held in solitary confinement for disciplinary violations for up to 14 days and for up to two months for the purpose of prevention of escape, violation of life or death of other persons and other crimes. The Committee is also concerned that current legislation imposes a strict regime of segregation during the initial five-year period, ordered by the sentencing for prisoners serving a life sentence, and that these prisoners are routinely handcuffed when outside their cells. The Committee is particularly concerned that some asylum seekers are also placed in solitary confinement for long periods (arts. 2, 11 and 16).

The Committee recommends that the State party consider the recommendations made by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/66/268) in which he urges States to prohibit the imposition of solitary confinement as punishment — either as a part of a judicially imposed sentence or a disciplinary measure — and recommends that States develop and implement alternative disciplinary sanctions to avoid the use of solitary confinement (para. 84). The Committee recommends the reduction of the periods of solitary confinement and the restrictions related thereto. The practice of placing asylum seekers in solitary confinement should be stopped without delay. The Committee recommends that the State party consider amending legislation concerning the strict regime of segregation during the first five years and handcuffing when outside their cells for prisoners serving life sentences. Life prisoners should be able to join the mainstream prison population.

Domestic violence

(25) The Committee is concerned at the narrow interpretation of the concept of domestic violence and that the phenomenon is not included as a specific offence in the Penal Code. It is also concerned that allegations of domestic violence must be initiated by the victim in cases of light or average bodily harm and that few cases of domestic violence are brought to justice and sanctioned, in particular regarding women and girls; that cases are generally limited to those where the perpetrator violates the protection orders that are usually issued for the duration of one month; and that there are no effective mechanisms for protection against domestic violence, including marital rape (arts. 2, 12, 13, 14 and 16).

The State party should amend its legislation to include domestic violence as a specific crime in the Penal Code which entails ex officio prosecution. The State party should strengthen its efforts to prevent domestic violence, especially against women and girls, and should encourage victims to report cases to the authorities. All cases of domestic violence should result in appropriate investigation, prosecution and sanction. Protection orders should be of much longer duration. The State party should introduce mechanisms for monitoring of and effective protection from domestic violence, including an effective complaints mechanism.

Early marriage

(26) The Committee is concerned by the practice of informal early and forced marriage of Roma girls as young as 11 (arts. 2 and 16).

The State party should enforce the legislation concerning minimum marriage age, clearly indicate that child marriages have no legal effect and constitute a harmful practice, in the light of the concluding observations of the Committee on the Rights of the Child and with general recommendation No. 24 (1999) on article 12 of the Committee on the Elimination of Discrimination against Women. Community awareness-raising campaigns should be carried out regarding the prohibition of these marriages, their harmful consequences and the rights of children. The Committee also urges the State party to enforce the requirement to register all marriages, in order to monitor their legality, as well as to strictly enforce the prohibition of early marriages and to investigate such cases and to prosecute the perpetrators.

Trafficking in persons

(27) While taking note of the National Programme on Prevention and Counteracting Human Trafficking and Protection of Victims and amendments to the Penal Code, section IX on “Trafficking in human beings”, the Committee is concerned that poverty and social exclusion result in vulnerability of women and children, and in particular Roma women and girls, including those who are pregnant, to human trafficking (arts. 2, 3, 14 and 16).

The Committee recommends that the State party strengthen its efforts to combat trafficking in persons, especially in women and children, in particular to:

(a) Prevent and promptly, thoroughly and impartially investigate, prosecute and punish trafficking in persons and related practices;

(b) Improve the identification of victims of trafficking and provide means of effective redress, including compensation and rehabilitation, to victims of trafficking, including assistance to victims to report incidents of trafficking to the police, in particular by providing legal, medical and psychological aid and rehabilitation, inter alia, through genuine access to health care and counselling and adequate shelters, in accordance with article 14 of the Convention;

(c) Prevent the return of trafficked persons to their countries of origin, where there is a substantial ground to believe that they would be in danger of torture, to ensure compliance with article 3 of the Convention;

(d) Provide regular training to the police, prosecutors and judges on effective prevention, investigation, prosecution and punishment of acts of trafficking, including on the guarantees of the right to be represented by an attorney of one’s own choice, and inform the general public on the criminal nature of such acts; and

(e) Compile data disaggregated, as appropriate, by nationality, country of origin, ethnicity, gender, age, and employment, as well as on the provision of redress.

Discrimination, hate speech and violence against vulnerable groups

(28) While acknowledging the stance taken by the authorities in publicly condemning manifestations of discrimination and intolerance, the Committee is deeply concerned at manifestations of discrimination and intolerance, including hate speech and violent attacks against certain national and religious minorities and persons belonging to sexual minorities. The Committee is also concerned by the excessive use of force by the police against certain minorities and the recent anti-Roma riots and destruction of property, which in some cases occurred without preventive action from the police. It is also concerned that slogans amounting to hate speech are voiced against vulnerable minority groups, including by

members of certain political parties and groups and that intolerance towards religious minorities has resulted in vandalism of places of worship and attacks on worshippers. The Committee takes note that the recent attacks on journalists in connection with the anti-Roma riots are being investigated (arts. 2, 12, 13, 14 and 16).

The State party should enhance efforts to eradicate stereotypes and discrimination against the Roma and other national minorities, including through increased awareness-raising and information campaigns to promote tolerance and respect for diversity. Measures should be taken to prohibit and prevent advocacy of hate speech, discrimination and intolerance, including in the public domain, in conformity with international standards and human rights instruments to which Bulgaria is a party. The State party should enhance the enforcement of anti-discrimination legislation and ensure that violent acts, discrimination and hate speech are systematically investigated, prosecuted and the perpetrators convicted and punished. The State party should systematically apply provisions of the Criminal Code concerning crimes based on intolerance and should ensure that offences motivated by discrimination constitute an aggravating circumstance in criminal prosecution. The State party should ensure that members of the Roma community are not singled out on an ethnically motivated basis with regard to the use of force by the police and ensure that excessive use of force against members of national and other minorities is promptly and impartially investigated and perpetrators prosecuted and punished. The victims need to be compensated and accorded all remedies afforded by the Convention, including reparations for damage. The Committee requests to be updated on the results of the investigations into the recent attacks on journalists.

Redress

(29) The Committee takes note of the information provided in the State party's report on the right to redress, including financial compensation, for persons whose rights have been violated. However, the Committee regrets that not more information was provided on the actual implementation of redress to persons subjected to torture or ill-treatment, among others, to persons who have been interned in centres and homes for persons with mental disabilities, including a high number of children (art. 14).

The State party should ensure that the efforts in respect of redress, including compensation and rehabilitation, are strengthened in order to provide victims, including those who have suffered torture and ill-treatment in such centres, with redress and fair and adequate compensation, including means for as full rehabilitation as possible.

Corporal punishment

(30) While taking note that corporal punishment is explicitly forbidden in law, the Committee is concerned by persistent lack of implementation and notes that the Committee on the Rights of the Child has found that children are still victims of corporal punishment in the home, schools, the penal system, alternative care settings and situations of employment. The Committee is concerned that a 2009 survey shows that 34.8 per cent of public opinion is in favour of corporal punishment in childrearing in some circumstances and that 10.9 per cent felt it was acceptable if the parent believed that it would be effective. It is concerned in particular that the use of corporal punishment is substantially higher in institutions for children with disabilities and that a number of cases of physical abuse were documented in the children's personal files (art. 16).

The Committee recommends that the State party carry out professional and public awareness-raising in order to promote non-violent, positive and participatory methods of childrearing and education; and that the State party take a comprehensive approach to ensuring that the law prohibiting corporal punishment is widely enforced

and known, including among children with regard to their right to protection from all forms of corporal punishment. There should be an absolute prohibition of corporal punishment in institutional settings, including for children with disabilities. The State party should provide effective and appropriate responses to corporal punishment, including investigations, prosecution and sanctioning of perpetrators.

Data collection

(31) The Committee regrets the absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement, security, military and prison personnel, or on trafficking and domestic and sexual violence, including means of redress (arts. 2, 11, 12, 13, 14 and 16).

The State party should compile statistical data relevant to the monitoring of the implementation of the Convention at the national level, including data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment, trafficking and domestic and sexual violence, and on means of redress, including compensation and rehabilitation, provided to the victims.

(32) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of Persons with Disabilities and its Optional Protocol, and the International Convention for the Protection of All Persons from Enforced Disappearance.

(33) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(34) The State party is invited to update its common core document (HRI/CORE/1/Add.81), in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(35) The Committee requests the State party to provide, by 25 November 2012, follow-up information in response to the Committee's recommendations related to (a) ensuring or strengthening legal safeguards for persons detained, (b) conducting prompt, impartial and effective investigations, and (c) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraphs 9, 10 and 28 of the present document.

(36) The State party is invited to submit its next periodic report, which will be the sixth periodic report, by 25 November 2015. For that purpose, the Committee invites the State party to accept, by 25 November 2012, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report to the Committee.

54. Djibouti

(1) The Committee against Torture (hereinafter referred to as "the Committee") considered the initial report of Djibouti (CERD/C/DJI/1) at its 1024th and 1027th meetings (CAT/C/SR.1024 and 1027), which were held on 2 and 3 November 2011, and adopted the following concluding observations at its 1045th and 1046th meetings (CAT/C/SR.1045 and 1046), on 17 and 18 November 2011.

A. Introduction

(2) The Committee welcomes the submission of the initial report of Djibouti, which generally follows the Committee's guidelines on initial reports. The Committee commends

the frankness of the report, which acknowledges shortcomings in the State party's implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Convention"). The Committee regrets, however, that the report was submitted seven years late. The Committee welcomes the very frank dialogue it held with the delegation of the State party on numerous areas covered by the Convention.

B. Positive aspects

(3) The Committee notes with satisfaction the State party's ratification of the following international instruments:

- (a) The International Covenant on Economic, Social and Cultural Rights, in 2002;
- (b) The International Covenant on Civil and Political Rights, in 2002;
- (c) The two Optional Protocols to the International Covenant on Civil and Political Rights, in 2002;
- (d) The International Convention on the Elimination of All Forms of Racial Discrimination, in 2011;
- (e) The Rome Statute of the International Criminal Court, in 2002.

(4) The Committee welcomes the fact that, under the provisions of article 37 of the Constitution, international treaties ratified by the State party, including the Convention, take precedence over the State party's domestic laws and may be applied directly in domestic judicial proceedings.

(5) The Committee welcomes the establishment in August 2011 of the Legal and Judicial Reform Commission, which is responsible for updating legislation and bringing it into line with the obligations deriving from the international human rights treaties ratified by the State party, including the Convention.

(6) The Committee notes with satisfaction that the State party abolished the death penalty in 1995.

(7) The Committee notes with appreciation that the State party has been able to prepare and submit its reports to the United Nations treaty bodies thanks to the Inter-ministerial Coordinating Committee for the Preparation and Submission of Reports to the Treaty Bodies, with technical support from the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme. Nevertheless, the Committee regrets that these reports have been submitted with some delay.

C. Principal subjects of concern and recommendations

Definition and criminalization of torture

(8) The Committee notes that article 16 of Djibouti's Constitution prohibits torture, physical abuse or inhuman, cruel, degrading or humiliating treatment. The Committee takes note of the State party's commitment to amend its domestic law in the light of its obligations deriving from the international human rights conventions it has ratified, introducing, inter alia, a definition of torture. Nevertheless, the Committee remains concerned about the absence of any clear definition of torture in the State party's current Criminal Code and of any provisions criminalizing acts of torture in accordance with articles 1 and 4 of the Convention (arts. 1 and 4).

The State party should include torture in its Criminal Code as an offence punishable by appropriate penalties that take into account the gravity of the acts committed, together with a definition of torture that includes all the elements mentioned in article

1 of the Convention. The Committee considers that by naming and defining the offence of torture in accordance with the Convention and distinguishing it from other crimes, States parties would directly advance the Convention's overarching aim of preventing and punishing torture.

Acts of torture

(9) The Committee notes with concern the State party's acknowledgement that abuses, notably acts of torture, have been committed by police officers in Djibouti in the performance of their duties. The Committee is particularly concerned about the fact that there has been no serious investigation of these cases, which has contributed to a situation in which such offences go unpunished (arts. 2 and 12).

The Committee invites the State party to take immediate and specific measures to investigate and, when appropriate, to prosecute and punish acts of torture. Moreover, the Committee invites the State party to: ensure that law enforcement personnel do not resort to torture under any circumstances; publicly and unambiguously reaffirm the absolute prohibition of torture; condemn the practice of torture, especially by the police and prison officers; and make it clear that anyone who commits, is complicit in or participates in such acts will be held personally responsible before the law, will be subject to criminal prosecution and will be punished accordingly.

Impunity for acts of torture and ill-treatment

(10) The Committee takes note of the State party's recognition that acts of torture have taken place and have neither been investigated nor prosecuted. In particular, it notes the absence of specific information on prosecutions initiated, sentences pronounced or disciplinary sanctions imposed on police or prison officers found guilty of acts of torture or ill-treatment. The Committee also notes the State party's acknowledgement that the weakness of domestic legislation contributes to impunity (arts. 2, 4, 12, 13 and 16).

The State party should ensure that all allegations of torture or ill-treatment are the subject of prompt, impartial, thorough and effective investigations and that the perpetrators are prosecuted and sentenced to penalties commensurate with the grave nature of the acts committed, as required by article 4 of the Convention, without prejudice to appropriate disciplinary sanctions. The State party should also take all appropriate legal measures to fully remedy this impunity.

Fundamental legal safeguards

(11) The Committee is concerned about the discrepancy between the fundamental legal safeguards offered by the Constitution and the Code of Criminal Procedure on the one hand and the implementation of these guarantees for all detainees from the very outset of their detention on the other. The Committee also remains concerned about reports of lengthy pretrial detention and slow proceedings. The Committee also regrets the absence of information on the fundamental legal safeguards available to persons with mental, intellectual or physical disabilities. In addition, the Committee regrets the absence of a comprehensive juvenile justice system oriented to the education and social integration of children in conflict with the law (art. 2).

The State party should take prompt and effective measures to ensure that in practice all detainees are afforded all fundamental legal safeguards from the very outset of their detention. In accordance with international standards, these safeguards should include, in particular, the rights of detainees to: be informed of the reasons for their arrest, including of any charges against them; have prompt access to a lawyer and, when needed, legal aid; undergo an independent medical examination, if possible conducted by a doctor of their choice; notify a relative; be brought promptly before a judge; and have the lawfulness of their detention reviewed by a court. The State party

should ensure that all fundamental legal safeguards are implemented for persons in psychiatric institutions.

The State party should also take measures to establish a juvenile justice system in compliance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by General Assembly resolution 40/33 of 29 November 1985, and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

Monitoring and inspection of places of deprivation of liberty

(12) The Committee notes the information provided by the State party on the establishment of a prison guard corps within the Legislation and Human Rights Directorate, part of the Ministry of Justice Penal Affairs and Human Rights. It also notes the work of the National Human Rights Commission, the visits the Commission has organized to Gabode prison, police stations, gendarmerie units and other places of detention or prisons, as well as the use of information gathered during those visits in the reports the Commission has drafted on the human rights situation in Djibouti. However, the Committee remains concerned about the State party's insufficient efforts to ensure sustained monitoring and inspection of places of deprivation of liberty (arts. 2, 10, 12, 13 and 16).

The Committee recommends that the State party establish an effective and independent national system to monitor and inspect all places of deprivation of liberty and ensure that systematic follow-up is given to the outcome of such monitoring. It should also strengthen its cooperation with NGOs and increase support for them to enable them to independently monitor conditions in places of deprivation of liberty.

The State party is requested to include in its next periodic report detailed information on the places, dates and periodicity of visits, including unannounced visits, to places of deprivation of liberty, as well as on the findings and the follow-up given to the outcome of such visits.

National human rights institution

(13) The Committee notes with satisfaction the establishment of the National Human Rights Commission, the duties of which include visiting places of deprivation of liberty and examining complaints of alleged human rights violations. The Committee regrets, however, that the Commission is not in conformity with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles, General Assembly resolution 48/134, annex). Among other things, its members, including its Chair and its Vice-Chair, are appointed by the President of the Republic, which thus compromises its independence (art. 2).

The State party should strengthen the role and terms of reference of the National Human Rights Commission, including its mandate to conduct regular and unannounced visits to places of deprivation of liberty in order to issue independent findings and recommendations. It should also give all due weight to the Commission's conclusions on the individual complaints it receives, and communicate those conclusions to the public prosecutor's office in cases where torture or ill-treatment is found to have occurred. The State party is requested to provide information, including statistical data, on the complaints examined by the Commission regarding alleged torture and other cruel, inhuman or degrading treatment or punishment, and to indicate whether these cases have been communicated to the competent authorities for prosecution.

The Committee encourages the State party to request accreditation of the National Human Rights Commission by the International Coordinating Committee of National

Institutions for the Promotion and Protection of Human Rights, in order to ensure that it complies with the Principles relating to the status of national institutions for the promotion and protection of human rights, including with regard to its independence.

Investigations

(14) Notwithstanding the explanations that the State party provided during the dialogue, the Committee continues to be concerned about:

(a) The lack of any thorough investigations into the arrests during the demonstrations that took place on 18 February 2011 of more than 300 persons, several of whom are alleged to have been subjected to torture and ill-treatment in gendarmerie custody (arts. 12, 13, and 14);

(b) The case of two Ethiopian nationals, Captain Behailu Gebre and Abiyot Mangudai, who, on 11 July 2005, were sent back to Ethiopia, where they were kept in detention and tortured. The Committee notes with concern that, according to information received, these persons did not have access to the remedy allowing them to lodge an appeal against their expulsion. It also expresses concern about the fact that the State party did not conduct any thorough and effective investigation into this case. Furthermore, it notes with concern that Djibouti did not respond to the urgent appeals on this matter sent by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Committee would thus welcome information from the State party on this subject (arts. 12, 13 and 14);

(c) The case of Yemeni national Mohammed al-Asad. According to information before the Committee, the latter was allegedly detained incommunicado in Djibouti for two weeks before being transferred to Afghanistan. In detention he was allegedly tortured, placed in extreme isolation without human contact, subjected to constant extremely loud music, and exposed to artificial light for 24 hours a day, to cold and to dietary manipulation. The Committee notes that this case is currently being examined by the African human rights system, specifically the African Commission on Human and Peoples' Rights.

The State party should immediately conduct independent, impartial and thorough investigations into the above-mentioned incidents with a view to bringing the possible perpetrators of violations of the Convention to justice. The Committee recommends that such investigations be undertaken by independent experts responsible for examining all information thoroughly, reaching conclusions as to the facts and the measures taken, and providing adequate compensation to the victims and their families, including the means for them to achieve as full rehabilitation as possible. The State party is requested to provide the Committee with detailed information on the outcome of all those investigations in its next periodic report.

The State party should adopt a legislative framework regulating expulsion, refoulement and extradition in order to fulfil its obligation under article 3 of the Convention. The expulsion, refoulement and extradition of individuals, including undocumented individuals, should be decided by a court after careful assessment of the risk of torture in each case and should be subject to appeal with suspensive effect. The terms of judicial cooperation agreements signed with neighbouring countries should be revised so as to ensure that the transfer of detainees to another signatory State is carried out under a judicial procedure and in strict compliance with article 3 of the Convention.

Complaints mechanism

(15) Notwithstanding the information provided in the State party's report on the possibility for prisoners and detainees to submit complaints to the Prosecutor-General, the

public prosecutor, the investigating judge or the president of the indictment division, as appropriate, or to the Prison Administration Directorate of the Ministry of Justice, the Committee regrets the lack of a dedicated, independent and effective complaints mechanism competent to receive complaints, conduct prompt and impartial investigations into allegations of torture, in particular of prisoners and detainees, and ensure that those found guilty are punished. The Committee also notes the absence of information, including statistics, on the number of complaints of torture and ill-treatment, on investigations carried out, and on prosecutions initiated and sanctions imposed against perpetrators of torture and ill-treatment, at both the penal and disciplinary levels (arts. 2, 12, 13 and 16).

The State party should take effective measures to establish an independent and effective complaints mechanism specifically devoted to allegations of torture and ill-treatment committed by law enforcement, security, military and prison officials, with a mandate to conduct prompt and impartial investigations into such allegations and to prosecute the perpetrators. The State party should ensure that complainants are protected in practice against any ill-treatment or intimidation they might suffer as a consequence of their complaints or any evidence given.

The Committee requests the State party to clarify whether acts of torture and ill-treatment are subject to ex officio investigation and prosecution and to provide information, including statistics, on the number of complaints filed against public officials for torture and ill-treatment, as well as information about the results of the proceedings, at both the penal and disciplinary levels. This information should be disaggregated according to the sex and age of the complainant and should indicate which authority undertook the investigation.

Refugees and asylum seekers

(16) The Committee is concerned about the fact that the National Asylum Eligibility Commission is not properly functional and that applicants for asylum or refugee status remain in an undefined legal situation for much too long, with a risk of expulsion. The Committee also notes with concern that the State party has not acceded to the Convention relating to the Status of Stateless Persons (1954) or to the Convention on the Reduction of Statelessness (1961) (arts. 3 and 16).

The State party should ensure that the National Asylum Eligibility Commission functions properly and that persons subject to an expulsion order are able to appeal to the courts against the decision.

The Committee recommends that the State party consider acceding to the Convention relating to the Status of Stateless Persons and to the Convention on the Reduction of Statelessness.

Conditions of detention

(17) The Committee takes note of the commitments the State party made in the course of the dialogue with the Committee to improve conditions in places of detention, specifically by renovating or even constructing some buildings in Gabode central prison, and by reopening and renovating prisons in the regions. It also takes note of the State party's efforts to improve access to health services. However, the Committee remains deeply concerned about reports, confirmed by the State party, of prison overcrowding, inadequate hygiene and cleanliness, as well as a lack of water and adequate food. Moreover, the State party does not distinguish between minors and adults in detention (arts. 11 and 16).

The State party should take urgent measures to bring the conditions of detention in police stations, prisons and other places of detention into line with the Standard Minimum Rules for the Treatment of Prisoners, as well as with other relevant standards, in particular by:

- (a) Reducing prison overcrowding, especially by considering non-custodial forms of punishment, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules);
- (b) Improving the quality and quantity of food and water provided to prisoners in pretrial detention, those on trial and convicts;
- (c) Strengthening judicial supervision of conditions of detention;
- (d) Ensuring that minors, whether in pretrial detention or convicted, are effectively separated from adults, in accordance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by General Assembly resolution 40/33 of 29 November 1985, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

Redress, including compensation and rehabilitation

(18) The Committee takes note of the State party's written assertion that "Djibouti's laws and regulations provide the right to redress and fair compensation for any victim of torture" (CAT/C/DJI/1, para. 181). It remains concerned, however, about the fact that without a legal definition of torture it remains difficult to provide any redress or fair compensation. The Committee is also concerned about the scarcity of court decisions awarding compensation to victims of torture and ill-treatment or their families. It is also concerned about the absence in Djibouti of rehabilitation programmes for torture victims (art. 14).

The State party should strengthen its efforts to ensure redress for victims of torture and ill-treatment in the form of fair and adequate compensation and as full rehabilitation as possible, based on a clear definition of torture in line with article 1 of the Convention. The State party should also provide details of redress and compensation ordered by the courts for victims of torture or their families. In addition, the State party should provide information on any rehabilitation programmes under way for victims of torture or ill-treatment, and should allocate sufficient resources to ensure the proper implementation of such programmes.

Training

(19) The Committee takes note of the information included in the State party's report and provided during the dialogue with regard to training, seminars and courses on human rights provided for judges, prosecutors, police and prison officers and members of the military. At the same time, it notes with concern the information in paragraphs 126 and 130 of the report concerning the absence of an express prohibition of torture in the training given to officers of the national police and to civil servants and public and administrative officials (art. 10).

The State party should further develop and strengthen training programmes to ensure that all officials, in particular judges and law enforcement, security, army, intelligence and prison officers, are aware of the provisions of the Convention, and specifically that they are fully aware of the absolute prohibition of torture and of the fact that violations of the Convention will not be tolerated, that they will be promptly and impartially investigated and that the offenders will be prosecuted.

Furthermore, all relevant personnel, including those referred to in article 10 of the Convention, should receive specific training on how to identify signs of torture and ill-treatment. This should specifically include an introduction to the use of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), published by the

United Nations in 2004. In addition, the State party should assess the effectiveness and impact of such training and educational programmes.

Confessions obtained under torture

(20) The Committee notes that statements made as a result of torture may not be invoked in any proceedings, and that they are recognized by the State party as “null and void” or as contracts “concluded under duress”. However, the Committee remains concerned to note that the law does not explicitly prohibit the act of obtaining confessions under duress; thus, the provisions currently in force remain inadequate to ensure proper implementation of the Convention (art. 15).

The State party should ensure that the law governing evidence adduced in judicial proceedings is brought into line with article 15 of the Convention so as to explicitly exclude any confessions obtained under torture.

Violence against women and harmful traditional practices

(21) The Committee welcomes the criminalization since 1995 of the practice of female genital mutilation through the inclusion of article 333 in the State party’s Criminal Code. The State party has recognized that the provisions of this article have not been applied owing to the lack of complaints filed against this practice. The Committee remains concerned about the fact that female genital mutilation is still very widespread, and in particular that there are many cases of infibulation — an extreme form of female genital mutilation — especially in rural areas. The Committee also remains very concerned about the fact that cases of mutilation are generally not reported and are therefore neither prosecuted nor punished (arts. 2, 10 and 16).

The State party should strengthen its efforts to prevent, combat and punish violence against women and children and harmful traditional practices, in particular in rural areas. The Committee endorses the recommendations addressed to the State party during the universal periodic review of Djibouti (A/HRC/11/16, para. 67, subparas. 18 and 25; para. 68, subparas. 3 and 8), as well as the recommendations of the Committee on the Elimination of Discrimination against Women (CEDAW/C/DJI/CO/1-3, paras. 18 and 19) and of the Committee on the Rights of the Child (CRC/C/DJI/CO/2, para. 56). Furthermore, the State party should provide victims with rehabilitative as well as legal, medical and psychological services, along with compensation. It should also create adequate conditions allowing victims to report incidents of harmful traditional practices and domestic and sexual violence without fear of reprisal or stigmatization. The State party should provide training to judges, prosecutors, police officers and community leaders on the strict application of the Criminal Code and the criminal nature of harmful traditional practices and other forms of violence against women.

In general, the State party should ensure that its customary law and customary practices are compatible with its human rights obligations, particularly those deriving from the Convention. The State party should also explain the hierarchy between customary law and domestic law, particularly with regard to the various forms of discrimination against women.

The Committee also asks that the State party include in its next report detailed information and updated statistics on complaints, investigations, prosecutions, convictions and penalties handed down to individuals found guilty of criminal behaviour involving harmful traditional practices, including murder, and on the aid and compensation provided to the victims.

Human trafficking

(22) The Committee notes the measures taken by the State party, such as the criminalization of human trafficking, training initiatives and the establishment of a Migration Response Centre in Obock, as well as the establishment of a coordinated national mechanism to combat human trafficking. However, the Committee remains concerned about the scale of the problem in the State party (arts. 2 and 16).

The State party should strengthen its efforts to prevent and combat human trafficking, provide protection and compensation to victims and ensure that they have access to rehabilitative as well as legal, medical, and psychological services. Accordingly, the Committee recommends that the State party should adopt a comprehensive strategy to combat human trafficking and its causes. The State party should also investigate all allegations of trafficking and ensure that perpetrators are prosecuted and sentenced to appropriate penalties that take into account the serious nature of their crimes. The State party is requested to provide information on measures taken to assist victims of trafficking, as well as statistical data on the number of complaints, investigations, prosecutions and convictions involving trafficking.

Corporal punishment of children

(23) The Committee notes with concern that the use of corporal punishment as a disciplinary measure in the home is not prohibited, according to the interpretation of the provisions of the Criminal Code (1995), the Family Code (2002) and the Constitution (art. 16).

The State party should consider amending its Criminal Code and revised Family Code to prohibit the use of corporal punishment in all settings, including the home, and to raise public awareness of positive, participatory and non-violent forms of discipline.

Data collection

(24) The Committee is concerned about the lack of full and detailed data on complaints, investigations, prosecutions, convictions and redress in cases of torture and ill-treatment involving law enforcement, security, military and prison personnel (arts. 2, 12, 13 and 16).

The State party should collect relevant statistical data on the monitoring of the implementation of the Convention at the national level, including on complaints, investigations, prosecutions, convictions and redress (compensation and rehabilitation for victims) in cases of torture and ill-treatment. The State party should include this data in its next periodic report.

(25) The Committee recommends that the State party should strengthen its cooperation with United Nations human rights mechanisms, including by permitting visits from, inter alia, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Working Group on Arbitrary Detention and the Special Rapporteur on the situation of human rights defenders.

(26) Noting the commitment the State party made during the dialogue, the Committee recommends that the State party ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

(27) The Committee further recommends that the State party should make the declarations envisaged under articles 21 and 22 of the Convention to recognize the competence of the Committee to receive and consider complaints of violations of the Convention.

(28) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance.

(29) The Committee encourages the State party to widely disseminate the report it submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(30) The Committee requests the State party to provide, before 25 November 2012, information on its follow-up to the recommendations on: (1) ensuring or strengthening legal safeguards for detainees; (2) conducting prompt, impartial and effective investigations; (3) prosecuting suspects and punishing perpetrators of acts of torture or ill-treatment; and (4) improving conditions of detention, as contained in paragraphs 11, 14, 15 and 17 of this document.

(31) The Committee invites the State party to submit its next periodic report, which will be its second periodic report, by 25 November 2015 at the latest. To this end, the Committee invites the State party to agree, before 25 November 2012, to submit its report according to the optional procedure, under which the Committee sends the State party a list of issues prior to the periodic report. The State party's replies to this list of issues prior to reporting will constitute the State party's next periodic report, in accordance with article 19 of the Convention.

55. **Germany**

(1) The Committee against Torture considered the fifth periodic report of Germany (CAT/C/DEU/5), at its 1028th and 1031st meetings (CAT/C/SR.1028 and 1031), held on 4 November and 8 November 2011. At its 1046th and 1047th meetings (CAT/C/SR.1046 and 1047), held on 18 November 2011, it adopted the following concluding observations.

A. Introduction

(2) The Committee welcomes the submission of the fifth periodic report by the State party but regrets that it was submitted after a delay of more than two years. The Committee further notes that the State party's report generally complied with the reporting guidelines despite lacking specific data, disaggregated by sex, age and nationality, in particular about acts of torture and ill-treatment by law enforcement officials.

(3) The Committee commends the State party for its comprehensive inter-ministerial delegation, which included the federal and Länder representatives of the National Agency for the Prevention of Torture, and appreciates the dialogue between the delegation and the members of the Committee covering many areas under the Convention. The Committee further commends the State party for the detailed written replies to the list of issues that it provided in advance of the session to facilitate the consideration of the State party report.

B. Positive aspects

(4) The Committee welcomes the ratification by the State party of the following international instruments:

(a) United Nations Convention against Transnational Organized Crime, on 14 June 2006;

(b) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, on 14 June 2006;

(c) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 4 December 2008;

(d) Convention on the Rights of Persons with Disabilities, on 24 February 2009;

(e) Optional Protocol to the Convention on the Rights of Persons with Disabilities, on 24 February 2009;

(f) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, on 15 July 2009;

(g) International Convention for the Protection of All Persons from Enforced Disappearance, on 24 September 2009.

(5) The Committee welcomes the enactment of the following legislation:

(a) Federal Law on the Parliamentary Control of Intelligence Services, having entered into force on 30 July 2009;

(b) Federal Law on Preventive Detention of January 2011 requiring that preventive detention is applied as a measure of last resort in accordance with the principles of necessity and proportionality.

(6) The Committee commends the establishment of the National Agency for the Prevention of Torture, composed of the Federal Agency and the Joint Commission of the Länder, which has been mandated to serve as independent national preventive mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(7) The Committee also welcomes the joint project by the International Organization for Migration and the Federal Office for Migration and Refugees to identify potential victims of trafficking among asylum seekers.

(8) The Committee notes the existence of a vibrant civil society that significantly contributes to the monitoring of torture and ill-treatment, thereby facilitating the effective implementation of the Convention in the State party.

C. Principal subjects of concern and recommendations

Definition and criminalization of torture

(9) The Committee welcomes the State party's Code of Crimes against International Law which codifies, inter alia, crimes of torture in the context of genocide, war crimes or crimes against humanity, in accordance with article 7 of the Rome Statute of the International Criminal Court. However, the Committee expresses serious concern at the absence of provisions adequately criminalizing acts of torture in the context of general criminal law, as the application of provisions of the Criminal Code (including sect. 340, para. 1, in conjunction with sect. 224) and the Military Penal Code (sects. 30 and 31) do not adequately punish the infliction of pain or suffering, whether physical or mental, as required by article 1 of the Convention. Moreover, while noting the data on investigations into alleged offences by law enforcement officers, the Committee regrets the absence of clarity regarding which of the allegations of ill-treatment by public officials, if proven true, would amount to torture under article 1 of the Convention or cruel, inhuman or degrading treatment or punishment under article 16 of the Convention (arts. 1 and 4).

The State party should include torture as a specific offence in its general criminal law and ensure that its definition encompasses all the elements of article 1 of the Convention. In accordance with the Committee's general comment No. 2 (2007) on implementation of article 2 by States parties, the State party should also clarify which of the incidents of ill-treatment by law enforcement officers reported in the State

party's response to the list of issues amount to torture and other cruel, inhuman or degrading treatment or punishment, in order to help the State party identify how and where the Convention is implemented and the monitoring thereof by the Committee.

(10) The Committee notes with concern that the State party has no specific information on cases in which the Convention has been invoked and directly applied before the domestic courts (arts. 2 and 10).

The Committee recommends that the State party take steps to disseminate the Convention to all public authorities, including the judiciary, thus facilitating direct application of the Convention before domestic courts, both at the federal and Länder level, and that it provide an update on illustrative cases in its next periodic report.

(11) While welcoming that the Military Penal Code allows for punishment of ill-treatment and degrading treatment by military superiors, in conjunction with the possible penalties for "causing grievous bodily harm" or "causing bodily harm while exercising a public office" stipulated in the Criminal Code, the Committee is concerned by the lenient penalties in the Military Penal Code, which range from six months' to five years' imprisonment, even where such acts can cause severe pain or suffering (art. 4).

The State party should amend its Military Penal Code in order to make the offences of torture in the military punishable by appropriate penalties which take into account their grave nature, in accordance with article 4 of the Convention and the relevant jurisprudence by the Committee.

Obligations of the Federation and the Länder

(12) While taking note of the constitutional reform of 2006 involving the transfer of responsibility for prison legislation from federal to Länder level, the Committee remains concerned at the prevalence of a higher standard of protection against torture and ill-treatment at the federal level as compared to individual Länder. This is particularly the case for physical restrictions (*Fixierung*). The Committee is also concerned at the lack of clarity about the measures taken by the Federal Government to ensure compliance with the Convention at the Länder level (art. 2).

Since the Federal Republic of Germany is a State party under international law that has undertaken the obligation to implement the Convention in full at the domestic level, the Committee recommends that the State party provide guidance and assist in the adoption and application of legislative and policy measures to individual Länder to achieve even protection of human rights in the context of law enforcement at the federal and Länder level, and seek consistency between the steps taken by various Länder, in order to ensure that the standards and safeguards set forth in the Convention are equally protected and implemented in all Länder.

National Agency for the Prevention of Torture

(13) The Committee is concerned at the lack of sufficient staff and financial and technical resources provided to the National Agency for the Prevention of Torture, comprised of the Federal Agency for the Prevention of Torture and the Joint Commission of the Länder, owing to which places of detention can be currently visited only once in four years, preventing the adequate fulfilment of the Agency's monitoring mandate (arts. 2 and 12). The Committee is further concerned at the information given by the State party that the Joint Commission of the Länder had to announce, in some instances, its intention to visit the places of detention to the respective authorities in advance in order to gain access.

The Committee recommends that the State party provide the National Agency for the Prevention of Torture with sufficient human, financial, technical and logistical resources to enable it to carry out its functions effectively and independently, in

accordance with article 18, paragraph 3, of the Optional Protocol and guidelines Nos. 11 and 12 of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as ensure its regular and timely access to all places of detention at the federal and Länder levels, without the requirement of a prior consent to the visit by the respective authorities.

(14) While commending the National Agency's recommendations aimed at, inter alia, improving conditions of physical restrictions, requirements relating to clothing in special secured rooms or technical requirements of new detention rooms in Brandenburg prison, the Committee notes with concern the lack of public awareness about the recommendations adopted by the National Agency and the steps taken by the State party in order to ensure their implementation. The Committee is further concerned at reports that cooperation between the Joint Commission of the Länder and the existing bodies, including the petitions committees, which are entitled in some of the Länder to make unannounced visits to places of detention, has not been established (arts. 2 and 12).

The Committee recommends that the State party:

(a) **Make public and regularly disseminate, using all appropriate means of communication, the recommendations adopted by the National Agency to improve conditions in places of detention and the steps taken by the State party to ensure their effective implementation;**

(b) **Compile the best practices by the National Agency and undertake relevant training to its personnel; and**

(c) **Establish cooperation between the Joint Commission of the Länder and the existing bodies in individual Länder, in particular the petitions committees that are also mandated to carry out preventive visits of places of detention.**

Trafficking in persons

(15) The Committee notes with interest the cooperation programmes between the federal and Länder levels, church and civil society organizations to provide assistance to victims of trafficking, and welcomes the exercise of universal jurisdiction with regard to crimes of trafficking for sexual and work exploitation pursuant to section 6 of the Criminal Code. However, it expresses serious concern at a "dark field of undetected cases" of trafficking acknowledged by the State party and evidenced by the low number of such crimes registered by the police as compared to non-governmental estimates. According to non-governmental organization sources, there are some 15,000 people, including children, who have been allegedly trafficked to the State party from various European, Asian and African countries for forced sex-work, illegal adoptions and as labourers in service sectors (arts. 2, 3, 12, 14 and 16).

The Committee urges the State party to:

(a) **Prevent and promptly, thoroughly and impartially investigate, prosecute and punish trafficking in persons and related practices;**

(b) **Provide means of redress to victims of trafficking, including assistance to victims in reporting incidents of trafficking to the police, in particular by providing legal, medical and psychological aid and rehabilitation including adequate shelters, in accordance with article 14 of the Convention;**

(c) **Prevent return of trafficked persons to their countries of origin where there is a substantial ground to believe that they would be in danger of torture, to ensure compliance with article 3 of the Convention;**

(d) Provide regular training to the police, prosecutors and judges on effective prevention, investigation, prosecution and punishment of acts of trafficking, including on the guarantees of the right to be represented by an attorney of one's own choice, and inform the general public of the criminal nature of such acts; and

(e) Compile data disaggregated, as appropriate, by nationality, country of origin, ethnicity, gender, age and employment sector and on the provision of redress.

Physical restraints (*Fixierung*)

(16) The Committee welcomes the information provided by the State party that, since the 2005 visit to the State party by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Federal Police has refrained from utilizing physical restraints (*Fixierung*) and at the Länder level the practice of *Fixierung* has been applied as a measure of last resort. However, the Committee remains concerned by the assertion by the State party that it will not be possible in the long term to abandon the practice of *Fixierung* in all non-medical settings at the Länder level, as recommended by CPT, and the lack of information on the uniform application of CPT principles and minimum standards in relation to *Fixierung* (arts. 2, 11 and 16).

The Committee urges the State party to strictly regulate the use of physical restraints in prisons, psychiatric hospitals, juvenile prisons and detention centres for foreigners with a view to further minimizing its use in all establishments and ultimately abandoning its use in all non-medical settings. The State party should further ensure adequate training for law enforcement and other personnel on the use of physical restraints, harmonization of the permissible means of physical restraints in all the Länder and the observance in all establishments of the principles and minimum standards in relation to *Fixierung* drawn up by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Preventive detention

(17) The Committee takes note of the judgement of the Federal Constitutional Court of 4 May 2011 which has considered that all provisions of the Criminal Code and the Youth Courts Act on the imposition and duration of preventive detention are unconstitutional and welcomes the fact that the federal and Länder authorities have already started to implement the ruling. The Committee nonetheless notes with regret the information that more than 500 persons remain in preventive detention, some of them having been in preventive detention for more than twenty years (arts. 2 and 11).

The Committee urges the State party to:

(a) Adapt and amend its laws on the basis of the Federal Constitutional Court's decision by 31 March 2013, as requested by the Court, in order to minimize the risks arising from preventive detention; and

(b) Take all necessary actions, in the meantime, to comply with the institutional measures requested by the Court's decision, in particular with regard to release of persons in preventive detention, reduction of its duration and the imposition thereof, and take into account the provisions of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) when devising the measures alternative to preventive detention.

Access to complaint mechanisms

(18) The Committee is concerned at information that alleged victims of ill-treatment by the police are not aware of complaint procedures beyond reporting their complaints to the police, who in some cases refused to accept allegations of misconduct by the police. The Committee is further concerned at reported cases of ill-treatment of persons in a vulnerable

situation who have declined to file a complaint against the police out of fear of counter-complaints by the police or other forms of reprisals (arts. 12, 13 and 16).

The Committee recommends that the State party take appropriate measures to:

(a) Ensure that information about the possibility and procedure for filing a complaint against the police is made available and widely publicized, including by being prominently displayed in all police stations of the Federal and Länder Police; and

(b) Ensure that all allegations of misconduct by the police are duly assessed and investigated, including cases of intimidation or reprisals in particular against persons in vulnerable situation as a consequence of the complaints of ill-treatment by the police.

Prompt, independent and thorough investigations

(19) The Committee welcomes the information provided by the State party on the measures taken by the Federal Government and the Länder to ensure that investigations into allegations of criminal conduct by the police are conducted promptly and impartially. However, the Committee is concerned that allegations of torture and ill-treatment and unlawful use of force by the police at the federal level continue to be investigated by the Public Prosecution Offices and the police acting under the supervision of the Public Prosecution Offices. The Committee is particularly concerned by the allegations that several incidents of ill-treatment by the police, raised during the dialogue with the State party, have not been investigated promptly, independently and thoroughly, as in some of those cases the same Federal Police unit to which the accused police officer belonged was responsible for parts of the investigation. The Committee thus reiterates its concern at the absence at the federal level as well as in some Länder of independent and effective investigations into the allegations of ill-treatment (arts. 12, 13 and 16).

The Committee recommends that the State party:

(a) Take all appropriate measures both at the federal and Länder level so as to ensure that all allegations of torture and ill-treatment by the police are investigated promptly and thoroughly by independent bodies, with no institutional or hierarchical connection between the investigators and the alleged perpetrators among the police; and

(b) Provide the Committee with its comments on the specific cases of ill-treatment by the police raised during the dialogue with the State party.

Intersex people

(20) The Committee takes note of the information received during the dialogue that the Ethical Council has undertaken to review the reported practices of routine surgical alterations in children born with sexual organs that are not readily categorized as male or female, also called intersex persons, with a view to evaluating and possibly changing current practice. However, the Committee remains concerned at cases where gonads have been removed and cosmetic surgeries on reproductive organs have been performed that entail lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians, where neither investigation, nor measures of redress have been introduced. The Committee remains further concerned at the lack of legal provisions providing redress and compensation in such cases (arts. 2, 10, 12, 14 and 16).

The Committee recommends that the State party:

(a) Ensure the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of

intersex people, including full information, orally and in writing, on the suggested treatment, its justification and alternatives;

(b) Undertake investigation of incidents of surgical and other medical treatment of intersex people without effective consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation;

(c) Educate and train medical and psychological professionals on the range of sexual, and related biological and physical, diversity; and

(d) Properly inform patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people.

Refugees and international protection

(21) While taking note that the transfers under the Dublin II Regulation to Greece have been suspended due to difficult reception conditions, the Committee notes with concern that the present suspension of returns, due to expire on 12 January 2012, might be terminated prior to the amelioration of the reception conditions in Greece (art. 3).

The State party is encouraged to prolong the suspension of forced transfers of asylum seekers to Greece in January 2012, unless the situation in the country of return significantly improves.

(22) While noting that asylum applications falling under the Dublin II Regulation are subject to appeal, the Committee is concerned that under article 34a, paragraph 2, of the German Law on Asylum Procedure, lodging of an appeal does not have suspension effect on the impugned decisions (art. 3).

The Committee also recommends that the State party abolish the legal provisions of the Asylum Procedures Act excluding suspensive effects of the appeals against decision to transfer an asylum seeker to another State participating in the Dublin system.

(23) The Committee takes note of the lack of procedural counselling for asylum seekers before a hearing is carried out by asylum authorities, and that legal aid is paid for a lawyer in appeals against negative decisions only if the appeal is likely to succeed according to the court's summary assessment (arts. 3, 11 and 16).

The Committee calls on the State party to guarantee access to independent, qualified and free-of-charge procedural counselling for asylum seekers before a hearing is carried out by asylum authorities, guarantee access to legal aid for needy asylum seekers after a negative decision, as long as the remedy is not obviously without a prospect for success.

Detention pending deportation

(24) The Committee notes a decrease in numbers and duration of detention of foreign nationals. However, it is concerned at the information that several thousand asylum seekers whose requests have been rejected and a vast majority of those who are the subject in so-called "Dublin cases" continue to be accommodated in Länder detention facilities immediately upon arrival, sometimes for protracted periods of time. This practice contravenes Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals which regulates detention pending deportation as a means of last resort. The Committee is particularly concerned at the lack of procedure in a number of Länder for identification of vulnerable asylum seekers, such as traumatized refugees or unaccompanied minors, given the absence of mandatory medical checks on arrival in detention, with the

exception of checks on tuberculosis, and systematic checks for mental illnesses or traumatization. The Committee is further concerned by the lack of adequate accommodation for detained asylum seekers separate from remand prisoners, especially for women awaiting deportation (arts. 11 and 16).

The Committee urges the State party to:

(a) Limit the number of detained asylum seekers, including those who are the subject in “Dublin cases”, and the duration of their detention pending return, while observing the European Union Directive 2008/115/EC;

(b) Ensure mandatory medical checks and systematic examination of mental illnesses or traumatization of all asylum seekers including the “Dublin cases” by independent and qualified health professionals upon arrival in all Länder detention facilities;

(c) Provide a medical and psychological examination and report by a specially trained independent health expert when the signs of torture or traumatization have been detected during the personal interviews by asylum authorities; and

(d) Provide adequate accommodation for detained asylum seekers separate from remand prisoners in all detention facilities, particularly for women awaiting deportation.

Diplomatic assurances

(25) The Committee notes the March 2009 Düsseldorf Administrative Court’s judgement as confirmed by Higher Administrative Court of North Rhine-Westphalia of May 2010 in the case of a Tunisian man, considered a national security threat by the Government of Germany, who could not be deported to Tunisia despite diplomatic assurances as the diplomatic assurances have been considered “not legally binding ...and by nature hardly trustworthy or verifiable”. It also notes the practice by the High Regional Courts in regard of evaluation of the requests for extradition in the light of all available information, including the incidents of torture and ill-treatment. The Committee further takes note of the State party’s assertion that no diplomatic assurances have been accepted since 2007; however, according to the State party “the possibility to accept diplomatic assurances in cases of extraditions still exists in appropriate and exceptional cases, in particular where the risk of torture or ill-treatment is only of general nature”. The Committee is also concerned at the reports that regulations implementing the Resident Act that aims at controlling the entry, residence and employment of foreigners in Germany provide for the use of diplomatic assurances in national security deportations carried out by the Federal Ministry of the Interior, as well as the lack of updated information on whether the diplomatic assurances have been applied in this context (arts. 3 and 14).

The Committee recommends that the State party refrain from seeking and accepting diplomatic assurances, both in the context of extradition and deportation, from the State where there are substantial grounds for believing that a person would be at risk of torture or ill-treatment upon return to the State concerned, as such assurances may not ensure that an individual would not be subjected to torture or ill-treatment if returned, even in cases where post-return monitoring mechanisms are put in place.

Secret detention and extraordinary renditions

(26) The Committee welcomes the adoption of a new law on the parliamentary control of intelligence services subsequent to the 2009 Parliamentary Inquiry into alleged involvement of the State party in extraordinary renditions and secret detention of terrorist suspects. However, it notes with concern the lack of clarity of the implementation by the Federal

Government of the recommendations of the Parliamentary Commission of Inquiry. The Committee also notes with concern that no Federal Government investigation has been undertaken in response to the June 2009 ruling by the Constitutional Court, which ruled that the failure by the Government to fully cooperate with the Inquiry has violated the Federal Constitution. The Committee is further concerned by the lack of information from the State party about the specific measures it has taken to implement the recommendations of the United Nations joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42) (art. 3).

The Committee urges the State party to:

(a) Provide information on concrete steps to implement the recommendations by the 2009 Parliamentary Commission of Inquiry and measures to initiate Federal Government's investigation into alleged involvement of law enforcement officers of the State party in rendition and secret detention programmes;

(b) Make the outcomes of the investigations public;

(c) Take all necessary measures to prevent the future incidents of such situations; and

(d) Take specific measures with a view to implement the recommendations of the United Nations joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42).

Unaccompanied minors

(27) While noting the information that the so-called "Airport Procedure" under article 18 of the Law on Asylum Procedure applies to the asylum seekers arriving from a safe country of origin or without a valid passport, the Committee remains concerned in particular by the reports of continuous exposure of unaccompanied minors to the "Airport Procedure", including those whose asylum application has been refused or refugee status repealed who can be deported to the countries of origin if no reasonable ground to expect torture or ill-treatment has been detected. The Committee is also concerned about the lack of information on the State party's position it represents in the context of the European Union discussion on minors subject to the "Airport Procedure" (art. 3).

The Committee recommends that the State party:

(a) Exclude unaccompanied minors from the "Airport Procedure", as recommended by the European Commission against Racism and Intolerance;

(b) Ensure that unaccompanied minors can enjoy the rights guaranteed by the Convention on the Rights of the Child;

(c) Ensure collection and public availability of data, disaggregated by age, sex and nationality, on the number of unaccompanied minors that are subject to enforced removal from the State party; and

(d) Play an active part in the European Union discussion on this issue with a view of extending the protection of unaccompanied minors from the risk of torture and ill-treatment.

Exercise of jurisdiction

(28) The Committee is seriously concerned at the reported reluctance on part of the State party to exercise jurisdiction over allegations of torture and ill-treatment of persons rendered abroad, including the case of Khaled El-Masri, in violation of article 5 of the Convention. In addition, the Committee is concerned at the absence of information from the

State party whether Khaled El-Masri has received any remedies, including compensation, in accordance with article 14 of the Convention (arts. 5 and 14).

The State party is urged to observe article 5 of the Convention which requires that the criteria for exercise of jurisdiction are not limited to nationals of the State party. The State party should also inform the Committee about the remedies, including adequate compensation provided, to Khaled El-Masri, in accordance with article 14 of the Convention.

Training of law enforcement personnel

(29) While taking note of the training of the federal and Länder law enforcement personnel on the Convention, constitutional guarantees and public and national criminal and procedural law, the Committee expresses its concern at the lack of specific training to all professionals directly involved in the investigation and documentation of torture as well as medical and other personnel involved with detainees and asylum seekers on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The Committee is also concerned that the training on the Istanbul Protocol, to be introduced next year in all the Länder, is designed to focus on detecting physical but not psychological traces of torture. The lack of training on the absolute prohibition of torture in the context of instructions issued to the intelligence services is yet another source of concern (arts. 2, 10 and 16).

The Committee recommends that the State party:

(a) **Ensure that all law enforcement, medical and other personnel involved in the holding in custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment and the documentation and investigation of torture are provided, on a regular basis, with training on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), requiring the identification of both physical and psychological consequences for victims of torture;**

(b) **Ensure that such training is also provided to personnel involved in asylum determination procedures, and make the existing publications and training tools on the Istanbul Protocol available on the Internet; and**

(c) **Include systematic reference to the absolute prohibition of torture in the instructions issued to the intelligence services.**

Identification of police officers

(30) The Committee is concerned by the State party's information that police officers, except in Brandenburg and Berlin, are not obliged to wear identification badges showing their number or name during the exercise of their functions and that even in those two Länder the wearing of badges might be withdrawn in order to protect the safety and interests of the police officers, according to the State party. This practice has reportedly hindered in many cases the investigation and holding to account of the police officers allegedly implicated in ill-treatment, including the incidents of the excessive use of force in the context of demonstrations. According to a study commissioned by the Berlin Police, some 10 per cent of cases of alleged ill-treatment by the police could not be elucidated or prosecuted because of lack of identification (arts. 12, 13 and 14).

The Committee recommends that the State party:

(a) **Weigh up the interests of both police officers and potential victims of ill-treatment and ensure that members of the police in all the Länder can be effectively identified at all times when carrying out their law enforcement function and held accountable when implicated in ill-treatment; and**

(b) Assess the cases of lack of investigation raised during the dialogue with the State party and report thereon to the Committee.

Interrogations abroad

(31) The Committee welcomes the reported discontinuance of the practice of interrogation of terrorism suspects by German intelligence agents abroad, reflecting on the findings of the Parliamentary Commission of Inquiry in regard to Khaled el-Masri case and the Federal Government's declaration that the investigations by the police, prosecutors and intelligence officers abroad have been halted. The Committee is however concerned about the lack of clarity as to whether the commitment to discontinue investigations abroad extends to private security companies. The Committee further notes with concern the lack of explanations, taking into account the June 2005 Hamburg Supreme Court decision related to the case of Mounir al-Motassadeq, about who carries the burden of proof in regard to inadmissibility of evidence allegedly extracted by torture or ill-treatment before the State party's courts. The absence of information on whether the Government continues to rely on information from intelligence services of other countries, some of which may have been extracted through torture or ill-treatment, is of serious concern (arts. 2, 3, 11 and 15).

The Committee recommends that the State party:

(a) Apply the ban on investigation abroad to all the authorities and entities engaged in law enforcement, including the private security companies when there is a suspicion of coercion being used;

(b) Clarify the procedural standards, including the burden of proof applied by the State party's courts for the assessment of evidence that may have been extracted by torture or ill-treatment; and

(c) Refrain from "automatic reliance" on the information from intelligence services of other countries, with the aim of preventing torture or ill-treatment in the context of forced confessions.

Corporal punishment

(32) While taking note that corporal punishment is prohibited in all circumstances in the German legal system (sect. 163 of the Code of Civil Law), the Committee expresses concern at the absence of information on the efforts to provide appropriate and ongoing public education and professional training on the prohibition of corporal punishment in all settings (art. 16).

The Committee recommends that the State party actively promote positive, participatory and non-violent forms of education and child-rearing as an alternative to corporal punishment.

Data collection

(33) The Committee appreciates the State party's decision to compile new statistics on crimes, including ill-treatment by the police and "violence in close social relations". It notes the data on complaints of ill-treatment by law enforcement officers, disaggregated by suspected crime. However, the Committee regrets the absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement, security, military and prison personnel, trafficking and domestic and sexual violence, crimes with racist motives, and on means of redress, including compensation and rehabilitation provided to the victims (arts. 2, 12, 13 and 16).

The Committee recommends that the State party compile data relevant to the monitoring of the implementation of the Convention at the national level, including data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement, security, military and prison personnel, trafficking, domestic and sexual violence, crimes with racist motives, and on means of redress, including compensation and rehabilitation provided to the victims.

(34) Noting the commitment made by the State party in the context of the universal periodic review of Germany, the Committee recommends that the State party ensure full implementation of the provisions of international human rights instruments, in particular in the context of counter-terrorism measures.

(35) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and to consider signing and ratifying the Optional Protocol to the Covenant on Economic, Social and Cultural Rights.

(36) The State party should consider withdrawing its declaration to article 3 of the Convention with a view to allowing direct application of article 3 of the Convention before courts and authorities at federal and Länder levels.

(37) The State party is requested to disseminate widely the report submitted to the Committee, summary records and the present concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(38) The State party is invited to further update its common core document (HRI/CORE/DEU/2009), in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(39) The Committee requests the State party to provide, by 25 November 2012, follow-up information in response to the Committee's recommendations related to (a) regulating and restricting the use of physical restraints in all establishments, (b) limiting the number of detained asylum seekers including the "Dublin cases" and ensuring mandatory medical checks of detained asylum seekers, (c) exercising jurisdiction in accordance with article 5 of the Convention and providing information about the remedies including compensation provided to Khaled El-Masri, and (5) ensuring that members of the police in all the Länder can be effectively identified and held accountable when implicated in ill-treatment, as contained in paragraphs 16, 24, 28 and 30 of the present document.

(40) The State party is invited to submit its next report, which will be the sixth periodic report, by 25 November 2015. To that purpose, the Committee invites the State party to accept, by 25 November 2012, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report to the Committee.

56. Madagascar

(1) The Committee against Torture considered the initial report of Madagascar (CAT/C/MDG/1) at its 1034th and 1037th meetings (CAT/C/SR.1034 and 1037), held on 10 and 11 November 2011, and adopted the following concluding observations at its 1052nd and 1053rd meetings (CAT/C/SR.1052 and 1053) on 23 November 2011.

A. Introduction

(2) The Committee welcomes the initial report of Madagascar. It appreciates the frank and constructive dialogue that it has had with the delegation of the State party and thanks it

for providing detailed replies to the questions raised at that time, as well as the additional written replies supplied subsequently.

B. Positive aspects

(3) The Committee welcomes the ratification by the State party of the following international instruments during the reporting period:

(a) The Rome Statute of the International Criminal Court, in 2008; and

(b) The International Labour Organization (ILO) Abolition of Forced Labour Convention, 1957 (No. 105), in 2007.

(4) The Committee takes note of the commitment made by the State party to ratify the Optional Protocol to the Convention and to develop an action plan for putting into practice the recommendations of the universal periodic review, including those concerning appropriate measures to prevent torture and ill-treatment.

(5) The Committee takes note that:

(a) The State party's Constitution prohibits torture;

(b) The State party has stated that the signing in September 2011 of the road map to end the political crisis, which had led to the appointment of a consensus candidate for the post of prime minister, should also allow national institutions paralysed since 2009 by the crisis to begin functioning normally again. The return to normal operations of such institutions, and in particular of Parliament, would permit the passage or amendment of laws to bring domestic legislation into line with the standards set forth in international human rights instruments ratified by the State party;

(c) The State party has pledged to renew the standing invitation it has verbally made to the special procedures of the Human Rights Council as soon as possible; and

(d) A de facto moratorium on the death penalty is in place.

C. Principal subjects of concern and recommendations

Criminalization of torture and ill-treatment

(6) While taking note of Act No. 2008-008 of 25 June 2008 which prohibits torture and other cruel, inhuman or degrading treatment or punishment in line with the Convention, the Committee is concerned about the failure to specify the range of penalties for acts of ill-treatment, which leaves the penalty completely at the discretion of the judge. In the Committee's view, the absence of a specified range of penalties violates the principle that both the offence and the penalty must be prescribed by law. In addition, the Committee regrets the failure to apply this law since its enactment in 2008, a fact borne out by reports that judges, lawyers and law enforcement officers are unaware of its existence (art. 4).

The State party should amend its law against torture in order to incorporate a scale of penalties for acts of ill-treatment and amend its Criminal Code and Code of Criminal Procedure to include relevant provisions from the law against torture, thereby facilitating their enforcement. In the meantime, the State party should circulate this law to judges, lawyers, criminal investigation officers, the heads of local administrative units (*fokontany*) and prison staff with a view to its immediate application.

Categorization of torture and the statute of limitations

(7) The Committee notes that the Act of 2008 draws a distinction between acts of torture categorized as offences, punishable by 2 to 5 years of imprisonment, and those defined as serious offences, punishable by terms of imprisonment of 5 to 10 years. The

Committee regrets that the statute of limitations for torture cases is, at most, 10 years, and that it is only in cases of genocide or crimes against humanity that no statute of limitations applies (arts. 1 and 4).

The State party should amend this Act in consideration of the fact that torture, because of its serious nature, should not be subject to a statute of limitations. The use of appropriate penalties and the absence of a statute of limitations increase the deterrent effect of the prohibition of torture. They also enable the public to monitor State action or inaction that violates the Convention and, if necessary, to challenge it.

Non-justification of torture and thorough, impartial investigations

(8) The Committee is deeply concerned about the numerous reports of human rights violations since the onset of the 2009 political crisis — including torture, summary and extrajudicial executions and enforced disappearances — that have neither been investigated, nor prosecuted. The Committee is concerned about reports that the use of torture is politically motivated and used against political opponents, journalists and lawyers (arts. 2, 12, 13, 14 and 16).

The State party should take appropriate measures to carry out independent, thorough and impartial investigations into human rights violations, including cases of torture, ill-treatment, summary executions and enforced disappearances, and ensure that the perpetrators are prosecuted and punished. No circumstance, including domestic political instability, may serve to justify torture, and no political or any other type of agreement should permit an amnesty for the perpetrators of the most heinous offences committed during the political crisis. The State party should strengthen the complaints mechanisms available to victims and ensure that they obtain redress and are provided with the means of achieving social reintegration and psychological rehabilitation. The State party should ensure that persons lodging such complaints, witnesses and members of their families are protected from any act of intimidation in connection with their complaint or testimony.

The Committee invites the State party to include statistics in its next periodic report on the number of complaints of torture or ill-treatment made and on the number of criminal convictions handed down or disciplinary measures taken in such cases, including those that occurred during the de facto state of emergency in 2009. The information should include the identity of the investigating authorities and should be broken down by the sex, age and ethnic origin of the persons filing the complaints.

Basic legal safeguards

(9) The Committee notes that, when suspects are arrested, they are rarely informed of their right to be examined by a physician, that they do not receive proper medical examinations and that persons held in custody sometimes encounter problems in gaining access to their lawyers or family members. The Committee considers that the extension of the duration of pretrial detention to 12 days is excessive. The Committee is seriously concerned about the fact that in several cases pretrial detention has extended beyond acceptable periods (arts. 2, 12, 13, 15 and 16).

In the light of the Committee's general comment No. 2 on the implementation of article 2, the State party should redouble its efforts to ensure that from the outset detainees benefit in practice from all the basic legal guarantees. These guarantees include in particular the obligation to inform such persons of their rights and of the charges against them and the rights of detainees to prompt legal assistance and, where necessary, legal aid; to an independent medical examination by, if possible, a physician of their choice; to notify a relative; and to be brought before a judge without delay.

The State party should ensure the implementation of Decree No. 2009-970 of 14 July 2009 regulating legal assistance, strengthen its system for providing persons taken into custody with free legal assistance and facilitate access by detainees to their lawyers and family members. The State party should also consider amending its Code of Criminal Procedure in order to reduce the duration of pretrial detention and to put rigorous safeguards in place to prevent it from being abused. The Committee invites the State party to strengthen its locally based justice system to the extent possible in order to preclude logistical problems posed by the need for persons standing trial and criminal investigation officers to travel considerable distances.

Living conditions in and systematic monitoring of places of detention

(10) While taking note of the information provided by the State party on the construction of four new prisons, the Committee remains concerned about the poor living conditions in prisons and, in particular, the failure to separate different categories of inmates, malnutrition, the lack of medical care which has led to the death of some inmates, and the inhuman conditions in punishment cells. The Committee also remains concerned about prison overcrowding; although the Constitution states that pretrial detention is an exceptional measure, more than half of the people held in prison have not yet been brought to trial. The Committee is particularly concerned about reports of the humiliating treatment of prisoners, of rape and of instances in which food is provided in exchange for the performance of sexual acts (arts. 2, 11, 12, 13, 14 and 16).

The State party should:

(a) **Ensure that prison conditions are in line with the Standard Minimum Rules for the Treatment of Prisoners, including in the cramped punishment cells, so that the conditions of solitary confinement in such cells are in compliance with international standards;**

(b) **Separate the categories of detainees, ensuring that remand prisoners are separated from convicts and that minors are separated from adults;**

(c) **Take into consideration the particular problems faced by women prisoners and the need to address those problems in accordance with the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly on 21 December 2010;**

(d) **Ensure that detainees have access to decent food and medical care;**

(e) **Expedite the cases of persons held in pretrial detention, if necessary by calling the responsible officials to account;**

(f) **Use non-custodial penalties to reduce overcrowding in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), adopted by the General Assembly on 14 December 1990;**

(g) **Investigate allegations of the humiliating treatment of prisoners, rape and other sexually motivated acts of violence and take steps, as a matter of urgency, to punish the perpetrators of such acts. The Committee reminds the State party that it is under an obligation to conduct an investigation ex officio, without a victim's prior complaint, whenever there are reasonable grounds for believing that an act of torture has been committed;**

(h) **Set up a system for monitoring places of detention on a regular basis with a view to improving conditions in those facilities. The State party should provide funding for the Prison Oversight Commission and cooperate more closely with NGOs**

by providing them with free access to places of detention so that such facilities can be independently monitored.

Traditional justice (*Dina*)

(11) The Committee is particularly concerned about the population's systematic recourse to the traditional justice system (*Dina*),⁵ which is apparently attributable to a lack of confidence in the formal system of justice. In addition to decisions in civil cases, the use of such courts has reportedly resulted in criminal verdicts as well, and also in torture and summary and extrajudicial executions (arts. 2 and 16).

In the light of its general comment on the implementation of article 2 of the Convention, the Committee does not accept references to respect for tradition as a justification to derogate from the absolute prohibition on torture. The State party should set up an effective system for monitoring decisions by *Dina* courts and investigate any violation of the law or provisions of the Convention. The State party should ensure that the *Dina* system is compatible with its human rights obligations, in particular those under the Convention. It should also explain the hierarchical relationship between customary law and domestic law.

The State party should take urgent measures to closely monitor the decisions of *Dina* courts in line with Act No. 2001-004 of 25 October 2001, which inter alia requires the approval of *Dina* court decisions by ordinary courts. It should also ensure that all decisions by *Dina* courts are appealed before the ordinary courts. The State party should work to increase the public's confidence in the system of justice. It should undertake judicial reforms to resolve the main problems in the administration of justice that are undermining the credibility of the justice system and find appropriate solutions to make it work effectively and to the people's benefit.

Trafficking in persons

(12) The Committee regrets that there is no information in the State party's report on trafficking in persons despite a persistent problem of sex tourism and exploitation of street children (arts. 2, 12, 13 and 14).

The State party should investigate all allegations of trafficking in persons, in accordance with Act No. 2007-038 of 14 January 2008 concerning trafficking and sex tourism and with the relevant international standards. It should carry out awareness-raising campaigns and organize training sessions for law enforcement officers as a means of preventing and combating trafficking in persons. It should offer protection to victims and provide them with access to medical, social and legal services, including rehabilitation services. The Committee invites the State party to include detailed information in its next report on the number of investigations carried out, complaints filed and convictions handed down for trafficking in persons.

Violence against women and children

(13) The Committee is concerned about information indicating that there is a large number of cases of early and forced marriages and of ill-treatment and domestic violence. It is also concerned about the fact that complaints are not lodged due to social and family pressure, despite the existence of Act No. 2000-21, which criminalizes domestic violence and sexual abuse (arts. 2, 12, 13 and 16).

⁵ A traditional parajudicial system designed to maintain social cohesion by settling civil disputes at the community level.

The State party should hold discussions at the community level, in particular with the heads of the *fokontany*, and take other steps to reduce the incidence of and ultimately eliminate forced marriages and *moletry* (probationary one-year marriages involving underage girls). It should enforce the obligation to register all marriages in order to monitor their compliance with domestic law and the conventions it has duly ratified. The State party should also prohibit early marriages, and prosecute offenders.

The Committee encourages the State party to pass a law to prevent and punish marital rape and prohibit corporal punishment of children. It invites the State party to ensure that methods for detecting violence against women and children are included in the training of law enforcement officers.

National human rights institution

(14) The Committee regrets that the political crisis of 2009 prevented the appointment of members of the National Human Rights Council, and that the Council has been unable to function since its establishment in 2008 (arts. 2, 12, 13 and 16).

The State party should ensure the effective and independent operation of this institution by allocating the human resources and funding it needs to fulfil its mandate, which in particular involves the investigation of allegations of torture and ill-treatment. The Committee encourages the State party to request technical assistance from the Office of the United Nations High Commissioner for Human Rights to ensure that the institution complies with the principles relating to the status of national institutions for the promotion and protection of human rights set forth in the annex to General Assembly resolution 48/134 (the Paris Principles).

Hostage-taking of relatives

(15) The Committee deplores the fact that women have allegedly been arrested and detained in order to force their husbands to turn themselves over to the police (arts. 12 and 16).

The State party should put an end to the practice of taking relatives of suspected criminals hostage and should expedite investigations with a view to punishing those responsible. This practice is a grievous violation of domestic law and the fundamental principles of human rights.

Prisoners on death row and capital punishment

(16) While noting that the State party has applied a de facto moratorium on the death penalty by systematically commuting death sentences to prison terms, the Committee regrets that the moratorium has not been given formal expression under the law (arts. 2, 11 and 16).

The State party should maintain the de facto moratorium on the use of capital punishment and consider passing a law systematically commuting death sentences to prison terms. The Committee would like more information addressing reports that death sentences continue to be handed down and concerning prison conditions on death row, the amount of time it generally takes to commute death sentences to prison terms, the treatment of convicts sentenced to death and the right of such convicts to receive visits from family members and their lawyers. The Committee also encourages the State party to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

Training

(17) While noting that human rights training sessions have been organized, the Committee regrets the failure to assess the impact of that training in terms of the

improvement of the human rights situation, as well as the lack of specific training in methods for detecting the physical and psychological sequelae of torture (art. 10).

The Committee recommends that the contents of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) be incorporated into forthcoming training sessions for law enforcement and medical personnel and be circulated among prison and medical personnel. The State party should also assess the impact and effectiveness of these training programmes.

Data collection

(18) The Committee regrets the absence of complete and detailed data on complaints, investigations, prosecutions and convictions in cases of torture or ill-treatment inflicted by law enforcement officers, security personnel, members of the armed forces or prison staff and the lack of such information on extrajudicial executions, enforced disappearances, human trafficking, domestic violence, conditions of detention and redress (arts. 12, 13, 14 and 16).

The State party should gather statistics that are useful for monitoring the implementation of the Convention at the national level, including data on complaints, investigations, prosecutions and convictions in cases of torture, ill-treatment and other types of human rights violations as mentioned above, and on the types of redress, compensation and rehabilitation offered to victims. The Committee invites the State party to include such data in its next periodic report. The information may be collected as part of the joint project being run with United Nations specialized agencies to set up a mechanism to monitor and assess the fulfilment of the State party's human rights commitments.

Refugees

(19) The Committee notes that article 19 of the national law against torture prohibits extradition to a State where a person runs the risk of being tortured but says nothing about deportation or refoulement cases. The Committee also notes the lack of information on the situation of refugees in the country and the absence of a law on asylum (art. 3).

The State party should amend article 19 of the law against torture of 25 June 2008 so that it also covers cases of deportation and refoulement, in accordance with article 3 of the Convention. The Committee encourages the State party to accede to the 1967 Protocol relating to the Status of Refugees and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. It invites the State party to include information on the situation of refugees in Madagascar in its next periodic report.

Cooperation with human rights mechanisms

(20) The Committee recommends that the State party intensify its cooperation with United Nations human rights mechanisms, in particular by authorizing visits inter alia by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Working Group on Arbitrary Detention and the Special Rapporteur on the situation of human rights defenders.

(21) Noting the commitment shown by the State party in the course of its universal periodic review and its dialogue with the Committee, the Committee recommends that the State party ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(22) The Committee also recommends that the State party make the declarations provided for in articles 21 and 22 of the Convention, thereby recognizing the competence of the Committee to receive and consider individual complaints of violations of the Convention.

(23) The Committee invites the State party to ratify the main human rights instruments of the United Nations to which it is not yet a party, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance.

(24) The State party is urged to ensure the broad circulation of the report that it has submitted to the Committee and the Committee's concluding observations through official websites, the media and NGOs.

(25) The Committee also urges the State party to update its common core document of 18 May 2004 (HRI/CORE/1/Add.31/Rev.1), and in so doing follow the harmonized guidelines on reporting under the international human rights treaties approved in June 2009 by the monitoring bodies of international instruments for human rights (HRI/GEN/2/Rev.6).

(26) The Committee requests that the State party provide information, within one year, on its follow-up to the recommendations made in paragraphs 8, 10, 14 and 15 of these concluding observations.

(27) The State party is invited to submit its next periodic report, which will be its second, by 25 November 2015. In this connection, the Committee requests that the State party accept instead to submit its report by 25 November 2012, under the optional procedure, which consists in the Committee sending a list of issues to the State party prior to presentation of the report, with the replies of the State party constituting, in accordance with article 19 of the Convention, the next periodic report.

57. Morocco

(1) The Committee against Torture considered the fourth periodic report of Morocco (CAT/C/MAR/4) at its 1022nd and 1025th meetings (CAT/C/SR.1022 and 1025), held on 1 and 2 November 2011, and adopted the following concluding observations at its 1042nd, 1043rd and 1045th meetings (CAT/C/SR.1042, 1043 and 1045).

A. Introduction

(2) The Committee welcomes the submission of the fourth periodic report of Morocco, the written replies provided by the State party (CAT/C/MAR/Q/4/Add.1) to the list of issues (CAT/C/MAR/Q/4) and the supplementary information provided orally by the Moroccan delegation during the consideration of the report, although it regrets the delay of over two years in its submission. The Committee welcomes the constructive dialogue held with the delegation of experts sent by the State party and thanks it for its detailed responses to the questions raised, as well as the additional written replies which have been supplied.

B. Positive aspects

(3) The Committee takes note with satisfaction of the action taken by the State party during the period under consideration regarding the following international human rights instruments:

(a) The ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, in April 2009;

(b) The ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol, in April 2009;

(c) The ratification of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, in April 2011;

(d) Recognition of the competence of the Committee to receive and consider individual communications under article 22 of the Convention; and

(e) The withdrawal of various reservations to a number of international conventions, including the State party's reservations to article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and to article 14 of the Convention on the Rights of the Child and all of its former reservations to the Convention on the Elimination of All Forms of Discrimination against Women.

(4) The Committee also takes note with satisfaction of the following measures:

(a) The adoption by referendum, on 1 July 2011, of a new Constitution which contains new provisions concerning the prohibition of torture and basic safeguards for persons who are arrested, detained, prosecuted or convicted;

(b) The reform of the legal system undertaken by the State party to adjust and amend laws and practices so as to bring them into line with the country's international obligations;

(c) The establishment on 1 March 2011 of the National Human Rights Council, which takes the place of the Consultative Council for Human Rights and which has broader powers than the Consultative Council did, and the establishment of regional offices for the protection of human rights;

(d) The establishment of a de facto moratorium on the enforcement of death sentences;

(e) The creation of the Equity and Reconciliation Commission as a transitional justice mechanism for determining the truth with regard to the human rights violations that occurred between 1956 and 1999 and paving the way for national reconciliation;

(f) The organization of a variety of human rights training and awareness-raising activities for justice officials and prison staff, among others.

C. Principal subjects of concern and recommendations

Definition and criminalization of torture

(5) While aware that bills that would amend the Criminal Code are currently being processed, the Committee remains concerned by the fact that the definition of torture contained in article 231.1 of the current Criminal Code is not fully in conformity with article 1 of the Convention due to its restricted scope. The definition contained in article 231.1 of the Criminal Code encompasses the main elements of article 1 of the Convention, but does not cover complicity or explicit or tacit consent on the part of law enforcement or security personnel or any other person acting in an official capacity. The Committee also regrets to note that the Criminal Code does not establish the imprescriptibility of the crime of torture, its previous recommendations in that regard notwithstanding⁶ (arts. 1 and 4).

The State party should ensure that the bills currently before Parliament extend the scope of the definition of torture to conform to article 1 of the Convention against Torture. The State party should also make certain that, in keeping with its international obligations, anyone who commits acts of torture, attempts to commit

⁶ CAT/C/CR/31/2, recommendation 6 (d).

torture, or is complicit or otherwise participates in such acts is investigated, prosecuted and punished without the possibility of availing themselves of any statute of limitations.

(6) The Committee is concerned by some of the existing legal provisions on torture, particularly those providing for the possibility of granting an amnesty or pardon to perpetrators of acts of torture. It is also concerned by the absence of a specific provision which clearly establishes that the order of a superior officer or of a public authority may not be invoked as a justification for torture and by the absence of a specific protection mechanism for subordinates who refuse to obey an order to torture a person who is in their custody (arts. 2 and 7).

The State party should ensure that its laws preclude any possibility of granting amnesty to any person convicted of the crime of torture or any kind of pardon that violates the Convention. The State party should also amend its laws in order to explicitly stipulate that an order from a superior officer or a public authority may not be invoked as a justification of torture. The State party should establish a mechanism for the protection of subordinates who refuse to obey such an order. The State party should ensure that all law enforcement officers are informed of the prohibition of obeying such an order and are made aware of the protective mechanisms that are in place.

Basic legal safeguards

(7) The Committee notes that Moroccan law provides a number of basic safeguards for persons taken into custody which are designed to prevent torture. It also takes note of the existence of, among other important proposals, draft legislative amendments aimed at ensuring that a person taken into custody will have access to a lawyer more quickly. The Committee is nonetheless concerned by the restrictions placed on the application of some of those basic legal safeguards, both under existing statutory law and in practice. The Committee is particularly concerned about the fact that, at present, a lawyer may not see his or her client until the first hour after the person's period of detention has been extended, provided that authorization has been obtained from the Crown Prosecutor-General. It is also concerned by the fact that access to the legal aid office is limited to minors and cases in which the possible sentence for a crime exceeds five years. The Committee regrets the lack of information on the practical application of other basic safeguards such as examination by an independent physician and notification of the family (arts. 2 and 11).

The State party should make certain that the bills currently under consideration ensure that all suspects will have the right to enjoy, in practice, the basic safeguards provided for by law, which include their right to have access to counsel at the time of their arrest, to be examined by an independent physician, to contact a relative or friend and to be informed of their rights and the charges against them, and to be brought before a judge without delay. The State party should take the necessary steps to ensure that people have access to their lawyers as soon as they are taken into custody, without any need to obtain prior authorization, and to put in place a system for the provision of effective legal assistance free of charge, particularly in the case of persons at risk or who belong to vulnerable groups.

Anti-terrorism law

(8) The Committee notes with concern that Anti-Terrorism Act No. 03-03 of 2003 does not set out a precise definition of terrorism, as required in order to uphold the principle that there can be no penalty for an offence except as prescribed by law. It is also concerned by the fact that the law in question defines advocacy of terrorism and incitement of terrorism as offences, which can be defined as such even if they do not necessarily involve an actual risk of violent action. In addition, under this law, the period during which a person may be

held in police custody is extended to 12 days, and access to a lawyer is not permitted until after the sixth day, which places suspects who are being held in custody at greater risk of torture. It is precisely while they cannot communicate with their families and lawyers that suspects are most vulnerable to torture (arts. 2 and 11).

The State party should revise Anti-Terrorism Act No. 03-03 in order to improve the definition of terrorism set forth therein, reduce the maximum amount of time during which a person can be held in police custody to the absolute minimum and permit access to counsel at the start of the period of detention. The Committee recalls that under the Convention no exceptional circumstance whatsoever may be invoked as a justification of torture and that, in accordance with various resolutions of the Security Council, notably Security Council resolutions 1456 (2003) and 1566 (2004), and other resolutions on the subject, any measure taken to combat terrorism must fully comply with international human rights law.

Non-refoulement and the risk of torture

(9) The Committee is concerned by the fact that the State party's existing extradition and refoulement procedures and practices may put persons at risk of torture. The Committee recalls that it has received individual complaints against the State party under article 22 of the Convention regarding extradition requests and it is concerned by the decisions and action taken by the State party in these cases. The Committee is disturbed by the State party's current decision to do nothing more than "suspend" the extradition of Mr. Ktiti, given that the Committee has already decided that his extradition would also constitute a violation of article 3 of the Convention and that this final decision has been duly transmitted to the State party.⁷ The Committee is also deeply concerned about the fact that Mr. Alexey Kalinichenko was extradited to his country of origin even though the Committee had requested that his extradition be temporarily suspended until it had issued its final decision, especially since his extradition was carried out solely on the basis of diplomatic assurances provided by Mr. Kalinichenko's country of origin (art. 3).

The State party should under no circumstance expel, return or extradite a person 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 recalls that it has adopted the position that under no circumstances should a State party regard diplomatic assurances as being a safeguard against torture or ill-treatment when there are substantial grounds for believing that a person would be in danger of being subjected to torture upon his or her return. In order to determine the applicability of the obligations that it has assumed under article 3 of the Convention, the State party should thoroughly examine the merits of each individual case, including the overall situation with regard to torture in the country concerned. It should also establish and apply well-defined procedures for eliciting diplomatic assurances, together with appropriate judicial oversight mechanisms and effective post-return monitoring arrangements for use in the event of refoulement.

Morocco should fulfil its international obligations and act in accordance with final and provisional decisions of the Committee concerning individual cases submitted to it under article 22 of the Convention. In the case of Mr. Ktiti, the State party should declare the extradition order to be permanently null and void in order to avoid acting in violation of article 3 of the Convention.

⁷ Committee against Torture, decision No. 419/2010 of 26 May 2011.

Use of torture in cases involving security concerns

(10) The Committee is concerned by numerous allegations regarding torture and ill-treatment committed by police officers, prison staff and, in particular, agents of the National Surveillance Directorate (DST) who are acting as members of the criminal investigation police force when people are deprived of basic legal safeguards, such as access to legal counsel, particularly in the case of people who are suspected of belonging to terrorist networks or of being supporters of independence for Western Sahara and in the course of interrogations carried out in order to extract confessions from persons suspected of terrorism (arts. 2, 4, 11 and 15).

The State party should immediately take substantive steps to investigate acts of torture and to prosecute and punish those who have committed such acts. The State party should ensure that law enforcement officers do not engage in torture through, inter alia, an unambiguous reaffirmation of the absolute prohibition of torture and a public condemnation of that practice by, in particular, the police, prison personnel and members of DST. It should also be made very clear that anyone who commits such acts or is complicit or otherwise participates in such acts will be held personally responsible before the law and will be subject to criminal prosecution and the appropriate penalties.

“Extraordinary renditions”

(11) The Committee takes note of the State party’s statements that it was not involved in any extraordinary renditions undertaken as part of the international fight against terrorism. The Committee nevertheless remains concerned by allegations that Morocco has served as a departure point, a transit country and a destination for blatantly illegal “extraordinary renditions” in such cases as those of Binyam Mohamed, Ramzi bin al-Shib and Mohamed Gatit. It notes that the incomplete information furnished by the State party on the investigations conducted in that connection is not sufficient to refute those allegations. The Committee is gravely concerned by the allegations that all these “extraordinary renditions” are reported to have been accompanied by incommunicado detention and/or detention in secret places, acts of torture and ill-treatment, particularly during the interrogation of suspects, as well as the return of persons to countries where they may also have been subjected to torture (arts. 2, 3, 5, 11, 12 and 16).

The State party should ensure that no one who is at any time under its control becomes the object of an “extraordinary rendition”. The transfer, refoulement, detention or interrogation of persons under such circumstances is in itself a violation of the Convention. The State party should conduct effective, impartial investigations into any and all cases of “extraordinary rendition” in which it may have played a role and bring to light the facts surrounding such cases. The State party should prosecute and punish those responsible for such renditions.

Events involving Western Sahara

(12) The Committee is concerned by the reports it has received regarding the alleged use by Moroccan law enforcement officers and security personnel of practices in Western Sahara such as arbitrary arrest and detention, incommunicado detention, detention in secret places, torture, ill-treatment, the extraction of confessions under torture and the excessive use of force.

The Committee recalls once more that, under the Convention, no exceptional circumstance whatsoever may be invoked as a justification of torture in territory that falls under the State party’s jurisdiction and that law enforcement measures and investigative procedures should be in full accord with international human rights law, as well as the legal procedures and basic safeguards in effect in the State party. The

State party should, as a matter of urgency, take substantive steps to prevent the aforementioned acts of torture and ill-treatment. It should also announce the introduction of a policy that will produce measurable progress towards the eradication of all torture and ill-treatment by State officials. The State party should put in place stronger measures for ensuring prompt, thorough, impartial and effective investigations into all allegations of torture or ill-treatment of prisoners and persons taken into custody or in any other situation.

The Gdeim Izik camp

(13) The Committee is particularly concerned by the events surrounding the closure of the Gdeim Izik camp in November 2010, during which several persons were killed, including law enforcement officials, and hundreds of others were arrested. The Committee takes note that the vast majority of the persons who were arrested were later released while awaiting trial, but is gravely concerned by the fact that those trials are to be held in military courts even though the persons concerned are civilians. The Committee is also concerned by the fact that there has not been an impartial, effective investigation to ascertain exactly what occurred and to determine what responsibility may be borne by members of the police or security forces (arts. 2, 11, 12, 15 and 16).

The State party should put in place stronger measures for ensuring prompt, thorough, impartial and effective investigations into the violence and deaths that occurred during the dismantlement of the Gdeim Izik camp and ensure that those responsible are brought to justice. The State party should amend its laws to guarantee that all civilians will be tried only in civilian courts.

Secret arrests and detention in cases involving security concerns

(14) The Committee is concerned by reports that, in cases involving terrorism, legal procedures for arresting, questioning and holding suspects in custody are not always followed in practice. The Committee is also concerned by information pointing to a consistent pattern whereby suspects are arrested by plain-clothes officers who do not clearly identify themselves, taken in for questioning and then held in secret detention facilities, which in practice amounts to incommunicado detention. The suspects are not officially registered and are subjected to torture and other cruel, inhuman or degrading treatment or punishment. They are held in these conditions for weeks at a time without being brought before a judge and without judicial supervision. Their families are not notified of their arrest, of their movements or of their whereabouts until such time as they are transferred to police custody in order to sign confessions that they have made under torture. It is only then that they are officially registered and their cases are processed through the regular justice system on the basis of falsified dates and information (arts. 2, 11, 12, 15 and 16).

(15) The Committee takes note of the statements made by the State party during the interactive dialogue to the effect that there is no secret detention centre at DST headquarters in Témara, as confirmed by the three visits made by the Crown Prosecutor-General in 2004 and by several representatives of the National Human Rights Commission and Members of Parliament in 2011. However, the Committee regrets the lack of information on the way in which those visits were organized and the methodology used, since, in view of the many continuing allegations concerning the existence of such a secret detention centre, in the absence of such information, it is not possible to lay to rest the suspicion that such a centre may in fact exist. The matter thus continues to be a source of concern for the Committee. The Committee is also concerned by allegations that secret places of detention are also located within certain official detention facilities. According to allegations received by the Committee, these secret detention centres are not monitored or inspected by any independent body. The Committee is concerned at reports that a new secret prison has been

built in the vicinity of Ain Aouda, close to the capital city of Rabat, to hold persons suspected of having ties to terrorist movements (arts. 2, 11, 12, 15 and 16).

The State party should ensure that the proper legal procedures are followed in the case of all persons who are arrested and taken into custody and that the basic safeguards provided for by law are applied, such as access for detained persons to legal counsel and to an independent physician, notification of their family of the arrest and of the location where they are being held and their appearance before a judge.

The State party should take steps to ensure that all register entries, transcripts and statements, and all other official records concerning a person's arrest and detention are kept in the most rigorous manner possible and that all information regarding a person's arrest and remand custody is recorded and confirmed by both the investigative police officers and the person concerned. The State party should ensure that prompt, thorough, impartial and effective investigations are conducted into all allegations of arbitrary arrest and detention and should bring those responsible to justice.

The State party should ensure that no one is held in a secret detention facility under its de facto effective control. As often emphasized by the Committee, detaining persons under such conditions constitutes a violation of the Convention. The State party should open a credible, impartial, effective investigation in order to determine if such places of detention exist. All places of detention should be subject to regular monitoring and supervision.

Prosecution of perpetrators of acts of torture and ill-treatment

(16) The Committee is particularly concerned that it has received no reports to date of any person being convicted under article 231.1 of the Criminal Code of having committed acts of torture. It notes with concern that police officers are, at the most, prosecuted for assault or assault and battery, but not for torture, and that the information provided by the State party indicates that the administrative and disciplinary penalties imposed on officers for such acts do not seem to be commensurate with their seriousness. The Committee observes with concern that allegations of torture, despite their number and frequency, rarely give rise to investigations and prosecution and that a climate of impunity appears to have taken hold, given the failure to impose genuine disciplinary measures or to bring any significant number of criminal cases against State officials accused of committing acts specified in the Convention, including the gross, large-scale human rights violations that took place between 1956 and 1999 (arts. 2, 4 and 12).

The State party should ensure that any and all allegations of torture and of ill-treatment are promptly, effectively and impartially investigated and that the persons who have committed such acts are prosecuted and are given sentences that are commensurate with the grave nature of their acts, as provided for in article 4 of the Convention. The State party should also amend its laws in order to explicitly stipulate that an order from a superior officer or a public authority may not be invoked as a justification of torture. The State party should also take steps to ensure that complainants and witnesses are effectively protected from any ill-treatment or act of intimidation related to their complaint or testimony.

Coerced confessions

(17) The Committee is concerned by the fact that, under the State party's current system of investigation, confessions are commonly used as evidence for purposes of prosecution and conviction. The Committee notes with concern that convictions in numerous criminal cases, including terrorism cases, are based on confessions, thus creating conditions that may provide more scope for the torture and ill-treatment of suspects (arts. 2 and 15).

The State party should take all steps necessary to ensure that criminal convictions are based on evidence other than the confession of the persons charged, especially when such persons retract their confessions during the trial, and to make certain that, except in cases involving charges of torture, statements made under torture are not invoked as evidence in any proceedings, in accordance with the Convention.

The State party is requested to review criminal convictions that have been based solely on confessions in order to identify cases in which the conviction was based on confessions obtained under torture or ill-treatment. The State party is also invited to take the appropriate remedial measures and to inform the Committee of its findings.

Monitoring and inspection of places of detention

(18) The Committee takes note of the detailed information provided by the State party concerning the different types of visits paid to places of detention by the Crown Prosecutor, various judges, members of provincial prison oversight commissions and representatives of the National Human Rights Council. It also takes note of the draft amendments under which the National Human Rights Council would be designated as the country's national preventive mechanism in conjunction with the forthcoming accession by Morocco to the Optional Protocol to the Convention. The Committee is nonetheless concerned by the fact that several non-governmental organizations that wished to gain entry to prison facilities as observers were refused access to detention centres. It seems that, under article 620 of the Code of Criminal Procedure, such visits may be conducted only by the provincial commissions. It also regrets the lack of information about the follow-up to and results of the visits that have been conducted (arts. 11 and 16).

The State party should ensure that the national mechanism for monitoring places of detention is capable of carrying out effective inspections and oversight of all places of detention and should ensure that action is taken to follow up on the results of that monitoring process. This mechanism should provide for regular and unannounced visits by national and international observers in order to prevent torture and other cruel, inhuman or degrading forms of treatment or punishment. The State party should also ensure that forensic doctors trained to detect signs of torture are present during those visits. In addition, the State party should amend its laws so that non-governmental organizations may also make unrestricted, regular, independent, unannounced visits to places of detention.

Prison conditions

(19) The Committee takes note with satisfaction of the information provided by the State party concerning its plan for building and renovating prison facilities, which is likely to have led to some improvement in prison conditions. The Committee nonetheless remains concerned about the fact that, according to the information in its possession, conditions in most prisons are still alarming owing to overcrowding, ill-treatment and the disciplinary measures employed (including long periods of incommunicado detention), unsanitary conditions, inadequate food and limited access to medical care. The Committee is concerned about the fact that these conditions have prompted some prisoners to hold hunger strikes and others to rebel and stage protests that are violently suppressed by prison guards (arts. 11 and 16).

In order to bring prison conditions throughout Morocco into line with the United Nations Standard Minimum Rules for the Treatment of Prisoners,⁸ the State party

⁸ Economic and Social Council resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

should continue its efforts to build new prison facilities and to renovate existing ones and should continue to increase its budget allocations for running the country's prisons, particularly for food and medical care. In order to reduce overcrowding, which is largely due to the fact that half of all the people being held in Moroccan prisons have yet to be tried, the State party should amend its laws to permit the use of alternatives to pretrial detention in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules).⁹ A system could be devised for arranging bail and making more frequent use of non-custodial penalties in the case of less serious offences.

Prison deaths

(20) The Committee takes note of the detailed information provided on the number of deaths that have occurred in Moroccan prisons and the officially recorded causes of death. It nonetheless regrets the lack of information on the mechanisms in place for conducting systematic and independent investigations into the causes of prison deaths, notwithstanding the fact that suicides are routinely investigated (arts. 11, 12 and 16).

The State party should promptly conduct a thorough, impartial investigation whenever a person dies in prison and should prosecute those responsible, if any, for the death. It should provide the Committee with information on all deaths occurring in prison as a result of acts of torture, ill-treatment or wilful negligence. The State party should also ensure that independent forensic doctors examine the corpse in each case and that their findings are admissible as evidence in criminal and civil trials.

Prisoners on death row

(21) The Committee takes note of the de facto moratorium on the enforcement of the death penalty that has existed since 1993. It also takes note of the bill under which the number of crimes punishable by the death penalty would be significantly reduced and under which such sentences would have to be made by unanimous decision. The Committee is concerned by the conditions under which prisoners are held on death row. These conditions in themselves could constitute cruel, inhuman or degrading treatment. This is particularly the case in view of the length of time that prisoners are held there and their uncertainty about their fate, especially given the absence of any prospect that their sentences will be commuted (arts. 2, 11 and 16).

The Committee recommends that the State party consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights with a view to the abolition of the death penalty. In the meanwhile, the State party should maintain its de facto moratorium on the enforcement of the death penalty, ensure that its laws provide for the possibility of commuting death sentences and ensure that all death row prisoners are protected in accordance with the Convention. The State party should also ensure that all death row prisoners are treated humanely, and that, in particular, they are able to receive visits from their families and their attorneys.

Psychiatric hospitals

(22) The Committee takes note of the supplementary written information provided by the State party regarding its plans for preventing the ill-treatment of patients in psychiatric hospitals and the new framework law of 2011 on the health system. The Committee is still, however, concerned about the lack of information on the system for monitoring and inspecting psychiatric hospitals that offer inpatient facilities and on the results of such monitoring arrangements and inspections (art. 16).

⁹ General Assembly resolution 45/110 of 14 December 1990.

The State party should ensure that the national mechanism for monitoring and overseeing places of detention, which is to be put in place soon, has the authority to inspect other types of facilities where people are deprived of their liberty as well, such as psychiatric hospitals. The State party should ensure that the results of such monitoring processes are duly acted upon. The mechanism in question should provide for regular and unannounced visits as a means of preventing torture and other cruel, inhuman or degrading treatment or punishment. The State party should also ensure that forensic doctors trained to detect signs of torture are present during those visits. It should also ensure that patients detained in psychiatric hospitals against their will are able to appeal against the corresponding internment order and have access to a physician of their choice.

Violence against women

(23) In view of the scale of violence against women in Morocco, the Committee is deeply concerned by the absence of a specific, comprehensive legal framework for the prevention of violence against women, for the criminal prosecution of persons who commit such acts and for the protection of victims and witnesses. The Committee is also concerned by the fact that so few complaints have been filed by victims, that the prosecution service has not initiated criminal proceedings in such cases, that the complaints which are filed are not systematically investigated, even in rape cases, and that the burden of proof is excessive and is borne entirely by the victim in a society where the risk of stigmatization of such victims is high. The Committee is concerned by the absence of any specific law that makes marital rape a criminal offence. In addition, the Committee is deeply concerned by the fact that, under Moroccan law, the rapist of a minor can avoid criminal responsibility by marrying the victim. The Committee regrets the lack of information about the number of cases in which victims have married their rapists or have refused to do so (arts. 2, 12, 13 and 16).

The Committee urges the State party to enact a law as soon as possible on violence against women and girls in order to ensure that any form of violence against women constitutes a criminal offence. The Committee also urges the State party to ensure that women and girls who are victims of violence have immediate access to means of protection, including shelters, and to redress, and that perpetrators are prosecuted and suitably punished. The Committee reiterates the recommendations made in that regard by the Committee on the Elimination of Discrimination against Women.¹⁰ The State party should amend its Criminal Code without delay to ensure that marital rape is criminalized and that criminal proceedings against rapists are not terminated if they marry their victims. The State party should also conduct studies on the causes and extent of violence, including sexual and domestic violence, against women and girls. The State party should present information in its next report to the Committee on the laws and policies in place to combat violence against women and on the impact of the measures taken.

Corporal punishment

(24) The Committee notes with concern that there is no law in Morocco that prohibits the use of corporal punishment within the home, at school or in institutions that provide child protection services (art. 16).

The State party should amend its laws in order to prohibit the use of corporal punishment in schools, in the home and in centres that provide child protection

¹⁰ CEDAW/C/MAR/CO/4, para. 21.

services. It should also raise public awareness of positive, participatory and non-violent forms of discipline.

Treatment of refugees and asylum seekers

(25) The Committee takes note of the information furnished by the State party concerning its increased cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR), which has included capacity-building activities with regard to the admission, identification and protection of asylum seekers and refugees by the State party. It is nonetheless disturbed by the absence of a specific legal framework for refugees and asylum seekers that would differentiate them from undocumented migrants. The Committee is concerned by the fact that, as things now stand, asylum seekers are not always in a position to file their request for asylum with the proper authorities. This is particularly the case at points of entry into Moroccan territory, where asylum seekers are often treated as if they were undocumented immigrants. The Committee is also concerned by the absence of a specific office for the efficient processing of applications for asylum from refugees and stateless persons and of safeguards for all the rights of refugees while on Moroccan territory (arts. 2, 3 and 16).

The State party should establish a legal framework to safeguard the rights of refugees and asylum seekers and should develop institutional and administrative instruments for their protection by, inter alia, increasing its cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR) and allowing UNHCR to take part in the reform of the asylum system as an observer. The State party should see to it that procedures and mechanisms are put in place for the systematic identification of potential asylum seekers at all points of entry into Moroccan territory. The State party should allow such persons to submit applications for asylum. These mechanisms should also ensure that decisions concerning asylum requests are subject to appeal, that such appeals have suspensive effect, and that no one is returned to a country where there is a risk of torture.

The State party should consider becoming a party to the Convention relating to the Status of Stateless Persons of 1954 and the Convention on the Reduction of Statelessness of 1961.

Treatment of migrants and foreign nationals

(26) The Committee takes note of the information supplied by the State party regarding the legal provisions governing the expulsion of undocumented migrants, particularly Act No. 02-03 on the entry and residence of foreign nationals in Morocco, and the examples it has provided of instances in which foreign nationals have been expelled in accordance with the provisions of that law. It is nevertheless concerned by reports that undocumented migrants have been escorted to the border or otherwise expelled in violation of Moroccan law without having been given the opportunity to exercise their rights. Several allegations have been made that hundreds of migrants have been abandoned in the desert without food or water. The Committee deeply regrets the State party's failure to provide information about these events or about the places and regimes of detention used for foreign nationals awaiting deportation that do not come under the authority of the Prison Service. The Committee also deeply regrets the lack of information about any inquiries that may have been made into the violence committed by law enforcement personnel against undocumented migrants in the vicinity of the Ceuta and Melilla enclaves in 2005 (arts. 3, 12, 13 and 16).

The State party should take steps to ensure that the legal safeguards governing the practice of escorting undocumented migrants to the border and the expulsion of foreign nationals are effectively enforced and that such practices and expulsions are carried out in accordance with Moroccan law. It should undertake impartial, effective

investigations into allegations that, during expulsions, migrants have been subjected to ill-treatment or excessive use of force. It should also ensure that those responsible are brought to justice and receive sentences that are commensurate with the seriousness of their acts.

The State party is requested to furnish detailed information in its next report on the places and regimes of detention used for foreign nationals awaiting deportation, together with data disaggregated by year, sex, place, length of detention and the reason for detention and expulsion.

Human trafficking

(27) The Committee is concerned by the general lack of information about the trafficking of women and children for purposes of sexual or other forms of exploitation and about the scale of trafficking in the State party, particularly with regard to the number of complaints, investigations, prosecutions and convictions and the steps taken to prevent and combat human trafficking (arts. 2, 4, 12, 13 and 16).

The State party should step up its efforts to prevent and combat the trafficking of women and children. Those efforts should include the passage of a specific law on the prevention and suppression of trafficking and the provision of protection and access for victims to rehabilitation services, as well as medical, social, legal and counselling services, as needed. The State party should also make sure that victims are able to exercise their right to lodge a complaint. It should promptly conduct impartial, effective inquiries into all reports of trafficking and ensure that those responsible are brought to justice and receive sentences that are commensurate with the seriousness of their acts.

Training

(28) The Committee takes note of the information that it has received regarding the training activities, seminars and courses on human rights that have been organized for justice officials, police officers and prison staff. It is concerned, however, by the lack of targeted training activities for personnel of the National Surveillance Directorate (DST), members of the Armed Forces, and forensic doctors and other medical personnel who deal with persons held in places of detention or patients in psychiatric hospitals and particularly the lack of training in proper methods for detecting the physical and psychological after-effects of torture (art. 10).

The State party should continue to design and reinforce training programmes for all staff — law enforcement officers, members of intelligence services, members of security forces, military personnel, prison staff and medical personnel employed in prisons or psychiatric hospitals — to ensure that they are well acquainted with the provisions of the Convention and that they know that violations of the Convention will not be tolerated and will be investigated and that the persons who commit violations will be prosecuted. In addition, the State party should ensure that all relevant staff, including members of the medical corps, are specifically trained to detect signs of torture and ill-treatment in accordance with the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol). The State party should also evaluate the effectiveness and impact of such training.

The Equity and Reconciliation Commission and the question of reparations

(29) The Committee takes note of the information provided by the State party on the considerable amount of work that was done between 2003 and 2005 by the transitional justice mechanism, the Equity and Reconciliation Commission, to investigate the gross, large-scale and systematic human rights violations that took place in Morocco between

1956 and 1999. The investigations have clarified the circumstances surrounding many of these violations, including numerous cases of enforced disappearance. They have also led to the award of compensation in various forms to many of the victims. The Committee remains, however, concerned by the fact that the Commission's work was incomplete, inasmuch as it did not encompass the violations that took place in Western Sahara, and that some cases of enforced disappearance had yet to be resolved when the Commission brought its work to a close in 2005. In addition, the Committee is concerned by the fact that the work of the Commission may have led to the de facto impunity of the perpetrators of violations of the Convention committed during that period, since none of them has been prosecuted to date. Finally, the Committee is concerned by reports that not all the victims or families of victims have received compensation and that in some cases the compensation awarded has been neither equitably distributed nor adequate or effective (arts. 12, 13 and 14).

The State party should ensure that the National Human Rights Council, which has been assigned the task of completing the Commission's work, continues with its efforts to establish the facts surrounding the cases of enforced disappearance between 1956 and 1999 that have not yet been resolved, including those connected with the situation in Western Sahara. The State party should also step up its efforts to ensure that victims of torture and ill-treatment receive redress in the form of equitable, sufficient compensation and support for as full a rehabilitation as possible. To that end, it should introduce legal provisions to protect the right of torture victims to equitable compensation that is commensurate with the harm suffered.

Cooperation with United Nations mechanisms

(30) The Committee recommends that the State party increase its cooperation with United Nations human rights mechanisms by, inter alia, authorizing visits on the part of such mechanisms as the Working Group on Arbitrary Detention, the Special Rapporteur on trafficking in persons, especially women and children, and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

(31) The Committee invites the State party to consider acceding to the main human rights instruments to which it is not yet a party, including the Optional Protocol to the Convention against Torture, and to the Rome Statute of the International Criminal Court.

(32) The State party is encouraged to ensure the broad circulation of the reports that it submits to the Committee and the Committee's concluding observations through official websites, the media and non-governmental organizations.

(33) The Committee requests the State party to provide it, before 25 November 2012, with information on the measures undertaken in response to its recommendations on: (1) providing or strengthening legal safeguards for detainees; (2) conducting prompt, impartial and effective inquiries; (3) prosecuting suspects and sentencing those found guilty of torture or ill-treatment; and (4) making the reparations referred to in paragraphs 7, 11, 15 and 28 herein. The Committee also requests the State party to provide it with information on the measures undertaken in response to the recommendations made in paragraph 8 herein regarding the Anti-Terrorism Act.

(34) The Committee invites the State party to update its common core document of 15 April 2002 (HRI/CORE/1/Add.23/Rev.1 and Corr.1), as necessary, in accordance with the instructions concerning the common core document contained in the harmonized guidelines on reporting to the bodies established under international human rights treaties (HRI/GEN/2/Rev.6).

(35) The Committee invites the State party to submit its fifth periodic report by 25 November 2015 at the latest. The Committee also invites the State party to agree, before 25

November 2012, to submit that report under the optional procedure which involves the transmission, by the Committee to the State party, of a list of issues prior to the submission of its periodic report. The reply of the State party to that prior list of issues would constitute its next periodic report under article 19 of the Convention.

58. Paraguay

(1) The Committee against Torture considered the combined fourth to sixth periodic reports of Paraguay (CERD/C/PRY/4-6) at its 1026th and 1029th meetings (CAT/C/SR.1026 and SR.1029), held on 3 and 4 November 2011. At its 1048th meeting (CAT/C/SR.1048), held on 21 November 2011, the Committee adopted the following concluding observations.

A. Introduction

(2) The Committee welcomes the submission by Paraguay of its combined fourth to sixth periodic reports in response to the list of issues prior to the submission of reports (CAT/C/PRY/Q/4-6). The Committee expresses its appreciation to the State party for agreeing to follow this new procedure for the submission of periodic reports, which facilitates cooperation between the State party and the Committee and helps focus the consideration of the report as well as the dialogue with the delegation.

(3) The Committee also appreciates the frank and open dialogue it had with the delegation of the State party and the supplementary information supplied during its consideration of the report, although it regrets that some of its questions to the State party were not answered.

B. Positive aspects

(4) The Committee notes with satisfaction that the State party has ratified or acceded to the following international instruments since the consideration of its third periodic report:

(a) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (14 May 2001);

(b) Rome Statute of the International Criminal Court (14 May 2001);

(c) Convention on the Prevention and Punishment of the Crime of Genocide (3 October 2001);

(d) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (27 September 2002) and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (18 August 2003);

(e) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (18 August 2003). The Committee notes with satisfaction that the State party has abolished the death penalty and recommends that the State party expressly eliminate the death penalty from the military justice system;

(f) International Convention on the Elimination of All Forms of Racial Discrimination (18 August 2003);

(g) United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention (22 September 2004);

(h) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2 December 2005);

(i) Convention on the Rights of Persons with Disabilities and its Optional Protocol (3 September 2008);

(j) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (23 September 2008);

(k) International Convention for the Protection of All Persons from Enforced Disappearance (3 August 2010).

(5) The Committee is pleased to note that the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment visited the State party in March 2009 and made a follow-up visit in September 2010, and that the State party has authorized the publication of the Subcommittee's reports and submitted its written replies thereto.

(6) The Committee congratulates the State party on the declaration it made on 29 May 2002 recognizing the competence of the Committee to receive communications under articles 21 and 22 of the Convention against Torture.

(7) The Committee notes with satisfaction that in 2003 the State party extended a standing invitation to visit the country to all Human Rights Council special procedure mandate holders. Since the consideration of its last periodic report, the State party has hosted visits from four of the Council's rapporteurs, including the Special Rapporteur on the question of torture.

(8) The Committee takes note of the State party's initiatives to review its legislation with a view to complying with the Committee's recommendations and improving implementation of the Convention. These initiatives include the following:

(a) The adoption on 20 April 2011 of Act No. 4288, establishing the national mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;

(b) The adoption on 12 October 2011 of Organization Act No. 4423 on the Ministry of Defence, which gives the latter operational and financial independence;

(c) The adoption on 11 August 2011 of Act No. 4381, making the right of victims of human rights violations during the 1954–1959 dictatorship to claim compensation imprescriptible, and Act No. 3603 of 2008, authorizing their children to claim that compensation;

(d) The establishment, by Decree No. 2225 of 2003, of the Truth and Justice Commission to investigate human rights violations committed by agents of the State or parastatal bodies between 1954 and 2003, and its operationalization in August 2004;

(e) Decision No. 195 of 5 May 2008 of the Constitutional Division of the Supreme Court, ruling that criminal proceedings and sentences for crimes of torture are imprescriptible.

(9) The Committee also welcomes the efforts made by the State party to modify its policies and procedures so as to enhance human rights protection and implement the Convention, especially:

(a) The establishment, by Decree No. 4674 of 9 July 2010, of the National Commission for Prison Reform, as a forum for technical discussion and help in formulating a plan to redefine the treatment of persons deprived of their liberty and to review prison management;

(b) The establishment, by Decree No. 2290 of 2009, of the Human Rights Network of the Executive Branch to coordinate human rights policies, plans and programmes;

(c) The publication in August 2008 of the final report, *Anivé Haguä Oiko* (Lest it happen again), of the Truth and Justice Commission, with the outcome of investigations into human rights violations in Paraguay in the period 1954–2003;

(d) The establishment, by Decree No. 5093 of 2005, of the Inter-Agency Board on Trafficking in Persons in the Republic of Paraguay to draw up public policy on that activity;

(e) The appointment, by Resolution No. 768 of the Chamber of Deputies in October 2001, of an ombudsman, whose office now has branches in a number of Paraguayan cities;

(f) The preparation by the State party, following a participatory process, of a national action plan for human rights.

C. Principal subjects of concern and recommendations

Definition and offence of torture

(10) The Committee notes that a bill has been drafted to amend the current legal definition of torture. However, it regrets that, despite its own previous recommendations and those of various regional and international human rights mechanisms, the offence of torture is still not defined in the State party's Criminal Code in accordance with the definition in article 1 of the Convention (arts. 1 and 4).

The Committee reiterates its earlier recommendation (A/55/44, para. 151) that the State party should adopt a definition of torture that covers all the elements contained in article 1 of the Convention. The State party should also ensure that such offences are punishable by appropriate penalties which take into account their grave nature, in accordance with article 4, paragraph 2, of the Convention.

Fundamental legal safeguards

(11) The Committee is concerned that many of the human rights of persons deprived of their liberty, including minors, as set out in Paraguayan legislation, are not observed in practice. In particular, the Committee expresses concern at the lack of mechanisms to give effect to the right of persons deprived of their liberty to legal assistance from the very start of detention and to independent medical examinations, and their right to notify a relative or trusted individual of their detention and to be informed of their rights and the grounds for arrest at the time of detention. With regard to habeas corpus, the Committee is concerned by information it has received that habeas corpus petitions can take 30 days to be resolved. As regards medical examinations at the start of detention, the Committee is concerned that these are not routinely carried out and that they take place in the presence of police officers. It is also concerned by reports that persons deprived of liberty are held in police custody for long periods without being properly registered and that a large number of police stations do not, in practice, comply with the rules on registration procedures for detainees. In general, the Committee expresses concern at the statement by the delegation from the State party that there are problems with the nationwide implementation of Decision No. 176/2010 of the Office of the National Police Commander, ordering the introduction of a registration system in police stations (arts. 2, 11 and 12).

The State party should take prompt and effective action to ensure that all detainees benefit in practice from all fundamental legal safeguards from the time of their detention. The State party should guarantee that, in practice, all detainees are informed immediately of the reason for their detention and of their rights, and that

their right to have access to a lawyer and to contact a relative or trusted individual is guaranteed. The remedy of habeas corpus should be reviewed and strengthened and the necessary steps taken to ensure that the procedure granting it is summary and brief and that decisions on it are taken within the legal time limit in every case. The State party should guarantee that individuals in police custody are able to undergo an independent medical examination at the very start of their detention and not in the presence of a police officer. The State party should make certain that persons deprived of their liberty are registered promptly and ensure that the custody records in police stations are inspected regularly to check that they are being maintained in accordance with the procedures established by law. The State party should also ensure that the provisions of Decision No. 176/2010, on registration of detainees, are observed and, to that end, should consider making said decision law.

Free legal assistance

(12) While welcoming the recent adoption of the Organization Act on the Public Defender Service and the increased human resources allocated to it, the Committee expresses concern at the limited number of public defenders in the country, which prevents many persons deprived of their liberty from receiving adequate legal assistance.

The State party should guarantee free legal assistance from the very start of detention for all persons requesting such assistance who do not have the means to pay for it themselves. To this end, the State party should improve working conditions in the Public Defender Service and allocate more human, financial and material resources to the institution to enable it to perform its duties.

State of emergency

(13) The Committee takes note of the declaration, in Act No. 4473 of 10 October 2011, of a 60-day state of emergency in the departments of Concepción and San Pedro. The Committee notes with concern that other states of emergency have been declared during the period covered by the State party's report. Despite the information provided by the State party on the steps taken to safeguard the human rights of the persons affected, the Committee is concerned about restrictions on human rights in this period, as well as about potential violations of the Convention during the state of emergency.

The State party should limit the declaration of a state of emergency to cases in which it is strictly necessary, and should at all times respect the provisions of article 4 of the International Covenant on Civil and Political Rights. The State party should also adhere strictly to the absolute prohibition of torture, in accordance with article 2, paragraph 2, of the Convention, which states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

National human rights institution

(14) The Committee welcomes the appointment in 2001, after a seven-year wait, of the State party's first national ombudsman. The Committee is concerned, however, that, according to the delegation of the State party, the mandate of the current ombudsman has expired and that no suitably qualified successor has as yet been appointed. The Committee is also concerned that the Office of the Ombudsman does not have the necessary resources to accomplish its task of independently and effectively protecting and promoting human rights (art. 2).

The Committee recommends that the State party take the necessary steps to appoint a new, suitably qualified ombudsman as soon as possible, in accordance with the procedure established by law. The State party should equip the Office of the Ombudsman with sufficient financial, material and human resources to carry out its

mandate effectively and independently, in accordance with the Paris Principles (annex to General Assembly resolution 48/134 of 20 December 1993).

National preventive mechanism

(15) The Committee takes note with interest of the information supplied by the delegation of the State party on the efforts under way to operationalize the national preventive mechanism established by Act No. 4288. Nonetheless, the Committee notes with concern that the State party's national preventive mechanism should have been established in 2007 and is still not operational.

The State party should speed up the implementation of the law establishing the national preventive mechanism, in particular by forming the selection body provided for by this law soon. The State party should ensure that this mechanism has the human, material and financial resources it needs to carry out its mandate independently and effectively throughout the country.

Prevention and eradication of corruption

(16) The Committee is deeply concerned about repeated allegations of widespread corruption in the prison system and police force in the State party. It has been alleged that persons deprived of their liberty have to bribe public officials in order to receive medical treatment or food or to receive visits. The Committee is also concerned about the unjustified granting of benefits to certain individuals deprived of their liberty that occurs as a result of corruption. The Committee notes with regret that the State party has not provided information on these issues (arts. 2, 10 and 12).

The State party should take immediate and urgent measures to eradicate corruption in the police force and prison system, which is an obstacle to the effective implementation of the Convention. These measures should include audits to identify corrupt behaviour and risks of corruption, as well as recommendations on how to ensure internal and external controls. The State party should also increase its capacity to investigate and try cases of corruption. In addition, the State party should organize training, awareness-raising and capacity-building programmes on fighting corruption and on the relevant professional codes of ethics, for police and other law enforcement officers, prosecutors and judges, and it should establish, de facto and de jure, effective mechanisms to ensure transparency in the conduct of public officials. The Committee requests the State party to keep it informed of any steps taken and any difficulties encountered in the fight against corruption. The Committee also requests the State party to supply information on the number of State officials, including senior officials, who have been tried and punished for corruption.

Non-refoulement

(17) The Committee is concerned about the allegations received concerning extraditions carried out by the State party without it having examined the risk of the person extradited being tortured in the receiving country. The Committee is also concerned about the lack of specific training for members of the judiciary regarding the scope of article 3 of the Convention (art. 3).

The State party should formulate and adopt legal provisions to incorporate article 3 of the Convention into its domestic law and ensure that the provisions of that article are applied in cases of expulsion, refoulement or extradition of foreign citizens. Under no circumstances should the State party expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in certain danger of being subjected to torture or ill-treatment.

Impunity for acts of torture and ill-treatment

(18) The Committee is concerned about the numerous and consistent allegations of torture and ill-treatment of persons deprived of their liberty, in particular by police officers. The Committee regrets the lack of any consolidated statistics on complaints of torture, investigations and the penalties handed down during the period covered by the State party's report. The Committee takes note of the statistics provided in the State party's report concerning disciplinary proceedings against police officers; however, it notes that the statistics do not indicate how many of those cases have been brought to court. The Committee is also concerned that, according to the information provided in the State party's report, during 2009 there were only nine complaints of torture in the State party's prisons. The Committee considers that the figures do not tally with the persistent allegations and extensive documentation received from other sources concerning cases of torture and ill-treatment of persons deprived of their liberty. The Committee is further concerned by the limited effectiveness of police monitoring and supervision mechanisms and the lack of compensation and rehabilitation services for victims of torture and ill-treatment (arts. 2, 12–14 and 16).

The Committee recommends that the State party should:

(a) As a matter of urgency, take immediate and effective measures to prevent acts of torture and ill-treatment, including through the announcement of a policy that would produce measurable results in the eradication of torture and ill-treatment by State officials;

(b) Adopt appropriate measures to ensure that all complaints of torture and ill-treatment are promptly and impartially investigated by an independent body;

(c) Review the efficacy of the internal complaints procedure available to persons deprived of their liberty and consider establishing an independent complaints procedure for all persons deprived of their liberty;

(d) Ensure that the Public Prosecution Service conducts, of its own motion, investigations and, if appropriate, institutes criminal proceedings whenever there are reasonable grounds to believe that acts of torture have been committed;

(e) Duly bring to trial alleged perpetrators of acts of torture or ill-treatment and, if they are found guilty, sentence them to penalties commensurate with the seriousness of their acts;

(f) Strengthen existing mechanisms for monitoring and oversight of the police so as to ensure independent and effective oversight;

(g) Provide victims with appropriate compensation and direct its efforts towards ensuring rehabilitation that is as complete as possible.

Conditions of detention and use of pretrial detention

(19) The Committee is concerned about the habitual and widespread use of pretrial detention, which may undermine the right to presumption of innocence, rather than non-custodial measures. The Committee is also concerned by the failure to respect the maximum legal period for pretrial detention and by the existence in the State party of legislation that restricts the possibility of using alternatives to preventive detention. The Committee is especially concerned by the extensive use of pretrial detention for children aged between 16 and 18 years. The Committee notes with concern the abundant information received from various sources on the deplorable material conditions in many of the State party's police stations and prisons, the overcrowding in them, the inadequate medical services and the almost complete lack of activities for persons deprived of their liberty. In particular, the Committee is concerned about the material conditions in the

psychiatric ward of the national prison in Tacumbú and the lack of specialized medical attention provided to the prisoners housed there. The Committee is further concerned about allegations of discrimination against the lesbian, gay, bisexual and transgender community in the State party's prisons, including discrimination in allowing private visits from partners. Lastly, the Committee is concerned about the arbitrary use of solitary confinement as a punishment in the State party's prisons (arts. 2, 11 and 16).

The State party should take effective measures to ensure that its policy of pretrial detention is in conformity with international standards and that pretrial detention is used solely as a last resort and for a limited period, in conformity with the requirements laid down in its legislation. To this end, the State party should review the use of pretrial detention as a primary measure for accused persons awaiting trial and consider the possibility of using alternatives to deprivation of liberty, as described in the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), adopted by the United Nations General Assembly in its resolution 45/110, in particular in cases involving minors. The State party should also increase judicial control over the duration of pretrial detention.

The State party should adopt urgent measures to ensure that detention conditions in police stations, prisons and other detention centres are in conformity with the United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the Economic and Social Council in its resolutions 663 C (XXIV) and 2076 (LXII). In particular, the Committee recommends that the State party should:

(a) **Adopt a plan for the improvement of the infrastructure of Paraguay's police stations and prisons so as to guarantee decent living conditions for persons deprived of their liberty;**

(b) **Ensure that there are sufficient medical professionals, including mental health professionals, to provide proper medical care for persons deprived of their liberty;**

(c) **Provide suitable accommodation and psychiatric treatment for those persons deprived of their liberty who require psychiatric supervision and treatment;**

(d) **Redouble efforts to combat discrimination against vulnerable groups, and in particular against the lesbian, gay, bisexual and transgender community;**

(e) **Use solitary confinement as a last resort, for as short a time as possible, under strict supervision and with the possibility of judicial control.**

Statements obtained under duress

(20) The Committee expresses its concern at reports that, in spite of the provisions of article 90 of the Code of Criminal Procedure prohibiting the use of force by the police to obtain a statement from a detained person, in practice the police continue to obtain statements by torture or ill-treatment. The Committee is concerned that the courts of the State party occasionally use such statements as evidence. The Committee is also concerned by the lack of information relating to officials who have been tried and punished for having obtained statements in this way (arts. 2, 4, 10 and 15).

The State party should take the necessary steps to ensure that all statements obtained as a result of torture are inadmissible in any court proceedings, in conformity with article 15 of the Convention. The Committee requests the State party to ensure in practice the inadmissibility of evidence obtained as a result of torture and to provide it with information on whether any officials have been tried and punished for having obtained statements in this way, together with examples of cases that have been set aside because a statement had been obtained as a result of torture. The State party

should also ensure the provision of training for law enforcement officials, judges and lawyers on the methods used to detect and investigate cases in which statements have been obtained by torture.

Violence against women

(21) The Committee takes note of the different measures adopted by the State party to combat violence against women, which include providing five police stations with the resources to register complaints of domestic violence. It also takes note of the implementation in seven public hospitals of the National Programme for Prevention and Comprehensive Care for Victims of Gender Violence and of the introduction of custodial penalties to punish acts of domestic violence. However, the Committee is concerned by the lack of a specific law to prevent, punish and eradicate violence against women, particularly sexual abuse, domestic violence and violent killings of women, in spite of the high incidence of such violence in the State party (arts. 2, 12, 13 and 16).

The State party should intensify its efforts to ensure the implementation of urgent and effective protective measures to prevent and combat all forms of violence against women and girls, particularly sexual abuse, domestic violence and violent killings of women. Such measures should include, in particular, the rapid adoption of a law to prevent, punish and eradicate violence against women that is in conformity with the Convention on the Elimination of All Forms of Discrimination against Women and with general recommendation No. 19 of 1994 on violence against women of the Committee on the Elimination of Discrimination against Women. The State party should also undertake broad awareness-raising campaigns and provide training courses on the prevention of violence against women and girls for officials who are in direct contact with victims (law enforcement officers, judges, lawyers, social workers, etc.) and for the general public.

(22) The Committee notes with concern the general prohibition of abortion in article 109 of the Criminal Code, which applies even to cases of sexual violence, incest or when the foetus is not viable, with the sole exception of cases where the foetus dies as an indirect result of an intervention that is necessary to avert a serious threat to the life of the mother. This means that the women concerned are constantly reminded of the violation committed against them, which causes serious traumatic stress and carries a risk of long-lasting psychological problems. The Committee also notes with concern that women who request an abortion under the circumstances described above are punished. The Committee is also concerned about the denial of medical care to women who have decided to have an abortion, which could seriously jeopardize their physical and mental health and could constitute cruel and inhuman treatment. The Committee expresses its deep concern that illegal abortions are still one of the main causes of mortality among women. The Committee also notes with concern that medical professionals can be investigated and punished by the State party for practising therapeutic abortions. The Committee is also concerned that medical professionals have reported abortions that have come to their knowledge under the protection of professional secrecy, in violation of the profession's code of ethics (arts. 2 and 16).

The Committee urges the State party to review its legislation on abortion, as recommended by the Human Rights Council, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights in their latest concluding observations, and to consider providing for further exceptions to the general prohibition of abortion, in particular for cases of therapeutic abortion and pregnancy resulting from rape or incest. The State party should, in accordance with the guidelines issued by the World Health Organization, guarantee immediate and unconditional treatment for persons seeking emergency medical care. The State party should also take measures to

preserve confidentiality between doctors and patients when medical care is provided for complications arising from an abortion.

Trafficking in persons

(23) The Committee recognizes the efforts made by the State party to address trafficking in persons, including the creation of the Inter-Agency Committee to Prevent and Combat Human Trafficking and special units in the National Secretariat for Children and Adolescents and the Secretariat for Women, the establishment of a centre to provide comprehensive support for trafficking victims and the drafting of a bill to combat trafficking in persons. The Committee notes with interest the opening of a temporary shelter for trafficking victims, but observes that the shelter has limited space and only receives female victims. The Committee is concerned that Paraguay continues to be both a source and transit country for human trafficking and regrets the lack of comprehensive information on trafficking cases and convictions (arts. 2, 10 and 16).

The State party should ensure that all allegations concerning the trafficking of persons are investigated promptly, impartially and thoroughly and that the offenders are prosecuted and punished for the crime of trafficking in persons. The State party should continue to conduct nationwide awareness-raising campaigns, provide adequate programmes of assistance, recovery and reintegration for victims of trafficking and offer training to law enforcement officers, judges, prosecutors, migration officials and border police on the causes, consequences and repercussions of trafficking and other forms of exploitation. In particular, the State party should make every effort to implement the National Plan for the Prevention and Elimination of the Sexual Exploitation of Children and Adolescents and ensure it is allocated the necessary human and financial resources. The Committee further recommends that the State party increase its efforts to establish systems and mechanisms of international, regional and bilateral cooperation with countries of origin, transit and destination in order to prevent, investigate and punish cases of human trafficking.

Training and the implementation of the Istanbul Protocol

(24) The Committee takes note of the information in the report of the State party on training schemes for the Armed Forces, prosecutors and members of the national police but regrets that so little information is available on the evaluation of those schemes and their effectiveness in reducing the incidence of torture and ill-treatment. In particular, the Committee regrets the lack of information on the training provided on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) to personnel involved in the investigation and identification of torture and ill-treatment (art. 10).

The State party should:

(a) **Continue to provide training programmes so as to ensure that all public servants, in particular police and other law enforcement officers, are fully aware of the provisions of the Convention;**

(b) **Assess the effectiveness and impact of training schemes and education on the incidence of torture and ill-treatment;**

(c) **Establish a training plan for all personnel involved in the investigation and identification of torture, including public defenders, doctors and psychologists, so that the contents of the Istanbul Protocol are known and applied in practice.**

Redress, including compensation and rehabilitation

(25) The Committee takes note of the information provided in the report of the State party on the financial compensation awarded to victims of human rights violations,

including torture, committed during the period 1954–1989. The Committee regrets not having received information on the implementation of rehabilitation measures, such as psychological assistance or training, for such victims. The Committee also regrets the total lack of information on measures to compensate victims of acts of torture committed after the dictatorship (art. 14).

The State party should ensure that the appropriate steps are taken to provide the victims of torture and ill-treatment with redress, including fair and adequate compensation, and the fullest possible rehabilitation.

In its next periodic report, the State party is asked to provide the Committee with statistics and full details of cases in which victims have obtained full redress, including investigation and punishment of the perpetrators, compensation and rehabilitation.

Violence against children

(26) The Committee takes note of the measures taken to prohibit corporal punishment of children living with their mothers in places of detention or in shelters. The Committee also takes note of the information provided by the State party delegation on the existence of a bill to prohibit corporal punishment. However, the Committee is concerned that corporal punishment in the home is still not prohibited (art. 16).

The Committee recommends that the State party explicitly prohibit corporal punishment of children in all settings, including in the home.

Protection of indigenous peoples

(27) The Committee takes note of the measures already taken by the State party to comply with the judgements and decisions handed down within the Inter-American human rights system on the protection of indigenous peoples in the territory of the State party. The Committee also takes note of the measures taken in collaboration with the International Labour Organization to combat the exploitation of indigenous peoples for their labour. However, the Committee is concerned by reports of the persistence of such exploitation of members of the indigenous peoples living in Paraguay, which is equivalent to inhuman treatment in violation of the Convention (art. 16).

The Committee recommends that the State party take all measures necessary to eliminate all forms of exploitation of members of indigenous peoples for their labour. The State party should also, within a reasonable time frame, fully comply with the judgements of the Inter-American Court of Human Rights that obligate it to adopt measures to protect indigenous peoples.

(28) The State party is urged to ensure wide circulation of the report submitted to the Committee and of the Committee's concluding observations through official websites, the media and non-governmental organizations.

(29) The Committee requests the State party to provide information, by 25 November 2012, on the follow-up to the Committee's recommendations on: (a) access to and strengthening of the legal safeguards for detained persons; (b) the conduct of prompt, impartial and effective investigations; and (c) the prosecution of those suspected of committing acts of torture and other forms of ill-treatment and the punishment of those responsible for such acts, as set forth in paragraphs 11 and 18 of the present document. The Committee also requests information on follow-up to the recommendations presented in paragraph 23 of the present document regarding measures to be taken to prevent, combat and eradicate trafficking in persons.

(30) The State party is invited to submit its seventh periodic report at the latest by 25 November 2015. In that regard, the Committee will, since the State party has agreed to

submit its reports under the optional reporting procedure, send the State party, in due course, a list of issues prior to the submission of the report.

59. **Sri Lanka**

(1) The Committee considered the combined third and fourth periodic report of Sri Lanka (CAT/C/LKA/3-4) at its 1030th and 1033rd meetings, held on 8 and 9 November 2011 (CAT/C/SR.1030 and 1033). At its 1050th, 1051st and 1052nd meetings, held on 22 to 23 November 2011 (CAT/C/SR.1050, 1051 and 1052), it adopted the following concluding observations.

A. Introduction

(2) The Committee welcomes the submission of the combined third and fourth periodic reports of Sri Lanka, which generally follows the Committee's guidelines for reporting. However, the Committee regrets that the report lacks statistical and practical information on the implementation of the provisions of the Convention and that it was submitted two years late. The Committee appreciates the dialogue with the delegation, the answers provided orally during the consideration of the report and the additional written submissions.

B. Positive aspects

(3) The Committee welcomes that, in the period since the consideration of the second periodic report, the State party has ratified or acceded to the following international instruments:

(a) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in September 2006;

(b) United Nations Convention against Transnational Organized Crime, in September 2006.

(4) The Committee notes the efforts undertaken by the State party to reform its legislation, including:

(a) The adoption in 2005 of the Prevention of Domestic Violence Act No. 34, which provides for protection orders to safeguard both children and women;

(b) The adoption in 2006 of the Penal Code (Amendment) Act No. 16, which *inter alia* made it a penal offence to engage and recruit a child for use in armed conflict and in child labour, child trafficking and child pornography.

(5) The Committee also welcomes the efforts made by the State party regarding ongoing policies and procedures, including:

(a) The adoption of a National Plan of Action for Children (2010–2015);

(b) The consultations with civil society organizations regarding the elements to be incorporated in the draft National Action Plan on Human Rights, which would include a focus area on the prevention of torture;

(c) The establishment of the Lessons Learnt and Reconciliation Commission in May 2010.

C. Principal subjects of concern and recommendations

Allegations of widespread use of torture and ill-treatment

(6) Notwithstanding the new circumstances prevailing since the defeat of the Liberation Tigers of Tamil Eelam (LTTE) and the end of the military conflict that had consumed the country for nearly 30 years, and the State party's public commitment to the Committee that it has a zero-tolerance policy on torture as a matter of State policy and practice, the

Committee remains seriously concerned about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings. The Committee is further concerned at reports that suggest that torture and ill-treatment perpetrated by State actors, both the military and the police, have continued in many parts of the country after the conflict ended in May 2009 and is still occurring in 2011 (arts. 2, 4, 11 and 15).

As a matter of urgency, the Committee calls upon the State party to take immediate and effective measures to investigate all acts of torture and ill-treatment and prosecute and punish those responsible with penalties that are consistent with the gravity of their acts. It calls upon the State party to ensure that torture is not used by law enforcement personnel and members of the military. In addition to these measures, the State party should unambiguously reaffirm the absolute prohibition of torture and publicly condemn practices of torture, accompanied by a clear warning that anyone committing such acts or otherwise complicit or participating in torture will be held personally responsible before the law for such acts and will be subject to criminal prosecution and appropriate penalties.

The Committee recalls the absolute prohibition of torture contained in article 2, paragraph 2, of the Convention, stating that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”, as well as the statement by the representative of the State party reaffirming this.

Fundamental legal safeguards

(7) While noting the information provided by the State party on the content of the Presidential Directives of 7 July 2006 (reissued in 2007) and the Rules with regard to Persons in Custody of the Police (Code of Departmental Order No. A 20), the Committee expresses its serious concern at the State party’s failure in practice to afford all detainees, including those detained under anti-terrorist laws, with all fundamental safeguards from the very outset of their detention. The Committee is concerned that, despite the content of the 2006 Presidential Directives, criminal suspects held in custody still have no statutory right to inform a family member of the arrest or to have prompt access to a lawyer of their choice. The Code of Criminal Procedure also lacks other fundamental legal safeguards, such as the right to have a lawyer present during any interrogation and to be assisted by an interpreter and the right to confidential communication between lawyer and client. The Committee notes with concern that access to a doctor is left to the discretion of the police officer in charge of the police station. It also expresses concern about reports that police fail to bring suspects before a judge within the time prescribed by law and that accused persons are often not adequately informed about their rights. The Committee also expresses its concern at the absence of a State-sponsored legal aid programme; and, at the variety of institutional, technical and procedural obstacles rendering the writ of habeas corpus ineffective (art. 2).

The State party should take prompt and effective measures to ensure, in law and in practice, that all detainees are afforded all legal safeguards from the very outset of their detention. These include, in particular, the rights of each detainee to be informed of the reasons for his/her arrest, including of any charges against him/her; to have prompt access to a lawyer and to consult privately with him/her and, when needed, legal aid, as well as an independent medical examination, if possible by a doctor of his/her choice; to notify a relative and to be informed of his/her rights; to have a lawyer present during any interrogation by the police and to be assisted by an interpreter; to be brought promptly before a judge and to have the lawfulness of his/her detention reviewed by a court, in accordance with international instruments.

The State party should ensure that, when suspects are produced before the courts by the police, magistrates always inquire whether the suspect was tortured or mistreated by the police while in custody. The State party should ensure that public officials, in particular judicial medical officers (JMO), prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, record and report any such suspected or claimed act to the relevant authorities.

Secret detention centres

(8) Notwithstanding the statement of the Sri Lankan delegation categorically denying all allegations about the existence of unacknowledged detention facilities in its territory, the Committee is seriously concerned about reports received from non-governmental sources regarding secret detention centres run by the Sri Lankan military intelligence and paramilitary groups where enforced disappearances, torture and extrajudicial killings have allegedly been perpetrated (arts. 2 and 11).

The State party should ensure that no one is detained in any secret detention centres, as these facilities are per se a breach of the Convention. The State party should investigate and disclose the existence of any such facilities and the authority under which any of them has been established. The State party should also ensure that the results of the investigation are made public. It should abolish any such facilities and any perpetrators found responsible should be held accountable.

Enforced disappearances

(9) While welcoming the State party's Supreme Court judgement in *Kanapathipillai Machchavallavan v Officer in Charge Army Camp Plaintain Point, Trincomalee and Three Others* (2005), according to which enforced disappearance could constitute a violation of article 13(4) of the Constitution, the Committee notes with concern that this reasoning has not been reflected in more recent decisions. It also notes that that enforced disappearance is not a separate offence under Sri Lankan criminal law and that such acts are charged under other crimes in the Penal Code, including kidnapping, abduction and wrongful confinement. The Committee expresses its concern that 475 new cases of enforced disappearance were transmitted by the Working Group on Enforced or Involuntary Disappearances to the State party under its urgent procedure during the period 2006–2010, and the claims that military, police, the Criminal Investigation Department (CID) and paramilitary groups are the alleged perpetrators. It is also concerned at reports suggesting that the sweeping powers granted under anti-terrorist legislation contributed to the large number of new disappearances (arts. 2, 11, 12, 13 and 16).

The State party should:

- (a) **Take all the necessary measures to ensure that enforced disappearance is established as an offence in its domestic law;**
- (b) **Ensure that the cases of enforced disappearances are thoroughly and effectively investigated, that suspects are prosecuted and those found guilty punished with sanctions proportionate to the gravity of their crimes;**
- (c) **Ensure that the any individual who has suffered harm as the direct result of an enforced disappearance has access to information about the fate of the disappeared person, as well as to fair and adequate compensation;**
- (d) **Adopt measures to clarify the outstanding cases of enforced disappearances and comply with the request to visit by the Working Group on Enforced or Involuntary Disappearances (A/HRC/16/48, para. 450).**

The Committee furthermore calls upon the State party to consider ratifying the International Convention for the Protection of All Persons from Enforced Disappearance.

Anti-terrorism measures

(10) While noting the State party's decision to lift the long-standing state of emergency on 31 August 2011, the Committee expresses concern that 24 hours before it ended new regulations were decreed under the Prevention of Terrorism Act No. 48 of 1979 (PTA). The Committee is concerned about the sweeping nature of these PTA regulations, which unduly restrict legal safeguards for persons suspected or charged with a terrorist or related crime, as pointed out by the Human Rights Committee and the Special Rapporteur on the question of torture. The Committee notes that the President continued to invoke Section 12 of the Public Security Ordinance (Chapter 40) to allow the armed forces to retain policing powers in all 25 districts (Presidential Order of 6 August 2011). In this connection, the Committee notes with concern that with the lapsing of the state of emergency, the limited safeguards contained in Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, which applied when arrests were made by armed forces, apparently are no longer in effect under the new PTA regulations (e.g. a person arrested by a member of the armed forces had to be handed over to the police within 24 hours) (arts. 2 and 16).

The State party should ensure the respect for fundamental legal safeguards and take all necessary measures to ensure that its legislative, administrative and other anti-terrorism measures are compatible with the provisions of the Convention, especially with article 2, paragraph 2.

Coerced confessions

(11) While noting the clarification given by the State party in respect of the inadmissibility of evidence obtained through torture under the Evidence Ordinance Act 1985, the Committee remains concerned about the fact that the PTA allows all confessions obtained by police at or above the rank of Assistant Superintendent of Police (ASP) to be admissible (sect. 16) placing the burden of proof on the accused that a confession was obtained under duress (sect. 17(2)). The Committee is also concerned at reports that in most cases filed under the PTA the sole evidence relied upon is confessions obtained by an ASP or an officer above that rank. The Committee further notes with concern reports documenting individual cases of torture and ill-treatment where the victims were allegedly randomly selected by police to be arrested and detained for what appears to be an unsubstantiated charge and subsequently subjected to torture or ill-treatment to obtain a confession for those charges (arts. 2, 11, 15 and 16).

The State party should explicitly exclude any evidence obtained as a result of torture and ensure that legislation, including anti-terrorism legislation, concerning evidence to be adduced in judicial proceedings is brought in line with the provisions of article 15 of the Convention.

The State party should also ensure that all detainees are asked by the judge whether or not they were ill-treated or tortured in custody. The State party should ensure that judges order independent medical examinations whenever a suspect requires one in court and that prompt and impartial investigations are conducted whenever there is a reason to believe that an act of torture occurred, especially in cases where the sole evidence presented is a confession. The judge should exclude such statements if the suspect so requests in court and the medical examination sustains the claim. Detainees should receive a copy confirming their request for a medical report and a copy of the report itself.

Registration of all detainees

(12) The Committee notes that according to the State party's core report, that over the period 2000–2005, more than 80,000 persons were imprisoned annually, of whom more than 60,000 were never convicted. Furthermore, according to the additional written information provided by the State party's delegation, 765 persons are detained in Sri Lanka under administrative detention orders as of 11 November 2011 but there is no central registry on detentions carried out under the PTA. The Committee recalls with concern that, in response to the Committee's confidential inquiry under article 20 of the Convention (A/57/44, paras. 123–195), the State party informed it that a computerized central police registry had been established, yet now reveals this has not happened (arts. 2, 11 and 16).

The State party should:

(a) **Ensure that all suspects under criminal investigation are registered promptly from the moment of apprehension and not only upon formal arrest or charging;**

(b) **Establish immediately a central register for all persons in official custody, inter alia, persons in prisons, police stations and “rehabilitation centres”, as well as those detained under the PTA.**

(c) **Publish a list of all detainees and places of detention.**

Human rights defenders, defence lawyers, journalists and other civil society actors at risk

(13) The Committee expresses its concern at reports that human rights defenders, defence lawyers and other civil society actors, including political activists, trade unionists and independent media journalists have been singled out as targets of intimidation, harassment, including death threats and physical attacks and politically motivated charges. It regrets that, in many cases, those allegedly responsible for acts of intimidation and reprisal appear to enjoy impunity. The Committee notes with regret that the State party was unable to provide adequate information on the specific incidents about which the Committee had inquired, including the cases of journalists, such as Poddala Jayantha, Prageeth Eknaligoda and J. S. Tissainayagam, and lawyers, such as J.C. Welliamuna and Amitha Ariyaratne. This resulted in a number of submissions to the Committee by some of the individuals concerned containing contradictory information. The Committee is also concerned about information received according to which the Ministry of Defence has published articles on its website implying that lawyers defending individuals are “traitors” to the nation. The Committee is concerned about the fact that one of these articles, entitled “Traitors in Black Cloaks Flocked Together”, included the names and photographs of five lawyers, putting them at of risk of attacks (arts. 2, 12, 13 and 16).

The State party should:

(a) **Ensure that all persons, including those monitoring human rights and combating torture and impunity are protected from intimidation or violence as a result of their activities;**

(b) **Take prompt and effective measures, including investigation and prosecution, to address concerns regarding the extremely hostile environment for human rights defenders, lawyers, journalists and other civil society actors in Sri Lanka.**

Conditions of detention in police stations and prisons

(14) The Committee is concerned at the deplorable levels of overcrowding and poor conditions prevailing at police stations and prisons, especially the lack of hygiene,

inadequate medical care, the non-separation of convicted and remand prisoners and the failure to keep adult detainees and juvenile offenders separate, as reported by the Special Rapporteur on the question of torture (A/HRC/7/3/Add.6 and A/HRC/13/39/Add.6). In this respect, the Committee regrets the absence of information provided by the State party on measures taken to improve conditions of detention for those held on remand and for convicted persons (arts. 11 and 16).

The State party should:

(a) Ensure that conditions of detention in the country's prisons are compatible with the Standard Minimum Rules for the Treatment of Prisoners and the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules);

(b) Increase its efforts to remedy prison overcrowding, in particular by instituting alternatives to custodial sentences;

(c) Continue to expand the prison infrastructure and the remand centres, including those for juvenile offenders;

(d) Take effective measures to improve the adequacy of health-care resources in penitentiary institutions, and ensure that the medical assistance given to detainees is of high quality.

Deaths in custody

(15) The Committee is concerned at reports from non-governmental organisations on deaths in custody, including police killings of criminal suspects in alleged staged "encounters" or "escape" attempts. The Committee notes with concern that the State party only reported two cases of death in custody, where the cause of death was determined to be suicide, for the entire period 2006–2011, while for a similar period between 2000–2005 the State party had reported in its core document approximately 65 annual deaths in custody from all causes (HRI/CORE/LKA/2008, p. 87).

The Committee urges the State party to investigate promptly, thoroughly and impartially all deaths of detainees assessing any possible liability of law enforcement officers and prison personnel, and provide, where appropriate punishment of the perpetrators and compensation to the families of the victims.

The State party should provide comprehensive data regarding reported cases of deaths in custody, disaggregated by location of detention, sex, age, ethnicity of the deceased and cause of death.

Monitoring detention facilities

(16) While noting the Human Rights Commission of Sri Lanka's (HRCSL) broad inquiry powers to investigate human rights violations vested in Section 11 of the Human Rights Commission Act No 21 of 1996, the Committee is concerned about its reported inactivity, the lack of cooperation from the police and the Government and the limited resources and challenges to its independence and impartiality as a result of the 18th Amendment to the Sri Lankan Constitution, which places the appointment of its members solely in the hands of the Head of State. The Committee is also concerned that, contrary to the information provided by the State party, the International Committee of the Red Cross (ICRC) is not allowed to visit the "rehabilitation centres" or facilities holding LTTE suspects yet to be formally charged. The Committee notes with concern that during 2009 the military administration in closed internment camps for IDPs denied access to humanitarian organisations, including the United Nations and the ICRC (arts. 2, 11, 12, 13 and 16).

The Committee calls upon the State party to establish an independent national system to effectively monitor and inspect all places of detention, including facilities holding LTTE suspects and closed IDP camps, and to follow-up on the outcome of its systematic monitoring.

The State party should take necessary measures to support work of HRCSL, ensuring that its recommendations are fully implemented. It should also provide detailed information on the action taken on the recommendations made by the Commission on its visit to Mount Lavinia police station on 15 August 2011.

The State party should strengthen the capacity of non-governmental organizations that undertake monitoring activities and adopt all appropriate measures to enable them to carry out periodic, independent and unannounced visits to places of detention.

The Committee strongly encourages the State party to consider the possibility of ratifying the Optional Protocol to the Convention against Torture, with a view to establishing a system of regular unannounced visits by national and international monitors, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Human Rights Commission of Sri Lanka (HRCSL)

(17) The Committee is concerned that the new appointment process set out by the 18th Amendment to the Sri Lankan Constitution (September 2010), which ends Parliament's role in approving appointments, undermines the independence of the HRCSL. The Committee is also concerned about the difficulties the HRCSL has had in carrying out its function owing in part to the lack of cooperation from other State party institutions, limited human and financial resources, which has reduced its ability to investigate specific incidents and make recommendations for redress, and failure to publish the reports of its investigations (arts. 2 and 12).

The State party should ensure that the HRCSL effectively fulfils its mandate and receives the necessary resources for that purpose. It should also ensure that the Commission is able to initiate as well as carry out independent investigations into alleged and possible cases of torture and ill-treatment, including those concerning military premises, as well as "rehabilitation centres" and other government-controlled facilities such as "welfare centres", and to publish the results. The State party should establish a transparent and consultative selection process to guarantee its full independence in line with the Paris Principles.

Impunity for acts of torture and ill-treatment

(18) The Committee remains concerned about the prevailing climate of impunity in the State party and the apparent failure to investigate promptly and impartially wherever there is reasonable ground to believe that an act of torture has been committed. It also notes the absence of an effective independent monitoring mechanism to investigate complaints of torture. The Committee expresses concern over reports that the Attorney General's office has stopped referring cases to the Special Investigations Unit (SUP) of the police and the large proportion of pending cases still outstanding. The Committee is also concerned at numerous reports concerning the lack of independence of the judiciary (arts. 11, 12 and 13).

The State party should:

- (a) Ensure that a prompt and impartial investigation is made into all complaints of torture or ill-treatment. In particular, such investigation should be under the responsibility of an independent body, not under the authority of the police;
- (b) Establish an independent complaints system for all persons deprived of their liberty;

(c) **Launch prompt and impartial investigations spontaneously and wherever there is reasonable ground to believe that an act of torture has been committed;**

(d) **Ensure that the Attorney General's office fulfils its responsibilities to refer cases to the SUP;**

(e) **Ensure that, in cases of alleged torture, suspects are suspended from duty immediately for the duration of the investigation, particularly if there is a risk that they might otherwise be in a position to repeat the alleged act or to obstruct the investigation;**

(f) **Ensure that, in practice, complainants and witnesses are protected from any ill-treatment and acts of intimidation related to their complaint or testimony;**

(g) **Bring to trial the alleged perpetrators of acts of torture or ill-treatment and, if they are found guilty, ensure sentences with penalties that are consistent with the gravity of their acts. In this connection, legislative measures should be taken to guarantee the independence of the judiciary.**

Witness and victim protection

(19) The Committee remains concerned at the absence of an effective mechanism to ensure the protection of and assistance to witnesses and victims of human rights violations and abuses, which has a negative impact on the willingness and ability of witnesses and victims to participate in investigations or to testify in proceedings. In this regard, the Committee is concerned about the impunity in the cases of attacks against witnesses and victims, as illustrated in the case of Gerald Perera and those allegedly involved in his murder following his allegation of torture against several police officers. The Committee notes with concern that a bill on witness and victim protection has been on the parliamentary agenda since 2008. The Committee regrets the scant substantive information provided by the State party regarding the case of Siyaguna Kosgodage Anton Sugath Nishantha Fernando, a complainant in a torture case before the Supreme Court, who was killed by unidentified gunmen on 20 September 2008. The victim had repeatedly requested protection measures for himself and his family against alleged perpetrators (arts. 2, 11, 12, 13 and 15).

The Committee reiterates its earlier recommendation (CAT/C/LKA/CO/2, para. 15) that the State party should ensure that witnesses and victims of human rights violations are effectively protected and assisted, in particular by ensuring that perpetrators do not influence protection mechanisms and that they are held accountable.

Internally displaced persons

(20) The Committee notes that near the end of the armed conflict in 2009 over 280,000 people fled from the northern LTTE-controlled areas to government-controlled territory in Vavuniya, Mannar, Jaffna and Trincomalee districts, where the vast majority of them entered closed military-run internment camps. While noting the information provided by the State party regarding the substantial efforts undertaken to respond to the influx of displaced persons, the Committee remains concerned at the situation of IDPs in the country, especially those who remain in "welfare centres". According to the State party, IDPs were initially provided with "a secure environment and cared for while they were screened to identify terrorist cadre[s] who had infiltrated the civilian population that was rescued at the conclusion of the armed conflict". The Committee, however, remains concerned about consistent allegations of torture and ill-treatment during questioning of camp residents by the Criminal Investigation Department (CID) and the Terrorist Investigation Department (TID). The Committee is concerned that these allegations have not been investigated

outside the context of the Lessons Learnt and Reconciliation Commission (LLRC) process and that no judicial action has been taken. The Committee is also concerned at reports of massive overcrowding, poor hygienic and sanitary conditions, malnutrition, inadequate medical and psychological assistance and lack of freedom of movement for camp residents during and after the final stages of the war (arts. 2, 11 and 16).

The State party should:

(a) Adopt the necessary measures to guarantee the physical integrity and address the specific needs of internally displaced persons, in accordance with the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), including the medical care and psychological attention they require;

(b) Ensure that investigations are carried out into the alleged cases of torture, including sexual violence, against camp residents and that perpetrators of such acts are brought before the courts;

(c) Provide mandatory in-service training programmes on human rights, internal displacement and gender-based violence for members of the military and law-enforcement officials serving in the camps.

Accountability process and the Lessons Learnt Reconciliation Commission (LLRC)

(21) The Committee notes that there have been a number of ad hoc commissions of inquiry looking into past human rights violations, including the Presidential Commission of Inquiry to investigate serious cases of human rights violations that occurred since 1 August 2005, which according to the International Independent Group of Eminent Persons (IIGEP) did not meet international standards of independence, witness and victim protection and transparency. The Committee notes the information on the mandate, composition and working methods of the Lessons Learnt Reconciliation Commission (LLRC) and the Inter-Agency Advisory Committee (IAAC), established in May and September 2010, respectively. The Committee notes the assurances by the delegation of the State party that the LLRC has the faculty to channel the complaints received “with a possibility of immediate investigation and remedial action”, and that the Attorney General is “empowered to institute criminal proceedings based on the material collected during the course of the recommendations made by the LLRC”. The Committee, nevertheless, regrets the apparent limited mandate of the LLRC and its alleged lack of independence. In addition, it regrets the lack of information provided by the State party on the investigations undertaken into allegations of serious violations of international human rights law, such as torture, including rape and enforced disappearances, and other forms of ill-treatment that allegedly occurred during the last stages of the conflict and in the post-conflict phase, as reported by numerous sources, including the Special Rapporteur on the question of torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Secretary-General’s Panel of Experts on Accountability in Sri Lanka. The Committee notes that the State party asserts that the LLRC “has taken cognizance of all the allegations”, but regrets that it has not received any such information. The Committee notes that the State party “(...) will await LLRC’s report before considering further action” and that a “comprehensive answer will be submitted” to this Committee on the establishment of programmes to assist victims of torture and ill-treatment that occurred during the course of the armed conflict “once the LLRC’s report is finalized and made public” (arts. 2, 12, 13, 14 and 16).

Following the LLRC initiative, the State party should promptly launch impartial and effective investigations into all allegations of violations of the Convention, including torture, rape, enforced disappearances and other forms of ill-treatment, occurred during the last stages of the conflict and in the post-conflict phase, with a view to

holding accountable those responsible and providing effective redress for victims of such violations.

The State party should consider also the possibility of accepting an international investigatory body, which would address past concerns over the lack of credibility of previous investigations and any outstanding concern about the LLRC.

Violence against women, including sexual violence

(22) The Committee notes with concern reports about a growing number of cases of violence against women, including sexual and domestic violence, as well as the insufficient information provided by the State party in this regard. It also notes with concern that domestic violence and marital rape are recognized only following a judge's legal recognition of the separation of spouses. The Committee is also concerned about reported cases of war-time rape and other acts of sexual violence that occurred following the end of the conflict, in particular in military-controlled camps. (arts. 2, 12, 13 and 16).

The State party should ensure prompt, impartial and effective investigations of all allegations of sexual violence and should prosecute suspects and punish perpetrators.

The Committee reiterates the recommendation made by the Committee on the Elimination of Discrimination against Women (CEDAW/C/LKA/CO/7) that the State party should extend criminalization of marital rape regardless of judicial acknowledgement of separation.

The State party should provide the Committee with information on the investigations of cases of war-time rape and other acts of sexual violence that occurred during the last stages of the conflict and in the post-conflict phase, and the outcome of such trials, including information on the punishments meted out and the redress and compensation offered to the victims.

Sexual exploitation and abuse of children by peacekeepers

(23) The Committee expresses its grave concern over the alleged sexual exploitation and abuse of minors by military members of the Sri Lankan contingent of the United Nations Stabilization Mission in Haiti (MINUSTAH) that occurred in 2007. While noting the information provided by the State party's delegation that the troops in question were repatriated and dealt with under military law, the Committee regrets the lack of information available regarding any specific charges or punishments faced by the 114 members of the Sri Lankan contingent who were repatriated on disciplinary grounds (arts. 2, 5, 12 and 16).

The State party should conduct investigations into the allegations of incidents of sexual exploitation and abuse by military members of the MINUSTAH's Sri Lankan contingent and report their findings and measures taken in response, including the resulting number of indictments, prosecutions and convictions, and measures taken to prevent further occurrences. The Committee encourages the State party to pursue its cooperation with the relevant United Nations departments to ensure progress in this matter.

Human trafficking and violence against Sri Lankan migrant workers

(24) While noting the adoption in 2006 of the Penal Code (Amendment) Act No. 16, the Committee is concerned about persistent reports of trafficking of women and children within the State party for the purposes of forced labour and sexual exploitation, the low numbers of convictions related to human trafficking and the detention of trafficking victims. The Committee is similarly concerned at the reported abuses of many Sri Lankan migrant workers, especially women, who travel abroad and subsequently face conditions of forced labour or other abuse in the host country, as alleged by the representative of the State party. In this regard, the Committee notes with interest the statement of the representative

of the State party that the draft National Action Plan on Human Rights contains a section devoted to the protection of Sri Lankan migrant workers (arts. 2, 12 and 16).

The State party should:

(a) **Increase its efforts to combat trafficking in human beings by taking effective measures to investigate, prosecute and punish those responsible and by further strengthening international cooperation with countries of origin, transit and destination;**

(b) **Review legislation and practices to prevent victims of trafficking from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as victims of trafficking;**

(c) **Instruct consular or diplomatic authorities to provide protection and assistance to Sri Lankan migrant workers to protect their rights to be free from violence, confinement and abuse in violation of the Convention;**

(d) **Consider the possibility of ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.**

Definition of torture

(25) The Committee reiterates its view that the definition of torture included in Section 12 of the 1994 Convention against Torture Act (hereinafter, CAT Act) does not entirely reflect the internationally agreed definition set out in the Convention. It restricts acts of torture to “any act which causes severe pain, whether physical or mental”, while the Convention definition refers to “severe pain or suffering”. It thus does not cover acts that are not violent per se, but nevertheless inflict suffering (arts. 1 and 4).

The Committee reiterates the recommendation made in its previous concluding observations (CAT/C/LKA/CO/2, para. 5), that the State party should amend the definition of torture included in Section 12 of the CAT Act in order to expand the definition of torture to all acts of torture, including those causing severe suffering, in accordance with article 1 of the Convention. In this regard, the Committee draws attention to its general comment No. 2 (2007), which states that serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity (CAT/C/GC/2, para. 9).

Jurisdiction over acts of torture

(26) While noting the information provided by the State party on the implementation of articles 5 to 8 of the Convention, the Committee regrets the lack of clarity on the existence of the necessary measures establishing the State party’s jurisdiction over acts of torture. While the 1994 CAT Act provides for jurisdiction over alleged perpetrators of torture present in the territory of the State party, whether or not citizens, it is unclear whether the law provides for the establishment of universal jurisdiction or whether this remains at the discretion of the High Court, as implied in Section 4(2) CAT Act. Furthermore, Section 7 CAT Act appears to require the rejection of an extradition request before the requirement that the case be submitted to the relevant authorities. The Committee recalls its jurisprudence on the content of the obligation to extradite or prosecute (*aut dedere, aut judicare*), that the State party’s obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for extradition (arts. 5, 6, 7 and 8).

The Committee reiterates its previous recommendation (CAT/C/LKA/CO/2, para. 10) that the State party should ensure that its domestic legislation permits the establishment of jurisdiction for acts of torture in accordance with article 5 of the Convention, including provisions to bring criminal proceedings under article 7 against non-Sri Lankan citizens who have committed acts of torture outside the territory of the State party, who are present in the territory and who have not been extradited.

Refugees, non-refoulement

(27) The Committee notes with concern the absence of domestic legislation or national policy that guarantees the protection of refugees and asylum seekers in the State party and persons who require international protection. The Committee regrets the lack of information provided by the State party on the number of cases of refoulement, extradition and expulsion carried out during the reporting period and on the number of instances in which it has offered diplomatic assurances or guarantees (art. 3).

The State party should adopt a national policy, as well as the necessary legislative and administrative measures, to guarantee protection for refugees, asylum seekers and stateless persons.

The Committee encourages the State party to consider the possibility of ratifying the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.

Training

(28) The Committee notes the information on human rights training for members of the police and the army contained in the State party's report and the responses to the list of issues. It, however, regrets the lack of information on the evaluation of those programmes and in reducing the incidence of torture and ill-treatment, as well as the lack of specific training of medical personnel in detention facilities to detect signs of torture and ill-treatment (art. 10 and 11).

The State party should:

(a) **Continue to provide mandatory training programmes so as to ensure that all public officials, in particular members of the police forces and army personnel, are fully aware of the provisions of the Convention, that breaches are not tolerated but investigated, and that the perpetrators are brought to trial;**

(b) **Assess the effectiveness and impact of training programmes and education on reducing the incidence of torture and ill-treatment;**

(c) **Support training on the use of the manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) for all relevant personnel, including medical personnel.**

Redress, including compensation and rehabilitation

(29) The Committee notes the State party's explanation that, under the fundamental rights jurisdiction, the Sri Lankan courts may grant compensation (529 cases have been filed against police officers since 2006), that there have been a number of instances in which the Supreme Court has awarded pecuniary compensation for torture and that compensation can also be obtained through a damages suit in the District Court. However, the Committee notes reports that compensation amounts are inconsistent. In this regard, the Committee regrets the lack of information contained in the State party's report on Supreme Court and District Court decisions awarding compensation to victims of torture and ill-

treatment, or their families, and the amounts awarded on those cases. The Committee also notes with concern that there is no provision in the 1994 CAT Act, or the penal law, for compensation or other forms of reparation for torture victims. Finally, the Committee regrets the insufficient information provided on the treatment and social rehabilitation services, including medical and psychosocial rehabilitation, provided for all victims of torture (art. 14).

The State party should strengthen its efforts to provide victims of torture and ill-treatment with redress, including fair and adequate compensation, and as full rehabilitation as possible.

The Committee reiterates its previous recommendation (CAT/C/LKA/CO/2, para. 16) that the State party should ensure that appropriate rehabilitation programmes are provided to all victims of torture and ill-treatment, including medical and psychological assistance.

Corporal punishment

(30) The Committee notes that, while corporal punishment is prohibited as a penal sentence under the Corporal Punishment (Repeal) Act No. 23 of 2005, it is not prohibited as a disciplinary measure in penal institutions for juvenile offenders, in the home or alternative care settings, under article 82 of the Penal Code. The Committee also notes with concern that, despite the issuance of Circular No. 2005/17, by the Ministry of Education in 2005, stating that corporal punishment should not be used in schools, there is no prohibition in law and its use is still widespread (arts. 10 and 16).

The State party should consider amending its Penal Code, with a view to prohibiting corporal punishment in all settings and raising public awareness.

Required documentation on compliance

(31) Despite its previous recommendation that the State party provide the Committee with detailed statistical information on a variety of basic criminal issues and other statistical matters (CAT/C/LKA/CO/2, para. 19), the Committee is concerned that this was not provided either in the State party's periodic report, its reply to the list of issues or written supplementary materials. The absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions in cases of torture and ill-treatment by law enforcement officials, military and prison personnel, including enforced disappearances, rape and violence against women, and other forms of torture and ill-treatment, hampers the identification of abuse requiring attention and the effective implementation of the Convention (arts. 2 and 19).

The State party should compile statistical data relevant to the monitoring of the implementation of the Convention at the national and local levels, disaggregated by gender, ethnicity, age, geographical region and type and location of place of deprivation of liberty, including data on complaints, investigations and prosecutions of cases of torture and ill-treatment by law enforcement officials, military and prison personnel, and on enforced disappearances, rape and violence against women.

(32) Noting the voluntary commitments made by the State party in the context of the universal periodic review of the Human Rights Council in May 2008 (A/HRC/8/46, paras. 90 and 108–110) the Committee recommends that the State party consider adopting the draft bill on witness and victim protection and the draft bill on the rights of internally displaced persons; improve and upgrade detention facilities; and, improve the capacity of police in carrying out investigations, with additional training in interrogation and prosecution.

(33) The Committee recommends that the State party consider ratifying the Optional Protocol to the Convention.

(34) The Committee recommends that the State party consider making the declarations under articles 21 and 22 of the Convention.

(35) The Committee invites the State party to consider ratifying the core United Nations human rights treaties to which it is not yet a party.

(36) The State party is encouraged to disseminate widely the reports submitted by Sri Lanka to the Committee and these concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(37) The State party is invited to update its common core document (HRI/CORE/LKA/2008), in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(38) The Committee requests the State party to provide, by 25 November 2012, follow-up information in response to the Committee's recommendations related to (1) ensuring or strengthening legal safeguards for persons detained, (2) conducting, prompt, impartial and effective investigations, and (3) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraphs 7, 11, 18 and 21 of the present document. In addition, the Committee requests follow-up information on remedies and redress to the victims addressed in those paragraphs.

(39) The State party is invited to submit its next report, which will be the fifth periodic report, by 25 November 2015. To that purpose, the Committee invites the State party to accept, by 25 November 2012, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report.

60. **Albania**

(1) The Committee against Torture considered the second periodic report of Albania (CAT/C/ALB/2), at its 1060th and 1063rd meetings (CAT/C/SR.1060 and 1063), held on 8 and 9 May 2012. At its 1084th meeting (CAT/C/SR.1084), held on 25 May 2012, it adopted the following concluding observations.

A. Introduction

(2) The Committee welcomes the submission of the second periodic report by the State party although it was submitted after a delay of almost two years. The Committee notes that the State party's report generally complied with the reporting guidelines, albeit it lacked specific data, disaggregated by sex, age and nationality, in particular about acts of torture and ill-treatment by law enforcement officials.

(3) The Committee appreciates the open and constructive dialogue with the State party's inter-departmental delegation covering all areas under the Convention. The Committee also appreciates the submission by the State party of the detailed written replies to the list of issues that it provided in advance of the session to facilitate the consideration of its report.

B. Positive aspects

(4) The Committee welcomes the ratification by the State party of the following international instruments:

(a) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, on 5 June 2007;

- (b) Optional Protocol to the International Covenant on Civil and Political Rights, on 4 October 2007;
- (c) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, on 17 October 2007;
- (d) International Convention for the Protection of All Persons from Enforced Disappearance, on 8 November 2007;
- (e) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, on 5 February 2008;
- (f) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, on 9 December 2008;
- (g) Council of Europe Convention on Action against Trafficking in Human Beings, on 6 February 2007;
- (h) Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, on 6 February 2007.

(5) The Committee welcomes the enactment of the following legislation:

(a) Law No. 9686 of 26 February 2007, amending the definition of torture in article 86 of the Criminal Code, that criminalizes acts falling under article 1 of the Convention, including when committed by persons acting in an official capacity, and adding aggravating circumstances in article 50 of the Criminal Code for the punishment of offences when motivated by factors such as gender, race or religion; and

(b) Law no. 9669 of 18 December 2006 'On measures against violence in family relations' and law no. 10494 of 22 December 2011 'On electronic monitoring of persons deprived of liberty according to law court decisions', aiming to prevent incidents of violence in the family.

(6) The Committee also welcomes:

(a) Assignment, by the Parliament of Albania in 2008, of the People's Advocate as the National Preventive Mechanism against Torture under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) The approval of a 'Manual on the Treatment of Persons in Police Custody', approved by the Director General of the State Police in December 2009;

(c) The adoption of the national Strategy on Gender Equality and Reduction of Violence on Gender Base and Violence in the Family, 2011 – 2015, through the Council of Ministers' Decision no. 573 of 16 June 2011.

(7) The Committee notes the existence of an active civil society that significantly contributes to the monitoring of torture and ill-treatment, thereby facilitating the effective implementation of the Convention in the State party.

C. Principal subjects of concern and recommendations

Definition and criminalization of torture

(8) The Committee welcomes that the State party's Criminal Code (art. 86) is in line with article 1 of the Convention. However, the Committee expresses serious concern at the fact that no information has been reported on the application of article 86 of the Criminal Code and the pattern of reclassifying reported incidents of torture as arbitrary acts under article 250 of the Criminal Code (arts. 1 and 4).

In accordance with the Committee's general comment No. 2 (2007) on implementation of article 2 by States parties, the State party should ensure that evidence of acts considered as torture under article 86 of the Criminal Code is duly compiled and evaluated, refraining from reclassification of reported incidents of torture as arbitrary acts under article 250 of the Criminal Code. The State party should also clarify which of the incidents of ill-treatment by law enforcement officers reported in response to the list of issues and during the dialogue amount to torture and other cruel, inhuman or degrading treatment or punishment, as well as what measures are taken to ensure that prosecutors can apply article 86 of the Criminal Code.

Direct applicability

(9) While welcoming the direct applicability of the Convention, pursuant to article 112 of the Albanian Constitution, the Committee notes with concern that the State party acknowledged during the dialogue that it has no specific information on cases in which the Convention has been invoked and directly applied before the domestic courts (arts. 2 and 10).

The Committee recommends that the State party take steps to:

(a) **Ensure the effective implementation of the Convention and its direct applicability and enforceability within the national legal framework, and disseminate the Convention to all relevant public authorities, including the judiciary, thus facilitating direct application of the Convention before domestic courts;**

(b) **Provide an update on illustrative cases of direct application of the Convention before domestic judicial bodies in its next periodic report.**

People's Advocate as National Preventive Mechanism

(10) The Committee is concerned at reports that the People's Advocate, acting as National Preventive Mechanism, monitors the situation in detention – through the Unit for Prevention of Torture only once it receives allegations of abuse and with prior consent, thus limiting the protective aspects of its preventive visits (art. 2).

The Committee recommends that the State party ensure a regular and timely access by People's Advocate to all places of detention without limiting its visits to on-site inquiry into allegations of abuse, and without prior consent to the visit by the respective authorities.

(11) The Committee is also concerned at the lack of professional staff, financial resources and methodological resources provided to the People's Advocate, and reports alleging undue pressures regarding its functioning such as the absence of assignment of the People's Advocate for more than two years, due to which the places of detention have been visited only irregularly, thus limiting the adequate fulfilment of the monitoring mandate by the People's Advocate and diminishing the role and significance of the institution (arts. 2 and 12).

The Committee recommends that the State party provide the People's Advocate with sufficient human, financial, technical and logistical resources to enable it to carry out its functions effectively and independently, in accordance with article 18, paragraph 3, of the Optional Protocol and guidelines Nos. 11 and 12 of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to make sure that the institution operates free from undue pressures.

(12) While commending the People Advocate's recommendations aimed at, inter alia, improving conditions of police detention cells, the Committee notes with concern the lack of dialogue and follow-up by the Parliament to the recommendations by the People's Advocate as required by the law, as well as public awareness about its recommendations.

The Committee also notes with concern the lack of the People Advocate's mandate to promote human rights of detainees, access to the institution at the regional level, systematic interaction with the international human rights system and of the transparency of appointment processes to the governing bodies (arts. 2 and 12).

The Committee recommends that the State party:

(a) Take steps to improve dialogue and follow-up by the Parliament with a view to implementing the findings and recommendations by the People's Advocate following the missions to the detention centres by its Unit for Prevention of Torture, as required by the law;

(b) Make public, using all appropriate means of communication, the steps taken by the State party to ensure effective implementation of the findings and recommendations adopted by the People's Advocate and to increase public awareness thereof;

(c) Compile and regularly disseminate the best practices by the People's Advocate and undertake relevant training thereon to its personnel;

(d) Strengthen the mandate of the People's Advocate to include promotion of human rights in order to improve safeguards, living conditions and treatment of detainees, make it more accessible through the establishment of a permanent regional presence and improve its systematic interaction with the international human rights system and the transparency of appointment processes to the governing bodies.

Fundamental legal safeguards

(13) The Committee expresses its deep concern at reports that basic safeguards against ill-treatment during pretrial detention are still not applied systematically and effectively as detainees are not always fully informed of their fundamental rights from the outset of their deprivation of liberty, get deprived of timely access to a lawyer and a medical doctor and of the right to notify a family member or person of one's choice of an arrest and current place of detention, and are not often brought before a judge within the constitutionally prescribed periods (arts. 2, 11 and 16).

The Committee recommends that the State party:

(a) Take measures to ensure that all persons detained by the police are fully informed of their fundamental rights as from the very outset of their deprivation of liberty, requiring the provision of an oral information on these rights at the very outset of detention, and supplemented by the provision of an information sheet at the earliest possibility, receipt of which should be attested by a signature of the detained person;

(b) Regularly train police officers on the legal obligation to grant access to a lawyer and a medical doctor from the very outset of a person's deprivation of liberty and to provide for a notification of a detained person's family member or person of one's choice of an arrest and current place of detention;

(c) Ensure that all persons detained by the police are brought before a judge within the constitutionally prescribed periods.

Violence against women, domestic violence and violence against children

(14) While welcoming the Law no. 9669 of 18 December 2006 'On measures against violence in family relations' prompting the establishment of appropriate police structures, protection mechanisms for victims of family violence and series of training activities, and noting the adoption of the national 'Strategy on Gender Equality and Reduction of Violence on Gender Base and Violence in the Family' on 16 June 2011, the Committee expresses

concern about the absence of specific criminal offences punishing violence against women that would consider marital rape and domestic violence as specific penal offences. The Committee is also particularly concerned by the high incidence of violence against children in the family and schools, and the public acceptance of corporal punishment of children (arts. 2 and 16).

The Committee urges the State party to:

- (a) Prepare and adopt, as a matter of priority, a comprehensive legislation on violence against women that would establish marital rape and domestic violence as specific penal offences;**
- (b) Adopt the new draft law against violence against children at schools, prohibit corporal punishment in all settings, including home and alternative care settings and hold the perpetrators of such acts accountable;**
- (c) Take measures at all levels of the government to ensure public awareness of the prohibition and harm of violence against children and women in all sectors.**

Trafficking in persons

(15) The Committee notes the State party's information about the legislative amendments to the Criminal Code to deal with trafficking in persons (articles 110/a, 114/b, and 128/b), activities of the National Coordinator against the Trafficking of Persons and the adoption of 'Action Standard Procedures for Identification and Reference of Potential Victims of Trafficking' of 27 July 2011. However, it expresses serious concern at the absence of data on the measures to prevent acts of trafficking and on prosecutions and types of sentences handed down for such acts (arts. 2, 3, 12, 13, 14 and 16).

The Committee urges the State party to:

- (a) Continue to take effective measures to increase protection to the victims of trafficking in persons;**
- (b) Prevent and promptly, thoroughly and impartially investigate, prosecute and punish trafficking in persons and related practices;**
- (c) Provide means of redress to victims of trafficking, including assistance to victims in reporting incidents of trafficking to the police, in particular by providing legal, medical and psychological aid and rehabilitation including adequate shelters, in accordance with article 14 of the Convention;**
- (d) Prevent return of trafficked persons to their countries of origin where there is a substantial ground to believe that they would be in danger of torture, to ensure compliance with article 3 of the Convention;**
- (e) Provide regular training to the police, prosecutors and judges on effective prevention, investigation, prosecution and punishment of acts of trafficking, including on the guarantees of the right to be represented by an attorney of one's own choice, and inform the general public of the criminal nature of such acts;**
- (f) Compile disaggregated data about the victims, prosecutions and types of sentences handed down for acts of trafficking, provision of redress to the victims and measures to prevent acts of trafficking as well as the difficulties experienced in preventing such acts.**

Pretrial detention

(16) The Committee welcomes the adoption of the Law no. 10494 of 22 December 2011 "For electronic monitoring of persons of limited liberty under a law court decision" aiming to limit pretrial detention; however, it notes with concern that pretrial detention continues to

be excessively applied. The Committee is particularly concerned about reports of high number of torture and ill-treatment during pretrial detention, the length of detention up to three years, as well as reports of court decision imposing pretrial detention often without justification. Furthermore, the Committee is also concerned at reports that persons who have been detained for long periods and whose rights have not been respected during pretrial detention face often difficulties in access to justice and seeking redress (arts. 2, 11 and 14).

The Committee urges the State party to:

(a) Amend the relevant criminal legislation with a view to imposing pretrial detention as a measure of last resort, in particular when the seriousness of the crime would make any other measure clearly inadequate;

(b) Devise alternative measures to pretrial detention and ensure their effective application by the judiciary;

(c) Adopt all necessary measures to reduce duration pretrial detention and the imposition thereof, and take into account the provisions of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) when devising the measures alternative to preventive detention;

(d) Ensure adequate training for law enforcement and other personnel on the use of pretrial detention;

(e) Immediately investigate all acts of torture and ill-treatment in pretrial detention and provide their victims with access to justice and means of redress.

Administrative detention

(17) The Committee remains concerned at the continued application of the 10-hour administrative detention period for interrogation prior to the 48-hour period within which a suspect must be brought before a judge (arts. 2 and 16).

The Committee recommends that the State party abandon the current 10-hour administrative detention period for interrogation and ensure that the objectives of identification of suspects are met within the 48-hour period during which a suspect must be brought before a judge.

Non-refoulement

(18) The Committee notes with concern the lack of information with regard to grounds for expulsion and means of protection of individuals, considered as a security threat, in accordance with article 3 of the Convention (art. 3).

The Committee recommends that the State party strictly observe in all cases article 3 of the Convention requiring that the State party shall not expel, return or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

Diplomatic assurances

(19) While noting the update on the situation, status and documentation of nine former Guantánamo inmates and their children, received by Albania, the Committee notes with concern the absence of information about the criteria for requesting and granting diplomatic assurances, including an indication if such assurances could serve to modify a conclusion of a risk of torture upon return to the country of origin (art. 3).

The Committee recommends that the State party refrain from seeking and accepting diplomatic assurances, both in the context of extradition and deportation, from the State where there are substantial grounds for believing that a person would be at risk

of torture or ill-treatment upon return to the State concerned, and desist from returning a person to the country of origin where there is a risk of torture or ill-treatment.

Access to complaint mechanisms

(20) The Committee is concerned about the information that alleged victims of ill-treatment by the police are not aware of complaint procedures beyond reporting their complaints to the police, who in some cases refused to accept allegations of misconduct by the police. The Committee is further concerned at reported cases of ill-treatment of persons in a vulnerable situation who have declined to file a complaint against the police out of fear of counter-complaints by the police or other forms of reprisals (arts. 12, 13 and 16).

The Committee recommends that the State party take appropriate measures to ensure that:

(a) Information about the possibility and procedure for filing a complaint against the police is made available and widely publicized, including by being prominently displayed in all police stations of the State party;

(b) All allegations of misconduct by the police are duly assessed and investigated, including cases of intimidation or reprisals in particular against persons in vulnerable situation as a consequence of the complaints of ill-treatment by the police.

Prompt, independent and thorough investigations

(21) The Committee is concerned at the prevalence of limited data on the investigation of torture and ill-treatment and unlawful use of force by the police. The Committee is particularly concerned at the lack of effective investigation of torture and ill-treatment due to the involvement of the Ministry of Interior Affairs in investigation of alleged violations by its subsidiary units, in contravention of a principle of impartiality. The Committee is also concerned about the absence of information whether the investigations into the fatal shooting of three demonstrators by the police during anti-government protests in Tirana in January 2011 have been carried out promptly, independently and thoroughly. The Committee thus reiterates its concern at the absence of independent and effective investigations into the allegations of torture and ill-treatment by law enforcement officials and lack of accountability of the perpetrators. The Committee is further concerned about the lack of investigation into the reported incidents of ill-treatment of children in social care settings (arts. 12, 13 and 16).

The Committee recommends that the State party:

(a) Take all appropriate measures to ensure that all allegations of torture and ill-treatment by the police are investigated promptly and thoroughly by independent bodies, with no institutional or hierarchical connection between the investigators and the alleged perpetrators among the police, and prosecute those responsible and take all measures to ensure that impunity does not prevail, as recommended in the context of the universal periodic review of Albania;

(b) Provide the Committee as a matter of priority with information on the investigations into the fatal shooting of three demonstrators by the police during anti-government protests in Tirana in January 2011, to be carried out promptly, independently and thoroughly;

(c) Compile accurate data on the investigation of torture and ill-treatment and unlawful use of force by the police and update the Committee thereon;

(d) Ensure effective investigation into the reported incidents of ill-treatment of children in social care settings.

Secret detention

(22) The Committee notes with concern that no meaningful Government investigation has been undertaken into the allegations of secret detention carried out on the territory of the State party in the context of its cooperation in countering terrorism. The Committee is further concerned about the lack of information from the State party about the specific measures it has taken to implement the recommendations of the United Nations joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42) (arts. 2, 3 and 12).

The Committee urges the State party to:

(a) Provide information on measures to initiate Government's investigation into alleged involvement of law enforcement officers of the State party in rendition and secret detention programmes;

(b) Make the outcomes of the investigations public;

(c) Take all necessary measures to prevent the future incidents of such nature;

(d) Take specific measures with a view to implementing the recommendations of the United Nations joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42).

Training of law enforcement personnel

(23) While noting the adoption of the Manual on the Treatment of Persons in Police Custody adopted in December 2009, the Committee remains concerned at reports that the staff of police stations has no knowledge of the Manual's existence and its requirements. The Committee also expresses its concern at the lack of specific training to all professionals directly involved in the investigation and documentation of both physical and psychological traces of torture as well as medical and other personnel involved with detainees and asylum seekers on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The Committee is additionally concerned at the lack of information about training programmes for judges on the Convention and the Committee's general comment No. 2 (2007) (art. 10).

The Committee recommends that the State party ensure:

(a) Adequate training on the requirements of the Manual on the Treatment of Persons in Police Custody to all the police staff;

(b) That all law enforcement, medical and other personnel involved in the holding in custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment and the documentation and investigation of torture are provided, on a regular basis, with training on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), requiring the identification of both physical and psychological consequences for victims of torture;

(c) That such training is also provided to personnel involved in asylum determination procedures;

(d) Effective training programmes for judges on the application of the Convention and the Committee's general comment No. 2 (2007).

Missing Roma children

(24) The Committee is concerned about information that 502 out of 661 Albanian Roma street children went reportedly missing following their placement during 1998-2002 in Aghia Varvara children's institution in Greece. The Committee is particularly concerned about the lack of effective efforts by the authorities of the State party to prompt effective investigations into cases of so called disappearance of Roma children by the relevant authorities of Greece (arts. 2, 11, 12 and 14).

The Committee urges the State party to immediately engage with the Greek authorities with a view to promptly creating an effective mechanism to investigate these cases in order to establish the whereabouts of the missing children, in cooperation with the Ombudsmen of both countries and relevant civil society organizations, and identify disciplinary and criminal responsibilities of those involved, before the charges may become time-barred.

Blood feuds

(25) While taking note of the State party's information about the decline in incidents of revenge killing vindicating honour outside the regular legal system, the Committee expresses concern that this practice still remains entrenched in certain parts of the society, in particular due to the prevalence of deeply rooted stereotypes of defending and restoring family honour lost as a result of the initial murder.

Recalling the recommendations by the Human Rights Committee and the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Committee recommends that the State party take further measures, including research and awareness-raising campaigns, to extinguish a belief in the practice of vindicating honour outside the regular legal system and to investigate such crimes and prosecute and punish all perpetrators of such acts.

Identification of members of intervention groups in prisons

(26) The Committee is concerned at reports that members of special intervention groups in prison establishments are not obliged to wear identification badges showing their proper identification during the exercise of their functions (arts. 12, 13 and 14).

The Committee recommends that the State party ensure that members of special intervention groups display appropriate identification at all times when in contact with prisoners to prevent ill-treatment and provide for accountability.

Adequate compensation

(27) While noting that article 44 of the Constitution guarantees compensation to persons who have suffered damage due to illegal action or lack of action by State authorities or its employees, the Committee expresses its concern at reports that in practice many victims of torture or ill-treatment by the police officers or other public officials have to resort to filing a civil suit for compensation (art. 14).

The Committee urges the State party to take immediate legal and other measures to ensure that victims of torture and ill-treatment obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible, in particular the former political prisoners and persecuted persons, and to collect data and share information in the next periodic report on instances and types of compensation and rehabilitation granted.

Data collection

(28) The Committee appreciates the State party's compilation of statistics on crimes, including ill-treatment by the police and trafficking in human beings. It notes the data on

complaints of ill-treatment by law enforcement officers, disaggregated by suspected crime. However, the Committee regrets the absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement, security, military and prison personnel, as well as on honour crimes, domestic and sexual violence, enforced disappearances, and on means of redress, including compensation and rehabilitation provided to the victims (arts. 2, 12, 13 and 16).

The Committee recommends that the State party compile statistical data relevant to the monitoring of the implementation of the Convention at the national level, including data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement, security, military and prison personnel, as well as on honour crimes, domestic and sexual violence, enforced disappearances, and on means of redress, including compensation and rehabilitation provided to the victims.

(29) The Committee recommends that the State party consider making the declarations envisaged under articles 21 and 22 of the Convention, in order to recognize the competence of the Committee to receive and consider inter-State and individual communications, as indicated by the delegation.

(30) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the Convention on the Rights of Persons with Disabilities and its Optional Protocol and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

(31) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(32) The State party is invited to submit its common core document, in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(33) The Committee requests the State party to provide, by 1 June 2013, follow-up information in response to the Committee's recommendations related to (a) ensuring or strengthening legal safeguards for persons detained, and (b) conducting prompt, impartial and effective investigations, and prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraphs 13 and 21 of the present document. In addition, the Committee requests follow-up information on the provision of fair and adequate compensation to the victims as well as data collection, as contained in paragraphs 27 and 28 of the present document.

(34) The State party is invited to submit its next report, which will be the third periodic report, by 1 June 2016. To that purpose, the Committee invites the State party to accept, by 1 June 2013, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of its report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report.

61. Armenia

(1) The Committee against Torture considered the third periodic report of Armenia (CAT/C/ARM/3), at its 1064th and 1067th meetings (CAT/C/SR.1064 and 1067), held on 10 and 11 May 2012. At its 1085th and 1086th meetings (CAT/C/SR.1085 and 1086), held on 28 and 29 May 2012, it adopted the following concluding observations.

A. Introduction

(2) The Committee welcomes the submission of the third periodic report by the State party, which follows the general guidelines regarding the form and contents of periodic reports. Nonetheless, it regrets the State party's delay of seven years in submitting the report.

(3) The Committee welcomes the opportunity to examine compliance with the Convention with a high-level delegation from the State party. It appreciates the State party's extensive written replies to the list of issues (CAT/C/ARM/Q/3 and Add.1) and the additional information provided orally and in writing by the delegation.

B. Positive aspects

(4) The Committee welcomes the ratification by the State party of a number of international and regional instruments, including:

(a) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in September 2006;

(b) International Convention for the Protection of All Persons from Enforced Disappearance, in January 2011;

(c) Convention on the Rights of Persons with Disabilities, in September 2010;

(d) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, in September 2006;

(e) Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict, in September 2005, and on the sale of children, child prostitution and child pornography, in June 2005.

(f) Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of death penalty, in September 2003.

(5) The Committee welcomes the legislative measures taken during the period under review, including:

(a) The adoption in 2008 of a law designating the Human Rights Defender as the national preventive mechanism provided for in the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) The enactment in March 2002 of the Law on the Custody of Arrestees and Remand Prisoners;

(c) The adoption in December 2004 of the Penitentiary Code.

(6) The Committee further welcomes:

(a) The establishment in 2006 of public monitoring groups comprising governmental and non-governmental members;

(b) The standing invitation extended to United Nations special procedures in April 2006, and the visit by the Working Group on Arbitrary Detention in 2010.

(7) The Committee welcomes the oral statement by the delegation that the State party will consider making the declaration envisaged under article 22 of the Convention, in order to recognize the competence of the Committee to receive and consider individual communications.

C. Principal subjects of concern and recommendations

Allegations of torture and ill-treatment in police custody

(8) The Committee is seriously concerned by numerous and consistent allegations, corroborated by various sources, of routine use of torture and ill-treatment of suspects in police custody, especially to extract confessions to be used in criminal proceedings (arts. 2, 4, 12 and 16).

As a matter of urgency, the State party should take immediate and effective steps to prevent acts of torture and ill-treatment throughout the country. The Committee urges the State party to promptly, thoroughly and impartially investigate all incidents of torture, ill-treatment and death in custody; prosecute those responsible; and report publicly on the outcomes of such prosecutions. In addition, the State party should unambiguously reaffirm the absolute prohibition of torture and publicly warn that anyone committing such acts or otherwise complicit or acquiescent in torture will be held personally responsible before the law for such acts and will be subject to criminal prosecution and appropriate penalties.

Hazing and ill-treatment in the armed forces

(9) The Committee remains concerned by allegations that suspicious deaths continue to occur in the Armenian Armed Forces under non-combat conditions and that the practice of hazing and other mistreatment of conscripts by officers and fellow soldiers continues, conducted by or with the consent, acquiescence or approval of officers or other personnel. While noting the information provided by the delegation, the Committee remains concerned about reports that investigations carried out into many such incidents have been inadequate or absent, including the investigations into the deaths of Vardan Sevian, Artak Nazerian, and Artur Hakobian. The Committee is further concerned at the reported absence of effective investigations into allegations of abuse, such as those made against Vardan Martirosian, and the inadequate punishments of those convicted for the abuses (arts. 2, 4, 12, 13 and 16).

The State party should reinforce measures to prohibit and eliminate hazing in the armed forces and ensure prompt, impartial and thorough investigation of all allegations of hazing and non-combat deaths in the military. Where evidence of hazing is found, the State party should ensure prosecution of all incidents and appropriate punishment of the perpetrators, make the results of those investigations public, and provide compensation and rehabilitation for victims, including through appropriate medical and psychological assistance.

Definition, absolute prohibition and criminalization of torture

(10) The Committee is concerned that national legislation criminalizing "torture" (article 119 of the Criminal Code) does not conform to the definition of torture in accordance with article 1 of the Convention, and that torture, as presently defined by the State party, does not include crimes committed by public officials, only by individuals acting in a private capacity, with the result that no public official has ever been convicted of torture by the State party. It is also concerned by reports that officials have closed cases of allegations of torture on the basis of reconciliation of the defendant with the victim. It is further concerned that current sanctions (a minimum of three years' imprisonment, and up to seven years' imprisonment with aggravating circumstances) do not reflect the gravity of the crime. Finally, it is concerned that several individuals convicted of torture or ill-treatment under other articles of the Criminal Code have been granted amnesty (arts. 1 and 4).

While appreciating the delegation's oral statement that it intends to amend the Criminal Code, the Committee recommends that the State party ensure that the definition of torture is in full conformity with articles 1 and 4 of the Convention. The

State party should also ensure that all public officials who engage in conduct that constitutes torture or ill-treatment are charged accordingly, and that the penalty for this crime reflects the gravity of the act of torture, as required by article 4 of the Convention. The State party should further ensure that persons convicted of torture or other acts amounting thereto under the Criminal Code are not subject to any statute of limitations, and that the authorities are obligated to investigate and punish persons for such acts regardless of assertions of reconciliation between the defendant(s) and the victim(s).

Fundamental legal safeguards

(11) Notwithstanding the safeguards provided by law, in Government Decision No. 574-N of June 2008 and Chief of Police instruction 12-C of April 2010, and by the Court of Cassation in its December 2009 decision in the case of G. Mikaelyan, the Committee expresses its serious concern about reports received regarding the State party's failure in practice to afford all detainees all fundamental safeguards from the very outset of their de facto deprivation of liberty, including timely access to a lawyer and a medical doctor and the right to contact family members. The Committee is concerned by reports that police officials do not keep accurate records of all periods of deprivation of liberty; do not afford fundamental safeguards to individuals in detention, particularly persons deprived of their liberty for whom a protocol of detention has not been drawn up; do not effectively notify detainees of their rights at the time of detention; do not adhere to the three-day time limit for transferring people deprived of their liberty from a police station to a detention facility; and do not promptly bring detainees before a judge. The Committee also notes that the number of public defenders in the State party remains insufficient (art. 2).

In the context of the current legislation reform, including the amendment of the Criminal Procedure Code, the State party should take prompt and effective measures to ensure, in law and in practice, that all detainees are afforded all legal safeguards from the very outset of their deprivation of liberty. These include the rights to access to a lawyer, to an independent medical examination, to notify a relative, to be informed of their rights, and to be brought promptly before a judge.

The State party should take measures to ensure audio- or videotaping of all interrogations in police stations and detention facilities as a further preventive measure. The Committee encourages the State party to implement as soon as possible its plan to require police to create an electronic protocol of detention immediately upon the de facto deprivation of liberty of persons in police stations. The State party should ensure access to these records by lawyers and relatives of those detained.

The State party should increase the funding provided to the Public Defender's Office of the Chamber of Advocates to ensure the availability of effective legal aid.

Investigations and impunity

(12) The Committee is deeply concerned that allegations of torture and/or ill-treatment committed by law enforcement officials and military personnel are not promptly, impartially or effectively investigated and prosecuted. The Committee is particularly concerned by reports that the Office of the Prosecutor directs the police to investigate some claims of torture and ill-treatment allegedly perpetrated by police officers, rather than assign these complaints to an independent investigation service. In this regard, it is concerned that the Office of the Prosecutor does not regularly ensure that different prosecutors supervise the investigation of a crime and allegations of torture made against police officials by the suspected perpetrator of that crime. The Committee is also concerned that the Special Investigation Service has been unable to gather sufficient evidence to identify the perpetrators in a number of cases in which torture or ill-treatment by officials was alleged, leading to concerns regarding its effectiveness. The Committee is further

concerned by reports that officials alleged to have committed torture or ill-treatment are not immediately suspended from their duties or transferred as appropriate for the duration of the investigation, particularly if there is a risk that they may otherwise be in a position to repeat the alleged act or to obstruct the investigation (arts. 2, 11, 12, 13 and 16).

The State party should:

(a) Take concrete steps to ensure prompt, thorough and impartial investigations into allegations of torture and ill-treatment by law enforcement officials and military personnel leading to the prosecution and punishment of those responsible with penalties that are consistent with the gravity of the act committed;

(b) Ensure that all investigations into crimes involving public officials are undertaken by an independent and effective body;

(c) Ensure that all officials alleged to be responsible for violations of the Convention are suspended from their duties while any investigation into the allegations is in progress.

The Committee urges the State party to provide information on the number of complaints filed against public officials alleging acts that constitute torture or ill-treatment under the Convention, as well as information on the results of investigations into those complaints and any proceedings undertaken, at both the penal and disciplinary levels. This information should describe each relevant allegation and indicate the authority that undertook the investigation.

Deaths in custody

(13) The Committee is concerned at reports from the State party and non-governmental organizations on deaths in custody, including the deaths in police custody of Vahan Khalafyan and Levon Gulyan (arts. 2, 11, 12 and 16).

The Committee urges the State party to investigate promptly, impartially and effectively all deaths of detainees, assessing any liability of public officials, and to ensure punishment of the perpetrators and compensation to the families of the victims. The Committee requests that the State party provide comprehensive updated information on all reported cases of deaths in custody, including location, cause of death and the results of any investigations conducted into such deaths, including punishment of perpetrators or compensation to relatives of victims.

Complaints, reprisals and protection of victims, witnesses and human rights defenders

(14) The Committee notes with concern reports that victims of and witnesses to torture and ill-treatment do not file complaints with the authorities because they fear retaliation. It also notes reports that human rights defenders, as well as journalists, have experienced threats and intimidation as a result of their work, and that the State party has taken few steps to ensure their protection (arts. 2, 11, 12, 13, 15 and 16).

The Committee urges the State party to establish an effective mechanism to facilitate the submission of complaints by victims and witnesses of torture and ill-treatment to public authorities, and to ensure in practice that complainants are protected against any ill-treatment, intimidation or reprisals as a consequence of their complaint. The State party should take all necessary steps to ensure that human rights defenders, as well as journalists, are protected from any intimidation or violence.

Redress, including compensation and rehabilitation

(15) While noting that the State party has paid compensation to victims further to the European Court of Human Rights ruling of July 2011, the Committee regrets the lack of data provided by the State party regarding the amount of any compensation awards made

by the courts to victims of violations of the Convention, including individuals who were denied fundamental safeguards or subjected to torture or ill-treatment in detention. The Committee is concerned that the law does not provide means of reparation for victims of torture other than financial compensation. The Committee also notes the lack of information on any treatment and social rehabilitation services, including medical and psychosocial rehabilitation, provided to victims (art. 14).

The State party should strengthen its efforts to provide victims of torture and ill-treatment with redress, including fair and adequate compensation, and as full rehabilitation as possible. The State party should amend its legislation to include explicit provisions on the right of torture victims to redress, including fair and adequate compensation and rehabilitation for damages caused by torture, in accordance with article 14 of the Convention. It should provide the Committee with information about measures taken in this regard, including allocation of resources for the effective functioning of rehabilitation programmes.

Coerced confessions

(16) The Committee is concerned by allegations that forced confessions are used as evidence in courts in the State party. The Committee is further concerned by reports that courts have failed to stay criminal proceedings in which the defendant has alleged that a confession was obtained through torture, and to request thorough investigations. The Committee is further concerned about the lack of information provided regarding cases in which the State party's courts deemed confessions to be inadmissible as evidence on the grounds that they were obtained through torture (art. 2, 11, 15 and 16).

The Committee urges the State party to ensure that, in practice, statements obtained by torture are not invoked as evidence in any proceedings. The State party should ensure that, in any case in which a person alleges that a confession was obtained through torture, the proceedings are suspended until the claim has been thoroughly investigated. The Committee urges the State party to review cases of convictions based solely on confessions.

The Committee urges the State party to firmly combat any use of torture to extract confessions, and ensure that in practice confessions obtained through torture are never used as evidence in judicial proceedings. The State party should ensure that legislation concerning evidence to be adduced in judicial proceedings is brought in line with article 15 of the Convention and provide information on whether any officials have been prosecuted and punished for extracting such confessions.

Independence of the judiciary

(17) The Committee is concerned by reports of the lack of independence of the judiciary, in particular by the fact that responsibility for appointing, promoting and dismissing judges rests with the President and executive branch. The Committee is further concerned that the State party's legislation provides for criminal liability against judges for adopting an unjust judgment or other judicial act (arts. 2, 12 and 13).

The State party should take measures to ensure the full independence and impartiality of the judiciary in the performance of its functions, and review the regime of appointment, promotion and dismissal of judges in line with the relevant international standards, including the Basic Principles on the Independence of the Judiciary, which provides, in part, that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

Violence against women, including trafficking

(18) The Committee is concerned by the reported extent of physical and sexual violence against women. Furthermore, it is concerned that women rarely report ill-treatment and violence against them to the police. The Committee is particularly concerned by reports that there are no State-funded shelters available for women victims of domestic violence, which is not criminalized in the State party. The Committee regrets that the State party did not provide information on reparation and compensation, including rehabilitation, provided for victims of violence against women. While noting favourably that various national action plans for combating trafficking in human beings have been adopted during the period under consideration, the Committee is concerned by reports that Armenia remains both a source and destination country for women and girls subjected to trafficking (arts. 2, 12, 13 and 16).

The State party should strengthen its efforts to prevent, combat and punish violence against women and children, in particular domestic violence, inter alia, by amending its criminal legislation to make domestic violence a separate crime, conducting awareness-raising campaigns and training on domestic violence for law enforcement personnel and for the public at large, and providing victims of violence with immediate protection and redress, in particular rehabilitation.

It should also create adequate conditions for victims of violence against women, including domestic violence and trafficking, to exercise their right to make complaints. It should thoroughly investigate all allegations of domestic violence and trafficking, and prosecute and punish all perpetrators.

The Committee recommends that State party ensure the implementation of the 2008 National Referral Mechanism for Trafficked Persons and provide services for victims of trafficking, including those relating to provision of shelter, access to professional medical and psychological assistance, and training programmes.

Conditions of detention

(19) While welcoming current efforts by the State party to improve conditions of detention in prisons, including the refurbishing of some facilities and work on the construction of a new prison, the Committee remains concerned at continued reports of severe overcrowding, understaffing and inadequate food and health care. The Committee is concerned by allegations of corruption in prison, including among groups of prisoners in whose behaviour prison officials appear to acquiesce. It is also concerned by reports that some victims of violence or discrimination are singled out by such groups of prisoners for abusive treatment based on perceived sexual orientation or nationality. The Committee regrets that there has not been a significant increase in the implementation of alternative measures to detention by the courts, and also regrets the lack of a confidential mechanism for detainees to make complaints of torture or ill-treatment. The Committee notes the establishment of public monitoring groups, consisting of representatives of non-governmental organizations, mandated to carry out monitoring of penitentiary institutions and police stations. However, the Committee is concerned that the Police Monitoring Group is not granted full access to police stations (arts. 2, 11 and 16).

The State party should continue to take effective measures to improve conditions in places of detention and to reduce overcrowding in such places. The Committee recommends that the State party increase its efforts to remedy prison overcrowding, including through the application of alternative measures to imprisonment in line with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and to provide the Committee with information on any probation service to be established in charge of alternative punishment, conditional release and rehabilitation.

The State party should take necessary measures to eliminate any form of violence or discrimination against detainees based on sexual orientation or nationality, including all abusive and discriminatory actions taken by prison inmates against other detainees. It should establish a confidential system for receiving and processing complaints regarding torture or ill-treatment and ensure that the system is established in all places of deprivation of liberty. The State party should further ensure that all complaints received are promptly, impartially and effectively investigated, and the perpetrators punished with appropriate penalties.

The State party should ensure that the Police Monitoring Group has access to all police stations, including the ability to conduct unannounced visits. It should also take effective measures to keep under systematic review all places of detention, including the existing and available health services therein, and should take measures to eliminate corruption in prisons.

Post-electoral violence

(20) The Committee notes with concern that despite efforts made by the State party to investigate allegations of the use of excessive and indiscriminate force by police in responding to clashes between police and protesters following the February 2008 elections, the investigation by the Special Investigation Service into the 10 deaths that occurred during the clashes remains ongoing. The Committee is also concerned about persistent allegations that in the immediate aftermath of the violence, many individuals were arbitrarily detained, denied the right to access to a lawyer of their choice, and subjected to ill-treatment in custody, and that these allegations have not been adequately investigated (arts. 2, 12, 13 and 16).

The State party should expedite the investigation into the 10 deaths resulting from the violence following the February 2008 elections and ensure that any law enforcement official found to have used excessive or indiscriminate force is prosecuted and punished with sentences appropriate to the gravity of the crime, and that the families of victims are provided with redress, including compensation. The State party should also ensure that broader allegations of excessive and indiscriminate use of force, ill-treatment and denial of safeguards by the police in the aftermath of these elections are independently and effectively investigated. The State party should take measures to ensure that individuals believed to have knowledge of the March 2008 events are effectively protected from reprisals and intimidation.

Juvenile justice

(21) The Committee regrets the absence of juvenile justice, including juvenile courts. The Committee notes the establishment of a public monitoring group, consisting of representatives of non-governmental organizations, mandated to carry out monitoring of special boarding schools. However, the Committee is concerned about the reported practice of holding juvenile detainees in solitary confinement for up to 10 days as a disciplinary sanction at such special schools (arts. 11, 12 and 16).

The Committee encourages the State party to establish a juvenile justice system, and particularly to establish a specialized juvenile division or jurisdiction with judges with professional competence to deal with juvenile cases and other judicial staff, and ensure its proper functioning in compliance with international standards. The State party should closely monitor the situation of special schools to ensure that children are not subjected to intimidation, ill-treatment or violence. The State party should limit the use of solitary confinement as a measure of last resort, for as short a time as possible under strict supervision and with a possibility of judicial review. Solitary confinement of juveniles should be limited to very exceptional cases.

Effectiveness of the Human Rights Defender

(22) The Committee is concerned by the lack of adequate resources for the Human Rights Defender (ombudsman), who has been designated the national preventive mechanism of Armenia, to carry out his mandate effectively. It is also concerned that some recommendations made by the Human Rights Defender to the authorities are not implemented (arts. 2 and 12).

The Committee recommends that the State party provide the resources necessary for the Office of the Human Rights Defender to carry out its double mandate as the ombudsman and national preventive mechanism of Armenia in an effective manner in accordance with the guidelines on national preventive mechanisms established by the Subcommittee on Prevention of Torture. The State party should ensure that law enforcement, prosecutorial, military and prison personnel cooperate with the Human Rights Defender and take steps to implement his recommendations.

Alternative service

(23) While taking note of the draft law to amend and supplement the law on alternative military service, the Committee remains concerned by the State party's acknowledgement that it continues to hold many individuals in detention for evading military service, some of whom are reportedly conscientious objectors who objected to the alternative service on grounds that it is supervised exclusively by military personnel (art. 16).

The Committee recommends that the State party adopt the draft law on alternative military service and that it review the detention of all individuals imprisoned for refusing to perform the alternative service on religious grounds.

Non-refoulement

(24) The Committee regrets the lack of information regarding safeguards against torture in extradition and expulsion. Furthermore, it is concerned about the lack of information on any diplomatic assurances secured by the State party in its return of applicants for asylum to neighbouring countries and in the implementation of the reported extradition agreement between the National Police of Armenia and the Police of the Russian Federation, and data concerning the number of people extradited pursuant to that agreement. The Committee is concerned by reports that the State party issued extradition warrants without allowing those concerned to exercise their right to appeal in accordance with article 479, paragraph 2, of the Criminal Procedure Code and without complying with the normal procedures for extradition (art. 3).

The State party should refrain from seeking and accepting diplomatic assurances from a State where there are substantial grounds for believing that a person would be at risk of being subjected to torture. The State party should provide detailed information to the Committee on all cases where such assurances have been provided.

The Committee also recommends that the State party respect its non-refoulement obligations under article 3 of the Convention, including the right to appeal the issuance of an extradition warrant, as provided for in article 479, paragraph 2 of the Criminal Procedure Code.

Training

(25) The Committee welcomes the organization of human rights training programmes for law enforcement and military officials during the period under consideration. However, the Committee regrets the lack of information on monitoring and evaluation of the impact of these training programmes in reducing incidents of torture and ill-treatment. The Committee also regrets the lack of information on training on the use of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment (Istanbul Protocol) in such training programmes (art. 10).

The State party should strengthen training programmes for law enforcement officials, military personnel and prison staff on the requirements of the Convention and assess the impact of such training programmes. The State party should ensure that relevant officials receive training on the use of the Istanbul Protocol to identify signs of torture and ill-treatment.

(26) The Committee invites the State party to consider ratifying the other core United Nations human rights treaties to which it is not yet party, namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Optional Protocol to the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

(27) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(28) The State party is invited to update its common core document (HRI/CORE/1/Add.57), in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(29) The Committee requests the State party to provide, by 1 June 2013, follow-up information in response to the Committee's recommendations relating to: (a) conducting prompt, impartial and effective investigations; (b) ensuring or strengthening legal safeguards for persons detained; and (c) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraphs 8, 11 and 12 of the present document.

(30) The State party is invited to submit its next report, which will be the fourth periodic report, by 1 June 2016. To that purpose, the Committee invites the State party to accept, by 1 June 2013, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report.

62. **Canada**

(1) The Committee against Torture considered the sixth periodic report of Canada (CAT/C/CAN/6) at its 1076th and 1079th meetings, held on 21 and 22 May 2012 (CAT/C/SR.1076 and 1079), and adopted the following concluding observations at its 1087th and 1088th meetings (CAT/C/SR.1087 and 1088).

A. Introduction

(2) The Committee welcomes the submission of the sixth periodic report by the State party, which broadly comply with the guidelines on the form and content of periodic reports, but regrets that it was submitted three years late.

(3) The Committee welcomes the open dialogue with the interministerial delegation of the State party and its efforts to provide comprehensive responses to issues raised by Committee members during the dialogue. The Committee further commends the State party for the detailed written replies to the list of issues, which was however submitted three months late, just before the dialogue. Such delay prevented the Committee from conducting a careful analysis of the information provided by the State party.

(4) The Committee is aware that the State party has a federal structure, but recalls that Canada is a single State under international law and has the obligation to implement the Convention in full at the domestic level.

B. Positive aspects

(5) The Committee notes the ongoing efforts by the State party to reform its legislation, policies and procedures in areas of relevance to the Convention, including:

(a) The establishment of the Refugee Appeal Division within the independent Immigration and Refugee Board by the 2011 Balanced Refugee Reform Act;

(b) The establishment of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry), in December 2006;

(c) The establishment of the Ipperwash Priorities and Action Committee by the Ontario Government in 2007 to work on the implementation of the Ipperwash Inquiry Report recommendations;

(d) The establishment of the Provincial Partnership Committee on Missing Persons in Saskatchewan in January 2006; and

(e) The Braidwood Inquiry, initiated by the province of British Columbia in 2008 to examine the case of Robert Dziekanski.

(6) The Committee notes with satisfaction the official apology and compensation provided to Maher Arar and his family soon after the release of a report by the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar.

(7) The Committee notes with satisfaction the official apology by Royal Canadian Mounted Police to the mother of Robert Dziekanski for the loss of her son.

C. Principal subjects of concern and recommendations

Incorporation of the Convention in the domestic legal order

(8) While welcoming the statement made by the delegation that all levels of Canadian governments take seriously their obligations under the Convention, the Committee regrets that Canada has not incorporated all provisions of the Convention into domestic law and that those provisions cannot be argued independently as the basis for a legal claim in courts other than through domestic legal instruments. The Committee is of the view that the incorporation of the Convention into Canadian law would not only be of a symbolic nature but that it would strengthen the protection of persons allowing them to invoke the provisions of the Convention directly before the courts (art. 2).

The Committee recommends that the State party incorporate all the provisions of the Convention into Canadian law in order to allow persons to invoke it directly in courts, give prominence to the Convention and raise awareness of its provisions among members of the judiciary and the public at large. In particular, the State party should take all necessary steps to ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be directly applied before domestic courts.

Non-refoulement

(9) The Committee notes the State party's information that the law allowing deportation despite a risk of torture is merely theoretical. However, the fact remains that it is the law in force at present. Therefore, the Committee remains seriously concerned that (art. 3):

(a) Canadian law, including subsection 115(2) of the Immigration and Refugee Protection Act, continues to provide legislative exceptions to the principle of non-refoulement;

(b) The State party continues to engage in deportation, extradition or other removals, in practice, often using security certificates under the Immigration and Refugee Protection Act and occasionally resorting to diplomatic assurances, which could result in violations of the principle of non-refoulement; and

(c) Insufficient information is provided in relation to investigations into all allegations of violation of article 3 of the Convention, remedies provided to victims and measures taken to guarantee effective post-return monitoring arrangements.

Recalling its previous recommendation (CAT/C/CR/34/CAN, paras. 5 (a) and (b)), the Committee urges the State party to amend relevant laws, including the Immigration and Refugee Protection Act, with a view to unconditionally respecting the absolute principle of non-refoulement in accordance with article 3 of the Convention, and take all necessary measures to fully implement it in practice in all circumstances. Furthermore, the State party should refrain from the use of diplomatic assurances as a means of returning a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(10) The Committee regrets the State party's failure to comply in every instance with the Committee's decisions under article 22 of the Convention and requests for interim measures of protection, particularly in cases involving deportation and extradition (with reference to communications Nos. 258/2004, *Dadar v. Canada*, and 297/2006, *Sogi v. Canada*), might undermine its commitment to the Convention. The Committee recalls that the State party, by ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with the Committee in good faith in applying and giving full effect to the procedure of individual complaints established thereunder. Consequently, the Committee considers that, by deporting complainants despite the Committee's decisions or requests for interim measures, the State party has committed a breach of its obligations under articles 3 and 22 of the Convention (arts. 3 and 22).

The State party should fully cooperate with the Committee, in particular by respecting in every instance its decisions and requests for interim measures. The Committee recommends the State party review its policy in this respect, by considering requests for interim measures in good faith and in accordance with its obligations under articles 3 and 22 of the Convention.

(11) While noting the State party's statement that the Canadian Forces assessed the risk of torture or ill-treatment before transferring a detainee into Afghan custody (CAT/C/CAN/Q/6/Add.1, para. 155), the Committee is concerned about several reports that some prisoners transferred by Canadian Forces in Afghanistan into the custody of other countries have experienced torture and ill-treatment (art. 3).

The State party should adopt a policy for future military operations that clearly prohibits the prisoner transfers to another country when there are substantial grounds for believing that he or she would be in danger of being subjected to torture and recognizes that diplomatic assurances and monitoring arrangements will not be relied upon to justify transfers when such substantial risk of torture exists.

Security certificates under the Immigration and Refugee Protection Act

(12) While taking note of the system of special advocates introduced by the amended Immigration and Refugee Protection Act in response to concerns raised by different actors and the judgement by the Supreme Court in the case of *Charkaoui v. Canada*, the Committee remains concerned that (arts. 2, 3, 15 and 16):

(a) Special advocates have very limited ability to conduct cross-examinations or to seek evidence independently;

(b) Individuals subject to security certificates have access to a summary of confidential materials concerning them and cannot directly discuss full content with the special advocates. Accordingly, the advocates cannot properly know the case against them or make full answer or defence in violation of the fundamental principles of justice and due process;

(c) The length of this detention without charge is indeterminate and some individuals are detained for prolonged periods; and

(d) Information obtained by torture has been reportedly used to form the basis of security certificates, as evidenced by the case of Hassan Almrei.

The Committee recommends that the State party reconsider its policy of using administrative detention and immigration legislation to detain and remove non-citizens on the ground of national security, inter alia, by extensively reviewing the use of the security certificates and ensuring the prohibition of the use of information obtained by torture, in line with relevant domestic and international law. In that regard, the State party should implement the outstanding recommendations made by the Working Group on Arbitrary Detention following its mission to Canada in 2005, in particular that detention of terrorism suspects be imposed in the framework of criminal procedure and in accordance with the corresponding safeguards enshrined in the relevant international law (E/CN.4/2006/7/Add.2, para. 92).

Immigration detention

(13) While noting the State party's need for a legal reform to combat human smuggling, the Committee is deeply concerned about Bill C-31 (the Protecting Canada's Immigration System Act), given that, with its excessive Ministerial discretion, this Act would (arts. 2, 3, 11 and 16):

(a) Introduce mandatory detention for individuals who enter irregularly the State party's territory; and

(b) Exclude "irregular arrivals" and individuals who are nationals of designated "safe" countries from having an appeal hearing of a rejected refugee claim. This increases the risk that those individuals will be subject to refoulement.

The Committee recommends the State party to modify Bill C-31, in particular its provisions regulating mandatory detention and denial of appeal rights, given the potential violation of rights protected by the Convention. Furthermore, the State party should ensure that:

(a) Detention is used as a measure of last resort, a reasonable time limit for detention is set, and non-custodial measures and alternatives to detention are made available to persons in immigration detention; and

(b) All refugee claimants are provided with access to a full appeal hearing before the Refugee Appeal Division.

Universal jurisdiction

(14) The Committee notes with interest that any person present in the State party's territory who is suspected of having committed acts of torture may be prosecuted and tried in the State party under the Criminal Code and the Crimes against Humanity and War Crimes Act. However, the very low number of prosecutions for war crimes and crimes against humanity, including torture offences, under the aforementioned laws raises issues with respect to the State party's policy in exercising universal jurisdiction. The Committee

is also concerned about numerous and continuous reports that the State party's policy of resorting to immigration processes to remove or expel perpetrators from its territory rather than subjecting them to the criminal process creates actual or potential loopholes for impunity. According to reports before the Committee, a number of individuals who are allegedly responsible for torture and other crimes under international law have been expelled and not faced justice in their countries of origin. In that regard, the Committee notes with regret the recent initiative to publicize the names and faces of 30 individuals living in Canada who had been found inadmissible to Canada on grounds they may have been responsible for war crimes or crimes against humanity. If they are apprehended and deported, they may escape justice and remain unpunished (arts. 5, 7 and 8).

The Committee recommends that the State party take all necessary measures with a view to ensuring the exercise of the universal jurisdiction over persons responsible for acts of torture, including foreign perpetrators who are temporarily present in Canada, in accordance with article 5 of the Convention. The State party should enhance its efforts, including through increased resources, to ensure that the "no safe haven" policy prioritizes criminal or extradition proceedings over deportation and removal under immigration processes.

Civil redress and state immunity

(15) The Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all victims of torture, mainly due to the restrictions under provisions of the State Immunity Act (art. 14).

The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim. In this regard, it should consider amending the State Immunity Act to remove obstacles to redress for all victims of torture.

Torture and ill-treatment of Canadians detained abroad

(16) The Committee is seriously concerned at the apparent reluctance on part of the State party to protect rights of all Canadians detained in other countries, by comparison with the case of Maher Arar. The Committee is in particular concerned at (arts. 2, 5, 11 and 14):

(a) The State party's refusal to offer an official apology and compensation to the three Canadians despite the findings of the Iacobucci Inquiry. Their cases are similar to the case of Arar, in the sense that all of them were subjected to torture abroad and the Canadian officials were complicit in the violation of their rights;

(b) Canadian officials' complicity in the human rights violation of Omar Khadr while detained at Guantánamo Bay (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3; and *Canada (Justice) v. Khadr*, 2008 SCC 28) and the delay in approving his request to be transferred to serve the balance of his sentence in Canada.

In the light of the findings of the Iacobucci Inquiry, the Committee recommends that the State party take immediate steps to ensure that Abdullah Almalki, Ahmad Abou Elmaati and Muayyed Nureddin receive redress, including adequate compensation and rehabilitation. Furthermore, the Committee urges the State party to promptly approve Omar Khadr's transfer application and ensure that he receives appropriate redress for human rights violations that the Canadian Supreme Court has ruled he experienced.

Intelligence information obtained by torture

(17) While taking note of the State party's national security priorities, the Committee expresses its serious concern about the Ministerial Direction to the Canadian Security Intelligence Service (CSIS), which could result in violations of article 15 of the Convention

in the sense that it allows intelligence information that may have been derived through mistreatment by foreign States to be used within Canada; and allows CSIS to share information with foreign agencies even when doing so poses a serious risk of torture, in exceptional cases involving threats to public safety, in contravention to recommendation 14 from the Arar Inquiry (arts. 2, 10, 15 and 16).

The Committee recommends that the State party modify the Ministerial Direction to CSIS to bring it in line with Canada's obligations under the Convention. The State party should strengthen its provision of training on the absolute prohibition of torture in the context of the activities of intelligence services.

Oversight mechanism over security and intelligence operations

(18) The Committee is concerned about the lack of information on measures taken by the State party to implement proposals made in the Policy Report from the Arar Inquiry for a model of comprehensive review and oversight of law enforcement and security agencies involved in national security activities (arts. 2, 12, 13 and 16).

The Committee recommends that the State party:

- (a) Examine options for modernizing and strengthening national security review framework in a more timely and transparent manner;**
- (b) Consider urgently implementing the model for oversight of agencies involved in national security agencies, proposed by the Arar Inquiry; and**
- (c) Inform the Committee of changes made with regard to oversight mechanism over security and intelligence operations in the next periodic report.**

Detention conditions

(19) While noting a Transformation Agenda launched by the Correctional Service of Canada with a view to improving its operations, the Committee remains concerned at (arts. 2, 11 and 16):

- (a) The inadequate infrastructure of detention facilities to deal with the rising and complex needs of prisoners, in particular those with mental illness;
- (b) Incidents of inter-prisoner violence and in-custody deaths resulting from high-risk lifestyles such as abuse of drugs and alcohol, which, as acknowledged by the delegation, still circulate in places of detention; and
- (c) The use of solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness.

The State party should take all necessary measures to ensure that detention conditions in all places of deprivation of liberty are in conformity with the Standard Minimum Rules for the Treatment of Prisoners. It should, inter alia:

- (a) Strengthen its efforts to adopt effective measures to improve material conditions in prisons, reduce the current overcrowding, properly meet the basic needs of all persons deprived of their liberty and eliminate drugs;**
- (b) Increase the capacity of treatment centres for prisoners with intermediate and acute mental health issues;**
- (c) Limit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with a possibility of judicial review; and**

(d) **Abolish the use of solitary confinement for persons with serious or acute mental illness.**

Violence against women

(20) While noting several measures taken by the federal and provincial governments to combat high violence against Aboriginal women and girls, including cases of murders and disappearances (CAT/C/CAN/Q/6/Add.1, paras. 76 ff), the Committee is concerned about ongoing reports that: (a) marginalized women, in particular Aboriginal women, experience disproportionately high levels of life-threatening forms of violence, spousal homicides and enforced disappearances; and (b) the State party failed to promptly and effectively investigate, prosecute and punish perpetrators or provide adequate protection for victims. Furthermore, the Committee regrets the statement by the delegation that the issues on violence against women fall more squarely within other bodies' mandate and recalls that the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in acts of torture or ill-treatment committed by non-State officials or private actors (arts. 2, 12, 13 and 16).

The State party should strengthen its efforts to exercise due diligence to intervene to stop, sanction acts of torture or ill-treatment committed by non-State officials or private actors, and provide remedies to victims. The Committee recommends that the State party enhance its efforts to end all forms of violence against aboriginal women and girls by, inter alia, developing a coordinated and comprehensive national plan of action, in close cooperation with aboriginal women's organizations, which includes measures to ensure impartial and timely investigation, prosecution, conviction and sanction of those responsible for disappearances and murder of aboriginal women, and to promptly implement relevant recommendations made by national and international bodies in that regard, including the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, and the Missing Women Working Group.

Conducted energy weapons

(21) The Committee notes the various initiatives taken by the State party to introduced greater accountability and more restricted standards to govern use of conducted energy weapons, including national guidelines issued by the Federal Government in 2010. However, it remains concerned at reports about the lack of consistent and coherent standards applicable to all policing forces at federal and provincial level and the unclear legal framework for the testing and approval for use of new forms of such weapons by police forces in Canada. Furthermore, the Committee regrets that the national guidelines are not binding and do not establish a consistent and sufficiently high threshold to govern the use of such weapons across the country (arts. 2 and 16).

Taking into consideration the lethal and dangerous impact of conducted energy weapons on the physical and mental state of targeted persons, which may violate articles 2 and 16 of the Convention, the Committee recommends the State party to ensure that such weapons are used exclusively in extreme and limited situations. The State party should revise the regulations governing the use of such weapons, including the national guidelines, with a view to establishing a high threshold for the use of them and adopting a legislative framework to govern the testing and approval for use of all weapons used by law enforcement personnel. Furthermore, the State party should consider relinquishing the use of such conducted energy weapons as "tasers".

Police crowd-control methods

(22) The Committee is concerned about reports on the excessive use of force by law enforcement officers often in the context of crowd control at federal and provincial levels, with particular reference to indigenous land-related protests at Ipperwash and Tyendinaga as well as the G8 and G20 protests. The Committee is particularly concerned about reports of severe crowd control methods and inhumane prison conditions in the temporary detention centres (arts. 11 and 16).

The Committee recommends that the State party strengthen its efforts to ensure that all allegations of ill-treatment and excessive use of force by the police are promptly and impartially investigated by an independent body and those responsible for such violation are prosecuted and punished with appropriate penalties. Furthermore, the State party and the government of the Province of Ontario should conduct an inquiry into the Ontario Provincial Police's handling of incidents at Tyendinaga and into all aspects of the policing and security operations at the G8 and G20 Summits.

Data collection

(23) The Committee regrets the absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions of cases of torture and ill treatment by law enforcement, security, military and prison personnel, and on extrajudicial killings, enforced disappearances, trafficking and domestic and sexual violence.

The State party should compile statistical data relevant to the monitoring of the implementation of the Convention obligations at the national level, including data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment, detention conditions, abuse by public officials, administrative detention, trafficking and domestic and sexual violence and on means of redress, including compensation and rehabilitation, provided to the victims.

(24) The Committee recommends that the State party strengthen its cooperation with United Nations human rights mechanisms and its efforts in implementing their recommendations. The State party should take further steps in ensuring a well-coordinated, transparent and publicly accessible approach to overseeing implementation of Canadian obligations under the United Nations human rights mechanisms, including the Convention.

(25) In the light of the State party's pledges to the Human Rights Council in 2006 and its acceptance of recommendations by the Working Group on the Universal Periodic Review (A/HRC/11/17, para. 86 (2)), the Committee urges the State party to accelerate the current domestic discussions and to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

(26) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

(27) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(28) The State party is invited to update its common core document (HRI/CORE/1/Add.91), in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6).

(29) The Committee requests the State party to provide, by 1 June 2013, follow-up information in response to the Committee's recommendations related to: (a) ensuring or

strengthening legal safeguards for detainees; (b) conducting, prompt, impartial and effective investigations; and (c) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraphs 12, 13, 16 and 17 of the present document.

(30) The State party is invited to submit its next report, which will be the seventh periodic report, by 1 June 2016. To that purpose, the Committee invites the State party to accept, by 1 June 2013, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report.

63. Cuba

(1) The Committee against Torture considered the second periodic report of Cuba (CAT/C/CUB/2) at its 1078th and 1081st meetings (CAT/C/SR.1078 and CAT/C/SR.1081), held on 22 and 23 May 2012, and adopted the following conclusions and recommendations at its 1089th and 1090th meetings (CAT/C/SR.1089 and CAT/C/SR.1090).

A. Introduction

(2) The Committee welcomes the second periodic report of Cuba and expresses appreciation for the opportunity to renew constructive dialogue with the State party. However, it notes that the periodic report, which was submitted more than nine years late, does not fully conform to the reporting guidelines.

(3) The Committee appreciates the written replies to the list of issues (CAT/C/CUB/Q/2/Add.1) as well as the supplementary information provided during consideration of the periodic report. The Committee also appreciates the dialogue with the delegation, but regrets that some of the questions put to the State party were not answered.

B. Positive aspects

(4) The Committee notes with satisfaction that, since the initial report was considered, the State party has ratified the following instruments:

(a) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (25 September 2001);

(b) The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (9 February 2007);

(c) The Convention on the Rights of Persons with Disabilities (6 September 2007); and

(d) The International Convention for the Protection of All Persons from Enforced Disappearance (2 February 2009).

(5) The Committee also welcomes the State party's efforts to amend its policies and procedures to ensure greater protection for human rights and apply the provisions of the Convention, in particular:

(a) Approval of a master plan for investment in the prison system, due to be implemented progressively until 2017;

(b) Continuation of the State party's scholarship programme for refugees which enables them to pursue secondary, university or higher secondary education and is currently benefiting 366 refugees, most of them Saharawis;

(c) The continuing work of the National Group for the Prevention and Treatment of Domestic Violence.

(6) The Committee notes the State party's positive response to the request for a visit of the Special Rapporteur on the question of torture, which was subsequently confirmed in the voluntary commitments assumed by Cuba during the universal periodic review performed by the Human Rights Council in February 2009 (A/HRC/11/22, para. 130 (37)). The State party noted the Special Rapporteur's interest in making this visit but the dates have not yet been confirmed (A/HRC/19/61, para. 6).

C. Principal subjects of concern and recommendations

Definition and crime of torture

(7) While noting the information provided by the State party regarding work towards a possible reform of the Criminal Code, the Committee regrets that torture, as defined in article 1 of the Convention, is still not codified as a specific offence. As regards the State party's assertion that other similar criminal offences are expressly defined in its domestic legislation, the Committee draws the State party's attention to its general comment No. 2 (2007), on the implementation of article 2 by States parties, which emphasizes the preventive value of codifying torture as a distinct offence (CAT/C/GC/2, para. 11) (arts. 1 and 4).

The Committee reiterates the recommendation made in 1997 (A/53/44, para. 118 (a)) that the State party should expressly criminalize torture in its domestic legislation and should adopt a definition of torture covering all the aspects contained in article 1 of the Convention. The State party must also ensure that such offences are punishable by appropriate penalties which take into account their grave nature, in accordance with article 4, paragraph 2, of the Convention.

Fundamental due process safeguards

(8) While noting the information provided by the State party concerning the content of the Criminal Procedure Act and related implementing regulations, the Committee highlights the lack of information on procedures in place to ensure the practical application of fundamental legal safeguards. The Committee is concerned about consistent reports that the State party does not extend all legal safeguards, including prompt access to a lawyer and an independent medical examination and notification of arrest to a family member, to all prisoners, including in particular those who are deprived of their liberty on alleged political grounds, from the outset of detention. The Committee regrets that no statistical data have been provided either about complaints or allegations of torture or about habeas corpus proceedings initiated during the period under review. The Committee is concerned that article 245 of the Criminal Procedure Act establishes that habeas corpus applications are inadmissible "when the deprivation of liberty is the result of a sentence or pretrial commitment order issued in criminal proceedings". While noting the delegation's explanations on this matter, the Committee considers that this provision unreasonably restricts the right to challenge the legality of detention by excluding those situations where the deprivation of liberty, having been initially lawful under prevailing legislation, becomes unlawful retrospectively (arts. 2 and 16).

The State party must adopt effective measures without delay to ensure that all detainees enjoy in practice all fundamental legal safeguards, including the right to have access to counsel at the time of arrest, to be examined by an independent physician, to have contact with a family member, to be informed of their rights and the charges against them, and to be brought before a judge without delay.

The State party must also adopt the measures necessary to guarantee the right of any person who has been deprived of their liberty to have access to an immediate remedy to challenge the legality of their detention.

Non-refoulement and access to a fair and expeditious asylum procedure

(9) The Committee is concerned about the lack of an appropriate legal framework for the protection of refugees, asylum seekers, and stateless persons. While noting the information provided by the State party to the effect that persons identified as refugees by the Office of the United Nations High Commissioner for Refugees are permitted to remain in the country while their resettlement is arranged, the Committee is concerned that this de facto temporary protection does not include recognition of refugee status on the part of the Cuban authorities. It also notes with concern that, although refugees and asylum seekers have access to free health services and education, they are unable to obtain a work permit and have no access to housing and other public services. The Committee is concerned that, since there is no prospect of local integration, resettlement in a third country is the only permanent solution possible for refugees in Cuba. The State party should also ensure that all cases of forced deportation are carried out in a manner consistent with the provisions of the Convention. The Committee expresses its concern about the lack of information provided on the circumstances in which the repatriation of illegal Haitian immigrants takes place. It also regrets the lack of information about any existing migration management mechanisms that facilitate the identification of persons requiring international protection (arts. 2, 3, 11 and 16).

The Committee recommends that the State party should:

(a) **Adopt the legislative measures necessary to ensure the protection of refugees, asylum seekers, and stateless persons. To this end, it urges the State party to consider ratifying the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, as well as the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness;**

(b) **Establish mechanisms for the identification and referral of refugees and other persons who have specific requirements in the context of mixed migration flows, so that their protection needs can be met;**

(c) **Facilitate the process of local integration of refugees in Cuban territory, working in association with the Office of the United Nations High Commissioner for Refugees;**

(d) **Amend the current legislation governing migration (Act No. 1312 on Migration and Act No. 1313 on the Status of Foreigners, both of 1976).**

Detention conditions

(10) The Committee notes that the State party has study programmes for all educational levels in detention facilities and that a programme of investment in the prison system has been approved. It regrets, however, that precise figures on occupancy levels in detention facilities have not been provided. The Committee is still extremely concerned about reports that the prison population allegedly experiences overcrowding, malnutrition, lack of hygiene, unhealthy conditions, and inadequate medical care. These reports also recount unjustified restrictions on family visits, transfers to detention facilities located a long way from detainees' family and friends, solitary confinement in degrading conditions and physical and verbal abuse of prisoners. For all these reasons, the Committee regrets the lack of data, disaggregated by age and sex, on the number of complaints and grievances filed by prisoners or members of their family and on the corresponding inquiries and their outcome (arts. 11 and 16).

Taking into account the voluntary commitments assumed by the State party in the universal periodic review in February 2009 (A/HRC/11/22, para. 130, (45)), the Committee recommends that the State party should take all necessary steps to ensure that conditions of detention in prisons and other detention facilities conform to the

Standard Minimum Rules for the Treatment of Prisoners (resolution 663 C [XXIV] of 31 July 1957, and resolution 2076 [LXII] of 13 May 1977, of the Economic and Social Council) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly in resolution 65/229 on 21 December 2010. In particular, the State party should:

- (a) Continue its ongoing efforts to improve infrastructures and reduce prison occupancy rates, principally by using alternative measures to deprivation of liberty;
- (b) Improve the quality of food and the medical and health-care facilities available to prisoners;
- (c) Ensure that all persons deprived of their liberty enjoy the right to communicate with family members and a lawyer;
- (d) Ensure that any cruel, inhuman or degrading punishment, such as solitary confinement in appalling conditions as a disciplinary measure, is absolutely prohibited.

Prolonged pretrial detention, detention for offences against State security and releases on extra-penitentiary leave

(11) The Committee notes the delegation's clarification that the Cuban legal system does not allow for the use of incommunicado detention. However, the Committee remains concerned about NGO reports that recount situations of protracted pretrial detention and indefinite detention, in application of article 107 of the Criminal Procedure Act, which appear to affect persons deprived of their liberty especially for political reasons. The Committee regrets the lack of information provided on the number and status of detainees accused of offences against State security, pursuant to article 243 of the Criminal Procedure Act. Lastly, the Committee is concerned about the ambiguous legal situation of prisoners released on extra-penitentiary leave and about information received concerning arbitrary restrictions on their personal freedom and freedom of movement. The Committee expresses particular concern about the situation of José Daniel Ferrer and Oscar Elías Biscet (arts. 2, 11 and 16).

The State party should take all necessary measures to:

- (a) Ensure, in law and in practice, that pretrial detention is not excessively prolonged;
- (b) Amend the Criminal Procedure Act to prevent indefinite prolongation of the examination of the preliminary case file;
- (c) Ensure independent judicial supervision of custodial measures and prompt access to legal assistance;
- (d) Ensure respect for the personal liberties and freedom of movement of persons released on extra-penitentiary leave, including their right to return to Cuba.

Preventive security measures

(12) The Committee expresses concern about the provisions of Chapter XI of Book I (Dangerousness and security measures) of the Criminal Code and in particular the definition, based on subjective and extremely vague concepts, of "dangerousness", which purports to refer to "an individual's particular proclivity to commit offences, as demonstrated by conduct that is manifestly contrary to the norms of socialist morality" (art. 72). The Committee takes note of the delegation's explanation that criminal penalties are not imposed on persons declared to be "dangerous". However, the Committee notes that the

rehabilitative, therapeutic and supervisory measures established in articles 78 to 84 of the Criminal Code can entail internment in specialized labour, educational, care, psychiatric or detoxification institutions for a period of between 1 and 4 years. The Committee is concerned that it has received no information about conditions of internment in these institutions (arts. 2, 11 and 16).

As part of the criminal legislation reform process announced by the delegation, the Committee recommends that the State party amend the aforementioned provisions of the Criminal Code with a view to ending the use of administrative detention on the basis of vague, subjective and imprecise criminal concepts such as pre-criminal social dangerousness.

Monitoring and inspection of places of detention

(13) The Committee notes that the Attorney-General's Office and the Ministry of the Interior are empowered to inspect detention facilities and that, in accordance with legislation in force, judges and prosecutors have access to prisons and other detention facilities. However, the Committee has no information on the number and nature of the visits made by the Attorney-General's Office or other agencies during the period under review, or on the content of the records and resolutions issued by the Attorney-General's Office and the related follow-up. The Committee remains concerned about the lack of monitoring and systematic, effective, independent inspection of all places of detention and disagrees with the State party's statement that the continuous improvement of the system does not call for other types of visit or additional assistance (arts. 11 and 12).

The Committee reiterates the recommendation previously made to the State party in 1997 (A/53/44, para. 118 (d)) to establish an independent national system to effectively monitor and inspect all places of detention and follow-up on the outcome of this systematic monitoring.

The Committee encourages the State party to consider the possibility of ratifying the Optional Protocol to the Convention with a view to establishing a system of regular unannounced visits by national and international monitors, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

The Committee also reiterates its previous recommendation (ibid., (i)) that the State party should allow human rights NGOs into the country and cooperate with them in the identification of cases of torture and ill-treatment.

Death penalty

(14) The Committee notes the information provided by the State party concerning the last three executions of persons sentenced to death in Cuba, which, after a summary procedure, were carried out on 11 April 2003. Despite the delegation's explanations, the Committee still has serious reservations as to whether in these cases the State party respected due process guarantees such as the detainees' right to have adequate time and facilities to prepare their defence and to communicate with counsel of their choosing. While noting that there are currently no convicted prisoners awaiting execution in the State party and that all death sentences have been commuted to prison sentences of 30 years or life, the Committee remains concerned about the high number of offences that carry the death penalty, including common crimes and vaguely defined categories of State security-related offences (arts. 2, 11 and 16).

The Committee urges the State party to respect the international norms established in the Safeguards guaranteeing protection of the rights of those facing the death penalty (approved by Economic and Social Council resolution 1984/50 of 25 May 1984). The State party is invited to consider the possibility of abolishing the death penalty and to

ratify the International Covenant on Civil and Political Rights and its Second Optional Protocol concerning abolition of the death penalty.

Deaths in custody

(15) The information provided by the State party indicates that no liability on the part of the officers involved was established in any of the deaths in custody that occurred during the period under review and that the autopsy found no signs of physical violence in any of these cases. However, the Committee regrets that the State party has provided no statistical information on the causes of these deaths or on mortality rates in detention facilities. The limited information provided indicates that between 2010 and 2011 there were a total of 202 deaths in the prison system, a figure which the Committee considers high. The Committee further regrets that the information relating to the death of Mr. Orlando Zapata Tamayo, a prisoner on hunger strike, was time-barred and without any possibility of dialogue. It also regrets the lack of information on the death in police custody of Mr. Juan Soto Wilfredo García, as requested in the list of issues (arts. 2, 11 and 16).

The State party should ensure that all deaths in custody are investigated promptly, thoroughly and impartially; should assess the health care received by inmates and any possible liability on the part of prison personnel; and should provide, where appropriate, adequate compensation to the families of the victims.

The State party should guarantee appropriate monitoring and medical treatment of persons deprived of their liberty who go on hunger strike.

Complaints mechanism

(16) Although the State party has provided information about the various bodies and mechanisms that deal with citizen complaints and petitions, the Committee regrets that no dedicated, independent and effective mechanism has as yet been established to receive complaints, conduct prompt and impartial investigations into allegations of torture and ill-treatment and ensure that those responsible are duly punished. The Committee also notes the lack of statistical information about the number of complaints, investigations, prosecutions and criminal and disciplinary sanctions imposed against the perpetrators of acts of torture and ill-treatment (arts. 2, 12, 13 and 16).

The Committee reiterates its previous recommendations (A/53/44, para. 118 (b) and (g)) in which it urged the State party to:

(a) **Establish a dedicated, independent mechanism for receiving complaints of torture and ill-treatment so as to ensure the prompt and impartial examination of such complaints;**

(b) **Establish a central register of complaints, investigations, prosecutions and convictions in cases of torture and ill-treatment, which should be publicly accessible.**

The State party should ensure that complainants and witnesses of torture and ill-treatment receive the necessary protection and assistance.

Investigations and prosecutions

(17) The figures provided by the State party indicate that the Attorney-General's Office received 263 complaints of ill-treatment in prisons and detention facilities between 2007 and 2011 and that, after the corresponding investigations, 46 law enforcement officers were found to be criminally liable. The Committee regrets that in the course of the dialogue the delegation provided no additional and more detailed information about the investigations, prosecutions, disciplinary proceedings and corresponding compensation. It has also received no information about the sentences and criminal or disciplinary sanctions imposed

on offenders, nor has it indicated whether or not the alleged perpetrators of these acts were removed or expelled from public service pending the outcome of the investigation of the complaints. In the absence of this information, the Committee finds itself once again unable to assess the State party's actions in the light of the provisions of article 12 of the Convention (arts. 2, 12, 13, 14 and 16).

The Committee urges the State party to:

(a) Ensure the prompt and impartial investigation of all complaints of torture and ill-treatment. Such investigations should be under the responsibility of an independent body and not subordinate to the executive branch of Government;

(b) Launch prompt and impartial investigations spontaneously whenever there are reasonable grounds to believe that an act of torture has been committed;

(c) Ensure that, in cases of alleged torture and ill-treatment, suspects are suspended from duty immediately for the duration of the investigation, particularly when there is a risk that they might otherwise be in a position to repeat the alleged act or to obstruct the investigation;

(d) Bring to trial the alleged perpetrators of acts of torture or ill-treatment and, if they are found guilty, ensure sentences with penalties that are consistent with the gravity of their acts and that the victims receive compensation.

Independence of the judiciary and the role of lawyers

(18) The Committee notes with concern that there have been no significant changes in the State party's justice system since its initial report was submitted in 1997. It is particularly concerned about the lack of independence from the executive and legislative branches within both the judiciary and the legal profession (art. 2, para. 1).

In the light of its previous recommendation (A/53/44, para. 118 (e)), the Committee considers it essential that legislative measures be adopted to guarantee the independence of the judiciary. The Committee also recommends that the State party should ensure compliance with the Basic Principles on the Role of Lawyers (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 [A/CONF.144/28/Rev.1], p. 118).

Psychiatric institutions

(19) The Committee notes the information provided by the State party regarding the content of the judgement delivered by the Second Criminal Division of the People's Court in Havana on 31 January 2011 in the case brought against the director, deputy directors and other employees of the Havana Psychiatric Hospital following the death of 26 patients from hypothermia in January 2010. The Committee regrets that it has not received the information requested about the redress and compensation measures ordered by the courts and actually provided to the families of the victims and other patients affected. Although it notes that the Ministry of Public Health has a plan to improve the efficiency of this institution, the Committee has received no information on the content of the plan. Lastly, the Committee regrets that it has received no statistical data on the number of persons with psychosocial disabilities that are currently receiving forced medical treatment (arts. 2, 11, 14 and 16).

The Committee urges the State party to provide information about the redress and compensation measures ordered by the courts and actually provided to the victims and/or their families in relation to the deaths that occurred in the Havana Psychiatric Hospital in 2010.

The State party should take the necessary steps to resolve any deficiencies that might exist in the psychiatric hospital network and ensure that events of this type do not recur. The Committee recommends that an analysis of the way in which psychiatric institutions operate in practice be undertaken as a matter of urgency, by means of external and internal audits of the institutions involved, with a view to adopting legislative and administrative measures to ensure that the guarantees required to prevent torture are applied in practice.

Civil society actors at risk

(20) The Committee notes that the State party denies that there has been an increase in the number of political opponents, human rights activists and independent journalists placed in short-term detention without a court order, as reported to the Committee by human rights organizations. However, given the lack of official data, the Committee remains seriously concerned about the continuing reports of arbitrary detention for short periods, the use of ambiguous criminal concepts such as “pre-criminal social dangerousness” to justify the imposition of security measures, restrictions on freedom of movement, intrusive surveillance, physical aggression and other acts of intimidation and harassment allegedly committed by officers of the National Revolutionary Police and members of State security bodies. The Committee is also concerned about reports that “acts of repudiation” continue to occur outside the homes of members of the Unión Patriótica de Cuba and the Ladies in White group, among others. The Committee regrets the State party’s reluctance to submit comprehensive information about the incidents referred to in the list of issues and the measures taken to prevent coordinated action of this kind, in which assumed collusion between the harassers and the police authority is apparent (arts. 2 and 16).

In the light of its previous concluding observations (A/53/44, para. 11), the Committee urges the State party to:

(a) **Adopt the measures necessary to put an end to the forms of repression mentioned above, including arbitrary detention and the use of preventive security measures against political opponents, human rights defenders and activists, independent journalists and other civil society actors at risk and members of their families. In addition, the State party should ensure that these acts of repression, intimidation and harassment are duly investigated and the perpetrators punished;**

(b) **Ensure that all persons are protected from the intimidation or violence to which they might be exposed as a result of their activities or the simple exercise of their freedom of opinion and expression and their right of association and peaceful assembly;**

(c) **Authorize the registration of human rights NGOs so requesting in the Register of National Associations, in accordance with the provisions of Act No. 54 of 27 December 1985 (Associations Act).**

Gender-based violence

(21) The Committee notes with concern that the State party has provided no information on the existing legal framework for combating violence against women in Cuba or on the measures taken to eliminate this phenomenon, including domestic and sexual violence. The Committee also regrets the lack of statistical data corresponding to the period under review for the different forms of violence against women (arts. 2 and 16).

The Committee urges the State party to provide detailed information on existing legislation governing this area and on cases of violence against women that occurred during the period under review.

Coerced confessions

(22) While it takes note of the constitutional safeguards and the provisions of the Criminal Procedure Act establishing the inadmissibility of evidence obtained through torture, the Committee expresses concern about reports of the use of coercive methods during questioning, in particular sleep deprivation, solitary confinement and exposure to sudden temperature changes. The Committee notes the information provided by the State party which indicates that during the period under review no cases were dismissed because the evidence or testimonies submitted were obtained through torture or ill-treatment, although, according to the delegation, neither was torture as a procedure invoked in any case (arts. 2 and 15).

The State party must adopt effective measures that guarantee in practice the inadmissibility of coerced confessions. The State party should ensure that law enforcement officials, judges and lawyers receive training in how to detect and investigate cases where confessions are obtained under duress.

Training

(23) The Committee takes notes of the information provided about the technical and vocational training programmes available to medical personnel, members of the National Revolutionary Police, prison officers and justice officials but regrets the paucity of available information on the evaluation of these programmes and their success in reducing the incidence of torture and ill-treatment. The Committee also notes that the State party has submitted no information about specific training programmes or the use of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (art. 10).

The State party must:

(a) Continue to prepare and run training programmes to ensure that judges, public prosecutors, law enforcement officials and prison officers are fully aware of the provisions of the Convention, that breaches are not tolerated but investigated, and that the perpetrators are brought to trial;

(b) Develop and implement a methodology for assessing the effectiveness and impact of training programmes in reducing the incidence of torture and ill-treatment;

(c) Ensure that all relevant personnel receive specific training in the Istanbul Protocol.

Redress, including compensation and rehabilitation

(24) While taking note of the information provided in the periodic report concerning avenues of redress for civil liability and the institutional mandate of the Compensation Fund, the Committee is concerned that victims of torture or ill-treatment cannot obtain compensation if the perpetrator of the acts of torture or ill-treatment has been the subject of disciplinary rather than criminal sanctions. The Committee further regrets that the State party has provided no information on the reparation and compensation measures, including rehabilitation, ordered by the courts and effectively provided to victims of torture and ill-treatment (see A/53/44, para. 117) (art. 14).

The State party should:

(a) Ensure that all the victims of torture and ill-treatment obtain redress and have a legally enforceable right to fair and adequate compensation, including the means for the fullest possible rehabilitation;

(b) Guarantee the effectiveness of mechanisms designed to ensure redress and adequate compensation for victims of torture and other forms of ill-treatment.

The Committee reiterates its previous recommendation (A/53/44, para. 118 (h)) that the State party should create a compensation fund for victims of torture and ill-treatment.

National human rights institution

(25) The Committee is concerned that the State party does not consider it opportune to establish a national human rights institution in accordance with the Paris Principles (General Assembly resolution 48/134, annex). While noting that the duties of the Attorney-General's Office and other State institutions include dealing with complaints of alleged rights violations filed by citizens, the Committee observes that none of the bodies listed by the State party qualifies as an independent national human rights institution (art. 2).

The Committee urges the State party to consider establishing a national human rights institution in accordance with the Paris Principles.

Data collection

(26) The Committee is concerned that, despite its previous recommendation (A/53/44, para. 118 (j)), the State party has not provided detailed statistical information on various issues and it regrets the State party's decision not to transmit all the information requested. The absence of disaggregated data on complaints, investigations, prosecutions and convictions in cases of torture and ill-treatment, as well as in cases of deaths in custody, domestic violence and trafficking in human beings, hampers the identification of abuse requiring attention, and the effective implementation of the Convention (arts. 2, 16 and 19).

The State party should compile statistical data relevant to the monitoring of the implementation of the Convention at the national and local levels, disaggregated by gender, ethnicity, age, geographical region and type and location of place of deprivation of liberty, including data on complaints, investigations and prosecutions of cases of torture and ill-treatment perpetrated by law enforcement officials and military and prison personnel, as well as of cases of deaths in custody, violence against women and trafficking in human beings. It should also collect information about any compensation or damages awarded to the victims.

(27) The Committee regrets that the State party has not provided any information on specific national court rulings in which the Convention and its provisions have been invoked.

(28) The Committee recommends that the State party consider making the declarations under articles 21 and 22 of the Convention.

(29) The Committee invites the State party to consider ratifying the core United Nations human rights treaties to which it is not yet a party, particularly the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

(30) The State party is encouraged to disseminate the reports submitted to the Committee and these concluding observations widely through the official media and non-governmental organizations.

(31) The State party is invited to upgrade its core document (HRI/CORE/1/Add.84), in accordance with the requirements of the common core document contained in the

harmonized guidelines on reporting under international human rights treaties (HRI/GEN/2/Rev.6).

(32) The Committee requests the State party to provide, by 1 June 2013, follow-up information in response to the Committee's recommendations related to: (a) ensuring or strengthening fundamental legal safeguards for detainees; (b) conducting prompt, impartial and effective investigations; and (c) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in paragraph 10 (c), paragraph 16 (b), paragraph 19 and paragraph 21 of this document. In addition, the Committee requests follow-up information on remedies and redress provided to the victims addressed in these paragraphs.

(33) The State party is invited to submit its next report, which will be the third periodic report, by 1 June 2016. To this end, the Committee invites the State party to agree, by 1 June 2013, to report under its optional reporting procedure, in which the Committee transmits a list of issues to the State party prior to submission of the periodic report. The State party's response to this list of issues will constitute the next periodic report to be submitted under article 19 of the Convention.

64. **Czech Republic**

(1) The Committee against Torture considered the combined fourth and fifth periodic reports of the Czech Republic (CAT/C/CZE/4-5) at its 1068th and 1071st meetings, held on 14 and 15 May 2012 (CAT/C/SR.1068 and CAT/C/SR.1071), and adopted the following concluding observations at its 1087 meeting (CAT/C/SR.1087).

A. Introduction

(2) The Committee welcomes the submission of the fourth and fifth periodic reports of the Czech Republic, submitted on time and in accordance with its reporting guidelines, and the detailed replies (CAT/C/CZE/Q/4-5/Add.1) to the list of issues (CAT/C/CZE/Q/4-5). The Committee expresses its appreciation to the State party for accepting the optional reporting procedure despite the fact that it did not report under it due to the advanced stage of the drafting of the report.

(3) The Committee appreciated the open and constructive dialogue with the State party's multi-sectoral delegation and thanks the delegation for its answers to the questions raised by the Committee members.

B. Positive aspects

(4) The Committee welcomes that since the consideration of the third periodic report, the State party has ratified or acceded to the following international instruments:

(a) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (20 July 2006);

(b) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (26 January 2005);

(c) Convention on the Rights of Persons with Disabilities (28 September 2009);

(d) Rome Statute of the International Criminal Court (21 July 2009).

(5) The Committee notes the State party's ongoing extensive efforts to revise its legislation in areas of relevance to the Convention, including:

(a) Amendment of the Ombudsman Act, granting the Ombudsman the power to act as the national preventive mechanism in compliance with the Optional Protocol to the Convention, which entered into force on 1 January 2006 (Act No. 381/2005);

(b) Amendments to the Code of Criminal Procedure in 2008 and 2011 relating to extradition and claims to compensation by victims of crime, including torture (Acts No. 457/2008 and No. 181/2011);

(c) Amendments to the Asylum Act in 2006 (Act No. 165/2006) and in 2011 (Act No. 303/2011);

(d) Amendments to the Domestic Violence Act which entered into force on 1 January 2007 (Act No. 135/2006);

(e) New Act on the Police Force of the Czech Republic (Act No. 273/2008);

(f) Entry into force on 1 January 2009 of the new Security Detention Act (Act No. 129/2008);

(g) The entry into force on 1 September 2009 of Act No. 198/2009 on Equal Treatment and Legal Means of Protection against Discrimination (the Antidiscrimination Act);

(h) Entry into force on 1 January 2010 of the new Criminal Code (Act No. 40/2009) establishing racial motive as an aggravating circumstance for a number of crimes;

(i) The new Act on Special Medical Services, effective 1 April 2012 (Act No. 373/2102 Coll).

(6) The Committee also welcomes the efforts of the State party to amend its policies, programmes and administrative measures to ensure greater protection of human rights and give effect to the Convention, including:

(a) Adoption of the Strategy for the Work of the Czech Police Force in Relation to Minorities 2008–2012;

(b) Adoption of the National Plan of Action for the Implementation of the National Strategy to Prevent Violence against Children in Czech Republic 2008–2018;

(c) Approval of the National Action Plan to Transform and Unify the System for the Care of Vulnerable Children in the period 2009–2011;

(d) Adoption of the National Action Plan for the Prevention of Domestic Violence for the Years 2011–2014;

(e) Adoption of the National Strategy against Human Trafficking in the Czech Republic for the Years 2012–2015;

(f) Establishment of the General Inspection of Security Forces in January 2012 (Act No. 341/2011).

C. Principal subjects of concern and recommendations

Definition of torture

(7) While noting that article 10 of the Constitution accords primacy to international treaties approved by the Parliament over domestic legislation, the Committee is concerned that new Criminal Code only establishes the crime of torture and other inhuman and cruel treatment but does not define torture in terms of the Convention (art. 1).

The Committee recommends that the State party amend its Criminal Code in order to adopt a definition of torture that covers all the elements contained in article 1 of the Convention.

Rendition flights and diplomatic assurances

(8) The Committee is concerned that in its written materials the State party had invoked the Convention on International Civil Aviation (the Chicago Convention) as a reason for not requesting to search civilian aircraft. The Committee notes that in the oral dialogue with the State party, the State party clarified that it was not the intention that the Chicago Convention would exclude or deter the application of the Convention against Torture. The Committee is also concerned that the State party has accepted diplomatic assurances in relation to extraditions of persons from its territory to States where those persons would be in danger of being subjected to torture. It is also concerned that no information was provided concerning the type of diplomatic assurances received or requested (arts. 3, 6 and 7).

The Committee recommends that the State party refuse to accept diplomatic assurances in relation to extraditions of persons from its territory to States where those persons would be in danger of being subjected to torture since those assurances cannot be an instrument to modify a determination of a possible violation of article 3 of the Convention. It also requests the State party to provide the Committee with the number and type of diplomatic assurances received since 2004 and the countries involved.

Conditions of detention

(9) The Committee is concerned about the increase in overcrowding in detention facilities which leads to increased inter-prisoner violence; about the use of pepper spray in closed prison spaces; about the number of suicides in places of detention and the absence of information about their causes; the presence of prison staff during the medical examination of prisoners; examination of inmates by psychiatrists through security grates and about the absence of information concerning alleged incommunicado detention (arts. 11 and 16).

The Committee recommends that the State party make greater use of alternative non-custodial measures in keeping with the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) and reduce the number of incarcerations resulting from the lack of implementation of alternative sentences which are then converted to incarceration. It recommends that the State party revise the regulations concerning the use of pepper spray in closed spaces. The Committee also recommends that a study be undertaken into the causes of suicides in detention, that the Prison Service enhance the monitoring and detection of detainees at risk and take preventive measures with regard to the risk of suicide and inter-prisoner violence, including installing cameras and increasing the number of prison staff. It also recommends that the rules governing the medical examination of prisoners be amended to ensure that the examination is private and independent; that inmates are not examined by psychiatrists through security grates; and that health services for detainees be transferred from the Prison Service under the Ministry of Justice to the Ministry of Health. The Committee wishes to receive information on the existence in the Czech Republic of incommunicado detention, including laws and regulations governing incommunicado detention, its duration, the number of persons held in incommunicado detention and whether it is subjected to judicial oversight that includes judicial review.

(10) The Committee is concerned at the continued policy of obliging certain categories of detainees to pay up to 32 per cent of the costs of their incarceration (arts. 2 and 11).

The Committee recommends that the State party put an immediate end to the policy of obliging certain categories of detainees to pay for their incarceration.

Treatment of the Roma minority

(11) The Committee is seriously concerned about reports concerning the continued marginalization of and discrimination against the members of the Roma minority. This has included some incidents in the recent past of three deaths, anti-Roma rallies as well as arson attacks against Roma homes. The Committee is also concerned about the lack of prompt, impartial and effective investigations and prosecutions regarding such incidents (arts. 2, 12, 13 and 16).

The State party should:

(a) **Ensure the protection of Roma citizens and their property through enhanced monitoring and preventive measures. All acts of anti-Roma violence and discrimination should be thoroughly and effectively investigated, the perpetrators brought to justice and redress and compensation provided to the victims. Law enforcement officials should receive training on combating crimes against minorities and members of the Roma community should be recruited into the police force. The Committee recommends that statistics be compiled regarding crimes with an extremist overtone, and on the outcomes of investigations, prosecutions and remedial measures taken in relation to such crimes;**

(b) **Publicly condemn verbal and physical attacks against Roma, prohibit and prevent the advocacy of hate speech and organize awareness-raising and information campaigns promoting tolerance and respect for diversity. The Act on Equal Treatment and Legal Means of Protection against Discrimination (the Anti-discrimination Act) should be translated into the Roma language.**

(12) The Committee is concerned about reports of sterilization of Roma women without free and informed consent, the destruction of medical records on involuntary sterilizations and the difficulties of victims to obtain redress (arts. 2, 14 and 16).

The Committee recommends that the State party investigate promptly, impartially and effectively all allegations of involuntary sterilization of Roma women, extend the time limit for filing complaints, prosecute and punish the perpetrators and provide victims with fair and adequate redress. Medical personnel conducting sterilizations without free, full and informed consent could be held criminally liable and medical records concerning possible involuntary sterilization should not be destroyed within the time frame prescribed by law. Medical personnel should be trained on appropriate means of how to obtain free and informed consent from women undergoing sterilization and all written materials relating to sterilization should be translated into the Roma language.

Redress and compensation, including rehabilitation

(13) The Committee is concerned about the absence of statistical data concerning compensation to victims of torture and ill-treatment, including victims of involuntary sterilization and surgical castration as well as ill-treatment in medical and psychiatric settings, violent attacks against ethnic minorities, trafficking and domestic and sexual violence. It is also concerned about the time limits set for filing complaints (arts. 14 and 16).

The Committee recommends that the State party ensure that victims of torture and ill-treatment are entitled to and provided with redress and adequate compensation, including rehabilitation, in conformity with article 14 of the Convention. It recommends that the State party provide it with statistical data on the number of victims, including victims of involuntary sterilization and surgical castration as well as ill-treatment in medical and psychiatric settings, violent attacks against ethnic minorities, trafficking and domestic and sexual violence, who have received

compensation and other forms of assistance. It also recommends the extension of the time limit for filing claims.

Roma children

(14) The Committee is concerned about the placement of Roma children in educational facilities for children with slight mental disabilities or with a reduced syllabus formerly used for special schools, which compromises their subsequent educational development (arts. 2, 10, 12, 13 and 16).

In light of its general comment No. 2 (2007) on implementation of article 2 by States parties, the Committee recalls that the special protection of certain minorities or marginalized individuals or groups especially at risk is part of the State party's obligations under the Convention. In this respect, the State party should ensure that Roma children are admitted to mainstream education, unless a proper assessment concludes that the child has a mental disability and that the child's legal guardian has requested placement in a special school. Standardized testing should be adapted to the social, cultural and linguistic specificities of minorities and educators and school personnel should receive training in principles of non-discrimination.

Complaints, investigations and prosecution of acts of torture and ill-treatment

(15) The Committee is concerned about the problematic registration of complaints and the independence of the system to assess them. In particular, the Committee is concerned about the discrepancy between the number of complaints of torture and ill-treatment in places of deprivation of liberty, especially those described as justified and partially justified, and the absence of prosecution in this connection for torture or ill-treatment committed by police officers and prison staff (arts. 12 and 13).

The Committee recommends that the General Inspection of Security Forces promptly, impartially and effectively investigate all allegations of torture and ill-treatment by law enforcement officials and prison staff, prosecute the perpetrators of such acts and provide redress, including compensation to the victims. The State party should provide the Committee with data disaggregated by, and with reference to, sex, age, ethnicity and origin of the victims and with a breakdown according to the categories established in the law as grounds for filing a complaint.

Trafficking in persons

(16) The Committee is concerned that not all victims of trafficking receive sufficient protection, access to health care and counselling, shelters and redress, including compensation and rehabilitation since only the victims of trafficking who cooperate with the authorities benefit from a special regime (arts. 10, 12, 13, 14 and 16).

The Committee recommends that the State party enhance the investigation of all types of trafficking, prosecute the perpetrators and provide all victims of trafficking, including those trafficked for sexual and labour exploitation, with equal protection, access to health care and counselling, shelters and redress, including compensation and rehabilitation. Efforts should be made to raise awareness of and train law enforcement personnel, judges and prosecutors in measures to combat trafficking in persons and to improve the identification of victims of trafficking.

Detention of asylum seekers and other non-citizens

(17) The Committee is concerned about the continuous practice of detention of asylum seekers, including families with children and minors accompanied by a legal guardian; the restrictions on the freedom of movement of asylum seekers in closed reception centres; and the regime and material conditions of detention in centres for foreign nationals awaiting deportation (arts. 3 and 11).

The Committee recommends that the State party implement alternatives to detention of asylum seekers, including unconditional release, in particular of families with children and asylum seeking adults who are responsible for children; that asylum seekers enjoy freedom of movement in closed reception centres, with adequate reception conditions; that the State party review the duration of restrictions on freedom of movement of asylum seekers in closed reception centres and that it review the regime and material conditions in centres for foreign nationals awaiting deportation in order to ensure that they are in conformity with the principle of non-refoulement set out in article 3 of the Convention and in the 1951 Convention on the Status of Refugees

Training

(18) The Committee is concerned about the State party's assertion that signs of physical and psychological injuries caused by torture are so specific that an experienced medical worker does not require training (art. 10).

The Committee recommends strongly that training in detecting signs and treating physical and psychological injuries resulting from torture and ill-treatment outlined in the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) be made part of the training for nursing, medical personnel, paramedical personnel and other professionals involved in the documentation and investigation of allegations of torture and ill-treatment to ensure that every case of torture is detected and the perpetrators duly punished.

Stateless persons

(19) While noting that the State party has ratified the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, The Committee is concerned about the particularly vulnerable situation of stateless persons, in particular persons without valid documents and permanent residence in the State party; about the absence of a definition of statelessness, of a central database of stateless persons and of a legal framework, and of a procedure or mechanisms to determine their status; and about the possible discrimination between different categories of stateless persons under the new Citizenship Act (arts. 3 and 16).

The Committee recommends that the State party introduce the definition of statelessness in its legislation, establish procedures and mechanisms for the determination of the status of statelessness and create a central database on stateless persons in its territory. In order to avoid discrimination among different categories of stateless persons, the State party should review the provisions in the draft Citizenship Act relating to acquisition of nationality by children who would otherwise be stateless or who are born out of wedlock to foreign stateless mothers. In addition, the Committee recommends that stateless persons be provided with identification documents.

Surgical castration of sex offenders

(20) The Committee is concerned about the continued use of surgical castration for detained sex offenders. The Committee is concerned that surgical castration usually takes place in the context of a measure of protective treatment (mandatory treatment in a psychiatric hospital) and that article 99 of the Penal Code implies that patients can be placed and treated without their consent. It is also concerned that the detention of sex offenders under the new Act on "forensic detention" may be of an indefinite nature. The Committee is concerned about the past practice that persons were led to believe that refusal of surgical castration would mean lifelong detention (arts. 2 and 16).

The Committee recommends that the State party desist from the practice of surgical castration and amend its legislation in order to bring it in line with international norms such as the “Standards of Care for the Treatment of Adult Sex Offenders”. Legislation regarding sex offenders should include procedural safeguards and precise regulations and professional instructions on their treatment and detention, including its duration.

Psychiatric facilities

(21) Notwithstanding the changes in legislation announced by the delegation of the State party, the Committee is concerned about the reports of frequent placement of persons with intellectual or psychosocial disabilities in social, medical and psychiatric institutions without their informed and free consent; the continued use of cage-beds, despite the prohibition in law, and of net-beds as well as the use of other restraint measures such as bed strapping, manacles, and solitary confinement, often in unhygienic conditions and with physical neglect. The Committee is also concerned about the absence of investigations into the ill-treatment and deaths of institutionalized persons confined to cage and net-beds, including suicides (arts. 11 and 16).

The Committee recommends that the State party:

(a) Allocate appropriate funding for the implementation of the national plan on the transformation of psychiatric, health, social and other services for adults and children with intellectual or psychosocial disabilities to ensure a speedy process of deinstitutionalization to more community-based services and/or affordable housing;

(b) Establish close supervision and monitoring by judicial organs of any placement in institutions of persons with intellectual or psychosocial disabilities, with appropriate legal safeguards and visits by independent monitoring bodies. Institutionalization and treatment should be based on free and informed consent and the persons concerned should be informed in advance about the intended treatment;

(c) Take all necessary measures to ensure, in practice, the prohibition of the use of cage-beds, in conformity with the prohibition enshrined in the Act on Medical Services (Act No. 372/2011). In addition, the Committee recommends that the Act be amended to include the prohibition of the use of net-beds since their effects are similar to those of cage-beds;

(d) Ensure the effective monitoring and independent assessment of the conditions in institutions, including hygiene and instances of neglect. It should establish a complaints mechanism, ensure counsel and provide training to medical and non-medical staff on how to administer non-violent and non-coercive care. All cases of ill-treatment and deaths, including those of 30 year-old Vera Musilova in 2006 and the suicide of a 51 year-old woman on 20 January 2012, should be effectively investigated and prosecuted and redress provided to the victims and their families, including compensation and rehabilitation.

Corporal punishment

(22) The Committee is concerned about the widespread tolerance of corporal punishment in the State party and the absence of legislation explicitly prohibiting it. It is also concerned about the provision in Act No. 94/1963 Coll. Family Act which states that parents have the right to use “adequate educational measures” and that the issue will be addressed in a similar manner in the new Civil Code (arts. 2 and 16).

The Committee recommends that the State party amend its legislation, including the Family Act and the new Civil Code, with a view to introducing an explicit prohibition against corporal punishment in all settings. The State party should carry out

awareness-raising campaigns among the general public regarding the unacceptability of and the harm done by corporal punishment.

Data collection

(23) The Committee regrets the absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions of cases of torture and ill treatment by law enforcement, security, and prison personnel, including in relation to involuntary sterilization, surgical castration, involuntary treatment and placement in social institutions, including the use of restraints, and violent attacks against ethnic minorities, in particular Roma, trafficking and domestic and sexual violence.

The State party should compile statistical data relevant to the monitoring of the implementation of the Convention at the national level, in such areas as data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment, in relation to involuntary sterilization, surgical castration, involuntary treatment and placement in social institutions, the use of restraints, and violent attacks against ethnic minorities, in particular Roma, trafficking and domestic and sexual violence, as well as on means of redress, including compensation and rehabilitation, provided to the victims.

(24) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families, the Convention for the Protection of all Persons from Enforced Disappearance, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

(25) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(26) The Committee requests the State party to provide, by 1 June 2013, follow-up information in response to the Committee's recommendations relating to (a) ensuring or strengthening legal safeguards for persons detained, (b) conducting prompt, impartial and effective investigations, and (c) prosecuting suspects and sanctioning perpetrators of torture and ill-treatment, as contained in paragraphs 11, 14 and 21 of the present document.

(27) The State party is invited to submit its next report, which will be the sixth periodic report, by 1 June 2016. For that purpose, the Committee will, in due course, submit to the State party a list of issues prior to reporting, considering that the State party has accepted to report to the Committee under the optional reporting procedure.

65. Greece

(1) The Committee against Torture considered the combined fifth and sixth periodic report of Greece (CAT/C/GRC/5-6) at its 1062nd and 1065th meetings (CAT/C/SR.1062 and SR.1065), held on 9 and 10 May 2012. At its 1084th and 1085th meetings (CAT/C/SR.1084 and SR.1085), held on 25 May 2012, it adopted the following concluding observations.

A. Introduction

(2) The Committee welcomes the submission by Greece of its combined fifth and sixth periodic reports in response to the list of issues prior to the submission of reports (CAT/C/GRC/Q/5-6). The Committee expresses its appreciation to the State party for accepting the optional reporting procedure and to have submitted its periodic report under

it, as it improves the cooperation between the State party and the Committee and focuses the examination of the report as well as the dialogue with the delegation.

(3) The Committee also appreciates the open and constructive dialogue it had with the high-level delegation of the State party and the supplementary information supplied during its consideration of the report although it regrets that some of its questions to the State party were not answered. The Committee is assured that the dialogue and ensuing recommendations will contribute to the necessary steps by the State party to comply with the Convention in practice.

B. Positive aspects

(4) The Committee notes with satisfaction that the State party has ratified or acceded to the following international instruments since the consideration of its fourth periodic report:

(a) The United Nations Convention against Transnational Organized Crime as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention (Palermo Protocol), in January 2011;

(b) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in February 2008.

(5) The Committee welcomes the State party's adoption, in 2010, of a "National Action Plan for Migration Management" to improve the asylum procedure and conditions for the treatment of third-country nationals irregularly entering the country, including asylum seekers; the adoption, in November 2010, of a Presidential Decree (P.D. 114/2010) amending the previous legislation on the asylum procedure, and setting, for a transitional period, appropriate standards and safeguards for the fair and efficient examination of asylum seekers; as well as the issuance, in January 2011, of a comprehensive law (L.3907/2011) providing for the establishment of a new Asylum Service independent from the police, to gradually take over full responsibility of asylum issues, and the establishment of an initial Reception Service to set up Centres of Initial Reception at border locations.

(6) The Committee notes with satisfaction that a number of other legislative initiatives have been taken by the State party with a view to complying with the Committee's recommendations and improving implementation of the Convention, including in the areas of pretrial detention, fair trial, conditions of detention, trafficking, domestic violence, etc.

(7) The Committee appreciates the efforts made by the State party to modify its policies and procedures so as to enhance human rights protection and implement the Convention, including:

(a) The establishment, as of June 2011, of a Record of Injuries to Detainees in every prison as well as a Record of Body Searches in every women's prison;

(b) The creation of a special hotline, allowing prisoners to contact and be heard by the central administration of prisons.

(8) The Committee also notes with satisfaction that the State party has extended a standing invitation to visit the country to all Human Rights Council special procedure mandate holders. Since the consideration of its last periodic report, the State party has hosted visits from three of the Council's rapporteurs, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

C. Principal subjects of concern and recommendations

Definition of torture

(9) The Committee notes that the State party's criminal law punishes acts of torture (arts. 137A and 137B) but is concerned that the current definition does not comply with the

one provided in article 1 of the Convention as it does not contain all the required elements (art. 1).

The State party should incorporate in its criminal law a definition of torture that is in strict conformity with and covers all the elements contained in article 1 of the Convention. Such a definition would meet the need for clarity and predictability in criminal law, as well as the need under the Convention to draw a distinction between acts of torture committed by or at the instigation of or with the consent or acquiescence of a public official and any other person acting in an official capacity, and acts of violence committed by non-State actors.

Allegations of torture and ill-treatment, impunity

(10) The Committee expresses its serious concern at persistent allegations of torture and ill-treatment by law enforcement officials during arrest or detention, including in the premises of the Criminal Investigation Departments (CID). The Committee is also concerned at the limited number of such cases that have been prosecuted, the very limited number of final convictions, and the lack of sanctions due to mitigating circumstances etc, in cases where there have been convictions. The Committee notes that this does not correspond to recent decisions and rulings from international bodies, including the Human Rights Committee and the European Court of Human Rights, as well as persistent allegations and extensive documentation received from other sources. The Committee also reiterates its concern at the continued reluctance of prosecutors to institute criminal proceedings under article 137A of the Criminal Code and that only one case has resulted in a conviction under this article. In addition, the Committee shares the concern of the Special Rapporteur on the question of torture regarding the limited forensic evidence available to corroborate allegations of ill-treatment amounting to torture (arts. 1, 2, 4, 12 and 16).

The State party should:

(a) **As a matter of urgency, take immediate and effective measures to prevent acts of torture or ill-treatment, including through public sensitization as well as the announcement and adoption of a policy that would produce measurable results in the eradication of torture or ill-treatment by State officials;**

(b) **Promptly amend its interrogation rules and procedures, such as introducing audio or videotaping, with a view to preventing torture and ill-treatment;**

(c) **Duly bring to trial alleged perpetrators of acts of torture or ill-treatment and, if they are found guilty, punish them with appropriate penalties which take into account the grave nature of their acts.**

Excessive use of force by the police

(11) The Committee reiterates its concern at continuing allegations of excessive use of force by law enforcement officials, often related to policing of demonstrations and crowd control (arts. 12 and 16).

The State party should take immediate and effective measures to ensure that law enforcement officials only use force when strictly necessary and to the extent required for the performance of their duty.

Ill-treatment of undocumented migrants, asylum seekers, minorities and Roma

(12) The Committee expresses its concern at repeated and consistent reports of ill-treatment of undocumented migrants, asylum seekers and Roma by law enforcement officials, including in detention facilities and in the context of regular police checks in the streets of urban settings, in violation of the Convention. The Committee is also concerned at information of widespread reluctance by victims to file complaints due to an absence of a

safe complaints mechanism, insufficient number of interpreters, and a lack of trust in authorities. The Committee further regrets the increase in manifestations of xenophobic and racist attacks against foreign nationals, irrespective of their status, including by citizens' groups and far-right groups, according to findings of the quasi-official Racist Violence Recording Network. Furthermore, the Committee notes with concern that the Muslim minority in Thrace is the only recognized minority group in the country (arts. 2, 12 and 16).

The State party should strongly combat the increasing manifestations of racial discrimination, xenophobia and related violence, including by publicly condemning all such intolerance and motivated violence and sending a clear and unambiguous message that racist or discriminatory acts, including by police and other public officials, are unacceptable, and by prosecuting and punishing the perpetrators of such acts. The State party should also take effective measures to prevent discrimination against and ensure protection of all minorities, recognized or not, in accordance with the Committee's general comment No. 2 (2007) on implementation of article 2 by States parties. Such measures include an increase in the recruitment from the minorities to the public administration, including law enforcement agencies.

Prompt, impartial and effective investigations

(13) While noting the establishment of an Office, within the Ministry of Citizen's Protection, responsible for addressing allegations of arbitrariness against law enforcement personnel, the Committee expresses its concern at information that the Office is not yet operational, that its mandate is reportedly limited to ruling on the admissibility of complaints and that cases will be transferred to the relevant disciplinary bodies of the security forces for further investigation. The Committee thus remains concerned at the lack of an effective independent system to investigate complaints of torture, ill-treatment or excessive use of force and it is concerned at the deficiencies in according protection from ill-treatment or intimidation to victims as a consequence of filing a complaint or giving evidence (arts. 12 and 13).

The State party should:

(a) **Strengthen existing mechanisms for monitoring and oversight of the police and other public officials, including by establishing a reliable, independent and accessible complaints system to undertake prompt, impartial and effective investigations into all allegations of torture, ill-treatment or excessive use of force;**

(b) **Certify that all such allegations are recorded in writing, that a forensic medical examination is immediately ordered, and that the necessary steps are taken to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries;**

(c) **Ensure that, in cases of alleged torture, suspects are suspended from duty immediately for the duration of the investigation, particularly if there is a risk that they might otherwise be in a position to repeat the alleged act or to obstruct the investigation;**

(d) **Take effective measures to ensure that all persons reporting acts of torture or ill-treatment are accorded adequate protection.**

Conditions of detention

(14) The Committee reiterates its serious concern at the failure of the State party's authorities to improve the conditions of detention in its police stations and prisons. The Committee is particularly concerned that the level of prison overcrowding, despite some improvements in certain facilities, remains alarming. The Committee also expresses its serious concern at the deplorable material and sanitary conditions in many police stations

and prisons, insufficient staff levels, including medical professionals, and lack of basic supplies (arts. 2, 11 and 16).

The State party should adopt urgent and effective measures to ensure that detention conditions in police stations, prisons and other detention facilities are in conformity with the United Nations Standard Minimum Rules for the Treatment of Prisoners (Beijing Rules). In particular, the State party should:

(a) **Alleviate the overcrowding in prisons, including through the wider use of non-custodial measures as an alternative to prison sentences;**

(b) **Take immediate and effective measures to improve the material and sanitary conditions in both police stations and prisons, ensure the provision of basic supplies, and appoint a sufficient number of trained staff, including medical professionals.**

Prolonged periods of pretrial detention, juveniles

(15) While noting some recent legislative initiatives, the Committee is concerned at the long periods of pretrial detention, including in the case of juveniles, due to shortcomings and considerable delays in the judicial system. The Committee is also concerned at the limited use of non-custodial measures for juvenile detainees. It is further concerned that separation between pretrial and convicted detainees as well as juveniles and adults is not always guaranteed (arts. 2 and 11).

The State party should take effective measures to considerably reduce the length of pretrial detention. Such measures include reform of the judicial system to ensure that pretrial detainees receive a fair and speedy trial, as well as application of alternative pretrial restrictions. In the case of juveniles, detention should only be used in exceptional circumstances or as a measure of last resort, on grounds specifically prescribed by law, and then only for the shortest possible time. Furthermore, the State party should ensure strict separation between pretrial and convicted detainees and between juveniles and adults in all detention facilities.

Body cavity searches

(16) The Committee expresses its concern at the continued use of invasive body cavity searches, especially internal, in detention facilities (arts. 11 and 16).

The State party should exercise strict supervision of body search procedures, especially internal searches, by ensuring that these are performed in a way that is the least intrusive and most respectful of the integrity of the individual, and in all cases in compliance with the terms of the Convention. The Committee also recommends that the State party consider alternatives such as electronic detection methods.

Systematic monitoring of detention facilities, national preventive mechanism

(17) While noting that a number of organizations have a mandate to visit places of detention and the policy referred to by the delegation to grant NGOs and other bodies access to prisons, the Committee is concerned that such visits currently take place on an ad hoc basis due to the absence of an independent organization in charge of systematic monitoring of all detention facilities. The Committee notes, however that the State party signed the Optional Protocol to the Convention on 3 March 2011 and that a recent draft law designates the Greek Ombudsman as the national preventative mechanism (NPM) (arts. 2 and 11).

The State party should ensure that a system of systematic monitoring of all detention facilities, including facilities for migrants and asylum seekers, be set up. In this respect, the Committee recommends that the State party ratify the Optional Protocol

as soon as possible and ensure the designation of an NPM with a mandate in conformity with the provisions of the Optional Protocol. The State party should further ensure that this mechanism is provided with the necessary human, material and financial resources to carry out its mandate independently and effectively throughout the country.

Access to a fair and impartial individual asylum determination procedure

(18) The Committee recognizes the challenges and burdens that the State party faces as the main entry point into Europe for many migrants and asylum seekers due to its geographic location, and it welcomes the efforts made to improve the asylum procedure in terms of quality and promptness. However, the Committee notes with concern that asylum seekers face serious obstacles in accessing the asylum procedure due to structural deficiencies and non-functioning screening mechanisms at the Greek border areas and at the Attika Aliens' Police Directorate (Petrou Ralli). Such obstacles include the absence of procedural guarantees, including free legal aid, interpretation and sufficient information, as well as the requirement of a fixed address. The Committee notes that the State party has cleared some of the backlog of pending asylum cases and appeals, including through the establishment of the second instance Appeals Committees, but it regrets that thousands of cases are still pending. It also remains concerned at the low refugee recognition rates (art. 2).

The State party should fully guarantee and facilitate access to a fair and impartial individual asylum determination procedure. To this end, the State party should ensure that the important safeguards for quality and fairness of its asylum procedure as included in the recent asylum legislation be implemented in practice and supported with appropriate infrastructure, including through the prompt operationalization of the Asylum Service and the initial Reception Service. The State party should also ensure the provision of adequate information in relevant languages, legal aid and interpretative services to facilitate such access. In addition, the State party should dedicate the necessary human and financial resources to address the considerable backlog of cases of appeal of decisions on asylum.

Non-refoulement

(19) The Committee notes with serious concern that individuals have frequently not been able to enjoy full protection under the relevant articles of the Convention in relation to expulsion, return or deportation to another country. The Committee reiterates its concern at the State party's implementation of its forced return procedures, including through means of direct deportation and application of its readmission agreement with Turkey. It is also concerned that persons who are subjected to forced return do not enjoy effective procedural guarantees to access legal remedies or access to the asylum procedure and that they do not have free legal aid or effective information provided through interpretation services. Consequently, they are not able to effectively appeal against orders of deportation and/or consequent detention. The Committee is concerned that these individuals are at a heightened risk of refoulement, including chain refoulement (art. 3).

The State party should ensure full protection from refoulement by establishing the necessary safeguards in forced return procedures and thereby guarantee at all times that no person in need of international protection is returned to a country where he or she fears persecution or is in danger of being subjected to acts of torture or cruel, inhuman or degrading treatment or punishment, as well as chain refoulement. To this end, the State party should review the content of its readmission agreement with Turkey to ensure that it complies with the State party's international law obligations. It should also ensure that appeals against return or expulsion orders have an automatic and immediate suspensive effect.

Administrative detention of asylum seekers and migrants

(20) The Committee expresses its concern at the current detention policy applied to asylum seekers and migrants in an irregular situation, including reports that asylum seekers at border locations are routinely subjected to long periods of administrative detention. The length of detention, in combination with the deplorable conditions of detention, amounts to inhuman or degrading treatment and constitutes a serious hindrance for asylum seekers to apply for asylum. Furthermore, the Committee is seriously concerned at the appalling conditions in the detention facilities, including regular police and border guard stations throughout the country, and particularly in the Evros region, in terms of severe overcrowding, insufficient staff levels, lack of basic supplies, as well as inadequate medical, psychological, social and legal support (arts. 2, 11 and 16).

The State party should ensure that administrative detention on the grounds of irregular entry is not applied to asylum seekers. In particular, detention of asylum seekers should be used only in exceptional circumstances or as a measure of last resort, on grounds specifically prescribed by law, and then only for the shortest possible time. To this end, alternatives to detention should be duly examined and exhausted, especially with regard to vulnerable groups.

The State party should also take urgent and effective measures to improve conditions of administrative detention through alleviation of overcrowding, appointment of a sufficient number of trained staff, and provision of basic supplies, such as medical care and treatment, adequate food, water and personal hygiene items in any facility used for the detention of foreign nationals.

Detention on public health grounds

(21) The Committee expresses its concern at a recent legislative amendment whereby a migrant or asylum seeker can be detained if he or she represents a danger to public health when he or she suffers from an infectious disease or belongs to groups vulnerable to infectious diseases (arts. 2 and 16).

The Committee urges the State party to repeal the provision permitting detention of migrants and asylum seekers on public health grounds and replace detention on such grounds with the appropriate medical measures.

Unaccompanied asylum seeking minors

(22) The Committee is particularly concerned that unaccompanied or separated asylum seeking minors are often not properly registered and are systematically detained, often in mixed immigration facilities with adults. The Committee is also concerned that the transitional Presidential Decree 114/2010 did not introduce a statutory prohibition regarding the detention of these minors and that the limited number of special reception centres for unaccompanied minors contributes to their prolonged detention. It is further concerned that many unaccompanied minors end up homeless and living in the streets where they are often exposed to heightened risks of exploitation and violence (arts. 2, 11 and 16).

The State party should strengthen its efforts to provide adequate protection and proper care in respect of unaccompanied or separated minors entering the country, including by promptly amending its legislation to prohibit their detention. The Committee concurs with the recommendation of the Special Rapporteur on the question of torture that the Ministry of Health and the Ministry of Interior should cooperate closely to ensure that they are placed in suitable and separate reception centres. Furthermore, specific measures should be put in place to prevent homelessness and to provide social support and education to this group.

Violence against women

(23) The Committee takes note of the legislative and other measures adopted by the State party to combat violence against women, including the enactment of Law 3500/2006 for combating domestic violence and the adoption of a National Action Plan on Violence against Women (2009–2013). However, the Committee remains concerned at the persistence of violence against women and children, including domestic and sexual violence, and at the limited number of prosecutions and convictions of the perpetrators. While noting that the State party has established a Standing Committee to elaborate a draft law on combating gender-based violence against women, the Committee is concerned that the State party's Criminal Code currently does not explicitly include rape and other forms of sexual violence as a form of torture (arts. 2, 12 and 16).

The State party should take urgent and effective protective measures to prevent and combat all forms of violence against women and girls, particularly domestic and sexual violence, including by investigating and punishing these offences. Such measures should include the amendment of article 137A of the State party's Criminal Code so as to explicitly include rape and other forms of sexual violence as a form of torture rather than "a serious breach of sexual dignity". The State party should also undertake broad awareness-raising campaigns and provide training courses on the prevention of violence against women and girls for officials who are in direct contact with victims (law enforcement officers, judges, lawyers, social workers, etc.) and for the general public.

Trafficking in persons

(24) The Committee recognizes the efforts made by the State party to address trafficking in persons. However, it expresses its concern at persistent reports of trafficking in women and children for sexual and other exploitative purposes and is concerned at the very few prosecutions and convictions of the offenders of such crimes. The Committee is also concerned that obstacles to the access to justice of the victims of such crimes include the insufficient knowledge by judges and prosecutors of the Palermo Protocol and that no interpretation services are reportedly available to the victims in trafficking trials. The Committee regrets that the support services provided to victims of trafficking with respect to health as part of their possible rehabilitation are inadequate (arts. 2, 10, 12 and 16).

The State party should ensure that all allegations concerning trafficking of persons are investigated promptly, impartially and effectively and that the offenders are prosecuted and punished for such crimes. The State party should also ensure that the victims are provided effective legal and social assistance as well as access to interpretation in the context of trials. The State party should continue to conduct nationwide awareness-raising campaigns and provide adequate programmes of assistance, recovery and reintegration for victims of trafficking. Furthermore, the State party should offer training to law enforcement officers, judges, prosecutors, migration officials and border police on the causes, consequences and repercussions of trafficking and other forms of exploitation, as well as on the Palermo Protocol.

Training

(25) The Committee takes note of the information provided in the State party's report and by the delegation on training schemes for law enforcement officials but it regrets that very little information is available on the evaluation of such schemes and their effectiveness in reducing the incidence of torture and ill-treatment. The Committee also regrets the lack of information on the training provided to border guards, and on the "Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Istanbul Protocol) to personnel involved in the investigation and identification of torture and ill-treatment (art. 10).

The State party should continue to provide training programmes to all public officials, in particular police and other law enforcement officers, to ensure that they are fully aware of the provisions of the Convention. The State party should also ensure that specialized training on obligations under international refugee and human rights law is provided to authorities involved with border surveillance processes, as well as exercise of subsequent regular internal control.

In addition, the State party should establish a training plan for all personnel involved in the investigation and identification of torture, including public defenders, doctors and psychologists, so that the contents of the Istanbul Protocol are known and applied in practice. It should further undertake an assessment of the effectiveness and impact of training schemes and education in reducing incidences of torture and ill-treatment.

Redress, including compensation and rehabilitation

(26) The Committee reiterates its concern at the insufficient information provided relating to redress, including fair and adequate compensation as well as rehabilitation, available to victims of torture or their dependants, in accordance with article 14 of the Convention. The Committee is also concerned at the significant delays in offering redress to victims of violence which has been determined by international supervisory organs and courts (art. 14).

The State party should strengthen its efforts in respect of redress, including compensation and the means for as full rehabilitation as possible, and develop a specific programme of assistance in respect of victims of torture and ill-treatment. The State party should also establish more efficient and accessible procedures to ensure that victims can exercise their right to compensation in accordance with Law 3811/2009, especially by reducing the time used by domestic courts to award damages in such cases. The Committee also recommends that the State party should without exception and as a matter of urgency offer prompt redress to victims of violence which has been determined by international supervisory organs and courts, such as this Committee and the Human Rights Committee, and the European Court of Human Rights.

Aghia Varvara case

(27) The Committee reiterates its previous concern that 502 out of 661 Albanian Roma street children reportedly went missing following their placement during 1998–2002 in the Greek Aghia Varvara children's institution and it is particularly concerned that these cases have not been investigated by the relevant State party authorities (arts. 2 and 12).

The Committee urges the State party to engage with the Albanian authorities with a view to promptly creating an effective mechanism to investigate these cases in order to establish the whereabouts of the missing children, in cooperation with the Ombudsmen of both countries and relevant civil society organizations, and identify disciplinary and criminal responsibilities of those involved, before the passage of time creates difficulties in ascertaining the facts. The Committee also recommends that the State party adopt a comprehensive policy to combat violations of the rights of street children in order to prevent recurrences in the future.

Data collection

(28) While noting with interest that a special working group has recently been set up to submit a thorough proposal for the reorganization and modernization of the State party's Justice Statistics, the Committee regrets the absence of comprehensive and disaggregated data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement officials, including police and prison officials and border guards, as well as on trafficking and domestic and sexual violence (arts. 11 and 12).

The State party should establish an effective system to compile statistical data relevant to the monitoring of the implementation of the Convention at the national level, including data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment, trafficking and domestic and sexual violence, as well as on means of redress, including compensation and rehabilitation, provided to the victims.

(29) The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, and the International Convention for the Protection of All Persons from Enforced Disappearance.

(30) The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(31) The State party is invited to submit its common core document, in accordance with the requirements of the common core document contained in the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN/2/Rev.6).

(32) The Committee requests the State party to provide, by 1 June 2013, follow-up information in response to the Committee's recommendations related to: (a) conducting prompt, impartial and effective investigations; and (b) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as set forth in paragraphs 10 and 13 of the present document. In addition, the Committee requests follow-up information on the conditions of detention and administrative detention of asylum seekers and migrants, as contained in paragraphs 14 and 20 of the present document.

(33) The State party is invited to submit its next report, which will be the seventh periodic report, by 1 June 2016. To that purpose, the Committee will, in due course, submit to the State party a list of issues prior to reporting, considering that the State party has accepted to report to the Committee under the optional reporting procedure.

66. **Rwanda**

(1) The Committee considered the initial report of Rwanda (CAT/C/RWA/1) at its 1070th and 1073rd meetings (CAT/C/SR.1070 and 1073), held on 15 May 2012, and adopted the following concluding observations at its 1090th and 1091st meetings (CAT/C/SR.1090 and 1091), held on 31 May 2012.

A. Introduction

(2) The Committee welcomes the submission of the initial report of Rwanda, which follows the Committee's guidelines for reporting. However, the Committee regrets that the report lacks statistical information on the implementation of the provisions of the Convention. The Committee appreciates the frank and open dialogue with the State party's delegation, as well as the answers provided orally during the consideration of the report and the additional written submissions.

(3) The Committee also notes the progress made towards full reconciliation of the people of Rwanda following the genocide that occurred in 1994, as well as efforts undertaken to provide justice to victims of the genocide and to build a State based on the rule of law.

B. Positive aspects

(4) The Committee welcomes the State party's ratification of or accession to the following international instruments:

(a) The Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, on 15 December 2008;

(b) The Optional Protocol to the Convention on the Elimination of Discrimination against Women, on 15 December 2008;

(c) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, on 15 December 2008;

(d) The Convention on the Rights of Persons with Disabilities, on 15 December 2008;

(e) The Optional Protocol to the Convention on the Rights of Persons with Disabilities, on 15 December 2008.

(5) The Committee notes the efforts undertaken by the State party to reform its legislation, including:

(a) The adoption in 2003 of the Constitution, in which article 15 states that no person shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment;

(b) The adoption in 2012 of a new Penal Code, which defines the offence of torture;

(c) The adoption in 2004 of Law No. 15/2004 relating to evidence and its production;

(d) The adoption in 2001 of Law No. 27/2001 relating to the rights and protection of the child against violence, which states that a child should not be subjected to torture or to cruel, inhuman and degrading treatment;

(e) The adoption in 2007 of Organic Law No. 37/2007 on the abolition of the death penalty;

(f) The adoption in 2008 of the Law on the prevention and punishment of gender-based violence.

(6) The Committee also welcomes the efforts made by the State party regarding ongoing policies and procedures, including the establishment of the Office of the Ombudsman.

C. Principal subjects of concern and recommendations

Definition and criminalization of torture

(7) While welcoming the information provided by the delegation that the newly adopted, but not yet promulgated, Penal Code contains a definition of torture in its article 166, the Committee is concerned that the penalties (six months to five years) provided for in article 205 of said code are lenient. Furthermore the penalties do not cover acts of torture involving the infliction of mental pain or suffering (arts. 1 and 4).

The State party should promulgate and implement the newly adopted Penal Code as soon as possible, ensuring that the definition of torture is in conformity with the Convention. The State party should further ensure that it provides for appropriate penalties for acts of torture, including the infliction of mental pain or suffering.

Direct application of the Convention before domestic courts

(8) While noting that the Convention can be directly invoked before domestic courts, the Committee expresses its concern at the lack of information about cases in which the Convention has been applied or invoked before courts in the State party (arts. 2, 10, 12, 13 and 16).

The State party should ensure that public officials, judges, magistrates, prosecutors and lawyers receive training on the provisions of the Convention so as to facilitate its direct invocation before and its application by domestic courts. The State Party should further ensure, in the transitional period before the promulgation of the new law, that the lack of definition of torture in the Penal Code is compensated by the direct application in domestic courts of the definition appearing in the Convention. The State party should also provide the Committee with illustrative cases of direct application of the Convention in its next periodic report.

Superior orders

(9) While noting that article 48, paragraph 2, of the Constitution provides for the right of any citizen to challenge a superior order and that the internal instruction of the National Police also provides for subordinates not to execute orders that are contrary to the law, the Committee expresses its concern at the lack of procedures to effectively implement such rules (art. 2).

The State party should guarantee, as a matter of practice, the right of a subordinate to refuse to execute an order from his or her superior that is contrary to the Convention. It should also ensure, in practice, that the execution of such act may not be a justification of torture, in full conformity with article 2, paragraph 3, of the Convention.

Allegations of torture and ill-treatment

(10) The Committee expresses its concern about allegations of torture that has occurred in some detention facilities in the State party, in particular reports of 18 cases of torture and ill-treatment (such as severe beatings and electric shocks) during interrogations by Rwanda military intelligence in the Kami and Kinyinga camps, and by other security personnel in “unlawful places,” including the mistreatment of political prisoners, notably Bertrand Ntaganda, Célestin Yumvihoze, Dominique Shyirambere and Victoire Ingabire (arts. 2, 11, 12 and 13).

The State party should take immediate and effective measures, to prevent torture and ill-treatment in all detention facilities and other places of deprivation of liberty in its territory. It should promptly, impartially and thoroughly investigate the 18 alleged cases of torture, and the reported cases of torture and ill-treatment of political prisoners, and prosecute and punish those responsible with appropriate penalties. Further to the investigation, the State party should ensure that those subjected to torture or ill-treatment are provided with redress, including rehabilitation.

Report on secret detention centres

(11) The Committee, though noting the statement by the delegation denying the existence of detention in secret places, nevertheless expresses its concern about reports of detainees held in “unofficial detention centres” without having been charged of a crime or brought before a court, nor having access to independent lawyers and to a doctor. The Committee is concerned at the reported 45 cases of unlawful detention in military camps and other alleged secret detention facilities in 2010 and 2011, where the time of detention ranged from 10 days to two years without the provision of legal safeguards (arts. 2, 11 and 12).

The State party should ensure that no-one is detained in secret or unofficial facilities and prevent all forms of unlawful detention in its territory as well as initiate investigations into such allegations. The State party should, as a matter of urgency, close such facilities and promptly ensure that those detained in such places are provided with all legal safeguards, in particular, the right to promptly appear before a judge, no later than 48 hours after arrest or detention (see Basic Principles on the Role of Lawyers, para. 7), the right to a lawyer of his/her choice, and the right to a

medical examination. The State party should establish and make public, in law, an official list of all places of detention, and promulgate penalties for those responsible for detaining persons outside of legal detention facilities.

Fundamental legal safeguards

(12) While noting that fundamental legal safeguards for detainees are provided for in the legislation of the State party, the Committee is concerned at reports that with regard to detainees held in police stations, prisons or other detention facilities, fundamental legal safeguards are not systematically applied in accordance with international standards. The Committee is particularly concerned that detainees can allegedly be held for a long period in pretrial detention without appearing before a judge, and that they do not have access to a lawyer or a doctor of their choice or to an independent medical examination, in accordance with international standards. In addition, they do not have the right to notify a family member or a relative. The Committee is further concerned at the lack of a centralized registration system of those deprived of their liberty (art. 2).

The State party should take prompt and effective measures to ensure, in law and in practice, that all detainees are afforded all legal safeguards from the very outset of their detention. These include the rights of each detainee to be informed of the reasons for his/her arrest, including any charges against him/her; to be informed of his/her rights in connection with his/her detention; to have prompt access to a lawyer or, if necessary, to legal aid, and to be able to consult privately therewith; to have access to an independent medical examination, preferably by a doctor of his/her choice; to notify a relative of his/her detention; to have a lawyer present during any interrogation by the police; to be assisted by an interpreter, if necessary; to be brought promptly before a judge and to have the lawfulness of his/her detention reviewed by a court.

The State party should ensure that public officials, in particular judicial officers, medical officers, prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, record and report any such suspected or claimed act to the relevant authorities. The State party should also consider establishing a centralized registration system of those deprived of their liberty.

System of monitoring places of detention

(13) The Committee notes the existence of laws, regulations and instructions as well as information that the National Commission for Human Rights, the Office of the Ombudsman and some non-governmental organizations are monitoring police stations and prisons. However, the Committee is concerned at the lack of a mechanism to ensure the monitoring of all places of detention. It also regrets the limited information provided about the existence of a complaints mechanism in such detention facilities, including possibilities to lodge complaints without fear of reprisal (arts. 2, 11, 12, 13 and 16).

The State party should facilitate the conduct of more visits to places of deprivation of liberty by institutions and non-governmental organizations for monitoring purposes, and ensure that detainees can lodge complaints without fear of reprisal. Complaints should be promptly, impartially and independently investigated.

Enforced disappearances

(14) The Committee expresses its concern about reported cases of enforced disappearance and the State party's failure to provide information about the whereabouts of the disappeared or to thoroughly investigate the disappearances, particularly in the cases of André Kagwa Rwisereka and Augustin Cyiza. The Committee is also concerned that 21 of the 24 cases submitted to the State party by the Working Group on Enforced or Involuntary Disappearances remain outstanding (arts. 2, 11, 12, 13, 14 and 15).

The State party should take all appropriate steps to effectively protect all persons from enforced disappearance. It should ensure that all cases of enforced disappearance are thoroughly investigated and that those responsible for enforced disappearances are prosecuted, and if found guilty, punished by appropriate penalties. The State party should also ensure that any individual who has suffered harm as a direct consequence of enforced disappearance has access to all available information which might be useful to determining the whereabouts of the disappeared person, as well as to fair and adequate compensation. The State party should reinforce its efforts to clarify all outstanding cases referred to it by the Working Group on Enforced and Involuntary Disappearances. Furthermore, the State party is urged to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

Gacaca courts – traditional justice

(15) The Committee appreciates the explanations provided by the State party on the system of Gacaca courts, which were established to speed up prosecutions in connexion with the 1994 genocide, and their imminent closure on the accomplishment of their mandate. The Committee is nevertheless concerned about criticisms raised in relation to the lack of guarantees of fundamental safeguards before the Gacaca courts (arts. 2, 10–13, 15 and 16).

The State party should ensure that the Gacaca courts system is compatible with the international human rights obligations of the State party, in particular obligations under the Convention relating to basic legal safeguards for a fair trial, and ensure that the remaining cases before the Gacaca are conducted in conformity with these standards. It should also ensure that decisions taken can be appealed before the ordinary courts.

Violence against women and children, domestic violence, including sexual violence

(16) The Committee notes the measures taken by the State party to combat domestic violence, in particular violence against women and girls. The Committee also notes that the number of cases of rape decreased between 2006 and 2009. However, the Committee remains concerned about the persistence of this phenomenon, as indicated in the State party's report, and notes that there were 1,570 cases of rape of children recorded by the State party in 2009. The Committee also regrets the absence of comprehensive and recent statistical data on domestic violence, as well as on investigations, prosecutions, convictions and penalties applied against perpetrators. The Committee further expresses concern about the absence of comprehensive legislation against corporal punishment of children (arts. 2, 12–14).

The State party should reinforce measures to eliminate domestic violence, in particular violence against women and girls, including by adopting a comprehensive strategy. It should facilitate the lodging of complaints by women against perpetrators, and ensure prompt, impartial and effective investigations of all allegations of sexual violence as well as prosecute suspects and punish perpetrators. The State party should continue to provide women victims with assistance, including shelters, medical aid and rehabilitation measures. Furthermore, the State party should explicitly prohibit corporal punishment of children in all settings.

The State party should provide the Committee with information on the investigations of cases of domestic violence, in particular violence against women and girls, including rape and other crimes, including sexual violence, and on the outcome of trials, including information on the penalties to perpetrators, and redress and compensation offered to the victims.

Non-governmental organizations, human rights defenders and journalists

(17) While noting the information provided by the State party's delegation on its relationship with the civil society, the Committee is concerned about reports of intimidation and threats which impede the effective participation of non-governmental organizations in human rights activities. The Committee is especially concerned about information regarding the arrest and detention of human rights defenders and journalists, and regrets the lack of information on investigations into such allegations. The Committee notes the information provided that international non-governmental organizations are currently authorized to register for 5 years, instead of one, and that local organizations are exempted from registration. Nevertheless, the Committee is concerned about reports of obstacles regarding the registration and work of non-governmental organizations (arts. 2, 12, 13 and 16).

The State party should remove the obstacles affecting the work of non-governmental organizations and provide effective protection against intimidation, threats, arrest and detention of human rights defenders and journalists, including by prosecuting and punishing those responsible for such acts. For this purpose, the State party should effectively implement its decision to grant a five-year registration permit to international non-governmental organizations, and to exempt local non-governmental organizations from registration.

Non-refoulement

(18) The Committee expresses its concern at the fact that a foreigner "who compromises or threatens to compromise public security," is expelled, extradited or returned to his or her country and may be in danger of being subjected to torture, in violation of the principle of non-refoulement, due to the lack of an effective mechanism to adequately assess his or her situation with regard to the risk of torture in the country of destination (art. 3).

The State party should ensure that persons are not expelled, extradited or returned to States where there are substantial grounds for believing that they would be in danger of being subjected to torture. The State party should take steps to guarantee that the principle of non-refoulement is properly applied by the High Court when it decides on such cases. The State party should further ensure that the draft law on extradition, currently under discussion in Parliament, incorporates international obligations under article 3 of the Convention.

Prison conditions

(19) While noting efforts made by the Government, the Committee is concerned about the inadequate prison conditions in the State party, in particular with regard to hygiene, access to health care and food. It is concerned about the high rate of overcrowding and that people may be held in detention after having completed their sentences. The Committee also expresses concern at reports that a high number of mothers are detained with their babies in extremely difficult conditions (arts. 2, 11 and 16).

The State party should strengthen its efforts to improve prison conditions and ensure that they are in conformity with the Standard Minimum Rules for Treatment of Prisoners, by:

(a) **Reducing the high rate of overcrowding, in particular through the wider use of non-custodial measures as an alternative to imprisonment, in the light of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules);**

(b) **Releasing detainees who have completed most of their prison sentences and for whom reintegration into society is considered appropriate by the competent authorities;**

(c) **Avoiding long periods of pretrial detention and ensuring that pretrial detainees receive a fair and speedy trial;**

(d) **Ensuring that minors are separated from adults, and that pretrial detainees are separated from convicted detainees;**

(e) **Ensuring that mothers detained with their babies are placed in more appropriate settings.**

Juvenile justice

(20) The Committee is concerned that minors under 12 years of age who are in conflict with the law can be detained for a maximum period of eight months, and that such minors are not always detained separately from adults. The Committee is also concerned about reports that some minors are arrested and detained for vagrancy without any legal safeguards (arts. 2, 10 and 16).

The State party should take steps, as a matter of urgency, to avoid detaining minors in conflict with the law and, as an alternative to imprisonment, provide them with special care. The State party should also ensure that all minors are only deprived of their liberty as a last resort and for a short period of time. The State party should further ensure that minors deprived of their liberty enjoy full legal safeguards, and if convicted, that they are detained separately from adults.

Training

(21) While noting information provided by the State party on human rights training conducted for law enforcement personnel, medical doctors and nurses, National Prison Service staff, Judicial Police officers, including on the principles set forth in the Convention, the Committee is concerned at the lack of information on the impact of such training in combating torture and ill-treatment and on its evaluation. It is also concerned at the lack of information on the training provided to medical doctors with regard to identifying acts of torture includes familiarization with the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)* (art. 10).

The State party should reinforce training programmes addressed to law enforcement officials, civil, military and medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of individuals subjected to arrest, detention or imprisonment. It should assess the effectiveness of the training provided and ensure that the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)* is included in the training programmes.

Redress, compensation, rehabilitation

(22) The Committee expresses concern about information provided in the State party's report that further to legislation, "the right of victims to obtain compensation is subject to authentic act or recognition from the perpetrator of the offence giving rise to compensation".. The Committee is of the opinion that this requirement may prevent victims of torture or ill-treatment from obtaining redress, including compensation, in compliance with the Convention. The Committee also expresses concern at the lack of cases in which the State party has been liable for compensation in relation to damages caused by its agents in connection with torture and ill-treatment, despite the provisions in the Civil Code (Book

III, arts. 258–262) relating to civil liability with respect to offences and quasi-offences (art. 14).

The State party should review its legislation and remove the condition based on “recognition of offence by the perpetrator” so as to ensure that victims of torture may seek and obtain prompt, fair and adequate compensation, including in cases where the civil liability of the State party is involved. The State party should provide the Committee with statistical data on cases in which the State party has provided compensation to victims of torture or ill-treatment, as well as the amount of the compensation.

Coerced confessions

(23) While noting information in the State party’s report that evidence obtained through torture or any cruel or degrading method is prohibited, the Committee is concerned about reports that individuals charged with threatening national security and detained at Kami or Mukamira military camps as well as in “safehouses” in Kigali had made confessions due to beatings and torture. The Committee is particularly concerned that judges did not require investigations into such cases but placed the burden of proof on the persons charged (art. 15).

The State party should ensure that confessions, statements and evidence obtained as a result of torture or ill-treatment are not invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. The State party should investigate confessions obtained through torture, and prosecute and punish those responsible. It should review criminal convictions based solely on confessions in order to identify instances of wrongful convictions based on evidence obtained through torture or ill-treatment, and take appropriate remedial measures and inform the Committee on its findings.

National Commission for Human Rights

(24) While welcoming the delegation’s explanations on the activities of the National Commission for Human Rights, the Committee is concerned about the reported lack of effective independence of the Commission and the insufficiency of financial and human resources necessary to enable it to adequately fulfil its mandate (art. 2).

The State party should take appropriate measures to guarantee, in practice, the independence of the National Commission for Human Rights and provide it with adequate financial and human resources to enable it to effectively fulfil its mandate, in full conformity with the Principles relating to the Status of National Institutions (the Paris Principles).

(25) The Committee recommends that the State party consider ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

(26) The Committee recommends that the State party consider making the declarations envisaged under articles 21 and 22 of the Convention in order to recognize the competence of the Committee to receive and consider communications.

(27) The State party is requested to widely disseminate the report submitted to the Committee as well as the present concluding observations, in appropriate languages, through official websites, the media and non-governmental organizations.

(28) The State party is invited to submit the common core document in accordance with the requirements of the common core document contained in the harmonized Guidelines on reporting under the international human rights treaties (HRI/GEN.2/Rev.6) approved by the

inter-committee meeting of the human rights treaty bodies and to observe the page limit of 80 pages for said common core document.

(29) The Committee requests the State party to provide by 1 June 2013 follow-up information in response to the Committee's recommendations with regard to (i) conducting prompt, impartial and effective investigations; (ii) prosecuting suspects and sanctioning perpetrators of torture and ill-treatment; (iii) providing redress to victims; and (iv) guaranteeing fundamental legal safeguards to detainees held in police stations, as contained in paragraphs 10, 12 and 14 of the present concluding observations. In addition, the Committee requests follow-up information on secret detention centres and reducing overcrowding in prisons, as contained in paragraphs 11 and 19 (a) and (b) of the present concluding observations.

(30) The Committee invites the State party to present the next report, which will be its second periodic report, by 1 June 2016. To that effect, the Committee invites the State party to accept, by 1 June 2013, to report under the optional reporting procedure, which consists in the transmittal by the Committee to the State party of a list of issues prior to the submission of its report. The State party's response to this list of issues will constitute, under article 19 of the Convention, its next periodic report.

67. **Syrian Arab Republic**

(1) The Committee against Torture considered the implementation of the Convention in the Syrian Arab Republic in the absence of the special report requested by the Committee at its 1072nd meeting (CAT/C/SR.1072), held on 16 May 2012, and adopted at its 1089th meeting (CAT/C/SR.1089), held on 30 May 2012, the following concluding observations.

A. Introduction

Request of the Committee

(2) By letter of 23 November 2011, addressed to the Permanent Mission of the Syrian Arab Republic, the Committee invited the Syrian Arab Republic to submit a special report on measures taken to ensure that all its obligations under the Convention were fully implemented and expressed its deep concern about numerous, consistent and substantiated reports from reliable sources about widespread violations to the provisions of the Convention by the authorities of the Syrian Arab Republic, including:

- (a) Torture and ill-treatment of detainees, including children who were subjected to torture and mutilation while detained;
- (b) Widespread or systematic attacks against the civilian population, including killing of peaceful demonstrators and the excessive use of force against them;
- (c) Extrajudicial, summary or arbitrary executions;
- (d) Arbitrary detentions by police forces and the military;
- (e) Enforced and involuntary disappearances; and
- (f) Persecution of human rights defenders and activists.

(3) The Committee noted that these reports of massive human rights violations take place in a context of total and absolute impunity as prompt, thorough and impartial investigations have not been undertaken by the Syrian authorities in these cases. It further noted that these generalized abuses are allegedly conducted under the direct order from public authorities, at their instigation or with their consent or acquiescence.

(4) The Committee considered that the follow-up comments and responses to the concluding observations of the Committee (CAT/C/SYR/CO/1/Add.1) did not provide

information that would be sufficient to dismiss the concerns of the Committee about the widespread violations of the provisions of the Convention.

(5) The special report was requested pursuant to article 19, paragraph 1, *in fine*, of the Convention, which provides that States parties shall submit “such other reports as the Committee may request”.

(6) The Committee reiterated its request to the Syrian Arab Republic by letter of 12 March 2012, inviting the State party to identify the representatives who would attend the meetings of 16 and 18 May 2012, for a review of compliance and an interactive dialogue with the Committee.

Responses of the Syrian Arab Republic

(7) By note verbale of 20 February, 2012, the Permanent Mission of the Syrian Arab Republic stated that its Government would inform the Committee about the measures it had taken to implement its undertakings under the Convention in its next periodic report, which was due in 2014, and that the Syrian Arab Republic considered that article 19 of the Convention did not provide for the possibility for the Committee to request a special report.

(8) By note verbale of 21 March 2012, the Permanent Mission of the Syrian Arab Republic indicated, among other reasons, that article 19 of the Convention gave the Committee the right to request a supplementary report only if there are any new measures, a matter to which the Committee had made no reference. The Syrian Arab Republic requested that the Committee withdraw its request for a special report and cancel the meetings at which such report would be considered.

(9) By note verbale of 2 April 2012, the Permanent Mission of the Syrian Arab Republic informed the Secretary-General, the Security Council and the Committee, about the human and material losses that have occurred in the Syrian Arab Republic since the beginning of the events in the State party until 15 March 2012, caused by the “actions of armed terrorist groups”.

(10) By note verbale of 24 May 2012, the Permanent Mission of the Syrian Arab Republic provided an official response in reference to the public meeting held by the Committee on 16 May 2012.

(11) The letters of the Committee and the notes verbales of the Permanent Mission of the Syrian Arab Republic are available for consultation at www.ohchr.org.

Committee’s authority to request a special report

(12) The Committee recalls that article 19, paragraph 1, *in fine*, explicitly provides that States parties shall submit “such other reports as the Committee may request”. This procedure was used by the Committee in the past.

(13) This request clearly falls entirely within the purview of the Committee’s functions under the Convention. The Committee’s request is fully consistent with the object and purpose of the Convention to prevent, suppress and make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment.

B. Consideration of the implementation of the Convention in the Syrian Arab Republic, in the absence of the special report requested by the Committee

(14) On 16 May 2012, in a public meeting, the Committee considered the situation of the implementation of the Convention in the Syrian Arab Republic on the basis of the information available.

(15) The Committee regretted that the State party did not submit the requested report. It also regretted that the State party did not send a delegation to attend the meeting of 16 May 2012.

(16) The Committee considered the implementation of the Convention in the State party on the basis of the available information from numerous credible and reliable sources, including:

(a) The reports of the International Commission of Inquiry on the Syrian Arab Republic of the Human Rights Council (A/HRC/S-17/2/Add.1 and A/HRC/19/69);

(b) The report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic (A/HRC/18/53);

(c) The urgent appeals from the special procedures of the Human Rights Council, namely the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and of expression, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UA G/SO 218, G/SO 217/1, G/SO 214 (76–17), G/SO 214 (107–109), 214 (53–24)); the allegation letter sent by the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ((G/SO 214 (33–27), G/SO 214 (53–24));

(d) The report of the Working Group on the Universal Periodic Review on the Syrian Arab Republic (A/HRC/19/11);

(e) The concluding observations of the Committee on the Rights of the Child on the third and fourth periodic reports of the Syrian Arab Republic under the Convention on the Rights of the Child (CRC/C/SYR/CO/3-4);

(f) Public reports submitted by United Nations specialized agencies and non-governmental organizations.

(17) The Committee also took note of information in the following resolutions about the situation in the State party:

(a) General Assembly resolutions 66/253 and 66/176;

(b) Security Council resolutions 2043 (2012) and 2042 (2012);

(c) Human Rights Council resolutions, including at three special sessions 19/22, 19/1, S-18/1, S-17/1 and S-16/1.

C. Principal subject of concerns

(18) The Committee is deeply concerned at consistent, credible, documented and corroborated allegations about the existence of widespread and systematic violations of the provisions of the Convention against the civilian population of the Syrian Arab Republic committed by the authorities of the State party and by militias (e.g. shabiha) acting at the instigation or with the consent or the acquiescence of the authorities of the State party.

(19) The Committee takes into account the finding of the International Commission of Inquiry on the Syrian Arab Republic that “a reliable body of evidence exists that ... provides reasonable grounds to believe that particular individuals, including commanding officers and officials at the highest levels of Government, bear responsibility for crimes against humanity and other gross human rights violations” (A/HRC/19/69, para. 87). It also takes note of the statement of the United Nations High Commissioner for Human Rights of 27 May 2012, according to which, “indiscriminate and possibly deliberate killing of

villagers in the El Houleh area of Homs in Syria may amount to crimes against humanity or other forms of international crime".¹¹

(20) The Committee expresses its grave concern about the prevalence, continuation and un-rebutted occurrence of violations of the Convention in the State party, as documented in the above-mentioned reports:

(a) Widespread use of torture and cruel and inhuman treatment of detainees, individuals suspected of having participated in demonstrations, journalists, web bloggers, defectors of security forces, persons wounded or injured, women and children (arts. 2, 11, 13 and 16);

(b) The habitual use of torture and cruel and inhuman treatment as a tool, which appears to be deliberate and part of State's policy, to instil fear and to intimidate and terrorize civilian population (arts. 2 and 16) and the complete disregard by State party authorities of the requests from authoritative international bodies and experts to cease these violations (art. 2);

(c) The extensive reports of sexual violence committed by public officers, including against male detainees and children (arts. 2, and 16);

(d) The extensive gross violations of children's rights committed by the Syrian authorities, including the torture and ill-treatment of children, the killing of children during demonstrations and their arbitrary detention;

(e) Reports of at least 47 missing children, some as young as 15 years old who may have disappeared since their detention (art. 16);

(f) Cruel, inhuman or degrading conditions of detention, including severe overcrowding of facilities (arts. 11 and 16);

(g) The reported existence of secret places of detention; as well as reports on the lack of access to places of detention by international and national monitors and organizations; such secret detention centres are per se breaches of the Convention and lead inevitably to cases of torture and ill-treatment contrary to the Convention (arts. 2, 11, 12, 13 and 16);

(h) Large-scale attacks by security forces against civilians across the country, resulting in numerous summary executions, including the killings of the elderly, women and children trying to flee the attacks on towns and villages (art. 2);

(i) The appalling and tragic events which took place in El-Houleh, on 25 May 2012, in which more than 100 persons, including at least 34 children under the age of 10 were killed as a result of an indiscriminate attack to the village (art. 2);

(j) Excessive use of force, including use of heavy lethal weapons against demonstrators participating in peaceful manifestations, and the artillery bombardments of residential areas, used consistently by units of the Syrian armed forces and diverse security forces, and the coordinated nature of these attacks, including the deliberate demolition and destruction of houses, as a mean of retaliation or punishment (arts. 2 and 16);

(k) Regular raids conducted by security forces in hospitals to search for and kill injured demonstrators; as well as routine denial of access to medical assistance for wounded protesters, sometimes resulting in death (arts. 2, 11, 12, 13 and 16);

¹¹ "Syria: Pillay says El Houleh killings may amount to international crimes", Geneva, 27 May 2012. Available from www.ohchr.org.

- (l) Killings of journalists, lawyers, human rights defenders and activists (arts. 2, 13 and 16);
- (m) Widespread attempts to cover up killings by the security forces, including the use of mass graves (arts. 12 and 13);
- (n) Widespread practice of arbitrary and unlawful arrest and subsequent unlawful detention of civilians, including the elderly, children and women (arts. 2 and 16);
- (o) The entry into force, on 21 April 2011, of the Legislative Decree No. 55/2011 amending article 17 of the Code of Criminal Procedure to allow for suspects to be held for up to seven days pending investigation and the interrogation of suspects for certain crimes, renewable for up to a maximum of 60 days (arts. 2 and 16);
- (p) Arbitrary arrests not formally acknowledged and suspects often held incommunicado without their families being notified about their arrest or whereabouts (arts. 2 and 16);
- (q) Numerous reports of enforced disappearances and death in custody of detainees following severe infliction of torture (arts. 2, 11, 12, 13 and 16);
- (r) Arbitrary arrests of activists who participated or helped to organize demonstrators and whose names appeared on security forces lists; arbitrary arrests of family and acquaintances of wanted individuals as a measure of intimidation and retribution (arts. 2, 12, 13 and 16);
- (s) Continued granting of immunity from prosecution for members of the security forces which promotes a long-standing culture of abuse and impunity, as evidenced by the fact that Legislative Decree No. 14, of January 1969, and Decree No. 69, of September 2008, are still in force (arts. 12 and 13).

(21) The Committee is also seriously concerned by the allegations received concerning acts of torture, and cruel and inhuman treatment, summary executions and abductions committed by armed opposition groups.

D. Recommendations

(22) The Committee reiterates its previous recommendations addressed to the Syrian Arab Republic (CAT/C/SYR/CO/1) following its first periodic report to:

- (a) Unambiguously reaffirm the absolute nature of the prohibition against torture and immediately cease and publicly condemn widespread and systematic practices of torture, especially by security forces, accompanied by a clear warning that anyone committing such acts, or otherwise complicit or participating in torture will be held personally responsible before the law for such acts and will be subject to criminal prosecution and appropriate penalties;
- (b) As a matter of urgency, take vigorous steps to revoke the decrees affording immunity for crimes committed on duty which result, in practice, in impunity for acts of torture committed by members of security services, intelligence agencies and police;
- (c) Establish a national independent system to effectively monitor and inspect all places of detention and follow up on the outcome of such systematic monitoring, including by allowing regular and unannounced visits by national and international monitors, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment;
- (d) Release all persons arbitrarily detained and ensure that no one is detained in secret detention facilities under the de facto effective control of States authorities; investigate and disclose the existence of any such facilities, the authority under which they

have been established and the manner in which detainees are treated in such facilities; as well as proceed immediately to close all such facilities;

(e) As a matter of urgency, investigate every case of reported enforced disappearances and communicate the results of the investigations to the families of missing persons;

(f) Immediately cease all attacks against journalists and human rights defenders and advocates, and take all necessary steps to ensure that all persons, including those monitoring human rights, are protected from any intimidation or violence as a result of their activities and exercise of human rights guarantees, to ensure the prompt, impartial and effective investigation into such acts, and to prosecute and punish perpetrators and provide redress including compensation to victims;

(g) Immediately adopt protective measures for all victims of torture and ill-treatment, including expedite access to medical care; and provide all victims of torture and ill-treatment with redress, including fair and adequate compensation and as full rehabilitation as possible.

(23) Furthermore, the Committee stresses as a matter of urgency, and in view of the extensively documented actions in violation of the Convention that continue unabated, that it is necessary that the Syrian Arab Republic:

(a) Immediately fulfil its obligations under the Convention to prevent and protect all individuals under its jurisdiction from torture and other cruel, inhuman and degrading treatment or punishment; the Committee recalls, in this regard, that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;

(b) Put an immediate end to all attacks against its population, especially peaceful demonstrators, women, children and the elderly; ensure that all acts in violation of the Convention are brought to a halt; and cease widespread, gross and continued human rights violations of all persons under its jurisdiction, especially the systematic denial, in some areas, of the basic requirements of human life, such as food, water and medical care;

(c) Establish, with the assistance of the international community, an independent commission of inquiry into the serious allegations of human rights violations committed by security forces and armed groups acting under the control or with the consent or acquiescence of State authorities; suspend members of the security forces against whom there are credible allegations of human rights abuse pending completion of investigations; and ensure that individuals or groups who cooperate with the commission of inquiry are not subjected to any reprisals, ill-treatment or intimidation as a consequence of this cooperation;

(d) Ensure prompt, impartial and thorough investigations into allegations of summary execution, enforced disappearance, arbitrary arrest and detention, torture or cruel, inhuman or degrading treatment or punishment, by State agents or non-State actors, prosecute those responsible before independent and impartial courts that meet international fair trial standards, and punish them according to the severity of their crimes. Prosecution of members of security forces involved in serious human rights violations and alleged crimes against humanity should comprise investigations up to the highest levels in the chain of command.

(24) The Committee calls upon the authorities of the Syrian Arab Republic to cease its clear breach of the obligations under the Convention. The Committee requests the State party to end its current practices in violation of the Convention, which are completely unacceptable, and to undertake an immediate and vigorous programme to establish compliance with the Convention, including through prompt and direct cooperation with the

Committee. To this effect, the Committee, pursuant to article 19, paragraph 1, in fine, of the Convention, requests that the Syrian Arab Republic submit a special follow-up report to the Committee on the measures taken to implement the above-mentioned recommendations no later than 31 August 2012.

IV. Follow-up to concluding observations on States parties' reports

68. Information regarding the follow-up responses by States parties, and the activities of the Rapporteur for follow-up to concluding observations under article 19 of the Convention, including the Rapporteur's views on the results of this procedure, is presented in the present chapter. This information is updated through 1 June 2012, the end of the Committee's forty-eighth session.

69. In its annual report for 2005–2006¹² the Committee described the framework that it had developed to provide for follow-up subsequent to the adoption of the concluding observations on States parties' reports. The Committee has presented information in its subsequent annual reports on its experience in receiving information on follow-up measures taken by States parties since the initiation of the procedure in May 2003.

70. In accordance with its rules of procedure, the Committee established the post of Rapporteur for follow-up to concluding observations under article 19 of the Convention and appointed Ms. Felice Gaer to that position. At the forty-seventh and forty-eighth sessions (October–November 2011 and May–June 2012, respectively) the Rapporteur presented progress reports to the Committee on the procedure.

71. At the conclusion of the Committee's review of each State party report, the Committee identifies concerns and recommends specific measures to prevent acts of torture and/or ill-treatment. Thereby, the Committee assists States parties in identifying effective legislative, judicial, administrative and other measures to bring their laws and practice into compliance with the obligations of the Convention.

72. In its follow-up procedure, the Committee has identified a number of its recommendations to each State party as requiring additional information within one year. Such follow-up recommendations are identified because they are serious, protective and are considered able to be accomplished within one year. The States parties are asked to provide information within one year on the measures taken to give effect to the follow-up recommendations. The recommendations requiring follow-up within one year are specifically identified in a paragraph at the end of each set of concluding observations.

73. Since the procedure was established at the thirtieth session in May 2003, through the end of the forty-eighth session in May–June 2012, the Committee has reviewed 126 reports from States parties for which it has identified follow-up recommendations (99 individual countries, 27 reviewed twice¹³). Of the 109 follow-up reports that were due by 1 June 2012, the time of the adoption of the present report, 74 had been received by the Committee, for a 68 per cent overall response rate. As at 1 June 2012, 33 States had not yet supplied follow-up information that had fallen due: Benin (thirty-ninth session), Bulgaria (thirty-second), Burundi (thirty-seventh), Cambodia (forty-fifth and thirty-first), Cameroon (forty-fourth and thirty-first), Chad (forty-second), Costa Rica (fortieth), Democratic Republic of the Congo (thirty-fifth), Ecuador (forty-fifth), El Salvador (forty-third), Ethiopia (forty-fifth), Finland (forty-sixth), Ghana (forty-sixth), Honduras (forty-second), Indonesia (fortieth), Ireland (forty-sixth), Jordan (forty-fourth), Kuwait (forty-sixth), Luxembourg (thirty-

¹² *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*.

¹³ Albania, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Canada, Cambodia, Cameroon, Chile, Colombia, Czech Republic, Ecuador, Finland, France, Germany, Greece, Latvia, Lithuania, Monaco, Morocco, New Zealand, Republic of Moldova, Slovenia, Sri Lanka, Switzerland, Syrian Arab Republic and Yemen.

eighth), Mauritius (forty-sixth), Monaco (forty-sixth), Mongolia (forty-fifth), Nicaragua (forty-second), Peru (thirty-sixth), Republic of Moldova (thirtieth), Slovenia (forty-sixth), South Africa (thirty-seventh), Tajikistan (thirty-seventh), Togo (thirty-sixth), Turkmenistan (forty-sixth), Uganda (thirty-fourth), Yemen (forty-fourth) and Zambia (fortieth). As can be seen, the 33 States parties that did not submit any information under the follow-up procedure by 1 June 2012 came from all world regions.

74. The Rapporteur sends reminders requesting the outstanding information to each State party for which follow-up information is due, but not yet submitted. The status of the follow-up to concluding observations may be found in a chart maintained on the web pages of the Committee. In 2010, the Committee established a separate web page for follow-up: <http://www2.ohchr.org/english/bodies/cat/follow-procedure.htm>. State party responses are posted on this web page, as are letters from the Rapporteur to the State party, and any follow-up submissions from NGOs.

75. The Rapporteur expresses appreciation for the information provided by States parties regarding those measures taken to implement their obligations under the Convention. In addition, she has assessed the responses received as to whether all the items designated by the Committee for follow-up have been addressed, whether the information provided responds to the Committee's concern, and whether further information is required. Each letter responds specifically and in detail to the information presented by the State party. Where further information has been needed, she has written to the concerned State party with specific requests for further clarification. To date, 23 State parties have provided additional clarifications in response to these requests. With regard to States that have not supplied the follow-up information at all, she requests the outstanding information.

76. The Rapporteur also expresses appreciation for the information submitted by human rights NGOs and other civil society groups under the follow-up procedure. As at 1 June 2012, the Committee has received follow-up reports from such sources on 19 State parties.

77. Since the recommendations to each State party are crafted to reflect the specific situation in that country, the follow-up responses from the States parties and letters from the Rapporteur requesting further clarification have addressed many topics. Among those addressed in the letters sent to States parties requesting further information have been a number of precise matters seen as essential to the implementation of the recommendation in question. A number of issues have been highlighted to reflect not only the information provided, but also the issues that have not been addressed but which are deemed essential to the Committee's ongoing work in order to be effective in taking preventive and protective measures to eliminate torture and ill-treatment.

78. During the period under review, the Rapporteur sent reminders to Austria, Bosnia and Herzegovina, Cambodia, Cameroon, Ecuador, Ethiopia, Finland, France, Ghana, Ireland, Jordan, Kuwait, Mauritius, Monaco, Mongolia, Slovenia, Switzerland, Turkey, Turkmenistan and Yemen.

79. The Rapporteur continued to report to the Committee on her findings on the Committee's follow-up procedure at the forty-seventh and forty-eighth sessions. She noted that, since the Committee had begun the follow-up procedure in 2003, the most frequently addressed follow-up topics, in order of occurrence, were: (a) conduct prompt, impartial, and effective investigations (80 per cent of States parties examined); (b) prosecute and sanction perpetrators (69 per cent); (c) ensure the respect for fundamental legal safeguards (55 per cent); (d) ensure the right to complain and have cases examined (43 per cent); (e) conduct training and awareness-raising (40 per cent); and (f) provide redress and compensation, including rehabilitation (39 per cent). In view of these findings, and the growing number of topics the Committee had identified for follow-up by States parties, the Rapporteur proposed that the Committee consider limiting follow-up items to the top three issues that

have emerged since 2003 (i.e. investigations, prosecutions and legal safeguards) to provide a more coherent and focused procedure for State parties and to highlight the Committee's emphasis on urgent matters.

80. Following the proposal presented by the Rapporteur and discussion of the Committee's large and growing number of items identified for follow-up by States parties, the Committee adopted a new procedure aimed at focusing the follow-up procedure. Effective beginning in November 2011, the Committee includes a paragraph requesting the concerned State party to provide, within one year, information on the measures taken to give effect to the Committee's recommendations relating to: (a) ensuring or strengthening legal safeguards for persons deprived of their liberty; (b) conducting prompt, impartial and effective investigations; and (c) prosecuting suspects and sanctioning perpetrators of torture or ill-treatment, as contained in concluding observations, when identified for follow-up. In addition, the State party concerned may be requested to provide follow-up information on other issues identified by the Committee in the concluding observations, including providing remedies and redress to the victims, when deemed necessary by the Committee, and considering the specific situation in that State party.

81. Also, at both the forty-seventh and forty-eighth sessions, the Rapporteur presented the results of a pilot study in which a double-ranking system was used to assess the responses to the follow-up procedure. In contrast to the ranking system utilized by another treaty body, where a single ranking combines (a) whether information requested by the Committee is provided and (b) whether the recommendation made by the Committee is implemented, the pilot study of the Committee against Torture used a double-ranking system. Such a double-ranking system enables the Committee to distinguish between a State party that provides a great deal of information but largely does not implement the recommendation and a State party that substantially implements the recommendation. The Rapporteur found that, in the pilot study, the double-ranking system more accurately reflects a State party's performance with regard to follow-up recommendations. Further study will take place on using this approach.

82. The chart below details, as at 1 June 2012, the end of the Committee's forty-eighth session, replies from States parties with respect to the follow-up procedure. The chart also includes references to the dates of submission of States parties' comments to concluding observations, if any, and any further action by the Committee.

Follow-up procedure to conclusions and recommendations from May 2003 to June 2012*

Thirtieth session (May 2003)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Azerbaijan	May 2004	7 July 2004 CAT/C/CR/30/RESP/1	Request for further clarification (21 April 2006)
Republic of Moldova	May 2004	-	Reminder (7 March 2006)

Thirty-first session (November 2003)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Cambodia	November 2004	-	Reminder (28 April 2006)
Cameroon	November 2004	-	Reminder (17 February 2006)
Colombia	November 2004	24 March 2006 CAT/C/COL/CO/3/Add.1	Reminder (17 February 2006)
		16 October 2007 CAT/C/COL/CO/3/Add.2	Request for further clarification (2 May 2007)
Latvia	November 2004	3 November 2004 CAT/C/CR/31/RESP/1	Request for further clarification (21 April 2006)
		14 May 2007 CAT/C/LVA/CO/1/Add.1	Information under review
Lithuania	November 2004	7 December 2004 CAT/C/CR/31/5/RESP/1	Request for further clarification (21 April 2006)
		25 October 2006 CAT/C/LTU/CO/1/Add.2	Request for further clarification (27 October 2008)
Morocco	November 2004	22 November 2004 CAT/C/CR/31/2/Add.1	
		2 August 2006 CAT/C/MAR/CO/3/Add.2	Request for further clarification (10 May 2006)
			Request for further clarification (17 March 2011)
		30 October 2006 CAT/C/MAR/CO/3/Add.3	
Yemen	November 2004	22 August 2005 CAT/C/CR/31/4/Add.1	Request for further clarification (21 April 2006)

* Reports submitted by State parties under article 19, paragraph 3, of the Convention are indicated as "comments" and are listed in the present annual report pursuant to article 19, paragraph 4.

Thirty-second session (May 2004)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Bulgaria	May 2005	-	Reminder (17 February 2006)
Chile	May 2005	22 January 2007 CAT/C/38/CRP.4	Reminder (17 February 2006) Request for further clarification (15 May 2008)
Croatia	May 2005	12 July 2006 CAT/C/HRV/CO/3/Add.1 16 February 2009 CAT/C/HRV/CO/3/Add.2	Reminder (17 February 2006) Request for further clarification (13 May 2008) Information under review
Czech Republic	May 2005	25 April 2005 CAT/C/CZE/CO/3/Add.1 14 January 2008 CAT/C/CZE/CO/3/Add.2	Request for further clarification (16 May 2006) Request for further clarification (6 May 2011)
Germany	May 2005	4 August 2005 CAT/C/CR/32/7/RESP/1 25 September 2007 CAT/C/DEU/CO/3/Add.1	Request for further clarification (30 October 2006) Request for further clarification (3 May 2011)
Monaco	May 2005	30 March 2006 CAT/C/MCO/CO/4/Add.1	Reminder (17 February 2006) Request for further clarification (15 May 2008)
New Zealand	May 2005	9 June 2005 CAT/C/CR/32/4/RESP/1 Comments: 19 December 2006 CAT/C/NZL/CO/3/Add.2	Request for further clarification (14 May 2007)

Thirty-third session (November 2004)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Argentina	November 2005	2 February 2006 CAT/C/ARG/CO/4/Add.1	Request for further clarification (11 May 2007)
Greece	November 2005	14 March 2006 CAT/C/GRC/CO/4/Add.1 9 October 2008 CAT/C/GRC/CO/4/Add.2	Reminder (17 February 2006) Request for further clarification (15 May 2008)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
United Kingdom of Great Britain and Northern Ireland	November 2005	14 March 2006 CAT/C/GBR/CO/4/Add.1	Reminder (17 February 2006)
		25 August 2009 CAT/C/GBR/CO/4/Add.2	Request for further clarification (29 April 2009)
			Information under review

Thirty-fourth session (May 2005)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Albania	May 2006	15 August 2006 CAT/C/ALB/CO/1/Add.1	Request for further clarification (15 November 2008)
Bahrain	May 2006	21 November 2006 CAT/C/BHR/CO/1/Add.1	Request for further clarification (17 November 2008)
		13 February 2009 CAT/C/BHR/CO/1/Add.2	Request for further clarification (25 May 2011)
Canada	May 2006	2 June 2006 CAT/C/CAN/CO/5/Add.1	Request for further clarification (29 April 2009)
Finland	May 2006	19 May 2006 CAT/C/FIN/CO/4/Add.1	Request for further clarification (13 May 2008)
		2 December 2008 CAT/C/FIN/CO/4/Add.2	Information under review
Switzerland	May 2006	16 June 2005 CAT/C/CHE/CO/4/Add.1	Reminder (5 April 2007)
		15 May 2007 CAT/C/CHE/CO/4/Add.2	Request for further information (11 Nov 2009)
		7 December 2009 CAT/C/CHE/CO/4/Add.3	Information under review
Uganda	May 2006	-	Reminder (5 April 2007)

Thirty-fifth session (November 2005)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Austria	November 2006	24 November 2006 CAT/C/AUT/CO/3/Add.1	Request for further clarification (15 November 2008)
Bosnia and Herzegovina	November 2006	Comments: 1 February 2006 CAT/C/BIH/CO/1/Add.1	Reminder (5 April 2007)
		6 May 2007 CAT/C/BIH/CO/1/Add.2	Request for further clarification (12 February 2008)
Democratic Republic of the Congo	November 2006	-	Reminder (5 April 2007)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Ecuador	November 2006	20 November 2006 CAT/C/ECU/CO/3/Add.1	Request for further clarification (11 May 2009)
France	November 2006	13 February 2007 CAT/C/FRA/CO/3/Add.1	Information under review
Nepal	November 2006	1 June 2007 CAT/C/NPL/CO/2/Add.1	Reminder (13 April 2007) Request for further clarification (15 May 2008)
Sri Lanka	November 2006	22 November 2006 CAT/C/LKA/CO/2/Add.1	Request for further clarification (21 November 2007)

Thirty-sixth session (May 2006)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Georgia	May 2007	31 May 2007 CAT/C/GEO/CO/3/Add.1	Request for further clarification (13 November 2009)
Guatemala	May 2007	15 November 2007 CAT/C/GTM/CO/4/Add.1	Reminder (4 September 2007) Request for further information (17 Nov 2008)
		9 June 2009 CAT/C/GTM/CO/4/Add.2	Information under review
Peru	May 2007	-	Reminder (4 September 2007)
Qatar	May 2007	12 December 2006 CAT/C/QAT/CO/1/Add.1	Request for further clarifications (7 May 2010)
Republic of Korea	May 2007	27 June 2007 CAT/C/KOR/CO/2/Add.1	Request for further clarification (15 November 2008)
		10 July 2009 CAT/C/KOR/CO/2/Add.2	Request for further clarifications (14 May 2010)
Togo	May 2007	-	Reminder (4 September 2007)
United States of America	May 2007	25 July 2007 CAT/C/USA/CO/2/Add.1	Requests for further clarification (8 August 2008 and 14 May 2009)

Thirty-seventh session (November 2006)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Burundi	November 2007	-	Reminder (25 April 2008)
Guyana	November 2007	5 December 2008 CAT/C/GUY/CO/1/Add.1	Reminder (25 April 2008) Request for further clarifications (14 May 2010)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Hungary	November 2007	15 November 2007 CAT/C/HUN/CO/4/Add.1	Request for further clarification (15 November 2008)
Mexico	November 2007	14 August 2008 CAT/C/MEX/CO/4/Add.1 7 January 2010 CAT/C/MEX/CO/4/Add.2	Request for further clarification (6 May 2009) Information under review
Russian Federation	November 2007	23 August 2007 CAT/C/RUS/CO/4/Add.1	Request for further clarification (15 May 2009)
South Africa	November 2007	-	Reminder (25 April 2008)
Tajikistan	November 2007	-	Reminder (25 April 2008)

Thirty-eighth session (May 2007)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Denmark	May 2008	18 July 2008 CAT/C/DNK/CO/5/Add.1	Request for further clarifications (12 May 2010)
Italy	May 2008	9 May 2008 CAT/C/ITA/CO/4/Add.1	Request for further clarification (17 November 2009)
Japan	May 2008	29 May 2008 CAT/C/JPN/CO/1/Add.1	Request for further clarification (11 May 2009)
Luxembourg	May 2008	-	Reminder (17 November 2008)
Netherlands	May 2008	17 June 2008 CAT/C/NET/CO/4/Add.1	Request for further clarifications (19 November 2010)
Poland	May 2008	12 June 2008 CAT/C/POL/CO/4/Add.1	Information under review
Ukraine	May 2008	21 April 2009 CAT/UKR/CO/5/Add.1	Reminder (17 November 2008) Request for further information (20 December 2011)

Thirty-ninth session (November 2007)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Benin	November 2008	-	Reminder (6 May 2009)
Estonia	November 2008	19 January 2009 CAT/C/EST/CO/4/Add.1	Reminder (29 April 2009) Information under review

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Latvia	November 2008	10 February 2010 CAT/C/LVA/CO/2/Add.1	Reminder (29 April 2009) Request for further clarifications (25 May 2011) Information under review
Norway	November 2008	9 July 2009 CAT/C/NOR/CO/5/Add.1 (Appendix 1 outstanding) 26 November 2010 CAT/C/NOR/CO/5/Add.2 4 March 2011 CAT/C/NOR/CO/5/Add.3	Reminder (29 April 2009) Request for further clarifications (12 May 2010) Information under review
Portugal	November 2008	23 November 2007 CAT/C/PRT/CO/4/Add.1 (including comments) 4 January 2012 CAT/C/PRT/CO/4/Add.2	Request for further clarifications (12 May 2010) Information under review
Uzbekistan	November 2008	13 February 2008 CAT/C/UZB/CO/3/Add.1 (including comments) 7 January 2010 CAT/C/UZB/CO/3/Add.2 27 December 2011 CAT/C/UZB/CO/3/Add.3	Reminder and request for further clarification (16 November 2009) Request for further clarification (13 September 2011) Information under review

Fortieth session (May 2008)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Algeria	May 2009	20 May 2008 CAT/C/DZA/CO/3/Add.1 (including comments)	Reminder and request for further clarification (20 November 2009)
Australia	May 2009	29 May 2009 CAT/C/AUS/CO/3/Add.1 12 November 2010 CAT/C/AUS/CO/3/Add.2	Request for further clarifications (6 May 2010) Information under review
Costa Rica	May 2009	-	Reminder (12 November 2009)
Iceland	May 2009	22 December 2009 CAT/C/ISL/CO/3/Add.1	Reminder (12 November 2009) Request for further clarifications (19 November 2010)
Indonesia	May 2009	-	Reminder (12 November 2009)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Sweden	May 2009	11 June 2009 CAT/C/SWE/CO/5/Add.1	Request for further clarification (25 May 2011)
The former Yugoslav Republic of Macedonia	May 2009	15 September 2009 CAT/C/MKD/CO/2/Add.1 3 May 2011 CAT/C/MKD/CO/2/Add.2	Request for further clarifications (19 November 2010) Information under review
Zambia	May 2009	-	Reminder (12 November 2009)

Forty-first session (November 2008)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Belgium	November 2009	17 March 2010 CAT/C/BEL/CO/2/Add.1	Information under review
China	November 2009	Comments: 17 December 2008 CAT/C/CHN/CO/4/Add.1 26 November 2009 CAT/C/CHN/CO/4/Add.2	Request for further clarification (29 October 2010, China)
Hong Kong SAR		7 January 2010 CAT/C/HKG/CO/4/Add.1 (Hong Kong SAR)	Request for further clarification (29 October 2010, Hong Kong SAR)
Macao SAR		8 March 2010 CAT/C/MAC/CO/4/Add.1 (Macao SAR)	Request for further clarification (29 October 2010, Macao SAR)
Kazakhstan	November 2009	25 February 2010 CAT/C/KAZ/CO/2/Add.1 18 February 2011 CAT/C/KAZ/CO/2/Add.2	Request for further clarifications (13 September 2010) Information under review
Kenya	November 2009	30 November 2009 CAT/C/KEN/CO/1/Add.1	Request for further clarifications (4 May 2010)
Lithuania	November 2009	29 March 2011 CAT/C/LTU/CO/2/Add.1	Reminder (28 March 2011)
Montenegro	November 2009	6 April 2009 CAT/C/MNE/CO/1/Add.1	Request for further clarification (19 November 2010)
Serbia	November 2009	5 February 2010 CAT/C/SRB/CO/1/Add.1	Request for further clarification (23 May 2011)

Forty-second session (May 2009)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Chad	May 2010	-	Reminder (28 March 2011)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Chile	May 2010	22 July 2011 CAT/C/CHL/CO/5/Add.1	Reminder (28 March 2011)
Honduras	May 2010	-	Reminder (28 March 2011)
Israel	May 2010	3 August 2010 CAT/C/ISR/CO/4/Add.1	Request for further clarification (16 May 2012)
New Zealand	May 2010	19 May 2010 CAT/C/NZL/CO/5/Add.1	Request for further clarification (7 May 2012)
Nicaragua	May 2010	-	Reminder (28 March 2011)
Philippines	May 2010	5 November 2010 CAT/C/PHL/CO/2/Add.1	Request for further clarification (5 December 2011)

Forty-third session (November 2009)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Azerbaijan	November 2010	18 November 2010 CAT/AZE/CO/3/Add.1	Request for further clarification (2 May 2012)
Colombia	November 2010	Comments: 17 December 2009 14 April 2011 CAT/C/COL/CO/4/Add.1	Reminder (28 March 2011)
El Salvador	November 2010	-	Reminder (28 March 2011)
Republic of Moldova	November 2010	14 February 2011 CAT/C/MDA/CO/2/Add.1	Request for further clarification (16 April 2012)
Slovakia	November 2010	16 November 2010 CAT/C/SVK/CO/2/Add.1	Information under review
Spain	November 2010	19 January 2011 CAT/C/ESP/CO/5/Add.1 16 February 2012 CAT/C/ESP/CO/5/Add.2	Request for further clarification (5 December 2011)

Forty-fourth session (May 2010)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Austria	May 2011	Comments: 6 April 2011 CAT/C/AUT/CO/4-5/Add.1 29 November 2011 CAT/C/AUT/CO/4-5/Add.2	Reminder (6 June 2011)
Cameroon	May 2011	-	Reminder (6 June 2011)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
France	May 2011	22 June 2011 CAT/C/FRA/4-6/Add.1	Reminder (6 June 2011)
Jordan	May 2011	-	Reminder (5 December 2011)
Liechtenstein	May 2011	Comments: 22 December 2009 CAT/C/LIE/CO/3/Add.1 18 May 2011 CAT/C/LIE/CO/3/Add.2	-
Switzerland	May 2011	7 June 2011 CAT/C/CHE/CO/6/Add.1	Reminder (6 June 2011)
Syrian Arab Republic	May 2011	24 August 2011 CAT/C/SYR/CO/1/Add.1	-
Yemen	May 2011	-	Reminder (5 December 2011)

Forty-fifth session (November 2010)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Bosnia and Herzegovina	November 2011	10 January 2012 CAT/C/BIH/CO/2-5/Add.1	Reminder (5 December 2011)
Cambodia	November 2011	-	Reminder (20 December 2011)
Ecuador	November 2011	-	Reminder (20 December 2011)
Ethiopia	November 2011	-	Reminder (5 December 2011)
Mongolia	November 2011	-	Reminder (20 December 2011)
Turkey	November 2011	5 March 2012 CAT/C/TUR/CO/3/Add.1	Reminder (20 December 2011)

Forty-sixth session (May–June 2011)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Finland	June 2012	-	Reminder (1 June 2012)
Ghana	June 2012	-	Reminder (1 June 2012)
Ireland	June 2012	-	Reminder (1 June 2012)
Kuwait	June 2012	-	Reminder (1 June 2012)
Mauritius	June 2012	-	Reminder (1 June 2012)
Monaco	June 2012	-	Reminder (1 June 2012)
Slovenia	June 2012	-	Reminder (1 June 2012)
Turkmenistan	June 2012	-	Reminder (1 June 2012)

Forty-seventh session (October–November 2011)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Belarus	November 2012	Comments: 28 December 2011 CAT/C/BLR/CO/4/Add.1	-
Bulgaria	November 2012	-	-
Djibouti	November 2012	-	-
Germany	November 2012	Comments: 28 February 2012 CAT/C/DEU/CO/5/Add.1	-
Madagascar	November 2012	-	-
Morocco	November 2012	Comments: 3 April 2012 CAT/C/MAR/CO/4/Add.1	-
Paraguay	November 2012	-	-
Sri Lanka	November 2012	-	-

Forty-eighth session (May–June 2012)

<i>State party</i>	<i>Information due in</i>	<i>Information received</i>	<i>Action taken</i>
Albania	June 2013	-	-
Armenia	June 2013	-	-
Canada	June 2013	-	-
Cuba	June 2013	-	-
Czech Republic	June 2013	-	-
Greece	June 2013	-	-
Rwanda	June 2013	-	-
Syrian Arab Republic	August 2012	-	-

V. Activities of the Committee under article 20 of the Convention

A. General information

83. In accordance with article 20, paragraph 1, of the Convention, if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State party, the Committee shall invite that State party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

84. In accordance with rule 75 of the Committee's rules of procedure, the Secretary-General shall bring to the attention of the Committee information which is, or appears to be, submitted for the Committee's consideration under article 20, paragraph 1, of the Convention.

85. No information shall be received by the Committee if it concerns a State party which, in accordance with article 28, paragraph 1, of the Convention, declared at the time of ratification of or accession to the Convention that it did not recognize the competence of the Committee provided for in article 20, unless that State party has subsequently withdrawn its reservation in accordance with article 28, paragraph 2, of the Convention.

86. The Committee's work under article 20 of the Convention continued during the period under review. In accordance with the provisions of article 20 and rules 78 and 79 of the rules of procedure, all documents and proceedings of the Committee relating to its functions under article 20 of the Convention are confidential and all the meetings concerning its proceedings under that article are closed. However, in accordance with article 20, paragraph 5, of the Convention, the Committee may, after consultations with the State party concerned, decide to include a summary account of the results of the proceedings in its annual report to the States parties and to the General Assembly.

87. In the framework of its follow-up activities, the Rapporteurs on article 20 continued to carry out activities aimed at encouraging States parties on which enquiries had been conducted and the results of such enquiries had been published, to take measures to implement the Committee's recommendations.

B. Summary account of the result of the proceedings concerning the inquiry on Nepal

88. Nepal acceded to the Convention on 14 May 1991. At the time of ratification it did not declare that it did not recognize the competence of the Committee provided for in article 20 of the Convention, as it could have done under article 28 of the Convention. Accordingly, the procedure under article 20 is applicable to Nepal.

89. In its concluding observations on the second periodic report of Nepal (CAT/C/NPL/CO/2), adopted at its thirty-fifth session in November 2005, the Committee expressed serious concerns about allegations concerning the widespread use of torture, the prevailing climate of impunity for acts of torture and the lack of a legal provision in domestic law to make torture a criminal offence.

90. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (hereafter Special Rapporteur on the question of torture), following a visit to Nepal in September 2005, concluded, *inter alia*, that "torture is systematically practised by

the police, armed police and Royal Nepalese Army. Legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the rule, and consequently victims of torture and their families are left without recourse to adequate justice, compensation and rehabilitation” (E/CN.4/2006/6/Add.5, para. 31).

91. In addition to this, at its thirty-seventh session in November 2006, in private meetings, the Committee considered information submitted to it by NGOs on the alleged systematic practice of torture in Nepal. It appeared to the Committee that this information submitted to it under article 20 of the Convention was reliable and that it contained well-founded indications that torture was being systematically practised in the territory of Nepal.

92. In accordance with article 20, paragraph 1, of the Convention and rule 82 of its rules of procedure, the Committee decided to invite the State party to cooperate in the examination of such information, a copy of which was sent to the State party on 5 April 2007, and to submit its observations in that regard to the Committee by 30 April 2007.

93. On 19 April 2007, the Permanent Mission of Nepal acknowledged receipt of the Committee’s request for observations on the information submitted to it. However, the State party did not provide such information by 30 April 2007 as requested by the Committee. To that effect, the Committee sent reminders to the State party.

94. On 3 April 2009, Nepal transmitted its observations to the Committee and requested that the procedure be dismissed. This information was examined by the Committee at its forty-second and forty-third sessions, in private meetings.

95. In view of all the information before it, the Committee decided to undertake a confidential inquiry in accordance with article 20, paragraph 2, of the Convention and designated Ms. Felice Gaer and Mr. Luis Gallegos Chiriboga for that purpose. On 30 November 2009, the Committee transmitted this decision to the State party, inviting Nepal, in accordance with article 20, paragraph 3, of the Convention, to cooperate with the Committee in the conduct of the inquiry, as well as proposing specific dates for a visit of the designated members of the Committee to Nepal.

96. On 9 March 2010, Nepal informed the Committee that “in the context of the ongoing peace process in the country and in particular the focused attention of the Government towards the promulgation of the Constitution to be made by the elected Constituent Assembly, the deadline of which was approaching, the concerned authorities [were] not in a position to receive the delegation of experts from the Committee for the purpose of the inquiry at this stage”.

97. At its forty-fourth session, the Committee decided to continue to seek the cooperation of the State party, thus continuing its dialogue with it, in order for Nepal to accept the visit in question. At its forty-fifth session, in November 2010, the Committee decided that, as its continuing efforts to visit the State party had been unsuccessful, it would proceed with the confidential inquiry without a visit and that the designated members of the Committee should prepare a report on Nepal under article 20 and report to the Committee at its forty-sixth session. On 28 January 2011, the Committee indicated this decision to the State party.

98. On 31 May 2011, the Committee adopted its report on Nepal under article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/46/R.2) and, in accordance with article 20, paragraph 4, of the Convention, decided to transmit it to the Government of Nepal, inviting the State party to inform it of the action taken with regard to its findings and in response to its recommendations. On 8 August 2011, Nepal submitted its comments and observations on the Committee’s report.

99. On 8 November 2011, the Chairperson of the Committee met with the Permanent Representative of Nepal to the United Nations Office in Geneva to discuss the publication of the report, pursuant to article 20, paragraph 5, of the Convention.

100. On 21 November 2011, Nepal informed the Committee that it agreed to the publication of the full text of the report together with the full text of its comments and observations to the report. Both documents are contained in annex XIII to the present report.

VI. Consideration of complaints under article 22 of the Convention

A. Introduction

101. Under article 22 of the Convention, individuals who claim to be victims of a violation by a State party of the provisions of the Convention may submit a complaint to the Committee against Torture for consideration, subject to the conditions laid down in that article. Sixty-five States that have acceded to or ratified the Convention have declared that they recognize the competence of the Committee to receive and consider complaints under article 22 of the Convention. The list of those States is contained in annex III. No complaint may be considered by the Committee if it concerns a State party to the Convention that has not recognized the Committee's competence under article 22.

102. In accordance with rule 104, paragraph 1, of its rules of procedure, the Committee established the post of the Rapporteur on new complaints and interim measures, which is currently held by Mr. Fernando Mariño.

103. Consideration of complaints under article 22 of the Convention takes place in closed meetings (art. 22, para. 6). All documents relating to the work of the Committee under article 22, i.e. submissions from the parties and other working documents of the Committee, are confidential. Rules 113 and 115 of the Committee's rules of procedure set out the modalities of the complaints procedure.

104. The Committee decides on a complaint in the light of all information made available to it by the complainant and the State party. The findings of the Committee are communicated to the parties (art. 22, para. 7, of the Convention and rule 118 of the rules of procedure) and are made available to the public. The text of the Committee's decisions declaring complaints inadmissible under article 22 of the Convention is also made public, without disclosing the identity of the complainant, but identifying the State party concerned.

105. Pursuant to rule 121, paragraph 1, of its rules of procedure, the Committee may decide to include in its annual report a summary of the communications examined. The Committee shall also include in its annual report the text of its decisions under article 22, paragraph 7, of the Convention.

B. Interim measures of protection

106. Complainants frequently request preventive protection, particularly in cases concerning imminent expulsion or extradition, where they allege a violation of article 3 of the Convention. Pursuant to rule 114, paragraph 1, at any time after the receipt of a complaint, the Committee, through its Rapporteur on new complaints and interim measures, may transmit to the State party concerned a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of the alleged violations. The State party shall be informed that such a request does not imply a determination of the admissibility or the merits of the complaint. During the reporting period, requests for interim measures of protection were received in 43 complaints, of which 27 were granted by the Rapporteur on new complaints and interim measures, who regularly monitors compliance with the Committee's requests for interim measures.

107. The decision to grant interim measures may be adopted on the basis of information contained in the complainant's submission. Pursuant to rule 114, paragraph 3, this decision

may be reviewed by the Rapporteur on new complaints and interim measures, at the initiative of the State party, in the light of timely information received from that State party to the effect that the need for interim measures is not justified and the complainant does not face any prospect of irreparable harm, as well as subsequent comments, if any, from the complainant. The Rapporteur has taken the position that such requests need only be addressed if based on new and pertinent information which was not available to him or her when he or she took his or her initial decision on interim measures.

108. The Committee has conceptualized the formal and substantive criteria applied by the Rapporteur on new complaints and interim measures in granting or rejecting requests for interim measures of protection. Apart from timely submission of a complainant's request for interim measures of protection under rule 114, paragraph 1, of the Committee's rules of procedure, the basic admissibility criteria set out in article 22, paragraphs 1 to 5, of the Convention, must be met by the complainant for the Rapporteur to act on his or her request. The requirement of exhaustion of domestic remedies need not be fulfilled if the only remedies available to the complainant are without suspensive effect, i.e. remedies that, for instance, do not automatically stay the execution of an expulsion order to a State where the complainant might be subjected to torture, or if there is a risk of immediate deportation of the complainant after the final rejection of his or her asylum application. In such cases, the Rapporteur may request the State party to refrain from deporting a complainant while his or her complaint is under consideration by the Committee, even before domestic remedies have been exhausted. As for substantive criteria to be applied by the Rapporteur, a complaint must have a reasonable likelihood of success on the merits for it to be concluded that the alleged victim would suffer irreparable harm in the event of his or her deportation.

109. In cases concerning imminent expulsion or extradition where a complaint failed to establish a prima facie case with a reasonable likelihood of success on the merits that would allow the Rapporteur on new complaints and interim measures to conclude that the alleged victim would suffer irreparable harm in the event of his or her deportation, the complainant is requested in writing to confirm his or her interest in having his or her communication considered by the Committee, despite the rejection, by the Rapporteur, of the respective request for interim measures. In some cases, requests for interim measures are lifted by the Rapporteur, pursuant to rule 114, paragraph 3, and on the basis of pertinent State party information received that obviates the need for interim measures.

C. Progress of work

110. At the time of adoption of the present report the Committee had registered, since 1989, 506 complaints concerning 31 States parties.¹⁴ Of those, 138 complaints had been discontinued and 63 had been declared inadmissible. The Committee had adopted final decisions on the merits on 203 complaints and found violations of the Convention in 73 of them. A total of 102 complaints were pending for consideration.

111. At its forty-seventh session, the Committee adopted decisions on the merits in respect of complaints No. 312/2007 (*Eftekhary v. Norway*), No. 327/2007 (*Boily v. Canada*), No. 347/2008 (*N.B.-M. v. Switzerland*), No. 351/2008 (*E.L. v. Switzerland*), No. 353/2008 (*Slyusar v. Ukraine*), No. 368/2008 (*Sonko v. Spain*), No. 374/2009 (*S.M. et al. v. Sweden*), No. 381/2009 (*Faragollah et al. v. Switzerland*) and No. 428/2010 (*Kalinichenko v. Morocco*). The text of these decisions is also reproduced in annex XIV, section A, to the present report.

¹⁴ The complaints examined by the Committee in relation to the Federal Republic of Yugoslavia, as well as to Serbia and Montenegro, are attributed to Serbia for statistical purposes.

112. Complaint No. 312/2007 (*Eftekhary v. Norway*) concerned a national of the Islamic Republic of Iran who complained that his deportation to his home country would constitute a violation of article 3 of the Convention by Norway, because of the risk of being tortured or subjected to inhuman or degrading treatment by the authorities, given his activities as a journalist and the fact that after his departure from the country he had been sentenced in absentia to five years' imprisonment by the Revolutionary Court in Tehran, on account of his alleged cooperation with counter-revolutionary groups and for publishing articles against the Islamic Republic. While the authenticity of the verdict (document presented by the complainant in support of his claims) was contested by the State party, the Committee took into consideration the existence of summonses received by him in 2003 to appear before the Revolutionary Court in Tehran, due to his journalistic activities; the previous interest of the Iranian authorities in the complainant, demonstrated by an arrest and interrogation; and the complainant's submission attesting to his continued journalistic activities since his arrival in Norway. The Committee further noted that, since Iran is not a party to the Convention, the complainant would be deprived of the option to address the Committee for protection of any kind if he were to be deported to Iran, and concluded that the decision of the State party to return the complainant to Iran would constitute a breach of article 3 of the Convention.

113. Complaint No. 327/2007 (*Boily v. Canada*) concerned a citizen of Canada who claimed that his extradition to Mexico would constitute a violation by Canada of article 3 of the Convention. In 1998, the complainant was sentenced in Mexico to 14 years' imprisonment for marijuana trafficking. In 1999, he organized an escape, during which one prison guard was killed. In 2005, the complainant was arrested at his home in Canada under a provisional warrant for his extradition to Mexico, which requested his extradition to complete his sentence and to face a charge of homicide for the death of the prison guard and a charge of escape from legal custody. He claimed that he would be exposed to a foreseeable, real and personal risk of torture if extradited, given that he had already been tortured by the Mexican authorities and threatened with death by police officers and that independent medical opinions had vouched for the fact that he had been tortured. The Committee noted that, after he was extradited, the complainant made allegations of having been tortured, and also noted the State party's assertion that the risk of torture was mitigated by the diplomatic assurances, whose worth had been assessed in consideration of the fact that a mechanism would be put in place to monitor the complainant's situation through regular visits by consular staff. The Committee considered that before deciding on the extradition, the State party did not take into account all of the circumstances indicating that the complainant ran a foreseeable, real and personal risk of torture. It observed that the State party gave no consideration to the fact that the complainant would be sent to the same prison in which a guard had died during the complainant's escape and that the guard's death was a subject of the extradition request. It also concluded that the agreed system of diplomatic assurances was not designed carefully enough to effectively prevent torture. The Committee concluded that the extradition of the complainant to Mexico in those circumstances constituted a violation by the State party of article 3 of the Convention.

114. Complaint No. 347/2008 (*N.B.-M. v. Switzerland*) concerned a national of the Democratic Republic of the Congo who faced deportation to her country of origin and claimed that her deportation would constitute a violation of article 3 of the Convention. The complainant contended that she faced a personal and present risk of torture in the Democratic Republic of the Congo because, at her fiancé's behest, she had spread a political message in her neighbourhood against the regime in power and that, as a result, she received threats from the security services, which have been looking for her since her departure from the family home and, subsequently, from her country. She also alleged that she had been raped by two officials who had helped her to flee the Democratic Republic of the Congo. Lastly, she drew the Committee's attention to her state of health, enclosing with

her submission a medical certificate attesting to the fact that she had numerous physical and psychiatric disorders. The Committee acknowledged the dire human rights situation in the Democratic Republic of the Congo, but observed that the State party had taken this factor into account in evaluating the risk the complainant might face if returned to her country. The Committee noted that the State party challenged the credibility of the complainant's statements, particularly her claim that she had spread a political message that she had received from her fiancé. It noted that the means reportedly deployed, both by the rebels to spread this message and by the Congolese authorities to find an isolated opponent, were disproportionate and therefore implausible. It concluded that the complainant had not put forward a persuasive argument that would allow it to call into question the State party's conclusions in this respect. With regard to the complainant's claims regarding her current state of health, the Committee noted the difficulties that she was experiencing, as well as the State party's contention that the complainant could consult a doctor in the Democratic Republic of the Congo. She had not challenged this argument, and the Committee observed that, even if the state of health of the complainant were to deteriorate after her deportation, that would not, of itself, amount to cruel, inhuman or degrading treatment attributable to the State party within the meaning of article 16 of the Convention. The Committee was of the view that the complainant had not provided sufficient evidence to allow it to consider that her return to the Democratic Republic of the Congo would put her at a real, present and personal risk of being subjected to torture, within the meaning of article 3 of the Convention.

115. Complaint No. 351/2008 (*E.L. v. Switzerland*) concerned a national of the Democratic Republic of the Congo, who faced deportation to her country of origin and claimed that her deportation would constitute a violation of article 3 of the Convention. The complainant claimed that the fact that she supposedly passed secret information to the Rwandan rebels when employed as a receptionist at the Congolese Parliament in 2004, added to the fact that she had requested political asylum in Switzerland, would expose her to the risk of ill-treatment if she were to return to the Democratic Republic of the Congo. The Committee noted that the complainant had not reported undergoing any ill-treatment in the Democratic Republic of the Congo. The Committee gave weight to the conclusions of the State party's authorities, which had considered the facts and evidence submitted by the complainant during an asylum procedure and concluded that the complainant lacked credibility. The above conclusions were based on the unlikelihood and inconsistencies of her account, particularly with regard to the secret information she allegedly passed to the Rwandan rebel forces and on the use of evidence which was considered to be forged. The Committee considered that the complainant's arguments had not been sufficiently substantiated to refute or clarify the contradictions noted by the State party in her observations. The Committee was not persuaded that on the whole the facts as submitted were sufficient to conclude that the complainant would face a foreseeable, real and personal risk of being subjected to torture if returned to the Democratic Republic of the Congo in the meaning of article 3 of the Convention.

116. Complaint No. 353/2008 (*Slyusar v. Ukraine*) concerned a national of Ukraine, who claimed to be a victim of violations of article 2, paragraph 1, and article 12 of the Convention. The complainant claimed that, while he was kept in administrative detention for a minor offence, he was tortured by police officers, who were investigating the murder of the complainant's father and who wanted to make him confess to the murder. He was severely beaten and kept in a cell where the temperature was 4° C. He was not allowed to sleep or eat and was threatened that his wife and mother would be harmed if he did not confess to having killed his father. He was later detained for a second time by the Prosecutor's Office as a suspect for the murder of his father and tortured again. His health deteriorated significantly and he was diagnosed with hypertensive cardiovascular disorder. He submitted medical reports in support of his allegations. The Committee noted that in

reaction to the claim made by the complainant the State party had merely stated that there was no link between the facts established in a medical reports and the possible use of torture against the complainant. In the absence of a detailed explanation by the State party, and based on the documentation provided, the Committee concluded that the facts, as submitted, constituted torture within the meaning of article 1 of the Convention, and that the State party had failed in its duty to prevent and punish acts of torture, in violation of article 2, paragraph 1, of the Convention. The Committee also noted that, according to the complainant, the State party had failed to investigate his claims that he was subjected to torture while in detention, that the State party had not refuted this allegation, and that the complainant's appeal against the inaction of the District Prosecutor's Office had been pending for several years. The Committee reiterated that article 12 of the Convention requires a State party to proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed and considered that the State party had failed to fulfil its obligations under article 12 of the Convention. It also considered that the State party had failed to comply with its obligation under article 13 of the Convention to ensure that the complainant had the right to complain to, and to have his case promptly and impartially investigated by, its competent authorities, as well as under article 14, to provide him, as a victim of torture, with redress and compensation.

117. Complaint No. 368/2008 (*Sonko v. Spain*) was submitted by a Senegalese national on behalf of her deceased brother, Lauding Sonko. She claimed that her brother was the victim of a violation by Spain of article 1, paragraph 1, and article 16, paragraphs 1 and 2, of the Convention. Mr. Sonko was one of four African migrants who attempted to enter the Autonomous City of Ceuta by swimming along the coast. Each person had a dinghy and a wetsuit. They were intercepted by the Spanish Civil Guard, who took them to Moroccan territorial waters and forced them to jump into the water, at a place where they were out of their depth, after puncturing the men's dinghies. Mr. Sonko clung to the rail of the vessel, saying repeatedly that he did not know how to swim, but the Civil Guard officers forced him to let go and threw him into the sea. He was calling for help and was having great difficulty reaching the shore, so one of the Civil Guard officers jumped into the water to help him. Once on the shore, the officer began to perform heart massage on him but Mr. Sonko died shortly thereafter. The State party contested the above claims of the complainant, stating that the events in question took place in Moroccan waters, that the persons who were picked up were left in an area very close to the shore, that the Civil Guard officers did not puncture Mr. Sonko's dinghy, and that he was aided by the officers, who performed resuscitation techniques on him. The Committee noted that both parties agreed that Mr. Sonko had been intercepted by a Civil Guard vessel, that he was brought on board alive, that upon reaching the beach he was not well and that, despite the efforts made to revive him, he died. The Committee recalled its general comment No. 2 (2007) on the implementation of article 2 by States parties, where it notes that a State party's jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law,¹⁵ and observed that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety. The Committee considered that it falls to the State party to explain the circumstances surrounding Mr. Sonko's death, considering that he was alive when he was pulled out of the water and that, regardless of whether or not the Civil Guard officers punctured his dinghy or at what distance from the shore he was expelled from the boat, he was placed in a situation that caused his death. The Committee considered that the subjection of Mr. Sonko to physical and mental suffering

¹⁵ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, annex VI, para. 16.

prior to his death exceeded the threshold of cruel, inhuman or degrading treatment or punishment, under the terms of article 16 of the Convention. The Committee also considered that the complaint concerned circumstances on which article 12 of the Convention had a bearing, and noted that the obligation to investigate indications of ill-treatment is an absolute duty under the Convention and falls to the State. It reminded the State party that it has an obligation to undertake a prompt and full investigation whenever there are indications that acts have been committed that may constitute cruel, inhuman or degrading treatment, and that an investigation should be aimed at determining the nature of the reported events, the circumstances surrounding them and the identity of whoever may have participated in them. The Committee was of the view that the investigation conducted by the authorities of the State party did not meet the requirements set forth in article 12 of the Convention.

118. Complaint No. 374/2009 (*S.M. et al. v. Sweden*) concerned two nationals of Azerbaijan and their minor daughter from the Nagorno-Karabakh area, who claimed that their deportation to Azerbaijan would constitute a breach by Sweden of article 3 of the Convention. Since in the interim the State party had issued a resident permit to the complainants' daughter, the Committee discontinued the part of the communication relating to her. The Committee noted the complainants' claims: that they run a risk of torture in Azerbaijan on account of S.M.'s mixed origin, which makes them a target for the authorities in their home country; that due to S.M.'s Armenian origins, the whole family was subjected to ethnically motivated persecution; that they had been victims of beatings and persecution by neighbours, as well as State agents (police); and that they had been detained, questioned, beaten and sexually assaulted (H.M.) by officers of the National Security Service. The Committee observed that the complainants' allegations of torture were corroborated by authoritative medical reports. The Committee noted the alleged ill-treatment inflicted on the complainants during a return to Azerbaijan in August 2004, and that according to general information available to the Committee, a hostile attitude on the part of the general public towards ethnic Armenians living in Azerbaijan is still widespread, persons of Armenian origin are at risk of discrimination in their daily life, they are harassed or bribes are requested by low-ranking officials when they apply for passports and they often conceal their identity by legally changing the ethnic designation in their passports. The Committee considered that the complainants' return to Azerbaijan would expose them to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.

119. Complaint No. 381/2009 (*Faragollah et al. v. Switzerland*) concerned the complainant and his wife and son, all nationals of the Islamic Republic of Iran. The complainant claimed that their return to Iran would constitute a violation by Switzerland of article 3 of the Convention. The Committee noted that, after his arrival in Switzerland, the complainant had been active in the Democratic Association for Refugees, of which he was the representative for the Canton of Obwald, and that he had written articles that were critical of the present regime in Iran, distributed publications put out by the association and participated in various events organized by NGOs and local churches in his canton. The Committee also noted that the complainant's son had been granted refugee status on the basis of activities comparable to those carried out by his father in the association, in particular the collection of signatures for petitions, the distribution of its monthly magazine and involvement in a radio project. Given that the State party concluded that the complainant's son could not be returned to Iran on account of his political profile, which would imperil his safety upon return, the Committee found that there was a difference in treatment. In the light of these circumstances, including the general human rights situation in Iran and the personal situation of the complainant, who continued to engage in opposition activities for the Democratic Association for Refugees, the Committee was of the opinion that he could well have attracted the attention of the Iranian authorities. The

Committee, therefore, considered that there were substantial grounds for believing that he would risk being subjected to torture if returned to the Islamic Republic of Iran. The Committee also noted that, since Iran is not a party to the Convention, the complainant would be deprived of the legal option of recourse to the Committee for protection of any kind.

120. Complaint No. 428/2010 (*Kalinichenko v. Morocco*) concerned a Russian Federation national, who claimed that his extradition to his home country would constitute a violation by Morocco of article 3 of the Convention. The Committee requested the State party not to extradite the complainant to the Russian Federation while his communication was under consideration by the Committee. Despite that request, on 14 May 2011, the complainant was extradited to the Russian Federation. The Committee observed 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. The complainant worked as a financial advisor and analyst in the Russian Federation. He was associated with three well-known businessmen and collaborated professionally with a local bank. In 2004, the complainant noticed that a local organized crime group had managed to gain control over several local companies, including some which belonged to the complainant's partners. He informed his partners, who in turn reported the facts to the authorities; however, their complaints were either dismissed or never investigated. Subsequently one of complainant's partners was arrested and allegedly committed suicide in prison. The complainant tried to further investigate the financial transactions of the bank, and eventually decided to report his findings to the judicial authorities and set up a website containing a description of the facts and documents. He went to Italy on a regular entry visa to avoid being persecuted by organized crime and later moved to Morocco. His criminal complaint was discontinued in his absence, and without his agreement or signature his shares in the bank were transferred to an unknown buyer. Further, data concerning shares of a company was falsified and executive officers of the bank reported the complainant to the police for having embezzled client's funds. The police opened an investigation and requested an international arrest warrant for the complainant on charges of fraud. In 2007, another of the complainant's business partners disappeared, allegedly when he went to testify before the investigative authorities. In September 2008, the third partner was killed. The Committee noted the complainant's arguments that, in the light of the death or disappearance of his business partners and pursuant to an assessment by the Office of the United Nations High Commissioner for Refugees in Morocco, he ran a personal risk of torture or even death in the Russian Federation. It also noted the State party's statement that its authorities found no evidence that the complainant would be subject to torture if extradited and that the extradition request was accompanied by diplomatic assurances that he would not be subjected to torture or assaults on his human dignity. The Committee recalled its concluding observations on the fourth periodic report of the Russian Federation, in which it noted its concern regarding reports that acts of torture, and other cruel, inhuman and degrading treatment or punishment continue to be committed by law enforcement personnel, in particular with a view to obtaining confessions, as well as regarding the insufficient level of independence of the Procurator's Office and its failure to initiate and conduct prompt, impartial and effective investigations into allegations of torture or ill-treatment (CAT/C/RUS/CO/4, paras. 9 and 12). The Committee observed that the complainant's business partners had been either found dead or disappeared, two of them while in the custody of the authorities of the Russian Federation, after having reported the facts of a criminal plot, and that the complainant himself had received death threats from organized crime groups, following which he decided to leave the country. The Committee concluded that the complainant had sufficiently demonstrated his foreseeable, real and personal risk of torture upon return to the Russian Federation. The Committee concluded

that the procurement of diplomatic assurances was insufficient to protect the complainant against this manifest risk, in the light of their general and non-specific nature and the fact they did not establish a follow-up mechanism. Accordingly, the Committee found that Morocco had breached article 3 of the Convention.

121. Also at its forty-seventh session, the Committee decided to declare inadmissible complaint No. 365/2008 (*S.K. and R.K. v. Sweden*). The complaint concerned two brothers, nationals of Afghanistan, who claimed that their removal to Afghanistan would constitute a violation by Sweden of article 3 of the Convention. They were refugees in the Islamic Republic of Iran and in the year 2000 they began working illegally. In September 2000, the Iranian police arrested them and in December 2000 they were deported to Afghanistan, where they were alleged to have been arrested by the Taliban, taken to Kandahar, tortured, beaten, ill-treated and insulted. Subsequently the complainants managed to escape, sought asylum in Sweden, but were refused refugee status. The Committee noted that the complainants had failed to appeal against the Migration Court's decision to the Migration Court of Appeal and that they had provided no arguments to the effect that an appeal to the Migration Court of Appeal would have been unlikely to bring any relief. The Committee also noted that the complainants had never mentioned during the asylum proceedings that they had been tortured in Afghanistan, that the decision regarding the complainants' expulsion became statute-barred on 28 March 2010 and is no longer enforceable and, lastly, that they had failed to initiate new asylum proceedings, although they had been given such an opportunity. The Committee concluded that the communication was inadmissible under article 22, paragraph 5 (b), of the Convention for failure to exhaust domestic remedies. The text of this decision is also reproduced in annex XIV, section B, to the present report.

122. At its forty-eighth session, the Committee adopted decisions on the merits in respect of complaints No. 343/2008 (*Kalonzo v. Canada*), No. 364/2008 (*J.L.L. v. Switzerland*), No. 370/2009 (*E.L. v. Canada*), No. 382/2009 (*M.D.T. v. Switzerland*), No. 391/2009 (*M.A.M.A. et al. v. Sweden*), No. 393/2009 (*E.T. v. Switzerland*), No. 396/2009 (*Gbadjavi v. Switzerland*), No. 413/2010 (*A.A.M. v. Sweden*), No. 414/2010 (*N.T.W. v. Switzerland*), No. 424/2010 (*M.Z.A. v. Sweden*), No. 433/2010 (*Gerasimov v. Kazakhstan*), No. 444/2010 (*Abdussamatov et al. v. Kazakhstan*) and No. 453/2011 (*Gallastegi Sodupe v. Spain*). The text of these decisions is also reproduced in annex XIV, section A, to the present report.

123. Complaint No. 343/2008 (*Kalonzo v. Canada*) concerned a Congolese national residing in Canada, who claimed that his return to the Democratic Republic of the Congo would constitute a violation by Canada of article 3 of the Convention against Torture. The Committee took note of the State party's observations concerning the complainant's lack of credibility, and of the State party's observations concerning the fact that the complainant was not a member of a political party and that his parents had travelled to the Democratic Republic of the Congo several times without being troubled. The Committee also took note of the moratorium declared by Canada on the removal of rejected asylum seekers to that country and of the information submitted by the complainant, according to which the moratorium was put in place owing to the widespread violence in the Democratic Republic of the Congo, and that it would not apply in his case on account of his criminal past. The Committee was of the view that this information underlined the discretionary nature of the moratorium procedure, insofar as, under article 3 of the Convention, a moratorium on the removal of persons who are at risk in their country because of widespread violence should apply to everyone without any distinction. The Committee further took note of the complainant's claims regarding: his detention and torture in the Democratic Republic of the Congo in 2002; a medical certificate issued in 2005, according to which the complainant showed signs of post-traumatic stress disorder fully consistent with his account and appeared to have a reasonable fear of what might befall him should he be returned to the Democratic Republic of the Congo; and the view of a judge in the United States of America that there were substantial grounds for believing the complainant would be in danger of

being subjected to torture upon return. The Committee considered the State party's argument that the complainant could resettle in Kinshasa, and recalled that, in accordance with its jurisprudence, the notion of "local danger" does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured. The Committee concluded that the State party's decision to return the complainant to the Democratic Republic of the Congo, if implemented, would constitute a breach of article 3 of the Convention.

124. Complaint No. 364/2008 (*J.L.L. v. Switzerland*) concerned a Congolese national and his two minor children, residing in Switzerland. He claimed that their return from Switzerland to the Democratic Republic of the Congo would violate article 3 of the Convention against Torture, given that his father was a Rwandan Tutsi and that in 1998 he had allegedly suffered ill-treatment at the hands of students, residents of the neighbourhood where he lived, and Congolese State agents, and had been arrested because of his origins. The Committee noted the doubts expressed by the State party as to the credibility of the allegations made by the complainant and observed that the complainant had not substantiated a causal link between the events that led him and his children to leave their country of origin on the one hand, and the risk of torture they would face if deported to the Democratic Republic of the Congo on the other, since he had provided the Committee with only scant information about the treatment he had allegedly suffered, and the information on possible ethnic tensions in the complainant's country of origin was of a general nature and did not imply any foreseeable, real and personal risk of torture. Accordingly, the Committee concluded that the return of the complainant and his children to the Democratic Republic of the Congo would not constitute a breach of article 3 of the Convention.

125. Complaint No 370/2009 (*E.L. v. Canada*) concerned a Haitian national, residing in Canada, who claimed that his removal to Haiti would constitute a violation by the State party of article 3 of the Convention. The complainant arrived in Canada in 1990 and became a permanent resident. In 2003, 2006 and 2007 he was tried and found guilty of various offences and in 2007 his permanent residency was revoked by Citizenship and Immigration Canada after he was declared inadmissible to Canada on grounds of serious criminality. After a deportation order had been issued, the complainant applied for refugee status, but his application was dismissed because of his inadmissibility on grounds of serious criminality. The complainant has a heart condition, which required the installation of a pacemaker. Having exhausted appeals proceedings, he submitted a complaint to the Committee claiming that his personal situation and state of health meant that he should not be deported. He alleged that as a criminal deportee having lived abroad for many years, he would be at risk of being kidnapped by criminal gangs, and that returned Haitians are systematically detained in appalling conditions and are given no food, water or medical care, which he claimed in his case could prove fatal. He also alleged that he would be unable to have his pacemaker replaced or receive proper medical care in Haiti. The Committee noted that the complainant had provided no evidence of a foreseeable, real and personal risk of torture following his removal to Haiti, that all his allegations were examined by the State party's authorities during the asylum procedure and that the latter carried out the necessary checks, including with regard to the complainant's access to health facilities in Haiti, before proceeding with the complainant's removal. The Committee concluded that the deportation of the complainant to Haiti did not constitute a breach of article 3 of the Convention.

126. Complaint No. 382/2009 (*M.D.T. v. Switzerland*) concerned a national of the Democratic Republic of the Congo, residing in Switzerland, who claimed that his deportation to the Democratic Republic of the Congo would constitute a violation by Switzerland of article 3 of the Convention. The complainant claimed that he faced a personal and present risk of torture in the Democratic Republic of the Congo because of his membership in an opposition party and active opposition to the candidature of Mr. Kabila

in the 2006 presidential elections and that, as a result of his opposition activity, he had been arrested and beaten by the security forces, which had since been looking for him. The complainant based his allegations of a risk of torture on the arrest warrant reportedly issued against him and a medical certificate of dental treatment provided as proof for his allegations of ill-treatment. The Committee noted that the State party had challenged the authenticity of the arrest warrant the complainant had produced, which it considered a forgery, and had questioned the relevance of the medical certificate for dental treatment adduced by the complainant. The Committee observed that the complainant had not shown that he had been involved in political activities to such an extent to convincingly demonstrate how this would expose him to a specific risk if he were to be returned to the Democratic Republic of the Congo, and concluded that the removal of the complainant to the Democratic Republic of the Congo would not constitute a violation of article 3 of the Convention.

127. Complaint No. 391/2009 (*M.A.M.A. et al. v. Sweden*) concerned an Egyptian national, his wife and their six children, residing in Sweden, who claimed that the enforcement of orders to expel them to Egypt would violate articles 3 and 16 of the Convention. The complainants claimed that they remained of interest to the security police because the first complainant's cousin was convicted for the assassination of President Anwar al-Sadat. Furthermore, they argued that that the first complainant's other cousin was suspected of belonging to a group with links to Al-Qaida and of attempting to assassinate President Hosni Mubarak in 1995. The complainants maintained that this family link, together with the fact that the first complainant was known to be in opposition to the Egyptian authorities, exposed them to a personal risk of being tortured if they were forced to return to Egypt. The Committee noted that the State party had accepted that it appeared not unlikely that the first complainant would still attract the interest of the Egyptian authorities due to his family relationship with the convicted murderer of President al-Sadat, that his Internet activities in Sweden, questioning whether the real murderers of President al-Sadat had been convicted and punished, should also be taken into account in this context and that it could not be excluded that the rest of the family would attract the interest of the Egyptian authorities. The Committee concluded that the first complainant and two of his adult children had established a foreseeable, real and personal risk of being tortured if they were to be returned to Egypt and that the enforcement of the order to expel them would constitute a violation of article 3 of the Convention. As to the cases of M.A.M.A.'s wife and their four children, who were underage at the time of the family's asylum application in Sweden, the Committee did not find it necessary to consider them individually.

128. Complaint No. 393/2009 (*E.T. v. Switzerland*) concerned a national of Ethiopia, residing in Switzerland, who claimed that her deportation to Ethiopia would constitute a breach by Switzerland of article 3 of the Convention. The complainant belongs to an ethnic minority, the people of Amhara, mostly living in the central highlands of Ethiopia. She left her home country due to unspecified political problems and claimed asylum in Switzerland in 2003. She alleged that while in Switzerland she became an active member of the diaspora opposition political organization Coalition of Unity and Democracy Party of Switzerland (KINIJIT/CUDP), participated in numerous demonstrations and political rallies and appeared in public in an Ethiopian radio programme on a Swiss local radio station speaking in Amharic to her fellow citizens. She alleged that in Ethiopia, KINIJIT/CUDP regularly faced political repression from the Government and its members continued to be persecuted, and that she would be at risk of arrest and torture if returned. The Committee noted the complainant's allegations about her political involvement in Switzerland. It also observed that the complainant had not claimed to have been arrested or ill-treated by the Ethiopian authorities, nor had she claimed that any charges had been brought against her under the anti-terrorist law or any other domestic law. In the Committee's view, the complainant had failed to adduce sufficient evidence about the conduct of any political

activity of such significance that would attract the interest of the Ethiopian authorities. Accordingly, the Committee concluded that the decision of the State party to return the complainant to Ethiopia would not constitute a breach of article 3 of the Convention.

129. Complaint No. 396/2009 (*Gbadjavi v. Switzerland*) concerned a national of Togo, residing in Switzerland, who claimed that his deportation to Togo would constitute a violation by Switzerland of article 3 of the Convention. In 1994, the complainant had joined the Union des Forces de Changement (UFC) as an active member of its security team. In 1999, he was detained by the gendarmerie for two months and repeatedly beaten and subjected to ill-treatment. The complainant left the country from 1999 to 2002 for Ghana and from 2003 to 2004 for Benin, both times after clashes with ruling party supporters, because he feared arrest, reprisals and/or being killed. In March 2006, the complainant and his sister were arrested and the complainant was taken by gendarmes to the office of the head of the Zébé camp. During questioning, he was asked about the nature of his relationship with a certain Mr. Olympio, who was suspected of instigating an attack on a gendarmerie camp in February 2006. The complainant was threatened with death and beaten during his time in detention. In April 2006, the complainant escaped from the prison after his brother-in-law bribed a guard. He went to Ghana, but, as he was afraid of being detained by the Togolese secret services in Ghana, he fled by plane to Italy under a false identity. He subsequently travelled to Switzerland, where he arrived in April 2006. In September 2006, the Federal Office for Migration rejected the claimant's asylum application and the subsequent appeals were also rejected. The Committee noted the complainant's claims that he was an active member of UFC, that his role was to protect party members, distribute leaflets and make statements, that he had been arrested on two occasions and that he had been tortured and held in inhuman conditions, as well as the complainant's argument that the situation in Togo had not improved for ordinary UFC members, who are at risk of being imprisoned and tortured. The Committee also noted the State party's challenge to the credibility of the complainant and its submission that even assuming that his testimony was credible, that did not constitute substantial grounds for believing that he would face torture if he returned to Togo. The Committee concluded that the return of the complainant to Togo would constitute a breach of article 3 of the Convention, taking into consideration the complainant's claim, as corroborated by a Swiss Refugee Council report, that members of the opposition UFC with a low political profile may still be subjected to Government reprisals and that those who fled Togo for Benin were viewed with greater suspicion. The Committee considered that the State party failed to properly assess the risk of torture when, at a later stage of the proceedings, the domestic courts rejected pieces of evidence such as a medical certificate which indicated a link between the claimant's state of health and the violations he allegedly suffered, without carrying out the necessary investigations. The Committee also took into account the current situation in Togo, where grave violations of human rights such as those perpetrated against representatives of opposition groups had still not been investigated and enjoyed impunity.

130. Complaint No. 413/2010 (*A.A.M. v. Sweden*) concerned a national of Burundi, who claimed that an enforcement of an expulsion order to her country of origin would result in a violation by Sweden of article 3 of the Convention against Torture. The complainant alleged that she originated from a family belonging to the Tutsi ethnicity, that her parents had been killed in 1993 by Hutu militia and that her only sibling, an older brother, had a high position in a Tutsi militia "Sans Échec". In 2006, the complainant's brother was allegedly killed in his home by Hutu soldiers from the national army. At that particular moment, the complainant was allegedly outside the house and could hear her brother being ill-treated inside the house and the soldiers asking him about her whereabouts, which she understood as a death threat. She fled Burundi and applied for asylum in Sweden. Her application was rejected, as were the subsequent appeals, because the State party's authorities found numerous inconsistencies in her account of the events that led to her flight

from Burundi, and because they doubted her identity, since a person with data and a picture that were almost identical to what she had provided had applied for a Swedish visa in Algeria. The Committee noted that the State party had taken into account the human rights situation in Burundi but had established that the prevailing circumstances in that country did not in themselves suffice to establish that the complainant's forced return to Burundi would entail a violation of article 3 of the Convention. The Committee also noted that the State party had drawn attention to numerous inconsistencies and serious contradictions in the complainant's accounts and submissions, which called into question her general credibility and the veracity of her claims, and of the information furnished by the complainant on these points. The Committee found that the complainant had not established that in the case of her expulsion to Burundi she would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

131. Complaint No. 414/2010 (*N.T.W. v. Switzerland*) concerned a national of Ethiopia, residing in Switzerland, who claimed that his forced return to Ethiopia would constitute a violation by Switzerland of article 3 of the Convention. The complainant alleged that during the electoral campaign in 2005 he had become interested in politics, had joined the supporters of the KINIJIT/CUDP party and had actively campaigned for the candidates of that party. After the elections the government party began a crackdown on the opposition party, and several members of the opposition were killed. The complainant alleged that he was warned by a friend, who had connections with the governing party, that he was a target and that the police were looking for him. He left Ethiopia and applied for asylum in Switzerland. He alleged that he would be arrested and tortured if returned to Ethiopia because of his past political involvement and because he continued to be politically active in Switzerland. The Committee observed that the complainant had not submitted any evidence that the police or other authorities in Ethiopia had been looking for him since he left the country, that he had never been arrested or ill-treated by the authorities during or after the 2005 election, nor did he claim that any charges had been brought against him under the anti-terrorist or any other domestic law. The Committee further noted the complainant's submission that the Ethiopian authorities used sophisticated technological means to monitor Ethiopian dissidents abroad, but observed that he had not elaborated on that claim or presented any evidence to support it. In the Committee's view, the complainant had failed to adduce sufficient evidence about the conduct of any political activity of such significance that would attract the interest of the Ethiopian authorities. Accordingly, the Committee concluded that the decision of the State party to return the complainant to Ethiopia would not constitute a breach of article 3 of the Convention.

132. Complaint No. 424/2010 (*M.Z.A. v. Sweden*) concerned a national of Azerbaijan, born in 1957, who claimed that his deportation to Azerbaijan would constitute a breach by Sweden of article 3 of the Convention against Torture. The complainant claimed that he and his family had economic problems because he struggled to get a job due to his political beliefs and membership in the Azerbaijan National Party. The complainant claimed that he was an active member responsible for the party programme and recruiting new members, and that he participated in a number of political demonstrations from 1998 until 2003. During one of those demonstrations, in response to the elections of 15 October 2003, the authorities attempted to repress the protesters and the complainant claimed that he managed to escape and not get arrested only because his father-in-law worked as a prosecutor in Baku. He then went into hiding at his friends' and acquaintances' homes. His wife told him that the police had searched for him in January 2004 and that they had threatened to arrest her if they did not locate him. He left Azerbaijan and applied for asylum in Sweden in 2004. In May 2004 the Migration Board rejected his application for asylum and his subsequent appeals were rejected as well. The Committee noted the complainant's claim that there was a risk that he would be tortured or ill-treated if deported because of his past political activities, but observed that he had failed to adduce any evidence that he was

wanted for his political activities in Azerbaijan and that he had not claimed that he had been detained or tortured in the past. The Committee concluded that his removal would not constitute a breach of article 3 of the Convention.

133. Complaint No. 433/2010 (*Gerasimov v. Kazakhstan*) concerned a Kazakh national, who claimed to be a victim of a violation by Kazakhstan of articles 1, 2, 12, 13, 14 and 22 of the Convention. The complainant alleged that he had been subjected to torture by the police, who wanted him to confess to having committed a murder. Although the acts of torture he complained of preceded the entry into force of the Convention for Kazakhstan he claimed that the violation was of a continuous nature. He further claimed that the State party had failed to establish adequate safeguards to prevent ill-treatment and torture, that no prompt, impartial and effective investigation was carried out into his allegations, and that the domestic law effectively prevented him from bringing civil proceedings for compensation in violation of article 14 of the Convention, as the right to compensation is recognized only after conviction of officials by a criminal court. The Committee noted the complainant's detailed description of the treatment he was subjected to while in police custody, the medical reports documenting the physical injuries and the psychological damage inflicted on him, the uncontested fact that the complainant was in the custody of the police at the time his injuries were incurred, and that he sought medical treatment for his injuries promptly after his release. The Committee observed that the State party should be presumed liable for the harm caused to the complainant and that it had not provided a compelling alternative explanation, as well as the uncontested failure to register the complainant's detention, to provide him with a lawyer and with access to an independent medical examination. The Committee also noted that, although the complainant reported the acts of torture several days after the events, a preliminary inquiry was initiated only after a month and, despite being closed and re-started several times, it resulted in the closure of the investigation with no criminal responsibility being attributed to police officers. The Committee recalled that an investigation in itself was not sufficient to demonstrate the State party's conformity with its obligations under article 12 of the Convention if it can be shown not to have been conducted impartially, promptly and effectively, and concluded that the State party had failed to comply with its obligations under that article. The Committee further noted that it was uncontested that according to domestic law, the right to compensation for torture arises only after the conviction of the responsible officials by a criminal court. The Committee lastly noted that the complainant had sent a notarized withdrawal letter with a copy to the Ministry of Foreign Affairs and that the complainant and his family had been subjected to pressure at the national level in connection with his complaints, therefore it had substantial reason to doubt that the withdrawal letter was produced voluntarily and concluded that the State party had interfered with the complainant's right of petition. The Committee concluded that the facts before it disclosed violations of article 1, in conjunction with article 2, paragraph 1, and articles 12, 13, 14 and 22 of the Convention.

134. Complaint No. 444/2010 (*Abdussamatov et al. v. Kazakhstan*) concerned 27 Uzbek and 2 Tajik nationals, who claimed that their extradition to Uzbekistan would constitute a violation by Kazakhstan of article 3 of the Convention against Torture. The Committee requested the State party not to extradite the complainants to Uzbekistan while their communication was under its consideration, but the State party failed to comply with this request. During its forty-seventh session, the Committee decided that, by breaching the Committee's request for interim measures the State party had failed in its obligations to cooperate in a good faith under article 22 of the Convention, and that the communication was admissible insofar as it raised issues with respect to article 3 of the Convention. The complainants are practitioners of Islam and fled Uzbekistan for fear of persecution for practising their religion outside of official institutions. In January 2010, a new law on refugees came into force in Kazakhstan, requiring all asylum seekers, as well as mandate

refugees recognized by the Office of the United Nations High Commissioner for Refugees, to register with the Government of Kazakhstan. The complainants duly registered with the Migration Police in May 2010. In August 2010, their asylum applications were rejected and on 8 September 2010 the Office of the Prosecutor announced that, upon a request by the Uzbek authorities and in accordance with the 1993 Commonwealth of Independent States' Convention on Legal Assistance and Conflicts in Law Matters of Civil, Family, and Criminal Law (Minsk Convention) and the 2001 Shanghai Convention, the complainants would be extradited to Uzbekistan, as they were involved in "illegal organizations" and accused of "attempts to overthrow the constitutional order" in Uzbekistan. In December 2010, the Almaty District Court rejected the complainants' appeals. On the merits, the Committee noted the counsel's arguments that the complainants and other individuals returned to Uzbekistan pursuant to extradition requests were generally held in incommunicado detention; counsel's claims that in Uzbekistan the practice of torture and ill-treatment remained systematic and that Muslims practising their faith outside official state control and charged with religious extremism and attempts to overthrow the constitutional order are specifically targeted; and the fact that the State party rejected the complainants' request for asylum on the grounds that they would pose a threat to the State party and could cause significant damage to its security and that of other countries. It also noted the counsel's argument that the proceedings in the State party leading to the extradition of the complainants were not fair, as no interpreter was provided, they had limited access to lawyers and the lawyers did not have access to the files. The Committee also noted the State party's argument that Uzbekistan is party to the International Covenant on Civil and Political Rights and to the Convention against Torture and that Uzbekistan had issued diplomatic assurances guaranteeing that the complainants would not be subjected to torture or cruel, inhuman or degrading treatment. It also noted that, according to the State party, Uzbekistan had assured that international organizations could monitor the detention facilities. The Committee observed that all 29 complainants were Muslims practising their religion outside of Uzbekistan's official institutions and/or accused of terrorism-related crimes. It also recalled that the non-refoulement principle in article 3 of the Convention is absolute and the fight against terrorism did not absolve the State party from honouring its obligation to refrain from expelling 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. It considered that the pattern of gross, flagrant or mass violations of human rights and the significant risk of torture or other cruel, inhuman or degrading treatment in Uzbekistan, in particular for individuals practising their faith outside of the official framework, had been sufficiently established. It further noted that the State party had not provided evidence refuting the complainants' claims that their extradition proceedings did not satisfy minimum fair trial requirements and that there was no individualized risk assessment of each complainant's personal risk of torture upon return to Uzbekistan. The Committee therefore decided that the facts before it revealed a breach by the State party of articles 3 and 22 of the Convention.

135. Complaint No. 453/2011 (*Gallastegi Sodupe v. Spain*) concerned a Spanish national who claimed to be the victim of a violation by Spain of articles 12, 14 and 15 of the Convention. The complainant alleged that on 24 October 2002 he was arrested in a violent manner at 5 a.m. by the Basque autonomous police force during a police operation and taken to the central police station where it was determined that the charges against him fell within the scope of anti-terrorism laws and he was held incommunicado for three days. He also alleged that his self-incriminating statements during police interrogations were obtained under ill-treatment and physical and psychological torture. The complainant further argued that the doctors, provided by the police, did not consider his allegation of torture during the medical examinations nor in their forensic medical reports. The complainant alleged that no prompt, independent and impartial investigation into his allegation of torture was carried out and that the competent courts failed to act on his

repeated claims of having been subjected to ill-treatment and torture. The complainant further asserted that the trial leading to his conviction was unfair since his self-incriminating statements, obtained under torture, were used as evidence leading to his conviction for the crime of terrorist murder. The Committee noted that the complainant had lodged a complaint of torture and ill-treatment, which was examined by a Magistrate's Court, that the latter ordered a stay of proceedings on the basis of the forensic medical reports, which did not support the complainant's allegations and that the Provincial High Court subsequently dismissed the complainant's appeal, also on the basis of the forensic medical reports. The Committee also noted that the complainant requested that further evidence be taken, but that his request was turned down by the courts, which considered this unnecessary. The Committee further noted that, during committal proceedings against the complainant by the Fourth Examining Magistrate of the National High Court and the subsequent trial, the complainant stated that he had incriminated himself as a result of the torture and ill-treatment to which he had been subjected and that the court did not take measures to investigate these allegations. The Committee considered that the above indicated a failure to investigate on the part of the authorities that was incompatible with the State party's obligation under article 12 of the Convention. The Committee also noted that the complainant's self-incriminating statement was lent substantial weight in the proceedings against him, but considered that the complainant had not provided information that would allow it to conclude that his self-incriminating statement was in all probability a result of torture and accordingly concluded that the information before it did not reveal a violation of articles 14 and 15 of the Convention.

D. Follow-up activities

136. At its twenty-eighth session, in May 2002, the Committee against Torture established the function of a Rapporteur for follow-up to decisions on complaints submitted under article 22. At its 527th meeting, on 16 May 2002, the Committee decided that the Rapporteur shall engage, inter alia, in the following activities: monitoring compliance with the Committee's decisions by sending notes verbales to States parties enquiring about measures adopted pursuant to the Committee's decisions; recommending to the Committee appropriate action upon the receipt of responses from States parties, in situations of non-response, and upon the receipt henceforth of all letters from complainants concerning non-implementation of the Committee's decisions; meeting with representatives of the permanent missions of States parties to encourage compliance and to determine whether advisory services or technical assistance by the Office of the United Nations High Commissioner for Human Rights would be appropriate or desirable; conducting with the approval of the Committee follow-up visits to States parties; preparing periodic reports for the Committee on his or her activities.

137. The present report contains information received from States parties and complainants since the forty-seventh session of the Committee against Torture.

State party	Canada
Case	<i>Singh, 319/2007</i>
Decision adopted on	30 May 2011
Violation	Article 3
Remedy recommended	Not to extradite the complainant to India.

On 18 November 2011, the State party informed the Committee that it had decided not to return the complainant to India.

The State party explains that it does not accept as a general proposition that its domestic system of judicial review, and in particular proceedings before its Federal Court, do not provide an effective remedy against removal where there are substantial grounds to believe that a person faces a risk of torture. The State party interprets the Committee's decision in this case as indicating that, in the particular circumstances of the case, the Committee did not find that the domestic remedies were sufficient.

The State party's observations were transmitted to the complainant, on 28 December 2011, for comments.

At its forty-eighth session, the Committee decided to await receipt of further information before deciding on the matter, but no information was received. A reminder to the counsel is to be prepared.

Committee's decision: follow-up dialogue ongoing.

State party	Canada
Case	<i>Boily, 327/2007</i>
Decision adopted on	14 November 2011
Violation	Articles 3 and 22
Remedy recommended	The State party is requested, in accordance with its obligations under article 14 of the Convention, to provide effective redress, including the following: (a) compensate the complainant for violation of his rights under article 3; (b) provide as full rehabilitation as possible by providing, inter alia, medical and psychological care, social services, and legal assistance, including reimbursement for past expenditures, future services, and legal expenses; and (c) review its system of diplomatic assurances with a view to avoiding similar violations in the future.

On 10 April 2012, the State party explained that Mr. Boily had been sentenced by a Mexican court to 30 years of imprisonment for homicide and 9 years of imprisonment for escape from legal custody. In the past, he had been sentenced in Mexico to 14 years of imprisonment for trafficking in marijuana. He has filed "*amparo*" proceedings to have his sentence reduced.

At present, the complainant is incarcerated in the Centro Federal de Rehabilitación Psicosocial located in Ayala. He was transferred there in October 2010, as a result of a medical procedure from which he has long since recovered and that is irrelevant to the communication.

The State party explains that it continues to provide the complainant with consular services, including consular visits on a routine basis, as appropriate. Consular officials visited him on 18 November 2011 and on 10 February 2012. During the visits, the complainant reported no health problems and expressed satisfaction with both the treatment by the facility's guards and the food received.

The complainant was made aware of his right to seek his transfer to Canada to serve the remainder of his sentence there under the Transfer of Offenders Treaty and the International Transfer of Offenders Act. However, according to the State party, he has chosen to pursue an objection to his sentence through the Mexican courts prior to applying for a transfer.

The State party explains that at the same time, the complainant is pursuing the Government of Canada for monetary compensation for the violation of his rights that allegedly occurred in the first week after his extradition to Mexico. The proceedings are pending before the Federal Court of Canada.

The State party explains that it is contesting the claims made by the complainant under domestic law and that it has no intention of paying compensation or rehabilitating Mr. Boily.

The State party explains that it has carefully reviewed the Committee's decision and the request to review its system of diplomatic assurances with a view to avoid future violations. Given that there is an ongoing domestic litigation with regard to the complainant's claims — including a claim alleging a failure of the Canadian authorities to properly monitor the diplomatic assurances received from Mexico — the State party believes it inappropriate to provide observations on the matter at this time. The State party concludes by informing the Committee that it will keep it informed of the developments in the case.

The State party's submission was sent to the complainant, for comments, in April 2012.

At its forty-eighth session, the Committee decided to await receipt of further information prior to deciding on the matter. A reminder to the complainant is to be prepared.

Committee's decision: follow-up dialogue ongoing.

State party	Morocco
Case	<i>Ktiti</i> , 419/2010
Decision adopted on	26 May 2011
Violation	Articles 3 and 15
Remedy recommended	Not to extradite the complainant to Algeria.

On 13 September 2011, the State party informed the Committee that its authorities have decided to extradite the complainant to Algeria.

On 16 September 2011, the secretariat, upon instructions of the Committee's Rapporteur for follow-up to decisions on complaints (hereinafter referred to as the Rapporteur), sent a note verbale to the State party's Permanent Mission in Geneva. The State party was informed that the content of its note verbale of 13 September 2011 had been drawn to the attention of the Committee and that the Rapporteur advised the State party that if it proceeded with the extradition it would breach its obligations under article 3 of the Convention, violating its international obligations to cooperate with the Committee in good faith. With reference to the Committee's decision of 26 May 2011, the Rapporteur further explained that the prohibition of torture is absolute and bans the

return of individuals to countries where it is established that they would face personal and real risk of torture. He further noted that the Committee had also concluded that the State party had violated article 15 of the Convention, given that the State party's decision to have the complainant extradited was based solely on confessions of a third person, obtained through torture in Algeria. The Rapporteur noted further that the Committee's decision had been adopted unanimously, following a thorough examination of all elements and circumstances of the case, in the spirit of the Convention. Next, the Rapporteur explained that the principle of *non-refoulement*, in the opinion of eminent jurists, has the nature of *jus cogens*, and as such, its aim is the prevention of torture. The application of the obligation to prevent torture cannot be realized solely by obtaining "written guarantees" in the form of engagements that the State party's legislation in the receiving State would be respected in order to protect the extradited individual's rights. In the light of the above considerations, the Rapporteur concluded that the Committee could not accept the extradition of the complainant. He also informed the State party that the issue would be discussed by the Committee during its November 2011 session.

Another note verbale was sent by the secretariat on 7 October 2011, as per the instructions of the Committee's Rapporteur for follow-up to decisions on complaints, in the light of information received concerning the possible extradition of the complainant. The State party was urged to provide updated information on the actual situation of the complainant, and was reminded of its obligations under article 3 of the Convention.

The matter was raised during the dialogue concerning the examination of the State party's fourth periodic report at the forty-seventh session of the Committee. The Moroccan authorities explained that they had decided to postpone the complainant's extradition.

On 16 November 2011, the complainant's relatives informed the Committee that Mr. Ktiti had in fact been transferred, on 3 November 2011, from Salé-Rabat Jail No. 1 to Salé-Rabat Jail No. 2, where suspected terrorists are allegedly usually held, and which, according to the relatives, is known for its harsh conditions of detention. In addition, Mr. Ktiti is being kept in isolation. The relatives asked the Committee to request updated information from the State party on the present situation of the complainant.

On 28 December 2011, relatives of Mr. Ktiti reiterated their previous submissions and sought the Committee's intervention in the case, as the complainant was still detained.

On 24 February 2012, the State party informed the Committee that by decision of the Government of Morocco, Decree No. 2-10-001 of 25 March 2010 to extradite the complainant to Algeria had been annulled (Decree No. 12-12-13 of January 2012), and that Mr. Ktiti had been released on 2 February 2012.

The State party's observations were sent to the complainant for comments (deadline 18 May 2012).

At its forty-eighth session, the Committee decided to await receipt of further information before deciding on the matter. A reminder to the complainant for comments is to be prepared.

Committee's decision: follow-up dialogue ongoing.

State party	Morocco
Case	Kalinichenko, 428/2010
Decision adopted on	25 November 2011

Violation	Articles 3 and 22 (the complainant has been already extradited to the Russian Federation)
Remedy recommended	The State party was urged 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 took 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 with the international standards. The Committee welcomed this undertaking and requested the State party to facilitate the visit of the complainant by two Committee members.

On 8 February 2012, the State party informed the Committee that the Russian authorities had informed it of the readiness of the Prosecutor's Office of the Russian Federation to scrupulously respect the guarantees provided to the State of Morocco concerning the possibility for the Committee to visit the complainant in his place of detention and to meet with him, confidentially, in isolated premises and in the absence of third persons.

At its forty-eighth session, the Committee decided to seek further information from the State party concerning the complainant's current situation and also on the mechanism in place to monitor systematically the complainant's situation. The Committee thus decided to await receipt of further information prior to deciding on the matter.

Committee's decision: follow-up dialogue ongoing.

State party	Norway
Case	<i>Eftekhary, 312/2006</i>
Decision adopted on	25 November 2011
Violation	Article 3
Remedy recommended	The Committee asked the State party not to expel the complainant to the Islamic Republic of Iran.

On 23 February 2012, the State party informed the Committee that following the adoption of its decision, the Norwegian Immigration Appeals Board had reopened the complainant's case and, on 31 January 2012, the complainant was granted a leave to stay, pending the consideration of his appeal. A hearing has been scheduled for 13 March 2012, and the complainant would be able to present his case.

The State party's information was sent to the complainant on 23 March 2012 for comments.

At its forty-eighth session, the Committee decided to await receipt of further information prior to deciding on the matter.

Committee's decision: follow-up dialogue ongoing.

State party	Senegal
Case	<i>Guengueng et al.</i> , 181/2001
Decision adopted on	17 May 2006
Violation	Article 5, paragraph 2, and article 7
Remedy recommended	The State party is obliged to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts committed by the Habré regime referred to in the communication. Moreover, under article 7 of the Convention, the State party is obliged to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other extradition request made by another State, in accordance with the Convention.

Previous follow-up information: A/66/44, chap. VI

On 8 November 2011, counsel explained that the State party continued to fail to implement the Committee's decision and that Mr. Habré remains in Senegal, without being prosecuted.

The complainant quotes a progress report of the African Union commission on Mr. Habré's case (July 2011), according to which the Government of Senegal has called for the suspension sine die of the ongoing consultations on the matter at the level of the African Union.¹⁶ Following this, the African Union, in a resolution, called upon the Senegalese authorities to have Mr. Habré tried promptly, "in the name of Africa".

In July 2011, the Senegalese authorities decided not to have Mr. Habré expelled to Chad, but reiterated that there was no possibility to have him tried in Senegal.

Counsel adds that on 22 July 2011, the Chadian authorities announced that they opted for the extradition of Mr. Habré to Belgium, in order for him to be tried there.

He notes that two requests for extradition, submitted previously by the Belgian authorities, have been rejected. At present, a third request to have Mr. Habré extradited to Belgium in order to be tried there, submitted by the Belgian authorities in September 2011, is pending before the courts in Senegal.

Counsel requests the Committee to remind the State party's authorities that they are under an obligation to have Mr. Habré tried, or, alternatively, to have him extradited to Belgium; and to avoid letting Mr. Habré leave Senegal, except if this is not in contradiction with the Convention's provisions.

Counsel's submission was sent to the State party, for observations, but no information was received.

¹⁶ The African Union has suggested to the Senegalese authorities to create a special tribunal for the trial of Mr. Habré, but, according to the complainant, the State party has refused to do so.

The Committee discussed the case at its forty-seventh session and decided to remind the State party of its obligation to prosecute and try Mr. Habré, or alternatively to extradite him to Belgium, as this country had made such a request, or to another country to be tried there, and to avoid having Mr. Habré leave Senegal except if his departure is in conformity with the Convention's provisions. This information was conveyed to the State party in February 2012. No observations were received from the State party in this connection.

At its forty-eighth session, the Committee decided to send another note verbale to the State party, reminding it of its obligation to apply the Convention and inviting it to provide updated information concerning the measures taken to give effect to the Committee's recommendation.

Committee's decision: follow-up dialogue ongoing.

State party	Serbia
Case	<i>Ristic, 113/1998</i>
Decision adopted on	11 May 2001
Violation	Articles 12 and 13
Remedy recommended	The Committee urged the State party to investigate allegations of torture by police.

Previous follow-up information: A/66/44, chap. VI.

On 17 September 2011, the State party explained that in February 2007, Mr. and Ms. Ristic had been paid compensation for the emotional anguish they suffered due to bereavement — the death of their son, Milan Ristic — in the amount of half a million dinars each, with an interest rate calculated as of 30 December 2004.

The National Prosecutor's Office demanded writs from the Higher Public Prosecutor in Šabac, in order to consider the writs of the former District Court in Šabac and the possibility of demanding the protection of lawfulness of that court's decision and the decision of the Supreme Court, provided that the legal requirements therefor are met in terms of enforceable decisions against which it is possible to apply this extraordinary legal remedy.

The State party's submission was sent to the complainant, in September 2011, with a request for comments, but no reply was received. A reminder to the complainant was sent in February 2012.

At its forty-seventh session, the Committee decided that the State party should be encouraged to complete the investigation and to provide information on the measures taken to give effect to the Committee's decision of 11 May 2011. A note verbale was sent to the State party to this effect on 7 February 2012, but no reply was received.

At its forty-eighth session, the Committee decided to await receipt of further information prior to deciding on the matter. A reminder to the State party for updated information is to be prepared, with a request for clarifications concerning the possible difficulties faced by the State party in implementing the Committee's recommendation.

Committee's decision: follow-up dialogue ongoing.

State party	Serbia
Case	<i>Dimitrov, 171/2000</i>
Decision adopted on	3 May 2005
Violation	Article 2, paragraph 1, in connection with articles 1, 12, 13 and 14
Remedy recommended	The Committee urged the State party to conduct a proper investigation into the facts alleged by the complainant.

Previous follow-up information: A/66/44, chap. VI.

On 17 September 2011 the State party informed the Committee that the Ministry of Justice had initiated a discussion with the complainant's counsel in order to fix the amount of compensation for the damages suffered. The discussion is ongoing, and the Ministry has taken every action to reimburse the complainant adequately. Once an agreement is reached, the Committee will be informed. The State party adds that in this case, absolute statute of limitations was established for criminal prosecution concerning acts of confession under duress (article 65 of the Penal Code). An investigative judge from the Novi Sad Municipal Court has taken the needed investigative actions, upon proposal of the Novi Sad Municipal Prosecutor, but the investigative actions have not resulted in the identification of perpetrators. The Prosecutor's Office has no grounds on which to apply extraordinary legal remedies because the investigative judge does not take decisions in this procedure, and the complainant has not undertaken the subsidiary criminal prosecution, i.e. he has not addressed a court at all. Therefore, according to the State party, other relevant bodies are left to review the possibility of responding to the Committee's decision in the present case.

The State party's submission was sent to the complainant in September 2011, with a request for comments, but no reply was received. A reminder was sent to the complainant in February 2012.

At its forty-seventh session, the Committee decided that the State party should be requested to provide updated information in the case; it should be encouraged to pay compensation. A note verbale was sent to the State party to this effect on 8 February 2012, but no reply was received.

At its forty-eighth session, the Committee decided to await receipt of further information prior to deciding on the matter. A reminder to the State party for updated information is to be prepared.

Committee's decision: follow-up dialogue ongoing.

State party	Serbia
Case	<i>Dimitrijevic, 172/2000</i>
Decision adopted on	16 November 2005
Violation	Article 2, paragraph 1, in connection with articles 1, 12, 13 and 14

Remedy recommended The Committee urged the State party to prosecute those responsible for the violations found and to provide compensation to the complainant.

Previous follow-up information: A/66/44, chap. VI.

On 17 September 2011, the State party informed the Committee that an agreement on damages had been reached by the authorities and the complainant, and compensation of 250,000 dinars was paid on 29 May 2008, which constituted an adequate compensation. According to the State party, there are no legal conditions to rectify the decisions of the State party's judiciary in this case, because the complainant has not taken over the criminal prosecution from the public prosecutor, as a subsidiary prosecutor. Thus, even if the complainant had not been informed of the public prosecutor's decision on his application, he is not in a position to address the court with a subsidiary request for investigation or with charges, and there is no negative decision of a judge concerning his request that would enable the National Public Prosecutor to file a request for protection of lawfulness, or to issue a mandatory instruction for proceeding to a lower instance public prosecutor, given the time elapsed.

The State party's decision was sent to the complainant, for comments, in September 2011, but no reply was received.

At its forty-eighth session, the Committee decided to await receipt of further information in order to decide on the matter. A reminder to the complainant for comments is to be prepared.

Committee's decision: follow-up dialogue ongoing.

State party	Serbia
Case	<i>Nikolić, 174/2000</i>
Decision adopted on	24 November 2005
Violation	Articles 12 and 13
Remedy recommended	Conduct of an impartial investigation into the circumstances of the death of the complainants' son.

Previous follow-up information: A/66/44, chap. VI.

On 17 September 2011, the State party informed the Committee that on 15 August 2008 the authorities paid non-tangible damages to the complainants for the emotional anguish suffered as a result of the death of Nikola Nikolić, in the amount of 400,000 dinars to each complainant. The Ministry of Justice has taken actions in order to execute also a payment of damages to the complainants for their bereavement, and the issue is being discussed with the complainants' representatives.

A "request for the protection of legality", given the serious violations of the Criminal Code's provisions, was filed by two of the complainants with the Supreme Court of Serbia on 27 December 2007, against the decisions of the Belgrade District Court of 17 February 1998 and 11 May 2006, and the Supreme Court's decision of 12 December 2001. On 11 November 2008, the Supreme Court rejected the said request for protection.

At its forty-eighth session, the Committee decided to await receipt of further information in order to decide on the matter. A reminder to the complainant for comments is to be prepared.

Committee's decision: follow-up dialogue ongoing.

State party	Spain
Case	<i>Sonko, 368/2008</i>
Decision adopted on	25 November 2011
Violation	Articles 12 and 16
Remedy recommended	The Committee invited the State party to carry out a suitable investigation into the events that occurred on 26 September 2007, to prosecute and punish any persons found to be responsible for those acts, and to provide effective remedy, which shall include adequate compensation for Mr. Sonko's family.

On 13 April 2012, the State party provided its follow-up observations. It supplied a copy of a report of the First Chief of the Command of the Civil Guard of Ceuta, dated 9 March 2012. The report contains information similar to the one provided by the State party (when presenting its observations on the merits of the communication) and refers, in particular, to some specific passages of the Committee's decision.

It questions the accuracy of the description of events in the narrative part of the Committee's decision and challenges the author's allegations. The State party notes in this connection that the testimonies of the Civil Guard's agents, which should enjoy the same presumption of truthfulness, show that when Mr. Sonko was left he was able to walk, and that the Civil Guard officers did not puncture his dinghy. In addition, the Spanish Civil Guard's vessel was close to the shore, as can be confirmed in the sequence of a video recorded by closed-circuit cameras. Thus, at 5:51:53 of the video recording, the vessel was few metres from the coastline. Second, there was no request for asylum. Moreover, according to the State party's laws, when an asylum request is submitted abroad, it shall be lodged at a Consulate or an Embassy. Third, the State party notes that it is not correct that Mr. Sonko's relatives and/or his lawyer were not notified about the proceedings before the Examining Court No. 1 of Ceuta. On 5 January 2009, Jankoba Coly, Mr. Sonko's cousin, was notified. Fourth, the State party's officers acted on a humanitarian basis to provide assistance and rescue, pursuant to international treaties signed with Morocco, and by request of the Moroccan authorities. Therefore, there was no administrative procedure for denial of entry because the officers' action was not within migration matters or regulation. Fifth, there is no cause-effect relationship between the rescue made by the Civil Guard officers and Mr. Sonko's death. Finally, the State party notes that in its decision, the Committee referred to the testimony of Dao Touré (para. 6.3). According to the State party, however, the record of the Civil Guard contains no information about such a person having been rescued with the deceased and, thus, it is difficult to give credit to the truthfulness of his testimony.

The report further challenges the Committee's conclusions. It asserts that the deceased was not subject to physical and mental suffering prior to his death, by any means. His death was an accident in which the Civil Guard was not involved.¹⁷ As to the Committee's recommendation for the State party to carry out a suitable investigation and to provide effective remedy, the report points out that in addition to a suitable and

¹⁷ The State party refers to the individual opinion of Ms. Felice Gaer.

impartial judicial investigation by the Examining Court No. 1 of Ceuta, the Ministry of Interior has carried out an administrative proceeding (Exp. No. 170/RP/08) in order to examine the complainant's request for compensation for the damages caused by the death of her brother (Mr. Sonko). On 16 June 2010, the General Technical Secretariat of the Ministry of Interior dismissed the complainant's request, explaining that Mr. Sonko's death could not be attributed to the action or omission of the Civil Guard's officers. The complainant could challenge this decision in court within two months.

In light of this, the Chief of the Civil Guard of Ceuta considers in his report that the State party has already complied with all the Committee's recommendations.

The State party submission also contains copies of a decision of the Court of Instruction No. 1 of Ceuta; the General Technical Secretariat of the Ministry of Interior's resolution of 16 June 2010; the report of the First Chief of the Command of the Civil Guard of Ceuta, dated 9 March 2012; and a letter addressed to the author's counsel, dated 26 March 2012, in which he is informed that any measure adopted by the State party will be conveyed through the Committee.

On 27 April 2012, the State party added that it had adopted the following measures pursuant to the Committee's decision:

- (a) The Committee's decision had been notified to all the concerned judicial and administrative authorities that intervened in this matter;
- (b) The Committee's decision would be published in the Ministry of Justice's Official Bulletin in the coming weeks;
- (c) As to the Committee's recommendation to carry out an adequate and impartial investigation of the facts, the Committee's decision had been transmitted to the Office of the Prosecutor in order to analyse whether there were legal grounds for the reopening of the judicial investigation. The State party points out that in general a judicial investigation is an impartial investigation appropriate within a rule of law regime. The State party is awaiting the final assessment of the Office of the Prosecutor;
- (d) As to effective remedies, including adequate compensation, the State party explains that it is for the relatives of the complainant to make a claim for remedies and compensation as long as they are entitled to do so. There is no record about such claims within criminal, civil or administrative proceedings.

The State party added that it will inform the Committee of any developments concerning the above-mentioned issues.

The State party's submissions were sent to the complainant, for comments, on 17 April and in May 2012, respectively.

At its forty-eighth session, the Committee decided to await receipt of further information prior to deciding on the matter.

Committee's decision: follow-up dialogue ongoing.

State party	Sweden
Case	<i>Agiza, 233/2003</i>
Decision adopted on	20 May 2005
Violation	Articles 3 and 22

Remedy recommended

The Committee requested the State party to take steps in response to the finding of a violation of the complainant's rights under articles 3 and 22 of the Convention, because of his forcible return to Egypt, and to prevent similar violations in the future.

Previous follow-up information: A/66/44, chap. VI.

On 13 May 2011, the State party informed the Committee that visits with Mr. Agiza were still being conducted by the Swedish Embassy in Cairo in order to monitor his situation in prison. So far, 63 such visits had been conducted in the Tora prison, the most recent one on 11 April 2011. The complainant has a pending case on early release; the Embassy is following up the matter and is seeking information from different sources.

The State party recalls that in its 7 December 2009 submission, it informed the Committee that the Government of Sweden had granted the complainant compensation and that a final decision concerning the issue of granting Mr. Agiza permanent residence in Sweden was also taken.¹⁸ The State party has also informed the Committee of its intention not to take further actions concerning the Committee's decision in the case. The State party affirms that in its view, this case is now closed, as the Committee has been provided with all the information required under the follow-up procedure.

On 5 September 2011, the complainant's counsel expressed surprise at the State party's view that the case was closed, but expressed satisfaction that the Embassy had continued its visits and taken action on the complainant's possible early release.

Counsel further explains that Mr. Agiza was released from prison in early August 2011, and lives freely in Cairo. The exact reasons for release remain unclear, but counsel suggests that it may have been the consequence of the recent changes in Egypt. The complainant intends to apply for a Swedish residence permit, mainly because his wife and six children are in Sweden and are Swedish citizens, and because he is in need of medical treatment due to the torture he was subjected to. Counsel believes that it would be appropriate, in the light of the Committee's decision, that the State party issue a residence permit to the complainant.

On 12 October 2011, the State party confirmed that Mr. Agiza had been released in August 2011. It explains that if the complainant submits an application for a residence permit in Sweden, it will be handled in accordance with the existing legislation and procedure. The State party adds that since the Government's decision of 19 November 2009 not to grant the complainant a residence permit, the procedure concerning "security cases" had been altered, on 1 January 2010, and such cases are now tried in the same way as cases concerning residence permits, i.e. the Migration Board's decisions thereon can be appealed before migration courts and to the Migration Court of Appeal, with the exception of "qualified security cases", for which a different system of appeal exists.

The State party emphasizes that the Migration Board and the migration courts are independent bodies in relation to the Government, and the Government cannot instruct them in the assessment of individual cases.

¹⁸ In fact, in 2009, the State party explained that the authorities refused to grant a residence permit to the complainant, as exceptional grounds existed owing to reasons relating to national security. The Government considered, inter alia, that, "the activities in which the complainant was involved were of such serious nature that it feared that if he were granted residence permit he could engage in similar activities threatening national security in Sweden" (A/66/44, p. 189).

The State party reiterates that it considers the case before the Committee closed, as the Committee has been provided with all the information required under the follow-up procedure.

At its forty-seventh session, the Committee decided, in the light of the measures taken so far by the State party, to close the follow-up dialogue.

State party	Sweden
Case	<i>Chahin, 310/2007</i>
Decision adopted on	30 May 2011
Violation	Article 3
Remedy recommended	The Committee asked the State party not to expel the complainant to the Syrian Arab Republic.

On 14 September 2011, the State party informed the Committee that the Swedish Minister of Justice, on 27 June 2011, had stayed the enforcement of the expulsion order of the complainant.

At present, the issue of what possible additional measures may be warranted by the Committee's decision in the present case, in particular whether the complainant can be granted a residence permit, is being studied, and the Committee will be informed of the decision taken.

On 30 September 2011, the complainant's counsel explained that the present legal procedure of the complainant differs from ordinary asylum cases, because in 1991 Mr. Chahin had been found guilty and sentenced for manslaughter by the Norrköppings Tingsrätt (district court), combined with a decision of expulsion and life-long prohibition to return to Sweden.

Under the Aliens Act, the Migration Board cannot grant asylum to individuals expelled by a criminal court. The Board can decide whether the person in question ought to be granted asylum or other protection and hand over the case to the Migration Court, with a recommendation. The Migration Court can either dismiss the case or decide to grant the individual asylum, by reversing the expulsion order, including the prohibition to return.

The complainant has submitted a new asylum application to the Migration Board and he was registered as an asylum seeker on 1 August 2011. He claimed that if returned to the Syrian Arab Republic, he would face a serious risk of torture and other forms of persecution there, due to the fact that he had violated his "restriction given after his release from prison there" and that he had been away from the Syrian Arab Republic for a long period; he also referred to the Committee's decision. On 30 August 2011, the Migration Board conducted an asylum interview with the complainant, but had not yet taken a decision.

On 31 October 2011, the State party reiterated that the question of possible action in this case was under consideration. On 30 September 2011, the Migration Board had found that the complainant should be granted a residence permit on protection-related grounds, and the case was still before the Migration Court.

By letters of 8 December 2011 and 23 January 2012, counsel confirmed to the Committee that the complainant has been granted a permanent residence with refugee status, and that the deportation order and the prohibition to return to Sweden has also been revoked, and thus the State party has given effect to the Committee's decision in this case. On 22 March 2012, the State party informed the Committee that the Migration Court in Malmö had decided, on 8 December 2011, to cancel the expulsion order of the complainant and to grant him permanent residence, declaration of refugee status and travel documents.

At its forty-eighth session, the Committee decided to close the follow-up dialogue with a finding of a satisfactory resolution.

State party	Sweden
Case	<i>Mondal, 338/2008</i>
Decision adopted on	23 May 2011
Violation	Article 3
Remedy recommended	The Committee asked the State party not to expel the complainant to Bangladesh.

On 14 September 2011, the State party informed the Committee that on 15 July 2010, the Migration Board decided to grant the complainant a permanent residence permit. Thus, the State party believes that it has complied with the Committee's decision in the present case and no further action is needed.

At its forty-seventh session, the Committee decided, in the light of the measures taken so far by the State party, to close the follow-up dialogue in the case, with a finding of a satisfactory resolution.

State party	Sweden
Case	<i>Güclü, 349/2008</i>
Decision adopted on	11 November 2010
Violation	Article 3
Remedy recommended	The Committee asked the State party not to deport the complainant to Turkey.

On 8 March 2011, the State party informed the Committee that on 4 March 2011, the Migration Board granted a temporary residence permit to the complainant, valid until 1 November 2011, with a possibility of extension, and she cannot be deported during the validity of the permit or during the time a request for its extension is submitted.

The Migration Board has excluded the complainant from being considered a refugee and from being considered eligible for subsidiary protection on account of the information she provided concerning her activities before arriving in Sweden.

In the light of the above, the State party expressed the view that it has complied with the Committee's decision and it has supplied the Committee with the information required under the follow-up procedure. It invites the Committee to close the follow-up examination in the case.

On 11 April 2011, the complainant's counsel noted that the permit issued to Ms. Güclü was only temporary, whereas the decision to deport her was not revoked. According to the counsel, the Migration Board has refused to grant a different permit to the complainant, as her involvement in the Kurdish Workers' Party (PKK) could be considered as initiating or helping others to commit war crimes or crimes against humanity. Referring to *Germany v. B. and C.*, case No. 101/09, European Court of Justice, 9 November 2010, counsel contests the reasoning of the Migration Board. He explains that the fact that a person has been a member of an organization, which, because of its involvement in terrorist acts, is on the list forming the annex to the Common Position of the Council of the European Union on the application of specific measures to combat terrorism (2001/931/CFSP, 27 December 2001), and the fact that a person actively supported armed struggle waged by that organization, does not automatically constitute a serious reason to consider that the person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations".

On 5 July 2011, counsel contended that the State party's decision to grant the complainant a temporary residence permit was not in conformity with the Committee's decision in the case.

On 13 September 2011, the State party explained that on 4 March 2011, the Migration Board decided that the complainant should be excluded from being considered a refugee or an alien otherwise in need of protection under the relevant provisions of the Aliens Act, based on article 1 (f) of the Convention relating to the Status of Refugees and on articles 12, paragraph 2, and 17, paragraph 1, in Council Directive 2004/83/EC (the Qualifications Directive). The State party notes that, however, there are other grounds for granting a residence permit under the Aliens Act. In this case, the Migration Board considered that there were impediments to the enforcement of the decision to deport the complainant, as pursuant to chapter 12, section 1, of the Aliens Act, the refusal of entry and expulsion of an alien may never be enforced to a country where there is fair reason to assume that the alien would be in danger of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or the alien is not protected in the country from being sent on to a country in which he or she would be in such danger. Thus, the Migration Board has granted the complainant a permit based on chapter 12, section 18, of the Aliens Act. Moreover, according to the State party, the complainant can re-apply for a residence permit once the current one expires; she will not be deported during the consideration of her application by the relevant authorities and courts.

The State party points out that pursuant to chapter 5, section 4, of the Aliens Act, if the Committee or another international body competent to examine individual complaints finds that a refusal-of-entry or expulsion order in a particular case is contrary to the State party's obligations under a Convention, a resident permit shall be granted to the individual in question, unless exceptional grounds exist.

Thus, according to the State party, the complainant will not be deported while her residence permit is valid nor during the consideration of her application for its renewal. In the circumstances, the State party holds that the measures taken by its competent authorities are compatible with the Committee's decision in the present case.

On 6 October 2011, counsel noted that, according to him, the State party has not fulfilled its obligations under the Convention and that the complainant was still at risk to be deported.

At its forty-seventh session, the Committee took note of the measures taken so far by the State party. The Committee decided to reiterate that the State party would violate article 3 of the Convention if the complainant is deported; a note verbale was sent to this effect in February 2012.

On 14 March 2012, the State party explained that the complainant's residence permit had expired on 1 November 2011, and the issue of its renewal was under consideration at the time the reply was being prepared. The complainant was thus at no risk to be deported. The State party explained that it would inform the Committee of the decision of its Migration Board concerning the complainant's permit.

On 24 May 2012, the State party informed the Committee that on 16 May 2002, the Swedish Migration Board decided to grant the complainant a permanent residence permit, under chapter 12, section 22, paragraph 3, of the Aliens Act, and therefore she is no longer at risk of deportation.

At its forty-eighth session, the Committee decided to close the follow-up dialogue, with a finding of a satisfactory resolution.

State party	Sweden
Case	<i>Aytulun and Güclü, 373/2009</i>
Decision adopted on	19 November 2010
Violation	Article 3 (Turkey)
Remedy recommended	The Committee asked the State party not to deport the author and his daughter to Turkey.

Previous follow-up information: A/66/44, chap. VI.

On 18 March 2011, the complainants' counsel explained that the temporary residence and work permits issued to the complainants following the decision of the Migration Board of 21 February 2011 were valid until 1 November 2011 only. According to the counsel, the Migration Board has refused to grant a different permit to Mr. Güclü, as his involvement in the PKK could be considered as initiating or helping others to commit war crimes or crimes against humanity. Referring to the case *Germany v. B. and C.*, case No. 101/09, European Court of Justice, 9 November 2010, counsel contests the reasoning of the Migration Board. He explains that the fact that a person has been a member of an organization, which, because of its involvement in terrorist acts, is on the list forming the annex to the Common Position of the Council of the European Union on the application of specific measures to combat terrorism (2001/931/CFSP, 27 December 2001), and the fact that a person actively supported armed struggle waged by that organization, does not automatically constitute a serious reason to consider that that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations". Thus, the complainants are still at risk of forcible return to Turkey, despite the Committee's decision.

On 13 September 2011, the State party informed the Committee that on 21 February 2011, the Migration Board decided that the complainants should be excluded from being considered refugees or aliens otherwise in need of protection under the provisions of the Swedish Aliens Act, based on article 1 (f) of the Convention relating to the Status of Refugees and on articles 12, paragraph 2, and 17, paragraph 1, in Council Directive 2004/83/EC (the Qualifications Directive). The State party notes that, however, there are other grounds for granting a residence permit under the Aliens Act. In this case,

the Migration Board considered that there were impediments to the enforcement of the decision to expel the complainants, as pursuant to chapter 12, section 1, of the Aliens Act, the refusal of entry and expulsion of aliens may never be enforced to a country where there is fair reason to assume that the aliens would be in danger of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or the aliens are not protected in the country from being sent on to a country in which he or she would be in such danger. Thus, the Migration Board has granted the complainants permits based on chapter 12, section 18, of the Aliens Act. Moreover, according to the State party, the complainants can re-apply for a residence permit once the current one expires; they will not be deported during the consideration of their application by the relevant authorities and courts.

The State party notes that pursuant to chapter 5, section 4, of the Aliens Act, if the Committee or another international body competent to examine individual complaints finds that a refusal-of-entry or expulsion order in a particular case is contrary to the State party's obligations under a Convention, a resident permit shall be granted to the individual in question, unless exceptional grounds exist.

Thus, the complainants will not be deported while their residence permits are valid nor during the consideration of the application for their renewal. In the circumstances, the State party holds that the measures taken by its competent authorities are compatible with the Committee's decision in the present case.

On 6 October 2012, the complainants' counsel noted that, according to him, the State party had not fulfilled its obligations under the Convention and that the complainants were still at risk to be deported.

The case was examined by the Committee at its forty-seventh session. The Committee took note of the measures taken so far by the State party. It asked the secretariat to remind the State party that eventual deportation of the complainants to Turkey would amount to a violation, by the State party, of its obligations under article 3 of the Convention; this was done in February 2012.

On 14 March 2012, the State party informed the Committee that the complainants' residence permits had expired on 1 November 2011 and the question of their extension was under consideration at the time the reply was being prepared. The State party reiterated that the complainants were not at risk of forcible removal pending the consideration of their application. The State party explained that it would keep the Committee informed of the outcome of the above-mentioned proceedings.

On 24 May 2012, the State party informed the Committee that on 16 May 2002, the Swedish Migration Board decided to grant the complainants permanent residence permits, under chapter 12, section 22, paragraph 3, of the Aliens Act, and therefore they are no longer at risk of deportation.

At its forty-eighth session, the Committee decided to close the follow-up dialogue, with a finding of a satisfactory resolution.

State party	Sweden
Case	<i>S.M. et al.</i> , 374/2009
Decision adopted on	21 November 2011
Violation	Article 3

Remedy recommended The Committee asked the State party not to deport the complainants to Azerbaijan.

On 6 March 2012, the State party informed the Committee that the Swedish Migration Board had decided, on 16 February 2012, to grant the complainants permanent residence permits. The complainants thus do not risk deportation to Azerbaijan. The State party considers that it has given effect to the Committee's decision in the present case.

The State party's submission was sent to the counsel, for comments, in March 2012. No reply was received.

At its forty-eighth session, the Committee decided to close the follow-up dialogue, with a finding of a satisfactory resolution.

State party	Sweden
Case	<i>Bakatu-Bia, 379/2009</i>
Decision adopted on	3 June 2011
Violation	Article 3
Remedy recommended	The Committee asked the State party not to remove the complainant to the Democratic Republic of the Congo.

On 1 September 2011, the State party informed the Committee that the Migration Board had decided, on 15 July 2010, to grant the complainant a permanent residence permit. In the light of this, the State party is of the opinion that it has complied with the Committee's decision, it has provided all the information required by the Committee, and, therefore, no further follow-up of the Committee's decision should be necessary.

The State party's submission was sent to the complainant's counsel, for comments, in September 2011, but no reply was received.

At its forty-seventh session, the Committee decided to close the follow-up examination of the case, with a satisfactory resolution.

State party	Switzerland
Case	<i>Jahani, 357/2008</i>
Decision adopted on	23 May 2011
Violation	Article 3
Remedy recommended	The Committee asked the State party not to deport the complainant to the Islamic Republic of Iran.

On 30 August 2011, the State party informed the Committee that on 24 August 2011, the Federal Office for Migration admitted Mr. Jahani temporarily. This means in practice, that the complainant cannot be sent back to his country of origin, unless there is a radical political change there, i.e. a sustainable change in the regime which would remove the risks in case of return. If this happens, the complainant would have the right to appeal against his removal. The complainant can also apply for a stay permit after having lived for five years in Switzerland, and the authorization is granted taking into account the level of integration, and family status, in particular. Under certain conditions, the spouse and minor children can benefit from family reunification.

On 3 October 2011, the complainant's counsel informed the Committee that on 24 August 2011, the Swiss authorities decided to accept Mr. Jahani as refugee and not to send him back to the Islamic Republic of Iran; he finds this measure adequate. Counsel invites the Committee to ask the State party to compensate the costs of the lawyer's representation. Counsel has approached the Federal Department of Justice and Police with a request to have these costs paid, but was informed that the Committee's decision did not contain any recommendation as to compensation, and that, therefore, there were no legal grounds to have such payment made.

At its forty-seventh session, the Committee decided to close the follow-up dialogue in the case with a satisfactory resolution, having taken note of the partial satisfaction expressed by the complainant's counsel.

State party	Switzerland
Case	<i>Singh Khalsa et al.</i> , 336/2008
Decision adopted on	26 May 2011
Violation	Article 3
Remedy recommended	The Committee requested the State party not to expel the complainants to India.

On 22 December 2011, the State party explained that on 28 October 2011, in the light of the Committee's decision in this case, the Federal Office for Migration decided to authorize the temporary admittance of the complainants given the impossibility to have them sent back to India, and thus they are at no risk of forcible return. Even if the Federal Office for Migration reviews periodically the issue of the temporary admittance of the complainants, their return in practice would only be possible in the case of a radical political change in the receiving country, i.e. a sustainable change of the regime which would annul the risk in case of return. If the risk in the receiving county disappears and the complainants risk being returned there, they can appeal under article 112 of the Foreign Nationals Act. In addition, their status can change if they leave Switzerland or if they obtain a valid permit there. They can, for example, apply for a residence permit after having lived for five years in Switzerland, and the permit is issued in light of their level of integration, and in particular of their family situation. In addition, they may also benefit from family reunification.

The State party also explains that on 2 December 2011, the complainants appealed to the Federal Administrative Tribunal against the decision to admit them temporarily, and asked to be recognized as refugees. This appeal was still pending at the time.

On 30 January 2012, counsel contends that the decision to temporary admit the complainants does not correspond to the Committee's decision, and for this reason, they appealed against it to the Federal Administrative Tribunal. According to counsel, the only effective way to protect the complainants in this case is to grant them refugee status. Temporary admission may be revoked at any time.

On 15 March 2012, the State party explained that the kind of residence permit issued to the complainants falls outside of the scope of article 3 of the Convention. The principle of *non-refoulement* as guaranteed under this provision is different from the asylum proceedings under the 1951 Status of Refugees Convention. The State party adds that article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not provide for a right to obtain the particular status of

asylum. According to the State party, by granting the complainants temporary admission, it has complied with the Committee's decision. The State party's submission was sent to the complainants, for comments, in March 2012.

On 19 April 2012, the complainants' counsel expressed dissatisfaction with the issuance of temporary residence permits to the complainants. He notes that there is no guarantee that the complainants would not be sent to India in the future, and adds that the appeal before the Federal Administrative Tribunal is still pending.

On 24 May 2012, the State party referred to its previous submission and explained that the complainants are not at risk of removal to India given that they have been granted temporary admission. The State party reiterates that the type of stay permit falls outside of the scope of article 3 of the Convention.

At its forty-eighth session, the Committee decided to seek clarifications from counsel concerning the outcome of the appeal before the Federal Administrative Tribunal, prior to deciding on the matter.

Committee's decision: follow-up dialogue ongoing.

State party	Tunisia
Case	<i>M'Barek, 60/1996</i>
Decision adopted on	10 November 1999
Violation	Articles 12 and 13
Remedy recommended	The Committee requested the State party to carry out an impartial investigation to ascertain whether acts of torture had occurred in this case.

Previous follow-up information: A/66/44, chap. VI.

On 7 June 2011, the State party informed the Committee that an investigation judge from the First Instance Tribunal of Grombalia, in line with the request of the Public Ministry of 11 August 2009 to continue the inquiry ("information"), decided to convoke the collegium of three medical professors who had drafted the 1993 report on the causes of the death of Faisal Baraket, to seek clarifications in order to take a decision on the issue of exhumation.

It transpired that two of the medical doctors had died. The judge heard the explanations of the third doctor, on 21 July 2010. The medical doctor, now chief of the Medical-Forensic Department of the principal hospital in Tunis, insisted on the fact that the autopsy report prepared by two other doctors in 1991 did not mention any existence of traumatic injuries in the area of the anus, which excludes the possibility of an item having been introduced there. The doctor added that the exhumation would not be useful in the establishment of the causes of death, given the time elapsed.

The investigation judge thus was reluctant to order an exhumation, in the light of the opinion of one of the medical doctors that it would be inopportune and useless. As a consequence, the Prosecutor of the Republic intervened on 13 December 2010, under article 55 of the Criminal Procedure Code, and asked the investigative judge to order the exhumation. On 15 December 2010, the investigative judge refused to comply with the request. The Prosecutor of the Republic appealed against this decision on 15 December 2010 before the Appeal Court of Nabeul.

On 3 February 2011, the Appeal Court of Nabeul decided to send the case back to the investigation judge, with a request to proceed with the exhumation, to be carried out by a collegium of medical experts. The case is pending at present. The State party will keep the Committee informed of the developments in the case.

By letter of 29 September 2011, the complainant noted that the State party continued to fail to implement the Committee's decision. According to him, the investigative judge has now designated a collegium of medical experts, without consulting the family. The family asked to designate one French medical expert — Professor Lionel Fournier — who had been involved in the case in the past and who had accepted to participate in the new examination. The family twice provided his name to the investigating judge and the Prosecutor of the Republic, requesting his participation in the proceedings, but received no answer to their request.

The complainant believes that the authorities' behaviour in the present case, and the manner in which the judicial proceedings are being dealt with, constitute a "manoeuvre" aimed at dismantling the case through the multiplication of the proceedings.

The complainant asked the Committee, *inter alia*, to urge the State party to implement the Committee's decision, to stop impunity, to prosecute those responsible for the ill-treatment in the present case, to have Mr. Baraket "rehabilitated as a victim of torture" and to compensate the family;¹⁹ not to commit similar violations in the future; and to have the Committee's decision disseminated widely in Tunisia.

Having taken note of the political changes which occurred recently in the State party, at its forty-seventh session, the Committee decided to invite the State party to conclude the investigations without delay and to inform it of the measures taken to give effect to its recommendations, and a corresponding note verbale was sent by the secretariat on 8 February 2012.

On 14 December 2011, the State party informed the Committee that on 14 May 2011 an investigation judge from the First Instance Tribunal of Grombalia visited the municipal cemetery of Menzel Bouzelfa city, accompanied by three medical-forensic experts, to monitor the exhumation of the body of the deceased and its transportation to the Charles Nicolle Hospital, in Tunis, to be examined there.

Mr. Baraket's relatives and their lawyer, however, opposed the removal of the body, insisting that the examination be conducted *in situ* and that the body be buried immediately thereafter. Thus, given the impossibility of bringing the body to the hospital for examination, the medical-forensic experts declared themselves unable to proceed with the different technical stages of the examination and to carry out their task. The State party adds that the designation and the choice of medical forensic experts belong exclusively to the judiciary instance in charge of the case.

On 22 December 2012, the State party provided a copy of the reports of the First Investigation judge of the First Instance Tribunal of Grombalia and the report prepared by the three medical forensic experts on the impossibility of conducting the necessary examinations due to the categorical refusal of the relatives of Mr. Baraket.

¹⁹ The complainant asks the Committee to find additional violations in the case, *i.e.* of articles 2, 11 and 14, of the Convention, as claimed in the initial communication of the case. The Committee, however, has concluded only to a violation of Mr. Barakat's rights under articles 12 and 13.

On 6 February 2012, the complainant appealed to the Committee not to allow the disappearance of evidence in the case. He notes that the State party ignored his previous submissions and refuses to allow an independent expert to take part in the medical forensic examinations. The authorities have also refused to designate another judge to be in charge of the proceedings, despite the family's requests to that effect. The complainant invites the Committee to take a strong and public position in the case given the time elapsed and its particular nature.

The complainant's submission was sent to the State party, for observations, on 13 February 2012.

At its forty-eighth session, the Committee decided to urgently seek updated information from the State party on the measures taken to give effect to its recommendation.

Committee's decision: follow-up dialogue ongoing.

State party	Tunisia
Case	<i>Ben Salem, 269/2005</i>
Decision adopted on	7 November 2007
Violation	Articles 1, 12, 13 and 14
Remedy recommended	The Committee urged the State party to conclude the investigation into alleged acts of torture inflicted on the complainant, with a view to bringing those responsible to justice.

Previous follow-up information: A/66/44, chap. VI.

On 7 June 2011, the State party recalled that by decision of the Prosecutor of the First Instance Tribunal in Tunis, an inquiry ("information") was opened concerning the complainant's torture allegations, and the case was being attributed to an investigation judge. The investigation judge has already conducted a multitude of acts, including the hearing of the complainant and a number of persons whose names were provided by the complainant. A number of individuals did not present themselves and had to be convoked again. The judge also proceeded with the identification and investigation of persons, responsible, according to the complainant, for his ill-treatment. Thus, the investigation is ongoing, and the State party will keep the Committee informed on the developments thereon.

On 20 July 2011, the complainant's counsel informed the Committee that, in the light of the changes in the State party, the complainant has proposed to the authorities to find a friendly settlement of the matter, without imposing obligations on the Government concerning acts committed during the previous regime, without success. According to counsel, the State party's explanations of the investigation acts accomplished remain vague, which creates confusion regarding the real advancement of the proceedings.

According to counsel, no investigation acts have been carried out since 8 January 2008, when the investigating judge met with the complainant and a number of witnesses, and asked a medical expert to conduct an examination. No other acts have been carried out, according to counsel, including in 2011. In any event, according to counsel, it is clear that the changes in the State party constitute a new element for having an effective,

thorough, independent and impartial inquiry of the torture and other acts of ill-treatment suffered by the complainant.

In addition, the complainant has not been offered any reparation and compensation. He did not receive the care necessary for his physical and psychological re-adaptation; his injuries resulting from torture are serious and worrying, and his health status deteriorated during the previous years. He does not have sufficient material resources to receive the necessary care. The right to obtain compensation, as prescribed in article 14 of the Convention, is not linked, according to counsel, to the issue of the identification of those responsible for acts of torture.

Counsel further notes that in addition to the compensation to be paid to the complainant, the State party is under an obligation of non-repetition to ensure that similar violations do not occur in the future. However, in December 2007, following the adoption of the Committee's decision in November 2007, the complainant was attacked by police officers and kicked, in front of his home, to the point that he had to be hospitalized in emergency. Until January 2011, he remained in his home under police observation, deprived of his right to freedom of movement and the possibility of meeting with his relatives and acquaintances.

Counsel adds that in May 2011, the World Organisation Against Torture (OMCT) conducted a mission in the State party, and reported that on that occasion the Prime Minister affirmed that the authorities would implement without delay the Committee against Torture's decisions. This was reflected in a letter, dated 22 June 2011, sent by the OMCT to the attention of the Prime Minister. The implementation of the Committee's decisions cannot, according to counsel, depend on the conclusion of the transition undertaken or the adoption of a new constitutional framework. In conclusion, counsel requests the Committee to invite the State party to conduct an effective investigation, to compensate the complainant, and to prosecute and sanction those responsible for the complainant's ill-treatment.

Having taken note of the political changes which occurred recently in the State party, at its forty-seventh session the Committee decided to invite the State party to conclude the ongoing investigations without delay, to implement the Committee's decision of 7 November 2007, and to provide it with updated information on all measures taken. No reply was received.

At its forty-eighth session, the Committee decided to seek urgently updated information from the State party on the measures taken to give effect to its recommendation.

Committee's decision: follow-up dialogue ongoing.

State party	Tunisia
Case	<i>Ali, 291/2006</i>
Decision adopted on	21 November 2008
Violation	Articles 1, 12, 13 and 14
Remedy recommended	The Committee urged the State party to conclude the investigation into the alleged acts of torture inflicted on the complainant, with a view to bringing those responsible to justice.

Previous follow-up information: A/66/44, chap. VI.

On 7 June 2011, the State party reiterated that an investigative judge had decided, on 6 February 2009, not to give suit to the complainant's complaint. The investigating judge closed the case for lack of evidence, pursuant to article 106 of the Code of Penal Procedure. Under article 121 of the Code, the case could only be re-opened on the basis of new evidence. As no new evidence had been presented to the Prosecutor's Office since 6 February 2009, the case could not be re-opened.

On 28 July 2011, the complainant's counsel (OMCT) informed the Committee that it had been unable to contact the complainant, and that, therefore, at that time, it was not in a position to comment on the State party's additional information of 7 June 2011.

Counsel points out however, that notwithstanding the investigations carried out in the past, the important changes in the State party since January 2011 constitute new circumstances requiring that a new effective, comprehensive, independent and impartial inquiry into the complainant's torture be undertaken.

Counsel adds that in May 2011, OMCT conducted a mission in the State party, and affirms that on this occasion, the Prime Minister stated that the authorities would implement without delay the Committee's decisions. This was reflected in a letter, dated 22 June 2011, sent by OMCT to the attention of the Prime Minister. The implementation of the Committee's decisions cannot, according to counsel, depend upon the conclusion of the transition undertaken or the adoption of new constitutional framework.

At its forty-seventh session, having taken note of the political changes which occurred recently in the State party, the Committee decided to invite the State party to conclude the ongoing investigations without delay, to fulfil the Committee's decision of 21 November 2008, and to provide the Committee with updated information on all measures taken. No reply was received.

At its forty-eighth session, the Committee decided to urgently seek updated information from the State party on the measures taken to give effect to its recommendation.

Committee's decision: follow-up dialogue ongoing.

VII. Future meetings of the Committee

138. In accordance with rule 2 of its rules of procedure, the Committee holds two regular sessions each year. In consultation with the Secretary-General, the Committee took decisions on the dates of its next regular session for 2012 and on the dates of its regular sessions for 2013. Those dates are:

Forty-ninth	29 October–23 November 2012
Fiftieth	6 May–31 May 2013
Fifty-first	28 October–22 November 2013

Additional meeting time for 2013 and 2014

139. The Committee reiterated its appreciation for General Assembly resolution 65/204, in which the Assembly authorized the Committee to meet for an additional week per session as a temporary measure, with effect from May 2011 until the end of November 2012, further to its request to the General Assembly for appropriate financial support to this effect.²⁰

140. The Committee noted that, at its forty-eighth session, it requested the General Assembly for appropriate financial support to meet for an additional week per session, with effect from May 2013 until the end of November 2014 (see chap. I, sect. P, above). This request is important for the Committee to continue to improve its efficiency and methods of work. The additional week has been reflected in the dates of its future meetings indicated above.

²⁰ See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 44 (A/65/44)*, annex IX.

VIII. Adoption of the annual report of the Committee on its activities

141. In accordance with article 24 of the Convention, the Committee shall submit an annual report on its activities to the States parties and to the General Assembly. Since the Committee holds its second regular session of each calendar year in November, which coincides with the regular sessions of the General Assembly, it adopts its annual report at the end of its spring session, for transmission to the General Assembly during the same calendar year. Accordingly, at its 1092nd meeting, held on 1 June 2012, the Committee considered and unanimously adopted the report on its activities at the forty-seventh and forty-eighth sessions.

Annexes

Annex I

States that have signed, ratified or acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as at 1 June 2012

<i>Participant</i>	<i>Signature</i>	<i>Ratification, accession,^a succession^b</i>
Afghanistan	4 February 1985	1 April 1987
Albania		11 May 1994 ^a
Algeria	26 November 1985	12 September 1989
Andorra	5 August 2002	22 September 2006
Antigua and Barbuda		19 July 1993 ^a
Argentina	4 February 1985	24 September 1986
Armenia		13 September 1993 ^a
Australia	10 December 1985	8 August 1989
Austria	14 March 1985	29 July 1987
Azerbaijan		16 August 1996 ^a
Bahamas	16 December 2008	
Bahrain		6 March 1998 ^a
Bangladesh		5 October 1998 ^a
Belarus	19 December 1985	13 March 1987
Belgium	4 February 1985	25 June 1999
Belize		17 March 1986 ^a
Benin		12 March 1992 ^a
Bolivia (Plurinational State of)	4 February 1985	12 April 1999
Bosnia and Herzegovina		1 September 1993 ^b
Botswana	8 September 2000	8 September 2000
Brazil	23 September 1985	28 September 1989
Bulgaria	10 June 1986	16 December 1986
Burkina Faso		4 January 1999 ^a
Burundi		18 February 1993 ^a
Cambodia		15 October 1992 ^a

<i>Participant</i>	<i>Signature</i>	<i>Ratification, accession,^a succession^b</i>
Cameroon		19 December 1986 ^a
Canada	23 August 1985	24 June 1987
Cape Verde		4 June 1992 ^a
Chad		9 June 1995 ^a
Chile	23 September 1987	30 September 1988
China	12 December 1986	4 October 1988
Colombia	10 April 1985	8 December 1987
Comoros	22 September 2000	
Congo		30 July 2003 ^a
Costa Rica	4 February 1985	11 November 1993
Côte d'Ivoire		18 December 1995 ^a
Croatia		12 October 1992 ^b
Cuba	27 January 1986	17 May 1995
Cyprus	9 October 1985	18 July 1991
Czech Republic		22 February 1993 ^b
Democratic Republic of the Congo		18 March 1996 ^a
Denmark	4 February 1985	27 May 1987
Djibouti		5 November 2002 ^a
Dominican Republic	4 February 1985	24 January 2012
Ecuador	4 February 1985	30 March 1988
Egypt		25 June 1986 ^a
El Salvador		17 June 1996 ^a
Equatorial Guinea		8 October 2002 ^a
Estonia		21 October 1991 ^a
Ethiopia		14 March 1994 ^a
Finland	4 February 1985	30 August 1989
France	4 February 1985	18 February 1986
Gabon	21 January 1986	8 September 2000
Gambia	23 October 1985	
Georgia		26 October 1994 ^a
Germany	13 October 1986	1 October 1990

<i>Participant</i>	<i>Signature</i>	<i>Ratification, accession,^a succession^b</i>
Ghana	7 September 2000	7 September 2000
Greece	4 February 1985	6 October 1988
Guatemala		5 January 1990 ^a
Guinea	30 May 1986	10 October 1989
Guinea-Bissau	12 September 2000	
Guyana	25 January 1988	19 May 1988
Holy See		26 June 2002 ^a
Honduras		5 December 1996 ^a
Hungary	28 November 1986	15 April 1987
Iceland	4 February 1985	23 October 1996
India	14 October 1997	
Indonesia	23 October 1985	28 October 1998
Iraq		7 July 2011 ^a
Ireland	28 September 1992	11 April 2002
Israel	22 October 1986	3 October 1991
Italy	4 February 1985	12 January 1989
Japan		29 June 1999 ^a
Jordan		13 November 1991 ^a
Kazakhstan		26 August 1998 ^a
Kenya		21 February 1997 ^a
Kuwait		8 March 1996 ^a
Kyrgyzstan		5 September 1997 ^a
Latvia		14 April 1992 ^a
Lao People's Democratic Republic	21 September 2010	
Lebanon		5 October 2000 ^a
Lesotho		12 November 2001 ^a
Liberia		22 September 2004 ^a
Libya		16 May 1989 ^a
Liechtenstein	27 June 1985	2 November 1990
Lithuania		1 February 1996 ^a
Luxembourg	22 February 1985	29 September 1987
Madagascar	1 October 2001	13 December 2005

<i>Participant</i>	<i>Signature</i>	<i>Ratification, accession,^a succession^b</i>
Malawi		11 June 1996 ^a
Maldives		20 April 2004 ^a
Mali		26 February 1999 ^a
Malta		13 September 1990 ^a
Mauritania		17 November 2004 ^a
Mauritius		9 December 1992 ^a
Mexico	18 March 1985	23 January 1986
Monaco		6 December 1991 ^a
Mongolia		24 January 2002 ^a
Montenegro		23 October 2006 ^b
Morocco	8 January 1986	21 June 1993
Mozambique		14 September 1999 ^a
Namibia		28 November 1994 ^a
Nauru	12 November 2001	
Nepal		14 May 1991 ^a
Netherlands	4 February 1985	21 December 1988
New Zealand	14 January 1986	10 December 1989
Nicaragua	15 April 1985	5 July 2005
Niger		5 October 1998 ^a
Nigeria	28 July 1988	28 June 2001
Norway	4 February 1985	9 July 1986
Pakistan	17 April 2008	23 June 2010
Palau	20 September 2011	
Panama	22 February 1985	24 August 1987
Paraguay	23 October 1989	12 March 1990
Peru	29 May 1985	7 July 1988
Philippines		18 June 1986 ^a
Poland	13 January 1986	26 July 1989
Portugal	4 February 1985	9 February 1989
Qatar		11 January 2000 ^a
Republic of Korea		9 January 1995 ^a
Republic of Moldova		28 November 1995 ^a

<i>Participant</i>	<i>Signature</i>	<i>Ratification, accession,^a succession^b</i>
Romania		18 December 1990 ^a
Russian Federation	10 December 1985	3 March 1987
Rwanda		15 December 2008 ^a
Saint Vincent and the Grenadines		1 August 2001 ^a
San Marino	18 September 2002	27 November 2006
Sao Tome and Principe	6 September 2000	
Saudi Arabia		23 September 1997 ^a
Senegal	4 February 1985	21 August 1986
Serbia		12 March 2001 ^b
Seychelles		5 May 1992 ^a
Sierra Leone	18 March 1985	25 April 2001
Slovakia		28 May 1993 ^b
Slovenia		16 July 1993 ^a
Somalia		24 January 1990 ^a
South Africa	29 January 1993	10 December 1998
Spain	4 February 1985	21 October 1987
Sri Lanka		3 January 1994 ^a
Sudan	4 June 1986	
Swaziland		26 March 2004 ^a
Sweden	4 February 1985	8 January 1986
Switzerland	4 February 1985	2 December 1986
Syrian Arab Republic		19 August 2004 ^a
Tajikistan		11 January 1995 ^a
Thailand		2 October 2007 ^a
The former Yugoslav Republic of Macedonia		12 December 1994 ^b
Timor-Leste		16 April 2003 ^a
Togo	25 March 1987	18 November 1987
Tunisia	26 August 1987	23 September 1988
Turkey	25 January 1988	2 August 1988
Turkmenistan		25 June 1999 ^a
Uganda		3 November 1986 ^a

<i>Participant</i>	<i>Signature</i>	<i>Ratification, accession,^a succession^b</i>
Ukraine	27 February 1986	24 February 1987
United Kingdom of Great Britain and Northern Ireland	15 March 1985	8 December 1988
United States of America	18 April 1988	21 October 1994
Uruguay	4 February 1985	24 October 1986
Uzbekistan		28 September 1995 ^a
Vanuatu		12 Jul 2011 ^a
Venezuela (Bolivarian Republic of)	15 February 1985	29 July 1991
Yemen		5 November 1991 ^a
Zambia		7 October 1998 ^a

Notes:^a Accession (75 States).^b Succession (7 States).

Annex II

States parties that have declared, at the time of ratification or accession, that they do not recognize the competence of the Committee provided for by article 20 of the Convention, as at 1 June 2012

Afghanistan

China

Equatorial Guinea

Israel

Kuwait

Mauritania

Pakistan

Saudi Arabia

Syrian Arab Republic

Annex III

States parties that have made the declarations provided for in articles 21 and 22 of the Convention, as at 1 June 2012^{a, b}

<i>State party</i>	<i>Date of entry into force</i>
Algeria	12 October 1989
Andorra	22 November 2006
Argentina	26 June 1987
Australia	29 January 1993
Austria	28 August 1987
Belgium	25 July 1999
Bolivia (Plurinational State of)	14 February 2006
Bulgaria	12 June 1993
Cameroon	11 November 2000
Canada	13 November 1989
Chile	15 March 2004
Costa Rica	27 February 2002
Croatia	8 October 1991 ^c
Cyprus	8 April 1993
Czech Republic	3 September 1996 ^c
Denmark	26 June 1987
Ecuador	29 April 1988
Finland	29 September 1989
France	26 June 1987
Georgia	30 June 2005
Germany	19 October 2001
Ghana	7 October 2000
Greece	5 November 1988
Hungary	13 September 1989
Iceland	22 November 1996
Ireland	11 May 2002
Italy	10 October 1989

<i>State party</i>	<i>Date of entry into force</i>
Kazakhstan	21 February 2008
Liechtenstein	2 December 1990
Luxembourg	29 October 1987
Malta	13 October 1990
Monaco	6 January 1992
Montenegro	23 October 2006 ^c
Netherlands	20 January 1989
New Zealand	9 January 1990
Norway	26 June 1987
Paraguay	29 May 2002
Peru	28 October 2002
Poland	12 May 1993
Portugal	11 March 1989
Republic of Korea	9 November 2007
Republic of Moldova	2 September 2011
Russian Federation	1 October 1991
Senegal	16 October 1996
Serbia	12 March 2001 ^c
Slovakia	17 March 1995 ^c
Slovenia	15 August 1993
South Africa	10 December 1998
Spain	20 November 1987
Sweden	26 June 1987
Switzerland	26 June 1987
Togo	18 December 1987
Tunisia	23 October 1988
Turkey	1 September 1988
Ukraine	12 September 2003
Uruguay	26 June 1987
Venezuela (Bolivarian Republic of)	26 April 1994

States parties that have only made the declaration provided for in article 21 of the Convention, as at 1 June 2012^a

<i>State party</i>	<i>Date of entry into force</i>
Japan	29 June 1999
Uganda	19 December 2001
United Kingdom of Great Britain and Northern Ireland	8 December 1988
United States of America	21 October 1994

States parties that have only made the declaration provided for in article 22 of the Convention, as at 1 June 2012^b

<i>State party</i>	<i>Date of entry into force</i>
Azerbaijan	4 February 2002
Bosnia and Herzegovina	4 June 2003
Brazil	26 June 2006
Burundi	10 June 2003
Guatemala	25 September 2003
Mexico	15 March 2002
Morocco	19 October 2006
Seychelles	6 August 2001

Notes:

^a A total of 61 States parties have made the declaration under article 21.

^b A total of 65 States parties have made the declaration under article 22.

^c States parties that have made the declaration under articles 21 and 22 by succession.

Annex IV

Membership of the Committee against Torture in 2012

<i>Name of member</i>	<i>Country of nationality</i>	<i>Term expires on 31 December</i>
Ms. Essadia Belmir (Vice-Chairperson)	Morocco	2013
Mr. Alessio Bruni	Italy	2013
Mr. Satyabhooshun Gupt Domah	Mauritius	2015
Ms. Felice Gaer (Vice-Chairperson)	United States of America	2015
Mr. Abdoulaye Gaye	Senegal	2015
Mr. Claudio Grossman (Chairperson)	Chile	2015
Mr. Fernando Mariño Menendez	Spain	2013
Ms. Nora Sveaass (Rapporteur)	Norway	2013
Mr. George Tugushi	Georgia	2015
Mr. Xuexian Wang (Vice-Chairperson)	China	2013

Annex V

**States parties that have signed, ratified or acceded to the
Optional Protocol to the Convention against Torture and
Other Cruel, Inhuman or Degrading Treatment or
Punishment, as at 1 June 2012**

<i>Participant</i>	<i>Signature, succession to signature^b</i>	<i>Ratification, accession,^a succession^b</i>
Albania		1 October 2003 ^a
Argentina	30 April 2003	15 November 2004
Armenia		14 September 2006 ^a
Australia	19 May 2009	
Austria	25 September 2003	
Azerbaijan	15 September 2005	28 January 2009
Belgium	24 October 2005	
Benin	24 February 2005	20 September 2006
Bolivia (Plurinational State of)	22 May 2006	23 May 2006
Bosnia and Herzegovina	7 December 2007	24 October 2008
Brazil	13 October 2003	12 January 2007
Bulgaria	22 September 2010	1 June 2011
Burkina Faso	21 September 2005	7 July 2010
Cambodia	14 September 2005	30 March 2007
Cameroon	15 December 2009	
Cape Verde	26 September 2011	
Chile	6 June 2005	12 December 2008
Congo	29 September 2008	
Costa Rica	4 February 2003	1 December 2005
Croatia	23 September 2003	25 April 2005
Cyprus	26 July 2004	29 April 2009
Czech Republic	13 September 2004	10 July 2006
Democratic Republic of the Congo		23 September 2010 ^a
Denmark	26 June 2003	25 June 2004
Ecuador	24 May 2007	20 July 2010

<i>Participant</i>	<i>Signature, succession to signature^b</i>	<i>Ratification, accession,^a succession^b</i>
Estonia	21 September 2004	18 December 2006
Finland	23 September 2003	
France	16 September 2005	11 November 2008
Gabon	15 December 2004	22 September 2010
Georgia		9 August 2005 ^a
Germany	20 September 2006	4 December 2008
Ghana	6 November 2006	
Greece	3 March 2011	
Guatemala	25 September 2003	9 June 2008
Guinea	16 September 2005	
Honduras	8 December 2004	23 May 2006
Hungary		12 January 2012 ^a
Iceland	24 September 2003	
Ireland	2 October 2007	
Italy	20 August 2003	
Kazakhstan	25 September 2007	22 October 2008
Kyrgyzstan		29 December 2008 ^a
Lebanon		22 December 2008 ^a
Liberia		22 September 2004 ^a
Liechtenstein	24 June 2005	3 November 2006
Luxembourg	13 January 2005	19 May 2010
Madagascar	24 September 2003	
Maldives	14 September 2005	15 February 2006
Mali	19 January 2004	12 May 2005
Malta	24 September 2003	24 September 2003
Mauritania	27 September 2011	
Mauritius		21 June 2005 ^a
Mexico	23 September 2003	11 April 2005
Montenegro	23 October 2006 ^b	6 March 2009
Netherlands	3 June 2005	28 September 2010
New Zealand	23 September 2003	14 March 2007

<i>Participant</i>	<i>Signature, succession to signature^b</i>	<i>Ratification, accession,^a succession^b</i>
Nicaragua	14 March 2007	25 February 2009
Nigeria		27 July 2009 ^a
Norway	24 September 2003	
Panama	22 September 2010	2 June 2011
Paraguay	22 September 2004	2 December 2005
Peru		14 September 2006 ^a
Philippines		17 April 2012 ^a
Poland	5 April 2004	14 September 2005
Portugal	15 February 2006	
Republic of Moldova	16 September 2005	24 July 2006
Romania	24 September 2003	2 July 2009
Senegal	4 February 2003	18 October 2006
Serbia	25 September 2003	26 September 2006
Sierra Leone	26 September 2003	
Slovenia		23 January 2007 ^a
South Africa	20 September 2006	
Spain	13 April 2005	4 April 2006
Sweden	26 June 2003	14 September 2005
Switzerland	25 June 2004	24 September 2009
The former Yugoslav Republic of Macedonia	1 September 2006	13 February 2009
Timor-Leste	16 September 2005	
Togo	15 September 2005	20 July 2010
Tunisia		29 June 2011 ^a
Turkey	14 September 2005	27 September 2011
Ukraine	23 September 2005	19 September 2006
United Kingdom of Great Britain and Northern Ireland	26 June 2003	10 December 2003
Uruguay	12 January 2004	8 December 2005
Venezuela	1 July 2011	
Zambia	27 September 2010	

Annex VI

Membership of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2012

<i>Name of member</i>	<i>Country of nationality</i>	<i>Term expires on 31 December</i>
Ms. Mari Amos	Estonia	2014
Mr. Mario Luis Coriolano (Vice-Chairperson)	Argentina	2012
Mr. Arman Danielyan	Armenia	2014
Ms. Marija Definis Gojanović	Croatia	2012
Mr. Malcolm Evans (Chairperson)	United Kingdom of Great Britain and Northern Ireland	2012
Mr. Emilio Ginés Santidrián	Spain	2014
Ms. Lowell Patria Goddard	New Zealand	2012
Mr. Zdeněk Hájek (Vice-Chairperson)	Czech Republic	2012
Ms. Suzanne Jabbour (Vice-Chairperson)	Lebanon	2012
Mr. Goran Klemenčič	Slovenia	2012
Mr. Paul Lam Shang Leen	Mauritius	2012
Mr. Zbigniew Lasocik	Poland	2012
Mr. Petros Michaelides	Cyprus	2014
Ms. Aisha Shujune Muhammad (Vice-Chairperson)	Maldives	2014
Mr. Olivier Obrecht	France	2014
Mr. Hans Draminsky Petersen	Denmark	2014
Ms. Maria Margarida E. Pressburger	Brazil	2012
Mr. Christian Pross	Germany	2012
Mr. Victor Manuel Rodríguez-Rescia	Costa Rica	2012
Ms. Judith Salgado Álvarez	Ecuador	2014
Mr. Miguel Sarre Iguíniz	Mexico	2014
Ms. Aneta Stanchevska	The former Yugoslav Republic of Macedonia	2014

<i>Name of member</i>	<i>Country of nationality</i>	<i>Term expires on 31 December</i>
Mr. Wilder Tayler Souto	Uruguay	2014
Mr. Felipe Villavicencio Terreros	Peru	2014
Mr. Fortuné Gaétan Zongo	Burkina Faso	2014

Annex VII

Fifth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2011)*

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* The fifth annual report of the Subcommittee has been issued separately under symbol CAT/C/48/3.

I. Introduction

1. This report is the first to cover the work of the expanded Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹ (the Subcommittee) of 25 members – making the Subcommittee the largest of the United Nations human rights treaty bodies. It has been a stimulating year for the Subcommittee, with reflection on past achievements and the building blocks for future change put in place, whilst it has continued to exercise both its visiting and national preventive mechanism (NPM) mandate. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Optional Protocol) continues to attract new States parties, and interest in its work continues to grow. This report follows the model established in the Subcommittee's fourth annual report and focuses on highlighting recent developments, introducing some matters of concern to the Subcommittee, setting out its position regarding a number of substantive issues and, finally, casting a forward look to the year ahead.

2. The Subcommittee wishes to emphasize, as reflected throughout the report, that the opportunities presented by its expansion can only be achieved if those with a stake in the Optional Protocol system — the Subcommittee itself, the NPMs, States parties and the United Nations as a whole — fully embrace the spirit of prevention in a focused yet flexible fashion, to benefit those stakeholders with the greatest interest in the Optional Protocol system, namely persons deprived of their liberty who are at risk of torture and ill-treatment.

II. The year in review

A. Participation in the Optional Protocol system

3. As of 31 December 2011, 61 States are party to the Optional Protocol.² Since January 2011, four States have ratified or acceded to the Optional Protocol: Bulgaria (1 June 2011), Panama (2 June 2011), Tunisia (29 June 2011) and Turkey (27 September 2011). In addition, four States have signed the Optional Protocol during the reporting period: Greece (3 March 2011), Venezuela (1 July 2011), Cape Verde (26 September 2011) and Mauritania (27 September 2011).

4. As a result of the increase in the number of States parties, the pattern of regional participation has changed somewhat, the number of parties in each region is now as follows:

States parties by region

Africa	11
Asia	6
Eastern Europe	17

¹ Established following the entry into force in June 2006 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. For the text of the Optional Protocol, see www2.ohchr.org/english/law/cat-one.htm. In accordance with the Optional Protocol (art. 16, para. 3), the Subcommittee presents its public annual reports to the Committee against Torture.

² For a list of the States parties to the Optional Protocol, see the Subcommittee's website.

Group of Latin American and Caribbean States (GRULAC)	14
Group of Western European and Other States (WEOG)	13
5. The regional breakdown of signatory States which are yet to ratify the Optional Protocol is now as follows:	
States that have signed but not ratified the Optional Protocol, by region (total 24)	
Africa	8
Asia	2
Eastern Europe	1
Group of Latin American and Caribbean States (GRULAC)	2
Group of Western European and Other States (WEOG)	11

B. Organizational and membership issues

6. During the reporting period (1 January to 31 December 2011), the Subcommittee held three one-week sessions at the United Nations Office in Geneva, from 21 to 25 February, from 20 to 24 June and from 14 to 18 November 2011.

7. The Subcommittee membership significantly changed in 2011.³ On 28 October 2010, at the third Meeting of States Parties to the Optional Protocol, five Subcommittee members were elected to fill the vacancies arising in respect of members of the Subcommittee whose terms of office would expire on 31 December 2010. Furthermore, in conformity with article 5, paragraph 1, of the Optional Protocol, 15 members were elected in order to expand the membership of the Subcommittee to 25 members, following the fiftieth ratification in September 2009. In order to ensure an orderly handover of membership and in accordance with established practice, the terms of office of 7 of the additional 15 members were reduced to two years by ballot. The terms of office of all the newly elected members started on 1 January 2011 and, in conformity with the Subcommittee rules of procedure, they made a solemn declaration at the opening of the February 2011 session before assuming their duties.

8. In view of its expansion, the Subcommittee rules of procedure were revised so as to provide for the election of an expanded Bureau, comprising the Chairperson and four Vice-chairpersons, the members of which serve for a period of two years. The Bureau, which was elected in February 2011 and continues in office until February 2013, comprises Malcolm Evans as Chairperson and Mario Coriolano, Zdenek Hajek, Suzanne Jabbour and Aisha Muhammad as Vice-Chairpersons. Ms. Muhammad is also the Rapporteur of the Subcommittee.

9. In order to facilitate the most effective, efficient and inclusive means of working as an enlarged Committee, it was agreed that each Bureau member should have a distinct responsibility for which he/she takes primary responsibility, under the overall leadership of the Chair and in cooperation with each other. Based on the Optional Protocol mandate as set out in article 11, the four Vice-Chairpersons have the following primary responsibilities: Mr. Coriolano: National Preventive Mechanisms, Mr. Hajek: Visits, Ms. Jabbour: External Relations, Ms. Muhammad: Jurisprudence.

³ For a list of members and the duration of their mandate, see the Subcommittee's website (www2.ohchr.org/english/bodies/cat/opcat/index.htm).

10. The Subcommittee also revised its allocation of internal responsibilities, largely to reflect, support and encourage its growing engagement with national and regional partners. A new system of regional focal points was also put in place. The role of these focal points is to undertake liaison and facilitate coordination of the Subcommittee's engagement within the regions they serve. Focal points for Africa, Asia-Pacific, Europe and Latin America were appointed at the fourteenth session and are as follows: Africa: Fortuné Zongo, Asia-Pacific: Lowell Goddard, Europe: Mari Amos, Latin America: Víctor Rodríguez-Rescia. Likewise, a new system of regional task forces on national preventive mechanisms has been established. Under the leadership of the Subcommittee Chairperson and Subcommittee Vice-Chairperson on National Preventive Mechanisms, and under the responsibility of the above focal points, each regional task force is responsible for work on NPM-related matters. Furthermore, the Subcommittee decided to establish working groups on dialogue arising from visits under the leadership of the Subcommittee vice-Chair for visits as well as a working group on security matters and a working group on medical issues. Further information on these developments is provided in chapter IV, section A, below.

C. Visits conducted during the reporting period

11. The Subcommittee carried out three visits in 2011. From 16 to 25 May 2011, it visited Ukraine, the second country visited by the Subcommittee in Europe (following the visit to Sweden in March 2008).

12. From 19 to 30 September 2011, the Subcommittee visited Brazil, the fifth country visited by the Subcommittee in Latin America (following the visits to Mexico in August–September 2008, to Paraguay in March 2009, to Honduras in September 2009 and to Bolivia in August–September 2010).

13. From 5 to 14 December 2011, the Subcommittee visited Mali, the fourth country visited by the Subcommittee in Africa (following the visits to Mauritius in October 2007, to Benin in May 2008 and to Liberia in December 2010).

14. Further summary information on all these visits, including lists of places visited, may be found in the press releases issued following each visit and which are available on the Subcommittee's website.

D. Dialogue arising from visits, including publication of the Subcommittee's reports by States parties

15. Six Subcommittee visit reports have been made public following a request from the State party (Benin, Honduras, Maldives, Mexico, Paraguay and Sweden), as provided for under article 16, paragraph 2, of the Optional Protocol, including one in the reporting period: Benin (in January 2011). Four replies (from Benin, Mexico, Paraguay and Sweden) have also been made public at the request of the State party, including Benin and Mexico during the reporting period (in January and October 2011).

16. In conformity with past practice, the Subcommittee systematized its practice regarding the formal elements of its dialogue arising from its visits. States parties are requested to provide a reply within a six-month deadline giving a full account of action taken to implement the recommendations contained in the visit report. At the time of the submission of the present report, 7 out of 13 States parties visited by the Subcommittee had provided replies: Mauritius in December 2008; Sweden in January 2009; Paraguay in March 2010, Benin in January 2011, Lebanon (partial reply) in January 2011, Mexico in October 2011 and Bolivia in November 2011. The replies from Bolivia, Lebanon and Mauritius remain confidential, while those from Benin, Mexico, Paraguay and Sweden

have been made public at the request of those States parties. The Subcommittee has provided its own responses and/or recommendations to the submissions of Benin, Lebanon, Mauritius and Sweden, while a follow-up visit was undertaken to Paraguay, with a follow-up visit report transmitted to the State party. Both the follow-up visit report and the follow-up reply have been made public following requests from Paraguay in May and June 2011. Reminders were also sent to States parties that have not yet provided replies to the Subcommittee visit reports. It should be noted that the six-month deadline for submission of replies had not expired for Liberia, Ukraine and Brazil during the reporting period. The substantive aspects of the dialogue process arising from visits are governed by the rule of confidentiality and are only made public with the consent of the State party in question.

E. Developments concerning the establishment of national preventive mechanisms

17. Out of 61 States parties, 28 have officially notified the Subcommittee of the designation of their NPMs, information concerning which is listed on the Subcommittee's website.

18. Two official notifications of designation were transmitted to the Subcommittee in 2011: the Former Yugoslav Republic of Macedonia and Serbia. It should be noted that, in the cases of Chile, Mali, Mauritius, Senegal and Uruguay, the designated bodies have not yet commenced their functioning as NPMs.

19. Thirty-three States parties have therefore not yet notified the Subcommittee of the designation of their NPMs. The one-year deadline for the establishment of an NPM provided for under article 17 of the Optional Protocol has not yet expired for five States parties (Bulgaria, Pakistan, Panama, Tunisia and Turkey). Furthermore, four States parties (Bosnia and Herzegovina, Kazakhstan, Montenegro and Romania) have made declarations under article 24 of the Optional Protocol permitting them to delay designation for up to an additional two years.

20. Twenty-five States parties have therefore not complied with their obligation under article 17, which is a matter of major concern to the Subcommittee. It should, however, be noted that the Subcommittee understands that four States parties (Armenia, Croatia, Nigeria and Ukraine) have designated NPMs, but that it has not yet been officially notified thereof.

21. The Subcommittee has continued its dialogue with all States parties which have not yet designated their NPMs, encouraging them to inform the Subcommittee of their progress. Such States parties were requested to provide detailed information concerning their proposed NPMs (such as legal mandate, composition, size, expertise, financial and human resources at their disposal, and frequency of visits, etc.).

22. The Subcommittee has also established and maintained contact with NPMs themselves, in fulfilment of its mandate under article 11 (b) of the Optional Protocol. At its thirteenth session, the Subcommittee held a meeting with the Estonian NPM in order to exchange information and experiences and discuss areas for future cooperation. At its fourteenth session, the Subcommittee held a similar meeting with the Georgian NPM. Finally, at its fifteenth session, the Subcommittee held a meeting with the Honduras (meeting supported by the Association for the Prevention of Torture (APT)) and Costa Rican NPMs. During this session, it also held a meeting with the Senegalese authorities in order to discuss measures taken to enable the designated NPM to become operational. The Subcommittee is also pleased that 18 NPMs have transmitted their annual reports during 2011, which have been posted on its website.

23. During the course of the reporting period, Subcommittee members accepted invitations to be involved in a number of meetings at the national, regional and international levels, concerning the designation, establishment and development of NPMs in particular or the Optional Protocol in general (including NPMs). Those activities were organized with the support of civil society organizations (in particular APT, the International Federation of ACAT (Action by Christians for the Abolition of Torture) (FIACAT), Penal Reform International (PRI) and the Optional Protocol Contact Group), NPMs, regional bodies such as the African Commission on Human and Peoples' Rights, the Committee for the Prevention of Torture in Africa (CPTA), the Inter-American Commission on Human Rights (IACHR), the Council of Europe, the European Commission and the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (ODIHR-OSCE), as well as international organizations such as the Office of the United Nations High Commissioner for Human Rights (OHCHR). These events included:

- (a) January 2011: High-level round-table on detention conditions in the European Union, held by the European Commission in Brussels;
- (b) March 2011: Workshop on the Optional Protocol held in Amman, Jordan by the OHCHR-Middle East Regional Office;
- (c) March 2011: International Conference on Enhancing Visits to Places of Detention: Promoting Collaboration held in Washington by the American University Washington College of Law and APT;
- (d) April 2011: Seminar on the Implementation of the Optional Protocol and the NPM in Burkina Faso held by APT and FIACAT;
- (e) May 2011: A series of consultations with national authorities and civil society representatives held in Brazil by APT;
- (f) June 2011: Regional Ombudsman Conference on the Role of the Ombudspersons in Combating Discrimination and Preventing Torture held by the Ombudsman of the former Yugoslav Republic of Macedonia and ODIHR-OSCE in the former Yugoslav Republic of Macedonia;
- (g) July 2011: National Dialogue on the implementation of the Optional Protocol to the Convention against Torture, held in the Maldives by APT and the Subcommittee;
- (h) July 2011: Seminar on the effective functioning of the Senegalese NPM in Dakar held by CPTA;
- (i) September 2011: Regional high-level conference on the role of National Human Rights Institutions (NHRIs) in the prevention of torture in Africa, held by APT and the National Council for Human Rights of Morocco in Rabat;
- (j) September 2011: Conference on OPCAT (Optional Protocol to the Convention against Torture) and Ombudsman, held by the International Ombudsman Institute in Poland;
- (k) September 2011: OSCE/ODIHR side-event meeting on the establishment of NPMs in Kazakhstan and Kyrgyzstan, held by PRI in Poland;
- (l) October 2011: Conference on Prevention of Torture, Implementation of NPMs in Argentina held by APT;
- (m) November 2011: Global Forum on the OPCAT held by APT in Geneva;
- (n) November 2011: Seminar on identifying national implementation mechanisms for the prevention of torture and other ill-treatment held in Addis Ababa by the

Universities of Bristol and Pretoria and the African Commission on Human and Peoples' Rights;

(o) November 2011: Seminar on the establishment of a Cambodian NPM held in Phnom Penh by OHCHR;

(p) November 2011: Regional consultations in the Americas, Cooperation between United Nations and Regional Human Rights Mechanisms, Prevention of Torture, held in Washington by OHCHR and IACHR;

(q) December 2011: Regional consultation for Europe on enhancing cooperation between United Nations and regional human rights mechanisms on prevention of torture, especially persons deprived of their liberty, held in Geneva by OHCHR.

24. In the framework of the European NPM Project of the Council of Europe/European Union, with APT as implementing partner, the Subcommittee has participated in four thematic workshops: (a) on security and dignity in settings of deprivation of liberty, in France in March 2011; (b) on how to collect and check and double-check information in relation to (the risks of) ill-treatment in places of deprivation of liberty, in Estonia in June 2011, (c) the protection of persons belonging to a particularly vulnerable group in places of deprivation of liberty, in Azerbaijan in October 2011 and (d) on medical issues, in Poland in December 2011; and two on-site visits and exchange of experiences: (a) with the Albanian NPM in June–July 2011; and (b) the Armenian NPM in October 2011. The Subcommittee also participated in consultations on the Ukrainian NPM in Kiev in October 2011 and in the 3rd Annual Meeting of the NPM Project Heads and Contact Persons in Slovenia in December 2011.

25. The Subcommittee would like to take this opportunity to thank the organizers of these events for the invitations to participate which were extended to them.

F. Contributions to the Special Fund under article 26 of the Optional Protocol

26. As at 31 December 2011, the following contributions to the Special Fund established by the Optional Protocol had been received: US\$29,704.98 from the Czech Republic; US\$5,000 from the Maldives, US\$82,266.30 from Spain, and US\$855,263.16 from the United Kingdom of Great Britain and Northern Ireland. The table below shows the contributions currently available.

Contributions received from 2008 to 2011

<i>Donors</i>	<i>Amount (in United States dollars)</i>	<i>Date of receipt</i>
Maldives	5 000.00	27 May 2008
Czech Republic	10 000.00	16 November 2009
Czech Republic	10 271.52	27 December 2010
Czech Republic	9 433.46	12 October 2011
Spain	25 906.74	16 December 2008
Spain	29 585.80	10 November 2009
Spain	26 773.76	29 December 2010
United Kingdom of Great Britain and Northern Ireland	855 263.16	20 June 2011

27. The Subcommittee wishes to express its gratitude to these States for their generous contributions.

28. In accordance with article 26, paragraph 1, of the Optional Protocol, the purpose of the Special Fund is to help finance the implementation of Subcommittee recommendations as well as education programmes of the national preventive mechanisms. The Subcommittee is convinced that the Special Fund has the potential to be a valuable tool in furthering prevention and it is therefore pleased that a scheme to operationalize the fund has been initiated within the reporting period. The Special Fund is administered by OHCHR (its Grants Committee acting as an advisory body to the High Commissioner for Human Rights) in conformity with the United Nations Financial Rules and Regulations and the relevant policies and procedures promulgated by the Secretary-General. This interim scheme will be revisited in 2012. The Subcommittee is pleased to report that the Administration of the Special Fund will consult the Subcommittee on the following basis: (1) the Subcommittee will identify, on an annual basis, thematic priorities for the annual call for applications, possibly by country, and with the objective of funding the implementation of recommendations contained in Subcommittee visit reports, (2) the Subcommittee Bureau will be kept informed of the applications received and the grants awarded; members of the Subcommittee may be consulted on issues arising from applications, and if any additional questions arise and, when necessary, a meeting with the Chairperson of the Subcommittee may be held. The Subcommittee identified the following thematic priorities for the current round: notification of the fundamental rights of detainees in a language which they can understand; improving recreational and/or vocational activities for juveniles in detention; basic training programmes for detention personnel (with the inclusion of a focus on health care); and any other specific recommendation in the visit reports that details a pressing and compelling need. Full details of the scheme have been publicized by the Secretary-General in his report to the General Assembly and the Human Rights Council on the operations of the Special Fund (A/65/381). The Subcommittee very much hopes that the implementation of the above scheme will encourage further donations to the Special Fund.

III. Engagement with other bodies in the field of torture prevention

A. International cooperation

1. Cooperation with other United Nations bodies

29. As provided for under the Optional Protocol, the Subcommittee Chairperson presented the fourth Subcommittee annual report to the Committee against Torture during a plenary meeting held on 10 May 2011. In addition, the Subcommittee and the Committee took advantage of their simultaneous sessions in November 2011 to meet to discuss a range of issues of mutual concern such as the concept of torture and other cruel, inhuman or degrading treatment or punishment; the Subcommittee strategic focus for 2012; the methodology of information sharing between both treaty bodies; and the provisions of the Optional Protocol concerning both bodies in relation to applicable methodology.

30. In conformity with General Assembly resolution 65/205 of 28 March 2011, the Subcommittee Chairperson presented the fourth Subcommittee annual report (CAT/C/46/2) to the General Assembly at its sixty-sixth session in New York in October 2011. This event also provided an opportunity for an exchange of information with the Chairperson of the Committee against Torture and the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment, who also addressed the General Assembly at that session.

31. The Subcommittee has continued to be actively involved in the inter-committee meetings (Inter-Committee working group on follow-up on 12 to 14 January 2011 and 12th Inter-Committee Meeting from 27 to 29 June 2011 in Geneva) and meetings of Chairpersons of human rights treaty bodies (from 30 June to 1 July 2011 in Geneva). Within that framework, a joint statement of Chairpersons of the UN Treaty Bodies on the 25th anniversary of the Declaration on the Right to Development was issued. The Subcommittee also contributed to the joint meeting with special-procedure mandate holders. In response to the High Commissioner's call to strengthen the treaty body system and as a follow-up to previous expert meetings dedicated to the work of treaty bodies, the Subcommittee participated at an informal technical consultation for States parties on treaty body strengthening held in Sion, Switzerland, in May 2011 and a further meeting in Dublin, Ireland in November 2011. It also attended several OHCHR activities, such as the international workshop on "the role of prevention in the promotion and protection of human rights" held in May 2011 in Geneva.

32. The Subcommittee continued its cooperation with the Special Rapporteur on Torture, for instance via its participation at a regional consultation on follow-up to country visits of the mandate of the Special Rapporteur held in Santiago de Chile in June 2011.

33. The Subcommittee joined the statement on the occasion of the International Day in Support of Victims of Torture on 26 June 2011 together with the Committee against Torture, the Special Rapporteur on Torture and the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture.

34. The Subcommittee continued its cooperation with the United Nations High Commissioner for Refugees, the World Health Organization and the United Nations Office on Drugs and Crime.

2. Cooperation with other relevant international organizations

35. In the framework of their ongoing cooperation, the Subcommittee and the International Committee of the Red Cross (ICRC) held a plenary meeting at the February 2011 session and an informal working meeting on the ICRC policy paper on torture and other cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty, in Geneva, in June 2011.

B. Regional cooperation

36. Through its focal points for the liaison and coordination with regional bodies, the Subcommittee continued its cooperation with other relevant partners in the field of torture prevention, such the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, the Council of Europe, the European Commission and ODIHR-OSCE. On 6 July 2011, members of the Bureau of the Subcommittee met the Council of Europe Committee for the Prevention of Torture (CPT) and discussed means of strengthening the cooperation between the two bodies.

C. Civil society

37. The Subcommittee has continued to benefit from the essential support provided by civil society actors, both the Optional Protocol Contact Group⁴ (present during the Subcommittee's February session) and academic institutions (in particular the Universities

⁴ For a list of members, see the Subcommittee's website.

of Bristol and Pretoria, and Arizona State University, the latter through its Centre for Law and Global Affairs at the Sandra Day O'Connor College of Law), both for the promotion of the Optional Protocol and its ratification, and for Subcommittee activities.

IV. Issues of note arising from the work of the Subcommittee during the period under review

A. The development of the Subcommittee's working practices

38. In its previous annual reports the Subcommittee has noted that its limited membership and resources prevented it from developing all aspects of its mandate to the extent it would have wished. It is therefore pleased that its expanded membership now permits it to undertake a broader range of activities in greater depth than was previously possible.

39. As set out in chapter II, section B, in an effort to make it more efficient and effective, the Subcommittee Bureau has focused its internal operations on all aspects of its mandate outlined in Article 11 of the Optional Protocol. Led by the Subcommittee Chairperson, and reporting to the Plenary, the four Vice-Chairpersons now exercise primary responsibility for distinct areas of activity: Mr. Coriolano: National Preventive Mechanisms, Mr. Hajek: Visits, Ms. Jabbour: External Relations, Ms. Muhammad: Jurisprudence. It is hoped that this will aid external communication by providing clear primary interlocutors, whilst also streamlining internal decision-making and accountability.

40. In addition to the change in the modus operandi of the Bureau, the Subcommittee has now established regional task forces to enable more meaningful and structured engagement with NPMs. For the purposes of its internal work, the Subcommittee has divided States parties into four broad regions; Africa, Latin America, Asia-Pacific and Europe. Each of these task forces is headed by a Regional Focal Point, and is assisted by an NPM Team, which consists of members who are assigned responsibilities for specific countries. Each NPM Team is composed of a combination of Subcommittee members from within the region, as well as members from other regions. In allocating members to these NPM Teams consideration was also given to gender, experience, expertise, and where possible, a common working language. Further, the number of members in each NPM Team reflects the number of States within the given region, and the realities of Subcommittee membership and availability. The Subcommittee is hopeful that this change will make its work with NPMs more constructive and active. The teams will meet individually at each session of the Subcommittee, giving detailed consideration to the situation regarding NPMs within their region and advising the Plenary accordingly.

41. It was generally expected that an enlarged Subcommittee membership would result in its conducting more visits, this being the rationale for the expansion of membership provided for in the Optional Protocol. However, since financial constraints meant that this was not possible during the reporting period, and aware of the need to ensure that all members experienced the reality of the Subcommittee's visiting mandate as soon as possible, it was decided to increase the number of members participating in each visit in 2011. Whilst this has been invaluable as a means of inducting members of the enlarged Subcommittee, it has presented real challenges organizationally and logistically for the Subcommittee, its secretariat, OHCHR and States parties alike. Since the resources available are unlikely to permit an increased number of regular visits as currently conceived, the Subcommittee is looking to identify innovative ways of conducting visits. Hence, the Subcommittee has decided that it will seek to undertake visits, combining these where possible, which focus upon the various aspects of its preventive mandate, so that

regular visits, follow-up visits, establishing initial contact with new States parties and engaging with NPMs can all be accommodated. The Subcommittee has also adopted a methodology regarding the dialogue arising from its visits, and has established working groups which will be responsible for leading and co-ordinating the Subcommittee's activities in relation to countries already visited by the Subcommittee. This mechanism will also help Subcommittee members keep abreast of the situation in different countries. As part of this methodology, the Subcommittee has also decided to consider issuing invitations to representatives of States parties to meet with the Subcommittee where there is a reply outstanding.

42. In an effort to develop jurisprudence and provide guidance, the Subcommittee has formulated a working method whereby the Subcommittee, based on visits, reports and correspondence, identifies issues requiring clarification. To this effect, during 2011, the focus has been placed on the importance of human rights education in the prevention of torture, and on the correlation between corruption and the prevention of torture. Other issues that the Subcommittee wishes to highlight in this regard are mental health and detention, prevention of torture in prisons through the application of judicial procedural control and due process standards, and the correlation between legal aid, a system of public defence and the prevention of torture. Further, as OHCHR launched a Programme of Commemoration for the 25th anniversary of the United Nations Declaration on the Right to Development in 2011, the Subcommittee saw it appropriate to highlight the linkages between the right to development and the prevention of torture.

43. The expansion of membership has brought a new dynamic to the Subcommittee, and has paved the way for the Subcommittee to work in ways that were not practically possible before. While the Subcommittee is hopeful that it will continue to move forward and grow stronger in fulfilling its mandate, it wishes to note that time and logistical and budgetary constraints constitute the greatest challenge to formulating innovative ways through which all members can be utilized in the best possible manner to fulfil the mandate of the Subcommittee.

44. Current levels of resourcing means that States parties to the Optional Protocol, currently at 61, might only receive a full visit once in 20 years. This is of grave concern to the Subcommittee, as conducting visits to States parties is one of the most visible and effective ways through which it is able to perform its preventive mandate. These challenges also mean that the Subcommittee is unable to engage and work with NPMs, vital partners in the prevention of torture, in the most effective manner.

45. The Subcommittee would also like to highlight the fact that fiscal constraints mean that the secretariat of the Subcommittee, which has a direct impact on the quality of the work the Subcommittee is able to produce, is grossly understaffed at present. The major expansion in the size of the Subcommittee and in its workload has not been matched by a similar expansion in the secretariat, which has only increased marginally. This means that the secretarial support base for the Subcommittee is even more stretched than previously and is set to remain so, despite the creativity of the Subcommittee in formulating new ways to function more efficiently. The Subcommittee therefore encourages States parties to consider supporting the Secretariat by providing staff on secondment, as some States parties have done in the past.

B. The establishment of working groups

46. In 2011 the Subcommittee decided that a working group on security matters should be established under the leadership of the Vice-Chair for Visits, Mr. Hajek. This decision was made in order to address issues arising from field experience in relation to security arrangements, including the role of security officers, and was informed by the recognition

for the need to improve cooperation and coordination with United Nations security officers, to encourage restraint on the part of Subcommittee members and an increased awareness of the need for a location- and culture-specific approach to dress codes.

47. Similarly, taking into account the requirement to develop specialized standards for health care in places of detention, the Subcommittee decided that a working group on medical issues should be convened, initially comprising Subcommittee members with medical backgrounds and subsequently expanding to include members with other professional backgrounds. The Subcommittee also decided to task the Working Group with organizing a discussion within the Plenary on issues concerning visits to persons with mental health illnesses and disabilities during the course of 2012.

C. Issues arising from visits

48. During the year in review the Subcommittee has identified a number of issues in the course of its visits which it wishes to highlight, and upon which it is reflecting. To assist in these reflections the Subcommittee has produced a number of papers which are summarized below and which may be accessed in full through the web link provided. The Subcommittee welcomes input from those who might be able to assist it in its process of ongoing reflection on these subjects.

49. Recognizing that Subcommittee visits have tended to focus on traditional places of detention, with the expansion of the Subcommittee and subsequent range of expertise that is currently available within it, the Subcommittee has made an effort to increase its activities in relation to non-traditional places of detention during 2011, including immigration facilities and medical rehabilitation centres. In line with its mandate, the Subcommittee is hoping to continue this trend in 2012.

50. The enlargement of the Subcommittee, resulting in larger delegations during visits, meant that there were numerous logistical difficulties in planning and conducting visits. There was also concern that the delegations did not spend an adequate amount of time in some facilities, and while the Subcommittee will formulate ways through which the matter can be addressed, it should be appreciated that there are constraints (e.g. in relation to the use of interpreters and transportation) that require consideration, which makes it extremely difficult to balance out the issues. Nevertheless, larger delegations meant that the teams could split up and cover more places of detention than was possible in the past.

1. Mental health and detention

51. People with mental health problems and intellectual disabilities in many countries are at the lowest level of the social hierarchy. Discrimination, prejudice, deprivation of fundamental human rights and violation of their dignity are widespread. The United Nations Convention on the Rights of Persons with Disabilities, adopted in 2006, represents a paradigm shift in attitudes to persons with disabilities, who are no longer regarded as objects of pity requiring treatment, protection and charity, but as deserving of the full range of human rights on an equal basis with others. Monitoring mental health institutions will be a growing focus of the Subcommittee's activities in the future.

52. For this purpose, the Subcommittee has developed guidelines with a list of key issues to be explored, such as patients' living conditions, general health care for mental patients, the spectrum of psychiatric treatment, means of restraint for agitated and/or violent patients, legal and ethical safeguards in the context of involuntary placement, record keeping, medical confidentiality and informed consent, availability of qualified staff such as psychiatrists, psychiatric nurses and occupational therapists, training possibilities for staff, participation of patients in research, and sterilization and abortion without consent.

Methods of observation and interviewing patients and staff are suggested, followed by a detailed list of questions to be posed during the visit. Special attention should be directed at outdated treatment methods, such as the excessive use of electroconvulsive therapy (ECT), overdose of psychopharmacological drugs, seclusion and physical restraint, which sometimes (under the guise of treatment) are used as punishment or are administered due to lack of modern treatment facilities such as psychotherapy, social psychiatry services in the community and social rehabilitation programmes.

53. The key purpose of monitoring is to prevent discrimination, deprivation of human rights, neglect and ill-treatment. This includes monitoring a country's mental health policy, allocation of funding, i.e. whether there is a shift from the outdated ideology of segregation and keeping patients in large institutions to more community-based services. The focus should also be directed towards raising public awareness in society on the rights and needs of people with mental health problems in order to overcome stereotypes, fears and prejudice concerning mental disabilities.

2. Preventing torture in prisons through the application of judicial procedural control and due process standards

54. Torture and other ill-treatment in places of detention, specifically in prisons for adults and juveniles, is made more likely by an erroneous belief that due process ends at the moment a person is sentenced and does not include aspects relating to prison conditions and regime after this point. As the incidence of torture is closely related to the legal framework governing places of detention, in addition to responding to complaints and monitoring places of detention, it is critical that States have suitable and comprehensive judicial procedures in place for the oversight and control of prison management relating to both sentenced and remand inmates.

55. In the specific case of prisons, various cultural factors such as ideas that inmates are "outside society" or that they are "dangerous" people and the reactions of the media to public insecurity, contribute to the neglect and vulnerability of persons serving prison sentences or held in pre-trial detention.

56. From a legal perspective, the deficiencies in providing adequate protection for inmates is reflected in the failure to clearly set out the substantive rights that, as a general rule, inmates retain even during the period in which they are incarcerated. It must be made clear from the outset of detention that only some of the rights of detainees are suspended or restricted. In addition, the rights which the prison authorities must provide must be defined and guaranteed.

57. The absence of a legal framework — both organizational and procedural — facilitates and increases the probability of impunity, further human rights violations and the lack of guarantees necessary for the realization of the rights of inmates. These guarantees include the existence of procedural bodies as well as safeguards. It is often said that "the laws are good, but what is lacking is their implementation". However, the problem is not only a practical one but also related to shortcomings in the standards that should ensure the availability of procedural bodies and necessary remedies to realize the rights of detainees. In reality, detainees have "rights without guarantees".

58. The Subcommittee wishes to note that it intends to work on the issue of due process and judicial oversight procedures in places of detention other than those which come under the criminal justice system, e.g. internment for the mentally ill and others.

3. The right to development and the prevention of torture

59. The United Nations Declaration on the Right to Development, adopted by the General Assembly 25 years ago on 4 December 1986, provides that the right to development:⁵

[i]s an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

60. This year marks the 25th anniversary of the right to development. The right is recognized in a number of international instruments, including the United Nations Charter, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. It is necessarily wide in scope and includes the promotion and protection of fundamental rights and freedoms.

61. In its preamble, the Declaration is mindful of the Charter purpose and principles that “promot[e] and encourag[e] respect for human rights ... without distinction ...”.⁶ It is axiomatic that respect for human rights cannot be promoted or encouraged in a situation where torture or other ill-treatment of persons deprived of their liberty is practised or condoned.

62. The work of the Subcommittee in the prevention of torture forms part of an integrated and balanced interpretation of the right to development. It also plays a pivotal role in helping to raise awareness. It is well established that development is not confined “to purely economic aspirations or goals but articulates a broad, comprehensive understanding ... at national and international levels”.⁷ Democracy, development and human rights are therefore interdependent and mutually reinforcing. The Subcommittee actively engages with the multi-faceted nature of development and human rights in its preventive work with States parties and their NPMs under the Optional Protocol. In fulfilling its mandate, the Subcommittee is guided by the United Nations Charter and its principles, the norms of the United Nations concerning persons deprived of their liberty, and the principles laid out in the Optional Protocol. It not only works effectively with State authorities but also undertakes research on a range of significant detention issues.

63. The efforts of NPMs and the Subcommittee, through the established national and international system of regular visits by both to places of detention, are effectively contributing to the goals of prevention and development through capacity-building, training and education, as well as legislative, administrative, judicial and other measures. Together they support durable systems based on transparency, accountability and the rule of law.

V. Substantive issues

64. In this chapter the Subcommittee wishes to set out its current thinking on a number of issues of significance to its mandate.

⁵ United Nations Declaration on the Right to Development (A/Res/41/128), art. 1.

⁶ Ibid., preambular para. 1.

⁷ Joint Statement of Chairpersons of the UN Treaty Bodies, 1 July 2011.

A. The importance of human rights education in the prevention of torture

65. All States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Optional Protocol) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) have an obligation to prevent torture and ill-treatment whether committed by public officials or by individuals.

66. The Subcommittee on Prevention of Torture is of the view that the obligation to prevent torture should embrace “as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring”.⁸

67. It is important to emphasize that a preventive approach focuses on the root causes of human rights violations. Below we give a non-exhaustive listing of the root causes of torture and ill-treatment at different levels:

(a) At a macro level the causes include, for example, social tolerance and acceptance of violence as a means of conflict “resolution”; the social legitimization of policies that impose severe sanctions for any form of offence; the lack of political will to eliminate the practice of torture; the construction of hierarchical power relationships in which certain groups of people — for example, those accused of common law or political offences or terrorism, immigrants, women, persons with disabilities, members of ethnic, religious and sexual minorities, the economically disadvantaged, adolescents, children and the elderly — are belittled, devalued, ignored, demonized and dehumanized; and a lack of awareness and ownership of human rights among the population in general;

(b) At an intermediate level the causes include denial by the State of the practice of torture combined with impunity enjoyed by the perpetrators of torture and ill-treatment, who are in many cases actually rewarded by the political and/or economic powers; the failure to report acts of torture and ill-treatment, lack of protection for victims of torture and the absence of redress; a failure to align domestic legal frameworks with the international norms that prohibit torture and provide safeguards for persons deprived of their liberty, coupled, very often, with a failure to apply regulations in those cases where they exist; the inadequate human rights training provided to members of the judiciary, prison personnel, law enforcement officials, health-care professionals, social workers and teachers, etc.; and the links between torture and corruption;

(c) At a micro level, i.e. in individual places of deprivation of liberty in the broadest sense, the causes include the condition of infrastructures and services, which range from run-down to totally inhumane; overcrowding; the precarious employment and living conditions of the staff working in these places; the tendency to use authority arbitrarily; widespread corruption; and a lack of external oversight.

68. The United Nations Declaration on Human Rights Education and Training establishes that human rights education “comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms”.⁹ It also states that “by providing persons with knowledge, skills and understanding and developing their attitudes

⁸ CAT/OP/12/6, para. 3.

⁹ Article 2.1 of the United Nations Declaration on Human Rights Education and Training adopted by the Human Rights Council at its sixteenth session (A/HCR/16/L.1).

and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights, it contributes to the prevention of human rights violations.”¹⁰

69. Human rights education and training is a key mechanism for the prevention of torture and ill-treatment in that it can help counter the numerous root causes.

70. Including human rights instruction in all levels of education (preschool, primary, secondary and higher) is indispensable for building a culture of respect for human rights from the earliest age and in all areas of everyday life, fostering an environment conducive to the prevention of human rights violations, including torture and ill-treatment, and promoting non-violent methods of conflict management, equality, non-discrimination, inclusion, respect for diversity, solidarity and recognition of the worth of every individual and group.

71. Professional training in the fields of law, health care, psychology, social work, anthropology, public policy, social communication and education, inter alia, requires a type of higher education which incorporates a cross-cutting human rights component as an effective mechanism for preventing human rights violations including torture. University education must be backed up by continuing education, refresher courses and in-service training in human rights.

72. Particular attention should be accorded to the human rights training provided to police, military and prison officers, emphasizing among other aspects their role in protecting human rights, international regulatory frameworks and their practical application in daily operations, and the rights and safeguards enjoyed by persons deprived of their liberty.

73. The training provided to legal professionals involved in the administration of criminal justice (public prosecutors, public defenders, judges and private defence counsels), constitutional judges and to health-care and other professionals who provide forensic expertise is of equal importance.

74. It is very important to strengthen the forums for human rights education that are developing outside the formal educational system, as well as the popular education initiatives that extend their scope to diverse population groups.

75. Human rights education and training must embrace persons who have been deprived of their liberty or whose liberty is restricted and their families.

76. To guarantee the holistic focus of human rights education and training and its consequent role as an increasingly effective tool for preventing human rights violations in general and torture and ill-treatment in particular, we think it vital to take the following guiding principles into account:

(a) Consistency between study programmes, course content, teaching materials and methods, forms of assessment and the environment in which the teaching/learning process takes place;

(b) Flexible study programmes which meet the needs of all participants;

(c) A balance between the physical, mental, spiritual and emotional aspects of the educational process;

(d) An interdisciplinary, critical and contextualized approach that combines theory and practice and embraces diversity (of gender, ethnicity, age, ability, socio-economic status, sexual orientation, nationality, religion, etc.);

¹⁰ Ibid.

(e) A historical approach to human rights, linking these with the various actors involved; and;

(f) Articulated efforts between educational institutions, civil society organizations, State agencies and international mechanisms for the promotion of human rights.

B. The correlation between legal aid, a system of public defence and prevention of torture

77. The right of access to a lawyer from the outset of detention is an important safeguard to prevent torture and other cruel, inhuman and degrading treatment or punishment. This right goes beyond the provision of legal aid solely for the purpose of building up a technical defence. Indeed, the presence of a lawyer at the police station may not only deter the police from inflicting torture or other cruel, inhuman and degrading treatment or punishment, but is also key to assisting in the exercise of rights, including access to complaints mechanisms, for those deprived of their liberty.

78. Effective protection of the right to counsel requires the existence of a legal assistance model, whatever this model might be, to ensure the performance of defence counsels in an independent, free and technically qualified manner. For the realization of the right to counsel there should be a legal framework which allows for public or ex officio defence — whether provided by public officials or by lawyers working pro bono — with functional independence and budgetary autonomy to guarantee free legal assistance for all detainees who require it from the time of their arrest in a timely, effective and comprehensive manner. In addition, the existence of an organizational framework which ensures effective equality of arms between the public defender (be it State, pro bono or mixed), the Public Prosecutor and the police force is essential.

79. Budget and staff constraints directly affect the public defence system as they generate an excessive workload that is not compatible with the effective defence of the interests of persons deprived of their liberty. This was observed repeatedly in the countries visited by the Subcommittee, through numerous interviews both with detainees and officials from various State organizations and civil society, and through information collected and verified during these visits.

80. Defence lawyers should visit their clients in detention periodically to obtain information concerning the status of their cases and to conduct confidential interviews to determine both their detention conditions and their treatment. They must play an active role in the protection of the rights of detainees. The lawyer is a key player — along with judges and prosecutors — in the execution of writs of habeas corpus.

81. Many victims of torture and other cruel, inhuman and degrading treatment or punishment are unwilling to report ill-treatment suffered for fear of reprisals. This can put lawyers in a difficult situation as they cannot commence legal action without the consent of their clients. In this regard, a centralized national database of allegations and incidents of torture and ill-treatment, including anonymous, confidential information obtained under professional confidentiality, is recommended.¹¹ Such a register would be a source of useful information that could point to situations where urgent action is required, and could also assist in the development and adoption of preventive measures. The NPM and other such bodies vested with authority to deal with prevention of and complaints concerning torture

¹¹ See also General Assembly resolution 66/150, para. 8, which encourages States to consider records.

and ill-treatment should also have access to such a national register of allegations and incidents of torture and ill-treatment.

82. The relationship of public defence lawyers to the NPM should be one of complementarity and coordination. Both actors, institutionally relevant in the prevention of torture and ill-treatment, should follow up on the various recommendations, share work programmes and plan their work on common issues, in particular to avoid reprisals after monitoring visits.

VI. Looking forward

A. The new approach to achieving the Subcommittee's mandate

83. As outlined above in chapter IV, section A, following the enlargement of the Subcommittee, members are developing new working methods which will enhance the capacity of the Subcommittee to fulfil its mandate. These include streamlined systems for advising and assisting States in the establishment of, and for engaging with, NPMs; establishing more formal procedures for engaging with dialogue with States arising from visits; developing the Subcommittee's jurisprudence and liaising with other national, regional and international bodies. The Subcommittee recognizes that the working methods recently put in place may need to be further improved in the light of experience, in order to further enhance their effectiveness.

84. While the Subcommittee acknowledges that its enlargement has necessitated change, it has tried to ensure that such change builds on its previous achievements in a positive fashion. It has sought to use this necessity to become more outwardly engaged, dynamic and responsive to preventive need, capitalizing on its increased pool of expertise and experience. At the same time, it also recognizes that diverse opinions and approaches can pose challenges and that a coordinated approach, informed by the institutional practices of the United Nations and OHCHR, is required to fulfil the distinct mandate of the Subcommittee. The Subcommittee is conscious that its work must be of practical use in addressing the needs of diverse systems and do so in a way which properly engages with their specificities.

85. The Subcommittee believes that developing its preventive mandate in the context of the United Nations and OHCHR allows it to benefit from a broad range of expertise and it will continue to seek to exploit this advantage to its full potential. The Subcommittee is acutely conscious of the resource constraints which affect the work of OHCHR and its capacity to make provision for the Subcommittee which is as adequate as it would wish. The Subcommittee will continue to work as closely as it can with OHCHR in the coming year in order to explore how to maximize the value which can be derived from the resources at its disposal, believing that this can best be achieved by enhancing its capacity to exercise operational flexibility within its resource envelope.

B. Plan of work for 2012

86. With the new approach to working with NPMs and follow-up activities, the Subcommittee hopes to make a greater impact in satisfying its mandate efficiently. The new strategy will assist in establishing a systematic range of activities regarding NPMs and opportunities for engagement with them in order to ensure that there is continued and constructive preventive dialogue. This process will also be used to ensure that new States parties are contacted as soon as possible. The Subcommittee is increasingly convinced that

establishing relations with States parties promptly upon their entry into the Optional Protocol system can itself be an effective tool of prevention.

87. The Subcommittee has identified a range of issues which it wishes to explore in its next phase of work. These include substantive issues concerning: torture in the prison context; the relationship between traditional justice of indigenous peoples; the prevention of torture and the detention of migrants. Organizational and procedural issues to explore include: harmonizing means of working with other bodies; determining the means for giving effect to article 16 of the Convention where States fail to cooperate, and the circumstances in which such action will be appropriate; exploring the possibility of building relationships with regional human rights bodies; and developing criteria through which States can access the Special Fund.

88. At the fifteenth session of the Subcommittee in November 2011, it was decided that the Subcommittee will conduct six country visits in 2012. The States parties to be visited are Argentina, Gabon, Honduras, Kyrgyzstan, Republic of Moldova and Senegal. In the case of Honduras, Republic of Moldova and Senegal, the Subcommittee will principally address issues regarding National Preventive Mechanisms (NPMs), as provided for under the Optional Protocol.

89. In identifying countries to visit, the Subcommittee continues to engage in a reasoned process, considering various factors, including making optimal use of the enlarged Subcommittee, making the most efficient use of the financial resources available and ensuring appropriate coverage of States parties. In addition, as in the past, the Subcommittee gives careful consideration to the date of ratification, development of NPMs, geographic distribution, size and complexity of the State, preventive monitoring at the regional level and specific/urgent issues reported.

Annex VIII

Joint statement on the occasion of the United Nations International Day in Support of Victims of Torture

26 June 2012

The Committee against Torture; the Subcommittee on Prevention of Torture; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture marked the International Day in Support of Victims of Torture with the following statement:

An arbitrarily detained man reaches out to United Nations human rights bodies for justice. While the United Nations body rules in his favour, the man faces grave reprisals for speaking out in defence of his rights. He is denied medical treatment, placed under solitary confinement and allegedly beaten by prison authorities.

Today, on the International Day in Support of Victims of Torture, we remind States that they have an obligation to protect such individuals and to ensure that they do not face reprisals or intimidation for cooperating with United Nations bodies.

Every year, the Committee against Torture and independent experts appointed by the Human Rights Council receive individual communications from victims of torture, and information about alleged violations from human rights defenders and civil society actors from all regions of the world to be considered in their reports. Many detainees, at great personal risk, find the courage to share their traumatic experiences of torture and ill-treatment with the Subcommittee on Prevention of Torture and the Special Rapporteur on the question of Torture during their visits to detention centres.

Every year, hundreds of rehabilitation centres, small and large, supported by the United Nations Voluntary Fund for Victims of Torture, provide indispensable humanitarian, medical and legal assistance to thousands of victims of torture and their family members.

Many of those victims and actors who enable us to do our work, by providing invaluable expertise and by sharing the sufferings they have endured, experience intimidation and reprisals.

Reprisals against people who cooperate with the United Nations mechanisms in protecting and advancing human rights are absolutely unacceptable and are in violation of international law and States' legal obligations. There must be an effective means of ensuring that reprisals do not occur, and if they do, the individuals involved and the State must be held accountable.

Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States have an obligation to take steps to ensure that complainants and witnesses or any other individual or organizations that cooperate with the Committee are protected against ill-treatment, intimidation or reprisals. Similarly, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment calls on States parties to fully respect their obligation under the Optional Protocol to the Convention against Torture to ensure that individuals it meets during the course of its visits are not sanctioned as a result of their cooperation.

In urging States to establish and support rehabilitation centres or facilities where victims of torture can receive treatment, the General Assembly stipulated recently that States should also ensure the safety of their staff and patients.

On this day, we stand in solidarity with those who, after having suffered the worst forms of torture and ill-treatment, place their trust in United Nations mechanisms despite the risk of reprisals. It is imperative that States translate their commitment to the fight against torture with measures that guarantee that victims and human rights advocates engaging with the United Nations mechanisms against torture will not be subjected to reprisals and re-victimization.

Annex IX

Oral statement of programme budget implications in accordance with rule 26 of the rules of procedure of the Committee against Torture

1. By its decision of 1 June 2012, the Committee against Torture is requesting the General Assembly to authorize the Committee to meet for an additional week per each session in 2013 and 2014, i.e. one additional week of sessional meetings in May and in November 2013 and in May and November 2014, for a total of four additional weeks.
2. The Committee is entitled to an annual six weeks of meeting time (two sessions of three weeks per year). Further to General Assembly resolution 65/204, it has been granted, on a temporary basis, additional meeting time for two weeks annually in 2011 and 2012 (two sessions of four weeks per year).
3. If granted, this additional meeting time would allow the Committee to continue to consider two additional reports per session, or a total of eight additional reports during the two-year period (2013 and 2014).
4. This additional meeting time would also permit the Committee to continue to consider, at a minimum, five additional individual complaints per session, or a total of 20 for the two-year period (2013 and 2014).
5. Finally, the additional meeting time would further allow the Committee to continue its optional reporting procedure, thus adopting an average of 10 additional lists of issues per session, or a total of 40 for the two-year period (2013 and 2014). This procedure consists of remitting a list of issues to States parties prior to the submission of their reports to the Committee, which has assisted States parties to report in a focused and timely manner, and reduced the time and cost of the reporting.
6. Therefore, the present request relates expressly to the possibility for the Committee to continue (1) its optional procedure assisting States parties to report; (2) reducing the backlog of pending reports; as well as (3) reducing the backlog of individual complaints pending before the Committee, currently of 115 cases.
7. The activities to be carried out relate to: section 24, Human rights; section 2, Conference services; and section 29E, Administration, Geneva, of the programme budget for the bienniums 2012–2013 and 2014–2015.
8. Provisions have been made in the 2012–2013 programme budget for travel and per diem costs of the 10 members of the Committee to attend its two annual regular sessions in Geneva of four weeks each in 2012 and three weeks each in 2013, as well as for conference services for the Committee.
9. Should the General Assembly approve this request by the Committee, provisions for a total of 40 additional sessional meetings would be required. The additional meetings of the Committee would require interpretation services in the official languages. Summary records would be provided for the 40 additional sessional meetings of the Committee. The additional meetings would require an estimated additional 600 pages of pre-session, 480 pages of in-session and 680 pages of post-session documentation, of which only 280 in all official languages, the remaining in the three working languages of the Committee. Should the General Assembly accept the Committee's request, additional resources would be required for per diem costs for the members of the Committee in relation to the additional meetings; however, additional resources would not be required for the travel.

10. Additional staffing requirements would be needed to cover 28 working months at the P-3 level for the two-year period (2013 and 2014), i.e. the provision of general temporary assistance for 14 months per year at the P-3 level.

11. Based on experience, on average, one professional staff member requires four weeks per Committee's consideration of a State party report; one week to assist in the preparation and adoption of a list of issues prior to reporting; and two weeks to assist the Committee in deciding an individual complaint. For State party reports, this includes research, the preparation of country analyses, draft lists of issues and draft concluding observations, and servicing the meetings of the respective Committee session. For a list of issues prior to reporting, this includes research and compilation of sources of information, the preparation of a draft list of issues prior to reporting, and servicing the meetings of the respective Committee session. For individual complaints, this includes research, legal analyses, including for consistency and coherence of jurisprudence, and preparation of draft decisions, as well as servicing the meetings of the respective Committee session. In addition, the staff member needs to undertake secretariat-related tasks, as required by the supervisor. Supporting the work load generated by the granting of this additional meeting time — namely, the consideration of eight additional State party reports, the adoption of 40 additional lists of issues prior to reporting and of 20 additional individual cases — requires 112 working weeks for the biennium, i.e. 28 work months for the biennium.

12. The above requirements relating to the additional meetings of the Committee would amount to \$1,021,950 per year as enumerated in the table below. These requirements are new and are not included in the programme budget for 2012–2013. Hence, an additional appropriation would be required for costs pertaining to 2013. As for the 2014 requirements, these will be included within the proposed programme budget for the next biennium.

		(United States dollars)	
		2013	2014
I.	Section 24, Human rights		
	Additional per diem for members (14 days/year)	82 100	82 100
	Staff requirement (P-3) for 14 months/year	215 250	215 250
II.	Section 2, General Assembly affairs and conference services		
	Meeting servicing, interpretation and documentation	718 300	718 300
III.	Section 29E, Office of Common Support Services		
	Support services	6 300	6 300
Grand total		1 021 950	1 021 950

13. Additional detailed information will be provided when the report of the Committee against Torture will be considered by the Third Committee of the General Assembly.

Annex X

Decision of the Committee to request approval from the General Assembly at its sixty-seventh session for additional meeting time in 2013 and 2014

1 June 2012

1. At its forty-fourth session, the Committee adopted a decision to request approval from the General Assembly at its sixty-fifth session authorizing the Committee to meet for an additional week per each session in 2011 and 2012, i.e. one additional week of sessional meetings in May and November 2011 and in May and November 2012, a total of four weeks. In its resolution 65/204, the General Assembly granted, on a temporary basis, the requested additional meeting time to the Committee.
2. Therefore, the Committee is currently entitled to an annual eight weeks of meeting time (two sessions of four weeks), further to the above-mentioned General Assembly resolution.
3. At its current forty-eighth session, the Committee decided to adopt a decision to request approval from the General Assembly at its sixty-seventh session authorizing the Committee to continue to meet for an additional week per each session in 2013 and 2014, i.e. one additional week of sessional meetings in May and November 2013 and in May and November 2014, a total of four weeks.
4. If granted, this request for additional meeting time would allow the Committee to continue to consider, at a minimum, two additional reports per session, eight for the biennium (2013–2014); it would also permit the Committee to continue to consider, at a minimum, five additional individual complaints per session, 20 for the biennium (2013–2014); finally, it would further allow the Committee to continue its optional reporting procedure, thus adopting an average of 10 additional lists of issues prior to reporting per session, 40 for the biennium (2013–2014). It is to be noted that this successful procedure consists in remitting a list of issues to States parties prior to the submission of their reports to the Committee, which assists States parties to report in a more focused and timely manner, and reduces the time and cost of the reporting procedure.
5. Consequently, the request relates expressly to the possibility for the Committee to continue (a) its optional reporting procedure assisting States parties to report, (b) to reduce the backlog of pending reports, as well as (c) to reduce the backlog of individual complaints pending before the Committee, currently of 115 cases.
6. Pursuant to rule 26 of the rules of procedure of the Committee against Torture, the programme budget implications arising from the Committee's decision have been circulated among the members of the Committee (oral statement, dated 1 June 2012). Therefore, the Committee requests that the General Assembly, at its sixty-seventh session, approve the present request and provide appropriate financial support to enable the Committee to meet for an additional week in each of its sessions of 2013 and 2014.

Annex XI

Overdue reports, as at 1 June 2012

A. Initial reports

<i>State party</i>	<i>Due date</i>
1. Andorra	22 October 2007
2. Antigua and Barbuda	17 August 1994
3. Bangladesh	4 November 1999
4. Botswana	7 October 2001
5. Burkina Faso	2 February 2000
6. Cape Verde	3 July 1993
7. Congo	30 August 2004
8. Côte d'Ivoire	16 January 1997
9. Equatorial Guinea	6 November 2003
10. Guinea	8 November 1990
11. Holy See	25 July 2003
12. Lebanon	3 November 2001
13. Lesotho	11 December 2002
14. Liberia	22 October 2005
15. Malawi	10 July 1997
16. Maldives	20 May 2005
17. Mali	27 March 2000
18. Mozambique	14 October 2000
19. Niger	3 November 1999
20. Nigeria	28 June 2002
21. Pakistan	23 July 2011
22. Saint Vincent and the Grenadines	30 August 2002
23. San Marino	27 December 2007
24. Seychelles	3 June 1993
25. Sierra Leone	25 May 2002
26. Somalia	22 February 1991
27. Swaziland	25 April 2005

<i>State party</i>	<i>Due date</i>
28. Thailand	1 November 2008
29. Timor-Leste	16 May 2004

B. Periodic reports

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Afghanistan	Second	25 June 1992	
	Third	25 June 1996	
	Fourth	25 June 2000	
	Fifth	25 June 2004	
	Sixth	25 June 2008	
	Albania	Third	9 June 2003
Fourth		9 June 2007	
Fifth		9 June 2011	
Algeria	Fourth	11 October 2002	[20 June 2012]
	Fifth	11 October 2006	
	Sixth	11 October 2010	
Andorra	Second	22 October 2011	
Antigua and Barbuda	Second	17 August 1998	
	Third	17 August 2002	
	Fourth	17 August 2006	
	Fifth	17 August 2010	
Argentina	Fifth	25 June 2004	[25 June 2008]
	Sixth	25 June 2008	[25 June 2008]
Armenia	Fourth	12 October 2006	[1 June 2016]
	Fifth	12 October 2010	
Australia	Fourth	6 September 2002	[30 June 2012]
	Fifth	6 September 2006	[30 June 2012]
	Sixth	6 September 2010	
Austria	Sixth	27 August 2008	[14 May 2014]
Azerbaijan	Fourth	14 September 2009	[20 November 2013]

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Bahrain	Second	4 April 2003	[4 April 2007]
	Third	4 April 2007	
	Fourth	4 April 2011	
Bangladesh	Second	4 November 2003	
	Third	4 November 2007	
	Fourth	4 November 2011	
Belarus	Fifth	25 June 2004	[25 November 2015]
	Sixth	25 June 2008	
Belgium	Third	25 July 2008	[21 November 2012]
Belize	Second	25 June 1992	
	Third	25 June 1996	
	Fourth	25 June 2000	
	Fifth	25 June 2004	
	Sixth	25 June 2008	
	Benin	Third	10 April 2001
Fourth		10 April 2005	
Fifth		10 April 2009	
Bolivia (Plurinational State of)	Third	11 May 2008	
	Fourth	11 May 2012	
Botswana	Second	7 October 2005	
	Third	7 October 2009	
Brazil	Second	27 October 1994	
	Third	27 October 1998	
	Fourth	27 October 2002	
	Fifth	27 October 2006	
	Sixth	27 October 2010	
	Burkina Faso	Second	2 February 2004
Third		2 February 2008	
Fourth		2 February 2012	
Burundi	Third	19 March 2002	
	Fourth	19 March 2006	
	Fifth	19 March 2010	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Cambodia	Third	13 November 2001	[19 November 2014]
	Fourth	13 November 2005	
	Fifth	13 November 2009	
Cameroon	Fifth	25 June 2008	[14 May 2014]
Cape Verde	Second	3 July 1997	
	Third	3 July 2001	
	Fourth	3 July 2005	
	Fifth	3 July 2009	
Chad	Second	9 July 2000	[15 May 2013]
	Third	9 July 2004	
	Fourth	9 July 2008	
Chile	Sixth	29 October 2009	[15 May 2013]
China, including Hong Kong SAR and Macao SAR	Fifth	2 November 2005	[21 November 2012]
	Sixth	2 November 2009	
Colombia	Fifth	6 January 2005	[20 November 2013]
	Sixth	6 January 2009	
Congo	Second	30 August 2008	
Costa Rica	Third	10 December 2002	[30 June 2012]
	Fourth	10 December 2006	
	Fifth	10 December 2010	
Côte d'Ivoire	Second	16 January 2001	
	Third	16 January 2005	
	Fourth	16 January 2009	
Croatia	Fourth	7 October 2004	[7 October 2008]
	Fifth	7 October 2008	[7 October 2008]
Cuba	Third	15 June 2004	[1 June 2016]
	Fourth	15 June 2008	
Cyprus	Fourth	16 August 2004	
	Fifth	16 August 2008	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Democratic Republic of the Congo	Second	16 April 2001	[16 April 2009]
	Third	16 April 2005	[16 April 2009]
	Fourth	16 April 2009	[16 April 2009]
Djibouti	Second	5 December 2007	[25 November 2015]
	Third	5 December 2011	
Egypt	Fifth	25 June 2004	
	Sixth	25 June 2008	
El Salvador	Third	16 July 2005	[20 November 2013]
	Fourth	16 July 2009	
Equatorial Guinea	Second	6 November 2007	
	Third	6 November 2011	
Ethiopia	Second	12 April 1999	[19 November 2014]
	Third	12 April 2003	
	Fourth	12 April 2007	
	Fifth	12 April 2011	
Gabon	Second	7 October 2005	
	Third	7 October 2009	
Georgia	Fourth	27 November 2007	[24 November 2011]
	Fifth	27 November 2011	
Germany	Sixth	30 October 2011	[25 November 2015]
Ghana	Second	6 October 2005	[3 June 2015]
	Third	6 October 2009	
Guinea	Second	8 November 1994	
	Third	8 November 1998	
	Fourth	8 November 2002	
	Fifth	8 November 2006	
	Sixth	8 November 2010	
Guyana	Second	17 June 1993	[31 December 2008]
	Third	17 June 1997	
	Fourth	17 June 2001	
	Fifth	17 June 2005	
	Sixth	17 June 2009	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Holy See	Second	25 July 2007	
	Third	25 July 2011	
Honduras	Second	3 January 2002	[15 May 2013]
	Third	3 January 2006	
	Fourth	3 January 2010	
Hungary	Fifth	25 June 2004	[31 December 2010]
	Sixth	25 June 2008	[31 December 2010]
Indonesia	Third	27 November 2007	[30 June 2012]
	Fourth	27 November 2011	
Ireland	Second	11 May 2007	[3 June 2015]
	Third	11 May 2011	
Israel	Fifth	1 November 2008	[15 May 2013]
Italy	Sixth	11 February 2010	[30 June 2011]
Japan	Third	29 July 2008	
Jordan	Third	12 December 2000	[14 May 2014]
	Fourth	12 December 2004	
	Fifth	12 December 2008	
Kazakhstan	Third	25 September 2007	[21 November 2012]
	Fourth	25 September 2011	
Kenya	Second	22 March 2002	[21 November 2012]
	Third	22 March 2006	
	Fourth	22 March 2010	
Kuwait	Third	6 April 2005	[3 June 2015]
	Fourth	6 April 2009	
Kyrgyzstan	Third	4 October 2006	
	Fourth	4 October 2010	
Lebanon	Second	3 November 2005	
	Third	3 November 2009	
Lesotho	Second	12 December 2006	
	Third	12 December 2010	
Liberia	Second	22 October 2009	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Libya	Fourth	14 June 2002	
	Fifth	14 June 2006	
	Sixth	14 June 2010	
Liechtenstein	Fourth	1 December 2003	[14 May 2014]
	Fifth	1 December 2007	
	Sixth	1 December 2011	
Lithuania	Third	2 March 2005	[21 November 2012]
	Fourth	2 March 2009	
Madagascar	Second	13 January 2011	[25 November 2015]
Malawi	Second	10 July 2001	
	Third	10 July 2005	
	Fourth	10 July 2009	
Maldives	Second	20 May 2009	
Mali	Second	27 March 2004	
	Third	27 March 2008	
	Fourth	27 March 2012	
Malta	Third	12 October 1999	[31 December 2000]
	Fourth	12 October 2003	
	Fifth	12 October 2007	
	Sixth	12 October 2011	
Mauritania	Second	17 December 2009	
Mauritius	Fourth	7 January 2006	[3 June 2015]
	Fifth	7 January 2010	
Mongolia	Second	23 February 2007	[19 November 2014]
	Third	23 February 2011	
Montenegro	Second	23 November 2010	[21 November 2012]
Morocco	Fifth	21 July 2010	[25 November 2015]
Mozambique	Second	14 October 2004	
	Third	14 October 2008	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Namibia	Second	27 December 1999	
	Third	27 December 2003	
	Fourth	27 December 2007	
	Fifth	27 December 2011	
Nepal	Third	12 June 2000	[12 June 2008]
	Fourth	12 June 2004	[12 June 2008]
	Fifth	12 June 2008	[12 June 2008]
New Zealand	Sixth	8 January 2011	[15 May 2013]
Nicaragua	Second	4 August 2010	[15 May 2013]
Niger	Second	3 November 2003	
	Third	3 November 2007	
	Fourth	3 November 2011	
Nigeria	Second	28 June 2006	
	Third	28 June 2010	
Panama	Fourth	22 September 2000	
	Fifth	22 September 2004	
	Sixth	22 September 2008	
Paraguay	Seventh	10 April 2011	[25 November 2015]
Philippines	Third	25 June 1996	[15 May 2013]
	Fourth	25 June 2000	
	Fifth	25 June 2004	
	Sixth	25 June 2008	
Portugal	Sixth	10 March 2010	[30 December 2011]
Qatar	Third	10 February 2008	
	Fourth	10 February 2012	
Republic of Korea	Third	7 February 2004	[7 February 2012]
	Fourth	7 February 2008	
	Fifth	7 February 2012	
Republic of Moldova	Third	27 December 2004	[20 November 2013]
	Fourth	27 December 2008	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Romania	Second	16 January 1996	
	Third	16 January 2000	
	Fourth	16 January 2004	
	Fifth	16 January 2008	
	Sixth	16 January 2012	
Russian Federation	Sixth	25 June 2008	
Saint Vincent and the Grenadines	Second	30 August 2006	
	Third	30 August 2010	
San Marino	Second	27 December 2011	
Saudi Arabia	Second	21 October 2002	
	Third	21 October 2006	
	Fourth	21 October 2010	
Senegal	Fourth	25 June 2000	
	Fifth	25 June 2004	
	Sixth	25 June 2008	
Serbia	Second	11 April 2006	[21 November 2012]
	Third	11 April 2010	
Seychelles	Second	3 June 1997	
	Third	3 June 2001	
	Fourth	3 June 2005	
	Fifth	3 June 2009	
Sierra Leone	Second	25 May 2006	
	Third	25 May 2010	
Slovakia	Third	27 May 2002	[20 November 2013]
	Fourth	27 May 2006	
	Fifth	27 May 2010	
Slovenia	Fourth	14 August 2006	[3 June 2015]
	Fifth	14 August 2010	
Somalia	Second	22 February 1995	
	Third	22 February 1999	
	Fourth	22 February 2003	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Somalia	Fifth	22 February 2007	
	Sixth	22 February 2011	
South Africa	Second	9 January 2004	[31 December 2009]
	Third	9 January 2008	
	Fourth	9 January 2012	
Spain	Sixth	19 November 2008	[23 November 2013]
Sri Lanka	Fifth	1 February 2011	[25 November 2015]
Swaziland	Second	25 April 2009	
Sweden	Seventh	25 June 2011	[30 June 2012]
Switzerland	Seventh	25 June 2011	[14 May 2014]
Syrian Arab Republic	Second	18 September 2009	[14 May 2014]
Tajikistan	Third	9 February 2004	
	Fourth	9 February 2008	
	Fifth	9 February 2012	
The former Yugoslav Republic of Macedonia	Third	11 January 2003	[30 June 2012]
	Fourth	11 January 2007	
	Fifth	11 January 2011	
Timor-Leste	Second	16 May 2008	
	Third	16 May 2012	
Togo	Third	17 December 1996	
	Fourth	17 December 2000	
	Fifth	17 December 2004	
	Sixth	17 December 2008	
Tunisia	Fourth	22 October 2003	
	Fifth	22 October 2007	
	Sixth	22 October 2011	
Turkey	Fourth	31 August 2001	[19 November 2014]
	Fifth	31 August 2005	
	Sixth	31 August 2009	
Turkmenistan	Second	24 July 2004	[3 June 2015]
	Third	24 July 2008	

<i>State party</i>	<i>Reports</i>	<i>Due date</i>	<i>Revised date</i>
Uganda	Second	25 June 1992	[25 June 2008]
	Third	25 June 1996	
	Fourth	25 June 2000	
	Fifth	25 June 2004	
	Sixth	25 June 2008	
Ukraine	Sixth	25 June 2007	[30 June 2011]
	Seventh	25 June 2011	
United Kingdom of Great Britain and Northern Ireland	Sixth	6 January 2010	
United States of America	Fifth	19 November 2011	[19 November 2011]
Uruguay	Third	25 June 1996	
	Fourth	25 June 2000	
	Fifth	25 June 2004	
	Sixth	25 June 2008	
Uzbekistan	Fifth	28 October 2012	
Venezuela (Bolivarian Republic of)	Fourth	20 August 2004	
	Fifth	20 August 2008	
Yemen	Third	4 December 2000	[14 May 2014]
	Fourth	4 December 2004	
	Fifth	4 December 2008	
Zambia	Third	6 November 2007	[30 June 2012]
	Fourth	6 November 2011	

Annex XII

Country Rapporteurs for the reports of States parties considered by the Committee at its forty-seventh and forty-eighth sessions (in alphabetical order)

A. Forty-seventh session

<i>Report</i>	<i>Rapporteur 1</i>	<i>Rapporteur 2</i>
Belarus (CAT/C/BLR/4)	Ms. Gaer	Ms. Sveaass
Bulgaria (CAT/C/BGR/4-5)	Ms. Kleopas	Mr. Wang
Djibouti (CAT/C/DJI/1)	Mr. Bruni	Mr. Grossman
Germany (CAT/C/DEU/5)	Mr. Grossman	Ms. Kleopas
Madagascar (CAT/C/MDG/1)	Ms. Belmir	Mr. Gaye
Morocco (CAT/C/MAR/4)	Mr. Gaye	Mr. Grossman
Paraguay (CAT/C/PRY/4-6)	Mr. Mariño	Ms. Sveaass
Sri Lanka (CAT/C/LKA/3-4)	Mr. Bruni	Ms. Gaer

B. Forty-eighth session

<i>Report</i>	<i>Rapporteurs</i>	<i>Rapporteur 2</i>
Albania (CAT/C/ALB/2)	Mr. Grossman	Mr. Gaye
Armenia (CAT/C/ARM/3)	Ms. Gaer	Mr. Wang
Canada (CAT/C/CAN/6)	Mr. Bruni	Ms. Belmir
Cuba (CAT/C/CUB/2)	Mr. Mariño	Ms. Sveaass
Czech Republic (CAT/C/CZE/4-5)	Mr. Grossman	Mr. Wang

<i>Report</i>	<i>Rapporteurs</i>	<i>Rapporteur 2</i>
Greece (CAT/C/GRC/5-6)	Ms. Sveaass	Ms. Belmir
Rwanda (CAT/C/RWA/1)	Mr. Bruni	Ms. Sveaass
Syrian Arab Republic (Not submitted)	Mr. Grossman	Ms. Belmir

Annex XIII

Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party

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List of acronyms

APF	Armed Police Force
CAT	Convention against Torture
CPA	Comprehensive Peace Agreement
CRT	Compensation relating to Torture Act 1996
FIR	First Information Report
NHRC	National Human Rights Commission
OHCHR	Office of the High Commissioner for Human Rights
RNA	Royal Nepalese Army
SSP	Special Security Programme
UCPN-M	Unified Communist Party of Nepal (Maoist)

Part 1
Report on Nepal under article 20 of the Convention
adopted by the Committee at its forty-sixth session
(9 May–3 June 2011)

I. Introduction

1. In accordance with article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as “the Convention”), if the Committee against Torture (hereinafter referred to as “the Committee”) receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State party, the Committee shall invite that State party to cooperate in the examination of the information and, to this end, to submit observations with regard to the information concerned. The Committee may subsequently decide to designate one or more of its members to undertake a confidential inquiry which may include, with its agreement, a visit to the territory of the State party concerned. The proceedings of the Committee under these processes are confidential and at all stages the cooperation of the State party is sought. After the proceedings have been completed, the Committee may, after consultation with the State party concerned, decide to include a summary account of the results in its annual report to the States parties to the Convention and the General Assembly and, if agreed with the State party, make public the present report and the replies of the State party.

2. Nepal acceded to the Convention on 14 May 1991. At the time of ratification it did not declare that it did not recognize the competence of the Committee provided for in article 20 of the Convention, as it could have done under article 28 of the Convention. The procedure under article 20 is, therefore, applicable to Nepal.

II. Development of the procedure

3. In its concluding observations on the second periodic report of Nepal, adopted at its thirty-fifth session in November 2005,¹ the Committee expressed serious concerns about allegations concerning the widespread use of torture, the prevailing climate of impunity for acts of torture and the lack of a legal provision in domestic law to make torture a criminal offence.

4. At the time, the Committee was “gravely concerned about the exceedingly large number of consistent and reliable reports concerning the widespread use of torture and ill-treatment by law enforcement personnel, and in particular the Royal Nepalese Army, the Armed Police Force and the Police, and the absence of measures to ensure the effective protection of all members of Society”. It was concerned about “the extensive resort to pre-trial detention lasting up to 15 days”² and “the contemptuous lack of compliance with court orders by members of security forces”.³ The Committee was “deeply disturbed by the continuing reliable allegations concerning the frequent use of interrogation methods by security forces that are prohibited by the Convention”.⁴ It recommended the State party to

¹ CAT/C/NPL/CO/2, paras. 12, 13, 24 and 25.

² *Ibid.*, para. 14 (b).

³ *Ibid.*, para. 16.

⁴ *Ibid.*, para. 20.

“publicly condemn the practice of torture and take effective measures to prevent acts of torture in any territory under its jurisdiction” and to “take all measures, as appropriate, to protect all members of society from acts of torture.”⁵

5. The Committee was further concerned “about the prevailing climate of impunity for acts of torture and ill-treatment and the continued allegations of arrests without warrants, extrajudicial killings, deaths in custody and disappearances” as well as “about the lack of an independent body able to conduct investigations into acts of torture and ill-treatment committed by law enforcement personnel” and thus recommended the State to “send a clear and unambiguous message condemning torture and ill-treatment to all persons and groups under its jurisdiction” and that it “should take effective legislative, administrative and judicial measures to ensure that all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and the perpetrators punished” as well as to “establish an independent body to investigate acts of torture and ill-treatment committed by law enforcement personnel”.

6. The Committee was also concerned “that the definition of torture in article 2 (a) of the Compensation Relating to Torture Act of 1996, the lack of a legal provision in current domestic law to make torture a criminal offence and the draft Criminal Code are not in line with the definition of article 1 of the Convention against Torture”. It recommended that the State party “adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the Convention. The State party should provide information to the Committee on domestic jurisprudence referring to the definition of torture as per article 1 of the Convention.”

7. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (hereafter “Special Rapporteur on the question of torture”), following a visit to Nepal in September 2005, concluded, inter alia, that “torture is systematically practised by the police, armed police and Royal Nepalese Army. Legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the rule, and consequently victims of torture and their families are left without recourse to adequate justice, compensation and rehabilitation.”⁶

8. In addition to this, at its thirty-seventh session in November 2006, in private meetings, the Committee considered information submitted to it by non-governmental organizations (NGOs) on alleged systematic practice of torture in Nepal. It appeared to the Committee that this information submitted to it under article 20 of the Convention was reliable and that it contained well-founded indications that torture was being systematically practised in the territory of Nepal. In accordance with article 20, paragraph 1, of the Convention and Rule 82 of its Rules of Procedure,⁷ the Committee decided to invite the State party to cooperate in the examination of such information, a copy of which was sent to the State party on 5 April 2007, and to submit its observations in that regard to the Committee by 30 April 2007.

9. On 19 April 2007, the Permanent Mission of Nepal acknowledged receipt of the Committee’s request for observations on the information submitted to it. However, the State party did not provide such information by 30 April 2007 as requested by the

⁵ Ibid., para. 13.

⁶ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (E/CN.4/2006/6/Add.5) of 9 January 2006, para. 31.

⁷ CAT/C/3/Rev.5.

Committee. The Committee sent reminders to the State party on 16 September 2008 and on 15 January 2009. On 19 November 2008 the Chairman of the Committee met with the permanent representative of Nepal in Geneva regarding this issue.

10. On 3 April 2009, Nepal transmitted its observations to the Committee and requested that the procedure be dismissed. In its observations, the State party stated that the reports which were at the origin of the Committee's decision to conduct an inquiry were sporadic reports describing the situation at the time of the conflict and were intended to support a campaign against Nepal going beyond the agenda of protection and promotion of human rights. The State party drew the Committee's attention to the speedy and dynamic transformation which had taken place in Nepal following the end of the conflict and the State party's strong commitment to address human rights violations and adopt the necessary legislative and governmental measures to end impunity. This information was examined by the Committee at its forty-second and forty-third sessions, in private meetings.

11. In view of all the information before it, the Committee decided to undertake a confidential inquiry in accordance with article 20, paragraph 2, of the Convention and designated Felice Gaer and Luis Gallegos Chiriboga for that purpose. On 30 November 2009, the Committee transmitted this decision to the State party, inviting Nepal, in accordance with article 20, paragraph 3, of the Convention, to cooperate with the Committee in the conduct of the inquiry, as well as proposing specific dates for a visit (between 1 and 15 July 2010) of the designated members of the Committee to Nepal. On 15 February 2010, the Committee transmitted to the Permanent Mission its General Principles guiding visits under article 20 of the Convention. In a note verbale dated 9 March 2010, Nepal informed the Committee that "in the context of the ongoing peace process in the country and in particular the focused attention of the Government towards the promulgation of the Constitution to be made by the elected Constituent Assembly, the deadline of which was approaching,⁸ the concerned authorities [were] not in a position to receive the delegation of experts from the Committee for the purpose of the inquiry at this stage". It further assured the Committee of its "willingness to work closely in a spirit of constructive dialogue and cooperation with the Committee". The State party requested a meeting between the Nepal Permanent Mission in Geneva and the Committee's Chairperson, which took place on 3 May 2010.

12. In May 2010 two NGOs, Advocacy Forum and REDRESS, submitted further information⁹ to the Committee on the alleged systematic practice of torture in Nepal, requesting the Committee to examine the situation in Nepal under article 20 of the Convention, which the Committee examined in private meetings at its forty-fourth session. At that session, the Committee also decided to continue to seek the cooperation of the State party, thus continuing its dialogue with it, in order for Nepal to accept the visit in question. On 29 June 2010, the Chairperson of the Committee met again with the Deputy Permanent Representative of Nepal on this issue.

13. At its forty-fifth session, in November 2010, the Committee decided that, as its continuing efforts to visit the State party were unsuccessful, it would proceed with the confidential inquiry without a visit and that the designated members of the Committee should prepare a report on Nepal under article 20 and report to the Committee at its forty-sixth session. On 28 January 2011, the Committee indicated this decision to the State party and reiterated that Nepal may submit to the Committee, at any stage of the proceedings,

⁸ The deadline for drafting the Constitution was initially set to 28 May 2010.

⁹ "Submission to the Committee against torture under article 20", Advocacy Forum and REDRESS, 5 March 2010.

according to article 20, paragraph 5, of the Convention against Torture, any information it deems relevant, in order to cooperate with the Committee in the inquiry.

14. The Committee notes that despite its numerous efforts to solicit cooperation and comments from Nepal in the context of its inquiry pursuant to article 20, Nepal provided information to the Committee on only one occasion, in April 2009, and did not avail itself of the opportunity it was offered to clarify the situation by accepting a visit of the Committee members undertaking the inquiry that would enable the Committee to form its view on the state of human rights protection in Nepal based on direct sources of information.

III. Background information

15. In 2006 a Comprehensive Peace Agreement ended a decade-long conflict between the Maoists, the Government and monarchy, and a popular pro-democracy uprising in Nepal that claimed over 13,000 lives and displaced thousands more. An Interim Constitution was adopted in January 2007 and a Constituent Assembly was elected on 10 April 2008. At its first session of 28 May 2008, the Assembly voted to end the 239-year-old Monarchy of Nepal and to establish a Republic. In August 2008, a new Government, led by the Communist Party of Nepal (Maoist) (hereafter UCPN-M) was formed. The coalition Government collapsed in May 2009 and the Prime Minister resigned. A new Government was formed later that month consisting of a 22-party coalition led by the UCPN-M. On 30 June 2010, Prime Minister Madhav Kumar Nepal resigned, leaving the coalition government with no leadership. On 3 February 2011, Jhalnath Khanal, chairman of the UCPN-M, was elected as the new Nepal Prime Minister. Nepal thus was without an effective Government from June 2010 until February 2011.

16. The Constituent Assembly, which also functions as the Legislature-Parliament during the transitional period, has focused almost exclusively on the Constitution-drafting process. The rules of procedure of the Constituent Assembly were adopted in November 2008 following six months of deliberations. The rules establish a 61-member Constitutional Committee which has the core responsibility of preparing a draft Constitution. After the Constituent Assembly failed to meet an initial 28 May 2010 deadline to promulgate a new constitution, its term was extended for another year, to May 2011.¹⁰

IV. Torture in Nepal

17. The Committee's present report addresses the reply of the State party dated 3 April 2009 and subsequent information provided by representatives of the Delegation of Nepal in bilateral meetings with the Committee's chairperson. This report also takes into account the report by the then Special Rapporteur on the question of torture, Manfred Nowak, following a mission to Nepal from 10 to 16 September 2005, and the follow-up reports of his successors, including the 4 March 2011 report of Juan E. Méndez.¹¹ The present report also takes into account the submissions of stakeholders and the United Nations to the universal periodic review of Nepal, which took place on 25 January 2011; information provided by the Office of the High Commissioner for Human Rights; reports from the Nepal National Human Rights Commission; and submissions from non-governmental organizations,

¹⁰ Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal (A/HRC/10/53), 3 March 2009.

¹¹ Follow-up report of the Special Rapporteur on torture (A/HRC/16/52/Add.2).

including Advocacy Forum (AF), REDRESS, the Centre for Victims of Torture Nepal, the Asian Legal Resource Centre, Human Rights Watch and Amnesty International. The Committee's report addresses a period of inquiry from 2007 until the present.

A. Observations of Nepal in response to the Committee's decision to initiate the procedure under article 20

18. On 3 April 2009, two years after the Committee's invitation to cooperate with the procedure initiated under article 20 of the Convention, the State party transmitted its observations to the Committee.

19. The State party argued that the Committee's decision to initiate a confidential procedure under article 20 of the Convention seemed to have been based on sporadic reports that were published during the armed conflict, and which have been largely commented upon by the State party with the concerned stakeholders. It considered that in large part, such reports were published in the framework of a campaign against Nepal going beyond the agenda of protection and promotion of human rights. The State party therefore asserted that such propaganda should not mislead the Committee and should not constitute part of any credible procedure of human rights treaty bodies in order for them to maintain the credibility of independence, impartiality and freedom from any kind of influence, be it emanating from the State or international organizations or individuals or entities claiming to be acting on others' behalf. Through its observations, the State party aimed at demonstrating the progress made since the publication of such reports.

20. After describing the political context in Nepal, including the peace process initiated with the signature of the Comprehensive Peace Agreement (CPA), the State party explained that the cessation of hostilities put an end to conflict-related violations, including alleged extrajudicial executions, detention, torture and ill-treatment in army barracks of those suspected of links with UCPN-M. Any alleged violations of international humanitarian law (hereafter "IHL") also ceased. The alleged incidents of disappearances were ended. All detainees or prisoners held in preventive detention under the Public Security Act or Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) or who were facing charges were released.

21. The State party emphasized that human rights have been placed at the centre of Nepal's peace process. In the "12-point Agreement" the Seven Party Alliance (SPA) and the UCPN-M expressed their commitment to "fully respect the norms and values of human rights". Two-thirds of the provisions of the Ceasefire Code of Conduct refer to international humanitarian law and human rights concerns. An eight-point Agreement between the Government and UCPN-M (signed on 16 June 2006) expresses strong commitment to "democratic norms and values including competitive multi-party system, civil liberties, fundamental rights, human rights, press freedom, and the concept of the rule of law". The State party added that it was committed to end impunity and make accountable those involved in the incidents of human rights violations. In this regard it had taken immediate action in several of the incidents.

22. The State party explained that the Interim Constitution of 15 January 2007 prohibits torture or cruel, inhuman or degrading treatment or punishment and provides constitutional guarantees to any person taken into custody. Any person, who suffered from torture or ill-treatment, shall be compensated under the law. The Interim Constitution also prohibits incommunicado detention. The State party argued that incommunicado detention is not practised in the country. The State party added that, during the armed conflict, some detainees were kept in army barracks for their own security due to a lack of civilian detention facilities, which is no longer the case. As for the prospect of criminalizing torture,

the State party stated that it is in progress and foreseen by the Interim Constitution. The State party also mentioned that the Compensation Relating to Torture Act (CRT) was being implemented since 1996 and is in conformity with the provisions of the Convention.

23. Regarding alleged perpetrators of acts of rape and other crimes, the State party submitted that the Military Act of 1959 provides that they should be tried by civilian courts according to ordinary criminal procedural laws. Human rights violations such as acts of torture and enforced disappearance are also investigated by a civilian authority headed by the Deputy Attorney General and should be heard by a special court presided over by the Judge of the Appellate Court. Crimes committed by Army personnel relating to public interests¹² are investigated by an investigation committee constituted by the Government and the matter is not precluded from being tried by civilian courts on the mere account that the perpetrator is a member of the army.

24. With regard to the Truth and Reconciliation Commission and the Commission on the Inquiry into Disappearances, the State party noted that they were being established; and that both of these Commissions would not only investigate cases of human rights violations, but also provide a unique opportunity for social reconciliation.

25. The State party emphasized that it has a proud tradition of working closely with the international community, including United Nations human rights mechanisms; that it had ratified a number of human rights instruments, had allowed visits of Human Rights Council mandate holders and the High Commissioner for Human Rights; and it had given full access to OHCHR to fulfil its mandate.

26. Regarding the allegation of systematic practice of torture in Nepal, the State party considered that the Committee based its decision to initiate an inquiry procedure, mainly on the report of the Special Rapporteur on the question of torture (November 2005), which was drafted in the context of the violent armed conflict in the country, and other “sporadic” NGO reports. The State party considers that the information contained therein tried to amplify the situation in a disproportionate manner. It expressed its unequivocal commitment to the rule of law and under no circumstance condones the practice of torture. According to the State party, the myth of “systematic practice of torture” is essentially an unfair and unilateral story created against Nepal. On 29 November 2005, the State party had responded with its views on the draft concluding observations of the Committee following its consideration of Nepal’s periodic report. Earlier too, it had comprehensively clarified the matter through the replies to the list of the issues sent by the Committee. Similarly, in December 2005, Nepal responded to the draft report of the Special Rapporteur on torture after his visit to Nepal. As, in the State party’s opinion, the Special Rapporteur’s interpretation of the situation did not correspond to reality, the State party categorically rejected his conclusion of “systematic practice of torture” and provided explanation on the points he had raised in the report. The State party deplored the fact that its views were not properly reflected when the final report of the Special Rapporteur’s visit was produced.

27. The State party insisted that personal opinions reportedly expressed in private by some security officials cannot be generalized as a State policy of practising torture. Isolated incidents, if any, during the time of the armed conflict, cannot be generalized as an outcome of deliberate State policy. Nepal neither condones torture nor is it a State policy to let the perpetrators go with impunity. Instead, Nepal always takes seriously any allegation of torture and the persons found guilty of committing torture are brought to justice promptly. Actions have been taken against a number of security officials in this regard. Nepal Police has taken action against 21 personnel in 11 cases relating to torture. Out of those, 6 cases

¹² The State party does not specify the meaning of “public interests” in this particular context.

were prosecuted in the court of law. Similarly, the Nepal Army has also punished 6 army personnel in torture-related cases occurred during the conflict.

28. The State party also stated that it has implemented most of the recommendations formulated by the Special Rapporteur on the question of torture and those in the concluding observations of the Committee. For example, ever since the conclusion of the CPA on 21 November 2006, the Nepal Army had not been involved in any law enforcement activities nor has it been accused of any human rights violations. The army has issued policy directives regarding the promotion and protection of human rights. Commensurate institutional arrangements had been put into place to make sustained efforts for the integration of human rights principles and values in the entire set up of security agencies. A zero-tolerance policy had been applied against any violations of human rights and international humanitarian laws. With the exception of counter-insurgency operations between 2001 and April 2006, the Nepal Army had not been involved in regular law enforcement activities and there exist no allegations of human rights violations against it before and after that period. Therefore, any isolated incidents of human rights violations attributed to the Nepal Army during the time of conflict were neither policy-driven nor an outcome of a deliberate action.

29. The State party assured that extra caution and vigilance were maintained all along the counter-insurgency operations with a view to protect international human rights law (hereafter "IHRL") and respect IHL. In the context of the armed conflict, the Chief of the Army Staff issued various directives, instructions and orders to the Nepal Army to ensure that IHRL and IHL were fully understood, disseminated and respected at all levels. The directive issued on 12 March 2004 outlined clear instructions on respect for IHRL and IHL codes of conduct during security operations. It outlined the arrest procedure; search procedure; standard operating procedures in checkpoint duties; the status of arrested persons; the procedure to be followed after their arrest; security of arrested persons/detainees; evacuation of detainees; the behavior to be observed with detainees; the use of firearms/weapons; the provision of rations, clothing, medical and other facilities to detainees; cooperation with the International Committee of the Red Cross (ICRC). The directive further emphasized that commanders at all levels were responsible and accountable for strictly implementing human rights and humanitarian law directives in their respective commands; commanders had the responsibility to provide adequate briefing to the troops on IHRL and IHL prior to all operations, and a debriefing was also necessary after each operation; court rulings on human rights violations should be disseminated by the Judge Advocate General Branch to the concerned units; commanders should sensitize their troops on IHRL and IHL on a regular basis; Human Rights Cells shall be established at the Division and Brigade headquarters.

30. In order to further streamline respect for human rights and international humanitarian law within the Nepal Army in times of conflicts, the then Chief of the Army Staff issued another directive on 10 January 2005 to all Branches, Directorates, Formations and Services of the Army. This directive provided clear instructions regarding judicial proceedings on issues of human rights and IHL during military operations. Following the People's movement and just before the conclusion of the CPA, on 14 September 2006, the newly appointed Chief of Army Staff, while reaffirming the previous directives, issued a comprehensive set of instruction to all branches, directorates, formations and services. This instruction not only contains the strong and total commitment of the high commanding level of the Nepal Army to the promotion and protection of human rights, but it also demonstrates the sensitivity and compliance of the norms and values of human rights and international humanitarian law in the entire working system of the Nepal Army. On 22 February 2008, the Chief of the Army Staff issued an order for the integration of international human rights and international humanitarian law in all its working methods. The Nepal Army, in collaboration with the ICRC and the Kathmandu School of Law, is

engaged at present in developing a manual on human rights and international humanitarian law. These measures and precautions taken, even at the time of the armed conflict, show the lack of tolerance towards human rights violations, including torture.

31. The Human Rights Cell at the Army Headquarters has been upgraded to a Human Rights Directorate and each Division and Brigade Headquarters of the Army now contains a Human Rights Division and a Human Rights Cell respectively, as an integral component of its institutional architecture. Human Rights Cells are being established at Battalion as well as at Company level. A comprehensive two-fold human rights directive has been issued at the platoon level with a view to ensure respect of human rights and IHL.

32. The Nepal Army has conducted investigations into human rights violations, which allegedly occurred during the conflict, and through legal procedures provided by the Interim Constitution and relevant laws of Nepal, discharged the following sentences to the army personnel of various ranks: 118 sentences to imprisonment (from 1 month to 10 years); 62 discharges from service; 40 demotions; 23 forfeits of grades; 26 forfeits of promotions; 8 warnings; and 8 sentences to pay compensation to families of victims. An outline of each case and action taken against the army personnel found guilty has been provided by the State party in an annex to its observations. The State party considers that this list demonstrates scrupulous attention paid by the Nepal Army to take each and every incident of human rights violations involving Nepal Army personnel seriously, and to investigate and sentence the perpetrators. The State party further considers this list as reflecting its zero tolerance policy towards human rights violations even if minor human rights violations occurred despite such policy.

33. The State party further states that the Human Rights Unit of the Nepal Police monitors operational activities of the police and issues necessary directives and instructions to all of its units. It also administers internal investigation upon the receipt of human rights complaints. According to the State party, action has been taken against perpetrators who have been found guilty of human rights violations. A regular well-functioning mechanism has been developed within the Nepal Police to respond and investigate allegations of human rights violations involving police personnel of all ranks. From 15 July 2007 to 14 July 2008, the Human Rights Unit of the Nepal Police responded to 1,005 complaints of all types related to human rights received from national and international human rights organizations. So far, actions have been taken against 318 police personnel of various ranks. During that period alone, i.e. from 15 July 2007 to 14 July 2008, actions were taken against 93 police personnel for human rights violations in the course of their duties.

34. The State party states that the authorities have maintained custody registers in police stations and prisons. The Appellate Court and the Chief District Officer are empowered to access the register at any time. Maintenance of custody registers is being made more systematic and detailed so that it reflects the detailed particulars of detainees and their release or transfer. The NHRC, OHCHR and the ICRC have been given unhindered access to prisons and places of detention with all requisite cooperation on the part of the government. The Interim Constitution guarantees the independence of the judiciary and the right of a person to seek remedy of *habeas corpus*. Every detainee has a guaranteed right to seek constitutional remedy and ascertain the legality of his/her detention.

35. The State party further argues that every person taken into custody is brought for a medical check-up and the same process is repeated when the person is being sent to the prison according to the order of the competent court. If any police personnel are involved in torture, the case is immediately investigated and the perpetrator is punished. Similarly, the NHRC has forwarded 5 cases of compensation in favor of victims of torture to the Government, on the basis of NHRC Regulation, 2000. The victims are in the process of receiving compensation. In addition, 13 cases forwarded by the NHRC for compensation have already been compensated.

36. The State Litigation Act, 1993 clearly provides that investigation of criminal cases has to be carried out with the direct involvement and under the supervision of District Attorneys. Detainees have been guaranteed the right to consult with the lawyer of their choice. Article 135 of the Interim Constitution empowers the Office of the Attorney General to investigate any complaints or allegations of torture and ill-treatment. Compensation has been provided to victims of torture as directed by a court of law. The internal process for the ratification of the Rome Statute is ongoing. The NHRC has been granted “A” status and has acquired constitutional status under the Interim Constitution, 2007. The head of the commission as well as other commissioners have been appointed. Its financial resources have doubled and the State party has been implementing the recommendations of the NHRC and continues to be committed to cooperating with the work of the Commission.

37. The Ministry of Home Affairs issued guidelines on human rights for its law enforcement officials. The guidelines target Chief District Officers, Prison Officials, Immigration Officials as well as Nepal Police and Armed Police Force officials. The Ministry regularly monitors the implementation of those guidelines and does the necessary follow up. Nepal has been implementing the National Human Rights Action Plan (NHRAP) since 2004 and, in 2008, following a comprehensive review of the same to align it with the realization of economic, social and cultural rights in general and the Millennium Development Goals in particular, another three-year NHRAP has been adopted which is presently under implementation. The reformulated NHRAP includes, among others, separate chapters on Prison Management and Reform. This has introduced a human rights-based approach to national development efforts.

38. A high number of awareness-raising and sensitization programs were launched for security personnel on the importance of complying with the provisions of the Convention when dealing with law and order situations. The visit to Nepal of the Special Rapporteur on the question of torture and the submission of Nepal’s second periodic report for its examination by the Committee, were some of the examples of the State party’s efforts to honor its commitments under the Convention. Even during the time of conflict, Nepal responded in an open manner to reported cases of torture received through the Special Rapporteur on the question of torture. The practice of torture as a resort to extract confessions or solicit information from detainees or for any other purposes is strictly prohibited by Nepali law and such confessions are not admissible as legitimate evidence before a court of law. The State party insists that it has no policy to allow torture as a method of criminal investigation.

39. On the vetting of security personnel, the State party emphasized that it had introduced such a system on its own initiative. Since 15 May 2005, the Nepal Army had implemented the policy that those who are found guilty of human rights violations are disqualified from participating in United Nations peacekeeping missions.

40. The State party therefore did not agree with the allegation of “systematic practice of torture” in Nepal and firmly rejected it. It was also of the view that individual remarks reportedly made by some officials in private should not be generalized as a state policy and that to conclude that there is a widespread use of torture, merely on the basis of a number of allegations is exaggerated and does not recognize the efforts made by national authorities to fight against such crime. On the basis of the observations outlined above, the State party requested the Committee to withdraw the inquiry procedure.

B. Information received from United Nations sources, non-governmental organizations, and national human rights institutions

1. The practice of torture and extrajudicial killings

(a) United Nations sources

41. According to the 2009 OHCHR report, during the period under review OHCHR Nepal documented 93 cases of torture and ill-treatment, as well as a number of cases of unlawful detention. Generally, allegations of illegal detention, ill-treatment, torture and other related violations were made against the Nepal Police (NP) and forest officials. Allegations against members of the Armed Police Force (APF) and the Nepal Army (NA) mostly involved claims of excessive use of force occasionally amounting to extrajudicial killings in controlling law and order situations and alleged poaching in national parks respectively.

(i) Widespread torture, particularly during interrogation

42. The 2009 report of the United Nations High Commissioner for Human Rights on the human rights situation in Nepal¹³ states that reports of ill-treatment sometimes amounting to torture were widespread, especially during interrogation. In his follow-up report of 4 March 2011, the Special Rapporteur on the question of torture also found that reports of beatings and ill-treatment sometimes amounting to torture were widespread in Nepal, especially during interrogation.¹⁴

43. The Special Rapporteur noted with concerns the reports of discriminatory targeting of detainees from certain ethnic minorities and lower castes, as well as the reported cases of torture in the Southern part of Nepal.¹⁵ He further notes that police continue to use torture in all parts of the country to coerce confession during interrogation.¹⁶

(ii) Torture of children in custody

44. The Special Rapporteur reported that 25.5 per cent of juveniles held in police custody from October 2008 to June 2009 claimed they were tortured or ill-treated. While this figure was 3.3 per cent lower than that documented in the period from January to September 2008, it remained significantly higher than the rate for the adult population (18.8 per cent). The Special Rapporteur cautioned that the Nepal's continued detention of juveniles in facilities meant for adults presented grave human rights concerns, as children housed with adult offenders are vulnerable to rape and other abuses.¹⁷

(iii) Incommunicado detention

45. A joint study issued by United Nations experts on 19 February 2010 on global practices in relation to secret detention in the context of counter terrorism¹⁸ addresses

¹³ Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal (A/HRC/10/53), 3 March 2009.

¹⁴ Follow-up report of the Special Rapporteur on torture, A/HRC/16/52/Add.2.

¹⁵ *Ibid.*, p. 170.

¹⁶ *Ibid.*, p. 177.

¹⁷ *Ibid.*, p. 188.

¹⁸ Joint Study on Global Practices in relation to Secret Detention in the Context of Terrorism of the Special Rapporteur on the promotion and protection of human Rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel,

practices of ill-treatment in secret detention places. The joint study particularly referred to two OHCHR reports on ill-treatment of detainees in two secret detention sites within Nepal Army barracks, the Maharajgunj barracks in Kathmandu (2006) and Chisapani barracks in Bardiya district (2008).

46. In 2007, following the end of the armed conflict, OHCHR documented several cases of detainees accused of belonging to armed groups being held for short periods in unacknowledged, incommunicado detention, in the worst case for 11 days.¹⁹ In June 2007, the Supreme Court of Nepal issued a ground-breaking judgement in response to petitions for the writ of habeas corpus in dozens of cases, ordering the Government to establish a Commission of Inquiry into Disappearances complying with international standards, to enact a law to criminalize enforced disappearances, to prosecute those responsible for past disappearances and to compensate families of victims. However, in his 2011 follow-up report, the Special Rapporteur on the question of torture stated that police regularly deny that suspected members of armed groups are in police custody and hold individuals incommunicado for multiple days before acknowledging that they are in detention or granting organizations such as OHCHR or the NHRC access to them. The Special Rapporteur regretted that the State party had not taken steps to make incommunicado detention and secret detention illegal and called upon the State party to release immediately the reported large number of detainees held arbitrarily by APF at unknown locations.²⁰

(iv) *Abuses in the Terai region*

47. In its Summary of Concerns (July 2010), OHCHR investigated allegations of extrajudicial killings²¹ in the Terai region, focusing exclusively on allegations related to unlawful means used by security forces during their operations, resulting in the deaths of civilians. The Government introduced the Special Security Plan (hereafter “SSP”) at the end of July 2009. Despite the fact that the SSP incorporates a commitment to protecting human rights, credible allegations of unlawful killings have continued to surface, most of which, according to information received by OHCHR, had been left uninvestigated. In its report as well as in previous investigations, OHCHR documented a pattern in which security forces resort to the use of excessive and sometimes unwarranted lethal force during their operations. Additionally, the United Nations Country Team in Nepal has objected to the lack of criminal prosecutions against alleged perpetrators of such acts.

48. The 2010 OHCHR Summary of Concerns particularly addresses cases in which a death occurred after a person was taken under the control of Nepal Police, Armed Police Force or Nepal Army personnel, or where a person was killed during a security forces’ operation at a time when the person did not pose a serious threat to life and where other means for law enforcement were available. These allegations often contradict official accounts that the person died as a result of cross-fire during an encounter. Between January 2008 and June 2010, OHCHR received reports of 39 incidents, resulting in 15 deaths,

inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on Arbitrary Detention, represented by its vice-chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its chair, Jeremy Sarkin (A/HRC/13/42), para. 182.

¹⁹ Ibid., para. 186.

²⁰ Follow-up report of the Special Rapporteur on the question of torture (A/HRC/16/52/Add.2), p. 170.

²¹ According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, an extrajudicial killing may be defined broadly as any killing that violates international human rights or humanitarian law, including “unlawful killings by the police”, “deaths in military or civilian custody” and “patterns of killings by private individuals which are not adequately investigated and prosecuted by the authorities”, report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the situation in the United States of America (26 May 2009), (A/HRC/11/2/Add.5), para. 3.

which involved credible allegations of the unlawful use of lethal force. All but two of these incidents allegedly took place in the Terai districts of the Eastern and Central Regions. First Information reports (FIR, the initial complaint to the police which formally initiate the investigations) initiated by relatives were registered in a few cases. In several cases, the police claim to have initiated their own investigations. However, none of these investigations have resulted in serious disciplinary or criminal action against the alleged perpetrators.

(v) *Failure of safeguards intended to protect against torture*

a. Records of detention

49. In his 2011 follow-up report, the Special Rapporteur on the question of torture stated that detainees in police custody continue to be held beyond the 24-hour period permitted by law and that the police continue to keep inaccurate records of detention in which they falsify the date of arrest.²² A lack of accurate record-keeping in many prisons and police detention facilities makes it difficult to hold police personnel accountable for these violations.²³ According to the Police Act, police authorities are obliged to maintain a standardized register indicating all complaints and charges, names of the arrested persons, names of the complainants, the offence for which persons were arrested, the arms or property recovered from them or from other sources, as well as names of the witnesses summoned. However, the practice of using ad-hoc registers and notebooks instead still remains a problem. The police often do not record the actual date of arrest in order to adjust it to give the impression the 24-hour limitation has been complied with. In cases where a detainee is released within a couple of hours or in the first few days after the arrest, records of it are not being kept. In addition, access to relatives and lawyers is normally granted only when detainees are brought before a court.²⁴

b. Required medical examinations of detainees

50. The 2009 OHCHR report mentioned that detainees in police custody, including those who had been abused, often went without medical care; and health examinations were poorly documented. Although detainees increasingly reported being taken for medical examination at the time of arrest in cases brought under the Compensation relating to Torture Act of 1996 (CRT), OHCHR expressed serious concerns regarding the quality of these examinations. Often, junior staff members were assigned the task of conducting medical check-ups of detainees brought to the hospital by police, and members of the police often insisted on staying with the patient while he/she was being examined, claiming a risk of escape. Detainees were rarely taken for examination at the time of transfer to the prison or at the time of release, despite the fact that such examinations are crucial in order to determine whether possible physical injuries or mental suffering were sustained during the individual's time in custody. Additionally, quite commonly, doctors underreported injuries out of concern for their own security and fear of reprisals. OHCHR determined that medical check-ups were mere formalities as police routinely took a group of detainees to a doctor, who simply asked whether they had any injuries or internal wounds and failed to physically examine them. OHCHR further found that doctors often fail to provide courts with adequate descriptions of detainees' medical condition as they fear being threatened by the police and Chief District Officers if they are to provide an adequate medical report.²⁵

²² Follow-up report of the Special Rapporteur on torture, A/HRC/16/52/Add.2, p. 174.

²³ *Ibid.*, pp. 174–175.

²⁴ *Ibid.*, pp. 175–176.

²⁵ *Ibid.*, p. 179.

- c. Prohibition of the use of self-incriminatory statements obtained by force in court proceedings

51. The Special Rapporteur on the question of torture noted that although under the CRT and Evidence Act, self-incriminatory statements obtained by force are inadmissible in court proceedings, police continue to use torture to coerce confessions, and judges do not generally restrict the admissibility of evidence obtained during interrogation in absence of the lawyer and rarely ask detainees whether their statements were given freely. Confessions remain the central piece of evidence in most cases. Therefore, incidents of beatings and ill-treatment during interrogation remain widespread.²⁶ It is very common for detainees to be forced to sign statements without being able to read them beforehand. This is sometimes due to illiteracy but mainly because the police refuse to give detainees an opportunity to read their statement. Further, although the prosecution carries the burden of ultimately proving a defendant's guilt, each defendant has to "persuade" the court of the "specific fact" that a statement was not freely given (Section 28, State Cases Act). In practice, this means that forced confessions are routinely accepted unless the defendant is able to produce some compelling evidence demonstrating that coercion or torture took place.²⁷ Moreover, the Special Rapporteur noted that there is no provision for video and audiotaping of interrogations in Nepal.²⁸

- d. Lack of investigations into allegations of inhumane treatment of persons in custody

52. The Special Rapporteur further noted that although article 135, paragraph 3(c), of the Interim Constitution gives power to the Attorney General's Office to investigate allegations of inhumane treatment of any person in custody and gives the necessary directions under the Constitution to the relevant authorities to prevent the recurrence of such a situation, prosecutors and judges rarely question detainees brought before them about their treatment in police custody. While he acknowledged that judges and court staff have recently tended to be more cooperative with victims of torture and lawyers, he noted that in many cases, judges rely solely on police reports in reaching determinations and do not even require the accused to be physically present.²⁹

(b) Non-governmental organizations and national human rights institutions

53. After the Committee had initiated the confidential procedure under article 20, it also received a number of additional well-documented reports from NGOs, including Advocacy Forum (AF), REDRESS, the Centre for Victims of Torture Nepal, the Asian Legal Resource Centre, Human Rights Watch and Amnesty International, on the human rights situation in Nepal and the major concern of widespread torture, particularly in police custody. A number of reports were also received in the context of the Committee's drafting of its list of issues prior to reporting to Nepal in November 2010. In May 2010, while the confidential procedure under article 20 had already been initiated, the NGOs REDRESS and Advocacy Forum drew the Committee's attention to major concerns of widespread torture and therefore requested that the Committee initiate a confidential procedure pursuant to article 20 of the Convention to investigate the systematic use of torture in Nepal.

²⁶ Ibid., p. 177.

²⁷ Ibid., p. 177.

²⁸ Ibid., p. 178.

²⁹ Ibid., p. 178.

(i) *Torture during interrogation*

54. While the practice of torture in Nepal has significantly decreased since the signing of the Peace Agreement in 2006, it remains widespread during interrogation in police custody and has seen a problematic resurgence since the beginning of 2009. Advocacy Forum-Nepal (AF) and the Redress Trust (REDRESS), the Centre for Victims of Torture, Nepal have in particular provided data to the Committee that they assert reflects an ongoing pattern of habitual and widespread torture in Nepal.

55. During the universal periodic review (UPR) of the Human Rights Council on the situation of Nepal in January 2011, this assessment was also endorsed by National Human Rights Institutions (National Human Rights Commission of Nepal, the National Women Commission of Nepal and the National Dalit Commission of Nepal), which noted that torture is frequently practiced in detention.³⁰ Also during the universal periodic review, a number of NGOs expressed their concerns regarding the practice of torture by the police in the course of criminal investigations and the lack of effective redress for victims of torture.³¹

56. In May 2011, AF and REDRESS indicated that while the rate of reported torture in Nepal has gradually declined since 2001, there has been an apparent reversal in this trend from 2009 and more importantly in the period of July to December 2010.³² During the period from January to December 2009, around 20 per cent of detainees interviewed reported torture, and during the period January–December 2010, this number remained largely consistent, with 19.3 per cent of 4,198 detainees interviewed alleging torture.³³ As there is no independent mechanism in place to monitor detention conditions throughout the country; AF notes that its data, gathered at 57 places of detention in 20 of Nepal's 75 districts, is only suggestive of wider patterns across the country. However, given the consistency with which patterns of torture that it has documented have emerged over time, AF is confident that they are reflective of national trends.³⁴

57. AF and REDRESS reported that since the end of the armed conflict, torture and ill-treatment are most commonly reported to be carried out by the Nepal Police (NP), the Armed Police Force (APF) (especially in the Terai region), customs officers and officials of the Forestry Department (who have powers to arrest and investigate in national parks). Members of the Young Communist League (YCL), the youth wing of the Communist Party of Nepal-Maoist and similar youth organizations set up by other political parties, and a number of armed groups operating in the Terai are also alleged to have committed acts amounting to torture and ill-treatment.³⁵

58. As for the methods of torture or other ill-treatment used, the Centre for Victims of Torture Nepal has stated that public officials employ 70 different methods of torture in detention. Advocacy Forum has also recorded these practices. They include beatings on various parts of the body, kicking and punching on various parts of the body including on thighs, hips, shoulders, back and head; slapping; application of electric current, including

³⁰ Joint report by the National Human Rights Institutions, para. 15.

³¹ See NGO submissions to the Human Rights Council's universal periodic review concerning the human rights situation in Nepal: Submission of ALRC_AF, para. 14 and submission of Amnesty International, para. C, p. 5, "Torture and other ill-treatment".

³² "Submission to the Committee against Torture under article 20", Update January–December 2010, Advocacy Forum and REDRESS, 29 April 2011, p. 1.

³³ *Ibid.*, p. 1.

³⁴ *Ibid.*, p. 2.

³⁵ "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 7.

on ear lobes; jumping and kicking on the body; tying the legs and arms and suspending the detainee upside down; trampling on the detainee's palms until they bleed; gagging the detainee to avoid noise; handcuffing the detainee to a post or stump fixed on the wall, forcing him/her to stand all night; making a detainee run or jump after being hit on the soles of the feet; forcing the detainee to adopt a half-sitting position for 15–20 minutes; stubbing out cigarettes on the body; plucking ears and pinching body parts; pouring water into the nose; formulating threats; using other types of verbal abuse; and using forced labour. Specific methods of torture used against women include rape, threats of rape, sexual abuse and sexual verbal abuse. Most of these practices are reported during interrogation although beating, slapping, blindfolding and using verbal abuses have been reported at the time of arrest and during transfer to police stations.³⁶

(ii) *Torture of children in custody*

59. NGOs report that despite the adoption of the Juvenile Justice Regulations in 2006, juveniles in custody remain particularly vulnerable to torture in Nepal. AF and REDRESS noted that 23.9 per cent of 1,024 juveniles interviewed by AF during 2010 reported torture or other ill-treatment, a rate that is considerably higher than that for the general population (19.3 per cent in 2010).³⁷ In addition, juveniles from minority ethnic groups allege being more frequently tortured than those belonging to major ethnic groups. For instance, in 2010, a total of 23.4 per cent of juveniles alleging torture belonged to the Chetri Group, 22.1 per cent belong to the Terai ethnic group and 13.5 per cent belonged to the Dalit ethnic group.³⁸

60. AF and REDRESS indicated that the group of detainees that most frequently alleged torture in 2010 was that comprising individuals charged under the Arms and Ammunition Act (42.5 per cent, or 65 of 153 individuals interviewed). People held under the Arms and Ammunition Act can be tried before Chief District Officers (CDOs), without representation by a lawyer or time to prepare their defence. AF claimed that CDOs are in general more likely to accept confessions extracted under torture.³⁹ These fair trial violations correspond to a serious discrepancy in conviction rates between the District Courts and CDOs. In fiscal year 2006–2007, District Courts convicted 72.67 per cent of 4,524 defendants, whereas CDOs convicted 98.27 per cent of 2,516 defendants.⁴⁰

(iii) *Incommunicado detention*

61. The Centre for Victims of Torture Nepal alleged the use of mobile secret detention centres for torture purposes, noting that while the existence of such clandestine places of detention cannot be confirmed, the organization has received frequent allegations from victims that they exist.⁴¹

³⁶ Criminalise torture, Coalition of Torture (Nepal), 26 June 2009. These allegations are also mentioned in the “Submission to the Committee against Torture under article 20”, Advocacy Forum and Redress, 5 March 2010, p. 9.

³⁷ “Submission to the Committee against Torture under article 20”, Update January–December 2010, Advocacy Forum and REDRESS, 29 April 2011, p. 6–7.

³⁸ *Ibid.*, Annex 1 and 2, Table 12.

³⁹ Review of the implementation of recommendations made by the Special Rapporteur on the question of torture, Manfred Nowak, after his mission to Nepal in 2005, Advocacy Forum, September 2010, p. 2.

⁴⁰ “Submission to the Committee against Torture under article 20”, Advocacy Forum and REDRESS, 5 March 2010, p. 20.

⁴¹ “Centre for victims of torture Nepal’s report on the situation of torture in Nepal”, April 2010.

(iv) Abuses in the Terai region

62. NGOs reported that internal disturbances, especially in the Terai region, have led to an increase in both torture and extrajudicial killings by the Nepal Police, the Nepal Armed Police Force and the Nepal Army. According to AF and REDRESS, in recent years, rates of torture are significantly higher than the national average in some particular areas of the country, notably in several districts of the Terai. For instance, 40.9 per cent of detainees interviewed in Dhanusha district, 30.5 per cent of detainees in Sunsari district and 29.3 per cent of detainees in Surkhet district reported torture. All of these districts are located within the Terai region. Moreover, from 2009 to 2010, the trends in reports of torture in the Terai region have increased from 22.4 to 33.2 per cent in the Morang district, from 23.3 to 27 per cent in Banke district, from 21 to 26 per cent in Jhapa district, from 10 to 13 per cent in Kapilvastu district and from 13.4 to 14.5 per cent in Udayapur district.⁴² AF and REDRESS also reported that in 2010, members of the Terai ethnic groups were more frequently subjected to torture than other detainees, as while individuals from Terai ethnic groups make up only 17 per cent of the detainees interviewed, they lodged 22.9 per cent of the allegations of torture recorded.

63. APF has become increasingly involved in arrests related to armed groups in the Terai region. It does not have clear legal powers to arrest and detain. However, in the context of ongoing unrest in the Terai region, its forces have been deployed alongside the NP. Allegations of illegal detention by APF have also been reported. For example, in 2010, AF and REDRESS alleged that torture had occurred at the Hathlewa and Mujeliya APF camp in Dhanusha District as well as at the Pathibara Gan APF camp in Padaguji, Jhapa district.⁴³

64. The Asian Legal Resource Center recorded 12 cases of alleged extrajudicial executions in the Terai region between February and October 2009 involving 15 victims. In most cases the alleged perpetrator was a member of the police, but two cases involved members of the APF. According to ALRC, in each of these cases, the security forces claimed that there had been an “encounter” between the police and alleged members of armed groups. However, there was no indication that members of the police or army were killed or injured in any of these incidents.⁴⁴

*(v) Failure of safeguards intended to protect against torture**a. Records of detention*

65. The Centre for Victims of Torture Nepal also reported that security forces have increasingly tortured or ill-treated individuals on their way to a place of custody. This practice impedes detainees’ ability to prove allegations of torture, as authorities can argue that a detainee’s injuries were sustained either through lawful means of arrest or at the hands of civilians.⁴⁵

66. AF and REDRESS also noted that despite the fact that article 15(a) of the Civil Rights Act (4 November 1955), which is also enshrined in the Interim Constitution, requires that a person be informed of the reason for his/her arrest at the time he/she is

⁴² “Submission to the Committee against Torture under article 20”, Update January-December 2010, Advocacy Forum and Redress, 29 April 2011, p. 5 and 7.

⁴³ “Submission to the Committee against Torture under article 20”, Advocacy Forum and Redress, 5 March 2010, p. 7.

⁴⁴ Submission to the Human Rights Council’s universal periodic review concerning the human rights situation in Nepal, 2010, ALRC_AF, par. 17.

⁴⁵ “Centre for victims of torture Nepal’s report on the situation of torture in Nepal”, April 2010.

detained, in practice, 73.6 per cent of the detainees interviewed by AF in 2009 and 77.7 per cent of those interviewed in 2010 stated that they were not informed to the reason for their arrest at the time they were detained.⁴⁶

b. Required medical examinations of detainees

67. Among the 3968 detainees interviewed by AF between December 2008 and November 2009, 17.2 per cent stated that they had not received a medical check-up during their time in custody; the rate of detainees receiving no medical check-up decreased to 13 per cent in 2010.⁴⁷ However, AF and REDRESS note that while the Compensation relating to Torture Act (CRT) requires that all detainees receive a medical check-up at the time of arrest as well as an examination at the time of release, it does not require that an *independent* doctor perform this examination. To the contrary, it states that such examinations should be performed *as far as possible* by a doctor from Government services, and when such doctor is not available, by the police.⁴⁸ As a result of this provision, detainees rarely, if ever, receive independent medical examinations. The Centre for Victims of Torture Nepal reported that in cases in which individuals accused police of acts of torture, prompting a court to order a medical examination, the police took the detainee to a police hospital or a doctor of their own choice to ensure that the medical report would not reveal signs of torture.⁴⁹

c. Requirement to present detainees before a judge within 24 hours of arrest

68. The 1955 Police Act, the 1955 Civil Rights Act, the 1993 State Cases Act and the Interim Constitution require that a detainee be brought before a judge within 24 hours of arrest. However, these laws are only partly respected in practice: AF and REDRESS reported that 47.1 per cent of the detainees interviewed in 2009 and 47.6 per cent of the detainees interviewed in 2010 were not brought before a judge within this time frame.⁵⁰

d. Right to legal counsel

69. AF and REDRESS reported that 77.6 per cent of the detainees interviewed were not aware of their right to legal counsel under Nepali law, demonstrating that while safeguards against torture in detention may be provided by law, they are not effective in practice.⁵¹

e. Prohibition on the use of self-incriminatory statements obtained by force in court proceedings

70. Some NGOs report that coerced confessions are frequently admitted as evidence in criminal proceedings and that there is little to prevent the police from using physical and mental coercion to compel detainees to confess. AF and REDRESS report that judges rarely ask detainees if their statements were freely given and instead require detainees alleging

⁴⁶ "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 21.

⁴⁷ *Ibid.*, p. 20.

⁴⁸ *Ibid.*, p. 20.

⁴⁹ "Centre for victims of torture Nepal's report on the situation of torture in Nepal", April 2010.

⁵⁰ "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 21.

⁵¹ *Idem.*

coerced confessions to prove that their statements were not freely given, thus reversing the appropriate burden of proof.⁵²

f. Lack of investigations into allegations of inhumane treatment of persons in custody

71. Nepali law does not require judges to inquire whether a detainee has been tortured while in custody. While some judges have made it a practice to ask detainees to remove their shirt and state whether they have been subjected to torture by the police, others do not. This practice is therefore not uniform among judges. Among the detainees interviewed by AF, 93.3 per cent of those taken to court in 2009 and 86.7 per cent of those taken to court in 2010 were not asked by the judge if they had been subjected to torture.⁵³

2. Impunity

(a) United Nations sources

72. Impunity for past and current human rights violations remains a central concern expressed in all United Nations reports, including the 2010 report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process,⁵⁴ the 2010 report of the United Nations High Commissioner for Human Rights,⁵⁵ OHCHR-Nepal Summary of Concerns (July 2010) on allegations of extrajudicial killings in the Terai and the 2011 follow-up report of the Special Rapporteur on the question of torture.⁵⁶

(i) *Failure to undertake adequate investigations into allegations of torture and to prosecute and punish those responsible*

73. As the Special Rapporteur on the question of torture noted in his 2011 follow-up report, there is no credible information demonstrating that any criminal prosecution and conviction against authorities indicted for abuse or torture has occurred in Nepal.⁵⁷ In general, from the interviews he conducted, the Special Rapporteur found a lack of confidence in the justice system and the rule of law on the part of victims and their families. In his 2011 follow-up report, he concluded that the civilian judicial system has failed to deliver justice as the State authorities themselves fail to observe court orders.⁵⁸ He also expressed his concern that a number of laws granting quasi-judicial powers to Chief District Officers (CDOs), and imposing only disciplinary sanctions and lenient penalties imposed on public officials for their alleged involvement in torture and ill-treatment, contribute to the culture of impunity.⁵⁹ He noted that the Police Act provides for disciplinary actions and lenient penalties for police officers involved in torture.⁶⁰ He further noted that only individuals who are found guilty of human rights violations are disqualified from

⁵² "Submission to the Committee against Torture under article 20", Advocacy Forum and Redress, 5 March 2010, p. 22.

⁵³ "Submission to the Committee against Torture under article 20", Update January-December 2010, Advocacy Forum and Redress, 29 April 2011, p. 10.

⁵⁴ Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process, S/2010/17, 7 January 2010, par. 27.

⁵⁵ Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal, A/HRC/13/73, 5 February 2010, par. 26.

⁵⁶ Follow-up report of the Special Rapporteur on torture, A/HRC/16/52/Add.2, para. 77.

⁵⁷ Ibid., pp. 181–182.

⁵⁸ Ibid., pp. 181–182.

⁵⁹ Ibid., para. 77.

⁶⁰ Ibid., p. 171.

participating in United Nations peacekeeping, rendering this penalty on perpetrators of torture largely ineffective.⁶¹

74. The 2010 report of the High Commissioner for Human Rights on the human rights situation in Nepal revealed that despite public and private commitments made by the State party, including those made by the Prime Minister before the General Assembly in September 2009, there had been no substantial progress in addressing impunity for conflict or post-conflict human rights violations and abuses; and both the NA and UCPN-M continued to resist attempts to hold their personnel accountable for human rights violations and abuses and to withhold cooperation from civilian authorities responsible for investigating these cases.⁶² The lack of progress in addressing impunity was also raised by the Secretary-General in January 2010.⁶³ Persistent impunity for human rights violations has had a corrosive effect on rule of law institutions and has further damaged their credibility. It has directly contributed to widespread failings in public security by sending a message that violence carries no consequences for the perpetrators.⁶⁴

75. The 2010 High Commissioner's report deplores the Government's lack of response to serious allegations of human rights violations involving Army personnel, including with regard to the non-implementation of orders issued by Nepali Courts. For example, the Kavre District Court issued a decision in September 2009 ordering the Army to suspend an alleged perpetrator, against whom an arrest warrant is outstanding, in the torture and killing of 15-year-old Maina Sunuwar in 2004 and to produce relevant documents, but the Army failed to comply with the order to suspend the suspect, whom it sent on a United Nations peacekeeping mission. The officer was subsequently repatriated by the United Nations. The Nepal Army has refused to surrender him to civilian authorities for an independent investigation, despite requests from the Nepal Police and NHRC. The Government has yet to arrest any of the four accused in the case, even though arrest warrants have been outstanding since July 2008.⁶⁵

76. The 2010 High Commissioner's report notes that although OHCHR extensively documented acts of conflict-related torture and enforced disappearances at the Chisapani barracks in Bardiya district in a public report released in 2008, one of the main alleged perpetrators continues to serve in the Army. The leadership of UCPN-M has likewise failed to cooperate with criminal investigations into the involvement of its cadres in serious human rights abuses during and after the conflict, including the killings of nearly 40 civilians in the bombing of a public bus in Made, Chitwan district in 2005, and the killings of Ram Hari Shrestha, Arjun Lama, and journalist Birendra Sah. OHCHR documented the lack of progress in each of these cases in a letter to the Chairman of the UCPN-M in July 2009.⁶⁶

77. The Special Rapporteur on the question of torture noted that despite repeated requests by OHCHR to the Government to conduct a thorough and impartial investigation into allegations of torture at the Maharajgunj barracks under the control of the NA

⁶¹ Follow-up report of the Special Rapporteur on torture (HRC/16/52/Add.2), pp. 186–187.

⁶² Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal (A/HRC/13/73), 5 February 2010, para. 26.

⁶³ Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process (S/2010/17), 7 January 2010, paras. 27 and 30.

⁶⁴ Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal (A/HRC/13/73), 5 February 2010, para. 27.

⁶⁵ *Ibid.*, para. 29.

⁶⁶ *Ibid.*, paras. 30–31.

Bhairabnath Battalion, no proper investigation has been undertaken and at least one perpetrator continues to serve in the NA.⁶⁷ However, he noted that in December 2007, a site was identified where the body of one of the disappeared may have been cremated, and a group of Finnish forensic experts visited the country in January 2008 and assisted local experts in the exhumation of some of the remains, and that additionally an 11-member team of Nepali and Finnish forensic experts led by the NHRC has started exhumations with regard to cases of disappearance in Dhanusha district.⁶⁸

78. The Special Rapporteur on the question of torture further criticized the performance of the “Human Rights Cell” set up within the Nepal Police, stating that its concept of “investigation” appeared to comprise mainly sending a letter with details of the complaint to the relevant District Police Office and requesting a response from that office, without actually visiting the detainees making the complaint and interviewing them privately. At the time of writing, no police officer had been suspended as a result of an investigation by the Human Rights Cell and in no cases had the Human Rights Cell visited a complainant and interviewed him/her privately to ascertain the veracity of the allegation.⁶⁹

79. The Special Rapporteur on the question of torture further noted that the Attorney General himself stated in May 2010 that its department was not entrusted with the investigation of ill-treatment in custody as stated under Section 135(3) of the Interim Constitution, but rather only had the power to monitor investigations carried out by the police.⁷⁰

(ii) *Failure to criminalize torture in line with the definition provided in the Convention and to provide adequate redress to victims of torture*

80. In 2005, following his visit to Nepal, the Special Rapporteur on the question of torture expressed deep concern about the prevailing culture of impunity for torture in Nepal, especially the emphasis on compensation to victims as opposed to criminal sanctions against perpetrators. Although officials cited the 1996 Compensation Relating to Torture Act (CRT) as being an effective preventive and deterrent measure against the practice of torture, the Special Rapporteur noted that the Act does not contain a definition of torture in line with article 1 of the Convention, nor does it provide for effective remedies; it does not provide for the criminalization of torture or the imposition of punishment commensurate with the gravity of torture. In the view of the Special Rapporteur on torture, the sanction of “departmental action” against perpetrators is so grossly inadequate that any preventive or deterrent effect envisaged by the Act is meaningless in practice. The Special Rapporteur was of the view that, if the Act did anything, it actually prevented and discouraged torture victims from seeking and receiving justice for torture and ill-treatment.⁷¹

81. The 2010 report of the High Commissioner for Human Rights noted that gaps and ambiguities in Nepal’s legal framework further hampered the prosecution of human rights violations in Nepali Courts and that neither torture nor enforced disappearance has been

⁶⁷ Follow-up report of the Special Rapporteur on torture, A/HRC/16/52/Add.2, p. 180.

⁶⁸ Ibid., p. 179.

⁶⁹ Ibid., pp. 180–181.

⁷⁰ Ibid., p. 180.

⁷¹ Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (E/CN.4/2006/6/Add.5), 9 January 2006, p. 3.

criminalized in Nepali legislation, placing additional obstacles in the way of victims and families seeking accountability in an already impaired criminal justice system.⁷²

(b) Non-governmental organizations and national human rights institutions

82. NGOs concur with the view that impunity for human rights violations remains the norm in Nepal with respect to both past human rights violations, which occurred during the armed conflict, and more recent human rights violations. They highlighted the impunity of police officers and other officials repeatedly accused of torture and the failure of prosecutors and judges to carry out investigations on allegations of torture.⁷³

(i) Failure to undertake adequate investigations into allegations of torture and to prosecute and punish those responsible

83. NGOs point out that impunity continues to impede justice for recently committed crimes, such as in the case of Amrita Sunar, Devisara Sunar and Chandrakala Sunar, who were killed on 10 March 2010. Two survivors claim that the women were part of an unarmed group of villagers collecting Kaulo (medicinal tree bark) when about 17 army personnel surrounded them and opened fire, resulting in the three deaths. The Nepal Army claims that the three victims were killed during an exchange of gunfire with armed poachers. AF and the Informal Sector Service (INSEC) made their own investigation to support the victims' relatives. On 12 March 2010, the Bardiya police went to the crime scene to investigate. Their efforts were vain, partly because of the army's unwillingness to cooperate. On 25 March 2010, the relative of one of the victims managed to have the police register a FIR against the 17 army personnel and four forestry officials. According to the families, army personnel threatened them, and coerced them into signing an agreement to withdraw the FIR in exchange of 25,000 NRS (US\$ 340).⁷⁴ On 17 March 2010, an investigation committee led by an assistant attorney general was set up to look into the incident. It submitted its report to the Government on 19 April 2010. The Government subsequently appointed a ministerial committee to study its findings. The findings have still not been made public and no concrete action has been taken.⁷⁵

84. NGOs also raised the case of Dharmendra Barai, who died on 4 July 2010, after having been allegedly tortured in police custody. Both national and local governmental authorities set up investigations in response to the outcry from civil society following his death. On 18 July 2010, the Home Ministry set up an investigation team, which visited the place where the alleged torture occurred. However, as late as November 2010, the team had not yet published a report. On 3 August 2010, another investigation team, set up by the district administration, made its report public. The report concluded that the cause of death was unknown and that there was insufficient proof that torture was the cause of death. It said the police had failed to take Dharmendra for a medical check-up at the time of arrest and to notify the higher authorities of his arrest. It recommended to the Government to provide the victim's family with compensation. The Government only paid 20,000 NRS to

⁷² Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal (A/HRC/13/73), 5 February 2010, para. 32.

⁷³ Submissions to the Human Rights Council's universal periodic review by NGO coalitions, including Amnesty International, International Commission of Jurists, Advocacy Forum and the Asian Legal Resource Centre (ALRC), 2010.

⁷⁴ Under the State Cases Act and its regulations, a FIR cannot be withdrawn once it has been registered unless decided by the Attorney General.

⁷⁵ "Indifference to duty, impunity for crimes committed in Nepal", Human Rights Watch and Advocacy Forum, December 2010, p. 15.

cover the funeral costs. The case is pending in court and no disciplinary action has been taken. On 22 August 2010, the victim's father tried to have a FIR registered but the police refused to do so, stating that it had already registered a FIR and that investigations had been carried out.⁷⁶

85. AF noted that in practice, proceedings against individuals accused of torture are rarely initiated as there is no impartial mechanism for receiving and investigating complaints of torture, and the police are the authority in charge of receiving these complaints.⁷⁷ Even when complaints reach the police, the latter routinely refuse to accept them from relatives of victims and to register First Information Reports (FIRs). And when FIRs are registered, police and prosecutors routinely procrastinate in carrying out investigations, sometimes despite superior's orders or court's rulings. This behaviour can be attributed to the great influence of the Nepal Army and the Maoist forces and police's knowledge that neither the army nor political parties will cooperate with the investigation. Following the release of AF report "Waiting for Justice" in October 2008, the NGO helped families of 51 victims file a total of 30 FIRs with the police, and on 10 December 2009, Human Rights Day, families of victims and lawyers tried to file another 28 FIRs with the police authorities in 12 districts. The police refused to register any of the FIRs submitted, stating that they first had to consult with higher authorities.⁷⁸

86. NGOs also raised a number of cases in which accusations of torture and enforced disappearances have been brought against high-ranking officers of the Nepal Army but in which no prosecutions have occurred. Instead, in some of these cases, the alleged perpetrators have been promoted. For example, Toran Bahadur Singh, former commander of the 10th Brigade, was accused of involvement in cases of enforced disappearances and custodial torture in the notorious Maharajgunj barracks in Kathmandu in 2003 and 2004. Singh was later promoted and appointed as Major General, acting as army chief in October 2009.⁷⁹

87. NGOs also report impunity for torture and disappearances committed by the Unified Communist Party of Nepal-Maoist (UCPN-M). In the case of Arjun Bahadur Lama, who disappeared after his abduction by the Maoists in 2005, UCPN-M have not cooperated with investigations made by the police and the NHRC, arguing that such cases should be dealt with through transitional justice mechanisms that have yet to be established.⁸⁰

88. NGOs have observed a lack of consistency and respect for higher courts' jurisprudence by the Appellate Court in several instances. In its ruling of 18 September 2007 regarding the torture and death of Maina Sunuwar, the Nepal Supreme Court decided that civilian courts had jurisdiction over alleged criminal acts committed by security forces during the armed conflict. In the Reena Rasaili ruling of 14 December 2009, the Supreme Court stated that an act declared a crime by law is a crime notwithstanding the identity or status of the perpetrator or the circumstances in which these acts occurred. The Court added that "the law does not prevent anyone from investigating a FIR stating that a woman sleeping at night in her home was forcefully arrested and shot dead by the army or security personnel. It would be a mockery of the law and of the national rights of civilians".⁸¹

⁷⁶ "Indifference to duty, Impunity for Crimes Committed in Nepal", Human Rights Watch and Advocacy Forum, December 2010, p. 15.

⁷⁷ "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 25.

⁷⁸ "Indifference to duty, impunity for crimes committed in Nepal", Human Rights Watch and Advocacy Forum, December 2010, p. 4.

⁷⁹ *Ibid.*, p. 10.

⁸⁰ *Ibid.*, p. 10.

⁸¹ Supreme Court of Nepal, ruling of 14 December 2009 in Writ no. 0339/2064 (2007), p. 4.

However, despite this ruling, some appellate courts have continued to reject writ petitions on the ground that civilian courts were not competent to deal with complaints against security personnel, whereas some other appellate courts apply the 2007 Supreme Court ruling.⁸²

89. NGOs have also reported problems with implementation of court orders, noting the case of the inquiry into the death of 15-year-old Maina Sunawar, in which a court martial ruling sentenced the three officers allegedly responsible for her death to six months in prison and a temporary suspension of promotion (September 2005). Thereafter, acting on a complaint by the victim's mother, a District Court charged four army officers with Maina Sunawar's murder and issued arrest warrants against the officers in January 2008. To date, they have not been arrested. On the contrary, in mid-2009, one of the accused was sent by the Nepal Army on a peacekeeping mission in Chad. The United Nations repatriated him to Nepal in December 2009, but the army took him into their custody on his arrival at the airport in Nepal and has so far not handed him over to the civilian authorities, despite the court orders and orders from the Prime Minister.⁸³

90. Similarly, in August 2010, the Prime Minister's Office issued a response to the Supreme Court, stating that the perpetrators would be punished following an investigation by the to-be-formed commission, referring to the Truth and Reconciliation Commission, which has not yet been established. This ignores an earlier Supreme Court ruling rejecting police attempts to delay investigations on the basis that these could only be performed by such a commission.⁸⁴ Similarly, following United Nations Human Rights Committee Views on the disappearance of Surya Prasad Sharma, the Government of Nepal stated that the author's disappearance would be investigated by the yet-to-be established Commission on the Inquiry into Disappearances, thus failing to respect Human Rights Committee Views to prosecute those responsible in a timely manner.⁸⁵

91. NGOs have further submitted that delays in establishing mechanisms such as the Truth and Reconciliation Commission and the Commission on the Inquiry into Disappearances contribute to the state of impunity in Nepal as they show a persistent lack of political will to investigate past gross violations of human rights, including approximately 1,000 cases of enforced disappearances and abductions which remain unsolved since the end of the conflict.⁸⁶

(ii) *Ineffectiveness of the National Human Rights Commission*

92. In its 2007–2008 annual report, the National Human Rights Commission cited the lack of implementation of its recommendations by the Government as one of the major challenges in its work. The NHRC received 1,173 complaints of human rights violations, including 104 of torture by security forces from 17 July 2007 to 14 July 2008. It conducted a total of 175 investigations, and made recommendations in 62 cases. None of its recommendations were implemented. The NHRC has repeatedly expressed frustration at

⁸² "Indifference to duty, Impunity for Crimes Committed in Nepal", Human Rights Watch and Advocacy Forum, December 2010, p. 7.

⁸³ "Submission to the Committee against Torture under article 20", Advocacy Forum and Redress, 5 March 2010, p. 27.

⁸⁴ Supreme Court ruling of 10 March 2008 in Writ. No. 1231 (2007).

⁸⁵ Human Rights Committee, *Yashoda Sharma v. Nepal*, communication No. 1469/2006, Views adopted on 28 October 2008.

⁸⁶ "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 27. See also "Recipe for impunity at work in Bardiya National Park", Asian Commission for Human Rights; see www.humanrights.asia/news/ahrc-news/AHRC-STM-081-2010/.

the Government's lack of implementation of its recommendations. In August 2010, it stated that, of the 386 recommendations made, the Government had implemented only 34.⁸⁷

93. NGOs also raised concern regarding the efficiency of NHRC's work. From 16 July 2008 to 14 July 2009, 677 complaints of human rights violations were reportedly brought to the Commission's attention.⁸⁸ This includes 70 allegations of torture by security forces. Out of these 70 cases, the NHRC investigated only three. In two of the three cases, it recommended action against the perpetrators, and in all three cases, compensation.⁸⁹ The annual report does not provide information on the reason why the remaining 67 cases were not investigated. Similarly, a joint study from the NHRC and CVICT, which examined the cases of 594 torture victims in five districts, revealed a high prevalence of torture as a consequence of which victims suffer from serious physical and mental problems and associated disabilities.⁹⁰ The NHRC did not take the initiative to process these cases for compensation but only called on human rights organizations to put in place immediate rehabilitation services for torture victims.⁹¹

(iii) *Failure to criminalize torture in line with the definition provided in the Convention*

94. According to AF, although the Interim Constitution promulgated in January 2007 made torture a criminal offence, it is still considered a civil offence since no bill on torture (providing criminal penalties for torture acts), has been passed to date.⁹² Without legislation expressly defining the offense, perpetrators can only be charged under the assault provision of the Muluki Ain (Country Code). There are no criminal sanctions provided for in the 1996 Compensation relating to Torture Act (CRT).⁹³

95. Despite a landmark ruling of the Supreme Court in 2007 and the initiation of a Commission on Disappeared Persons bill, there have been no major positive developments to resolve disappearance cases or to criminalize enforced disappearance in Nepali law.⁹⁴

(iv) *Failure to provide adequate redress to victims of torture*

96. NGOs report that despite the existence of the Compensation relating to Torture Act (CRT), victims of torture are rarely able to access compensation. Since the enactment of the CRT, out of 160 cases filed by the Centre for victims of Torture Nepal for torture compensation, 8 have received some compensation out of the 50 with positive decisions in favour of victims. Due to this lack of access to justice and reparations, victims have lost confidence in the judicial system and have become increasingly reluctant to bring compensation cases to court. In cases where victims obtain some form of compensation, it is usually awarded with significant delays. The compensation amounts provided are very

⁸⁷ "Discrimination and Irregularities, The Painful Tale of Interim Relief in Nepal", A report, Advocacy Forum, 2010, p. 6.

⁸⁸ NHRC Annual report July 2008 to July 2009, only available in Nepali and therefore referred to in "Discrimination and Irregularities, The painful Tale of Interim Relief in Nepal", A report, Advocacy Forum, 2010, p. 6.

⁸⁹ *Idem*.

⁹⁰ NHRC, "Study on the insurgency related to torture and disability", 2003.

⁹¹ "Discrimination and Irregularities, The painful tale of interim relief in Nepal", A report, Advocacy Forum, 2010, p. 6.

⁹² "Criminalize Torture, Advocacy Forum, 2009, p. 3 and "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 25.

⁹³ "Centre for victims of torture Nepal's report on the situation of torture in Nepal", April 2010.

⁹⁴ "Submission to the Committee against Torture under article 20", Advocacy Forum and REDRESS, 5 March 2010, p. 27. See also "Recipe for impunity at work in Bardiya National Park", Asian Commission for Human Rights; see www.humanrights.asia/news/ahrc-news/AHRC-STM-081-2010/.

low, ranging from 10,000 NRS (100 euros) to 100,000 NRS (1,000 euros). But most victims receive the minimum amount, which is not nearly sufficient to cover the costs of their physical and psychological rehabilitation.⁹⁵

V. Conclusions and recommendations of the Committee

97. The Committee recalls the definition of systematic practice of torture adopted at its first inquiry:

The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.⁹⁶

98. The Committee recalls the findings of United Nations bodies, non-governmental organizations, and national human rights institutions cited in this report, including the 2009 report of the High Commissioner for Human Rights on the human rights situation in Nepal,⁹⁷ which mentioned that reports of ill-treatment sometimes amounting to torture were widespread, especially during interrogation; the follow-up report of 4 March 2011 of the Special Rapporteur on the question of torture, who found that reports of beatings and ill-treatment sometimes amounting to torture were widespread in Nepal, especially during interrogation; and NGO reports stating that while the practice of torture in Nepal has significantly decreased since the end of the conflict, it remains widespread during interrogation in police custody and has seen a problematic resurgence since the beginning of 2009, reflecting an ongoing pattern of habitual and widespread torture in Nepal.

99. The Committee further notes that juveniles in custody remain particularly vulnerable to torture in Nepal. Information provided by United Nations bodies and NGOs highlight that juveniles continue to report torture in detention at a higher rate than the general population and continue to be detained in adult facilities and that rates of torture are significantly higher than the national average in several districts of the Terai region. The Committee notes that torture and ill-treatment are most commonly reported to be carried out by the Nepal Police (NP), the Armed Police Force (APF), customs officers, and officials of the Forestry Department in order to coerce confessions.

100. The Committee considers these reports to contain well-founded indications that torture is being systematically practised, and has been for some time, often as a method for criminal investigation and for the purpose of obtaining confessions, in a considerable part of the territory of Nepal.

101. The Committee recalls its earlier conclusions in its first inquiry, where it stated:

⁹⁵ "Centre for victims of torture Nepal's report on the situation of torture in Nepal", April 2010.

⁹⁶ A/48/44/Add.1, para. 39, and A/56/44, para. 163.

⁹⁷ A/HRC/10/53, 3 March 2009.

“The Committee considers that, even though only a small number of torture cases can be proved with absolute certainty, the copious testimony gathered is so consistent [...] that the existence of systematic torture cannot be denied.”⁹⁸

102. The Committee notes the information provided by United Nations bodies and NGOs regarding allegations of widespread torture in Nepal and regrets that Nepal did not agree to a visit to its territory which would have allowed for direct engagement between Committee members and individuals alleging torture, as well as with the relevant authorities. The Committee notes that a number of observers report that while the practice of torture in detention remains widespread, with approximately 20 per cent of detainees reporting being subjected to torture, these reports suggest that today, security forces in Nepal are committing torture at a lower rate than alleged during the conflict era. However, as the Committee has previously determined, a State party may be considered to be systematically practicing torture despite the fact that there has been a decrease in allegations of violations of the Convention in the years in which the investigation has occurred.⁹⁹ The Committee determines that the replies of the State party to these allegations of widespread torture are insufficient to refute them.

103. While noting the State party’s claims that it does not approve of torture acts and that it is committed to end impunity, in the Committee’s determination, the State party has not provided the Committee with clear and practical evidence corroborating this. Nepal has made no substantial progress in addressing impunity for conflict-era human rights violations and abuses. Allegations of torture continue to be made with great frequency despite the end of the armed conflict in 2006, and the State party has failed to adequately investigate all but a handful of these allegations. In rare cases where investigations into allegations of torture have been successfully carried out, those found responsible have not been subjected to criminal penalties, and particularly not to terms of imprisonment commensurate with the gravity of the offense. The Committee recalls its general comment No. 2 where it has stated, in the context of non-State actors, that where State authorities have reasonable grounds to believe that acts of torture or ill-treatment are being committed and they fail to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators, the State bears responsibility and its officials should be considered as authors, responsible under the Convention for consenting to or acquiescing in such impermissible acts. The Committee’s general comment No. 2 further articulates that the failure of the State to exercise due diligence to intervene and stop, sanction and provide remedies to victims of torture, facilitates and enables the commission of acts impermissible under the Convention with impunity, and also that the State’s indifference or inaction regarding torture and ill-treatment provides a form of encouragement and/or de facto permission.¹⁰⁰ Although these principles are articulated in general comment No. 2 with an eye to the commission of torture and ill-treatment by non-State actors, they are undoubtedly applicable in cases such as this, in which it is alleged that agents of the State are directly responsible for the commission of torture and ill-treatment of individuals in their custody.

104. Actions and omissions of Nepal therefore amount to more than a casual failure to act. It demonstrates that the authorities not only fail to refute well-founded allegations but appear to acquiesce in the policy that shields and further encourages these actions, in contravention to the requirements of the Convention.

105. The Committee’s determination as to whether or not torture is being systematically practiced takes into account both the frequency and territorial scope of incidents of torture

⁹⁸ A/48/44/Add.1, para. 38.

⁹⁹ A/56/44, para. 160.

¹⁰⁰ General comment No. 2, para. 18.

in the country and also whether the State party has put effective mechanisms in place to prevent the commission of such abuses. The Committee recalls its general comment No. 2, which notes that States parties are obligated to take positive effective measures to ensure that torture is effectively prevented.¹⁰¹ In this regard, Nepal failed to ensure the effective prosecution of those responsible in cases in which copious evidence of guilt was gathered by NGOs and the NHRC, and particularly in cases in which national courts established the responsibility of those involved. It failed to put an end to practices such as falsification of police and prison registers, police holding individuals incommunicado for multiple days or for periods longer than 24 hours before presentation to a judge, police refusals to register FIRs. It failed to put an end to the implementation of provisions of the Arms and Ammunition Act that violate basic due process guarantees. It failed to ensure that detainees receive medical examinations conducted by independent physicians, that judges exclude confessions obtained through torture from legal proceedings, and that promotions of as well as refusals to suspend officials accused of torture or extrajudicial killings are banned. The State party also failed to implement court orders and recommendations of the National Human Rights Commission. All these practices and acts of negligence contribute to the continuing habitual, widespread and deliberate practice of torture in Nepal. The State party's statements disavowing support for torture and condemning impunity are not independently sufficient to address these shortcomings.

106. The Committee further observes that general comment No. 2 notes that States are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment. Nepal acceded to the Convention on 14 May 1991, 20 years ago, and in its concluding observations on the initial report of the State party,¹⁰² in April 1994, the Committee first recommended Nepal to enact legislation prohibiting torture. This same recommendation was reiterated in April 2007 in the Committee's concluding observations on the second periodic report of Nepal.¹⁰³ As the Committee notes in general comment No. 2, by defining the offence of torture as distinct from common assault or other crimes, States parties will directly advance the Convention's overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention's aim, *inter alia*, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence; (b) strengthen the deterrent effect of the prohibition itself; (c) enhance the ability of responsible officials to track the specific crime of torture; and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention. The State party's inaction with regard to the fundamental obligation of enacting a law criminalizing torture is another factor leading the Committee to conclude that it actively contributes to widespread torture in Nepal, since acts of torture are not yet prohibited and sanctioned under domestic law.

107. The Committee reminds the Government that the Convention against Torture places an obligation on States parties to ensure its implementation in domestic law and to strictly observe its provisions in practice. The information before the Committee does not enable it to conclude that Nepal has established and maintained governmental policies sufficiently effective to prevent torture and to end endemic impunity in Nepal for perpetrators of acts of torture.

108. In light of the abundant and consistent information submitted to it and received from a variety of sources and as found above, the Committee concludes that torture is being

¹⁰¹ CAT/C/GC/2.

¹⁰² A/49/44, paras. 138 to 147.

¹⁰³ CAT/C/NPL/CO/2, para. 12.

systematically practised in the territory of Nepal, according to its longstanding definition, mainly in police custody.

109. In the light of these considerations, the Committee reiterates the following recommendations from its previous concluding observations:

(a) The State party should publicly condemn the practice of torture and take effective measures to prevent acts of torture in any territory under its jurisdiction. The State party should also take all measures, as appropriate, to protect all members of society from acts of torture;¹⁰⁴

(b) The State party should adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the Convention;¹⁰⁵

(c) The State party should send a clear and unambiguous message condemning torture and ill-treatment to all persons and groups under its jurisdiction. The State party should take effective legislative, administrative and judicial measures to ensure that all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and the perpetrators punished.¹⁰⁶

110. Reiterating its recommendation that the State party should demonstrate in practice its will and commitment to combat torture in its territory, the Committee recommends the following measures:

(a) The State party should establish without any delay independent investigative bodies such as the Truth and Reconciliation Commission and the Commission on the Inquiry into Disappearances to inquire into all allegations of torture, extrajudicial killings and enforced disappearances, including the alleged torture and extrajudicial killings which occurred in the Terai region in 2009–2010,¹⁰⁷ the alleged arbitrary detention, torture and disappearance at the Maharajgunj Royal Nepalese Army barracks, Kathmandu, in 2003–2004, and the alleged conflict-related disappearances in Bardiya district (December 2008);¹⁰⁸

(b) Complaints alleging torture by public officials should be promptly, effectively and impartially investigated and offenders should be prosecuted and, if found guilty, convicted with penalties appropriate to the gravity of their acts;

(c) The Office of the Attorney General should be empowered to initiate and carry out investigations into any allegations of torture and should be provided with the necessary financial and human resources to allow them to fulfil this responsibility;

(d) The State party should take immediate effective measures to ensure that all detainees are afforded, in practice, all fundamental legal safeguards from the very outset of their detention; these include, in particular, the rights to have prompt access to a lawyer and an independent medical examination, to notify a relative, and to be informed of their rights at the time of detention, including about the charges laid

¹⁰⁴ CAT/C/NPL/CO/2, para. 13.

¹⁰⁵ Ibid., para 12.

¹⁰⁶ Ibid., para. 24.

¹⁰⁷ A/HRC/13/73, para. 38.

¹⁰⁸ A/HRC/13/42, paras. 180–182.

against them, as well as to appear before a judge within the 24-hour time limit. The State party should also ensure that all detainees are included in a central register and should monitor the performance of officials in maintaining this register accurately;

(e) The Committee calls upon the State party to establish an effective national system to monitor and inspect all places of detention and to follow up on the outcome on such systematic monitoring. It should also ensure that forensic doctors trained in detecting signs of torture are present during these visits;

(f) Law enforcement and military personnel accused of torture should be suspended from their duties as well as from any engagement in United Nations peacekeeping activities, pending the outcome of the investigation into alleged torture and any subsequent legal or disciplinary proceedings;

(g) Where a detainee alleged that a confession was extracted under torture, the prosecution should carry the burden of proof that the confession was made freely;

(h) Alleged human rights violations committed by the Nepal Army and Armed Police Forces against civilians should be investigated and prosecuted by ordinary civilian courts at all stages of the criminal proceedings;

(i) The State party should provide all victims of torture with redress, including fair and adequate compensation, full rehabilitation, and other forms of redress as appropriate without further delay. A victim's ability to file claims for redress should not be subject to statutes of limitations. The State party should ensure that all individuals receive awarded redress promptly. Furthermore, the State party should ensure the establishment adequate reparation programmes, including for medical treatment of trauma and other forms of rehabilitation provided to victims of torture and ill-treatment, and allocate adequate resources to ensure the effective functioning of such programmes;

(j) Juvenile offenders should be separated on the basis of age and seriousness of the offence, as recommended by the Committee in its last concluding observations as well as by the Committee the Rights of the Child;¹⁰⁹

(k) Police stations should not hold detainees without presentation before a judge beyond the 24-hour period prescribed by the law;

(l) Statistics disaggregated by age, sex and race on the number of complaints of torture received and investigations carried out should be compiled in a public document which should be submitted to the Parliament and brought to the attention of the Committee;

(m) In all cases in which a person alleges torture, the competent authorities should guarantee that an independent medical examination is carried out in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). Medical doctors should be trained to identify injuries that are characteristic of torture or ill-treatment in accordance with the Istanbul Protocol. Forensic examinations of detainees should be routine and not dependant on a police request;

(n) The technical and scientific independence of forensic doctors in the execution of their forensic work should be guaranteed, including through placing them under the judicial authority or any other independent authority and separating them from all police structures;

¹⁰⁹ CAT/C/NPL/CO/2, para. 21, and CRC/C/15/Add.261, para. 97.

(o) The State party should consider ratifying the Optional Protocol to the Convention, which would provide for the establishment of a national protection mechanism with the authority to make periodic visits to places of detention;

(p) The State party should consider accepting the competence of the Committee to receive and consider individual communications under article 22 of the Convention.

Part 2

Comments and observations submitted by Nepal on 8 August 2011

111. Nepal received a report adopted by the Committee against Torture under Article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention). The report, supposedly based on abundant and consistent information submitted to the Committee and received from a variety of sources, concludes that torture is being systematically practiced in the territory of Nepal, mainly in police custody. Having gone through the contents of the report, Nepal would like to submit that the information and allegations relied on to reach such a conclusion have no basis in fact.

112. It should be noted that Nepal is undergoing a profound socio-economic and political transformation within an overall framework of democratic polity following the peaceful People's Movement in 2006. The mandate of the Movement comprises peace, change, stability, establishment of a competitive multiparty democratic system of governance, rule of law, promotion and protection of human rights and fundamental freedoms, full press freedom, and an independent judiciary based on democratic values and norms. Human rights remain at the centre of the peace process, which in turn, stands anchored to the principles of democracy, equity, inclusion and participation. The decision of the democratically elected Constituent Assembly to declare Nepal as a Federal Democratic Republic on 28 May 2008 represents a rare peaceful transformation in contemporary history. The transformation process firmly establishes political, economic, cultural and social rights of the people as the bedrock of Nepal's democratic process. Nepal is presently engaged in building national democratic institutions to consolidate democratic gains, expedite the process of socio-economic transformation, and take the peace process to meaningful conclusion including the framing of a democratic constitution by the Constituent Assembly.

113. The Committee's decision to initiate a confidential procedure under article 20 of the Convention seems to have been based on some reports that were published in the framework of a campaign against Nepal going beyond the agenda of protection and promotion of human rights. Thus, Nepal would like to assert that such reports should not constitute part of any credible procedure of human rights treaty bodies in order for them to maintain independence, impartiality and freedom from any kind of influence, be it emanating from the State or international organizations or individuals or entities.

114. The Interim Constitution of Nepal, 2007 (the Constitution) has established the obligation of the State to adopt a political system fully upholding the universally accepted concepts of basic human rights, competitive multiparty democratic system, rule of law and independence of judiciary, while putting an end to impunity. Nepal is undergoing a transitional phase, which is itself a delicate and difficult period. Challenges like corruption and impunity also face any State in this phase. Establishing the rule of law remains a supreme task as well as an essential foundation of any democratic society. Nepal firmly believes that a strong and inclusive democracy can help meet these challenges in a comprehensive and sustainable manner. Accordingly, the Government of Nepal (GON) has

undertaken, and will undertake, a range of measures to address these issues. These measures include enhanced respect for rule of law, focusing on more effective implementation of relevant laws, human rights treaties and directives and recommendations by the Supreme Court and National Human Rights Commission (NHRC), revamping relevant institutions and security bodies with adequate resources and formulating commissions on disappearance, and truth and reconciliation.

115. The Constitution prohibits torture or cruel, inhuman or degrading treatment or punishment and provides constitutional guarantee to any person taken into custody. Any person who suffers from torture or ill treatment is entitled to compensation in accordance with law. The Government of Nepal, Ministry of Home Affairs finalized a draft legislation criminalizing torture fully in line with the Convention against Torture, and forwarded it to the Ministry of Law and Justice for the finalization of the draft bill. Nepal has implemented the Compensation Relating to Torture Act since 1996. Moreover, the Government of Nepal has tabled some important bills to the Legislature-Parliament for enactment. These bills include bills on the penal code and criminal procedure code. They contain provisions, inter alia, prohibiting torture in any form with entitlement of the victims to compensation. Nepal is thus unequivocally committed to the rule of law and under no circumstance condones the practice of torture. Allegations of systematic practice of torture is essentially an unfair and unilateral story created against Nepal. Nepal would also like to note that the Special Rapporteur's interpretation of the situation does not correspond to ground realities. Nepal would like to reiterate that it rejects the conclusion about the existence of systematic practice of torture in its territory. It is also noteworthy that the Constitution prohibits incommunicado detention; incommunicado detention is not practised in Nepal.

116. In 2007, Nepal enacted the Military Act, 2007, repealing the Military Act, 1959. Under Section 62 of the Military Act, 2007, there is a provision to form a committee headed by the Deputy Attorney General to investigate cases regarding corruption, theft, torture and disappearance, and the proceedings of these cases are taken up in the Military Special Court. If there is dissatisfaction with the verdict made by the Military Special Court, under Section 119 of the Military Act, 2007, there is a provision to take the case to the Supreme Court for appeal. Further, under Section 66 of the Act, cases of rape and murder committed by a military person and which involves a civilian, do not fall under the jurisdiction of the Military Act and is taken up by the regular court.

117. Nepal would like to submit that isolated incidents, if any, cannot be generalized as an outcome of deliberate State policy. Nepal neither condones torture nor does it have a State policy to let perpetrators go with impunity. It has always remained serious about any allegation of torture and the persons found guilty of committing torture are brought to justice promptly. Actions have been taken against a number of security officials in this regard. Action has been taken against a total of 571 police personnel, ranging from police constable to deputy inspector general of police. Of these, 375 personnel were subjected to action for the violation of the right against torture and other cruel, inhuman and degrading treatment. A total of 54 armed police personnel have been subjected to action for violations of human rights. The action includes demotion to a lower post, removal from service, withholding of promotion and grade, and suspension. Similarly, the Nepal Army has also punished 285 army personnel in past human rights violation cases. The Nepal Army has conducted investigations into human rights violations, and handed down the following sentences to the army personnel of various ranks: 118 sentences of imprisonment; 62 discharges from service, 40 demotions, 23 forfeits of grade, 26 forfeits of promotion, 8 warnings, 8 sentences to pay compensation to families of victims. Nepal believes that this demonstrates scrupulous attention paid by the security agencies to take each and every incident of human rights violations involving security personnel seriously and to investigate and sentence the perpetrators. It reflects the zero-tolerance policy of Nepal towards human rights violations.

118. Various policy, legal and institutional measures have been adopted to further ensure the integration of human rights principles and values in the entire set up of security agencies. The Nepal Army has been incorporating human rights and international humanitarian law (IHL) package in all training (basic, career and special curricula) conducted by it. A separate training package, inter alia, is also conducted at various locations of Division Headquarters and Brigade Headquarters periodically. In the period between 2007 and 2010, a total of 1032 persons were given human rights and IHL package, sensitizing all staff in basic norms. A total of 367 army personnel have already obtained training on United Nations Security Council Resolutions 1325 and 1820. With the joint effort of the Nepal Army and the International Committee of the Red Cross (ICRC), a training movie about the law of armed conflict has been developed and distributed within the Nepal Army. Similarly, with a view to providing field commanders with quick reference book, an IHL handbook has been published and distributed within the Nepal Army. A zero-tolerance policy has been applied against any violations of human rights and IHL. Commensurate institutional arrangements have been made. The Nepal Army established a Human Rights Directorate in 2006, with basic mandate to impart knowledge to the armed forces about human rights and enable them to fully carry out commitments on human rights. Moreover, there is a human rights division in each Regional Headquarters and human rights sections at the Brigade level, and this provision is planned to be extended up to the operational level. It is also to note that a human rights promotion and grievance handling section has recently been established in the Ministry of Defence. In 2010, a military code of conduct was enforced, which also prohibit any involvement in acts of torture.

119. The Human Rights Unit of Nepal Police has been monitoring operational activities of the police and issued the Nepal Police Human Rights Standing Order to each and every police personnel. The Unit has administered internal investigation on the receipt of human rights complaints. A regular well-functioning mechanism developed within the Nepal Police has responded to and investigated allegations of human rights violations involving police personnel of all ranks. A national committee on IHL was formed in 2007 under the chairpersonship of the Minister for Law and Justice. The committee has been working for the domestication of IHL instruments to which Nepal is a party.

120. The authorities have maintained custody registers in police stations and prisons. The Appellate Court and Chief District Officers are empowered to access the register at any time. Maintenance of custody registers has been made more systematic and detailed so that it reflects the detailed particulars of detainees and their release or transfer. The national human rights institutions including the NHRC, and institutions such as the Office of High Commissioner for Human Rights (OHCHR) and the ICRC have been given access to prisons and places of detention with all requisite cooperation on the part of the GON. The Constitution guarantees the independence of judiciary and the right of a person to seek remedy of habeas corpus. Every detainee has a guaranteed right to seek constitutional remedy and to ascertain the legality of his/her detention.

121. Every person taken into custody is brought for a medical check-up, and the same process is followed when the person is being sent to prison as per the order of the competent court. If any police personnel are involved in torture, the case is immediately investigated and the perpetrators are punished in accordance with law. Similarly, the NHRC has forwarded some 35 cases of compensation in favour of victims of torture from 2007 to date. Compensation in the sum of 1,450,000 Rupees has already been provided to the victims, and the remaining sum is being provided as per the decision of the Council of Ministers.

122. The State Cases Act, 1993 provides that investigation of criminal cases has to be carried out with the direct involvement and under the supervision of District Attorneys.

Detainees have been guaranteed the right to consult with the lawyer of their choice. The Constitution in Article 135 authorizes the Attorney General to investigate into any complaints or allegations of torture and ill-treatment. Compensation has been provided to victims of torture as directed by the courts of law. The Government of Nepal remains engaged in developing requisite legal and institutional infrastructures with a view to acceding to the Rome Statute of the International Criminal Court. Nepal has adopted and implemented an action plan on implementation of the recommendations of the Universal Periodic Review (UPR).

123. The GON has been implementing the recommendations of the NHRC and continues to be committed to cooperating with the work of the NHRC. It has established a database on the status of implementation of the recommendations of the NHRC, and set up a fast track special implementation and follow-up mechanism for the implementation of recommendations.

124. Nepal has been implementing the three-year National Human Rights Action Plan, 2010, following its comprehensive review to align it with the realization of economic, social and cultural rights in general and the Millennium Development Goals in particular. This Action Plan includes, inter alia, separate chapters on peace, security, law enforcement and human rights protection. Legal reforms, prison reforms, improvement in detention centres, effective implementation of the compensation related provision of the Compensation Relating to Torture Act are major areas for intervention. Measures have been in place to make a new law on the prohibition of torture and compensation in consonance with the Convention against Torture. A central torture-related compensation fund is being established to ensure prompt provision of compensation to the victims of torture. Similarly, a range of activities have been carried out to achieve the objective of prison management and reforms as envisaged by the Action Plan. Enhancing the economic, social standards and physical facilities of prisoners/detainees in prisons, making timely reforms in tune with relevant international principles and standards, providing effective counselling to prisoners/detainees, segregating detainees suffering from mental diseases from other detainees, developing the system of engaging offenders of minor cases in community services and re-integration or socialization of prisoners/detainees, physical improvements in prisons, establishment of reform systems for juvenile delinquents and protection and promotion of the rights of child of prisoners/detainees in prisons are some important activities being launched in this regard.

125. A great number of awareness-raising and sensitization programs have been launched for security personnel on the importance of complying with the provisions of the Convention when dealing with law and order situations. The visit to Nepal by the Special Rapporteur on torture and the submission of Nepal's periodic reports for consideration by the Committee are some examples of Nepal's efforts to honour its commitment under the Convention. The practice of torture in order to extract confessions or obtain information from detainees is strictly outlawed. Any confession so obtained is not admissible in evidence before a court of law. Nepal would like to make it clear that it has no policy to allow torture as a method of criminal investigation.

126. In relation to the issue of the vetting of security personnel, Nepal would like to reiterate that it has already introduced such a system on its own initiative. Since 2005, the Nepal Army has implemented the policy that those who are found guilty of human rights violations are disqualified from participating in United Nations peacekeeping missions. The Nepal Police and Armed Police Force have also implemented a similar policy of vetting.

127. In relation to the OHCHR-Nepal report entitled "Investigating Allegations of Extra-Judicial Killings in the Terai" of July 2010, Nepal had made its responses and comments on it. Nepal would like to reiterate that it has categorically refuted the contents and facts presented in the report.

128. Nepal's attention has also been drawn to the recommendations made by the Committee, and would like to make the following observations in this respect:

(a) The Constitution itself prohibits any act of torture. The Constitution is the fundamental policy and law of the land, and any law inconsistent with it is void. Torture is also outlawed by various laws including the Compensation Relating to Torture Act. When the practice of torture is strictly outlawed by the fundamental law of the land, it is a testimony that Nepal has already publicly condemned the practice of torture. Through periodic reports submitted under various treaties to which Nepal is a party, including the Convention against Torture, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, as well as its national report on UPR, Nepal has described the measures taken to curb torture;

(b) Nepal is in the process of adopting a specific legislation criminalizing torture in consonance with the spirit of the Convention. A bill on the Penal Code tabled by the Government of Nepal before the Legislature-Parliament also contains provisions criminalizing torture;

(c) Through the publicity of various measures designed to prevent torture, Nepal has been sending a clear and unambiguous message condemning torture and ill-treatment to all persons and groups under its jurisdiction;

(d) The Legislative Committee of the Legislature-Parliament is actively deliberating on the bills on the Truth and Reconciliation Commission and the Commission on the Inquiry into Disappearances. The GON firmly believes that these bills will be adopted without delay, in accordance with the legislative procedures of the Legislature-Parliament;

(e) As mentioned above, complaints alleging torture by public officials have been promptly, effectively and impartially investigated, and offenders prosecuted and convicted;

(f) In relation to ratifying the Optional Protocol to the Convention, and accepting the competence of the Committee to receive and consider individual communications under article 22 of the Convention, Nepal would like to mention that at the moment it does not intend to be a party to the Optional Protocol, nor accept the competence of the Committee with regard to communications;

(g) In relation to other recommendations, various policy, legal and institutional measures have already been adopted and implemented. The existing legal provisions amply take care of those recommendations.

129. Despite various constraints and challenges inherent in the kind of political and socio-economic transformation and the peace process in a post-conflict situation, Nepal is fully committed to the protection and promotion of human rights. The GON feels that all these positive developments and remarkable improvements in the human rights situation on the ground should have been duly appreciated and acknowledged as such in the report.

130. In the light of the foregoing, Nepal does not agree with the allegation of systematic practice of torture in Nepal and rejects the report. The Committee's conclusion of widespread use of torture merely on the basis of allegations is totally unfounded and appears to ignore the sincere efforts made by national authorities to fight against such crime. Nepal would, therefore, like to request the Committee to withdraw the inquiry procedure.

Annex XIV

Decisions of the Committee against Torture under article 22 of the Convention

A. Decisions on merits

Communication No. 312/2007: *Eftekhary v. Norway*

Submitted by: Hamid Reza Eftekhary
Alleged victim: The complainant
State party: Norway
Date of complaint: 24 October 2006 (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. 312/2007, submitted to the Committee against Torture by Hamid Reza Eftekhary 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. The complainant is Hamid Reza Eftekhary, an Iranian national born in 1979, at risk of deportation from Norway to the Islamic Republic of Iran. Although in the initial submission he invokes only rule 114 (previously rule 108) of the Committee's rules of procedure (CAT/C/3/Rev.5), the complainant's arguments amount to a complaint that his deportation to Iran would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As of September 2008, he is unrepresented before the Committee.

The facts as submitted by the complainant

2.1 The complainant is a journalist who previously worked for the newspaper Asia in the Islamic Republic of Iran. The newspaper was closed in the spring of 2003, allegedly for having published "false information and for having conducted activities which disturb people's thinking". In June/July 2003, the complainant was arrested and his house was searched. During the search of his house, government officers confiscated documents and a computer belonging to the complainant. During his arrest, the complainant was interrogated by the authorities on the subject of his journalistic activities for approximately 14 hours.

2.2 After his release, the complainant went into hiding in the Islamic Republic of Iran. During the time that he was in hiding, two summons for him to appear before the

Revolutionary Court in Tehran were received at his house. Following the receipt of these summons to appear at court, the complainant decided to flee Iran. The complainant applied for asylum in Norway on 11 October 2003.

2.3 The complainant states that, once in Norway, he discovered that he had been sentenced in absentia to five years' imprisonment by the Revolutionary Court in Tehran, on account of his alleged cooperation with "counter-revolutionary groups" and for "publishing articles against the Islamic Republic". He subsequently obtained the relevant court documents regarding his sentence through relatives in the Islamic Republic of Iran, who sent him copies of these documents to support his asylum application in Norway. The complainant states that the Revolutionary Court does not normally provide copies of its judgments, and therefore the complainant's relatives had to pay a bribe to obtain the documents.

2.4 On 4 January 2006 the Norwegian Immigration Authorities (UDI) decided to reject the complainant's application for asylum. On 18 September 2006 the Norwegian Immigration Appeals Board (UNE) confirmed the decision to reject the complainant's application for asylum. The decisions were based mainly on the fact that the UDI and UNE found that the complainant had not substantiated his concrete and individual risk of persecution, torture or ill-treatment if returned to the Islamic Republic of Iran. However, both bodies placed a special emphasis on a verification report conducted by the Norwegian Embassy in Tehran, dated 5 September 2004. The verification report found that the court documents presented by the complainant to prove that he had been sentenced in absentia to five years' imprisonment were false.

2.5 The complainant was ordered to leave Norway on 19 October 2006. In order to avoid police arrest and deportation, the complainant went into hiding.

2.6 The complainant continued his journalistic activities after his arrival in Norway, maintaining weblogs, wherein he published articles providing critical and provocative views on political and religious topics, and in particular criticizing the Government of the Islamic Republic of Iran. The complainant signed the weblog articles using his real name. In addition, he gave interviews and wrote short articles for a local Norwegian newspaper. The complainant states that both his weblogs were closed by the Iranian authorities while he was in Norway.

2.7 Following the rejection of the complainant's applications for asylum by the immigration authorities, the complainant would have wished to pursue his asylum case before the Norwegian courts. In order to pursue his case before the courts, the complainant applied for legal aid. The complainant was denied legal aid by the Fylkesmannen on 7 December 2006, and this decision was confirmed by the administrative appeals instance, the Justissekretariatene, on 26 January 2007. In the light of the fact that the complainant would not be able to pursue judicial remedies without legal aid, the denial of free legal aid to the complainant effectively barred the complainant from further pursuing his case before the Norwegian courts.

The complaint

3.1 The complainant claims that his life would be threatened, and that he would be at risk of imprisonment and torture if returned to the Islamic Republic of Iran, and that this would constitute a violation of article 3 of the Convention by Norway. The claim is based on the complainant's activities as a journalist both while still in Iran, as well as his continued activities as a blogger and journalist after his arrival in Norway in 2003. In support of his claim, the complainant highlights the two summonses for him to appear before the Revolutionary Court in Tehran, as well as the sentence in absentia to five years'

imprisonment by the Revolutionary Court, with reference to the general treatment of journalists and the current serious human rights situation in Iran.

3.2 The complainant submits that the Norwegian asylum authorities failed to ensure that the consideration of his asylum case respected due process, by focusing solely on the verification of the court documents from the Revolutionary Court in Tehran. In this regard, he maintains that the authorities placed a disproportionate weight on the alleged forgery of the court documents that the complainant presented in support of his asylum application, and did not conduct any further investigation of his case. The complainant submits that he had no control over the content of the court document providing the sentence in absentia, since it was sent to him by his relatives, after his arrival in Norway.

3.3 The complainant further maintains that the two summons to appear before the Revolutionary Court in Tehran are uncontested, and the fact that he did not appear before the Revolutionary Court following those summons, in and of itself substantiates the risk that he will be arrested and subjected to torture or other cruel, inhuman or degrading treatment or punishment, if he is returned to the Islamic Republic of Iran.

3.4 According to the complainant, the case is not under consideration by any other international procedure of investigation or settlement, and all available domestic remedies have been exhausted.

3.5 Interim measures were requested by the complainant in the initial submission of the complaint dated 23 October 2006, but were denied by the Committee, since at the time of the request the author was in hiding.

State party's observations on admissibility and merits

4.1 On 16 October 2007, the State party challenged the admissibility of the complaint for lack of substantiation even on a prima facie basis in relation to the complainant's claims under article 3 of the Convention, and argued that the complaint should be declared inadmissible under article 22, paragraph 2, of the Convention, as manifestly unfounded.

4.2 On the exhaustion of domestic remedies, the State party does not submit that the author has failed to exhaust domestic remedies, in the light of the fact that the complainant exhausted all administrative remedies and that the complainant's request for legal aid was rejected, effectively barring him from pursuing judicial remedies before the Norwegian courts. The State party refers to the Committee's jurisprudence regarding the exhaustion of judicial remedies in the absence of legal aid.^a

4.3 The State party submits that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be at risk of being subjected to torture upon his or her return to that country, and recalls the Committee's jurisprudence in that regard.^b Additional grounds must exist to show that the individual concerned would be personally at risk. As regards the current human rights situation in the Islamic Republic of Iran, the State party acknowledges that the working conditions for journalists and other media representatives in that country are generally poor.

4.4 The State party notes, however, that in its view, the complainant did not present any reliable facts to support his claim that he would be at a personal and foreseeable risk of persecution, torture or ill-treatment upon his return to the Islamic Republic of Iran. In that

^a Communication No. 238/2003, *Z.T. (No. 2) v. Norway*, decision adopted on 14 November 2005.

^b Communications No. 233/2003, *Agiza v. Sweden*, decision adopted on 20 May 2005, and No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006.

regard, the State party reiterates the views adopted by the Norwegian Immigration Appeals Board as well as the Norwegian Immigration Authorities, that although the working conditions for journalists and other media representatives in Iran are poor, the complainant had not generated journalistic activities of a nature or scope that could be deemed to draw the continued attention of the authorities, and place him at personal and foreseeable risk. The State party argues that the journalistic activities conducted by the complainant, even after his arrival in Norway, do not constitute the type of activities that would be subject to monitoring by the Iranian authorities, since the latter are primarily preoccupied with monitoring activities by Iranians in exile that may pose a concrete risk to the regime.

4.5 Regarding the complainant's allegation that he was sentenced in absentia to five years' imprisonment by the Revolutionary Court in Tehran, and that consequently, he would be likely to be imprisoned and tortured if he were returned to the Islamic Republic of Iran, the State party submits that the court documents provided by the complainant to support his case were found to be false by the Norwegian Embassy in Tehran. The verification of the documents was conducted by the Norwegian Embassy, and the verification report was submitted to the complainant through his counsel at the time, for comment. The State party notes that the complainant challenged the verification report, maintaining the authenticity of the court documents. Nevertheless, the authorities found that the complainant did not present any substantial arguments to doubt the verification. The State party considers the essential documents in the case to be false; consequently it questions the credibility and reliability of the complainant's submissions in their entirety.

4.6 By letter dated 2 December 2008, the State party informed the Committee that on 5 November 2008, the Norwegian Immigration Appeals Board rejected the complainant's request for reopening of the case, dated 2 January 2007, on the basis that no new information had been put forward to warrant a different assessment from the Board's assessment in its previous decisions. The State party further informed the Committee that the complainant was registered with an address in Norway as from 20 November 2007, and was therefore no longer in hiding.

Author's submissions

5.1 On 18 April 2009, the complainant sought to refute the observations submitted by the State party. He argues that the court documents presented in support of his asylum application are authentic, and that the State party did not give due regard to the submissions presented by his previous counsel on the authenticity of the documents.

5.2 The complainant also submits further documentation of his activities as a journalist both in the Islamic Republic of Iran and Norway, including Internet and newspaper articles that he had written on the subject of religion and politics in Iran, and signed by him using his real name. The complainant argues that the content and nature of his writing and the ideology represented therein would be considered sufficiently grave for the Iranian authorities to persecute, imprison and torture a person. He recalls that two of his weblogs were closed and blocked by the Iranian authorities after he fled to Norway.

5.3 Finally, the complainant draws attention to the current increasingly grave human rights situation in the Islamic Republic of Iran, with particular focus on the arrest, torture and killing of journalists, bloggers and persons engaged in political activism and criticism of the Government. According to the complainant, the current situation in Iran would undoubtedly lead to his persecution if he were returned to the country.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any 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, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any complaint unless it has ascertained that the complainant has exhausted all available domestic remedies; this rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged, or that it is unlikely to bring effective relief to the alleged victim.

6.3 The Committee notes that the complainant exhausted all administrative remedies. The Committee takes note that the complainant was denied legal aid by the Fylkesmannen in its decision dated 7 December 2006, and that this decision was confirmed following an administrative appeal to the Justissekretariatene, in its decision dated 26 January 2007. The Committee considers that, in the light of the fact that the complainant would not be able to pursue judicial remedies without legal aid, the denial of free legal aid to the complainant effectively renders the possibility of judicial review unavailable, and that accordingly, the complainant must be considered to have exhausted all available domestic remedies.^c

6.4 The Committee takes note of the State party's argument that the communication should be declared inadmissible as manifestly unfounded. The Committee considers, however, that the complaint raises substantive issues under article 3 of the Convention, which should be examined on the merits. Accordingly, the Committee finds the communication admissible.

Consideration of merits

7.1 The Committee must determine whether the forced return of the complainant to the Islamic Republic of Iran would violate 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.

7.2 The Committee recalls its general comment No. 1 (1996) on the implementation of article 3 of the Convention,^d and its case law, which state that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to meet the test of being highly probable, the Committee recalls that the burden of proof is generally placed on the complainant, who must present an arguable case establishing that he runs a "foreseeable, real and personal" risk.^e Furthermore, in its general comment No. 1 the Committee states that it must also determine whether the complainant has engaged in political activity within or outside the State concerned that would appear to make him particularly vulnerable to the risk of being subjected to torture (para. 8 (e)). The Committee also recalls that, while it gives considerable weight to the findings of fact of the

^c *Z.T. (No. 2) v. Norway* (footnote a above).

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

^e See general comment No. 1 of the Committee, and communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3.

State party's bodies, it is entitled under article 22, paragraph 4, of the Convention, to freely assess the facts of each case, based upon the full set of circumstances in every case.

7.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon his return to the Islamic Republic of Iran. In assessing the risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence, in the State concerned, of a consistent pattern of gross, flagrant or mass violations of human rights.

7.4 Referring to its recent jurisprudence,^f the Committee recalls that the human rights situation in the Islamic Republic of Iran is extremely worrisome, particularly since the elections held in the country in June 2009. The Committee has received many reports describing, in particular, the repression and arbitrary detention of many reformers, students, journalists and human rights defenders, some of whom have been detained in secret and others sentenced to death and executed. The Committee also notes that on 7 July 2009, six special procedures mandate holders of the Human Rights Council (in the areas of arbitrary detention; extrajudicial, summary or arbitrary executions; right to freedom of opinion and expression; torture and other cruel, inhuman or degrading treatment or punishment; the situation of human rights defenders; and enforced or involuntary disappearances) expressed their concern regarding the protests linked to the Iranian presidential elections of 2009, following which at least 20 people were killed and hundreds of others seriously injured in clashes with security forces, who allegedly used live ammunition and rubber bullets. The same experts also expressed their concern about reports of arrests and detention without charge and ill-treatment of detainees.^g

7.5 In addition, the Committee takes note of the concluding observations on the Islamic Republic of Iran adopted by the Human Rights Committee on 2 November 2011, in which the latter Committee stated that it "is deeply concerned about the frequent violations of fair trial guarantees provided for under the Covenant, especially in the Revolutionary Courts" (CCPR/C/IRN/CO/3, para. 21), and that it "is deeply concerned at reports of the widespread use of torture and cruel, inhuman or degrading treatment in detention facilities, particularly of those accused of national security-related crimes or tried in Revolutionary Courts, which in some cases have resulted in the death of the detainee" (ibid., para. 14).

7.6 The Committee further notes that the Human Rights Committee expressed its concern that:

Many newspapers, magazines, as well as the Journalists Association, have been closed by the authorities since 2008, and that many journalists, newspaper editors, film-makers and media workers have been arrested and detained since the 2009 presidential elections. The Committee is also concerned about the monitoring of Internet use and contents, blocking of websites that carry political news and analysis, slowing down of Internet speeds and jamming of foreign satellite

^f See communications No. 357/2008, *Jahani v. Switzerland*, decision adopted on 23 May 2011, para. 9.4, and No. 381/2009, *Faragollah et al. v. Switzerland*, decision adopted on 21 November 2011, para. 9.4.

^g See also the documents prepared by the Office of the United Nations High Commissioner for Human Rights for the universal periodic review in respect of the Islamic Republic of Iran: A/HRC/WG.6/7/IRN/2, for example paras. 28, 31 and 56; and A/HRC/WG.6/7/IRN/3 and Corr. 1, paras. 28–29. Finally, see also the statement made by the High Commissioner for Human Rights on 2 February 2011 on the execution of at least 66 persons in the month of January 2011, including at least 3 political prisoners (available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10698&LangID=E).

broadcasts, in particular since the 2009 presidential elections (art.19) (*ibid.*, para. 27).

7.7 The Committee takes note of the previous interest of the Iranian authorities in the complainant, as demonstrated by his arrest and interrogation, and the summons received by him in 2003 to appear before the Revolutionary Court in Tehran, due to his journalistic activities. The Committee notes that the complainant does not submit that he was tortured at any time by the Iranian authorities during his arrest and interrogation in 2003. However, the Committee notes the complainant's submission of his continued journalistic activities since his arrival in Norway, and the submission that his weblogs were shut down by the Iranian authorities during that time. The Committee is therefore of the opinion that the complainant could well have maintained the continued attention of the Iranian authorities.

7.8 In relation to the alleged sentence in absentia to five years' imprisonment, the Committee notes the State party's submission that the court documents presented in support of the asylum application, and in support of the complainant's claim that he would be at risk of imprisonment and torture if returned to the Islamic Republic of Iran, are not authentic, in accordance with a verification conducted by the Norwegian Embassy in Tehran. On the other hand, the Committee notes that the complainant contested the verification of the documents conducted by the State party, and maintains that he has been sentenced to five years' imprisonment by the Revolutionary Court in Tehran. The Committee is not in a position to assess the verification of the court documents regarding the alleged sentence in absentia to five years' imprisonment, taking into consideration that the State party and the complainant have presented contradictory statements, without corroborating evidence.

7.9 The Committee notes however that the two summons for the complainant to appear before the Revolutionary Court have not been contested, and that these summons, combined with the fact that the complainant did not appear before the Revolutionary Court in Tehran at the time that he was summoned, in themselves constitute an element of high risk to the complainant. Finally, the Committee notes that, since the Islamic Republic of Iran is not a party to the Convention, the complainant would be deprived of the option to address the Committee for protection of any kind, if he were to be deported to Iran.

8. In the light of the above, and taking into account all the circumstances of the case and the information presented before it, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the complainant to the Islamic Republic of Iran would constitute a breach of article 3 of the Convention.

9. In conformity with rule 118 (formerly rule 112), paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to the present decision.

Communication No. 327/2007: *Boily v. Canada*

Submitted by: Régent Boily (represented by counsel,
Christian Deslauriers and Philippe
Larochelle)

Alleged victim: The complainant

State party: Canada

Date of complaint: 4 July 2007 (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 14 November 2011,

Having concluded its consideration of complaint No. 327/2007, submitted to the Committee against Torture by Régent Boily 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, Régent Boily, is a citizen of Canada born in 1944. In his complaint of 4 July 2007, he claimed that his extradition to Mexico would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Christian Deslauriers and Philippe Larochelle.

1.2 On 6 July 2007, the Rapporteur on new communications and interim measures, pursuant to rule 108, paragraph 1, of the Committee's rules of procedure (CAT/C/3/Rev.4),^a requested the State party not to extradite the complainant to Mexico while his complaint was under consideration.

1.3 On 13 August 2007, the Rapporteur on new communications and interim measures, after thorough consideration of the observations submitted by the State party on 27 July 2007 and by the complainant, decided to withdraw the interim request.

1.4 On 17 September 2007, following a request by the complainant, the United Nations High Commissioner for Human Rights requested the State party to state what measures it had taken to ensure that Mexico would honour its diplomatic assurances.

The facts as submitted by the complainant

2.1 In 1993, the complainant decided to move from Canada to live in Mexico, where he remarried and transferred all of his assets. In 1998, after losing half of his savings, he became involved in transporting marijuana. On 9 March 1998, the complainant was arrested by the police, who found 583 kg of marijuana in his vehicle. A police officer beat

^a New rule 115, para. 1 (CAT/C/3/Rev.5).

him and asked him to hand over US\$ 25,000 and half of his cargo in exchange for allowing him to continue on his way. At the police station, the complainant asserted, in vain, the right to be represented by a Canadian lawyer. One police officer threatened to kill him if he did not reveal the names of his accomplices and the origin and destination of his drugs. Having refused to provide that information, the complainant was smothered with a plastic bag, had various substances, including chilli sauce, inserted into his nose and was hit on the head with a book. Subsequently, the complainant was forced to sign a statement in Spanish, without knowing its contents. He was taken to prison that same day and received a medical examination but, fearing retaliation by the police officer present at the examination, did not mention the treatment he had received at the police station. After 72 hours in a cell with no light, the complainant was taken to the prison infirmary, where he met two police officers who had tortured him at the police station. They warned him not to report that he had been tortured and threatened to kill him.

2.2 On 10 November 1998, the complainant was sentenced to 14 years in prison for marijuana trafficking. The statement he had signed under torture was allegedly admitted as evidence.

2.3 On 9 March 1999, he organized an escape, during which one of the two guards assigned to him was killed. The complainant subsequently fled to Canada. On 1 March 2005, he was arrested at his home in Canada under a provisional warrant for his extradition to Mexico. Mexico requested his extradition to complete his sentence and to face a charge of homicide for the death of the prison guard and a charge of escape from legal custody. On 11 April 2005, the complainant submitted a request for bail, which was denied. The Court of Appeal also dismissed his application. On 22 November 2005, the complainant was imprisoned pending his extradition. On 23 January 2006, he presented his arguments to the Minister of Justice, including two reports from psychologists confirming that he had been tortured and that he showed symptoms of post-traumatic stress. He also submitted the results of a polygraph test done by the Ottawa police department, which showed he was telling the truth. On 24 May 2006, the Minister of Justice ordered his extradition in return for diplomatic assurances by Mexico. The Court of Appeal of Québec dismissed an appeal to have that decision reviewed and, on 5 July 2007, the Supreme Court of Canada refused to allow an appeal against it.

2.4 On 17 August 2007, after the Committee lifted interim measures, the complainant was extradited to Mexico and transferred to Zacatecas prison, the facility in which he was accused of having killed a guard. Between 17 and 20 August 2007, the complainant was tortured by prison guards and he was refused contact with the Canadian Embassy and his lawyer. Fearing retaliation, the complainant did not openly report the ill-treatment.

The complaint

3.1 In his initial communication, the complainant claimed that his extradition to Mexico would constitute a violation of article 3 of the Convention. He submitted that he would be exposed to a foreseeable, real and personal risk of torture if extradited to Mexico, given that he had already been tortured by the Mexican authorities when he was arrested on 9 March 1998^b and threatened with death by two police officers in the prison infirmary, and that independent medical opinions had vouched for the fact that he had been tortured. Moreover, he submitted that the seriousness of the crime with which he was charged, the fact that those responsible for committing the crime at the time of his escape had not been arrested

^b See communication No. 133/1999, *Falcon Ríos v. Canada*, decision adopted on 23 November 2004, para. 8.6.

and the prospect of being sent back to the prison from which he had escaped would expose him to a foreseeable, real and personal risk of torture in Mexico.

3.2 Moreover, the complainant underlined that diplomatic assurances from Mexico could not remove the risk of torture, especially as it was known that torture was systematic and endemic in Mexico and that the State of Mexico exercised little control over its security forces. He claimed that the uncertainty about the worth of the assurances only served to underline their ineffectiveness.^c The complainant submitted that it was ingenuous to assume, as the assurances led to believe, that he would not be questioned about the two crimes that had not been dealt with in court, as those responsible still had not been arrested. He added that he was in a far more difficult position than in 1998, standing accused of a much more serious crime – one involving the death of a state official.

State party's observations on the measures taken to ensure observance of the diplomatic guarantees

4.1 On 28 September 2007, the State party provided an update on the measures taken to ensure that the Government of Mexico honoured its diplomatic guarantees. According to the State party, when the complainant arrived in Mexico on 17 August 2007, he was met by a consular official and informed of the services available to him. At that meeting, the complainant reportedly expressed concern about his safety, given that he was being sent back to the prison from which he had escaped. On 20 August 2007, consular officials asked the Human Rights Commission of the State of Zacatecas to send representatives to visit the complainant. After receiving a letter in which it was claimed that the complainant had been tortured on 19 August 2007, the State party contacted senior Mexican officials and the Zacatecas prison administration on 22 August 2007 to remind them that the diplomatic assurances must be respected. That same day, consular officials visited the complainant. During that visit, the complainant again claimed that he had been tortured, but did not wish to lodge a complaint. The consular officials saw no evidence of wounds. At the inquiry held by the Mexican authorities, the director of Zacatecas prison denied the complainant's allegations of torture.

4.2 On 23 September 2007, the complainant was reportedly beaten by another inmate, but he stated that he had been properly treated for his wounds and that his assailant had been placed in solitary confinement. Subsequently, the State party asked the prison director for a report on the incident, as well as a medical report and an explanation of what measures had been taken to avoid a repetition of violence against the complainant. The State party emphasized, however, that the complainant did not wish to lodge a complaint and asked that the details of his allegations of torture not be revealed to the Mexican authorities. On 18 October 2007, the complainant, with the backing of a letter from the State party to the judge concerned, requested a transfer to the prison in the State of Aguascalientes.

State party's observations on the admissibility and the merits of the complaint

5.1 On 5 February 2008 and 20 August 2008, the State party submitted its observations on the admissibility and merits of the complaint. According to the State party, the communication should be declared inadmissible because the complainant had neither demonstrated a *prima facie* violation of article 3 of the Convention nor sufficiently supported his allegation that he ran a serious and personal risk of being tortured if

^c See communication No. 233/2003, *Agiza v. Sweden*, decision adopted on 20 May 2005; see also Human Rights Committee communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006, paras. 11.4 and 11.5.

extradited to Mexico. The State party emphasized that the grounds for believing that the complainant was in danger of being subjected to torture if returned must go beyond mere theory or suspicion^d and that it must be established that the individual concerned would be personally at risk.^e The State party submitted that the complainant's allegations of torture were connected with his arrest and questioning by the police in 1998, and that he had never claimed that he had been tortured in prison. The complainant had therefore apparently failed to establish that if he was extradited to complete his sentence and stand trial he would be questioned by the police, and would thus be in danger of being tortured in Mexican prisons.

5.2 The State party argued that it could not be deduced from the additional grounds submitted by the complainant, such as international reports on torture in Mexico and the charges he faced for his part in the murder of a prison guard, that he would run a personal risk of being tortured if extradited. It underlined that the international reports, including the latest concluding observations of this Committee,^f alluded to the problem of torture in police stations, but did not indicate that torture was endemic in the prison system. The State party also underlined that mechanisms for judicial and administrative review and for monitoring human rights^g existed and were applied when people served prison terms. Mexico had also ratified the Optional Protocol to the International Covenant on Civil and Political Rights and recognized the competence of the corresponding Committee to examine individual complaints, therefore giving the complainant the option of lodging complaints against Mexico with either Committee.

5.3 The State party also submitted that the diplomatic assurances sufficed to eliminate the risk of torture. It pointed out that it had requested the following assurances of the Government of Mexico: that Mexico would take reasonable precautions to guarantee the safety of the complainant; that it would ensure that the complainant's lawyer and officials of the Canadian embassy could visit the complainant at any reasonable time and that he could communicate with them at any reasonable time; that it would do everything possible to ensure that the complainant's trial was held and completed without delay, and that any other complaint or request would be dealt with quickly. The State party emphasized that Mexico had agreed to such assurances in another case and that it would have every reason to respect the assurances provided in the light of its obligations under the extradition treaty and in order to avoid damaging its international reputation. Moreover, the State party claimed that it had put in place a mechanism for monitoring the complainant's situation in Mexico.^h

5.4 With regard to the allegation of torture since his return to Zacatecas prison, the State party submitted that the complainant had not substantiated his claim or furnished any details to support it. It said that an inquiry held by Mexico had concluded that his allegations were "implausible".

^d See communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3.

^e See communications No. 36/1995, *X. v. The Netherlands*, Views adopted on 8 June 1996, para. 7.2; No. 15/1994, *Kahn v. Canada*, Views adopted on 15 November 1994, para. 12.2; and No. 13/1993, *Mutombo v. Switzerland*, Views adopted on 27 April 1994, para. 9.3.

^f CAT/C/MEX/CO/4, adopted on 21 November 2006.

^g When it ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Government of Mexico established the National Human Rights Commission, which has the power to investigate instances of human rights violations, including torture.

^h See communication No. 199/2002, *Attia v. Sweden*, decision adopted on 17 November 2003, para. 12.3; and *Alzery v. Sweden* (footnote c above), para. 11.5.

5.5 The State party maintained that the complainant's allegations and the risk of torture at the time of his extradition had been examined closely by national courts and that, in the absence of obvious errors, procedural abuses, bad faith, bias or serious procedural irregularities, the Committee should not substitute itself for the national courts.ⁱ

5.6 Alternatively, the State party contended that, should the Committee admit the communication, it was without foundation for the reasons given.

Complainant's comments on the State party's observations

6.1 On 25 April and 26 September 2008 and 6 April 2009, the complainant challenged the State party's observations and noted that the failure of the State party to question the worth of the diplomatic assurances provided by Mexico constituted a denial of justice. According to the complainant, the State party did not take sufficient account of the personal risk he ran of being tortured when it extradited him. Sending him back to the prison from which he had escaped, together with the fact that a guard of that prison had lost his life and the complainant's accomplices had never been identified, would expose him to a personal risk. That was underlined by the content of international reports and the latest periodic report of Mexico to the Committee against Torture, which made clear that the use of torture was endemic in Mexico.^j In addition, his allegation of having been tortured in 1998 had never been refuted. With regard to the consideration of the events of 1998 by the State party, the complainant submitted that the Minister of Justice had deliberately misconstrued the sense of a letter received from the Mexican authorities, claiming that the complainant's allegations of torture were unfounded. The complainant contended that none of the relevant sections of the letter indicated that his allegations were groundless, as the Government of Mexico merely stated that the allegations had no legal basis and that his presence in Mexican territory would suffice to guarantee his human rights and freedoms. The complainant maintained that the State party acted in bad faith and based its decisions on a false premise by rejecting his credibility with regard to the personal risk he ran of being tortured. The rulings by the national courts were therefore unwarranted because they were not based on the evidence. Moreover, the fact that the state officials who tortured him in 1998 had not been punished no doubt heightened his personal risk.

6.2 The complainant pointed out that the State party had not considered whether Mexico could effectively control its security forces and so guarantee that its diplomatic assurances would be respected. The complainant noted that the assurances were vague and did not, for example, stipulate that he not be sent back to the same prison facility from which he had escaped. He also submitted that the State party had failed to enquire after his well-being before 20 August 2007, though it was aware of his concerns and of the risks entailed in being returned to the same prison facility from which he had escaped. Considering that Canadian embassy officials in Mexico were informed of his case only two days before his extradition and were unaware of the diplomatic assurances until that very day,^k the complainant challenged the assertion by the State party that it put in place a mechanism to ensure that Mexico would honour its diplomatic assurances.

ⁱ Communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006, para. 7.6; No. 193/2001, *P.E. v. France*, decision adopted on 21 November 2002, para. 6.5; No. 183/2001, *B.S.S. v. Canada*, decision adopted on 12 May 2004, para. 11.6; and *A.R. v. The Netherlands* (footnote d above), para. 7.6.

^j See the fourth periodic report of Mexico (CAT/C/55/Add.12, para. 299), in which the Government of Mexico admits that torture continues to be a problem in its territory despite the legal arsenal put in place to combat it.

^k The complainant bases his claim on an exchange of e-mails between embassy officials and the Department of Foreign Affairs and International Trade.

6.3 The complainant submitted that on 17, 19 and 21 August 2007 two prison guards and the chief of security at Zacatecas prison had tortured him to avenge the death of their colleague, who had been killed at the time of his escape. They beat him on the back, shoved his head into a barrel of water as though to drown him, kept his head in a plastic bag until he collapsed and shoved chilli sauce into his nostrils.¹ Between his arrival at the Zacatecas prison on 17 August 2007 and 20 August 2007, the complainant was denied access to a telephone to contact anyone. Moreover, a telephone conversation between his sister and an embassy official on 20 August 2007 revealed that, in violation of the diplomatic assurances, the State party was unaware whether the complainant had access to a telephone. The complainant also submitted that it was only after a visit by consular officials on 22 August 2007 that the State party took steps to check on his safety.

6.4 According to the complainant, the extradition treaty between the State party and Mexico states explicitly in article III.1 that Canada is under no obligation to extradite its own nationals to Mexico, and the treaty allows Canada to try its own citizens for offences of which they are accused in Mexico. The complainant maintained that the State party took an unacceptable risk in extraditing him to Mexico, and so violated article 3 of the Convention.

Additional comments by the State party

7.1 On 28 August 2009, the State party reiterated its previous observations. It stated that assessment of the risk of torture prior to the complainant's extradition should not be confused with his allegations of ill-treatment once he was in the hands of the Mexican authorities. The State party maintained that it did not accept without reservation the truth of the allegations in the complainant's affidavit of 21 March 2009, which were insufficiently substantiated because, in the absence of the complainant's consent, neither the consular staff of the State party nor the staff of the Human Rights Commission of Zacatecas had been able to inquire into what had happened on 17, 19 and 21 August 2007. In addition, the State party submitted that, leaving aside the question of whether the allegations of torture contained in the complainant's affidavit were true, at the time of the extradition proceedings it was reasonable to extradite the complainant to Mexico on the basis of the diplomatic assurances and the absence of a serious personal risk of the complainant being tortured. It stated that claims made after the extradition did not affect the legitimacy of the decision to extradite the complainant. Furthermore, the State party said that it had put in place a mechanism to check that the diplomatic assurances were being respected and had responded appropriately when the complainant alleged that he had been tortured.

7.2 With regard to the extradition process, the State party explained that the Department of Justice was initially responsible for extradition cases, and that once an extradition order was confirmed the Department of Foreign Affairs and International Trade was responsible for following up the case abroad. The staff of the latter department therefore became involved in the case only from the time of the complainant's extradition. In this instance, the State party maintains that the Canadian embassy in Mexico was duly informed of the complainant's extradition on 15 August 2007. On 17 August 2007, the complainant was met by a consular official and given instructions so that he could communicate with the embassy. With regard to the complainant's allegation that Canadian officials did not know whether he could receive telephone calls, the State party said that each prison had its own

¹ The complainant submitted an affidavit by a fellow inmate who reportedly saw the state in which the complainant was brought back to his cell on 17 August 2007. In it, he states that the complainant's face was all red and that he saw that he was weeping. The complainant had been carried to the cell by two guards. The following day, he had reportedly called the complainant's lawyer and sister to inform them of the treatment inflicted on the complainant.

rules on making telephone calls and that, unless there were valid reasons for doing so, it was not for the consular officials to interfere with those procedures; telephone contact between the consular officials and the complainant was established on 20 August 2007. The State party also maintains that until they learned of a potential breach of the diplomatic assurances, the consular officials were not obliged to do more than maintain contact with the complainant.

7.3 The State party refers to the Committee's jurisprudence, according to which the evaluation of the risks of torture prior to extradition is an exercise in projection and a decision resulting from it may not then be called into question as a result of subsequent unpredictable events.^m It submits that the fact that ill-treatment subsequently occurred means only that the State party's actions to ensure the assurances were honoured could be called into question, not its decision to extradite the complainant in the first place. It recalls that the Minister of Justice had given due consideration both to the complainant's allegations of torture in 1998 and to the official denial of those allegations by the Mexican authorities; he had also studied various reports claiming that violations of human rights in Mexico were frequent, as well as the experiences of other Canadians tried in Mexico. Lastly, he had also taken into account the fact that a prison guard had been killed during the complainant's escape and the possibility that the prison authorities might seek revenge against the complainant. The Minister had been convinced that Mexico, given the importance it attached to respecting diplomatic relations and previous positive experience, would honour its diplomatic assurances. The conclusions of the Minister of Justice had been fully supported by the Court of Appeal.

Additional comments by the complainant

8.1 In additional comments submitted on 29 September 2009, the complainant reiterates that, throughout the extradition process, he stood by his claim that he had been tortured in 1998 and that this has never been questioned by the Canadian authorities.ⁿ

8.2 With regard to the extradition process, he also reiterates that Canadian officials in Mexico knew nothing about his case, as confirmed by the State party's observations, according to which the embassy had been informed on 15 August 2007, just 48 hours before he was extradited. The complainant emphasizes that the State party itself admitted that embassy officials merely reacted to events, and maintains that such an attitude is bewildering, especially as it had been deemed necessary to obtain diplomatic assurances from the destination country prior to extradition, and a visit by consular officials to the prison and a letter from the ambassador to the Governor of Zacatecas State had been enough to put an end to the ill-treatment. Referring to the State party's observations of 28 September 2007, the complainant underlines that the consular officials had not known that the State party had obtained diplomatic assurances, and so had taken no measures to make sure that the complainant could communicate with his lawyer and embassy officials. Moreover, Canadian officials never verified whether he could do so.

8.3 The complainant considers that the State party's assertion that he ran no risk of being tortured prior to his extradition stands in contradiction with the decision to request diplomatic assurances and with the fact that the Court of Appeal had lent more credence to his allegations of torture than to Mexico's outright denial. He also maintains that the

^m See *Agiza v. Sweden* (footnote c above), para. 13.2; and communications No. 194/2001, *I.S.D. v. France*, decision adopted on 3 May 2005, para. 9.3; and No. 297/2006, *Sogi v. Canada*, decision adopted on 16 November 2007, para. 10.6.

ⁿ The complainant cites the decision of the Court of Appeal, *Boily v. Canada (Minister of Justice)* 2007 QCCA 250, paras. 54 and 55.

previous case of extradition of a Canadian had been presented without any information that might allow comparison between the two cases and in no way diminished the existence of serious and personal risks of torture in the case of the complainant.

8.4 With regard to the quality of the diplomatic assurances, the complainant maintains that even if the Minister of Justice did take into account the possibility of retaliation against the complainant because of the accusations he faced over the murder of a prison guard, the diplomatic assurances contained no measures to prevent such retaliation. Moreover, the State party failed to take steps before he was extradited to ensure that he would be safe and allowed to communicate. He also disputes the claim that a mechanism had been put in place to monitor observance of the diplomatic assurances, and insists that the action taken by consular officials came only in response to his allegations of torture, and were not part of a monitoring mechanism. The complainant also reiterates that nine months passed between the moment the State party obtained the diplomatic assurances, on 16 November 2006, and 15 August 2007, when an official of the Department of Foreign Affairs and International Trade tried to obtain a copy of them. He points out that if embassy officials did not have a copy of the diplomatic assurances, then obviously the prison authorities and those of the State of Zacatecas would not have one either.

Additional observations by the State party on admissibility

9. On 26 April 2010, the State party submitted that the communication should be declared inadmissible on the grounds of non-exhaustion of domestic remedies because on 8 April 2010 the complainant had brought an action before the Federal Court related to the substance of the complaint before the Committee. The complainant claimed before the Federal Court that the State party had violated his rights by extraditing him to Mexico on 17 August 2007, having placed its trust in the diplomatic assurances provided, and having allegedly done nothing to ensure that those assurances were respected after the complainant was extradited. The State party maintains that the complainant had therefore not established a prima facie case for the purpose of admissibility of his communication.^o Moreover, there were no grounds for believing that the domestic remedy would be unreasonably prolonged.

Additional comments by the complainant

10.1 In additional comments submitted on 30 June 2010, the complainant asserted that the action brought before the Federal Court and the communication before the Committee were two different matters. In his complaint before the Committee, the complainant had invoked article 3 of the Convention, which prohibited his extradition to a country in which there was a serious risk of him being subjected to torture, and aimed to show that the State party had violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by extraditing him to Mexico on 17 August 2007. He reiterates that the foreseeable, real and personal nature of the risk of torture was based on the fact that a prison guard had been killed during the complainant's escape and that torture was a widespread practice in Mexican prisons. In his action before the Federal Court, the complainant sought to obtain compensation for having been tortured, not for the risk of being tortured. It was therefore wrong to suggest that the action before the Federal Court constituted a remedy yet to be exhausted.

10.2 The complainant maintains that the fact that a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also been

^o See the Committee's general comment No. 1 (1996) on the implementation of article 3 (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1)*, annex IX).

invoked before the Federal Court does not mean that the communication may be dismissed for a failure to exhaust domestic remedies. Before the Committee, the violation of the Convention itself constituted the prejudice, while before the Federal Court it constituted one of a series of alleged errors for which the State party might incur liability. The complainant also maintained that the communication before the Committee had been lodged on 4 July 2007, before he was tortured in Mexico on 17, 19 and 21 August 2007. The action before the Federal Court was begun only one and a half months later, and therefore did not need to be exhausted. Moreover, a claim for damages in civil proceedings was not an effective means of preventing the extradition of the complainant, and could not be used to achieve the aims of this communication against the State party. The complainant reiterates that he had taken his challenge against the extradition order as far as the Supreme Court, beyond which there were no further domestic remedies.

State party's supplementary submission on admissibility

11.1 On 10 February 2011, the State party submitted that the domestic proceedings were linked to those before the Committee inasmuch as they dealt with the same facts. It argues that the chronological order of proceedings or distinctions between the kinds of redress sought are of little importance, given that the findings of the domestic courts were to be based on consideration of the same allegations that had been submitted to the Committee.

11.2 On 26 August 2010, the complainant had requested a stay of his action before the Federal Court. The State party itself had requested that the action be dismissed. On 6 December 2010, the Federal Court had denied the complainant's request for a stay of the action and granted the request for its dismissal, ruling that the question of the complainant's extradition had already been considered in all the appropriate courts and could no longer be used as a cause of action. The request for dismissal of the action was granted because of an abuse of process by the complainant. On 10 January 2011, the time limit set by the Court for filing an action aimed at obtaining compensation for the events that supposedly occurred after the extradition, the complainant had brought a new action before the Federal Court. The State party reiterates its observations of 26 April 2010 and maintains that the communication should be declared inadmissible because of a failure to exhaust domestic remedies.

11.3 With regard to follow-up by consular officials, the State party explains that, by monitoring mechanisms, it meant the usual consular follow-up measures that reflected the State party's concern for the physical and mental well-being of the complainant during his period of imprisonment in Mexico.

Additional comments by the complainant

12.1 On 14 April 2011 the complainant confirmed that he had filed an application requesting compensation for the incidents that had taken place after his extradition. He emphasizes that the risks taken in violation of the Convention cannot be invoked as a basis for stating that State party acted responsibly. He submits that it is thus valid to challenge the legality of the decision to extradite him to Mexico before the Committee, the sole body dealing with the matter, and argues that clearly, a suit for damages filed subsequent to the torture he endured after extradition to Mexico cannot constitute an effective remedy that would have prevented his extradition and thus cannot be considered as an available means of domestic remedy.

12.2 As for the consular follow-up, the complainant states that at the time of his extradition in August 2007 the staff at the Canadian embassy in Mexico were unaware of the content of the diplomatic assurances, as demonstrated by the evidence he submitted, in particular by e-mails. He further points out that the diplomatic assurances were not accompanied with specific measures taken on the spot likely to reduce the real risk of

torture, and submits that the State party's observations of 10 February 2011 confirm that the State party took no specific measures to try to prevent his torture. The usual consular follow-up measures were taken; no system of monitoring was put in place.

Issues and proceedings before the Committee

Consideration of admissibility

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

13.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention. The Committee notes that, on 6 December 2010, the Federal Court dismissed the action brought by the complainant and that, on 10 January 2011, the complainant brought another action before that court. It also notes that the State party disputed the admissibility of the communication on grounds of non-exhaustion of domestic remedies as a result of the action brought by the complainant before the Federal Court. The Committee recalls its jurisprudence^p to the effect that the principle of exhaustion of domestic remedies requires the petitioner to use remedies that are directly related to the risk of torture in the country to which he would be sent. In this case, the application was launched on 10 January 2011 and seeks compensation for ill-treatment allegedly suffered by the complainant in Mexico. The Committee finds that this remedy was not available before the complainant was extradited and that it is highly unlikely to bring effective relief to the complainant, who claims to be a victim of a violation of article 3 of the Convention. The Committee also notes that on 5 July 2007 the Supreme Court refused to allow an appeal against the order to extradite the complainant. As a result, the Committee finds that, under the circumstances, article 22, paragraph 5 (b), of the Convention is not an obstacle to the admissibility of the communication.

13.3 The Committee notes that the State party has contested the admissibility of the communication on the grounds that the complainant had not established a prima facie violation of article 3 of the Convention because he had not demonstrated that, should he be extradited, he ran a personal risk of being tortured in Mexican prisons, and that diplomatic assurances were sufficient to eliminate any risk. The Committee also notes the State party's argument that the Committee should not stand in for national courts if the consideration of the complainant's allegations by the State party has not been flawed by irregularities. However, the Committee is of the view that the arguments submitted to it raise questions that should be examined on the merits and not with regard to admissibility. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

14.1 The Committee must determine whether the extradition of the complainant to Mexico would constitute a violation of the State party's obligation under article 3 of the

^p *A.R. v. Sweden*, communication No. 170/2000, decision adopted on 23 November 2001, para. 7.1.

Convention not to extradite, expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In evaluating the risk of torture, the Committee must take account of all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, 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 if he were extradited to Mexico. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon 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 gross violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.⁹ As to the burden of proof, the Committee also recalls its general comment and jurisprudence, according to which the burden is generally upon the complainant to present an arguable case, and the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

14.2 The Committee notes that the complainant submitted his arguments and supporting evidence to the various State party authorities. In this connection, it also recalls its general comment No. 1 (para. 9), which states that considerable weight will be given to findings of fact that are made by organs of the State party; however, the Committee is not bound by such findings and instead has the power, under article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case. While noting the complainant's contention that the courts of the State party based their decisions on false assumptions about the worth of the diplomatic assurances provided by Mexico, in particular with regard to the ability of the Mexican authorities to control the country's security forces and so lessen the risk of torture, the Committee concludes that the information before it does not indicate any obvious errors in the State party's consideration of the allegations and evidence provided by the complainant.

14.3 In assessing the risk of torture at the time of the complainant's extradition, the Committee notes that the complainant claimed to have been tortured when he was arrested and threatened with torture in the prison infirmary in Mexico in 1998 and that, in support of his allegations, he provided medical reports confirming that he suffered from psychological disorders, including post-traumatic stress, together with the results of a polygraph test carried out by police in the State party indicating that his torture allegations were plausible. With regard to the real and personal risk of torture if he were extradited, the Committee notes that the complainant claimed to run a high risk of being tortured given that he would be sent back to the prison from which he had escaped and in which he had allegedly been threatened with torture by officers from the police station responsible for his arrest in 1998. The complainant contested the reliability of the diplomatic assurances, on the one hand because they came from a country in which torture was said to be widespread or its practice denied by the authorities, and on the other hand because it was unlikely that the complainant would not be subject to questioning by the police for the crime of which he was accused. With regard to the follow-up to the diplomatic assurances, the Committee notes that, after he was extradited, the complainant made allegations of having been tortured that are contested by the State party. The Committee also notes that the national courts of the State party considered that the risk the complainant ran of being tortured in prison would be minimal and that the complainant had failed to establish that he would be questioned by the police. The Committee notes the State party's assertion that the risk of

⁹ General comment No. 1, para. 6.

torture was mitigated by the diplomatic assurances, whose worth had been assessed in consideration of the fact that a mechanism would be put in place to monitor the complainant's situation through regular visits by consular staff. That assertion is challenged by the complainant, who maintains that from 17 to 20 August 2007 the State party made no enquiries as to his safety.

14.4 The Committee concludes that the main issue is to determine whether, at the time the extradition took place, the complainant ran a foreseeable, real and personal risk of torture. Article 3 of the Convention obliges the State that decides whether or not to extradite a person under its jurisdiction to another State to take all necessary steps to prevent torture from occurring. This obligation means that it has the duty to examine carefully and take into account all existing circumstances that may reasonably be considered to indicate a risk of torture as previously defined. The standards that must be met to ensure prevention are still more stringent when the State decides to request diplomatic assurances before proceeding with extradition (or any other type of handover), given that such a request demonstrates that the extraditing State harbours concerns about the treatment that may be reserved for the extradited person in the destination country. Even when the evidence does not clearly indicate the existence of a risk of such nature, the circumstances of the case may demonstrate that there is a reasonable doubt that the receiving State would comply with the obligation to prevent torture under articles 1 and 2 of the Convention. In the instant case it is uncontested that the complainant had been previously subjected to torture. In these circumstances, the Committee must determine whether the diplomatic assurances in the specific case were of a nature to eliminate all reasonable doubt that the complainant would be subjected to torture upon his return. In this context the Committee must take into account whether the obtained diplomatic assurances include follow-up procedures that would guarantee their effectiveness.

14.5 In this case, the Committee is of the view that the State party did not take into account, before deciding on extradition, all of the circumstances indicating that the complainant ran a foreseeable, real and personal risk of torture. First, the State party gave no consideration to the fact that the complainant would be sent to the same prison in which a guard had died during the complainant's escape years before, and that the guard's death too was a subject of the extradition request. Second, the agreed system of diplomatic assurances was not carefully enough designed to effectively prevent torture. The diplomatic and consular authorities of the State party were not given due notice of the complainant's extradition and not informed of the need to stay in close and continuous contact with him from the moment he was handed over. In this case the diplomatic assurances and the foreseen consular visits failed to anticipate the likelihood that the complainant had the highest risk of being tortured during the initial days of his detention. This risk proved to be true, as the complainant arrived in Mexico on 17 August 2007 and stated that he was subsequently tortured from 17 to 20 August 2007. However, the State party did not take steps to check on his safety until 22 August 2007. The Committee concludes therefore that the extradition of the complainant to Mexico in those circumstances constituted a violation by the State party of article 3 of the Convention.

14.6 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the extradition of the complainant to Mexico by the State party constituted a violation of articles 3 and 22 of the Convention.

15. The Committee requests that the State party, in accordance with its obligations under article 14 of the Convention, provide effective redress, including the following: (a) compensate the complainant for violation of his rights under article 3; (b) provide as full rehabilitation as possible by providing, inter alia, medical and psychological care, social services, and legal assistance, including reimbursement for past expenditures, future

services, and legal expenses; and (c) review its system of diplomatic assurances with a view to avoiding similar violations in the future.

16. Pursuant to rule 118 (former rule 112), paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps the State party has taken in response to the views expressed above, including measures of compensation for the breach of article 3 of the Convention and determination, in consultation with Mexico, of his current whereabouts and state of well-being.

Communication No. 343/2008: *Kalonzo v. Canada*

Submitted by: Arthur Kasombola Kalonzo
Alleged victim: The complainant
State party: Canada
Date of complaint: 4 June 2008 (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 18 May 2012,

Having concluded its consideration of communication No. 343/2008, submitted on behalf of Arthur Kasombola Kalonzo 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 author of the communication is Arthur Kasombola Kalonzo, a Congolese national, born on 2 December 1976 in the Democratic Republic of the Congo. He is currently residing in Canada. He claims that his return to the Democratic Republic of the Congo would constitute a violation by Canada of article 3 of the Convention against Torture.

1.2 On 6 June 2008, acting under rule 108, paragraph 1, of the Committee's rules of procedure, the Rapporteur on new complaints and interim measures requested the State party to refrain from expelling the complainant to the Democratic Republic of the Congo while his complaint was being considered. The State party acceded to this request.

The facts as presented by the complainant

2.1 The complainant was 8 years old when his family went to the United States of America in 1984 in order to escape persecution in the Democratic Republic of the Congo resulting from the opposition political activities of his father, who was an influential and well-known member of the Union for Democracy and Social Progress (UDPS).^a

2.2 In April 2002, the United States authorities deported the complainant to the Democratic Republic of the Congo because he had several criminal convictions. It was also because of his criminal record that he, unlike the other members of his family, was not granted United States citizenship. Upon his arrival at the Kinshasa airport, he was intercepted by the Congolese authorities, who accused him of being a criminal and took the money he had on him. After a few hours, they told him that they were aware of his criminal record in the United States and that they knew his father, a famous former soccer player,

^a According to the affidavit of the complainant's father, André Kalonzo Ilunga, made on 4 June 2008 and included in the file, he is a co-founder of UDPS, a party that has officially been in existence since 15 February 1982.

and were aware of the latter's activities as a UDPS member. The complainant was accused of being a UDPS member, like his father, and was taken to the Makala prison, where he claims to have been ill-treated, beaten, tortured and sexually assaulted.^b His detention lasted 4 months and several days. He then escaped from the prison.

2.3 The complainant managed to obtain travel documents for Canada, where he requested asylum on 4 February 2003. Owing to his psychological state following his experiences in the Democratic Republic of the Congo, he wanted to return to the United States, where he had lived for most of his life, in order to join his family. On 1 May 2003, he attempted to return illegally to the United States using a fake birth certificate, but he was stopped, detained and sentenced to 30 months' imprisonment in the United States. As he was still in the United States when the hearing concerning his application for asylum in Canada was to take place, the complainant did not appear at the hearing and the proceedings were discontinued by the Immigration and Refugee Board of Canada on 7 August 2003. A warrant for his arrest pending his removal from the country was issued on 28 June 2004.

2.4 The complainant filed an application in the United States under the Convention against Torture in which he claimed that he would be at risk of torture in the Democratic Republic of the Congo. He set out several facts in support of his claim, including the political activities of his father, a UDPS member; the political views attributed to the complainant as a result of his father's activities; the fact that he was a Luba from Kasai and the links of this ethnic group to UDPS; the political situation in the Democratic Republic of the Congo; and his detention and torture following his forcible return to the Democratic Republic of the Congo in 2002. He also submitted a medical certificate issued by the University Hospital (Newark, New Jersey) after an examination carried out on 17 October 2005. The certificate states that the complainant bears little physical evidence of the torture and rapes that he underwent, which is not inconsistent with the events he described; that the psychological effects are evident; and that he seems to be suffering from post-traumatic stress disorder.^c

2.5 On 12 February 2005, a United States judge granted the complainant protection under the Convention based primarily on the risk of torture linked to his father's opposition political views.^d However, the complainant was deported to Canada under the Agreement between the Government of Canada and the Government of the United States of America

^b Detailed information on the treatment suffered by the complainant is given in his statement to the Canadian authorities, which is contained in the file.

^c In her report, Dr. Mona El-Gabry indicates: "On physical examination, Mr. Kalonzo bears little physical evidence of the torture and rape experienced, but in my medical opinion, this is not at all inconsistent with the story he describes. (...) I noted a 1 cm linear, hypopigmented scar on the crown of his head, in the midline, which is consistent with his story of having had an open wound in this area. Mr. Kalonzo shows no external signs of the rape that he had experienced; however, it is rare for there to be any external evidence of rape or sodomy. Mr. Kalonzo relates a story of brutalization and trauma at the hands of Congolese authorities. Because Mr. Kalonzo was a young man when he received his wounds and because he received adequate medical attention immediately after his release from prison in the Congo, he bears little physical evidence of his torture. The psychological effects are still evident. Based upon what Mr. Kalonzo describes to me about his current condition and based upon my training and experience in evaluating torture victims, he seems to suffer from aspects of post-traumatic stress disorder. Additionally, he seems to have a very reasonable fear of what may become of his life if he is returned to the Congo."

^d According to the information submitted by the complainant, the American judge found there was sufficient evidence to conclude that there was a possibility that the complainant would be tortured in the event of his return, albeit not necessarily immediately upon return and not with complete certainty; there was, however, a risk of torture.

for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries on 9 April 2006, after completing his prison sentence in the United States.

2.6 Upon his arrival in Canada, the complainant applied for refugee status but his application was declared inadmissible because of the discontinuance of the proceedings in 2003. On 18 October 2006, Citizenship and Immigration Canada issued a report stating that the complainant was inadmissible to Canada because of his past criminal activity. On 30 March 2007, he applied for a pre-removal risk assessment (PRRA).^e His application was rejected on 7 April 2008 on the grounds that: (a) the complainant himself was not a UDPS member; (b) he had failed to demonstrate that his father was still a UDPS member and had experienced problems as a result of his political views during his stay in the Democratic Republic of the Congo in 2006–2007; (c) the complainant could relocate to Kinshasa, as no violence against the Luba seemed to be taking place there; and (d) the complainant's credibility concerning the events allegedly experienced in the Democratic Republic of the Congo in 2002 was in doubt.

2.7 The complainant claims to have submitted evidence to refute the PRRA officer's conclusions, which the latter allegedly failed to take into consideration. For example, he maintains that, during his father's stay in the Democratic Republic of the Congo during the election period from March 2006 to November 2007, the latter had received anonymous phone calls and threats from the police, probably on account of a transfer of money he had made to the UDPS fund and his efforts to have his house, which was illegally occupied by Government officials, returned to him.

2.8 The complainant claims that the PRRA officer, on his own initiative, made enquiries about his father and used extrinsic evidence (not disclosed to the complainant) to call into question his father's UDPS membership and the nature of the problems encountered by the latter during his stay in the Democratic Republic of the Congo from 2006 to 2007. However, the complainant's father was never interviewed, even though he was ready to testify. The PRRA officer also refused to accept a written statement on the grounds that the father's testimony would be biased. The complainant therefore submitted a letter of support from a UDPS member, which was dismissed by the officer as coming from a biased witness, a claim the complainant contests. The complainant points out that the decision by the United States authorities to grant him protection under the Convention against Torture was based primarily on the risk of torture linked to his father's opposition political views. Whether the latter is still a UDPS member is not decisive, as he has been one in the past; the complainant has the same family name; and persons suspected of political opposition are systematically targeted by the authorities of the Democratic Republic of the Congo, which the PRRA officer does not dispute.

^e The pre-removal risk assessment (PRRA) report is attached to the present complaint. In that report, the PRRA officer states, *inter alia*, that on the personal information form submitted to the Immigration and Refugee Board of Canada, the complainant stated that his father had died in 2002 as a result of ill-treatment. However, other documents showed that his father was still alive. In addition, the complainant did not mention that he had lived in the United States, but rather submitted that he had lived in the Democratic Republic of the Congo until his arrival in Canada in January 2003. The report also indicates that the complainant, when questioned at a hearing on 17 December 2007, contradicted himself several times and omitted important information. For example, he claimed to be unable to provide any details concerning the prison in which he had been held or the circumstances of his detention. It was unclear from his testimony whether he had escaped from prison or whether he had been released lawfully with the assistance of his lawyer. In different statements, he claimed to have been released in July 2002, August 2002 and January 2003, which means that the duration of his alleged detention ranged from 3 to 9 months. Contradictions were also noted as to the dates of and reasons for his father's trip to the Democratic Republic of the Congo and the latter's current UDPS membership status.

2.9 As to the internal flight alternative, according to the complainant, the PRRA officer had no grounds to conclude that he could relocate to Kinshasa despite being a Luba from Kasai and despite the violence suffered by this ethnic group.

2.10 The PRRA officer calls into question the complainant's credibility as to the events he allegedly experienced in the Democratic Republic of the Congo in 2002 but does so by focusing on minor inconsistencies and by arbitrarily dismissing the evidence that the complainant suffers from post-traumatic stress disorder, which can considerably impair his recollection of events. The officer also fails to take into consideration the letter from the complainant's Congolese lawyer, who was involved in the efforts to secure his release in 2002 and who has confirmed the complainant's allegations. The officer considers the lawyer to be biased but does not advance any reasons for this conclusion. The evidence that the complainant suffers from post-traumatic stress disorder was also dismissed without giving any reason for that decision, despite the fact that the medical certificate was issued by a doctor specialized in examining torture victims.

2.11 On 6 May 2008, the complainant received a notification that his removal was scheduled for 6 June 2008. On 22 May 2008, he filed a motion for a stay of removal with the Federal Court of Canada. His motion was rejected on 2 June 2008.

The complaint

3.1 The complainant claims that, because of his criminal record in the United States, his detention and subsequent escape from prison in the Democratic Republic of the Congo in 2002, and his father's political opinions, he would risk being arrested and tortured again should he be returned to his country of origin. The fact that he is a Luba (Baluba) from Kasai would also put him at risk, as this ethnic group is linked to the UDPS opposition party. The author claims that the Canadian authorities are aware of this risk, as there is a moratorium on the deportation of Congolese nationals. However, exceptions are made to this moratorium, in particular for persons who are inadmissible to Canada because of past criminal activity, under section 230 (3) (c) of the Immigration and Refugee Protection Regulations. This exception constitutes discrimination based on his criminal record and is thus a violation of the right to equal treatment before the law. The complainant invokes the Committee's decision in communication No. 297/2006, *Sogi v. Canada*, in which the Committee recalled that article 3 affords absolute protection to anyone in the territory of a State party, regardless of the person's character or the danger which that person may pose to society. Therefore, the State party cannot invoke the applicant's criminal record to justify derogating from the moratorium to return him to a country where he is at risk of being tortured.

3.2 The author also cites documents concerning the human rights situation in the Democratic Republic of the Congo, in particular regarding the practice of arbitrary detention, torture, extrajudicial killings and impunity. The documents he submitted prove that the Congolese Government is not in control of its security forces in the country and that those forces arrest and detain citizens arbitrarily and with total impunity on the slightest suspicion of political opposition.

3.3 Given his extended stay outside the country, the fact that he applied for asylum, his criminal record, his deportation, his connection to UDPS through his father, the identity checks made upon arrival in the Democratic Republic of the Congo and his medical condition, he is at greater risk of being detained and ill-treated.

State party's observations on admissibility

4.1 On 5 August 2008, the State party submitted observations on the admissibility of the communication. It argues that the complainant has not exhausted domestic remedies, that

his complaint is manifestly unfounded, that it constitutes an abuse of process, and that the complainant has failed to demonstrate that the decisions of the Canadian authorities have been arbitrary or have amounted to a denial of justice. The complainant disagrees with the decisions of the Canadian authorities in his case. The Committee should not, however, act as a fourth instance and should not re-examine the facts and evidence or review the application of domestic law by the Canadian authorities.

4.2 The complainant applied for asylum on 4 February 2003. On 19 March 2003, he submitted information under a false name and gave an account of his persecution in the Democratic Republic of the Congo that proved to be entirely invented. In particular, he claimed that he had lived his entire life in the Democratic Republic of the Congo, that he had been arrested together with his father because of their political activities, and that his father had died in 2002 as a result of torture.

4.3 The complainant failed to appear at the hearing on 5 August 2003, when his asylum application was to be considered. On that date, another hearing was scheduled. Given that neither the author nor his counsel appeared, the proceedings were discontinued. He did not apply to the Federal Court for judicial review of the decision to discontinue the proceedings.

4.4 On 30 March 2007, the complainant applied for a PRRA assessment; his application was rejected on 7 April 2008. The PRRA officer found that there were significant omissions and contradictions in the information provided by the complainant and concluded that he was not credible. On 20 May 2008, the complainant applied to the Federal Court for the PRRA decision and the removal order to be reviewed. This application was rejected on the ground that he had repeatedly lied to the Canadian and United States authorities, which called into question his credibility with regard to the alleged facts. In addition, the Court did not find any errors in the risk assessment prepared by the PRRA officer.

4.5 The State party maintains that the complainant has not exhausted domestic remedies because: (a) he failed to pursue his application for asylum in Canada and to apply for judicial review of the decision to discontinue the proceedings; and (b) he failed to file an application for residence based on humanitarian and compassionate (H&C) grounds. Such applications are filed on the basis of the potential risk to the person in his or her country of origin and are examined by a PRRA officer. However, unlike PRRA applications, the consideration of H&C applications is not limited to new evidence submitted since the previous decision in a case. The examination takes into account all the circumstances, not only risk factors, and goes beyond the criteria established with respect to PRRA assessments.

4.6 The State party disagrees with the decisions of the Committee in which it determined that, given the discretionary nature of ministerial decisions, it was not necessary to exhaust the H&C procedure. The fact that a remedy is discretionary does not mean that it is ineffective. While it is discretionary from a technical point of view, the ministerial decision must nevertheless be based on certain criteria and procedures. The discretion must be exercised in conformity with the law, the Canadian Charter of Rights and Freedoms and the international obligations of Canada. An H&C application can be based on the risk of torture in the country of return, and ministerial decisions can be reviewed by the Federal Court. A negative decision by the Federal Court can be appealed before the Federal Court of Appeal if the case raises an issue of general importance. A decision by the Federal Court of Appeal can be appealed before the Supreme Court of Canada.

4.7 The State party contends that the complaint is manifestly unfounded and thus inadmissible. The complainant's allegations and the evidence he has provided to the Committee are essentially the same as those submitted to the Canadian authorities. The complainant was interviewed by the PRRA officer, who was able to make a personal

assessment of his credibility. The officer's conclusions concerning the risk in the event of return are appropriate and well-founded. The State party recalls the Committee's jurisprudence, according to which it is not its role to re-evaluate findings of fact and credibility made by competent national authorities, unless it emerges that the assessment was arbitrary or constituted a denial of justice. The documents submitted by the complainant to the Committee do not show that the conclusions of the PRRA officer were tainted by such irregularities. Therefore, there are no grounds on which the Committee could consider it necessary to re-evaluate the findings of the Canadian authorities concerning the facts and the complainant's credibility.

4.8 The State party submits that the complainant lacks credibility for the following reasons: (a) his account is contradictory as to the date on which he arrived in Canada for the first time. On different occasions, he has claimed to have arrived in September 2002, January 2003 and April 2003; (b) he also provided contradictory information as to his identity, in particular his family name and his date of birth; (c) he provided false information concerning, inter alia, his father's political activities, persecution, arrest, torture and death; (d) he provided false information to the United States immigration authorities, which led to his arrest and sentencing to 30 months' imprisonment; (e) upon release, he was deported to Canada, where he initially denied having requested asylum in the past; and (f) during the PRRA procedure, he provided contradictory information concerning the treatment he allegedly suffered in 2002 in the Democratic Republic of the Congo. In particular, he was unable to give details concerning the prison in which he had been detained. He failed to clarify whether he had been released or whether he had escaped. He contradicted himself with regard to the date on which he regained his freedom and the time spent in Lumumbashi following his detention. He also provided contradictory information to the PRRA officer concerning his father's return to the Democratic Republic of the Congo in 2006–2007. Following the interview, the PRRA officer asked the complainant to provide certain documents. However, the documents he provided were deemed unsatisfactory. For example, the photocopy of his father's passport was illegible and did not show the dates of his stay in the Democratic Republic of the Congo, and the complainant provided a copy of a letter from UDPS, not the original requested by the officer.

4.9 With regard to the medical certificate provided by the complainant as evidence of the torture suffered in the Democratic Republic of the Congo, the PRRA officer found it inconclusive. He notes that there is little evidence of torture or abuse. The doctor indicates that the complainant shows symptoms of post-traumatic stress disorder but draws no definitive conclusion. It was the complainant himself who claimed to have had suicidal and depressive thoughts. The doctor does not explain what tests were used to diagnose post-traumatic stress disorder. While it is stated that the complainant has injuries consistent with his allegations, there is no evidence that these injuries were inflicted during his detention in the Democratic Republic of the Congo. The doctor does not explain the link between the complainant's angina and high blood pressure and his alleged torture. In view of the above, the complainant has failed to demonstrate that the PRRA officer's conclusion as to the weight that should be given to the medical certificate is unreasonable.

4.10 Given the complainant's lack of credibility, the PRRA officer concluded that his detention in the Democratic Republic of the Congo in 2002 and the risk to which he would be exposed in the event of his return had not been established. The officer noted that UDPS members might be arrested and ill-treated. However, according to a report of the United Kingdom Home Office, the situation had improved in 2007 compared to 2005.

4.11 The PRRA officer also noted that the United States judge had expressed doubts about the author's credibility. The officer nevertheless made an independent assessment, concluding that the complainant had not demonstrated that he or his father was an active UDPS member or that he would be ill-treated because of his ethnic origin, especially if he

lived in Kinshasa. The officer was not unaware of the difficulties that the complainant could encounter, given that he had lived most of his life in the United States. Those difficulties, however, could not be said to amount to persecution within the meaning of the Convention or to a risk to his life or a risk of torture or cruel and unusual treatment or punishment.

4.12 The State party is of the view that the situation in the Democratic Republic of the Congo has been difficult for years. However, this is not sufficient to establish that the complainant would be exposed to a real, personal and foreseeable risk of torture in the event of his return. The State party maintains that, even if this were the case, the complainant has failed to demonstrate that such a risk exists across the entire territory. The PRRA officer has acknowledged that the situation could be difficult for the Luba in the Katanga region, but the complainant has failed to demonstrate that such a risk exists in Kinshasa.

Complainant's comments on the State party's observations on admissibility

5.1 On 13 November 2008, the complainant submitted comments on the State party's observations on admissibility. He reiterates the reasons why he tried to enter the United States illegally on 1 May 2003 and was detained in that country, which prevented him from appearing at the hearing in Canada. Given the application for protection that he filed in the United States under the Convention against Torture, and the psychological circumstances that led him to leave Canada and seek the support of his family in the United States, he cannot be held responsible for not having pursued his asylum application in Canada at that time or for failing to apply for leave and judicial review of the decision to discontinue the proceedings.

5.2 Contrary to the State party's assertions, the complainant did file an application for permanent residence based on humanitarian and compassionate grounds on 29 May 2008.^f At the time of the submission of his comments, no decision had yet been taken on the application. A decision had, however, been rendered by the Federal Court on his application for leave and judicial review of the PRRA decision. That application was rejected, without any reason being given, on 14 August 2008.

5.3 The complainant contends that neither the PRRA assessment nor the H&C procedures constitute effective remedies. Decisions to grant H&C applications are not made on a legal basis, but rather *ex gratia* by a minister. Filing an H&C application does not legally stay the removal of the applicant. Appeals against negative PRRA decisions (applications to the Federal Court for leave and judicial review and appeals before the Federal Court of Appeal) also fail to constitute effective remedies, as none of these procedures legally stays the removal of the applicant. In the present case, the PRRA assessment of the facts and evidence is manifestly arbitrary and/or amounts to a denial of justice.

5.4 The complainant argues that his claims are sufficiently substantiated. His father is a long-standing political opponent who is known and recognized in the Democratic Republic of the Congo as a co-founder of UDPS, the main opposition party. Contrary to the State party's assertions, the complainant's identity has never been questioned by the Canadian authorities, nor has the family relationship between the complainant and his father ever been contested. Furthermore, the complainant's identity and his relationship to his father

^f A copy of the application is contained in the file. The application states, *inter alia*, that the Democratic Republic of the Congo is one of eight countries for which there is a moratorium on the return of unsuccessful asylum seekers owing to widespread violence. The complainant is excluded from the moratorium because of his illegal entry into the United States from Canada.

are clearly established by the complainant's passport and birth certificate. The complainant cites the United States Department of State Country Report on Human Rights Practices for 2007 to show that political opponents, whether actual or only perceived as such, are routinely arrested and tortured in the Democratic Republic of the Congo, and that family members of suspected or wanted persons are at risk of being arrested, detained and tortured.

5.5 The State party's assertions concerning the complainant's lack of credibility are irrelevant and should be dismissed. The Canadian courts have decided on several occasions that an asylum seeker's lack of credibility does not rule out the possibility of that person being a Convention refugee. Likewise, the complainant's credibility with regard to certain allegations is of little importance, as he could still objectively and subjectively be at risk of being tortured if returned to the Democratic Republic of the Congo.

State party's observations on the merits

6.1 On 6 February 2009, the State party submitted observations on the merits of the complaint. At the same time, it reiterated that the complaint should be declared inadmissible.

6.2 The complainant attempts to justify his failure to pursue his asylum application by citing his psychological condition following the treatment to which he was allegedly subjected in the Democratic Republic of the Congo and his need to join his family in the United States. This explanation is not valid because he has failed to provide medical or other evidence in support of his allegations. The only medical certificate that he has provided was issued in 2005 and was inconclusive, as has already been stated. Psychological stress is not unusual among asylum seekers. This cannot, however, absolve the complainant of his obligation to pursue his application, especially since he was represented by a lawyer. He should thus have been aware of the consequences of failing to do so. In addition, the State party rejects the complainant's argument concerning the judicial review of the discontinuance of the proceedings and maintains that this is an effective remedy. The State party confirms that the complainant filed an H&C application and emphasizes that this remedy must be exhausted.

6.3 The State party reiterates that the complainant's claims are manifestly unfounded and therefore inadmissible. As for the merits, he has failed to demonstrate that there are sufficient grounds for believing that he would be subjected to torture if returned to the Democratic Republic of the Congo for the reasons listed below.

6.4 The complainant provided contradictory information concerning his detention and the ill-treatment experienced in the Democratic Republic of the Congo in 2002. As regards the length of his detention, he declared on different occasions that it had lasted three, four and nine months. With regard to communication with his co-detainees, he first stated that they could not speak French. When he was told that French was an official language in the country, he said that some of them spoke French. Eventually, he said that most of them spoke French. Regarding the fact that he had kept 20 or 40 dollars on his person, he first said that he had kept the money in his socks. When confronted with his previous statement that he had been barefoot, he said that he had hidden the money in his trousers, where it had not been found. For the State party, these statements are not credible in view of his allegations that he was repeatedly abused. As to the manner in which he regained his freedom, he claimed in his written statements that a guard who knew his grandfather had set him free during the night. However, in a letter that, according to him, was written by his lawyer, it is stated that the release was the result of the intervention of a public prosecutor and a senior military judge. Lastly, in his PRRA application, he claimed to have been detained in the Democratic Republic of the Congo until his departure for Canada in January 2003. However, during his interview, he claimed to have stayed in Zambia for several months before travelling to Canada.

6.5 In his asylum application of February 2003, the applicant does not mention having been tortured in the Democratic Republic of the Congo. According to the State party, it is improbable that the complainant would have omitted to refer to the torture in his asylum application if he really had been tortured. Psychological stress cannot explain such behaviour.

6.6 Further information provided by the complainant to the Canadian authorities has proved to be contradictory. For example, as regards his family name and his date of birth, he gave a false name in his asylum application of 2003; he stated different dates of first arrival in Canada; he tried to enter the United States using false documents and denied that he had previously requested asylum in Canada; and he told the PRRA officer in December 2007 that his father had not returned to the Democratic Republic of the Congo for a long time, although the latter had just come back from a 20-month stay in the country.

6.7 The State party reiterates its comments concerning the medical certificate submitted by the complainant. This certificate, which is based on the complainant's account, states that he seems to be suffering from aspects of post-traumatic stress disorder. The State party also argues that the PRRA officer was right not to attach weight to the affidavits submitted in support of the complainant, since they either came from persons who were biased or contained inaccuracies.

6.8 The complainant has never participated in activities that could give rise to a risk of being subjected to torture. He is not a member of any political organization and has not shown that his criminal record in the United States or his deportation itself could constitute a risk. His parents have reportedly spent time in the Democratic Republic of the Congo in recent years (in particular his father between March 2006 and November 2007) without being detained or tortured. The complainant submitted a letter from a UDPS member stating that threats were made against the complainant's father by the police while he was in the process of trying to recover his house. However, there is no mention of any incident involving detention or physical danger.

6.9 The American judge who determined that there was a risk of torture in 2005 had attached considerable importance to the situation of the complainant's father. However, his father stayed in the Democratic Republic of the Congo after this date without being detained. In addition, the judge does not seem to have been aware of the fact that the complainant had submitted false information to the Canadian authorities in connection with his asylum application in 2003.

6.10 Lastly, the State party submits that there are very few references to the torture of UDPS members or Luba from Kasai in reports on the human rights situation in the Democratic Republic of the Congo, such as the 2007 Amnesty International report or the United States Department of State report for 2008.

Complainant's comments on the State party's observations on the merits

7.1 On 17 June 2009, the complainant submitted comments on the State party's observations on the merits. He recalls that he filed an application for judicial review of the PRRA decision. This application having been rejected, no other remedies are available to him to challenge his removal. His motion for a stay of removal pending a decision on his H&C application has been rejected.

7.2 The complainant explains that he failed to pursue his asylum application because he was suffering from post-traumatic stress, which has been confirmed by the certificate issued by a doctor who specializes in such matters. As regards the contradictions in his statements to the Canadian authorities to which the State party refers, he emphasizes that, in the absence of recordings of his interview with the PRRA officer, the Committee should not give any weight to this interview, as it is not possible to prove that there actually were any

such contradictions. When asked about his father's whereabouts, he had answered that he had travelled to the Democratic Republic of the Congo to participate in the elections. This reply was not inconsistent with any of the information he had given.

7.3 The complainant reiterates that he was tortured in the Democratic Republic of the Congo on account of his father's political opinions and that, since he has been tortured before, he fears being tortured again. As to the State party's argument that his father was not troubled in the Democratic Republic of the Congo, the complainant contends that, while he himself is of Congolese nationality, his father has a United States passport, which may afford a certain level of protection. This explains why the two were treated differently. If he were to be sent back, he would arrive at the airport in the Democratic Republic of the Congo under a deportation order, a situation which would be much more likely to lead to problems with the Congolese authorities.

7.4 The claimant submits that, when he applied for asylum in Canada, he did not mention that he was the son of Ilunga André Kalonzo. After what he experienced in the Democratic Republic of the Congo because of his links to his father, he thought that not mentioning these ties would be the best way to ensure his safety.

7.5 The State party has failed to mention that a moratorium on the removal of Congolese nationals is still in force owing to the state of insecurity in the country. The situation in the Democratic Republic of the Congo has not really changed since the American judge granted the complainant protection because of his potential risk of torture. Detainees continue to be tortured in the country, regardless of whether or not they belong to a political party. In this regard, he refers to the United States Department of State report for 2008 and the 2007 Amnesty International report on the situation in the country.

7.6 Lastly, the complainant informs the Committee that, since his arrival in Canada, he has found a job and that he is the father of a Canadian child. He requests the Committee to find a solution to prevent him from being separated from his daughter and his partner, who is a Canadian resident.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee takes note of the State party's observations concerning non-exhaustion of domestic remedies and of the complainant's comments in this regard. The Committee recalls that, following his deportation to Canada from the United States on 9 April 2006, he applied for refugee status, but that his application was found inadmissible. On 30 March 2007, the complainant applied for a PRRA assessment, the only available remedy. His application was rejected on 7 April 2008. On 20 May 2008, he applied to the Federal Court for review of that decision and of the removal order; this application was also rejected, without any reason being given, on 14 August 2008.

8.3 On 29 May 2008, the complainant applied for permanent residence on humanitarian and compassionate grounds (H&C). With regard to the State party's observations concerning the effectiveness of this remedy, the Committee recalls that, at its twenty-fifth session, in its concluding observations on the report of the State party, it considered the question of requests for ministerial stays on humanitarian grounds. It noted the apparent lack of independence of the civil servants deciding on such a remedy and the possibility

that a person could be expelled while such an application was being considered. It concluded that those circumstances could detract from effective protection of the rights covered by article 3, paragraph 1, of the Convention. It observed that, although the right to assistance on humanitarian grounds may be a remedy under the law, such assistance is granted by a minister on purely humanitarian grounds, rather than on a legal basis, and is thus *ex gratia* in nature. The Committee has also observed that when an application for judicial review is approved, the Federal Court returns the file to the body that took the original decision or to another decision-making body and does not itself conduct the review of the case or hand down any decision.^g Rather, the decision depends on the discretionary authority of a minister and, thus, of the executive. Based on these considerations, the Committee concludes that, in the present case, the possible failure to exhaust this remedy does not constitute an obstacle to the admissibility of the complaint.

8.4 As regards the alleged violation of article 3, the Committee is of the opinion that the complainant's arguments raise substantive issues which should be examined on the merits rather than on the basis of admissibility alone. Accordingly, the Committee finds the communication admissible and proceeds to its consideration on the merits.

Consideration on the merits

9.1 The issue before the Committee is whether the removal of the complainant to the Democratic Republic of the Congo would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo, 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 in the Democratic Republic of the Congo. 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 returned.

9.3 The Committee recalls its general comment on the implementation of article 3 of the Convention, which states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to meet the test of being highly probable, the Committee recalls that the burden of proof normally falls upon the complainant, who must present an arguable case establishing that he runs a "foreseeable, real and personal" risk. The Committee also recalls that, as set forth in its general comment No. 1 (1996),^h while it gives considerable weight to the findings of fact of the State party's bodies, it is entitled freely to assess the facts of each case, taking into account the specific circumstances.

9.4 The Committee takes note of the State party's observations concerning the complainant's lack of credibility, which are based, in particular, on the fact that contradictory information was submitted to the Canadian authorities regarding the length of his detention in the Democratic Republic of the Congo, his communication with his co-detainees, the money that he allegedly kept on his person, the manner in which he regained his freedom, his stay in Zambia before travelling to Canada, his father's stay in the Democratic Republic of the Congo and other matters. The Committee also notes the State

^g See communication No. 333/2007, *T.I. v. Canada*, decision of 15 November 2010, para. 6.3.

^h *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1)*.

party's observations concerning the fact that the complainant is not a member of a political party and that his parents have travelled to the Democratic Republic of the Congo several times without being troubled.

9.5 The Committee takes note of the difficult human rights situation in the Democratic Republic of the Congo and of the moratorium declared by Canada on the removal of rejected asylum seekers to that country. In this regard, the Committee notes the information submitted by the complainant, according to which the moratorium was put in place owing to the widespread violence existing in the Democratic Republic of the Congo and the fact that the moratorium would not apply in his case because of his criminal record. The State party has not challenged this information. The Committee is of the view that this information points up the discretionary nature of the moratorium procedure, whereas, in the spirit of article 3 of the Convention, it is to be understood that a moratorium on the removal of persons who would be at risk in their country because of widespread violence should apply to everyone without distinction.

9.6 The Committee also takes note of the complainant's claims regarding: (a) his detention and torture in the Democratic Republic of the Congo in 2002; (b) the medical certificate issued in 2005, according to which, although the complainant bore little physical evidence of torture, this was not the case with regard to psychological effects, as he showed signs of post-traumatic stress disorder fully consistent with his account and appeared to have a reasonable fear of what might befall him should he be returned to the Democratic Republic of the Congo;ⁱ and (c) the view of the American judge who granted him protection under the Convention that there were substantial grounds for believing that the complainant would be in danger of being subjected to torture in the event of his return.

9.7 The Committee also takes note of the State party's reference to reports dating from 2007 and 2008 that mention few cases of the torture of UPDS members or Luba from Kasai. In this regard, the Committee is of the view that, even if cases of torture are rare, the risk of being subjected to torture continues to exist for the complainant, as he is the son of a UDPS leader, is a Luba from Kasai and has already been the victim of violence during his detention in Kinshasa in 2002. In addition, the Committee considers that the State party's argument that the complainant could resettle in Kinshasa, where the Luba do not seem to be threatened by violence (as they are in the Katanga region), does not entirely remove the personal danger for the complainant. In this regard, the Committee recalls that, in accordance with its jurisprudence, the notion of "local danger" does not provide for measurable criteria and is not sufficient to entirely dispel the personal danger of being tortured.^j

9.8 In the light of the above, the Committee concludes that the complainant has established that he would run a real, personal and foreseeable risk of being subjected to torture if he were to be returned to the Democratic Republic of the Congo.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the State party's decision to return the complainant to the Democratic Republic of the Congo, if implemented, would constitute a breach of article 3 of the Convention.

11. In conformity with rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps taken by the State party in response to this decision.

ⁱ See communication No. 374/2009, *S.M. et al. v. Sweden*, decision of 21 November 2011, para. 9.7.

^j See communication No. 338/2008, *Mondal v. Sweden*, decision of 23 May 2011, para. 7.4.

Communication No. 347/2008: *N.B-M. v. Switzerland*

Submitted by: N.B-M. (not represented by counsel)

Alleged victim: The complainant

State party: Switzerland

Date of complaint: 10 April 2008 (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 14 November 2011,

Having concluded its consideration of complaint No. 347/2008, submitted to the Committee against Torture by Ms. N.B-M. 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 and the State party,

Adopts the following:

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

1.1 The complainant N.B-M., is a national of the Democratic Republic of the Congo born in 1974, who faces deportation from Switzerland to her country of origin. She claims that her deportation would constitute a violation by Switzerland of article 3 of the Convention. She is not represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 28 July 2008. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, requested the State party not to deport the complainant to the Democratic Republic of the Congo while her complaint was being considered. The State party acceded to this request on 30 July 2008.

Factual background^a

2.1 In her initial submission of 10 April 2008, the complainant described how distressed she felt because of her fear of returning to the Democratic Republic of the Congo and because of her precarious living conditions in Switzerland. She stated that she was suffering from depression and had developed psychosomatic problems as a result of that fear and the fact that she was not working in Switzerland, since she did not have legal permission to do so. In her letter of 24 July 2008, she reiterated that she was suffering from serious health problems that required regular medical follow-up. She also alleged that she had been raped by two officials who had helped her to flee from Ndjili airport – a fact which she said she had not mentioned in her asylum application out of a sense of propriety and because she had not thought that it was important to her application.

2.2 As far as the complainant's departure from the Democratic Republic of the Congo is concerned, it is claimed in her file that in late 2000 her fiancé, who had left Kinshasa for a

^a In order to make the factual background as comprehensive and coherent as possible, this section is based on both the complainant's correspondence and the judicial decisions concerning her.

business trip to Lubumbashi, informed her by telephone that he was travelling to Kisangani and that he was working for the rebels led by Jean-Pierre Bemba. She claims that he also informed her in the same conversation that Joseph Kabila was not the son of Laurent-Désiré Kabila, but the son of a Rwandan, and that the assassination of Kabila senior had been planned so that a Rwandan could take control of the Democratic Republic of the Congo. The complainant claims to have shared that information with persons in her neighbourhood in Kinshasa. She states that her fiancé subsequently sent a messenger, who gave her a mobile telephone, money and a copy of the magazine *Jeune Afrique* featuring an article relating to the circumstances of the death of Laurent-Désiré Kabila, which she was to circulate. After this, the messenger was allegedly arrested and questioned. The complainant also claims to have learned that her name and that of her fiancé had been mentioned when the messenger was being questioned. She alleges that the police went to her home in her absence and found copies of the magazine *Jeune Afrique* and letters from her fiancé.

2.3 Fearing for her life, the complainant claims that she initially took refuge with relatives living in Maluku, where she stayed until 25 August 2001. Having then allegedly heard from her mother that soldiers were constantly visiting the family home and enquiring about her, the complainant decided to leave the country. She says that she flew from Ndjili airport to Bamako on 28 August 2001 and arrived in Rome — via Lagos, Accra and Addis Ababa — on 9 September 2001, before reaching Switzerland by road on 10 September 2001. The same day, she submitted an application for asylum in Vallorbe.

2.4 On 13 June 2002, the Swiss Federal Office for Refugees rejected the complainant's application for asylum, deeming her claims to be implausible. The Office noted, in particular, the complainant's inability to substantiate the role of her fiancé in the rebellion led by Jean-Pierre Bemba, and did not accept her testimony that she had been responsible for spreading political propaganda in her neighbourhood. The Office considered that the complainant's low profile in the opposition undermined the credibility of her claim that there had been a major mobilization of security forces to arrest her.

2.5 On 14 November 2002, the Swiss Asylum Appeals Commission rejected the complainant's appeal on the grounds that she had failed to pay the procedural fee by the deadline set. Two successive requests for an extension of the deadline were also declared inadmissible.

2.6 On 15 August 2005, the complainant requested that the decision of the Swiss Federal Office for Refugees of 13 June 2002 be reconsidered in the light of new evidence. This included a copy of the weekly magazine *Le Courrier d'Afrique*^b featuring two articles which, according to her, proved that she was wanted by the security forces of the Democratic Republic of the Congo for supporting an opposition group. She also requested that the Swiss Mission in the Democratic Republic of the Congo conduct an inquiry to assess the authenticity of the evidence. On 19 August 2005, the Federal Office for Migration decided that, in the absence of any new facts or evidence, and since the copy of *Le Courrier d'Afrique* submitted to the authorities had been forged, there were no grounds for examining the complainant's application for reconsideration.

2.7 On 12 September 2005, the complainant appealed against the latest decision of the Federal Office for Migration, arguing that she had provided firm evidence of the threats she faced in the Democratic Republic of the Congo. To support her appeal, she produced new evidence, including a summons served on her mother and a letter addressed to the complainant by her mother. On the basis that the appeal seemed unlikely to succeed, on 1 November 2005 the Asylum Appeals Commission's investigating judge refused to order

^b No. 47 (25 April to 10 May 2005).

interim measures and set a deadline for payment of the estimated procedural fees. The complainant challenged this decision on 11 November 2005 and stood by the authenticity of the documents she had submitted, to which she added a summons addressed to her on 10 October 2001. On 18 November 2005, the judge rejected the complainant's request, noting the lack of authenticity of the summons, which had, moreover, not been mentioned earlier in the proceedings.

2.8 In its decision of 31 March 2008, the Federal Administrative Court rejected the complainant's appeal on the grounds that she had not introduced any new facts or evidence, and stressed the lack of credibility of her claims and the evidence presented. It considered that the two summonses submitted by the complainant had very little evidentiary value, noting that they had been presented in 2005, almost five years after the alleged events.

2.9 On 18 July 2008, the Court again dismissed the complainant's appeal on the grounds that she had not made the advance payment for the procedural fees.

2.10 The complainant maintains before the Committee that her application for asylum is well founded and that she fears being arrested, tortured and raped if she returns to the Democratic Republic of the Congo. She says that, if she returned to her country, she would immediately be imprisoned and that she is afraid of being raped in prison, being exposed to serious illnesses and being subjected to forced labour. She adds that her mother has also received threats and has had to leave Kinshasa. She no longer has any relatives in Kinshasa and would therefore not receive any material or moral support, whereas in Switzerland she has built a social network, has accommodation, is covered by health insurance and receives welfare. In her letter of 21 August 2008, the complainant reiterated that she was suffering from depression, for which she was receiving medical treatment.

The complaint

3.1 The complainant claims that her deportation from Switzerland to the Democratic Republic of the Congo would be a violation of article 3 of the Convention, as there are substantial grounds for believing that she would be in danger of being subjected to torture if returned.

State party's observations on the merits

4.1 On 22 January 2009, the State party submitted its observations on the merits of the communication. It states that the complainant has failed to establish that she would face a personal, real and foreseeable risk of torture upon her return to the Democratic Republic of the Congo. While noting the human rights situation in the Democratic Republic of the Congo and referring to general comment No. 1 of the Committee,^c the State party asserts that this situation is not in itself a sufficient basis for concluding that the complainant would be at risk of torture if she returned. It further states that the complainant has failed to demonstrate that she faces a personal, real and foreseeable risk of torture if returned to the Democratic Republic of the Congo.

4.2 The State party notes that the complainant did not inform it of her allegations that she had been raped at the time of her departure from Ndjili airport in 2001. It asserts that the explanations she has provided to justify her failure to do so are implausible. In addition, the State party notes that, in any event, the rape alleged by the complainant is said to have been committed by officials involved in her flight from the Democratic Republic of the

^c A/53/44 and Corr.1, annex IX (21 November 1997). The State party also refers to communications No. 94/1997, *K.N. v. Switzerland* (Views of 19 May 1998) and No. 100/1997, *J.U.A. v. Switzerland* (Views of 10 November 1998).

Congo, who were therefore not acting in an official capacity. Accordingly, these events, even if proved to be true, cannot be taken into account to infer that the complainant faces a risk of torture if she returns to the Democratic Republic of the Congo.

4.3 According to the State party, the complainant lacks credibility: although she claims that she risked her life to deliver a political message, she has not been able to describe her experience in detail or to provide clarification of her fiancé's political activities. Her claim that her fiancé had sent a messenger who gave her a telephone, copies of the magazine *Jeune Afrique* and money to spread a political message in her neighbourhood are also implausible because the means deployed by the rebels seem disproportionate to the desired outcome in a neighbourhood of some 50 people. By the same token, the State party considers that the determination said to be shown by the authorities, who reportedly came to the complainant's home to look for her on many occasions in her absence, is unlikely in the case of an isolated opponent.

4.4 In the State party's view, the fact that the complainant was able to leave the Democratic Republic of the Congo from Ndjili airport (one of the places most closely watched by law enforcement officials), even though she supposedly faced a serious threat of arrest, also makes her testimony implausible. As to the two newspaper articles that she produced, they are crude forgeries. The same applies to the two summonses against the complainant and her mother, which are not sufficient to substantiate the risks faced and have very little evidentiary value, since both were produced in 2005, five years after the reported events.

4.5 Regarding her political activities, the State party notes that, although the complainant now indicates that she continues her political activities as a supporter of the Alliance des Patriotes pour la Refondation du Congo (APARECO), she has not substantiated these claims. At a hearing in 2001, she claimed that she had never been involved in politics and had never been a supporter or member of a political party. The State party therefore concludes that her testimony, which remains vague and unclear, is implausible and that her claim of current political activity is not credible.

4.6 According to the State party, the complainant's current state of health cannot be attributed to her fear of being subjected to violence if she returns to the Democratic Republic of the Congo, but rather to the fact that she is not working in Switzerland. Furthermore, her medical condition is not so severe as to prevent her removal from Switzerland, particularly since she may request financial support upon her return and consult a doctor in the Democratic Republic of the Congo. In conclusion, the State party reiterates that there are no substantial grounds for believing that the complainant faces a specific and personal risk of torture if she returns to the Democratic Republic of the Congo.

Complainant's comments on the State party's observations on the merits

5.1 In a communication dated 26 March 2009, the complainant argues that the State party has recognized a pattern of consistent human rights violations in the Democratic Republic of the Congo and that this situation has a direct impact on the risks that she would face if she returned. She also refers to objective fears that arose after her escape, particularly in view of the threats allegedly received by her mother. She reiterates that the newspaper articles that she has provided constitute objective evidence of the risks faced. She maintains that she currently carries out political activities within APARECO aimed at raising awareness and spreading a political message. Her name and face have thus become familiar to the Congolese community in Switzerland and, as a result, to the Congolese authorities.

5.2 The complainant maintains that she did not mention the rape she suffered to the Swiss authorities because it had been a traumatic experience that she was unable to disclose

at that time. She adds that her current state of health is an important factor that should be taken into consideration in assessing the risks which she faces in the event of deportation, including the risk of suicide. Lastly, the complainant requests that the specific risks faced by women be taken into account by the Committee and maintains that her political activities in Switzerland expose her to real danger if returned to her country.

Additional submissions by the complainant

6.1 On 15 April 2010 the complainant informed the Committee that she had applied for a residence permit on grounds of “serious personal hardship”, under article 14 (2) of the Asylum Act.^d The Federal Office for Migration rejected the initial application dated 13 January 2010 and rejected it on appeal on 12 February 2010, the main reason being that the complainant did not meet the conditions listed in article 14 (2) of the Asylum Act; she had lived in Switzerland for only eight years and had not demonstrated that she was sufficiently integrated socially, professionally and family-wise in the country. The Office also noted that there was no indication that the complainant could not successfully reintegrate in the Democratic Republic of the Congo, a country she did not leave until she was 27 years old.

6.2 On 15 October 2010, the complainant further informed the Committee that in January 2010 she had filed an appeal against the last decision of the Federal Office for Migration, cited above. On 14 May 2010, the Federal Administrative Court denied her application for legal aid in relation to this appeal and instructed her to pay the procedural fees. On 29 June 2010, the Federal Office for Migration presented a submission to the Court relating to the procedure undertaken by the complainant under article 14 (2) of the Asylum Act, reiterating that the complainant had not sufficiently integrated into Swiss society and that she had no close ties binding her with Switzerland. On 1 July 2010, the Court instructed the complainant to submit her comments by 16 August 2010, which she did.^e

6.3 In the same submission of 15 October 2010, the complainant reiterated her fears about returning to Kinshasa, claiming that she was still an active member of APARECO in Zurich. She added that the Parti du Peuple pour la Reconstruction et la Démocratie, which was close to President Kabila, was also active in Zurich, and reported on members of the opposition working against the Kinshasa regime, which exacerbated the risks she would face if she returned. The applicant also informed the Committee that her mother had died in the Democratic Republic of the Congo in June 2010, and said that her fiancé was still missing and that she had had no news of him. Lastly, she drew the Committee’s attention to her state of health, enclosing with her submission a medical certificate attesting to the fact that she had numerous disorders, both physical and psychiatric, including depression, severe insomnia and suicidal tendencies.

^d Article 14 (2) of the Federal Asylum Act (26 June 1998) stipulates that:

“The canton may with consent of the Federal Office grant a person for whom it is responsible in terms of this Act a residence permit if:

(a) The person concerned has been a resident for a minimum of five years in Switzerland since filing the asylum application;

(b) The place of stay of the person concerned has always been known to the authorities; and

(c) In light of their advanced stage of integration, there is a case of serious personal hardship.”

^e The complainant enclosed her submission to the Court dated 18 August 2010 as an annex.

Additional submissions by the State party

7.1 On 14 April 2011, at the request of the Committee, the State party submitted observations on the rules applicable to the free assistance of a lawyer in appeal proceedings, as well as the rules on the advance payment of fees in asylum proceedings. On the first of these points, the State party begins by stressing that article 3 of the Convention cannot be construed as placing an obligation on the State party to pay the fees of a court-appointed lawyer in every case, regardless of the circumstances of the case.^f The State party adds that, under the relevant domestic law, three conditions must be met for the court-appointed lawyer's fee to be paid: (a) the applicant must be indigent; (b) their application must have some chance of success; and (c) representation must be necessary, in the sense that the case must present, in law or in fact, specific difficulties that the party is not capable of resolving on their own.^g According to the State party, the requirements of article 3 of the Convention do not go further than these principles.

7.2 As for the procedural fees, the State party stresses that the initial application for asylum is free of charge. However, a fee is payable for review procedures processed by the Federal Office for Migration and for repeated asylum applications.^h The Office may, moreover, require advance payment of the estimated procedural fees.ⁱ If an application for reconsideration is submitted shortly before execution of the expulsion order, and the expulsion has already been planned, it is the practice of the Office to skip the request for advance payment of fees and process the application as quickly as possible. The same practice is adopted in certain other circumstances, such as when the application is submitted at an airport or while the applicant is in detention. In other cases, if the applicant is not indigent, or if their application appears doomed to failure, advance payment of the fees is usually requested, for either an application for reconsideration or a new asylum application. Normally the inquiries to determine if fees must be paid in advance are carried out as soon as the application is submitted.

7.3 The indigence requirement is met when the person concerned cannot afford to pay the procedural fee without using money needed for their personal needs or their family's needs. Case law considers that a case has no chance of success if the prospects of winning it are considerably less than losing it and if success cannot be seen as a serious possibility, to the extent that a reasonable, well-off litigant would not embark on the procedure on account of the costs they would be liable to incur. On the other hand, legal aid may be granted when the chances of success or failure are about the same, or when the first are only slightly lower than the latter. The official decision is based on a brief pre-evaluation of the evidence in the case file; the applicant's allegations must be verified. In asylum proceedings, most refusals to exempt a person from payment of fees are motivated by the fact that the application appears doomed to failure from the outset. In practice, when the Federal Office for Migration sends a letter to the applicant requesting advance payment of fees, it sets a deadline of 15 days from the date the letter is posted; this deadline is not extended, even if the applicant is late in collecting the letter from the post office. If the advance requested — which corresponds to the expected cost of the proceedings — is not paid, the Federal Office for Migration does not take up the application. The applicant has 30 days to appeal against this decision to the Federal Administrative Court.

7.4 In the specific case of the complainant, the State party points out that no fees were charged for the first decision of the Federal Office for Migration, issued on 13 June 2002.

^f The State party refers to the Committee's general comment No. 1, para. 5.

^g Federal Constitution of the Swiss Confederation of 18 April 1999, art. 29, para. 3 (Cst., RS 101).

^h Federal Asylum Act, art. 17b, para. 1.

ⁱ Federal Asylum Act, art. 17b, para. 3.

Nor did the Office charge a fee for informing the complainant that her application for reconsideration, filed on 15 August 2005, provided no grounds for it to reconsider its decision of 13 June 2002. The Office did, however, charge a fee of 600 Swiss francs for processing the complainant's application for review dated 9 April 2008, which it rejected by decision of 4 June 2008.

7.5 On 12 July 2002, the complainant appealed against the aforementioned decision of the Federal Office for Migration to the Swiss Asylum Appeals Commission (which was later replaced by the Federal Administrative Court). By registered letter of 24 July 2002, the Commission gave her until 8 August 2002 to make the advance payment of the procedural fee of 600 Swiss francs, telling her, as is standard practice, that, as a rule, payment by instalments was not allowed, and that her appeal would be declared inadmissible if the advance was not paid in time. A letter from the complainant dated 6 August 2002 on her precarious financial situation was interpreted by the Commission as a request to waive payment of the procedural fee, which it rejected by decision of 23 October 2002, after examining the decision of the Federal Office for Migration and the complainant's arguments and concluding that, on the face of it, her appeal appeared to be doomed to failure. The Commission gave the complainant another three days to pay the procedural fee. When she failed to do so, the Commission declared her appeal inadmissible by decision of 14 November 2002. A fee of a further 200 Swiss francs was charged for this decision. On 2 December 2002 she contacted the Commission to say that she had not received any notification that the decision of 23 October was ready for collection at the post office, and that she had that very day made the advance payment requested. She also requested, by letter of 12 December 2002, an extension of the deadline. By decision of 23 December 2002, the Asylum Appeals Commission declared this request inadmissible, on the grounds that the deadline extension was set at 10 days from the cessation of the impediment that led to the failure to observe the deadline. A fee of 200 Swiss francs was charged for this decision.

7.6 On 16 January 2003, the complainant, through a lawyer, asked the Asylum Appeals Commission to reconsider this decision, on the grounds that she had not received the decisions of 23 October 2002 and 14 November 2002 in time to prepare an appeal. By letter of 3 February 2003, the Commission sent the complainant's representative various documents attesting to the fact that the decision of 14 November 2002 had been mailed to her on 15 November 2002 and that it had been received at the post office before 25 November 2002. In a letter dated 6 February 2003, the complainant's representative refused to comment on this point. On 27 February 2003, the Asylum Appeals Commission consequently declared the complainant's second request for an extension of the deadline to be inadmissible, and a fee of 400 Swiss francs was charged for this decision.

7.7 On 12 September 2005, the complainant appealed against the decision of the Federal Office for Migration of 19 August 2005, in relation to her first application for review. By interlocutory decision of 1 November 2005, the Asylum Appeals Commission gave her until 16 November 2005 to pay advance fees of 1,200 Swiss francs. It considered that, to begin with, the articles in *Le Courrier d'Afrique* filed by the complainant were forgeries with no evidentiary value whatsoever, and that they clearly did not reflect her statements on the reasons for her asylum application. The Commission also noted that the complainant had produced no new information to support her asylum application. Accordingly, on 1 November 2005, after a prima facie review of the appeal, the Commission concluded that the appeal had no chance of success. As the advance payment of fees had been made on 11 and 23 November 2005, the appeal was heard by the Federal Administrative Court, which rejected it on 31 March 2008, insofar as it was admissible.

7.8 On 7 June 2008, the complainant challenged the decision of the Federal Office for Migration dated 4 June 2008, on her second application for review. Taking the view that

this was an appeal, the Office forwarded it to the Federal Administrative Court, the body competent to deal with it. As it referred to the complainant's precarious financial situation, the Court took it as a request to be exempted from paying the procedural fees, which it rejected by decision of 19 June 2008: in any case, the appeal appeared doomed to fail as the application contained no new information and the documents attached thereto did not demonstrate that the complainant was engaged in any political activity in exile. Moreover, the Court noted that the health problems she referred to did not pose an obstacle to her removal, as she could receive psychiatric treatment in Kinshasa. The Court gave the complainant until 4 July 2008 to pay the advance fees, estimated at 1,200 Swiss francs, and informed her that if she did not pay, her appeal would be declared inadmissible and the deadline would not be extended any further, even if she reapplied for legal aid. On 30 June 2008, the complainant applied again to be exempted from payment of the advance fees, claiming she was on welfare. The Federal Administrative Court therefore declared the appeal to be inadmissible by decision of 18 July 2008. A fee of 200 Swiss francs was charged for this decision.

7.9 As for the rules on representation of asylum seekers by a court-appointed lawyer, on which the Committee had also requested information, the State party refers it to the relevant legal provisions^j and points out that the complainant was represented at her first application for review. The lawyer concerned had not asked for his fees to be covered by legal aid. The complainant was not represented at her second application for reconsideration. It is clear from her statement of 9 April 2008, as well as from the rest of her case file, that the complainant did not at any point ask for a lawyer to be assigned to her. Moreover, the State party points out that, according to the various authorities called upon to rule on the matter, the complainant's applications for reconsideration clearly had no chance of success. Nor did the case present any legal problems, since the only issue was whether the complainant had refugee status within the meaning of the Federal Asylum Act, and whether there were any reasons for objecting to her removal. Her first application for reconsideration, for which she was represented by a lawyer, was rejected, as were her subsequent applications. It is likely that the outcome of the proceedings would have been the same if the complainant had been represented by a lawyer, and she has not suffered any harm as a result of not being represented during the proceedings before the Federal Office for Migration.

7.10 As for the proceedings before the Federal Administrative Court, the complainant was represented by a lawyer for her second request for an extension of the deadline, addressed to the Asylum Appeals Commission on 16 January 2003. Just as she never asked for a lawyer to be assigned to her for the proceedings before the Federal Office for Migration, she never asked for one in the proceedings before the Federal Administrative Court. As she was denied legal aid because her appeals had no chance of success, it is likely that any request for a court-appointed lawyer would have been rejected too. The case file shows that the complainant had a good understanding of the criteria applied in asylum proceedings and that she was capable of formulating her reasons clearly and intelligibly, and that she had even included references to case law in her applications for reconsideration. Consequently, the complainant did not need the assistance of a court-appointed lawyer to adequately assert her rights, and she has not suffered any harm as a result of not being represented in all the proceedings.

7.11 In conclusion, the State party reiterates that article 3 of the Convention cannot be construed as requiring exemption from procedural fees and the assignment of a court-appointed lawyer in every case. In view of all the circumstances in the case at hand, it

^j See paragraph 7.1 above.

believes that the fact that no exemption was granted from the obligation to pay procedural fees and that no lawyer was appointed by the court does not constitute a violation of article 3 of the Convention. Moreover, the State party maintains all its earlier conclusions on the merits of the case.

Additional submission by the complainant

8.1 On 29 August 2011, the complainant informed the Committee that her application for a residence permit on grounds of “serious personal hardship” had been rejected by the Federal Administrative Court in a decision of 8 August 2011.^k The Court found, among other things, that the complainant had not demonstrated that she was integrated in Switzerland socially, professionally and family-wise, and that she would be able to successfully reintegrate in the Democratic Republic of the Congo, a country she had left when she was already 27 years old. The complainant points out that she has been living in Switzerland for 10 years and that she has not been able to work because her legal status in Switzerland does not allow her to do so. She repeats that there would be a serious risk to her health and safety if she was deported to the Democratic Republic of the Congo, because of the tragic human rights situation there, especially for women, because of her opposition to the current regime and her activities within APARECO, and because of the worrying state of her health. Moreover, she no longer has any family in the Democratic Republic of the Congo and would no longer feel integrated there.

Issues and proceedings before the Committee

9.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes that domestic remedies have been exhausted and that the State party does not contest admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

9.2 With regard to the procedural aspects of the State party’s law and practice, particularly the issue of advance payment of fees and representation by a lawyer when submitting an appeal in an asylum case, the Committee has taken note of the information supplied by the State party. It notes that the complainant was represented by a lawyer for part of the proceedings and that at no point did she submit a request for legal aid and representation by a lawyer. With regard to the advance payment of procedural fees, the Committee notes that when the Asylum Appeals Commission declared her appeal inadmissible for non-payment of such fees on 14 November 2002, the complainant was able to appeal against this decision to the Federal Administrative Court on 16 January 2003, and that she was represented by a lawyer on this occasion. The Committee notes that she did not raise any grievance in respect of the appeals procedure to the various instances and that nothing in the case file suggests that the complainant has suffered any harm as a result of the lack of legal representation or the denial of legal aid.

9.3 The issue before the Committee is whether the removal of the complainant to the Democratic Republic of the Congo would constitute a violation of the State party’s obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

^k See above, para. 6.1 et seq.

9.4 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo, 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 she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds 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 specific circumstances.

9.5 The Committee acknowledges the dire human rights situation in the Democratic Republic of the Congo, especially for women,¹ and recalls its jurisprudence on the issue.^m The Committee observes that the State party has taken this factor into account in evaluating the risk the complainant might face if returned to her country. It concludes, moreover, on the basis of information on the prevailing situation in Kinshasa,ⁿ where the complainant would be returned, that the weight to be attached to this factor is not sufficient to prevent her removal. The Committee therefore proceeds to an analysis of the personal risk facing the complainant with respect to article 3 of the Convention.

9.6 The Committee recalls its general comment 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”.^o The complainant contends that she faces a personal and present risk of torture in the Democratic Republic of the Congo because, at her fiancé’s behest, she spread a political message in her neighbourhood against the regime in power and that, as a result, she received threats from the security services, which have been looking for her since her departure from the family home and, subsequently, from her country in 2001. The Committee notes that the State party challenges the credibility of the complainant’s statements, particularly her claim that she spread a political message that she had received from her fiancé. It noted that the means reportedly deployed, both by the rebels to spread this message and by the Congolese

¹ See, inter alia, the second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo (A/HRC/13/63, 8 March 2010), as well as the report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo (A/HRC/13/64, 28 January 2010).

^m Communication No. 322/2007, *Njamba and Balikosa v. Sweden*, decision adopted on 14 May 2010, para. 9.5.

ⁿ The Committee has requested the views of the Office of the United Nations High Commissioner for Refugees (UNHCR) regarding the return of asylum seekers to the Democratic Republic of the Congo, including Kinshasa. In the guidelines that it made available to the Committee on 11 November 2009, UNHCR makes a distinction between the situations of asylum seekers as a function of their region of origin: UNHCR considers that any asylum seeker who is a resident of North Kivu, South Kivu, Maniema or Orientale provinces (Ituri, Bas-Uélé and Haut-Uélé districts) needs international protection, given the massive human rights violations currently taking place in these conflict zones. UNHCR is of the view that requests for asylum from residents of the other areas of the Democratic Republic of the Congo (including Kinshasa) should be considered on a case-by-case basis in order to determine their acceptability under the 1951 Convention relating to the Status of Refugees. UNHCR nevertheless invites States to take into account any pertinent humanitarian considerations, as well as their obligations under human rights conventions.

^o See footnote c above (para. 6.4).

authorities to find an isolated opponent such as the complainant, were disproportionate and therefore implausible. The complainant has not put forward a persuasive argument that would allow the Committee to call into question the State party's conclusions in this respect. In view of all these circumstances, the Committee is not convinced that, 11 years after the event described in the Democratic Republic of the Congo, the complainant, who was never politically active in that country, is a wanted person. As for her political activities in Switzerland, and despite her late claim to be active in the Alliance des Patriotes pour la Refondation du Congo,^p she does not specify how long she has been involved in this movement or demonstrate convincingly how such activities would expose her to a specific risk of violation of article 3 if she were to be returned to the Democratic Republic of the Congo.

9.7 With regard to the complainant's claim that she was raped at Kinshasa airport as she was about to leave the Democratic Republic of the Congo, which she mentioned in her second letter to the Committee,^q the Committee cannot grant much weight to the allegation, as she raised it only summarily to the Committee, merely mentioning that she had been raped by two officials who had helped her to flee, without further substantiating the allegation.

9.8 With regard to the complainant's claims regarding her current state of health, the Committee has noted the difficulties that she is experiencing. It has also noted the State party's contention that the complainant could consult a doctor in the Democratic Republic of the Congo. She has not challenged this argument, and the Committee has itself found reports which, while they demonstrate the uncertainties and high cost of health care in the Democratic Republic of the Congo, show that facilities do exist in Kinshasa for the treatment of depression.^r The Committee further observes that, even if the state of health of the complainant were to deteriorate after her deportation, this would not, of itself, amount to cruel, inhuman or degrading treatment attributable to the State party within the meaning of article 16 of the Convention.^s

9.9 The Committee recalls its jurisprudence, according to which it is normally for the complainant to present an arguable case.^t On the basis of all the information submitted to it, including information on the situation in Kinshasa, the Committee is of the view that the complainant has not provided sufficient evidence to allow it to consider that her return to the Democratic Republic of the Congo would put her at a real, present and personal risk of being subjected to torture, as required under article 3 of the Convention.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the return of the complainant to the Democratic Republic of the Congo would not constitute a breach of article 3 of the Convention.

^p This claim appears only in the complainant's fourth submission to the Committee (dated 26 March 2009).

^q Dated 24 July 2008.

^r See, for example, the country file for the Democratic Republic of the Congo in the "Country of Return Information" project (November 2008), para. 3.6.1, and the report by the Organisation suisse d'aide aux réfugiés (OSAR) entitled "DRC: Psychiatrische Versorgung", A. Geiser, 10 June 2009, p. 2.

^s See communication No. 186/2001, *K.K. v. Switzerland*, Views of 11 November 2003, para. 6.8; and communication No. 83/1997, *G.R.B. v. Sweden*, Views of 15 May 1998, para. 6.7.

^t See communication No. 298/2006, *C.A.R.M. et al. v. Canada*, Views adopted on 18 May 2007, para. 8.10; communication No. 256/2004, *M.Z. v. Sweden*, Views adopted on 12 May 2006, para. 9.3; communication No. 214/2002, *M.A.K. v. Germany*, Views adopted on 12 May 2004, para. 13.5; and communication No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3.

Communication No. 351/2008: E.L. v. Switzerland

Submitted by: E.L. (not represented by counsel)

Alleged victim: The complainant

State party: Switzerland

Date of complaint: 9 May 2008 (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 15 November 2011,

Having concluded its consideration of complaint No. 351/2008, submitted on behalf of Ms. E.L. 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 and the State party,

Adopts the following:

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

1.1 The complainant is E.L., a national of the Democratic Republic of the Congo, born in 1988, who faces deportation from Switzerland. She maintains that her removal to the Democratic Republic of the Congo would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She is not represented by counsel.

1.2 On 18 August 2007, the Special Rapporteur on New Communications and Interim Measures, acting under rule 108, paragraph 1, of the Committee's rules of procedure, requested the State party not to deport the complainant to the Democratic Republic of the Congo while her complaint was being considered.

Factual background^a

2.1 The complainant alleges that after her mother's death in 1998 — which followed her father's death in 1990 — she lived with her two elder brothers until they left for Rwanda to join the rebel forces in 2002. After their departure, she lived with her neighbours. On 22 June 2003, when the complainant was aged 15, she started to work as a receptionist in the office of the rapporteur to the Congolese National Assembly in Kinshasa, Raphaël Luhulu Lunghe. Her work included receiving distinguished visitors to the Parliament, preparing documents for the sittings and cleaning the rapporteur's office.

2.2 In 2004,^b the complainant allegedly received a telephone call from one of her brothers, who apparently told her that he had joined the rebel forces and that he had asked her to pass on all the information she had access to in the course of her work, especially concerning any pending legislation or the composition and positions of the Congolese

^a The facts as stated are based on the complainant's submissions and on the decisions concerning her adopted in the course of asylum proceedings in Switzerland.

^b The exact date of this telephone call is not specified.

armed forces. The complainant allegedly did as her brother asked and gave him a considerable amount of information over the telephone.^c

2.3 On 26 January 2005, the complainant reportedly received a warning from a member of the National Intelligence Agency (ANR),^d who allegedly told her that he was aware of her contacts with the rebel forces and the secret information she was passing on to them. On the next day, the rapporteur allegedly summoned all the members of his staff to his office and informed them that the Intelligence Agency was conducting an investigation and that the informer would be found out sooner or later.

2.4 The complainant allegedly immediately informed her brother of the warning given by the rapporteur in his office. In response, her brother supposedly took immediate steps to help the complainant leave the country. The following day, the complainant allegedly travelled by canoe to Brazzaville with the help of one of her brother's contacts. She is said to have stayed in hiding there in a house for a few days before flying to Switzerland on 22 March 2005.

2.5 On 23 March 2005, the complainant submitted an application for asylum. In a decision dated 23 March 2005, the Swiss Federal Office for Migration (ODM) expressed the view that the complainant's statements did not meet the credibility requirement. ODM considered in particular that it was unlikely that the complainant should have had access to secret information, especially of a military nature, through her work in the rapporteur's office. Moreover, the complainant was unable to specify the content of the supposedly secret information she passed on to her brother or to explain how the latter had heard about her new job in the rapporteur's office, considering that he had not been in touch with her for years. Lastly ODM considered that the situation in the Democratic Republic of the Congo, which was not experiencing a civil war or generalized violence throughout the country, did not warrant the complainant being deemed at risk in the meaning of article 14a, paragraph 4, of the Swiss Federal Law on the Residence and Settlement of Foreigners.

2.6 On 4 July 2007, the complainant lodged an appeal against that decision with the Federal Administrative Court (TAF). On 26 July, the complainant produced a copy of a press article taken from the Congolese twice-weekly newspaper *La Manchette*, dated 28 January 2005, according to which the complainant was wanted by the political police, which accused her of "information trafficking and spying". The complainant maintained that this document showed that her fear of future persecution was real.^e On 6 September 2007, the Federal Court rejected the appeal, handing down a final decision on ODM's rejection of the complainant's asylum application and deportation order. The Federal Court concluded that it was not believable that the complainant should be unable to supply the least substantiated details of the nature and content of the sensitive, confidential information that she was supposed to have passed on for months to her brother. The Federal Court considered that the manner in which she was supposedly informed that she was suspected by the Intelligence Agency of passing information to the rebels appeared highly unlikely, just like the fact that a member of the Agency should have run the risk of warning her of the danger she was in rather than arresting her, or that her two brothers, who had been in exile in Rwanda for several years, should have been able, with just a phone call and in less than a day, to organize her instant flight from the country. As for the newspaper article submitted by the complainant, the Federal Court found that it had no probative value considering that a copy like the one produced could be falsified and that the type used for

^c The content of this information is not specified.

^d The National Intelligence Agency of the Democratic Republic of the Congo acts as both an internal and an external intelligence service.

^e A copy of the said article was attached to the complainant's initial complaint.

the article that appeared on the page of the newspaper was of a different size from that of the other articles printed on the same page.

2.7 On 29 November 2007, the Federal Court found the complainant's appeal inadmissible on the ground that she had put forward no relevant new facts or conclusive evidence. On 1 February 2008, the complainant lodged an application for a reconsideration of ODM's decision of 5 June 2007, which was declared inadmissible by the Federal Court on 18 March 2008 on the ground that it was manifestly time-barred.

The complaint

3.1 The complainant alleges that if she were sent back to the Democratic Republic of the Congo she would be in danger of being subjected to torture or ill-treatment. She points out that she was engaged in political work in the country, involving several secrets regarding the political and security situation, and she opted for exile in a foreign country, which in the eyes of the Congolese authorities placed her in the position of a "deserter". She maintains that if returned to her country she would be in real and serious danger, since it was very likely that she would be subjected to thorough questioning and possibly to ill-treatment.

3.2 According to the complainant, the existence of such a risk of torture or ill-treatment is supported by the minutes of her hearings, the conclusions of her appeals and the evidence submitted in the course of internal proceedings, including the aforementioned newspaper article,^f a written statement by Mr. Luhulu Lunghe, which she alleges was not taken into account, and her pass, which showed that she had worked for the National Assembly.

3.3 The complainant refers to specific female reasons for escape in asylum applications, but does not substantiate this argument.

State party's observations on the merits

4.1 On 17 February 2009, the State party submitted that the complainant had failed to establish that she would face a foreseeable, personal and real risk of torture if returned to the Democratic Republic of the Congo. It points out that the complainant has not shown that she was ever subjected to ill-treatment in the past. Moreover it suggests that the facts she alleges about the passing of secret information to her brothers, in connection with a rebel movement, lack any credence. For example, she had apparently been unable to explain how her brother had found out about her job with the Parliament and her whereabouts several years after he had left Kinshasa. The State party adds that it would be surprising if the complainant on a mere phone call would have taken the risk of losing her employment and facing serious consequences, especially since her alleged activity was directed against the very person who had apparently offered her the post she held. Similarly, the complainant seemed unable to say just when her brother had contacted her and even appeared to contradict herself by saying at the first interview that she had not been in touch with her brothers since a final telephone call when she was 15 years old until the day of her departure, while claiming later that she had passed information to them by telephone. The State party also points out that the complainant has been unable to give any details about the information she alleges she passed on and argues that the explanation she gave, saying that she was afraid to remember, was hardly convincing.

4.2 The State party also draws attention to factual inconsistencies in the complainant's statements and her credibility. According to the State party, the information she gave about her family background rested on little evidence and did not resemble the sort of social

^f See paragraph 2.6.

relations that were common in Africa. For example, it appears unlikely that the complainant should have had no information about her parents' relatives or that she should be unaware of her mother's ethnic origin or approximate date of birth, or of her brothers' whereabouts. The State party adds that the reasons she gives for her flight do not tally with what is common experience or logical behaviour. Thus it seems unlikely that a secret service agent would have taken the risk of warning the complainant that she was being investigated, especially in view of the situation prevailing in the Democratic Republic of the Congo. They suggest such doubts are only aggravated by the fact that she first said that the agent had called her, before giving a new version, according to which she had spoken to him personally. The State party points out that the complainant gave only a superficial account of her flight, without being able to say who might have helped her, who might have paid for her trip, how her departure had actually taken place or how her brothers could have set it up from Rwanda in a matter of hours.

4.3 According to the State party, the doubts raised by the complainant's account were only made worse when, at the appeal stage, she produced a newspaper article which was clearly not authentic and the content of which was peculiar and in apparent contradiction on several points with the complainant's own allegations. Thus, the article reports that she was constantly being followed by uniformed men, a fact she had completely omitted to mention. The article also mentions that the complainant's parents were making enquiries, whereas they were apparently already deceased. In addition, the complainant handed the Court a confirmation by the publisher of the newspaper *La Manchette* of the validity of the said article, except that the confirmation was drafted on headed notepaper that did not correspond to the name of the newspaper, which was given as *La Machette*. The State party believes it is unlikely that the headed paper of printed media would contain such a spelling mistake.

4.4 Lastly, the State party argues that the submission at the appeal stage of a written "statement" by Mr. Luhulu Lunghe raises still further doubts. According to the State party, it is unlikely that Mr. Luhulu Lunghe would explicitly admit responsibility for a major information leak occurring in his department. They add that it would be surprising if the statement had been furnished by the very person who apparently disapproved of the complainant for passing confidential information. The fact that the document contains a reference to the article that appeared in *La Manchette* and which was considered a forgery casts further doubt on the reliability of the testimony.

4.5 The State party concludes that the allegations and evidence submitted by the complainant offer no substantial grounds for believing that the complainant's return would expose her to a real, concrete and personal risk of torture.

Complainant's comments on the State party's observations

5.1 On 24 April 2009, the complainant reiterates her earlier conclusions and asks the Committee to ignore the State party's observations. She submits a copy of a search warrant, dated 25 January 2009, according to which the National Intelligence Agency had allegedly launched an immediate search operation against her in Kinshasa. According to the complainant, the document shows that she ran a foreseeable, real and personal risk of being exposed to treatment that violated article 3 of the Convention. This risk was supposedly due to the work she was doing in the Parliament prior to leaving the Democratic Republic of the Congo, to the sensitive State information to which she had access, and to her application for asylum in Switzerland. The complainant points out that the State party has not queried the fact that she worked for the Congolese Parliament. She stresses the importance of the statement made by the rapporteur Luhulu Lunghe and the newspaper article — despite a few formal inconsistencies — as evidence of the serious risk she would run if returned to the Democratic Republic of the Congo.

Additional observations by the State party

6. On 12 May 2009, the State party reiterates its previous observations, pointing out that the complainant's comments contain no new elements. The State party contends that the search warrant submitted by the complainant is clearly a forgery. According to the State party, it is unlikely that such a warrant should have been issued in January 2009, considering that by then the complainant had been gone from the Democratic Republic of the Congo for almost four years. It would also be inconsistent for the Congolese authorities to issue a search warrant in Kinshasa when, according to the complainant, they were quite aware that she had applied for asylum in Switzerland.

Additional comments by the complainant

7. On 24 May 2009, the complainant states that the State party's argument that the search warrant is a forgery is based on mere supposition lacking any objectivity. According to the complainant, the warrant is valid both in form and in substance. She asserts that she obtained a copy of it through an acquaintance with whom she stayed in touch and who kept her informed of the risk she ran in the event of return.

Issues and proceedings before the Committee*Consideration of admissibility*

8. Before considering any claim contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes that domestic remedies have been exhausted and that the State party does not contest admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

Consideration on the merits

9.1 The Committee must ascertain whether the return of the complainant to the Democratic Republic of the Congo would violate the State party's obligation under article 3, paragraph 1, of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2 In so doing, the Committee must take account of all relevant considerations, including the existence in the State to which the complainant would be returned of a consistent pattern of gross, flagrant or mass violations of human rights. However, it must also determine whether the complainant runs a personal risk of being subjected to torture in the country to which she would be returned. The Committee reiterates that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not in itself constitute sufficient reason for concluding that a particular person would be in danger of being subjected to torture upon returning 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 gross and flagrant violations of human rights does not mean that in particular circumstances a person might not be in danger of being subjected to torture.

9.3 The Committee recalls its general comment on the implementation of article 3 of the Convention and reasserts 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”,^g but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.^h Furthermore, the Committee observes that considerable weight will be given, in exercising the Committee’s jurisdiction pursuant to article 3 of the Convention, to findings of facts that are made by organs of the State party concerned.

9.4 The Committee is aware of the human rights situation in the Democratic Republic of the Congo and of the many violations which continue to be reported in the country, including torture, arbitrary arrests and violence against women.ⁱ The Committee recalls, however, that this situation in itself is not a sufficient reason to establish that the complainant is at risk of being subjected to torture on her return to the country; there have to be other reasons for believing that she personally runs such a risk.

9.5 The Committee notes the complainant’s argument that the fact that she supposedly passed secret information to the Rwandan rebels when employed as a receptionist at the Congolese Parliament in 2004, added to the fact that she has requested political asylum in Switzerland, would expose her to the risk of ill-treatment if she were to return to the Democratic Republic of the Congo. The Committee also notes that the complainant has not reported undergoing any ill-treatment in the Democratic Republic of the Congo and that her allegations were not deemed to be credible by the national authorities.

9.6 While at the conclusion of its general comment the Committee is at liberty to appreciate the facts in the light of all the circumstances of each case, it recalls that it is not an appellate judicial body and that it must attach considerable weight to findings of fact made by organs of the State party concerned.^j In this particular case, the Committee gives the requisite weight to the conclusions of the State party’s organs, which considered the facts and evidence submitted by the complainant for the asylum procedure and concluded that the complainant lacks credibility. The conclusions are based on the unlikelihood and inconsistencies of her account, particularly with regard to the secret information she allegedly passed to the Rwandan rebel forces, the contacts with her brothers, the supposed warning by the National Intelligence Agency official, her flight from the country and the details regarding the members of her family. The conclusions also rest on the use of evidence which is considered to be forged – such as the above-mentioned newspaper article^k and the written statement by Mr. Luhulu Lunghe, rapporteur for the Congolese

^g General comment No. 1, annex IX, para. 6 (see HRI/GEN/1/Rev.9, vol. II).

^h See, inter alia, the Committee’s decisions in *Mostafa Dadar v. Canada* (communication No. 258/2004), of 23 November 2005; *T.A. v. Sweden* (communication No. 226/2003), of 6 May 2005; and *N.S. v. Switzerland* (communication No. 356/2008), of 6 May 2010.

ⁱ See, inter alia, the Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo, of 10 January 2011 (A/HRC/16/27); the Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, of 17 January 2011 (S/2011/20); the conclusions of the Committee on the report of the Democratic Republic of the Congo under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/DRC/CO/1/CRP.1 (2006)); the concluding observations of the Human Rights Committee on the report submitted by the State party under the International Covenant on Civil and Political Rights (CCPR/C/COD/CO/3 (2006)); and the report on Technical Assistance and Capacity-building: Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country (A/HRC/10/59).

^j See the Committee’s general comment No. 1, *supra*, para. 9. See also, inter alia, the Committee’s decision in *T.D. v. Switzerland* (communication No. 375/2009), of 26 May 2011, para. 7.8.

^k The font and character size used for the article in question, entitled “*Mme E.L. recherché [sic] traquée par la police politique*” (Ms. E.L. wanted and hounded by the political police), which is

Parliament. The Committee has paid due attention to the complainant's comments, but nonetheless considers that her arguments have not been sufficiently substantiated to refute or clarify the contradictions noted by the State party in her observations.

9.7 In light of the above, the Committee is not persuaded that on the whole the facts as submitted are sufficient to conclude that the complainant would face a foreseeable, real and personal risk of being subjected to torture if returned to the Democratic Republic of the Congo in the meaning of article 3 of the Convention.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's removal to the Democratic Republic of the Congo would not constitute a breach by the State party of article 3 of the Convention.

included in the file, differ in objective terms from those used for the rest of the page. The article appears on the "Economy and Society" page of *La Manchette* newspaper (28 January 2005). The Committee also noted that the title of the letter confirming the authenticity of the article contains a gross spelling error ("*La Machette*" instead of "*La Manchette*").

Communication No. 353/2008: *Slyusar v. Ukraine*

Submitted by: Dmytro Slyusar (not represented by counsel)
Alleged victim: The complainant
State party: Ukraine
Date of complaint: 28 July 2008 (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 14 November 2011,

Having concluded its consideration of complaint No. 353/2008, submitted to the Committee against Torture by Dmytro Slyusar 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 and the State party,

Adopts the following:

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

1. The complainant is Dmytro Slyusar, a citizen of Ukraine, born in 1981. He claims to be a victim of violations of article 2, paragraph 1, and article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is unrepresented.

The facts as presented by the complainant

2.1 On 17 April 2003, the complainant's father disappeared under strange circumstances. Two days before, he allegedly wrote a will whereby he was leaving all his property to his brother, Yuriy Slyusar. On 18 April 2003, the complainant and his mother went to the police and other law-enforcement agencies to report the disappearance; however, no actions were taken to investigate the disappearance. Instead a criminal case was opened regarding his murder.

2.2 The complainant claims that his uncle, Yuriy Slyusar, created obstacles to the investigation of the case, by giving false statements and instigating others to give false statements against the complainant and his mother.

2.3 On 17 February 2006, on his way to work, the complainant was detained by three men carrying police identification and taken to the Solomyanskiy District Police. Allegedly, they filed a report accusing him of an administrative offence for having used inappropriate language despite their warnings. The complainant claims that these accusations are false. On the same day, he was taken to the Svyatoshinskiy District Court, which sentenced him to seven days in detention. He claims that he did not have legal assistance while in administrative detention.

2.4 The complainant submits that in fact his arrest was ordered by the Prosecutor's Office, which was also investigating his father's murder. He claims that first he was kept in the Kyiv temporary detention centre, and after two or three days, he was transferred to the Solomyanskiy Police Department, where he was subjected to physical and psychological

torture. He was severely beaten and kept in a cell where the temperature was 4° C. He was not allowed to sleep or eat and was threatened that his wife and mother would be harmed if he did not confess to having killed his father. On 24 February 2006, he was again detained by the Prosecutor's Office as a suspect for the murder of his father and tortured again.^a His health deteriorated significantly and later, he was diagnosed with hypertensive cardiovascular disorder.

2.5 The complainant appealed the decision of the Svyatoshinskiy District Court to the Kyiv Court of Appeal, which annulled the decision and sent the case for re-examination on 4 April 2006. On 20 October 2006, a different judge of the Svyatoshinskiy District Court confirmed that the complainant had committed an administrative offence.

2.6 The complainant submitted another appeal to the Kyiv Court of Appeal against the second decision by the Svyatoshinskiy District Court. On 29 December 2006, it again annulled the decision of the Svyatoshinskiy District Court and sent the case for re-examination by the same court. On 4 April 2007, the third judge of the Svyatoshinskiy District Court decided that the complainant had committed an administrative offence and closed the case again due to the amount of time that had elapsed. The complainant's third appeal to the Kyiv Court of Appeal was dismissed. His appeal to the Supreme Court was also rejected on 26 December 2007.

2.7 The complainant submits that his claims of torture are supported by a forensic medical report. On 2 March 2006, he complained of the torture to the Prosecutor's office, which ignored the complaint. The lawsuit he filed with the Solomyanskiy District Court regarding the failure of the Prosecutor's Office to investigate his torture claims was dismissed. He appealed the decision of the District Court to the Kyiv Court of Appeal, which partly annulled the decision of the former. Namely, it recognized the failure by the Prosecutor's Office to investigate his claims but did not oblige the Office to conduct the investigation. Therefore, the complainant concludes that any domestic remedies would have been ineffective and unavailable.

The complaint

3. The complainant claims he was unlawfully detained and subjected to severe torture in violation of article 2, paragraph 1, and article 12 of the Convention.

State party's observations on admissibility and the merits

4.1 On 24 November 2008, the State party submitted that on 20 May 2003 the Solomyanskiy District Prosecutor's Office opened a criminal case regarding the illegal captivity of the complainant's father, Slyusar Sergey, under section 146, part 1, of the Criminal Code. On 9 July 2003, during the investigation of this criminal case, the same Prosecutor's Office initiated a criminal investigation against the complainant and his mother under the same section of the Criminal Code. On that date, both the complainant and his mother were detained for 10 days under the decision of the Solomyanskiy City Court. On 18 July 2003, they were released on the condition that they would not leave the country. As the involvement of the complainant and his mother could not be proven, the case was closed on 21 July 2003.

4.2 On 17 February 2006, the police detained the complainant for minor hooliganism. The case was examined the same day by the Svyatoshinskiy District Court, which sentenced the complainant to seven days of detention under section 173 of the Administrative Code.

^a The complainant was released on 27 February 2006.

4.3 After his release from detention on 24 February 2006, the complainant was again detained, but this time as a suspect in the murder of his father. On 27 February 2006, he was released. On 28 February 2006, the complainant asked for a medical examination, which showed that he had light injuries. He complained to the Prosecutor's Office about physical and psychological pressure by the police officers during both his detentions. However, the investigation by the Ministry of the Interior and the Prosecutor's Office did not confirm such claims. The Supreme Court found the complainant's detention in relation to hooliganism lawful and decided to uphold the decision of the Svyatoshynskiy District Court.

4.4 The State party submits that as a result of the complainant's appeals the decision on his detention was examined by the lower court several times. He also complained to the District Prosecutor's Office regarding torture, but on 26 July 2006, the Prosecutor's Office refused to open a criminal case against police officers. This decision was appealed to the higher Prosecutor's Office. The appeal is pending, thus the complainant has not exhausted domestic remedies.

Complainants' comments on the State party's observations on admissibility

5. On 19 January 2009, the complainant reiterated the facts from his initial submission and claimed that he exhausted all available domestic remedies in relation to his detention. He claims that there were seven decisions by the Ukrainian courts, all of which had dismissed his claims. Four months after his initial complaint of torture, his case was sent to the Kyiv Solomyanskiy District Prosecutor's Office in July 2006, which refused to open a criminal case against police officers. He appealed the decision to the Kyiv Prosecutor's Office on 26 July 2006, but has not received any answer since then. Therefore, he claims that the period of exhaustion is unreasonably prolonged and cannot bring effective remedy, as it will result in the return of the case to the Prosecutor's Office.

Additional observations by the State party

6.1 On 20 March 2009, the State party submitted that there was no link between the facts established by medical examination on 28 February 2006, the report of the medical clinic of the Ministry of Interior of 4 May 2006 and the possible use of torture against the complainant. Testimonies given by witnesses and the victim confirm his guilt regarding the administrative offence. The complainant has not used his constitutional right to complain before a court against the use of torture by the police.

6.2 On 27 May 2009, the State party cited domestic legislation in relation to the appeal procedure, which sets the deadline of seven days to appeal the decision of the Prosecutor's Office.

Further comments by the complainant

7.1 On 11 May 2009, the complainant contested the State party's submission. He stated that the witnesses referred to by the State party were officers of the Solomyanskiy Police Department, acting under the orders of the Kyiv Prosecutor's Office, which was investigating his father's murder. He reiterates that after seven days of detention for the administrative offence, before he could leave the premises of the Solomyanskiy Police Department he was detained again for 72 hours as a suspect in the murder of his father. He claims that the police officers were in his district conducting an investigation into his father's case and had instructions to detain him. He claims that if he had been detained merely for the administrative offence, as stated by the State party, he should have been kept in the Kyiv temporary detention centre and not transferred to the Solomyanskiy Police Department.

7.2 The complainant claims that there were many other inconsistencies and lies in the statements of the police officers and their collaborator – (the “victim” of the hooliganism offence), which were not thoroughly investigated by the court.

7.3 The complainant submits that, according to the medical report, his injuries were caused during his detention. As a result, he had to go to the hospital, where he was diagnosed with a hypertensive cardiovascular disorder, as indicated in the report of 4 May 2006. Finally, he reiterates his previous submission in relation to the exhaustion of remedies concerning his torture claims.

7.4 On 6 July 2009, the complainant once again reiterated that no decision had been taken by the Kyiv Prosecutor’s Office in relation to his case, although under the law it should have responded within three days. He submits that he did not appeal the decision of the District Prosecutor’s Office not to open a criminal case to the court because he appealed to the higher Prosecutor’s Office and his appeal could not be considered by two bodies at the same time.

7.5 On 26 October 2011, the complainant submitted that his further appeals in 2010 and 2011 to the Prosecutor General’s Office and the Kyiv Prosecutor’s Office were dismissed.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering a claim contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention.

8.2 The Committee notes the State party’s claim that the complainant has not exhausted domestic remedies as his complaint is still pending with the Kyiv Prosecutor’s Office. The complainant contested the claim, stating that his appeal had been pending several years and, therefore, the procedure had been unreasonably prolonged. The Committee notes that States parties are required to proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed. The Committee considers that significant time has elapsed since the complainant filed his appeal. In these circumstances, the Committee concludes that the exhaustion of domestic remedies has been unreasonably prolonged and that it is not precluded by the requirements of article 22, paragraph 5 (b), of the Convention, from considering the communication.

8.3 With the other admissibility requirements having been met, the Committee declares the communication admissible.

Consideration of merits

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

9.2 The Committee notes that the complainant has alleged a violation of article 2, paragraph 1, of the Convention, on the grounds that the State party failed in its duty to prevent and punish acts of torture. It also notes his allegations on the treatment he was subjected to while in detention and the medical certificates, provided by the complainant describing the physical injuries inflicted on him as well as the absence of legal safeguards while in administrative detention. The State party merely stated that there was no link between the facts established in the medical report of 28 February 2006, the report of the medical clinic of the Ministry of Interior of 4 May 2006 and the possible use of torture against the complainant. In the absence of a detailed explanation by the State party, and based on the documentation provided, the Committee concludes that the facts, as

submitted, constitute torture within the meaning of article 1 of the Convention, and that the State party failed in its duty to prevent and punish acts of torture, in violation of article 2, paragraph 1, of the Convention.

9.3 As to the allegations concerning the violation of article 12 of the Convention, the Committee notes that according to the complainant the State party failed to investigate his claims that he was subjected to torture while in detention. The State party has not refuted this allegation. Furthermore, the complainant's appeal against the inaction of the District Prosecutor's Office has been pending for several years, as confirmed by the State party. In the circumstances, the Committee reiterates that article 12 of the Convention^b requires the State party to proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed. In the absence of any other information, the Committee considers that the State party failed to fulfil its obligations under article 12, of the Convention. The State party also failed to comply with its obligation under article 13 of the Convention to ensure that the complainant has the right to complain to, and to have his case promptly and impartially investigated by, its competent authorities, as well as under article 14, to provide him, as a victim of torture, with redress and compensation.

9.4 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, considers that the State party violated articles 1, 2, paragraph 1, 12, 13 and 14 of the Convention.

10. In conformity with rule 118 (former rule 112), paragraph 5, of its rules of procedure (CAT/C/3/Rev.5), the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to this decision.

^b Communication No. 8/1991, *Halimi-Nedzibi v. Austria*, Views adopted on 18 November 1993, para. 13.5.

Communication No. 364/2008: J.L.L. v. Switzerland

<i>Submitted by:</i>	J.L.L.
<i>Alleged victims:</i>	The complainant and his children, A.N. and M.L.
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	18 November 2008 (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 18 May 2012,

Having concluded its consideration of communication No. 364/2008, submitted to the Committee against Torture by J.L.L. 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 and the State party,

Adopts the following:

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

1. The complainant in the communication dated 18 November 2008 is Mr. J.L.L., born on 20 May 1968, and his two minor children, A.N., born in 1995, and M.L., born in 2000, who are nationals of the Democratic Republic of the Congo and currently residing in Switzerland. He claims that their return from Switzerland to the Democratic Republic of the Congo would violate article 3 of the Convention against Torture. The complainant is not represented by counsel.

Factual background^a

2.1 The complainant was born in Kinshasa to a Rwandan Tutsi father and a Congolese mother. On 2 August 1998, during the attack on the Democratic Republic of the Congo by Rwandan-backed rebels, the complainant, who was living in Kinshasa at the time, allegedly suffered ill-treatment at the hands of students, neighbours and Congolese State agents and was eventually arrested because of his origins. The authorities were reportedly unable to protect him.

2.2 The complainant arrived in Switzerland and applied for asylum on 2 July 2003. During the review of his asylum application by the Swiss authorities, the complainant claimed that, as a law student at the University of Kinshasa, he had been arrested by State agents because of his Rwandan origin on or around 10 November 1998 and had been taken to the home of Laurent-Désiré Kabila, from which he had escaped with the help of a guard after spending one week in captivity. The complainant claims that he then fled to Bunia

^a In order to provide as comprehensive and coherent a factual background as possible, this section has been based on both the initial complaint and on the court decisions and other documents contained in the complainant's case file.

(Ituri). On 1 May 2003, the complainant was allegedly abducted and mistreated by Lendu militiamen who mistook him for a Hema because of his appearance. They allegedly attempted to make him disclose the names of people who were planning to attack them. During his transfer on 5 May 2003, the complainant allegedly managed to escape with the help of one of the militiamen, who had recognized him. He fled to Uganda by pirogue on 7 May 2003. He then continued on to Kenya and thence to Rome by plane on 29 June 2003. He then made his way to Switzerland, arriving on 2 July 2003, and applied for asylum the same day.

2.3 On 2 February 2005, the Federal Office for Migration rejected the complainant's asylum application. It established, through investigations conducted by the Swiss embassy in the Democratic Republic of the Congo, that the complainant's father was Rwandan, but of Hutu ethnicity, not Tutsi, as the complainant claims. What is more, the complainant could not speak Tutsi, knew nothing about Tutsi traditions and could not name his father's place of origin. In the complaint before the Committee, the complainant claims to be of Tutsi ethnicity, which contradicts the findings of the Swiss authorities. Furthermore, based on the investigations conducted by the Swiss mission in Kinshasa, the Federal Office for Migration has established that the complainant apparently did not live in Bunia from 1998 to 2003. The complainant has maintained this claim and requested permission to call on individuals from Bunia to testify on his behalf. The Federal Office for Migration denied this request. It did confirm, however, that the complainant had been the victim of harassment in 1998, but established that the harassment was not sufficiently intense to prevent him from remaining in Kinshasa until 2003.

2.4 On 11 July 2005, the Swiss Asylum Appeals Commission, later replaced by the Federal Administrative Tribunal, rejected the complainant's appeal and ordered his deportation from Switzerland on 8 September 2005. The Commission maintained that it had not been established that the complainant was actually of Tutsi origin and that his claims regarding his two escapes from detention in Kinshasa and Bunia were not plausible. The Commission did acknowledge, however, that the complainant had experienced difficulties in Kinshasa in 1998, but found that there were no grounds for believing that the complainant would be exposed to any real, specific or substantial risk of torture, as defined under article 3 of the Convention if he were to be returned to the Democratic Republic of the Congo.

2.5 On 22 August 2005, the complainant's two children applied for asylum. The Federal Office for Migration denied their application on 20 December 2007. On 24 September 2008, the Federal Administrative Tribunal rejected their appeal and ordered their deportation from Switzerland by 3 November 2008. The children had allegedly left the Democratic Republic of the Congo after being threatened and persecuted because of their Rwandan origin. In August 2005, an unknown "white female" allegedly informed their father that the children had arrived in Switzerland. The Federal Administrative Tribunal decided that the children's statements were not plausible and that their claim to Tutsi origin could not be accepted, given that their father's own origin was in dispute. The Federal Administrative Tribunal also affirmed that the psychological problems referred to in the medical report on the complainant's children did not constitute an obstacle to their return, since treatment was available in Kinshasa. The Tribunal concluded that the complainant's children had not established that they personally would be in danger of being subjected to torture if they were to be returned to the Democratic Republic of the Congo.

The complaint

3.1 The complainant asserts that his and his children's deportation to the Democratic Republic of the Congo would constitute a violation of article 3 of the Convention against

Torture because of their Rwandan Tutsi origins, for which they would be persecuted by State agents and members of the community.

3.2 The complainant adds that, although the end of the war has facilitated the inclusion of members of the different sides in the management of the affairs of State, the peace remains uneasy. There has been an unremitting rebellion in the east of the Democratic Republic of the Congo since 2005. The goal of this uprising, which is supported by Rwanda and led by Nkunda Batware, a Congolese Tutsi, is to protect persecuted Tutsis in the Democratic Republic of the Congo. In the media and in schools, the instability plaguing the entire country is blamed on Tutsis.

State party's observations on admissibility and on the merits

4.1 On 26 January 2009, the State party contested the admissibility of the communication on the ground of non-exhaustion of domestic remedies, given that the complainant had filed a request for reconsideration on 18 December 2008, which was after he had submitted his complaint to the Committee. In a decision dated 30 December 2008, the Federal Office for Migration had denied the complainant's request. In a letter of 13 May 1999, the State party informed the Committee that the complainant had lodged an appeal before the Federal Administrative Tribunal on 4 February 2009. On 23 June 2009, the State party informed the Committee that the Tribunal had issued a judgement on 19 June 2009 rejecting the complainant's claims, thus bringing domestic remedies to an end.

4.2 On 28 April 2010, the State party submitted its observations on the merits. After listing the various steps in the asylum procedures undertaken by the complainant and his children, the State party summarizes the grounds advanced for the request for reconsideration filed by the complainant on his own and his children's behalf on 18 December 2008 (that is, after the complaint had been submitted to the Committee). The complainant informed the Swiss authorities that he had learned that his wife, who had remained in the Democratic Republic of the Congo, had died on 1 October 2008. As a result, he and his children no longer had any social network there that they could count on for support. He also claimed that his children's psychological state had deteriorated since they had learned of their mother's death.

4.3 The complainant submitted a certificate from the Work for the Rehabilitation and Protection of Street Children (ORPER), medical certificates and a statement from the Tutsi community in Europe. The State party notes, however, that the complainant provides no new evidence to challenge the Federal Administrative Tribunal judgements of 24 September 2008 and 17 June 2009, which had been handed down following a thorough examination of the case. Nor does the complainant provide the Committee with any explanation for the discrepancies and contradictions discovered by the Swiss authorities.

4.4 In reference to article 3 of the Convention, the State party draws attention to the criteria established by the Committee in its general comment No. 1,^b particularly paragraphs 6 et seq., in which it states that individuals must establish that they would face a personal, present and substantial risk of torture if they were to be returned to their country of origin. While article 3, paragraph 2, of the Convention does provide that all relevant considerations — including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights — should be taken into account, it also states that the purpose of doing so is to determine whether an individual would be at personal danger of being subjected to torture. And yet, as the Federal Administrative Tribunal establishes in its judgement of 24 September 2008, the Democratic Republic of

^b *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44).*

the Congo is not currently in a situation of war or civil war and is not experiencing widespread violence throughout its territory to an extent that would justify the automatic assumption that all complainants from that State were in real danger regardless of the individual circumstances in each case.

4.5 According to the information provided by the Swiss embassy in Kinshasa in December 2008, there is currently no ethnic conflict nor are particular ethnic groups being persecuted in Kinshasa, where the complainant and his children lived prior to their departure. Furthermore, the residents of Kinshasa consider the war in the east to be a conflict between the elites of all the ethnic groups that is being waged for economic and political ends. Nor do they consider the Tutsi and Hutu, of whom there are some 100,000 living in Kinshasa, responsible for that conflict. Consequently, the State party claims that the complainants would not face a real and substantial danger because of their origins if they were to be returned to the Democratic Republic of the Congo.

4.6 The State party further notes that the petition from the Congolese Tutsi community denouncing the continued threat of genocide, dated 13 November 2007 and appended to the present complaint, was submitted only to the Committee, not to the authorities of the State party. The State party notes, however, that this petition refers to the general situation of the Tutsi in the Democratic Republic of the Congo and therefore does not concern the complainant and his children, especially since, in the course of the asylum proceedings, the Swiss authorities had called their Tutsi origins into question.

4.7 The State party adds that the credibility of the complainant and his children has also been called into question during the asylum proceedings, particularly with regard to his detention at Joseph Kabila's residence and his abduction by militiamen in Bunia. While acknowledging the difficulties the complainant experienced in 1998, the Swiss authorities do not consider them to have been serious enough to constitute a risk of future persecution. In addition, the amount of time that elapsed between the complainant's problems in 1998, which might have been linked to his ethnic origin, and his departure in 2003 precludes any possibility of a link between those problems and the asylum application.

4.8 The State party further notes that the complainant and his children have not supplied evidence of any political activity to support their asylum application.

4.9 The State party is of the view that the complainant has never established that he is a Rwandan of Tutsi ethnicity. He has simply denied the results of the Swiss embassy's investigations of the matter, without backing up his claims, and restated his position before the Committee without providing any further evidence. He informed the authorities of the State party that he had hidden in a specific location in November 1998 to escape the violence against Rwandans in Kinshasa. The results of the State party's investigation show, however, that the complainant was not known at that address. This claim therefore does not appear to be credible. What is more, the complainant has not made this argument before the Committee. The investigation also showed that the complainant had never been to Bunia, which is why his claims regarding his abduction by militiamen lack credibility.

4.10 The investigation has also shed some doubt on the credibility of the complainant's children, it having been established that they had not been subjected to insults or threats at school or in their neighbourhood. On the contrary, they lived a privileged life at the address that they had given in Kinshasa, were well integrated and were in no danger. The authorities in charge of applications for asylum also pointed out that the children's statements concerning their departure from Kinshasa were inconsistent. The children claimed that a "white female" had taken them first to South Africa by plane and then to Switzerland by train. However, the investigation shows that the children were brought to Switzerland directly, without transiting through South Africa. Moreover, the Work for the Rehabilitation and Protection of Street Children (ORPER) in Kinshasa has stated, in a

document appended to the present complaint, that the complainant's children had stayed in centres run by that organization from 6 November 2003 to 2 July 2005, the date on which they left the Democratic Republic of the Congo. Yet, during the asylum proceedings, the children said that they had stayed with their mother until their departure.

4.11 The State party questions the truth of the complainant's claims that his wife has died, which was the basis for his request for reconsideration. Indeed, only a copy of the death certificate was submitted to the Swiss authorities, and the complainants have not disclosed the exact circumstances under which they obtained that document to the authorities. In particular, the complainant has not divulged the name of the person who sent him the fax informing him of his wife's death.

4.12 Regarding the state of health of the complainant and his children, the State party asserts that this does not constitute a criterion for determining whether there are substantial grounds for believing that they would be in danger of being subjected to torture if they were deported. In this regard, the State party refers to the Committee's jurisprudence, according to which the aggravation of a person's state of physical or mental health owing to his or her deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment that would be in violation of article 16 of the Convention.^c The complainant informed the Swiss authorities that he suffered from tuberculosis. However, according to a medical report of 4 April 2005, his medical treatment for tuberculosis has been completed. Moreover, in the event of a relapse, treatment for this illness is available in Kinshasa, sometimes even free of charge.

4.13 Where the children are concerned, as the Federal Administrative Tribunal found in its judgement of 24 September 2008, their state of health cannot be considered sufficiently serious as to put them in any real danger if they were returned to their country of origin. There is nothing to indicate that they will require extensive treatment that could not be provided in the Democratic Republic of the Congo in the near future. In the event that the financial support they receive from their family in Kinshasa does not suffice to allow them to continue a proper course of treatment, the complainant may seek repatriation aid from the Federal Office for Migration, as well as assistance on an individual basis to help him cover the cost of medical care for a reasonable period of time. Although it has been established that the complainant comes from a privileged family, given that he himself has a university education, the Federal Administrative Tribunal has proposed a deadline for departure that takes into account the requirements of the course of treatment that is now under way. The Tribunal also maintains that a deterioration in the psychological health of persons whose asylum claims have been rejected is commonplace, but that this should not necessarily be viewed as a serious obstacle to the individual's deportation.

4.14 Regarding the report from the school psychological support services of the city of Zurich dated 19 November 2008, the Tribunal has some reservations about the portion of the diagnosis which indicates that the children run a greater risk of suicide and that their pre-existing symptoms have been aggravated by the news of their mother's death. The case history presented in the report departs on several points from the findings of fact set forth in the final decisions handed down in the course of the regular asylum proceedings and in the related judgements on appeals. Nor does the report suggest that this case history was verified. The medical certificate from the Zurich school psychological support services, dated 30 September 2008 which the complainant submitted to the Committee contains no information that had not already been provided by the support services' earlier certificates, which were duly studied and taken into account by the Tribunal in its judgement of 17 June

^c The State party cites *A.A.C. v. Sweden*, communication No. 227/2003, decision adopted on 16 November 2006, para. 7.3.

2009. Lastly, if the children were to be returned to the Democratic Republic of the Congo, they would be returned with their father and would thus be neither unaccompanied nor unsupported.

4.15 The State party concludes that there is nothing to indicate that there are substantial grounds for fearing that the complainant and his children would face a real and personal risk of torture if returned to the Democratic Republic of the Congo.

Additional information provided by the complainant

5.1 On 17 May and 8 June 2010 the complainant noted that domestic remedies have been exhausted and that there is therefore no obstacle to the admissibility of the complaint.

5.2 The complainant notes that, once his asylum application had been refused, he initiated proceedings to apply for a permit based on humanitarian grounds under article 14, paragraph 2, of the Swiss Asylum Act. That request was also denied. He criticizes the asylum policy of the Canton of Zurich, which, he claims, discourages all asylum seekers from legalizing their situation. The complainant points out that he is well integrated into Zurich society, inasmuch as he has a good command of German, has received a job offer and has enrolled his children in school.

5.3 He fears that the presidential election scheduled for 28 November 2011 in the Democratic Republic of the Congo, which could result in the re-election of Joseph Kabila, who is of Rwandan origin, might once again stir up ethnic tensions, bringing with them the risk of torture and attacks on people's lives, including his and his children's.

Complainant's comments on the State party's submission

6.1 In his comments dated 18 August 2011, the complainant contests the State party's claim that the inhabitants of Kinshasa consider the war in the east to be a conflict between ethnic elites. The complainant points out that ethnic groups such as the Ndade, the Bashi or the Hema do not have elites. Moreover, massacring civilians and raping women are not the kind of acts that elites generally engage in.

6.2 With regard to his political activities, the complainant notes that he is active in the Alliance des Patriotes pour la Refondation du Congo (Alliance of Patriots for the Refoundation of the Congo) (APARECO) and that this can be confirmed by the president of that organization in Switzerland. The complainant adds that he has been interviewed several times on Radio Tshiondo, an Internet radio station, making his political activity in Switzerland common knowledge.

6.3 Regarding the conclusion reached by the Swiss embassy regarding the doubtfulness of his Tutsi origins, the complainant replies that in the region of Kinshasa, most of the inhabitants are unable to distinguish between Hutu and Tutsi and that the primary consideration is Rwandan nationality.

6.4 The complainant claims that the Swiss authorities never investigated the circumstances of his wife's death and that she did not die a natural death but was murdered. Contrary to the State party's claims, the threats he received in the Democratic Republic of the Congo were more than mere "harassment", because persons identified as Rwandans there risk dying a very painful death.

6.5 The complainant also once again raises the question of the State party's doubts about his credibility. He confirms his address in Kinshasa, and refers to his knowledge of his Rwandan origins and the fact that he spent his childhood far away from Kinshasa. With regard to his detention by militiamen, he claims to have been detained in a mud hut, as the militia have no prisons.

6.6 The complainant finds that the Swiss authorities' scepticism about his children's statements is regrettable and criticizes their failure to make any attempt to verify their claims. He considers it not unusual for children not to remember exact dates, such as when they entered and left the centre run by ORPER. Lastly, the complainant rejects the State party's argument that the children could receive appropriate medical treatment in the Democratic Republic of the Congo. He notes that he contracted tuberculosis during his detention, which attests to the difficulties he endured in the Democratic Republic of the Congo.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee further notes that domestic remedies have been exhausted pursuant to article 22, paragraph 5 (b), with regard to the claims contained in the original communication before the Committee. Although the State party initially contested the admissibility of the complaint on the ground of non-exhaustion of domestic remedies, those remedies were subsequently exhausted and the State party has acknowledged the admissibility of the complaint. However, with regard to the complainant's claim that he is active in APARECO, making his political activity in Switzerland common knowledge, the Committee notes that the complainant made this claim for the first time in his comments on the State party's submission. The Committee therefore notes that the State party has not had a chance to comment on that claim, which, moreover, was not invoked before the domestic courts as a factor constituting a risk of torture for the complainant if he were returned to the Democratic Republic of the Congo. In the light of the above, the Committee finds that this part of the communication is inadmissible under article 22, paragraph 5 (b), of the Convention.

7.3 The Committee finds that the other claims made under article 3 of the Convention are admissible and therefore proceeds to its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the complaint in the light of all the information made available to it by the parties, as provided for under article 22, paragraph 4, of the Convention.

8.2 The issue before the Committee is whether, in deporting the complainant and his children to the Democratic Republic of the Congo, the State party would be failing to fulfil its obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

8.3 In assessing the allegations made by the complainant on his own and his children's behalf under article 3, 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 in the State concerned. The aim of such an assessment, however, is to determine whether the complainant would personally be in danger of being subjected to torture in the Democratic Republic of the Congo. It follows that the existence in that country of a pattern of gross, flagrant or mass violations of human rights does not in itself

constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture if deported to that country. Additional grounds must be adduced to show that the individuals concerned would be personally at risk.^d

8.4 The Committee recalls its general comment No. 1 (1996) on the implementation of article 3 of the Convention in the context of article 22, which states that, while the risk of torture does not have to meet the test of being highly probable, it must be personal and present. In this regard, the Committee has established in previous decisions that the risk of torture must be “foreseeable, real and personal”.^e As to the burden of proof, the Committee recalls that it is generally incumbent upon the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

8.5 The Committee is aware of the dire human rights situation in the Democratic Republic of the Congo.^f However, it also notes the doubts expressed by the State party as to the credibility of the allegations made by the complainant and his children since their first asylum applications were lodged on 2 July 2003 and 22 August 2005, respectively.

8.6 In assessing the risk of torture in the case under consideration, the Committee notes the complainant’s claims that, starting in 1998, he suffered ill-treatment at the hands of students, neighbours and State agents because of his Rwandan Tutsi origins. The Committee notes that, during the asylum proceedings, the complainant explained that on or around 10 November 1998 he was taken to the home of Laurent-Désiré Kabila, whence he managed to escape after spending one week in captivity; that the complainant then fled to Bunia in the east of the country; that he was then allegedly abducted by militiamen on 5 May 2003 and held in a mud hut; that he again escaped and fled the country; and that he travelled to Kenya, then to Italy and finally to Switzerland, where he applied for asylum on 2 July 2003. The Committee notes the complainant’s claims that his children were themselves persecuted in Kinshasa because of their origins, which led them to leave the country with the help of a “white female” in July 2005; and that they applied for asylum on 22 August 2005. Lastly, the Committee notes the complainant’s claim that he faces a real risk of being persecuted because of his Rwandan origins (regardless of whether he is a Hutu or Tutsi), given that ethnic tensions persist in Kinshasa and that the upcoming presidential elections cannot but exacerbate the situation.

^d See *S.P.A. v. Canada*, communication No. 282/2005, decision adopted on 7 November 2006; *T.I. v. Canada*, communication No. 333/2007, decision adopted on 15 November 2010; and *A.M.A. v. Switzerland*, communication No. 344/2008, decision adopted on 12 November 2010.

^e See *A.R. v. The Netherlands*, communication No. 203/2002, decision adopted on 14 November 2003, para. 7.3; *A.A. et al. v. Switzerland*, communication No. 285/2006, decision adopted on 10 November 2008, para. 7.6; and *R.T.N. v. Switzerland*, communication No. 350/2008, decision adopted on 3 June 2011, para. 8.4.

^f See, inter alia, the report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo (A/HRC/16/27); report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (S/2011/20); the Committee’s concluding observations on the report submitted by the Democratic Republic of the Congo under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/DRC/CO/1); the concluding observations of the Human Rights Committee on the report submitted by the State party under the International Covenant on Civil and Political Rights (CCPR/C/COD/CO/3); and “Technical assistance and capacity-building. Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country” (A/HRC/10/59).

8.7 The Committee notes the State party's argument that the evidence adduced by the complainant in support of his communication before the Committee provides insufficient evidence to challenge the decisions handed down by the Swiss authorities following a thorough examination of the case. The Committee further notes the State party's argument that, according to the investigation conducted by the Swiss embassy in Kinshasa, there is no ethnic conflict nor are particular ethnic groups being persecuted in Kinshasa, the city where the complainant and his children were living prior to their departure; that the complainant and his children are of Rwandan Hutu rather than Tutsi origin; and that therefore the claims that they make on the basis of their ethnic origin are not credible.

8.8 In the light of the information provided by the parties, the Committee finds that the complainant has not substantiated a causal link between the events that ostensibly led him and his children to leave their country of origin and the risk of torture that they would face if deported to the Democratic Republic of the Congo. The complainant has in fact provided the Committee with very little information about the treatment he allegedly suffered, particularly with regard to the events in Kinshasa in 1998, and it was only by referring to the decisions issued by the national authorities that the Committee was able to piece together the allegations put forward by the complainant and his children. Lastly, the Committee is of the view that the information on possible ethnic tensions in the complainant's country of origin is of a general nature and does not indicate the presence of any foreseeable, real and personal risk of torture.

8.9 Taking into account all the information made available to it, the Committee considers that the complainant has failed to provide sufficient evidence to demonstrate that he or either of his children would face a foreseeable, real and personal risk of being subjected to torture if deported to their country of origin.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the return of the complainant and his children to the Democratic Republic of the Congo would not constitute a breach of article 3 of the Convention.

Communication No. 368/2008: *Sonko v. Spain**

<i>Submitted by:</i>	Fatou Sonko (represented by counsel Alberto J. Revuelta Lucerga)
<i>Alleged victim:</i>	Lauding Sonko (deceased)
<i>State party:</i>	Spain
<i>Date of complaint:</i>	23 October 2008 (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 communication No. 368/2008, submitted to the Committee against Torture 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, her counsel and the State party,

Adopts the following:

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

1.1 The complainant is Ms. Fatou Sonko, a Senegalese national residing in Spain. She has submitted the complaint on behalf of her brother, Lauding Sonko, born on 16 October 1978. The complainant states that her brother was the victim of a violation by Spain of article 1, paragraph 1, and article 16, paragraphs 1 and 2, of the Convention. Spain made the declaration under article 22 of the Convention on 21 October 1987. The complainant is represented by counsel Alberto J. Revuelta Lucerga.

The facts as submitted by the author

2.1 On the night of 26 September 2007, a group of four African migrants (three men and one woman), one of whom was Mr. Lauding Sonko, attempted to enter the Autonomous City of Ceuta by swimming along the coast between Belionex and Benzú. Each person had a dinghy and a wetsuit. At 5.05 a.m., a vessel of the Spanish Civil Guard intercepted the four swimmers, who were pulled up alive onto the vessel. Having been taken to the vicinity of Bastiones Beach, in Moroccan territorial waters, they were made to jump into the water, at a place where they were out of their depth. Beforehand, the Civil Guard officers had punctured all the migrants' dinghies except that of the woman.

2.2 Mr. Sonko clung to the rail of the vessel, saying repeatedly that he did not know how to swim, but the Civil Guard officers forced him to let go and threw him into the sea. Mr. Sonko was calling for help and was having great difficulty in reaching the shore, so that one of the Civil Guard officers jumped into the water to help him and save him from drowning. Once on the shore, the officer began to perform heart massage on him. Mr.

* The text of the individual (partially dissenting) opinion of Ms. Felice Gaer, member of the Committee, is appended herewith.

Sonko died shortly thereafter, despite the efforts made to revive him, and was buried in an unmarked grave in Santa Catalina cemetery.

2.3 On 28 September 2007, Examining Court No. 1 of Ceuta, in the course of a preliminary inquiry, dismissed the proceedings initiated in connection with the death of Mr. Sonko based on its finding that it was not competent to hear a case concerning events that had occurred in Moroccan territory.

2.4 On 4 and 9 October 2007, the complainant requested that the Ombudsman investigate the circumstances surrounding Mr. Sonko's death. On 12 November 2007, the Ombudsman apprised the Attorney General of the events, and on 14 December 2007, the Attorney General ordered that the necessary steps be taken to determine the facts of the matter.

2.5 On 9 May 2008, one of the immigrants who had been part of the group, Mr. Dao Touré, submitted a written statement concerning the events of September 2007 to Examining Court No. 1 of Ceuta, which appears in Preliminary Inquiry No. 1135/2007. In his statement, he said that:

“At no time did [the migrants] state that they wished to seek asylum in Spain, but [the Civil Guard officers] did not speak to them in French either, nor did they attempt to communicate with them in any way. There were only two Civil Guard officers in the vessel. They did not understand anything that the migrants said and appeared to be arguing; finally, they headed for Belionex Beach.

They stopped the boat just off Belionex Beach. They were not far from the shore, but they were not really close either. (...) With a knife [the Civil Guard officers] punctured all the migrants' dinghies, except that of the woman, and threw them into the water, at a place where they were all out of their depth. There was a group of Moroccan soldiers waiting for them on the beach. The first to be thrown into the water was the Senegalese, who grabbed the boat rail as he fell. He was very nervous and kept repeating that he did not know how to swim, but the Civil Guard officers forcibly pried his hands off the rail and threw him into the sea. (...) But the Senegalese was drowning and he kept shouting for help: 'aide-moi, aide-moi ...' (help me, help me ...). So then one of the Civil Guard officers jumped into the water, while the other watched from the boat. The Civil Guard officer took hold of the Senegalese and pulled him to shore, where he immediately began to perform heart and chest massage, while the Senegalese lay face up on the shore.”

2.6 The complainant states that she has not provided a copy of the record of the proceedings including the decision handed down by Examining Court No. 1 of Ceuta on 28 September 2007, because neither her family nor her attorney, a member of the legal aid office of the Southern Branch Office of the Spanish Refugee Aid Committee (CEAR/SUR), were notified of those proceedings. The complainant further states that neither her family nor CEAR/SUR were able to be joined as a party to the proceedings initiated by the Office of the Attorney General.

The complaint

3.1 The complainant contends that her brother was the victim of violations by Spain of article 1, paragraph 1, and article 16, paragraphs 1 and 2, of the Convention. The complainant alleges that, once on board the vessel of the Civil Guard, Mr. Sonko was under the Spanish flag, and the Spanish authorities were responsible for what happened on that vessel and for providing due protection for persons present under that flag.

3.2 She notes that the State party, through its police officers, used force to throw the victim into the sea, who did not know how to swim and consequently drowned. Neither the

deceased nor his companions were brought before the Investigative Police Force (Cuerpo Superior de Policía) of Ceuta, which is the body responsible for dealing with immigration matters, or before any court. The complainant states that there was no administrative procedure for denial of entry, which would have involved a hearing, a decision that would be kept in the case file and the possibility of appealing any such decision. At the time that the border guards were alerted by thermal imaging cameras of the attempt being made by four foreign nationals to enter Spanish territory and gave the order to stop them, the administrative procedure for denial of entry was initiated, but was not continued.

3.3 The complainant contends that throwing the migrants overboard constituted inhuman and degrading treatment, was an offence against their personal dignity and put their lives in danger (as demonstrated by the fact that the victim did in fact die), in violation of article 16, paragraph 1, of the Convention.

3.4 The complainant also invokes violations of the International Covenant on Civil and Political Rights and of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

3.5 With respect to the admissibility of the complaint, she argues that all legal remedies were exhausted when Examining Court No. 1 of Ceuta found that it was not competent to hear the case because the events in question had occurred in Morocco and issued a dismissal of proceedings order.^a The order was not challenged and became final. Consequently, domestic remedies in Spain have been exhausted.

State party's observations on admissibility

4.1 In its note verbale of 11 February 2009, the State party asserts that the complaint is inadmissible because domestic remedies have not been exhausted. It states that the events referred to in the complaint are under investigation by the Spanish judicial authorities and specifically by Examining Court No. 1 of Ceuta.

4.2 It is not true that neither the family nor CEAR could have been joined as a party to the legal proceedings initiated by the Public Prosecution Service (Ministerio Fiscal). On 28 November 2008, Examining Court No. 1 of Ceuta sent a letter rogatory to the High Court of Almería in which it requested that the relatives of the deceased be located. On 5 January 2009, Mr. Jankoba Coly, a cousin of Mr. Sonko, was notified in Vicar (Almería) of the proceedings. No family member, however, registered as a party to the proceedings.

4.3 The State party affirms that the complainant's version of the events differs in certain fundamental aspects from the facts ascertained by the State party. It attaches a copy of a report issued by the Lieutenant Colonel stationed at the Civil Guard Headquarters in Ceuta, in which he states that the dinghies were not punctured; that the aid and rescue operation was carried out in Moroccan waters; that the migrants did not speak a language that was intelligible to the officers in question; that the Civil Guard officer jumped into the water to retrieve Mr. Sonko and to try to revive him; and that no traumatic injuries were found on Mr. Sonko's body. The Civil Guard officers acted in accordance with the procedures for

^a According to the Criminal Procedure Act:

“Article 637. Proceedings shall be dismissed:

- a. When there is no reasonable indication that the act which gave rise to the proceedings was actually perpetrated.
- b. When the act does not constitute a criminal offence.
- c. When the persons being tried as perpetrators, accomplices or accessories after the fact appear exempt from criminal responsibility.”

dealing with immigration by sea that have been established by the Civil Guard of Ceuta, the applicable special laws, and the conventions and treaties signed by the State party. According to the report, the procedures used to assist migrants found in Moroccan waters and in the vicinity of the breakwaters that mark each country's border have substantially reduced the number of deaths. Ships that rescue persons at sea who are in distress or in danger have the obligation to provide them with assistance, to take them to a "place of safety" and to treat them humanely.

Author's comments on the State party's submission

5.1 In her communication of 6 April 2009, the complainant maintains that all domestic remedies have been exhausted. She states that General Court No. 1 of Ceuta declared the preliminary inquiry closed and issued an order dismissing the proceedings concerning the death by drowning of Mr. Sonko. The dismissal order was not challenged by either the attorney representing the Civil Guard officers concerned or by the Office of the Attorney General of Ceuta and thus became final. The complainant states that she was unable to register as a party to the proceedings because the State party made no attempt during the judicial proceedings to locate Mr. Sonko's family. The complainant refers to domestic jurisprudence which indicates that, once an order for the dismissal of proceedings has become final, it has the force of *res judicata*.

5.2 According to the complainant, the State party's allegations do not belie the facts as initially described by the complainant and demonstrate the occurrence of torture or inhuman or degrading treatment. She reiterates that Mr. Sonko and his companions were taken on board a Spanish patrol boat and were therefore under Spain's jurisdiction. Mr. Sonko was in good health when he was on board. When he reached the beach, however, he was in a poor condition; medical assistance was required and he died. The cause-effect relationship is unquestionable.

5.3 She asserts that the principle of non-refoulement obligates States to authorize the temporary admission or entry of asylum seekers and to provide them with access to a procedure for arriving at a substantive determination as to whether or not, if they were to be returned, they would be in grave danger of losing their lives, being deprived of their freedom or being subjected to torture or inhuman or degrading treatment. In support of her argument, the complainant refers to the report of the Ombudsman of 3 April 2009, in which he objects to the procedure used by the Provincial Maritime Service of Ceuta for returning people to Morocco who have been intercepted in Moroccan waters near the breakwaters that mark the border between Spanish and Moroccan territory. According to that report, the decisive factor is not whether the asylum seekers are on Spanish territory, but rather whether or not they are under the effective control of Spanish authorities; if they are, the principle of non-refoulement cannot be circumvented by arguing that the rescue took place outside Spanish territorial waters.^b

^b In the above-mentioned report, the Ombudsman states that: "In view of the foregoing, and while recognizing the necessary and effective work performed by the Civil Guard in Ceuta in order to, as noted in its report, 'save the lives of a large number of illegal immigrants who attempt to enter Spain illegally by sea, either by swimming or under precarious conditions', the procedure being used lacks any sort of support whatsoever. It also makes it impossible to detect who among the migrants of different types attempting to enter our territory illegally may be in need of international protection, in breach of article 33 of the 1951 Geneva Convention relating to the Status of Refugees, under which Spain is obligated to apply the principle of non-refoulement beyond its own borders in the event that a ship flying the Spanish flag rescues migrants outside our territorial waters and there are asylum seekers among them."

State party's observations on the merits

6.1 On 15 June 2009, the State party submitted its observations on the merits of this complaint.

6.2 The State party reiterates that the events referred to by the complainant are under investigation by the Spanish judicial authorities and specifically by Examining Court No. 1 of Ceuta and that the ground for finding the complaint inadmissible set forth in article 22, paragraph 5 (b), of the Convention therefore applies. It also states that family members could have been joined as parties to the judicial proceedings but did not do so.

6.3 The State party has submitted a copy of the record of Preliminary Inquiry No. 1135/2007, which states, in part:

1. On 28 September 2007, Examining Court No. 1 of Ceuta opened an inquiry to ascertain the facts. On the basis of the evidence, on that same date the judge decided to dismiss the proceedings and close the case because the events in question did not occur on Spanish territory and the acts in question are not defined as offences in the Criminal Code. The Court also ordered that samples be taken from the dead body for purposes of genetic identification and decided to refer the proceedings to the Public Prosecution Service.

2. On 11 January 2008, the Office of the Attorney General requested that Examining Court No. 1 of Ceuta reopen the case in the light of new information that indicated that the events in question had taken place on board a vessel flying the Spanish flag, which would render the Spanish courts competent to hear the case. The Attorney General found that the preliminary inquiry had uncovered signs that a criminal offence had been committed, since Mr. Sonko's death occurred while he was in the custody of the Civil Guard, which meant that the Civil Guard officers were responsible for protecting his life and ensuring his safety.

3. On 7 February 2008, Examining Court No. 1 of Ceuta reopened the inquiry and ordered that statements be taken from the three Civil Guard officers under suspicion, from a member of the Civil Guard as witness and from Mr. Lucerga (a member of CEAR/SUR), also as witness. The statements of the three Civil Guard officers under suspicion were taken on 15 April 2008; that of the member of the Civil Guard who served as witness was taken on 13 March 2008; and Mr. Lucerga's statement on 13 May 2008.

4. On 9 May 2008, an attorney from CEAR/SUR appeared before Examining Court No. 1 and submitted a statement made by Mr. Dao Touré, a Senegalese national who was one of the four African migrants who attempted to swim across the border into Ceuta. Mr. Touré confirmed the version of the events given by the complainant. He said that at no time had they stated that they wished to seek asylum in Spain and that the guards did not speak to them in French, nor did they attempt to maintain any sort of communication with them.

5. On 14 May 2008, the CEAR/SUR attorney said that he had learned that Mr. Touré was going to be called as a witness to testify in court and requested that he be

(...)

“[U]nder the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in no event should such persons be set ashore in a territory where there exists a well-founded fear that these persons may be subjected to torture. Nor should the Spanish authorities share personal information about asylum seekers with the authorities of the country from which they are fleeing or with others who may transmit that information to those authorities.”

allowed to be present when Mr. Touré did so. On 15 May 2008, Examining Court No. 1 denied the attorney's request on the grounds that he had no official status in the case.

6. On 23 May 2008, the Attorney General of Ceuta submitted a request in which he urged that the proceedings be referred to the National High Court, which he considered to be competent to hear the case, since the suspects were Spanish nationals and the events had occurred in a foreign territory.

7. On 27 May 2008, Examining Court No. 1 of Ceuta withdrew from the case and turned it over to the National High Court.

8. On 16 June 2008, Counsel for the State filed an application in which he opposed the reopening of the case, on the grounds that the further inquiries that had been undertaken had not furnished evidence of any circumstances other than those that had led to the dismissal of the proceedings on 28 September 2007. Counsel also contended that in no event would the central examining courts have jurisdiction over such cases on the grounds that the patrol boat constituted national territory. On 9 July 2008, Examining Court No. 1 of Ceuta reaffirmed its decision of 27 May 2008.

9. On 18 July 2008, Counsel for the State lodged an appeal, in which he argued that it was improper to reopen the case because the decision to dismiss the proceedings had become final and because no new evidence had been uncovered. On 30 September 2008, the Provincial High Court of Cádiz in Ceuta partially upheld the appeal, finding that the dismissal was not final because it had not been communicated to "persons who might be adversely affected", as provided for by law. The Provincial High Court decided to set aside the decision to withdraw from the case, issued on 27 May 2008, until such time as the interested parties had been notified, which would give them the opportunity to appear in court as parties in the case and appeal against the dismissal. In its decision of 30 September 2008, the Provincial High Court notes that the records of the inquiry make reference to the existence of family members of the deceased and give the names of his parents, Malan and Fatou; they also state that the CEAR/SUR legal aid office had located a sister, a brother-in-law and a cousin.

10. On 5 January 2009, Examining Court No. 1 of Ceuta sent a notification to Mr. Jankoba Coly, a cousin of the victim. On 19 February 2009, Examining Court No. 1 of Ceuta decided to withdraw from the case and to refer it to the National High Court.

11. On 12 February 2009, the Chief Counsel for the State notified Examining Court No. 1 of Ceuta that a complaint had been submitted to the Committee against Torture.

6.4 The State party considers that the facts set out in the complaint do not reveal the occurrence of torture or ill-treatment, but rather an unfortunate accident that occurred when the Civil Guard patrol assisted several persons who were swimming in the sea and took them close to shore. It asserts that the events took place in Moroccan waters, that the persons picked up by the vessel were left in an area very close to the shore, that the Civil Guard officers did not puncture the dinghies of Mr. Sonko and his companions, and that Mr. Sonko was assisted by the Civil Guard officers, who used resuscitation techniques on him.

Author's comments on the State party's observations

7.1 On 3 July 2009, the complainant submitted her comments on the observations submitted by the State party.

7.2 She argues that judicial remedies have been exhausted, since Proceeding No. 1135/2007 was closed on 23 April 2009. The complainant has attached a sworn statement by Mrs. Abderrahaman, the attorney for Mr. Dao Touré, who was a witness in the proceedings initiated by Examining Court No. 1 of Ceuta concerning the death of Mr. Sonko, in which she states that the Attorney General of Ceuta informed her on 23 April 2009 that: "In relation to your submission dated 6 April 2009 [...] regarding DON DAO TOURE and his role as a witness in Summary Proceedings No. 1135/07, I hereby inform you that a final dismissal order concerning these proceedings has been issued and has not been appealed against, and there is therefore no need for you to make a court appearance."

7.3 She contends that the statements made by the State party regarding the notification of Mr. Sonko's family members are untrue. Since the opening of proceedings in October 2007, no notification has been sent to his sister, who is the person directly affected by them. The notification sent on 5 January 2009 to Mr. Jankoba Coly, a cousin of Mr. Sonko, came one and a half years after the proceedings were initiated. In this connection, the complainant invokes the second sentence of article 107, subparagraph (e), of the Committee's rules of procedure. She also contends that the competent authorities prevented the only living witness present in Spain, Mr. Dao Touré, from appearing in court and testifying.

7.4 She maintains that, under domestic law, the investigation of an offence, the initiation of legal proceedings and the task of carrying those proceedings forward are the responsibility of the State. Consequently, the State party's allegations as to the supposed obligation of the complainant to move the proceedings forward or to be in attendance at them lack legal merit.

Additional observations of the State party on admissibility and on the merits

8.1 On 28 May 2011, the State party supplied additional information concerning the current status of the judicial proceedings.

8.2 The State party adds that, in a decision issued on 28 November 2008, Examining Court No. 1 of Ceuta agreed to notify the family members of Mr. Sonko, specifically his sister, Mrs. Jankoba Coly, of the order issued on 28 September 2007.

8.3 On 31 March 2009, the National High Court declared the referral of the case to it by Examining Court No. 1 of Ceuta invalid, referring the proceedings back to the examining court, on the grounds that since the order of dismissal filed on 28 September 2007 had not been challenged, it had become final.

8.4 On 12 May 2009, Examining Court No. 1 of Ceuta ruled that the case should be dismissed, once the order issued by the Provincial High Court of Cádiz in Ceuta regarding the notification of the injured parties (relatives of the deceased) of the proceedings had been duly carried out and the dismissal order of 28 September 2007 had not been challenged.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any complaint contained in a communication, the Committee against Torture must decide whether the complaint is admissible under article 22 of the Convention.

9.2 The Committee observes that, although the State party initially argued that the complaint was inadmissible because domestic remedies had not been exhausted, on 28 May 2011 the State party informed the Committee that Examining Court No. 1 of Ceuta had

dismissed the case on 12 May 2009. Consequently, the Committee considers that there is no obstacle to consideration of the merits of the complaint under article 22, paragraph 5 (b), of the Convention.

Consideration of the merits

10.1 The Committee takes note of the State party's observations that the events in question took place in Moroccan waters, that the persons who were picked up were left in an area very close to the shore, that the Civil Guard officers did not puncture Mr. Sonko's and his companions' dinghies, and that Mr. Sonko was aided by the Civil Guard officers, who performed resuscitation techniques on him. The Committee also takes note of the complainant's allegations that an undeniable cause-effect relationship exists between Mr. Sonko's death and the actions of the Civil Guard officers, inasmuch as Mr. Sonko was in good health when on the patrol boat but, by the time he reached the beach, was in a poor condition and subsequently died.

10.2 The Committee recalls that it is not its task to weigh the evidence or to reassess the statements made regarding the facts or the credibility of the relevant national authorities. The Committee further observes that the State party's and the complainant's versions of the circumstances surrounding these events differ, but that both parties agree that Mr. Sonko and the other three swimmers were intercepted by a Civil Guard vessel and were brought on board alive. They also both assert that, upon reaching the beach, Mr. Sonko was not well and that, despite the efforts made to revive him, he died.

10.3 The Committee recalls its general comment No. 2, where it notes that a State party's jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.^c This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all the provisions set forth in the Convention, including article 22.^d In the present case, the Committee observes that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety.

10.4 The Committee recalls that, under the Convention, the prohibition of ill-treatment is absolute and that its prevention is an effective and non-derogable measure.^e The Committee considers that it falls to the State party to explain the circumstances surrounding Mr. Sonko's death, considering that he was alive when he was pulled out of the water. The Committee further considers that, regardless of whether or not the Civil Guard officers punctured Mr. Sonko's dinghy or at what distance from the shore he was expelled from the boat, he was placed in a situation that caused his death. As for the legal classification of the way in which Mr. Sonko was treated on 26 September 2007, the Committee considers that while the subjection of Mr. Sonko to physical and mental suffering prior to his death, aggravated by his particular vulnerability as a migrant, does not constitute a violation of article 1 of the Convention, it does exceed the threshold of cruel, inhuman or degrading treatment or punishment, under the terms of article 16 of the Convention.

10.5 The Committee considers that, although the complainant has alleged a violation only of articles 1 and 16 of the Convention, the present complaint concerns circumstances on which article 12 of the Convention may have a bearing as well. The Committee also

^c General comment No. 2 of the Committee against Torture on implementation of article 2 of the Convention by States parties, *Official Documents of the General Assembly, Sixty-third Session*, Supplement No. 44 (A/63/44), annex VI, para. 16.

^d See communication No. 323/2007, *J.H.A. v. Spain*, decision of 10 November 2008, para. 8.2.

^e General comment No. 2 of the Committee (see footnote c above), para. 3.

observes that both the complainant and the State party have made observations regarding the judicial inquiry initiated by the State party.

10.6 In this respect, the Committee observes that the State party notified a relative of the victim 16 months after the inquiry had begun. It also observes that the complainant (and/or a family member) was not joined as a party to the legal proceedings. On other occasions, the Committee has already stated that, under the Convention, a victim is not required to lodge a formal complaint in the national courts when torture or cruel, inhuman or degrading treatment has occurred and that it is sufficient for the facts to have been brought to the attention of Government authorities.^f Consequently, the Committee is of the view that it was not indispensable for the complainant (and/or another family member) to be joined as a party to the proceedings for the State party to fulfil its obligation under article 12 of the Convention, and that the obligation to investigate indications of ill-treatment is an absolute duty under the Convention and falls to the State.

10.7 The complexity of the case notwithstanding, the Committee reminds the State party that it has an obligation to undertake a prompt and full investigation whenever there are indications that acts have been committed that may constitute cruel, inhuman or degrading treatment. Such an investigation should be aimed at determining the nature of the reported events, the circumstances surrounding them and the identity of whoever may have participated in them.^g The investigation of the facts was initiated on 28 September 2007 and was definitively shelved on 12 May 2009, without a prompt and impartial investigation of the facts being undertaken. The Committee is therefore of the view that the investigation conducted by the authorities of the State party did not meet the requirements set forth in article 12 of the Convention.

10.8 The Committee, acting under article 22, paragraph 7, of the Convention, considers that the information before it discloses a violation of articles 12 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

10.9 The Committee urges the State party to carry out a suitable investigation of the events that occurred on 26 September 2007, to prosecute and punish any persons found to be responsible for those acts, and to provide effective remedy, which shall include adequate compensation for Mr. Sonko's family. In accordance with rule No. 118, paragraph 5, of its rules of procedure, the Committee wishes to receive information, within 90 days from the issuance of the present decision, about any steps taken in response to the observations set out above.

^f See communication No. 6/1990, *Henri Unai Parot v. Spain*, decision of 2 May 1995; and communication No. 59/1996, *Encarnación Blanco Abad v. Spain*, decision of 14 May 1998.

^g See, for example, communication No. 261/2005, *Besim Osmani v. Serbia*, decision issued on 8 May 2009, para. 10.7.

Appendix

Individual opinion of Committee member Ms. Felice Gaer (partially dissenting)

1. In the present case, the author of the communication and the State party concerned disagree fundamentally over certain key facts critical to the determination of whether or not a violation of article 16 of the Convention was committed. Without objecting to the Committee's ultimate decision in this case that a violation occurred, I respectfully disagree with the methodology it claims to have applied in resolving the dispute regarding the alleged violation of article 16.

2. In this case, the Committee is presented with an allegation by the author that officers of the Spanish Civil Guard took her brother, Lauding Sonko, and his companions on board their vessel, punctured three of the four dinghies they had previously been using, and threw them into the sea at a depth at which they could not stand, despite the protestations of her brother that he could not swim, with the result that Mr. Sonko subsequently drowned. The State party confirms that its Civil Guard officers did in fact take Mr. Sonko and his companions on board their vessel and subsequently "released them", but argues that they did so "in an area very close to the shore", and did not puncture the dinghies. Thus, the State party alleges, the death of Mr. Sonko was "an unfortunate accident" rather than an act of cruel, inhuman, or degrading treatment or punishment.

3. The Committee's task in this instance is to determine whether a violation of article 16 of the Convention occurred. Surely, the Committee cannot make this determination without assessing the facts of the case. Yet rather than engaging directly with the factual disputes at hand, the Committee's opinion instead makes the shocking pronouncement that "it is not its task to weigh the evidence or to reassess the statements made regarding the events in question or the credibility of the relevant national authorities" (see para. 10.2 above). I strongly dissent from this statement, as it conflicts both with the content of the Committee's general comment No. 1, which has guided many Committee decisions, and with the Committee's jurisprudence in a host of decisions on individual communications.

4. Paragraph 9 of the Committee's general comment No. 1 addresses this issue directly. It states:

"Bearing in mind that the Committee against torture is not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only, it follows that:

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

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

^a Committee against Torture, general comment No. 1, implementation of article 3 in the context of article 22. *Official Documents of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr. 1), annex IX.

5. In a number of cases, both where the judicial organs have made relevant findings of fact bearing on the allegations at issue and, as in this case, where the judicial organs of the State have failed to conduct prompt, full investigations and thus have not made findings of fact deserving of “considerable weight”, the Committee has engaged in a “free assessment” of the facts at issue, based upon the full set of circumstances in the case. One relevant example was the decision on communication No. 257/2004, *Keremedchiev v. Bulgaria*. In that case, the Committee rejected the State party’s claim, stemming from a decision of its courts, that the State party’s police officers had used necessary and proportionate force in arresting him and had inflicted only “slight physical injury”. Instead, the Committee found that the complainant’s injuries were too great to correspond to the use of proportionate force by the officers and rejected the State party court’s finding that the injury resulting from the infliction of force was “slight”, finding instead that it amounted to cruel, inhuman or degrading treatment or punishment within article 16 of the Convention.^b

6. Not only does the Committee’s statement that “it is not its task to weigh the evidence” conflict with general comment No. 1 and with its jurisprudence in individual communications; it also seems inconsistent with the Committee’s decision in this very case. For the Committee to reach a decision that a violation of article 16 of the Convention occurred, it must reject the version of the facts articulated by the State party in this case. While, as the Committee notes, Mr. Sonko was undisputedly in the custody of the State party in the moments leading to his death, this fact alone should not compel us to conclude that the State party committed cruel, inhuman, or degrading treatment. It is not the case that every death that occurs in custody constitutes a violation of the Convention; moreover, even where a State’s agents were negligent, resulting in the death of a person in their custody, and should incur liability under domestic tort law for the harm caused by their negligence, it is not necessarily the case that this negligence will also constitute “cruel, inhuman, or degrading treatment or punishment” as proscribed by the Convention. In this case, the Committee is called upon to make a finding of fact, and to resolve tensions between the accounts offered by the author and the State party, such as whether the State’s agents left Mr. Sonko in possession of his dinghy when they expelled him from the patrol vessel, and if so, how Mr. Sonko could have nevertheless drowned before reaching the shore if this was the case. The Committee has apparently determined that the State’s version of the events is not credible. It is well within its power to do so and should have stated so plainly.

(Signed) Felice Gaer

^b Communication No. 257/2004, *Keremedchiev v. Bulgaria*, decision of 11 November 2008, para. 9.3.

Communication No. 370/2009: E.L. v. Canada

<i>Submitted by:</i>	E.L. (represented by counsel, Carlos Hoyos-Tello)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of complaint:</i>	14 January 2009 (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 21 May 2012,

Having concluded its consideration of complaint No. 370/2009, submitted to the Committee against Torture by E.L. 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, Mr. E.L., was born in 1961 in Haiti and is a Haitian national. He claims that his removal to Haiti would constitute a violation by the State party of article 3 of the Convention. The complainant is represented by counsel, Mr. Carlos Hoyos-Tello.

1.2 On 11 February 2009, in application of rule 108, paragraph 1, of its rules of procedure, the Committee asked the State party not to deport the complainant to Haiti while his complaint was being considered. On 28 December 2009, in the light of the information submitted by the State party, the Committee decided to withdraw its request for interim measures.

The facts as submitted by the complainant

2.1 The complainant arrived in Canada on 21 November 1990 and became a permanent resident, sponsored by his first wife. On 9 April 2003 he was found guilty of assault and given a two-year suspended sentence. On 12 June 2006 he was found guilty of another offence, thereby violating the conditions of his suspended sentence, and was fined 50 Canadian dollars. On 29 June 2007 he was found guilty of importing narcotics, possession of narcotics for the purpose of trafficking, and possession of prohibited substances, and was sentenced to 31 months in prison. On 11 December 2007 his permanent residency was revoked by Citizenship and Immigration Canada after he was declared inadmissible to Canada on grounds of serious criminality.

2.2 On 31 December 2007, after a deportation order had been issued, the complainant applied for refugee status. The application was dismissed because of his inadmissibility on grounds of serious criminality. On 21 April 2008 both his pre-removal risk assessment (PRRA) application and his humanitarian and compassionate (H&C) application were rejected. On 27 May 2008 the deportation was temporarily suspended in order to allow the Federal Court to carry out a judicial review of the negative decisions on the PRRA and

H&C applications. On 5 January 2009 the Federal Court rejected both applications. The court held that the complainant had not submitted any evidence to substantiate his claim that neither medical care by a competent cardiologist nor instruments for replacing his pacemaker batteries were available in Haiti. Such evidence should have been submitted by the complainant himself, the court found.

2.3 On 16 January 2009 the complainant received a letter from the Canada Border Services Agency informing him that he would be deported on 18 February 2009. The complainant's counsel applied for a stay of deportation in order to be able to prove that the medical facilities required to replace the complainant's pacemaker were not available in Haiti. In support of his application, the complainant claimed that evidence of the lack of medical equipment existed but that he had been unable to submit it at the time of the PRRA and H&C applications because he had been in prison and had not had the means to assemble the evidence. He presented a letter from the Consulate-General of Haiti in Montreal, dated 9 May 2008, which confirmed that, in view of the current state of medical technology in Haiti and the nature of the complainant's illness, the complainant would not be able to receive the medical care he required in Haiti. The complainant submitted another letter, dated 22 May 2008 and signed by a cardiologist in Canada, which stated that the complainant had worn a Medtronic KDR 733 Kappa pacemaker since June 2000, which would need to be replaced in June 2010. The cardiologist added that there was no Medtronic service in Haiti.

The complaint

3.1 The complainant claims that his personal situation and state of health mean that he should not be deported, especially given that he has two young children (born in 2002 and 2005) and that his wife has psychological problems brought on by his detention and by fears of his forced removal to Haiti. The complainant also submits a document confirming that his pacemaker will need to be replaced in 2010 and that there are no Medtronic services in Haiti.

3.2 He submits that, as a criminal deportee having lived abroad for many years, he would be at greater risk of being kidnapped by criminal gangs, who would see him as a rival who had accumulated considerable wealth during his long stay in Canada. He points out that the Immigration and Refugee Board applies a moratorium on removals to Haiti, but the moratorium does not apply to persons considered to be major criminals or a threat to society. He cites the Committee's concluding observations in respect of Canada (May 2005), in which the Committee expressed its concern at the exclusion of certain categories of persons considered as criminals from international protection against the risk of torture or cruel and inhuman treatment. The complainant cites the case of two Haitian nationals; one was removed from Canada and has not been heard of since, while the other has also submitted a complaint to the Committee, requesting interim measures to suspend the order to remove him to Haiti.^a

3.3 The complainant appends to his complaint a number of press articles showing that returned Haitians are systematically detained in appalling conditions and are given no food, water or medical care, which in the complainant's case could prove fatal. The articles also describe how the Government of Haiti denies all returnees the right to obtain a Haitian passport for eight months following their return. The complainant alleges that, as attested to by the two letters submitted in support of his application for a stay of the deportation order, he would be unable to have his pacemaker replaced or receive proper medical care in Haiti,

^a Communication No. 367/2008, removed from the Committee's list of communications on 22 November 2010.

especially since there is a risk that he would not have a passport for the first few months following his return. He argues that, on the basis of all these considerations, there is a real and personal risk that his deportation to Haiti would put his life in danger.

State party's observations on admissibility and the merits

4.1 On 24 July 2009, the State party submitted its observations on the admissibility and the merits. The State party considers the complaint to be incompatible with the Convention, since the alleged risks do not constitute torture for the purposes of admissibility under article 22, paragraph 2, of the Convention. The State party also maintains that the complaint has not been sufficiently substantiated, since it is based on mere theory and contains no evidence of a personal risk of torture in the event of the complainant's removal. As a subsidiary argument, the State party considers that the complaint should be dismissed on the merits, since there is no serious reason to believe that the complainant's removal to Haiti would expose him to a real, personal and imminent risk of torture.

4.2 The State party notes that all the allegations made by the complainant in his complaint to the Committee were thoroughly examined by the Canadian authorities, which invariably concluded that they were unfounded. The State party points out that after obtaining permanent residency status, the complainant was found guilty on 1 May 2007 of importing and possessing narcotics — namely 1.9 kg of cocaine — for the purposes of trafficking. He was sentenced to 31 months in prison on 29 June 2007. In the light of this conviction, the Canada Border Services Agency issued an inadmissibility report in respect of the complainant, and referred his case to the Immigration Division of the Immigration and Refugee Board for investigation. On 31 December 2007, following a hearing at which the complainant was given the chance to present the evidence he considered relevant, the Immigration Division confirmed the complainant's inadmissibility on grounds of serious criminality, in accordance with article 36, paragraph 1 (a), of the Immigration and Refugee Protection Act, and issued a removal order against him. As a result of the removal order, the complainant lost his Canadian permanent residency status.

4.3 The complainant then claimed refugee status, which was refused on 9 January 2008 on the grounds of his inadmissibility to Canada, in accordance with article 101, paragraph 2 (a), of the Immigration and Refugee Protection Act and article 33, paragraph 2, of the Convention relating to the Status of Refugees. Both his pre-removal risk assessment (PRRA) application and his humanitarian and compassionate (H&C) application were turned down on 21 April 2008. The PRRA officer considered that the complainant had not provided sufficient evidence to show that he was personally at risk of being tortured, in danger of his life or at risk of being subjected to cruel and unusual treatment. The same officer dismissed the risk of his being detained and added that even if he were detained, there was nothing to suggest that a family member would not be able to obtain his release. The officer also dismissed the allegation that the health services in Haiti were not equipped to replace the complainant's pacemaker batteries, noting that access to medical care was less difficult in Port-au-Prince, the complainant's hometown.

4.4 On 9 May 2008 the complainant applied for leave and for judicial review. On 4 June 2008 the Federal Court of Canada granted the complainant a stay of removal while those applications were being considered. On 5 January 2005 the Federal Court of Canada rejected the applications for leave and judicial review of the PRRA and H&C decisions. The Court held that it fell to the complainant to establish a link between his personal situation and the general conditions prevailing in his country, which he had not done. The Court noted that it could not, in the context of an application for judicial review, consider new evidence that had not been submitted previously to the immigration officer. The Court consequently rejected the argument that the health services in Haiti were not equipped to replace the complainant's pacemaker batteries.

4.5 On 31 January 2009, the complainant submitted an application for an administrative stay of removal to the Canada Border Services Agency, once again alleging that the health services in Haiti were inadequate. He substantiated the application with the same evidence that had been submitted to the Committee, namely a letter from the Vice-Consul of Haiti in Montreal and a letter from a cardiologist in Canada. Consequently, the complainant's file was referred to a doctor approved by Citizenship and Immigration Canada for a medical opinion. The approved regional doctor attached to the Canadian mission in Port of Spain, Trinidad and Tobago, was also consulted. After checking, the specialists concluded that cardiac health services were available in Haiti, and located a hospital, with a team of specialists consisting of two cardiologists and a surgeon, where the complainant would be able to have his pacemaker checked and its battery replaced. The name of the hospital and the relevant contact details were given to the complainant. In view of the fact that the necessary health services were available in Haiti, the application for an administrative stay of removal was rejected.

4.6 With regard to the admissibility of the complaint, the State party notes first of all that under article 3 of the Convention there must be substantial grounds for believing that a complainant would be in danger of being subjected to torture. In accordance with the Committee's jurisprudence, such danger must be personal and real and must not be based on mere theory or suspicion. The State party recalls also that it falls to the complainant to establish that his complaint is admissible *prima facie* under article 22 of the Convention. The State party notes that the alleged danger of being kidnapped, tortured and killed by Haitian criminals, and the evidence in support of that claim, were thoroughly examined by the Canadian authorities. No new information has been submitted to the Committee to support the claim that he is well known in Haiti and would be quickly identified by criminals as a drug-trafficker. In addition, there is nothing to prove that persons removed to Haiti on grounds of criminality were in any particular danger of being kidnapped, as the claimant alleges. The State party cites the report of the Secretary-General on the United Nations Stabilization Mission in Haiti, which states that there has been a decline in the number of kidnappings.^b Furthermore, the risk of kidnapping applies to the entire population. The State party concludes that even if the danger were real it would not fall within the scope of article 3 of the Convention, since kidnapping does not constitute torture. Aside from the issue of the intensity of suffering inflicted, acts of torture must be inflicted or instigated by State agents. There was nothing to show, however, that Haitian officials were involved in such kidnappings. Lastly, kidnappers appear to be motivated by greed, and not by any of the grounds mentioned in article 1 of the Convention.

4.7 The State party considers that in alleging a risk of detention, the complainant is probably referring to the practice of preventive imprisonment of criminal deportees at the Port-au-Prince national penitentiary. This practice was abolished following a court ruling of 11 September 2006. Since then, Haitian policy has been to detain criminal deportees temporarily at an office of the Central Directorate of the Criminal Investigation Service near the airport for a period of up to 2 weeks. The aim of the preventive detention is to establish whether the individual has committed crimes in Haiti and to allow a family member to stand surety. The individual is then granted conditional release for a period of eight weeks to six months. The State party notes that this practice is not invariable. Since August 2008, 9 of the 23 persons deported from Canada to Haiti on the grounds of criminality were detained; from August 2007 to August 2008 the figure was 7 out of 15. According to the information available to the State party, none of the deportees were detained at the national penitentiary and there have been no complaints of any ill-treatment. In addition, the State party recalls that, according to the Committee's jurisprudence, mere

^b The State party cites United Nations document S/2009/129, paras. 17 and 25.

arrest or detention does not as such constitute torture.^c In the present case, the complainant does not allege that he is in danger of being tortured by the Haitian authorities and does not submit any evidence to show that the conditions of detention at the Central Directorate of the Criminal Investigation Service constitute torture.

4.8 The State party considers that the allegations relating to the complainant's wife and children are inadmissible *ratione materiae*, since they do not constitute torture under the Convention.

4.9 The allegations relating to the complainant's pacemaker have already been considered by the Canadian authorities in the context of his application for an administrative stay of removal. As stated in paragraph 4.5, Citizenship and Immigration Canada requested a medical opinion, which confirmed that the medical care required to maintain the complainant's pacemaker was available in Haiti and that, therefore, the complainant's allegations in that regard were not persuasive. The State party adds that, according to the Committee's settled jurisprudence, "the aggravation of the complainant's state of health that could possibly be caused by his deportation does not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention".^d The scope of the non-refoulement obligation described in article 3 does not extend to situations of ill-treatment envisaged by article 16.^e Consequently, this part of the complaint is incompatible with the Convention and is insufficiently substantiated for the purposes of admissibility.

4.10 The State party rejects the complainant's allegations on the merits, and notes that they were studied by independent and impartial national authorities, fairly and in compliance with the law. In the absence of proof of an obvious error, abuse of process, bad faith, obvious bias or serious irregularities in the procedure, the Committee should not substitute its own findings of fact for those of the Canadian authorities. Moreover, the Committee^f has repeatedly stated that it is not for the Committee to question the evaluation of facts and evidence by national authorities.^g

Complainant's comments on the State party's observations

5.1 Prior to submitting his comments, the complainant provided additional information on 13 and 16 September 2009 in support of his request for interim measures. He notes that he made a further application for an administrative stay of removal on 4 September 2009, which was rejected the very same day; he was concerned that the reply he received was identical to the letter rejecting his first application for an administrative stay, dated 9 February 2009, save for the following phrase: "The individual's pacemaker can be replaced in the Dominican Republic." That meant that his pacemaker could not be replaced in his home country, Haiti, but would have to be replaced in another country. There is no guarantee that the complainant will be able to travel to the Dominican Republic, especially

^c The State party cites communication No. 57/1996, decision adopted 17 November 1997, *P.Q.L. v. Canada*.

^d The State party cites communication No. 245/2004, decision adopted 16 November 2005, *S.S.S. v. Canada*, para. 7.3.

^e The State party cites communication No. 228/2003, decision adopted 18 November 2003, *T.M. v. Sweden*, para. 6.2.

^f The State party cites communication No. 193/2001, decision adopted 21 November 2002, *P.E. v. France*, para. 6.5; communication No. 282/2005, decision adopted 7 November 2006, *S.P.A. v. Canada*, para. 7.6; and communication No. 148/1999, decision adopted 5 May 2004, *A.K. v. Australia*, para. 6.4.

^g Following the State party's observations, the Committee decided to withdraw its request for interim measures on 4 August 2009.

in view of his criminal past. Following the rejection of his first application for a stay of removal, the complainant obtained two medical statements, dated 11 and 12 February 2009. One of the statements was from Medtronic Canada, informing the complainant that the company did not know of a clinic or doctor in Haiti authorized to provide Medtronic pacemaker support. The complainant stresses that he does not simply need medical care in Haiti: he needs there to be Medtronic equipment in Haiti. The applicant also mentions a letter, dated 14 September 2009, from a doctor at the Centre Hospitalier de l'Université de Montréal, who also casts doubt on the availability of medical staff trained to replace Medtronic pacemakers in Haiti.^h

5.2 On 4 October 2009 the complainant submitted his comments on the State party's observations. He recalled that in its concluding observations, the Committee had expressed its concern at the explicit exclusion of certain categories of persons posing security or criminal risks from the protection against refoulement provided by the Immigration and Refugee Protection Act 2002 (sect. 115, subsect. 2). The Committee had then recommended that the State party remove the exclusions in the Immigration and Refugee Protection Act 2002, thereby extending to currently excluded persons entitlement to the status of protected person, and protection against refoulement on account of a risk of torture.ⁱ The complainant thus claims that he cannot be deported to Haiti for having committed a crime in Canada; other individual cases show that persons who ran the risk of being tortured but had a criminal past had been deported, and they had not been heard of since.

5.3 Contrary to what is affirmed by the State party, there is no standard practice regarding the detention of returned persons. The abolition of the practice of preventive detention of criminal deportees at the Port-au-Prince national penitentiary is too recent to infer that there is no risk of arbitrary detention. Press articles submitted by the complainant show that people are arbitrarily detained in police stations, in inhuman conditions of detention, with no proper access to water, food or health care. In the complainant's case, such deficiencies could prove fatal. Even regular prisons have deficiencies in the provision of medical care, which would certainly put the complainant's life at risk. In this regard, the complainant refers to articles by the non-governmental organization Alternative Chance, which note the poor detention conditions in Haiti. The complainant considers that his life is also at risk outside prison, given the inadequate medical infrastructure in Haiti for the replacement of his pacemaker.

5.4 The complainant mentions the case of another individual who risked being returned to Haiti, and who also had a criminal past in Canada. The complainant considers that in this case the Federal Court had given more weight to the documents by Alternative Chance than to the assertions by a State official that he had not observed any cases of deportees to Haiti being detained or tortured.^j In the present case, the Committee should also give more weight to the findings of a serious organization such as Alternative Chance than to an assertion in a press article that the new detention policy implemented following the court decision of 11 September 2006 had eliminated the risk of arbitrary detention in Haiti. The complainant therefore reiterates that it is too early to ascertain whether the measures taken by the Haitian authorities in that regard have been effective.

^h Following receipt of this additional information, the Committee asked the State party on 15 September 2009 to provide it with further details that would enable the Committee to determine whether the current state of medical technology in Haiti would allow the applicant's pacemaker battery to be replaced. Pending a reply from the State party, the State party was requested not to deport the applicant to Haiti.

ⁱ Concluding observations, Canada, CAT/C/CR/34/CAN, 7 July 2005, paras. 4 (d) and 5 (b).

^j For reasons of confidentiality, the identity of the person in question is not mentioned.

5.5 With regard to the statistics submitted by the State party on the number of returnees who had been detained, the applicant considers that even if only one person had been detained, the risk would still be real. The complainant agrees with the State party that mere arrest or detention does not constitute torture. However, being held in inhuman, degrading conditions, with no access to proper medical care or to one's medical file and no chance of a fair trial, does constitute torture and cruel and unusual treatment or punishment.

5.6 The complainant also refers to a document published on the website of Alternative Chance,^k which describes United States case law relating to the non-refoulement of Haitian criminals. In one of the cases, a United States court had considered that a mentally disabled person who was HIV-positive ran the risk of being discriminated against and subjected to treatment equivalent to torture if he were deported. The complainant concludes that even if ordinary deportees do not run the risk of being tortured in the event of their return to Haiti, deportees who are ill, such as himself, do run such a risk because of the deliberate negligence of the Haitian authorities, which amounts to a violation of human rights. The complainant therefore considers that, contrary to the State party's claims, he has demonstrated that he would run a real, personal risk of being subjected to torture if he were deported to his country of origin.

5.7 With regard to the allegations concerning his pacemaker, the claimant criticizes the State party for having analysed the situation in an incomplete and superficial manner,^l as can be seen from the superficial response to his application for an administrative stay of removal, dated 4 September 2009, which was identical to the letter rejecting the first application for an administrative stay, dated 9 February 2009, save for the following phrase: "The individual's pacemaker can be replaced in the Dominican Republic." The complainant would be surprised if he could be removed to one country and then authorized to travel to a third country for the treatment required by his heart condition. In his view, his criminal past precludes that possibility. Even if he managed to travel to the Dominican Republic after his return to Haiti, his deportation from Canada would be in violation of Canada's international obligations, which prohibit it from deporting a person on the assumption that he will subsequently be able to travel to a third country. With regard to the claim that suitable medical care is available in Haiti, the complainant refers the Committee to the information provided in his letters of 13 and 16 September 2012 (see paragraph 5.1 above). The complainant concludes that the risk analysis carried out by the Canadian authorities lacked impartiality and contained obvious errors.

Additional comments by the parties

6.1 On 17 December 2009 the State party replied that, from the complainant's comments, it appeared that he had not bothered to contact the Sacré-Coeur hospital, the contact details of which had been passed on by the State party, after checking that the hospital's specialists were able to check the operation of the complainant's pacemaker and replace the battery. Following the complainant's comments, the State party had contacted the hospital again, which confirmed that the Medtronic battery of the complainant's pacemaker could be replaced by a Biotronik battery, and that this could be done by specialists at the hospital. If necessary, the hospital could also fit the complainant with a new pacemaker equivalent to the KDR 733 Kappa, namely the Biotronik Axios model. The complainant's claims are therefore unfounded.

^k Paper entitled "Cases of respondents who fear imprisonment as criminal deportees to Haiti: updates in the law since *Matter of J-E*", at: <http://alternativechance.org>.

^l The complainant informs the Committee that he submitted an application to the Federal Court for judicial review of the decision refusing an administrative stay of removal, and that the application was still being processed when he submitted his comments to the Committee.

6.2 Contrary to the complainant's assertions, the Haitian and Canadian authorities are aware of the situation of one of the Haitian deportees he mentioned in his comments;^m after being detained, the deportee was released, as noted by members of the Montreal police force who were on a temporary assignment in Haiti. The State party notes that an affidavit by the First Secretary (Immigration) and migration integrity officer at the Embassy of Canada in Port-au-Prince describes the current practice, in place since 2007, of Haitian authorities with regard to Haitian nationals removed from Canada on grounds of criminality. This detailed information contradicts, in a conclusive manner, the complainant's claim that the submissions by Canada are based on practices by the Haitian authorities that are too recent to be properly evaluated. The affidavit confirms that removed persons are not usually detained and that, if they are, the average length of detention is 5 days. The affidavit goes on to state that there is no reason to believe that such persons are treated badly during detention or that they are held in inhuman conditions. The State party thus maintains that the complainant's allegations are inadmissible and that, in the alternative, they do not constitute a violation of article 3 of the Convention.ⁿ

6.3 On 27 February 2010 the complainant submitted that, following the earthquake in Haiti, 29 hospitals and other health centres had been partially damaged or destroyed; and that he had tried to contact the Sacré-Coeur hospital in Port-au-Prince but to no avail, which suggested that the hospital had been at least partially destroyed. The earthquake had also brought about a major crisis in the justice system, since a large number of inmates had escaped from prison. The complainant also reiterated the arguments submitted previously.

6.4 On 9 March 2010, the complainant submitted a copy of a letter from a doctor at the Hôtel-Dieu hospital of the Centre Hospitalier de l'Université de Montréal who considered that the only way to interrogate a Medtronic pacemaker without a Medtronic interrogation unit was to install a new Biotronik pacemaker in its place. However, in view of the risks accompanying all medical procedures, it would be prohibitive to replace a pacemaker designed to last more than eight years for the sole purpose of facilitating check-ups. It was therefore essential for the patient to have his check-ups performed at a place where Medtronic pacemakers could be interrogated.

6.5 On 16 March 2011, in response to the complainant's most recent allegations, the State party submitted the medical opinion of a doctor approved by the High Commission of Canada to Trinidad and Tobago, who had been in touch several times with the Sacré-Coeur hospital to discuss the complainant's case. In the letter, the doctor confirmed that the hospital was still able to perform check-ups on all Medtronic pacemakers, despite the earthquake of 12 January 2010. The doctor added that even if the hospital did not have the necessary equipment to perform a check-up on a specific Medtronic model, it would be possible to do so by remote interrogation using an ordinary mobile phone, which would connect any Medtronic pacemaker to appropriate testing equipment located elsewhere.

6.6 The State party adds that the request for judicial review of the second rejection of the complainant's application for an administrative stay was rejected on 29 April 2010, and that consequently domestic remedies have been exhausted. Following the Committee's withdrawal of its request for interim measures on 28 December 2009, the State party could therefore deport the complainant to Haiti. However, following the earthquake of 12 January 2010, it had announced a moratorium on removals to Haiti, on humanitarian grounds. This measure applies to all persons who are the subject of a removal order. As a result, the complainant's removal had been suspended. The State party reiterates its previous

^m See paragraph 5.4 above.

ⁿ Following the clarification provided by the State party, the Committee withdrew its request for interim measures on 28 December 2009.

submissions that the complainant's allegations are inadmissible and, in the alternative, unfounded.

6.7 On 1 July 2011 the complainant submitted a new letter from the doctor at the Centre Hospitalier de l'Université de Montréal, which cast doubt on how easy it was to carry out remote check-ups on pacemakers. The complainant considers that this technical aspect is important, given the situation in Haiti following the earthquake. On 6 and 18 August 2011 the complainant informed the Committee that his deportation was set to take place on 22 August 2011.

6.8 On 10 October 2011 the complainant stated that he had been detained after his arrival in Haiti, and freed following the intervention of a police inspector he knew. On 23 August 2011 he visited the Sacré-Coeur hospital, which confirmed that — contrary to the State party's claims — Biotronik equipment could not interrogate Medtronic pacemakers. The complainant asked the medical staff to give him a certificate confirming that they could not perform the check-ups, but they refused. The complainant notes that his next medical appointment is scheduled for 24 November 2011 and that if no solution is found he should be allowed to return to Canada to receive treatment.^o

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee also notes that all domestic remedies have been exhausted pursuant to article 22, paragraph 5 (b), and that the State party has not contested this.

7.3 With regard to the State party's allegations of incompatibility with article 1 and of the unfounded nature of the complainant's allegations, the Committee notes that the complainant's allegation is based on the risk of being subjected to treatment contrary to article 1 of the Convention, on the basis of a wide range of factors such as the risk of being targeted by criminal gangs, the risk of treatment contrary to article 1 while in detention, his state of health and the general situation prevailing in Haiti. The Committee considers that these allegations are closely bound up with the merits. The Committee therefore declares the complaint admissible and proceeds to its consideration on the merits.

Consideration of the merits

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

8.2 The Committee must determine whether, in deporting the complainant to Haiti, the State party failed in its obligation under article 3 of the Convention not to expel or return (refouler) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

^o The complainant, via his counsel, provided no more information to the Committee on this matter. On 27 February 2012, the secretariat requested updated information about the complainant's situation. On the same day, the complainant's counsel confirmed by telephone that the complainant had not contacted him since that date.

8.3 Without prejudice to its possible findings in this case, the Committee notes the information provided by the complainant that the State party declared a moratorium on the removal of Haitian nationals to their country of origin, but that it excluded persons who, such as the complainant, had criminal records. The State party has not challenged this information. The Committee recalls that under article 3 of the Convention, a moratorium on the removal of persons to countries in crisis should apply to everyone, without any distinction.^p

8.4 In assessing the complainant's allegations under article 3, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of such assessment, however, is to determine whether the complainant would *personally* be in danger of being subjected to torture in Haiti. It follows that the existence in that country of a consistent pattern of gross, flagrant or mass violations of human rights does not in itself constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture if expelled to that country. Additional grounds must be adduced to show that the individual concerned would be personally at risk.^q In considering the risk, the Committee will give considerable weight, pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned. However, the Committee is not bound by such findings, and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

8.5 The Committee recalls its general comment No. 1 on implementation of article 3 of the Convention in the context of article 22, which states that while it is not necessary to demonstrate that the risk of torture is highly probable, the risk must be personal and present. In this regard, the Committee has established in previous decisions that the risk of torture must be "foreseeable, real and personal".^r As to the burden of proof, the Committee recalls that it is generally incumbent upon the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

8.6 The Committee notes that the complainant has not adduced evidence of a real, personal and foreseeable risk of torture after his removal to Haiti. Indeed, the complainant made a series of allegations that he was at risk of being tortured, but provided no persuasive evidence to corroborate the allegations, be they of kidnapping, the risk of torture or the risk of violation of the right to life while in detention. Furthermore, all the allegations submitted by the complainant were examined by the State party's authorities during the asylum procedure and in the proceedings before the Committee. With regard to the complainant's health, the State party has looked into the availability in Haiti of treatment appropriate for the applicant. The situation does not fall within the scope of article 1, and in respect of the risk to his health, cannot on its own fall under the scope of article 16 of the Convention.^s The Committee also notes that the State party took this allegation seriously and carried out the necessary checks before proceeding with the complainant's removal. The Committee

^p Concluding observations, Canada, CAT/C/CR/34/CAN, paras. 4 (d) and 5 (b).

^q Communication No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; see also communication No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and communication No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

^r Communication No. 203/2002, *A.R. v. the Netherlands*, decision adopted on 14 November 2003, para. 7.3; communication No. 285/2006, *A.A. et al. v. Switzerland*, decision adopted on 10 November 2008, para. 7.6; communication No. 350/2008, *R.T.-N. v. Switzerland*, decision adopted on 3 June 2011, para. 8.4.

^s Communication No. 245/2004, *S.S.S. v. Canada*, para. 7.3.

further notes that following his return to Haiti on 22 August 2011 the complainant was briefly detained, and did not submit any allegations of torture or ill-treatment to the Committee.

8.7 The Committee recalls that in accordance with its general comment on implementation of article 3 of the Convention, and with its jurisprudence, the State party does not have to show, when assessing the risk of torture in the case of a person being removed to a third country, that the risk is “highly probable”, but it must be personal and present. In this regard, in previous decisions the Committee has determined that the risk of torture must be foreseeable, real and personal. Further, the Committee observes that considerable weight will be given, in exercising the Committee’s jurisdiction pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned. It must therefore be determined whether, at the time of assessing the risk run by the complainant, the State party carried out a thorough assessment of the complainant’s allegations and took into account all the elements enabling it to assess the risk that was run. The Committee considers that in the present case the State party carried out the assessment in accordance with these principles.^t

8.8 The Committee considers that the information submitted to the Committee does not show that the complainant ran a foreseeable, real and personal risk of being subjected to torture following his return to his country of origin.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the deportation of the complainant to Haiti does not constitute a breach of article 3 of the Convention.

^t See general comment No. 1 on implementation of article 3 of the Convention in the context of article 22 (refoulement and communications) (1996), paras. 6, 7 and 9 (a) and, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

Communication No. 374/2009: *S.M. et al. v. Sweden*

<i>Submitted by:</i>	S.M., H.M. and A.M. (represented by counsel, Sanna Vestin)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	11 November 2008 (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 21 November 2011,

Having concluded its consideration of complaint No. 374/2009, submitted to the Committee against Torture by S.M., H.M. and A.M. 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 complainants, their counsel and the State party,

Adopts the following:

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

1. The complainants of the communication, dated 11 November 2008 and 9 February 2009, are Mr. S.M. (born in 1950) and Mrs. H.M. (born in 1955). The communication is also submitted on behalf of their daughter, A.M. (born in 1992). They claim that their deportation to Azerbaijan would constitute a breach by Sweden of article 3 of the Convention. The complainants are represented by counsel, Sanna Vestin.

The facts as presented by the complainants

2.1 The complainants originate from the enclave Nagorno-Karabakh. In 1988, they became internally displaced persons (IDPs) and lived near Baku. S.M. is Christian Armenian on the maternal side; he looks and speaks like a typical Armenian. This caused ethnically motivated persecution of the whole family in Azerbaijan. S.M. alleges that one of his sisters committed suicide after she had been raped, in front of him. Therefore, in order to diminish the risk of persecution, he decided to leave his wife and daughter in Azerbaijan and search for work outside the country, in Moscow, visiting them only occasionally. Despite this, the persecution did not stop; his wife was beaten by their neighbours, which resulted in a broken leg; their daughter was also injured.

2.2 In 2002, the family sought asylum in Sweden, which was denied, and on 19 August 2004, they were deported to Azerbaijan. Upon arrival, they presented their identity documents to the Azerbaijani police. However, before handing them over, the Swedish police had given two documents which indicated S.M.'s Armenian origin to H.M., his wife, who thus had them in her luggage. During the search of their luggage, the documents were discovered and viewed as an attempt to conceal important information. The family was extensively questioned under violence by officers of the National Security Service. They were held at the airport for four days without any proper food or accommodation. S.M.'s teeth were knocked out and his arm was twisted; he also suffered kicks and blows. H.M.

was questioned, beaten and sexually assaulted. Thereafter, the family spent ten days in a hospital near Baku. It was found that S.M. had heart problems and signs of arteriosclerosis; H.M. showed signs of assault and battery, including a skull injury. Their daughter had witnessed some of the violence against her mother and suffers from stress disorder since then. After their release, the National Security Service called them repeatedly for further questioning. Their daughter could not be enrolled in school. The complainants turned to various institutions and organizations, inter alia, the Embassy of the United States of America, United Nations High Commission for Refugees (UNHCR) and a women's organization, seeking a way out of the country since they feared for their lives.

2.3 In December 2004, the family returned to Sweden and applied for asylum on 13 December 2004. They submitted several documents in support of their asylum application, inter alia, medical certificates, a document certifying that S.M.'s mother is Armenian, and a letter from a women's organization in Azerbaijan. The Migration Board did not order any medical examinations. Instead, the complainants were referred to the Crisis and Trauma Centre at Danderyd Hospital in Stockholm by the Swedish section of Amnesty International. The psychiatric examination concluded that S.M. had given an account of persecution which fulfilled the criteria for torture; it considered as established that he had been subjected to interrogation under torture in the manner he had described. The forensic medical examination also found that there was nothing to contradict his claims of ill-treatment. As regards H.M., the psychiatric opinion concluded that she had suicidal thoughts and fulfilled the criteria for posttraumatic stress disorder (PTSD); it also concluded that it was beyond dispute that she had experienced the events she had described. The forensic investigation findings could possibly confirm that she had been subjected to torture.

2.4 In 2005, while watching the news from Azerbaijan, H.M. allegedly recognized the National Security Service officer who had assaulted her and who is now a high-ranking official in the department of border control. Thereafter, she decided to speak out about her being sexually assaulted by the officer, and an additional application on this matter was filed to the Migration Board.

2.5 On 17 March 2006, the Migration Board rejected the complainants' asylum application. While not questioning that the complainants had been subjected to assault and harassment, the Board indicated that such incidents did not necessarily take place after the enforcement of the deportation order in 2004. The Migration Board concluded that the perpetrators did not act on behalf of the authorities and that the complainants would be able to live in Azerbaijan.

2.6 The complainants appealed the Migration Board's decision to the Migration Court. The court hearing was held on 7 May 2007. Subsequently, several written submissions were filed with the Court, including a letter from UNHCR in Stockholm, stating that its 2003 Guidelines on Azerbaijan were still valid and that a returned Armenian would be at risk of being pressurized by the security services.^a The Migration Board opposed the

^a The document dated 22 May 2007 states that "the situation of ethnic Armenians residing in Azerbaijan has not improved since 2002. Section V-2 of the UNHCR's position paper International Protection Considerations Regarding Azerbaijani Asylum-Seekers and Refugees, dated September 2003, remains therefore valid and is applicable to the current situation. With regard to return of asylum seekers of ethnic Armenian or mixed ethnicity, these cases might be at high risk upon arrival back in Azerbaijan. As explained in the guidelines regarding Azerbaijani asylum seekers, the majority of the Armenians living in Azerbaijan conceal their identity. It is doubtful that they may be accepted back to Azerbaijan, or if accepted, they are, in UNHCR's opinion, at high risk of being pressurized by the Security Services or treated without sympathy by the majority of the population. Any deportee, upon return, is referred to the officer of the National Security Ministry based at the airport for identity

appeal, arguing that UNHCR's guidelines applied to Armenians and mixed families, whereas S.M.'s family did not belong to this category. Another document issued by UNHCR in Baku had been submitted for the first time to the migration authorities.

2.7 On 7 September 2007, the Migration Court rejected the complainants' appeal on the grounds that the medical certificates were not sufficiently conclusive with regard to the ill-treatment alleged, and that the alleged assaults were the result of actions by individuals, not by State agents. The Migration Court further questioned the mixed ethnicity of the family on the grounds that the children's birth certificates stated that both parents were registered as ethnic Azeri in Azerbaijan. Furthermore, the Court noted that from 1976–1996, S.M. had worked at Baku airport and that in 2000, he had acquired a driving license, both events indicating that he did not face any problems with the authorities because of his mother's Armenian origins. Moreover, the family had made contact with three different schools and the Ministry of Education to enrol their daughter, and that this showed the absence of persecution by the authorities. The Court stated that the opinions submitted by UNHCR and Amnesty International did not prove State-sanctioned persecution in Azerbaijan or that S.M.'s family was persecuted; it also pointed to a number of inconsistencies in the complainants' testimonies. However, the complainants note that the judgement by the Migration Court was not handed down unanimously; one judge had written a dissenting opinion in their favour.

2.8 The complainants lodged an appeal with the Migration Court of Appeal, arguing that the Migration Court did not give due consideration to the medical reports issued by the experts on torture and that it did not take into account the expert country information from UNHCR and Amnesty International. On 3 January 2008, leave to appeal was not granted by the Migration Court of Appeal. Their deportation was scheduled for 12 June 2008. Since that date, S.M. and H.M. have gone into hiding. Their daughter has been placed in foster care and attends school in Sweden.

2.9 The complainants further submit that their case received large publicity in the mass media in Sweden. Several articles have been published. In October 2007, their daughter's classmates organized a manifestation against the deportation order. In May 2008, the Bishop wrote an open letter to the Director General of the Migration Board. Most of the publicity around their family occurred after the judgment of the Migration Court and in the weeks before their scheduled deportation. They claim, therefore, that the publicity given to their case could increase the risk that they would be suspected by the Azerbaijani authorities as being enemies of the regime. Moreover, in 2008, when one of their sons travelled to Azerbaijan to obtain a document, he was questioned at the airport, without being mistreated, about his whereabouts in Sweden and the purpose of his stay, as well as about his parents and was told that the police were "waiting for them".

2.10 On an unspecified date, the complainants' counsel filed an application for re-examination of their case to the Migration Board, alleging that new circumstances had emerged that constituted obstacles to the enforcement of the deportation order, namely the large publicity received by their case in Sweden and the Azerbaijani authorities' interest in the family, as had been shown by the visit of their son to Azerbaijan. A.M.'s social ties to Sweden after seven years, and new psychiatric reports confirming that the complainants' mental health had not improved, were invoked as additional obstacles to the enforcement of the deportation order. On 3 July 2008, the Migration Board rejected their request for re-examination on the grounds that the circumstances invoked only constituted amendments or

check and questioning [...] if necessary, the deportee is referred to the Ministry of National Security for further questioning."

modifications to their previous submissions in their asylum applications. On 27 August 2008, the Migration Court upheld this decision.

The complaint

3.1 The complainants claim that their forcible deportation to Azerbaijan would amount to a violation by Sweden of article 3 of the Convention. In particular, they underline the torture and ill-treatment they suffered upon their return to Azerbaijan, following their first deportation in 2004, as well as the ethnically motivated persecution they suffered before leaving the country in 2002.

3.2 They further claim that the Swedish authorities only focused on minor inconsistencies instead of duly considering their claim of persecution due to their mixed origin. Even if they have overestimated the time they spent in custody at the airport, forgot the dates of summons to KBG or were unable to explain how smugglers could provide them with passports, these factors are not sufficient to deny their traumatizing experience or the injuries they sustained. Their account of the facts is corroborated by medical reports and there is a well-founded fear of repeated torture and humiliating treatment upon a second return.

State party's observations on admissibility and merits

4.1 On 11 December 2009, the State party provided its observations on the admissibility and the merits of the complaint. It submits that S.M., H.M. and their daughter, A.M., first arrived in Sweden on 29 March 2002 and applied for asylum on 2 April 2002. They stated that they originated from Nagorno-Karabakh province of Azerbaijan, which they had left in 1998 and had since lived as internally displaced persons following the persecution they endured because S.M. has the appearance and the accent of an Armenian. On this account, he has been subjected to beatings, degrading treatment and had to quit his job because of his mixed ethnic origin. H.M. was raped several times and beaten on one occasion, also due to the family's mixed origin. On one occasion, she was detained for three days after a dispute in a convenience store. The complainants invoked that there were humanitarian reasons for granting their daughter a residence permit. They also stated that they had not been politically active.

4.2 The first asylum application was rejected by the Migration Board on the grounds that State-sanctioned discrimination or persecution of Armenians does not occur in Azerbaijan and the general situation of citizens belonging to this ethnic group cannot, as such, constitute grounds for asylum. It found that it had not been substantiated that the complainants would be subjected to persecution if they returned to their home country. The health problems invoked by the complainants were not so severe as to warrant suspension of the expulsion order against them. The complainants appealed to the Aliens Appeals Board, which upheld the Migration Board's decision in March 2004. The refusal-of-entry order was enforced on 19 August 2004. The complainants subsequently submitted a new application for a residence permit, which was rejected by the Aliens Appeals Board on the grounds that the expulsion order had already been enforced.

4.3 The complainants returned to Sweden on 10 December 2004 and submitted a second asylum application on 14 December 2004. At the request of H.M., her case was dealt with separately by the Swedish authorities. However, the submissions of the complainants were to a large extent identical or at least very similar. The asylum interview for the complainants was held on 20 January 2005. They submitted that, upon arrival in Baku in 2004, the Swedish police handed them over to the Azerbaijani authorities and left. They were interrogated and requested to present documents containing information about their ethnicity. After having been asked questions about the reason for arriving on a chartered airplane and about the purpose of their stay in Sweden, S.M. was subjected to beatings. He

also became the object of derogatory remarks. H.M. and A.M. were also interrogated. They were forced to sign a document stating that they would stay at a certain address and the police took them there. This occurred after four or five days of interrogation at the airport. The next day, they were summoned to the security service in Baku, where they were interrogated and subjected to physical abuse. They were made to appear before the security service five or six times before S.M. ended up in hospital. After his stay in hospital, they went into hiding and have not been in touch with the authorities since. S.M.'s mixed origin makes them a target for the authorities in their home country. They were in touch with both UNHCR and the United States embassy, but neither was able to provide help. Regarding their health, S.M. stated that he suffers from PTSD and a number of physical injuries caused by the treatment endured upon return to Azerbaijan. H.M. stated that she was hospitalized in Baku for 10 days due to back pains caused by beatings during her interrogation.

4.4 In support of their second application, the complainants submitted a vast number of documents, including various medical reports. According to these medical reports, S.M. suffers from considerable mental health problems. The doctor concluded that, on the basis of the psychiatric assessment alone it could be regarded as established that he was interrogated under torture in the way he had stated. S.M.'s small scar formations could have arisen at the times and in the way he had described. Nor was there any indication that the extensive damage to his teeth was not a consequence of the physical mistreatment he had been subjected to. The expert further noted that the scars were fairly unspecific and for that reason the findings could not be regarded as entirely conclusive; however, he concluded that the assessment findings might substantiate that he had been subjected to torture in the way alleged.

4.5 On 17 March 2006, the Migration Board rejected the complainants' asylum application. It did not call into question that the complainants had been subjected to abuse and harassment, even if this did not mean that these took place after their removal to Azerbaijan in 2004. The Board concluded that the perpetrators were to be regarded as criminal elements rather than representatives of the country's authorities and thus the case was not a matter of persecution sanctioned by State authorities. After an overall assessment of all the circumstances, it found, based on available reports, that it should be possible for the complainants to live in Azerbaijan. Consequently, they were not refugees or persons otherwise in need of protection. The Board stated that, according to information available to it, the Azerbaijani government provides free medication to persons suffering from mental illness and most illnesses can be treated in Azerbaijan. It found that S.M. and A.M. cannot be regarded as suffering from life-threatening diseases or health conditions that constitute grounds for a residence permit. H.M.'s second application was rejected on essentially the same grounds.

4.6 The complainants filed an appeal to the Migration Court. They claimed that they had submitted credible and coherent accounts about the torture to which they had been subjected and that the mere fear of being forced to return to Azerbaijan may cause irreparable harm. They also submitted that A.M. had shown very serious symptoms of suffering harm, she had made repeated visits to the Child and Adolescent Psychiatric Clinic. H.M. maintained that the medical reports corroborated her allegation of the serious abuse she had suffered upon return to her home country.

4.7 The complainants adduced a written communication by a representative of UNHCR, stating that Armenians and those with mixed ethnicity who return after having sought asylum abroad run a high risk in Azerbaijan. The communication further stated that it was doubtful whether Azerbaijan would take them back, and if they would be accepted, there was a great risk that they would come under pressure from the security services or be treated without sympathy by the majority of the rest of the population. It also recalled that

the majority of the Armenians in Azerbaijan hide their identity. Moreover, the complainants also adduced a written communication from a representative of Amnesty International, Sweden, stating, inter alia, that the complainants should be regarded as people in a mixed marriage. In addition, H.M. submitted a document produced by an organization working to strengthen the rights of Azerbaijani women.

4.8 The Migration Board opposed the grant of the appeal, stating that the complainants have not shown convincingly that they are to be regarded as refugees or in need of protection, nor can they be granted a residence permit on any other grounds. Their respective accounts cannot form the basis of assessment of the risk of persecution or other inhuman or degrading treatment, since there were several inconsistencies that undermined the general credibility of their claims. Regarding the alleged health problems, the Board held that there was nothing to indicate that they would be unable to receive adequate medical care in Azerbaijan.

4.9 On 7 September 2007, the Migration Court rejected the complainants' appeals, stating that the medical reports and other written evidence submitted did not substantiate the complainants' claim of ill-treatment on the occasions they alleged. The documents produced by them contained contradictory information. Furthermore, the documents issued by UNHCR and Amnesty International did not prove that State-sanctioned persecution of people of Armenian origin occurs in Azerbaijan. Therefore, the Court concluded that the complainants had not substantiated that they ran a risk of torture upon return.

4.10 The complainants appealed against the judgment and held that the Migration Court had made an erroneous assessment of the evidence adduced. On 21 December 2007, the Migration Court of Appeal decided not to grant leave to appeal. The complainants then filed applications to the Migration Board alleging that new circumstances had emerged granting them the right to a residence permit or, alternatively, a re-examination of their case. These applications were rejected for the reason that the circumstances invoked only constituted amendments or modifications to previous submissions in the complainants' asylum applications. The Migration Court upheld the Migration Board's decision.

4.11 With regard to the admissibility of the complaint, the State party submits that it is not aware of the present matter having been or currently being examined under another procedure of international investigation or settlement and also acknowledges that all available domestic remedies have been exhausted. However, the State party maintains that the complainants' claim that they are at risk of treatment contrary to the Convention fails to attain the basic level of substantiation required for purposes of admissibility, and therefore is inadmissible under article 22, paragraph 2, of the Convention. See communication No. 216/2002, *H.I.A. v. Sweden*, decision adopted on 2 May 2003, para. 6.2.^b

4.12 Should the Committee consider the complaint admissible, the issue before it is whether the forced return of the complainants to Azerbaijan would violate the obligation of Sweden under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The State party recalls that, when determining whether the forced return of a person to another country would constitute a violation of article 3, the Committee must take into account all relevant considerations including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in that country. However, as the Committee has repeatedly emphasized, the aim of the determination is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of

^b See communication No. 216/2002, *H.I.A. v. Sweden*, decision adopted on 2 May 2003, para. 6.2.

a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. For a violation of article 3 to be established, additional grounds must exist, showing that the individual concerned would be personally at risk.^c

4.13 Concerning the human rights situation in Azerbaijan, the State party submits that torture, beatings leading to death, police brutality and arbitrary arrests are not uncommon. The Armenian population of Azerbaijan has a bad reputation among the public. Although harassment may occur, the Armenians cannot be regarded as the target of State-sanctioned discrimination.^d Discrimination against ethnic Armenians was a problem in 2006, and Azerbaijani citizens who were ethnic Armenians often concealed their ethnicity by legally changing their ethnic designation in their passports.^e There were also specific complaints with regard to the way law enforcement agents treat Armenians. Examples of harassment and extortion were mentioned.^f According to the United States Department of State report, there were, however, no reports of discrimination against Armenians in 2008. Moreover, according to a survey carried out in 2003 by UNHCR's implementing partner, while discrimination against ethnic Armenians is not a proclaimed official policy in Azerbaijan, there is clearly a certain amount of discrimination against them in everyday life, which is tolerated by the authorities; this discrimination is not such as to amount to persecution per se, but in individual cases it is possible that the cumulative effect amounts to it.^g Moreover, the State party submits that the lack of reports of discrimination during 2008 indicates an improvement of the situation.

4.14 The State party further submits that the circumstances referred to in the above mentioned reports do not in themselves suffice to establish that the forced return of the complainants to Azerbaijan would entail a violation of article 3 of the Convention. A forced deportation would only violate article 3 if the complainants could show that they would be personally at risk of being subjected to torture. According to the Committee's jurisprudence, for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is to be returned.^h The State party refers to the Committee's general comment No. 1 on the implementation of article 3 of the Convention, according to which it is for the complainant to present an arguable case, i.e. to collect and present evidence in support of his or her account of events.ⁱ In this context, the Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee will apply when examining a complaint under the Convention. The national authorities conducting the asylum interview are in a very good position to assess the credibility of a claim that a person, in the event of deportation, would run the risk of being subjected to treatment that would violate article 3 of the Convention. The complainants' case has been

^c See communications No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.3; No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

^d Swedish Ministry for Foreign Affairs, 2007 Human Rights Report on Azerbaijan.

^e United Kingdom Home Office, *Operational Guidance Note: Azerbaijan*, 26 April 2007, paras. 3.6.2–3.6.3.

^f Council of Europe, Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Azerbaijan, 3–7 September 2007 (20 February 2008), para. 91.

^g UNHCR, "International Protection Considerations Regarding Azerbaijani Asylum-Seekers and Refugees", September 2003, para. 124.

^h Communication no. 103/1998, *S.M.R. and M.M.R v. Sweden*, decision adopted on 5 May 1999, para. 9.7.

ⁱ Communications No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.4; No. 265/2005, *A.H. v. Sweden*, decision adopted on 16 November 2006, para. 11.6.

brought before the Swedish authorities and courts on a number of occasions. The Migration Board and the Migration Court have made thorough examinations of their applications for a residence permit, as well as their request for re-examination. Therefore, great weight must be attached to the decisions of the Swedish authorities.

4.15 The State party maintains that the complainants' claims under article 3 of the Convention are unsubstantiated, since the information provided is inconsistent, vague and to some extent contradictory. H.M. provided a document from an organization working to strengthen the rights of Azerbaijani women, in which it is stated that S.M. and H.M. have always belonged to the political opposition. This statement was disclaimed by H.M. during the oral hearing. The document thus contained information which was not consistent with her oral submissions and information submitted previously in the proceedings, therefore it was deemed to have low value as evidence. With regard to the medical opinions submitted by the complainants (para. 4.4 above), they were found not conclusive. One of the medical experts met with H.M. on only one occasion. The forensic certificate was deemed very vague since it only stated that it cannot be ruled out that S.M. suffered his injuries in the way he had described. Another certificate only stated that H.M. might have been subjected to torture; this statement was too vague to substantiate their allegations of past ill-treatment.

4.16 Amnesty International and UNHCR submitted written communications to the Migration Court in support of the complainants' case. Amnesty International stated that if forced to return to Azerbaijan, the complainants would risk again being subjected to persecution that by its nature and extent would be grounds for asylum and they should be granted protection in Sweden. A UNHCR document stated that Armenians and those of mixed ethnicity who return after having sought asylum abroad run a high risk in Azerbaijan. The document also stated that it was doubtful whether Azerbaijan would take them back, and if they were accepted, there was a great risk that they would come under pressure from the security services or be treated without sympathy by the majority of the population. The State party argues that the submissions by Amnesty International and UNHCR are not pertinent to the complainants' case. According to S.M.'s birth certificate, his father was an Azerbaijani citizen and his mother was of Armenian descent. His surname is typical for a person of Azerbaijani origin and their children's birth certificates show that both complainants are registered as ethnic Azerbaijanis. The family was received as Azerbaijani citizens at the time of their deportation from Sweden. According to UNHCR, they would most probably not have been received in the country if they had been registered as ethnic Armenians or as being of mixed ethnicity, therefore the State party submits that it is doubtful that the complainants would be considered by the Azerbaijani authorities or by others as being Armenians or of mixed ethnicity. It also recalls that as recently as 2000, S.M. had been issued a new driving licence, and in 2004, the complainants had obtained new passports.

4.17 The State party further states that even if the complainants were considered to be of mixed ethnicity, they have not substantiated that they would risk treatment in violation of article 3 of the Convention. It concedes that the Armenian population and those of mixed ethnic origin face difficulties in Azerbaijani society. However, according to the UNHCR report, "International Protection Considerations Regarding Azerbaijani Asylum Seekers and Refugees" of September 2003, although discrimination against Armenians is tolerated by the authorities to some extent, it is not an official policy in the country and the level of discrimination is not such as to amount to persecution. The State party maintains that there is nothing to suggest that the general situation of Armenians in Azerbaijan is worse than in 2003; on the contrary, recent reports seem to indicate a slight improvement in this regard.

4.18 The complainants have also invoked a document issued by the UNHCR Office in Baku which summarizes the submission made by S.M. on 24 August 2004 after the family had been sent back to Azerbaijan. S.M. stated that he and his family were detained and

questioned for two days at the airport. They were allowed to leave the airport on account of his and his daughter's deteriorating health. He further submitted that he and his wife were to report for questioning on a certain date and that they had been questioned for one hour and threatened with imprisonment. S.M. also stated that his brother, who lived with their Armenian mother in Baku, did not experience similar difficulties due to his ethnicity. The document makes no reference to the ill-treatment allegedly suffered by S.M. during interrogation at the airport. Furthermore, according to the above-mentioned document, S.M. stated that he and his family were held at the airport by security forces for two days, while he had claimed before the Swedish authorities that his detention lasted for four or five days. These inconsistencies weaken the general credibility of the complainants' submissions about their experience after being deported to Azerbaijan. Moreover, it seems very contradictory that S.M.'s brother, who apparently lives with their Armenian mother, has not experienced any difficulties due to his ethnicity.

4.19 The complainants have also been inconsistent about what occurred subsequent to S.M.'s stay in hospital in September 2004. S.M. and H.M. stated separately in writing that they were questioned a few days before they left the country. Then they both stated separately that after discharge from hospital they went into hiding and did not undergo any further questioning. During the oral hearing they changed their story and went back to the first version, and explained that by hiding they meant that they were hiding from the community and the local police, not from the KBG. Therefore, the veracity of their statements was called into question.

4.20 S.M. has claimed that he and his family used temporary passports in order to leave Azerbaijan, which they had allegedly obtained with the assistance of an organization. However, if the complainants were of interest to the authorities, it is unlikely that they would have been able to obtain passports. Moreover, if the complainants had been treated in the manner alleged, this information would have been brought to the attention of the Swedish embassy either by other embassies and institutions with which it has regular contacts or by human rights organizations that are very active in Azerbaijan. Therefore, the State party considers it improbable that the complainants were subjected to the violations alleged upon their return to Azerbaijan. The fact that the Swedish embassy has no information about the incidents and that the information in the document issued by UNHCR Baku is inconsistent with what the complainants have stated before the Swedish authorities calls into question the veracity of their allegation of past ill-treatment.

4.21 The State party recalls that, while past torture is one of the elements to be taken into account when making the assessment pursuant to article 3, the deciding factor is whether there are substantial grounds for believing that the complainants would be subjected to any treatment contrary to the Convention upon return to their home country. In view of the fact that the complainants left the country in December 2004, there is little to suggest that they would still be of interest to the Azerbaijani.

4.22 In conclusion, the State party submits that the evidence and circumstances invoked by the complainants do not suffice to show that the alleged risk of torture fulfils the requirements of being foreseeable, real and personal. Accordingly, the enforcement of the expulsion order would not constitute a violation of article 3 of the Convention. Since the complainants' claim fails to rise to the basic level of substantiation, the communication should be declared inadmissible as being manifestly unfounded. Concerning the merits, the State party contends that the communication reveals no violation of the Convention.

Complainants' comments on the State party's observations

5.1 By letter of 31 March 2010, the complainants submitted that the specialist who carried out the psychiatric examinations is one of Sweden's foremost experts in diagnostics of torture and trauma injuries. As to the opinion of the State party that the documents

submitted by Amnesty International and UNHCR did not prove that State-sanctioned persecution of persons of Armenian descent occur in Azerbaijan, they maintain that both organizations noted that asylum seekers of Armenian origin or mixed ethnicity may be at high risk upon arrival in Azerbaijan, inter alia, of being pressurized by the security forces. Therefore, taking into account this information and the traumatizing experiences and pressure they have already faced in Azerbaijan, their return would expose them to a high risk of suffering at the hands of public officials or other individuals acting in an official capacity. The absence of new reports on discrimination against Armenians during one specific year should not be used as evidence that such discrimination has ceased, especially when various other reports concurrently indicate that Armenians in Azerbaijan are trying to conceal their ethnicity.

5.2 The complainants also contest the State party's argument that they would most probably not have been received by Azerbaijan if they had been regarded as ethnic Armenians or as being of mixed ethnicity. In this context, they recall that the documents proving S.M.'s Armenian origin were not actually handed over to the border control officers, but were found in the family's luggage after the departure of the Swedish escort. When the border officers discovered that S.M. tried to conceal his origins, the hostility towards them increased. They also add that S.M.'s brothers and sisters have also experienced various kinds of difficulties: at least one brother has left the country and one sister committed suicide after being abused. The others try to hide their ethnicity, and if they are successful in doing so, it does not mean that they would be safe upon return.

Additional observations by the State party

6. In its submission of 4 October 2010, the State party recalled that it had questioned the veracity of the complainants' account of ill-treatment upon their return to Azerbaijan in 2004 due to inconsistencies in their accounts (see, inter alia, paras. 4.15 and 4.18 above). It also contested that the complainants would still be of interest to the Azerbaijani authorities even if their alleged reasons for leaving Azerbaijan were considered substantiated. Therefore, the State party reiterates its previous observations and maintains that the evidence and circumstances invoked by the complainants do not suffice to show that the alleged risk of torture upon return fulfills the requirements of being foreseeable, real and personal, and their deportation to Azerbaijan would not constitute a violation of article 3 of the Convention.

Additional comments by the complainants

7.1 In a submission dated 26 October 2010, the complainants' counsel informed that the complainants' daughter has been granted leave to remain in Sweden. She is staying in foster care with her brother and his family. The decision was based on the existing obstacle to the enforcement of the expulsion, namely that no adult can be expected to take care of her in Azerbaijan since her grandparents passed away and her parents (the complainants) are in hiding. Other elements considered were her health status, adaptation to Sweden, traumatic experiences and anamnesis of psychiatric problems.

7.2 By letter of 22 November 2010, the counsel submitted that the complainant's request for family reunification with their daughter was denied on grounds that they have been in hiding for more than two years, and their daughter would be able to stay in foster care. Therefore, the expulsion order is still enforceable.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the complainant has exhausted all available domestic remedies. The Committee notes the State party's acknowledgment that domestic remedies have been exhausted and therefore finds that the complainants have complied with article 22, paragraph 5 (b), of the Convention.

8.3 The State party submits that the communication is inadmissible under article 22, paragraph 2, of the Convention, since the complainants' claim that they are at risk of being subjected to torture upon return to Azerbaijan fails to rise to the level of substantiation required for purposes of admissibility. The Committee is of the opinion that the arguments before it raise substantive issues which should be dealt with on the merits and not on admissibility considerations alone. Accordingly, the Committee decides that the communication is admissible with regard to article 3 of the Convention and proceeds to its examination on the merits.

Consideration of the merits

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

9.2 The Committee notes that the State party has issued a resident permit to the complainants' daughter, A.M. Therefore, the Committee decides to discontinue the part of the communication relating to A.M.

9.3 The issue before the Committee is whether the complainants' deportation to Azerbaijan would constitute a violation of the State party's obligation under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.4 In assessing whether there are substantial grounds for believing that the complainants would be in danger of being subjected to torture upon return, 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 in Azerbaijan (art. 3, para. 1). The aim of such an analysis is to determine whether the complainants run a real personal risk of being subjected to torture in the country to which they would be returned. It follows 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 may not be subjected to torture under his or her specific circumstances.

9.5 The Committee recalls its general comment No.1 on the implementation of article 3,^j which states that the Committee must assess whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture were he/she to be expelled, returned or extradited to the country of origin. The risk need not be highly probable, but it must be personal and present. In this regard, the Committee has established in previous decisions that the risk of torture must be “foreseeable, real and personal”.^k Furthermore, in exercising the Committee’s jurisdiction pursuant to article 3 of the Convention, considerable weight will be given to findings of facts that are made by organs of the State party concerned. However, the Committee is not bound by such findings; instead, it has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.^l

9.6 The Committee notes the complainants’ claim that they run a risk of torture in Azerbaijan on account of S.M.’s mixed origin, which makes them a target for the authorities in their home country. It further notes their allegation that due to S.M.’s Armenian origins, the whole family was subjected to ethnically motivated persecution, and as a result they had been victims of beatings and persecution by neighbours, as well as State agents (police). Moreover, they claim that they had been detained, questioned, beaten and sexually assaulted (H.M.) by officers of the National Security Service, including at the airport upon their return from Sweden in August 2004, as well as during further interrogation.

9.7 The Committee observes that the complainants’ allegations of torture are corroborated by authoritative medical reports issued by the Crisis and Trauma Centre in Stockholm. In light of the above and taking into account the treatment inflicted on the complainants upon their return to Azerbaijan in August 2004 and general information available to the Committee, according to which a hostile attitude on the part of the general public towards ethnic Armenians living in Azerbaijan is still widespread,^m persons of Armenian origin are at risk of discrimination in their daily life,ⁿ they are harassed or bribes are requested by low-ranking officials when they apply for passports and they often conceal their identity by legally changing the ethnic designation in their passports, the Committee considers that the complainants’ return to Azerbaijan would expose them to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. Accordingly, the Committee concludes that their deportation to Azerbaijan would constitute a breach of article 3 of the Convention.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the return of S.M. and H.M. to Azerbaijan would constitute a violation of article 3 of the Convention.

^j Committee’s general comment No. 1 (1996) on the implementation of article 3 of the Convention, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1), annex IX.*

^k See, inter alia, communications No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3; No. 285/2006, *A.A. et al. v. Switzerland*, Views adopted on 10 November 2008, para. 7.6; No. 322/2007, *Njamba v. Sweden*, decision adopted on 14 May 2010, para. 9.4.

^l Committee’s general comment No. 1 (note j above), para. 9.

^m See the concluding observations of the Committee on the Elimination of Racial Discrimination on the fifth and sixth reports of Azerbaijan (CERD/C/AZE/CO/6), para. 15.

ⁿ Council of Europe, European Commission against Racism and Intolerance, Report on Azerbaijan (23 March 2011), para. 98.

11. In conformity with rule 118 (former rule 112), paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to this decision.

Communication No. 381/2009: Faragollah et al. v. Switzerland

<i>Submitted by:</i>	Abolghasem Faragollah et al. (represented by counsel, Urs. Ebnöther)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	17 April 2009 (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 21 November 2011,

Having concluded its consideration of complaint No. 381/2009, submitted to the Committee against Torture on behalf of Mr. Abolghasem Faragollah et al. 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 is Abolghasem Faragollah, born on 1 November 1956, accompanied by his wife Mitra Pishan, born on 27 September 1962, and their son Armin Faragollah, born on 6 December 1992.^a All are nationals of the Islamic Republic of Iran. He claims that their return to the Islamic Republic of Iran would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel, Urs Ebnöther.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 23 April 2009. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, requested the State party not to deport the complainant and his family to the Islamic Republic of Iran while the complaint was being considered.

Factual backgrounds

2.1 The complainant and his family are Iranian nationals and claim to have left the Islamic Republic of Iran for political reasons.^b Upon his arrival in Switzerland, the complainant submitted an application for asylum on 3 September 2000, which was turned down by Federal Office for Refugees (now the Federal Office for Migration) on 19 April 2002. An appeal against that decision was rejected by the Swiss Asylum Appeals Commission (now part of the Federal Administrative Tribunal) on 15 June 2004. The

^a It transpires from the file that the complainant has another adult son, Arash Faragollah, born on 19 September 1983, who is not associated with the initial submission.

^b There is no further mention in the file of "the political reasons" behind the departure from the Islamic Republic of Iran of the complainant and his family.

complainant's wife, Mitra Pishan, filed an initial asylum application on her own behalf and on that of their son, Amin, on 20 March 2003.^c The application was rejected on 18 March 2004 by the Federal Office for Refugees and that decision was upheld by the Swiss Asylum Appeals Commission on 15 June 2004. On 6 April 2005, the complainant requested that the decisions of the Federal Office for Refugees of 19 April 2002 and 18 March 2004 be reconsidered. That appeal was turned down by the Federal Office for Migration on 10 August 2005.

2.2 The complainant argues that, since October 2005, he has been a member of the Democratic Association for Refugees, an Iranian migrant organization that he claims is highly critical of the present regime in the Islamic Republic of Iran and attempts to raise awareness of the woeful human rights situation there, including the issue of the death penalty and the prevailing climate of discrimination against and repression of members of the opposition and minorities.

2.3 In April 2007, the complainant was elected representative for the Canton of Obwald by the executive committee of the Democratic Association for Refugees. In that capacity, he has written articles denouncing the present regime in the Islamic Republic of Iran, which have appeared in the association's publications, and been involved in events organized by NGOs and local churches in his canton in order to alert the public to the human rights violations committed in the Islamic Republic of Iran. The complainant takes part in meetings of the association's leaders at the cantonal level and contributes to the strategic planning of its activities. He works closely with the association's executive committee, directors and deputy director.

2.4 On the basis of his political activities in Switzerland, on 24 July 2006 the complainant submitted a new asylum application, which was rejected by the Federal Office for Migration on 4 October 2007. The court ruled that given the complainant's political profile and level of activities, he was unlikely to attract the attention of the Iranian authorities. On appeal, that decision was upheld by the Federal Administrative Tribunal on 19 March 2009. The Tribunal argued that the Iranian secret service kept a close watch only on the activities of persons whose role went beyond low-profile political protests of exiles, and that the Iranian authorities were aware that asylum seekers did all they could to highlight their activities in order to secure residence permits in the host country. According to the Tribunal, the complainant had not done enough to bring himself to the attention of the Iranian authorities. Mere identifiability did not constitute a risk of persecution and only those of the regime's opponents who, by dint of their personality, represented a real threat to the regime were kept under surveillance and on file. The Tribunal considered that the close and regular contacts maintained by the complainant with cantonal and national leaders of the Democratic Association for Refugees amounted to little more than the association's internal activities that did not raise his profile above that of any ordinary member. As a result, the Tribunal considered that such activities did not expose him to any danger from the Iranian regime. Similarly, the Tribunal judged that the complainant's publications in no way contributed to any risk he might run, as similar writings containing stereotypical criticisms of the present regime and attempting to tarnish its reputation were plentiful and appeared regularly on various websites. In the wake of that judgement, the Federal Office for Migration ordered the complainant and his family to leave Switzerland by 21 April 2009 at the latest, a decision that is the subject of the complaint submitted by the complainant to the Committee. He maintains that the Tribunal, in its ruling of 19 March 2009, had mistakenly concluded that his role and activities as representative for the Canton

^c The State party maintains that the application was made on 20 February 2003.

of Obwald in the Democratic Association for Refugees did not expose him to a risk of persecution should he be deported to the Islamic Republic of Iran.

2.5 The complainant insists that the Tribunal's ruling of 19 March 2009 differs considerably from earlier rulings made in similar cases, given that the same court had granted asylum to other cantonal representatives of the Democratic Association for Refugees in leadership positions, thereby recognizing the risks to those opponents of the regime.^d He adds that the Federal Office for Migration has already decided that cantonal representatives of the Democratic Association for Refugees, regardless of the size of the canton, risk persecution should they return to the Islamic Republic of Iran.^e Moreover, he claims that the Tribunal explicitly deemed the post of cantonal representative of the Democratic Association for Refugees to entail a real risk of persecution and that such persons would have a well-founded fear of suffering if they were forced to return to Iran.^f In a subsequent ruling of 19 February 2009, the Tribunal granted asylum to a member of the Democratic Association for Refugees who, although not a cantonal representative, was especially active in the association, organizing and participating in demonstrations, contributing articles critical of the present regime in the Islamic Republic of Iran to websites and helping to organize other activities of the association. The Tribunal therefore considered in its ruling that, given his role, the appellant would obviously be seen to be connected with the Democratic Association for Refugees and therefore perceived as dangerous by the authorities, thus leading to a risk of persecution.^g The complainant adds that, in addition to such rulings, numerous credible reports show that the Iranian authorities keep a close watch on and record the political activities of members of the Iranian diaspora.^h

2.6 In the light of those reports and of the Tribunal's own jurisprudence, the complainant is surprised by the various authorities' conclusions that he runs no risk in the event of his return to the Islamic Republic of Iran. He reiterates that he is a cantonal representative, a position of responsibility, of the Democratic Association for Refugees and that his name and address have been published.ⁱ He plans and coordinates many of the association's demonstrations and meetings, and his activities extend beyond mere participation in such events and the publication of articles. He reiterates that he is involved in the association's strategic planning, working closely with the association's director. For

^d The complainant refers to a ruling made by the Tribunal on 29 August 2007, in which he claims that it recognized that the Iranian authorities monitored the political activities of Iranian political opponents residing abroad and kept a record of supposedly subversive activities through Internet searches. Similarly, he claims that the Tribunal recognized in the same ruling that the Democratic Association for Refugees was the most important and active opposition group in Switzerland and that its former director was well known to the Iranian authorities. The Tribunal therefore concluded, he says, that anyone having regular contact with him ran the risk of being documented by the Iranian authorities.

^e The complainant invokes cases N 440 341 of July 2006, N 409 182 of November 2006, N 397 027 of February 2007 and N 404 499 of February 2009.

^f Decision No. D-6849/2006 of 26 August 2008, pp. 12–13, para. 4.2.2.2.

^g Decision No. D-4581/2006 of 19 February 2009, pp. 8–9, para. 4.3.

^h The complainant refers to a report by the German Ministry of the Interior (*Verfassungsschutzbericht*, 2007, p. 297) and another by the Swiss Refugee Council entitled "*Iran: Dangers encourus par les activistes et membres des organisations politiques en exil de retour dans leur pays. Moyens d'accès à l'information des autorités iraniennes*" (Michael Kirschner, 4 April 2006), attached to the file, according to which Iranian citizens living in Switzerland and occupying positions of importance in the Democratic Association for Refugees face a risk of persecution.

ⁱ *Kanoun*, the monthly publication of the Democratic Association for Refugees (No. 4, April 2009, p. 8).

those reasons, the complainant reiterates that it is highly likely that he has drawn the attention of the Iranian authorities to himself and that his political activities will be seen by them not only as defamatory toward the present regime — itself a crime in Iran — but also as a threat to the country's internal security. He adds that the Tribunal has recently decided that a person who performs the duties of cantonal representative of the Democratic Association for Refugees runs a real risk of persecution in the event of return to the Islamic Republic of Iran, and that the same reasoning should apply in his case.

The complaint

3. The complainant claims that his deportation from Switzerland to the Islamic Republic of Iran, as well as that of his wife and son, would be in violation of article 3 of the Convention, as there are substantial grounds for believing that they would be in danger of being subjected to torture if sent back.

State party's observations on the merits

4.1 On 22 October 2009, the State party submitted its observations on the merits of the communication. It states that the complainant has failed to establish that he would face a personal, real and foreseeable risk of torture upon his return to the Islamic Republic of Iran. While noting the worrisome human rights situation in Iran and referring to general comment No. 1 of the Committee,^j the State party recalls that this situation is not in itself a sufficient basis for concluding that the complainant would be in danger of being subjected to torture if returned. It contends that he has failed to demonstrate that he faces a foreseeable, personal and real risk of torture if returned to Iran.

4.2 According to the State party, the complainant declared, during the domestic judicial proceedings, that he had been arrested in 2003 near the University of Teheran on suspicion of having taken part in the university revolt of Kuye Daneshgah. The arrest, however, apparently did not prompt his departure from the Islamic Republic of Iran. The complainant does not claim to have been tortured and has focused his communication before the Committee on his second asylum application, which is based exclusively on his political activities since his departure from the Islamic Republic of Iran.

4.3 With regard to the complainant's political activities in Switzerland, the State party notes that in many decisions concerning the removal of unsuccessful asylum seekers to the Islamic Republic of Iran, the Federal Administrative Tribunal has found that the Iranian secret service may carry out surveillance of political activities in opposition to the regime undertaken abroad, but only when those involved in such activities fit a certain profile, take action that falls outside the usual scope of the mass opposition movement, and hold office or carry out activities of such a nature that they represent a serious and real threat to the Government concerned.^k The State party adds, making reference to various sources, that persons suspected of being involved in a serious crime or of acting on behalf of specific political groups also risk being arrested.

4.4 The State party asserts that nothing in the report of the Swiss Refugee Council cited by the claimant leads to the conclusion that people who hold a particular position within the Democratic Association for Refugees would be exposed to a specific risk if they were to return to Iran. According to the same report, even repeated support for actions in opposition

^j General comment No. 1, A/53/44 and Corr.1, annex IX (see HRI/GEN/1/Rev.9, vol. II). The State party also refers to communications No. 94/1997, *K.N. v. Switzerland*, decision adopted on 19 May 1998, and No. 100/1997, *J.U.A. v. Switzerland*, decision adopted on 10 November 1998.

^k The State party refers to the decision of the Federal Administrative Tribunal of 26 August 2008, para. 4.2.2.1; see footnote f above.

to the current Iranian regime would not lead to an increased risk of reprisals. The report does note, however, that carrying out violent actions or holding a particularly senior post in certain opposition groups might increase that risk.¹ Moreover, the Council cites as examples only the most important and especially well-known organizations. The State party also suggests that numerous organizations in Switzerland, aside from the Democratic Association for Refugees, take pains to appoint their members to particular posts so that they may be shown to be especially exposed to the danger of being subjected to ill-treatment should they be sent back to their countries of origin. The Iranian authorities are unable to identify and monitor every individual, even when they are aware of the political activities of Iranian citizens in exile. They are interested in identifying only those persons whose activities represent a real threat to the country's political system.

4.5 With reference to the conclusions of the Federal Office for Migration, the State party asserts that the complainant's activities on behalf of the Democratic Association for Refugees, especially in his capacity as its representative for the Canton of Obwald and his regular involvement in demonstrations and the distribution of pamphlets and magazines, do not constitute a ground for fearing that he would receive treatment prohibited by the Convention should he return to Iran. The complainant does not occupy a leadership position of sufficient importance or with a high enough profile to warrant the conclusion that he would be at risk of ill-treatment should he return. The same can be said of his contacts with the association's leadership and the publication on the Internet of his articles, which contain no more than the same kind of stereotypical criticisms of the regime that appear regularly under other names. Given that the association is active above all in Switzerland, there is little reason to believe that its monthly publication has much readership outside the country. There is no evidence that the Iranian regime has taken any measures against the complainant because of his activities in Switzerland.

4.6 With regard to the complainant's claims that the Federal Administrative Tribunal has made rulings granting asylum to other people occupying similar positions, the State party asserts that each case is examined on its merits. It notes that, although asylum has indeed been granted to some members of the Democratic Association for Refugees, that was not so in many other cases of people who occupy various posts in the association.^m The Tribunal has issued around 40 decisions since the beginning of 2007 concerning persons who have adduced political activities as members of the Democratic Association for Refugees and has granted asylum only in a certain number of cases after due consideration of all the circumstances. Even if they have undertaken similar activities in the Democratic Association for Refugees, two individuals may be exposed to a different level of risk if returned to Iran because other factors influence how much attention the Iranian authorities focus on them.

4.7 The State party also maintains that the Iranian authorities are capable of distinguishing between political activities deriving from a serious, personal conviction, which thus represent a potentially significant source of instability, and those aimed primarily at providing the individuals concerned with a residence permit. Moreover, the Democratic Association for Refugees has become known for its systematic attempts to provide its members with personal grounds for requesting asylum, by setting up stalls as often as once a week with around a dozen participants, who are photographed carrying pamphlets. Those photographs are then published on its website. When the Federal Administrative Tribunal confirmed its ruling that simply being a member of the association did not in itself constitute personal grounds for asylum after having fled from another

¹ The State party refers to the aforementioned report of the Swiss Refugee Council; see footnote h above.

^m The State party refers to various rulings of the Federal Administrative Tribunal, attached to the file.

country, it established a variety of posts, such as logistics or security manager, etc. Since then, almost all cases involving its members have had to do with persons playing a “leading role” in the association. In this particular case, the complainant has not demonstrated that he would be exposed to a substantial risk as a result of his activities in the association.

Complainant’s comments on the State party’s observations on the merits

5.1 In his comments of 13 January 2010, the complainant contends that the fact that the Democratic Association for Refugees is not included in the list of the most prominent Iranian opposition organizations is explained by the fact that this list is only indicative. He further states that, when the report of the Swiss Refugee Council was published in 2006, the association was still a young organization and not yet sufficiently well known to be classified alongside other, older opposition movements. Nevertheless, the existence of the Democratic Association for Refugees has been acknowledged in several court decisions of the State party.

5.2 The complainant rejects suggestions by the State party that he is one of many applicants seeking asylum for economic rather than political reasons and attempting to obtain residence permits by joining political organizations. The complainant has been a member of the Democratic Association for Refugees since October 2005 and has occupied the post of cantonal representative since April 2007. His personal and financial commitment in recent years, attesting to his political motivation, is genuine and credible. The Democratic Association for Refugees currently has 12 cantonal representatives in Switzerland. Given that the association has around 200 members, the post of cantonal representative is clearly one of the most senior positions.

5.3 The complainant draws a distinction between the various decisions of the Federal Administrative Tribunal mentioned by the State party, noting that four of themⁿ dealt with association security personnel or ordinary members with no management position, which is not the complainant’s current situation. He adds that the Federal Office for Migration has granted refugee status to several persons acting as cantonal representatives of the Democratic Association for Refugees.^o In conclusion, given the present situation in the Islamic Republic of Iran, marked by massive human rights violations,^p and in view of his continued political commitment and profile, the complainant maintains that he would be exposed to a substantial risk of treatment prohibited by article 3 of the Convention if he were forcibly returned to Iran.

Additional comments by the State party

6.1 On 10 February 2010, the State party, referring to the decision of the Federal Administrative Tribunal of 9 July 2009, mentioned by the complainant in his comments above, explained that the decision concerned an Iranian complainant who was accompanied by her two young children and had converted to Christianity before her departure from the Islamic Republic of Iran. The Tribunal had ruled that her allegations regarding the period prior to her departure were not plausible and that no grounds had emerged since she had fled the country to justify the granting of political asylum. Nevertheless, the Tribunal granted the complainant temporary admission, deeming it not to be in the best interests of

ⁿ Decisions of 2 July 2007, 21 January 2008, 18 September 2008 and 16 January 2009.

^o The complainant refers to decision Nos. N 440 341 of July 2006, N 409 182 of November 2006, N 397 027 of February 2007, and N 404 499 of February 2009 of the Federal Office for Migration.

^p The complainant refers to a decision of the Federal Administrative Tribunal of 9 July 2009, pp. 25–27.

the children, who had completed the greater part of their schooling in Switzerland, to return them to the Islamic Republic of Iran.

Additional observations by the complainant

7.1 On 5 May 2010, the complainant informed the Committee that, on 27 April, the Federal Office for Migration had granted refugee status to his son Arash Faragollah, born on 19 September 1983. He had requested asylum independently of his parents and, in his latest application, of 4 February 2008, set out the risks to which he claimed to be exposed as a result of his political activities in the Democratic Association for Refugees. Arash Faragollah had devoted a great deal of time to collecting signatures for petitions, distributing *Kanoun*, the association's magazine, and taking part in a radio project on behalf of the association in conjunction with radio LoRa. Having started as a technician for *Stimme des Widerstands* (Voice of Resistance), he later took over editorial responsibility for the programme. After assessing all the circumstances, the Federal Office for Migration found that the profile of the complainant's son might attract the attention of the Iranian authorities and that he would therefore have reason to believe that he could face serious harm should he return to the Islamic Republic of Iran.⁹

7.2 Under these circumstances, the complainant alleges that the risk he runs of being subjected to torture and other cruel, inhuman or degrading treatment is greater still, given that he is the father of a recognized refugee in Switzerland and that he has the same dissident profile.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 Noting that there is no impediment to the admissibility of the complaint, the Committee proceeds to its consideration of the merits.

Consideration of the merits

9.1 The issue before the Committee is whether the removal of the complainant to the Islamic Republic of Iran would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to the Islamic Republic of Iran, 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 in the Islamic Republic of Iran. 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 returned.

⁹ This information was transmitted to the State party on 23 June 2010.

9.3 The Committee recalls its general comment on the implementation of article 3 of the Convention, which states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to meet the test of being highly probable, the Committee recalls that the burden of proof normally falls to the complainant, who must present an arguable case establishing that he runs a “foreseeable, real and personal” risk.^r Furthermore, in its general comment the Committee states that it must also determine whether the complainant has engaged in political activity within or outside the State concerned that would appear to make him particularly vulnerable to the risk of being subjected to torture.^s The Committee also recalls that, while it gives considerable weight to the findings of fact of the State party’s bodies, it is entitled freely to assess the facts of each case, taking into account the circumstances.

9.4 Referring to its recent jurisprudence,^t the Committee recalls that the human rights situation in the Islamic Republic of Iran is extremely worrisome, particularly since the elections held in the country in June 2009. The Committee has seen many reports describing, in particular, the repression and arbitrary detention of many reformers, students, journalists and human rights defenders, some of whom have been detained in secret and others sentenced to death and executed.^u The State party itself has recognized that the human rights situation in Iran is worrisome on many levels.

9.5 The Committee notes that the complainant arrived in Switzerland in 2000. Since 2005, he has been active in the Democratic Association for Refugees, of which he is the representative for the Canton of Obwald. He has written articles that are critical of the present regime in Iran, distributed publications put out by the association and participated in various events organized by NGOs and local churches in his canton. As a senior member of the association, he claims to take part in the strategic planning of its activities, and his name and address have been published in its monthly magazine. The Committee also notes that the complainant’s son has been granted refugee status on the basis of activities comparable to those carried out by his father in the association, in particular the collection of signatures for petitions, the distribution of its monthly magazine, *Kanoun*, and involvement in a radio project. The State party has not contested this information. Given that the State party concluded that the complainant’s son could not be returned to the Islamic Republic of Iran on account of his political profile, which would imperil his safety

^r See general comment No. 1 of the Committee, footnote j above, and communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 21 November 2003, para. 7.3.

^s See general comment No. 1, *ibid.*, para. 8 (e).

^t See communication No. 357/2008, *Jahani v. Switzerland*, decision adopted on 23 May 2011, para. 9.4.

^u For example, on 7 July 2009, six special procedures mandate holders of the Human Rights Council (arbitrary detention; extrajudicial, summary or arbitrary executions; right to freedom of opinion and expression; torture and other cruel, inhuman or degrading treatment or punishment; situation of human rights defenders; and enforced or involuntary disappearances) expressed their concern regarding the protests linked to the Iranian presidential elections of 2009, following which at least 20 people were killed and hundreds of others seriously injured in clashes with security forces, who allegedly used live ammunition and rubber bullets. The same experts have also expressed their concern about reports of arrests and detention without charge and ill-treatment of detainees. See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8383&LangID=E>; see also the documents prepared by OHCHR for the universal periodic review in respect of Iran: A/HRC/WG.6/7/IRN/2 (25 November 2009), e.g. paras. 28, 31 and 56; and A/HRC/WG.6/7/IRN/3 (30 November 2009), paras. 28–29. See also the statement made by the High Commissioner for Human Rights on 2 February 2011 on the execution of at least 66 persons in the month of January 2011, including at least 3 political prisoners (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10698&LangID=E>).

upon return, the Committee finds that there is a difference in treatment, since the same authorities are prepared to send his father back to the Islamic Republic of Iran, even though he carries out similar activities and is exposed to similar risks.

9.6 In the light of all these circumstances, including the general human rights situation in the Islamic Republic of Iran, the personal situation of the complainant, who continues to engage in opposition activities for the Democratic Association for Refugees and whose son has been granted refugee status, and bearing in mind its preceding jurisprudence,^v the Committee is of the opinion that he could well have attracted the attention of the Iranian authorities. The Committee therefore considers that there are substantial grounds for believing that he would risk being subjected to torture if returned to the Islamic Republic of Iran with his wife and his son, Armin Faragollah. Moreover, the Committee notes that, since Iran is not a party to the Convention, the complainant would be deprived of the legal option of recourse to the Committee for protection of any kind.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consequently concludes that the removal of the complainant and his family to the Islamic Republic of Iran would constitute a violation of article 3 of the Convention.

11. The Committee urges the State party, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it, within 90 days from the date of the transmittal of this decision, of the steps taken in response to the decision expressed above.

^v See the Committee's communications No. 339/2008, *Amini v. Denmark*, decision adopted on 15 November 2010, para 9.8, and No. 357/2008, *Jahani v. Switzerland*, see footnote t above, para. 9.4.

Communication No. 382/2009: *M.D.T. v. Switzerland*

Submitted by: M.D.T. (unrepresented)
Alleged victim: The complainant
State party: Switzerland
Date of complaint: 11 April 2009 (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 14 May 2012,

Having concluded its consideration of complaint No. 382/2009, submitted by M.D.T. 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 and the State party,

Adopts the following:

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

1.1 The complainant is M.D.T., a national of the Democratic Republic of the Congo, born on 29 June 1977, who faces deportation from Switzerland to his country of origin. He claims that his deportation would constitute a violation by Switzerland of article 3, paragraph 1, of the Convention. The complainant requested that immediate measures of protection be provided to stay his removal to the country of origin. He is not represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 29 April 2009. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, requested the State party not to deport the complainant to the Democratic Republic of the Congo while his complaint was being considered. The State party acceded to this request on 1 May 2009.

The facts as presented by the complainant

2.1 In his initial submission of 11 April 2009, the complainant claims that his deportation from Switzerland to his country of origin — the Democratic Republic of the Congo — would constitute a violation by Switzerland of article 3, paragraph 1, of the Convention as he would face a risk of torture if returned.

2.2 The complainant joined the principal opposition party, the Movement for the Liberation of the Congo (MLC), in 2005 and became its active member shortly after. He participated in several MLC activities seeking a restoration of the rule of law in the country. In the neighbourhood, he was well-known for his active promotion of MLC activities. During the presidential electoral campaign in 2006, Kinshasa witnessed very violent clashes between the followers of the outgoing President Laurent Kabila and his principal political rival Jean-Pierre Bemba. Jean-Pierre Bemba gained an electoral victory in Kinshasa as well as the Provinces of Equateur and Bas-Congo. The complainant is from Bas-Congo by origin.

2.3 On 22 and 23 March 2007, the new conflict arose in Kinshasa, which was regarded as an act of retaliation by the security forces of the newly elected president Joseph Kabila against the followers of Jean-Pierre Bemba. The complainant states that he was stopped on 22 March 2007 by the presidential guard in the Gombe neighbourhood of Kinshasa due to his active political-religious views as he could be easily distinguished as a participant to the demonstrations by his cap bearing the image of Bemba's MLC. He was subjected to torture, including using rifle butts, slaps, hits, insults and threats. The complainant allegedly lost consciousness and was reportedly left bleeding on a side-walk in a sand-box. Two of the complainant's teeth were reportedly broken during the incident.

2.4 Following the incident, the complainant went into hiding in Kimbanseke, a suburb of Kinshasa, in order to escape persecution by the police. When in hiding, the complainant learned that he was being sought and that an arrest warrant against him had been issued on 6 April 2007 by the National Intelligence Agency. Given the threats against his family and relatives and fearing for his life and security, in particular due to the incidents of torture on 22 March 2007, the complainant decided to flee the Democratic Republic of the Congo.

2.5 Upon arrival in Switzerland on 26 December 2007, the complainant submitted a request for asylum. The Federal Office for Migration in its decision of 14 January 2009 rejected the complainant's request as unsubstantiated and ordered him to leave Switzerland before 11 March 2009. The complainant appealed against the decision to the Federal Administrative Tribunal, which on 16 March 2009 dismissed the appeal and ordered an immediate execution of the Federal Office for Migration order for the forced return of the complainant. However, the Office extended the time limit for the complainant's departure from Switzerland to 16 April 2009.

The complaint

3.1 The complainant claims that his deportation from Switzerland to the Democratic Republic of the Congo, which has signed an agreement with Switzerland on the readmission of refused asylum seekers, would constitute a violation of article 3, paragraph 1, of the Convention as there are substantial grounds for believing that he would be in danger of being subjected to torture if returned.

3.2 Referring in general to information from unspecified human rights organizations, the complainant alleges that many of those who were arrested during the events of 22 and 23 March 2007, including the members of MLC, followers of Jean-Pierre Bemba and those coming from the Provinces of Equator and Bas-Congo, have been subjected to secret detention. The complainant also claims that no amnesty has been granted to those arrested many of whom have been killed or have disappeared.

3.3 The complainant claims, without providing any details, that his family members have continued to suffer persecution by the security agents as a reprisal for not disclosing his whereabouts. To further demonstrate the substantial grounds for believing that he would be at risk of being subjected to torture if returned, the complainant draws to the Committee's attention the medical certificate concerning his treatment of two broken teeth as well as the arrest warrant issued against him by the National Intelligence Agency of the country.

State party's observations on the merits

4.1 On 27 October 2009, the State party submitted its observations on the merits of the communication, without any comments on its admissibility.

4.2 The State party recalls that the complainant left the Democratic Republic of the Congo on 25 December 2007 on board a plane to Rome, via Paris. He arrived in Switzerland by car. The State party argues that the complainant based his allegations of risk

of torture solely on the existence of the arrest warrant against him and a medical certificate for dental treatment. Those facts have been duly considered in the decisions of the Federal Office for Migration of 14 January 2009 and of the Federal Administrative Tribunal of 16 March 2009. In addition, the State party notes that the complainant failed to explain the incoherence and contradictions of his allegations as identified by the competent Swiss authorities. Since the complainant submitted to the Committee only the rulings of the decisions, without their justification, together with the arrest warrant, the State party considers the arguments of the complainant to be misleading.

4.3 Referring to the Committee's jurisprudence^a and its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22,^b the State party asserts that the complainant has failed to demonstrate that he faces a personal, real and foreseeable risk of torture if returned to the Democratic Republic of the Congo. According to the State party, the existence of a risk of torture must be evaluated in light of the evidence which cannot be limited to mere allegations or suspicions. While noting the human rights situation in the Democratic Republic of the Congo, the State party contends that this situation is not in itself a sufficient basis for concluding that the complainant would be at risk of torture if returned.

4.4 Referring to the decisions by the relevant asylum authorities in the complainant's case, the State party states that the complainant used to live in Kinshasa and not in the East which has been the least stable part of the country. According to the State party, the political situation in the country has become less strained since the departure of Jean-Pierre Bemba in 2007.

4.5 In addition, the complainant's allegations concerning his supposed beating by the security forces during the demonstrations of 22 March 2007 for wearing a cap bearing the image of Bemba's MLC lack credibility, in particular due to contradictions and inconsistencies in the complainant's assertions. Moreover, the State party does not consider the medical certificate of the complainant's dental treatment relevant as it does not describe the sources of dental problems. Importantly, it does not suggest in any respect that the complainant would be at risk of torture if returned to the country of origin. Finally, the State party notes that the complainant has not submitted any further evidence to prove that he had been subjected to ill-treatment in the past.

4.6 In the State party's view, the complainant's allegations of his political activity were not credible as he could not establish that he had been politically active. Moreover, the complainant could not provide any details about his involvement or membership in MLC. In addition, he conceded that he had not exercised any political activities since his arrival in Switzerland.

4.7 Both the Federal Office for Migration and the Federal Administrative Tribunal considered that the allegations of the complainant were not reliable and thus could not support a conclusion that the complainant would be at risk of torture. Furthermore, both authorities have considered the arrest warrant against the complainant to be fake, with some parts of the document being incomprehensible and erroneous while other parts were missing. The State party also pointed out that the arrest warrant has been produced in colour, which is not a regular practice, and stressed that the procurement of false documents is fairly easy in the country.

^a The State party also refers to the communications No. 94/1997, *K.N. v. Switzerland*, Views adopted on 19 May 1998, paras. 10.2 and 10.5, and No. 100/1997, *J.U.A. v. Switzerland*, Views adopted on 10 November 1998, paras. 6.3 and 6.5.

^b *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/53/44 and Corr.1)*, annex IX, para. 6.

4.8 In the view of the Federal Office for Migration and the Federal Administrative Tribunal, the complainant's request for asylum lacked substance while many of his statements in support of the request were perceived as contradictory and inconsistent.

4.9 The State party also states that the complainant's accounts of the events following the incident of his beating have not been credible. The allegations that the complainant was left in a sand-box by the security forces which reportedly issued later on an arrest warrant against him are implausible in the view of the State party. The complainant's claims of being persecuted by the security forces were not considered credible either since the complainant stayed working in Kinshasa for several months following the incident despite the fact that he allegedly knew about the arrest warrant of 6 April 2007. Moreover, the State party notes that the complainant conceded during his interview of 23 January 2008 that with the exception of one demonstration in Matadi in June 2006, he has not been politically active. He subsequently changed his opinion affirming that he was an important member of MLC who was responsible for awareness-raising. The Federal Administrative Tribunal dismissed as unsubstantiated the complainant's appeal of 17 February 2009, alleging inter alia a misunderstanding of the question during the first interview on 23 January 2008, since the questions had been clear and simple. It should be also noted that the complainant did not present any convincing arguments or supporting documents with respect to his political activities for MLC. Nor did he show any awareness of the structure and leaders of the party.

4.10 According to the State party, the complainant has failed to clarify numerous inconsistencies revealed during the asylum procedure both before the national authorities and the Committee. The Government has thus aligned itself with the findings of the decisions by the Federal Office for Migration and the Federal Administrative Tribunal due to absence of credibility of the complainant's allegations.

4.11 The State party concludes that nothing indicates that serious grounds exist to believe that the complainant would face a serious and personal risk of torture if returned to the Democratic Republic of the Congo. His allegations and the evidence do not adequately justify the finding that the complainant would face a real, concrete and personal risk of torture prohibited under article 1 of the Convention if returned. In the State party's view, should the Committee decide to consider this communication admissible, it is requested to conclude that the facts and allegations before it do not present a violation of the obligations of Switzerland under article 3 of the Convention.

Complainant's comments on the State party's observations on the merits

5.1 In his comments dated 28 May 2010, the complainant recalls that his complaint has been based on a concrete and personal risk of torture and other ill-treatment if returned. He points out that he was arrested, tortured and ill-treated by the security service of the Democratic Republic of the Congo due to his political opinions, allegations of which have been supported by the arrest warrant and the medical certificate. At the same time, he contests the need to submit new elements and makes a reference to the claims raised during the asylum procedure. He maintains that the purpose of his communication has not been to review the decisions of the Swiss authorities but to seek justice. He also opposes the allegations of contradictions and inconsistencies by the State party, which are not substantial in his view. He makes a reference to the traumatizing events he went through, including the departure from his country and the questioning by unknown officials of a foreign country. He further stated that it was not easy to provide an identical account of events during the first and second hearings by the asylum authorities. Disputing the State party's consideration of the medical certificate as unreliable, the complainant suggests that the Committee contact the dentist to verify the reasons for treatment.

5.2 In addition, the complainant contests the State party's consideration of the arrest warrant as forgery and considers such claims to be inaccurate and misleading. While conceding the practice of manipulation with the official documents in the Democratic Republic of the Congo, he opposes the State party's challenge to the authenticity of the arrest warrant. He suggests that the best way to refute any doubts would be to seek further clarifications from the security authorities of the Democratic Republic of the Congo through the Swiss Embassy.

5.3 The complainant recalls that he was a vigilant member of MLC and played an active role during the electoral campaign in 2006. According to the complainant, the documents proving his affiliation to MLC were seized during his arrest as explained to the Swiss authorities in the context of asylum procedure. As regards the structure of MLC, the complainant argues that he answered all the questions to the best of his knowledge and draws attention to the records of the asylum procedure hearings. Concerning the inconsistencies surrounding the events subsequent to his beating, the complainant states that he regained consciousness in Kimbanseke without knowing the circumstances of how he got there. For the rest of the queries, he refers to the records of the hearings.

5.4 Finally, the complainant contends that the above explanations and circumstances of his case fall within the scope of the general comment No. 1 of the Committee and reasserts that he is afraid of returning to the country as the majority of persons arrested in connection with the events of 22 and 23 March 2007 have remained in detention without conviction or due process.

Issues and proceedings before the Committee

6. Before considering any claim contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes that domestic remedies have been exhausted and that the State party does not contest admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

7.1 The issue before the Committee is whether the removal of the complainant to the Democratic Republic of the Congo would violate the State party's obligation under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

7.2 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo, 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 analysis is to determine whether the complainant runs a personal risk of being subjected to torture in the country to which he would be returned. The existence of a pattern of gross, flagrant or mass violations of human rights in a country does not in itself constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture upon returning 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 particular person might not be in danger of being subjected to torture.

7.3 The Committee takes note of the prevalence of the precarious human rights situation in the Democratic Republic of the Congo, including the escalation of human rights

violations during the presidential elections of 2006. The Committee observes that the State party has taken this factor into account when evaluating the existence of a personal risk the complainant might face if returned to his country, including its consideration of the situation as less strained since the departure of Jean-Pierre Bemba from the country in 2007.

7.4 The Committee recalls its general comment No. 1 on the implementation of article 3, which states 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”, but must be personal and present.^c In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.^d The Committee recalls that under the terms of its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.^e

7.5 The complainant claims that he faces a personal and present risk of torture in the Democratic Republic of the Congo because of his membership in MLC and active opposition to the candidature of Mr. Kabila in the 2006 presidential elections and that, as a result, he was arrested and beaten by the security forces which have since been looking for him. The complainant based his allegations of a risk of torture on the arrest warrant reportedly issued against him and a medical certificate of dental treatment provided as proof for his allegations of ill-treatment. While the complainant requested an extension of a deadline for his response to the State party’s observations on the merits with a justification of the need to seek further evidence from his contacts in the Democratic Republic of the Congo, he did not submit any new documents that would help to substantiate his allegations.

7.6 The Committee further observes that the State party has challenged the authenticity of the arrest warrant the complainant has produced, which it has considered as forgery. The State party has also questioned the relevance of the medical certificate for dental treatment adduced by the complainant. The complainant has maintained before the Committee that the arrest warrant and medical certificate are authentic and relevant. However, the complainant has not put forward sufficient evidence of the authenticity of the arrest warrant, nor has he clarified why the dental certificate does not show the cause of his broken teeth. In this connection, the Committee notes that according to the report on the complainant’s hearing by the Federal Office for Migration, the complainant stated that the acquisition of a copy of the arrest warrant had cost a lot of money, which led the State party to its conclusion that the document was forged against a bribe. The complainant has not put forward a persuasive argument that would allow the Committee to call into question the State party’s conclusions in this respect.

7.7 With regard to the risk of torture that the complainant claims he faces because of the fact that he was a vigilant member of MLC and played an active role during the presidential electoral campaign in 2006, the Committee observes the State party’s challenges to the substantiation and credibility of the complainant’s claims. It also notes the complainant’s

^c See, inter alia, communications No. 94/1997, *K.N. v. Switzerland*, Views adopted on 19 May 1998, paras. 10.2 and 10.5, and No. 100/1997, *J.U.A. v. Switzerland*, Views adopted on 10 November 1998, paras. 6.3 and 6.5.

^d See, inter alia, communications No. 258/2004, *Dadar v. Canada*, Decision adopted on 23 November 2005, and No. 226/2003, *T.A. v. Sweden*, Decision adopted on 6 May 2005.

^e See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, Decision adopted on 6 May 2010.

statement that the documents proving his affiliation to MLC were seized during his arrest by the security forces. The Committee notes the lack of complainant's capacity to provide further details about the structure and management of MLC. It further notes that the complainant did not participate in the political activities of MLC in Switzerland. The complainant has not provided any explanation of the reasons for which he has not been involved in the activities of MLC after the departure from his country. The Committee concludes that the complainant has not shown to have been involved in political activities to such an extent to convincingly demonstrate how this would expose him to a specific risk if he were to be returned to the Democratic Republic of the Congo.

7.8 In view of all the information before it, the Committee considers that the material before it does not show that the complainant who may have been active in the context of 2006 presidential elections is still a wanted person or that he would be at risk of torture or ill-treatment. Consequently, the Committee is not able to conclude that the complainant's return to the Democratic Republic of the Congo would expose him to a real, specific and personal risk of torture within the meaning of article 3 of the Convention. The Committee is concerned at the many reports of human rights violations, including the use of torture in the Democratic Republic of the Congo, but recalls that for the purposes of article 3 of the Convention the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

7.9 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consequently concludes that the removal of the complainant to the Democratic Republic of the Congo would not constitute a violation of article 3 of the Convention.

Communication No. 391/2009: M.A.M.A. et al. v. Sweden

<i>Submitted by:</i>	M.A.M.A. et al. (represented by counsel, Per Andersson)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	7 July 2009 (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 23 May 2012,

Having concluded its consideration of complaint No. 391/2009, submitted to the Committee against Torture by Per Andersson on behalf of M.A.M.A. et al. 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 complainants, their counsel and the State party,

Adopts the following:

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

1.1 The complainants are M.A.M.A. (born on 25 June 1956), his wife S.S.Y. (born on 14 April 1960), and their six children, N.M.A.M.A. (born on 15 October 1984), Ah.M.A.M.A. (born on 23 August 1987), S.M.A.M.A. (born on 16 February 1990), K.M.A.M.A. (born on 7 February 1993), J.M.A.M.A. (born on 6 June 1994) and Am.M.A.M.A. (born on 14 July 1995). The family is also named A.-P. in certain submissions to the Swedish Migration Board and the Migration Court. The complainants are all Egyptian nationals and they currently reside in Sweden. They claim that an enforcement of the orders to expel them to Egypt^a would violate articles 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainants are represented by counsel, Per Andersson.

1.2 Under rule 114 of its rules of procedure, the Committee requested the State party, on 8 July 2009, to refrain from expelling the complainants to Egypt while their communication was under consideration by the Committee. On 10 December 2009, the State party informed the Committee that the Migration Board has decided, on 8 July 2009, to stay the enforcement of the decision to expel the complainants to Egypt until further notice.

^a Egypt acceded to the Convention on 25 June 1986 but did not accept the Committee's competence to receive and consider individual communications in accordance with article 22 of the Convention.

Factual background

Case of M.A.M.A. (the first complainant)

2.1 According to the first complainant, his grandfather was awarded the title of Prince by the then King of Egypt. These titles were inherited by his sons but were removed officially by the President Gamal Abdel Nasser Hussein. The first complainant trained as an engineer at the University of Cairo. His family members were strong supporters of President Nasser and he had been schooled in nationalism and Arab unification. The first complainant has made a name for himself in the Arab world for his writings, mainly poetry with political and critical undertones. His extended family had prominent positions in the Governments of the Presidents Nasser and Muhammad Anwar al-Sadat. In the early 1980s the first complainant was very active in the students' union, chairing it for a while. He took part in demonstrations and spoke at meetings. As a result, he attracted the attention of the police. He was summoned and questioned but felt secure. He felt that he was fighting for a better Egypt but was not involved in party politics. As a true supporter of President Nasser, he felt that the President al-Sadat's policies were slipping away from his ideals.

2.2 On 6 October 1981, President al-Sadat was killed, allegedly by the first complainant's cousin, Khalid Islambouli, and the situation changed dramatically for the first complainant and his family. Those family members who had held high Government positions fled Egypt and those who stayed were persecuted by the security police. On 12 October 1981, the security police arrested the first complainant while he was visiting his aunt, Khalid Islambouli's mother, in order to console her. He was detained for five days, severely beaten and subjected to torture. The first complainant was interrogated about Khalid Islambouli, his knowledge about the assassination of President al-Sadat and the terrorist group to which Khalid Islambouli was thought to belong.

2.3 Some months after the assassination of President al-Sadat, the first complainant organized a students' demonstration for better health care, social reforms and changes in the foreign policy towards Israel, which they saw as dividing the Arab world. Although the demonstration was peaceful, the police used tear gas, truncheons and rubber bullets to disperse the students. The first complainant was arrested and subsequently detained for 45 days, during which he experienced various forms of torture, including having his hands tied to the ceiling, having to stand for 14 hours per day, sexual and other physical abuse, and verbal insults. A doctor had allegedly regularly examined him to determine how much torture he could still tolerate. The first complainant claims that his torturers always went until he could not take it anymore. For example, they pricked his hand so that blood would drop into a bowl and then made a dog drink from that bowl. The worst part, however, was when the torturers penetrated his anus with bottles, truncheons and metal objects, pulled his testicles and pubic hairs. He was repeatedly questioned about Khalid Islambouli and the Muslim Brotherhood. The police wanted to know whether he was an Islamist and asked the same questions time after time. When the first complainant was finally released, he was forbidden to ever tell anyone about what had happened to him and requested to put an end to his political activities. Despite the 20 years that passed since, the first complainant continues to have nightmares about the torture to which he had been subjected.

2.4 After 45 days in detention, the first complainant returned to the university to finish his studies. He stopped his political activities and left the students' union. He had a travel ban, even in the country, and had to report regularly to the police. At the end of 1982, the first complainant had to do compulsory military service. He submits that usually individuals of his social background would get high military ranks, whereas he had to clean toilets for 14 months and sleep in a locked solitary prison cell every night. While the first complainant was doing his compulsory military service, his parents fled to Saudi Arabia.

2.5 After the military service, the first complainant married and settled down in El-Arish near Sinai. In 1984, two months after his first child was born, he was interrogated and tortured again.

2.6 In January 1987, the first complainant drove a hitchhiker to the border with Israel and he was arrested by the police shortly thereafter. He was told by the police officers that they were aware of his opposition to the Government. On this occasion, the first complainant was detained for four months without any formal charges being brought against him. While in detention, he was tortured and interrogated about Khalid Islambouli and the Muslim Brotherhood.

2.7 The first complainant submits that, in total, he was arrested and tortured six times before he fled to Saudi Arabia in 1987. When the police in Egypt realized that he had escaped to Saudi Arabia, his wife was interrogated and their house was destroyed. The first complainant had arranged for his wife and children to join him in Saudi Arabia 15 months later. Meanwhile, his parents returned to Egypt, as they were old and did not want to die abroad. The first complainant submits that his father was arrested and interrogated. He does not know exactly what happened to his father but he had "ended up in hospital badly injured". The first complainant does not exclude that his father had been tortured.

2.8 The first complainant, his wife and their children stayed in Saudi Arabia until 1997. While working in Saudi Arabia, the first complainant reportedly started an organization to defend the rights of migrant workers, which apparently resulted in him having problems with the Saudi Arabian authorities. This was one of the reasons why his contract in Saudi Arabia was not renewed and the family was expelled. The first complainant was forced to leave the country in 1997. He first moved to the United Arab Emirates and later, in June of 1999, to Oman, where he lived with the family until 2007. While working in Oman, the first complainant created a website with information about "prominent people" in the country. When the website was published, he was arrested by the Sultan's security police, who confiscated computers and documents, and banned the website. The first complainant was threatened and allegedly told by the security police that the only "prominent person" in the country was the Sultan. The police kept him under surveillance and his work contract was not renewed, which implied expulsion. He was summoned to a police interview, became very afraid and fled Oman with his family instead of appearing.

Case of N.M.A.M.A. (the second complainant)

2.9 The first child of the family, N.M.A.M.A., was born in Cairo and came to Saudi Arabia with her mother in 1988. Over the years, she attended school in Saudi Arabia, Egypt and Oman. The second complainant returned to Egypt in 2002 to start university, as she was unable to attend a university in Oman. She studied at the university until the summer of 2006. During her studies, the second complainant travelled several times between Egypt and Oman; every time she entered Egypt, she was taken for questioning to a special interview room. She was questioned about her father, the reasons why he had left Saudi Arabia and his contacts in Egypt. The interrogators have consistently treated her in a degrading manner, used sexually offensive and humiliating expressions against her and her family. They made her fear for her life and safety. On three occasions, she was summoned for questioning by the security police. The third time, in spring of 2006, when the second complainant was again questioned about her father by a member of the security police, the police officer took her identity document, locked the door and then grabbed her breasts and genitals and made obscene movements towards and against her body. She was terrified and tried not to annoy him. The harassment continued for at least an hour. Then he sent her out of the room, threw out her identity document and threatened to "have a lot of contact" with her in the future. The second complainant was terrified and left Egypt with her younger

sister to their parents in Oman. She then stayed in her parents' home until the family went to Sweden.

Case of Ah.M.A.M.A. (the third complainant)

2.10 The second child of the family, Ah.M.A.M.A., was born in Cairo and came to Saudi Arabia with his mother in 1988. Over the years, he attended school in Saudi Arabia, Egypt and Oman. The third complainant returned to Egypt in 2004 to start university, as he was unable to attend a university in Oman. Upon his arrival, he was stopped at passport control at the airport, questioned about his father's activities and whereabouts, and some private belongings were taken away from his luggage. The border police requested that he report to the police whenever he changed his address. The third complainant arrived at the airport in the morning and was not released until the evening. When he was released, the border police allegedly told him to inform his father that the police would now be seeing the third complainant frequently. After about two months, the third complainant got his own flat and reported his new address to the police, as requested. After some days, he was summoned to the police. There he was tied up, had a bag put over his head and was taken to a different location. After a day and a half, they started questioning him about his father. Those who questioned him, shouted sexual words, insulted and humiliated him. After being questioned for a few hours, he was released on the street where he lived.

2.11 In the first year of his studies, the third complainant was arrested for questioning five or six times. On some of these occasions he was held in a dark dungeon for two days and then released without being questioned. After his first academic year, the third complainant went back to his family in Oman for summer holidays. Shortly after his return to Egypt, he was summoned for an interview. Subsequently, the third complainant was detained for a week and questioned about his father all the time. Among other things, the third complainant was asked if he had not heard about the security police. While in detention, he was subjected to physical and mental torture, including rape. Once released, the third complainant was instructed not to tell anyone about what had happened. After between four and five days, he was picked up again, subjected to repeated rape and torture, and released again after between four and five days. In April 2006, the third complainant tried to finish his final exam but due to severe post-traumatic stress, he had to give up. He wanted to leave but could not do so, since he was not given a travel permit.

2.12 At some point, the third complainant contacted a relative, who was a lawyer. The third complainant was told that he must have a medical certificate and he, therefore, visited a public hospital approximately a month after the last rape took place. The doctor said that it was possible to establish rape but that too much time had passed to be able to identify the perpetrator, since the time limit for using sperm for identification was two weeks. The hospital could only start an investigation at the order of the police, which meant that the third complainant would have to report the incident to the police first. Out of fear of the police, he did not dare to report it. Instead, he visited a private hospital that was willing to conduct the investigation. The third complainant was then advised by a lawyer to close the investigation, as it would be too dangerous for him to continue. He followed this advice and visited a psychologist whom he then saw regularly. Meanwhile, the police continued to pick him up once a week and held him for two–three hours each time. They asked the same questions as before. He was not raped but he was assaulted, insulted and humiliated. The third complainant managed to obtain a travel permit by paying a bribe and travelled from Egypt to Oman on 13 May 2006. He was unable to tell his family about the torture to which he had been subjected in Egypt.

Asylum proceedings in Sweden

2.13 The first complainant and family went by car from Oman to Qatar, flew from there to an unidentified country and entered Sweden by car on 13 September 2007. On the same day, the family applied for asylum at the Migration Board's asylum examination unit in Gävle. Their applications included residence and work permits.

2.14 On 14 September 2007, the Migration Board held short application interviews with the complainants. During the application interview before the Migration Board, the first complainant presented his story as summarized in paragraphs 2.1–2.8 above. The third complainant stated that he had been a student at a university in Egypt when his father had told him on the phone to urgently book a ticket. His father explained to him that the family had to leave Oman as soon as possible. The third complainant further stated that his father had had problems in Egypt and was unable to return to that country. He added that he was also wanted in Egypt on account of his father. Every time he entered Egypt, he was stopped at the airport, taken to an interview room and questioned about his father. He was assaulted during the interviews, released and allowed to enter the country. When asked by the Migration Board about the problems his father had in Egypt, the third complainant replied that his father had been arrested several times, because he was a human rights advocate who defended people and dared to stand up to the Government and those in power. During the application interview before the Migration Board, the second complainant stated that her grounds for asylum were related to those of her father.

2.15 On 28 October 2007, the Migration Board appointed Per Andersson, as a legal aid counsel for all family members. On 26 December 2007, the counsel filed petitions, including statements and request for refugee status together with the travel documents for all family members. On 3 June 2008, the Migration Board summoned seven family members (all but the youngest, Am.M.A.M.A.) to separate new application interviews. The family was assisted by their counsel and an interpreter.

2.16 On 24 July 2008, the Migration Board rejected the complainants' applications for residence permits, refugee status and travel documents and decided to expel them to Egypt. In the case of the third complainant, the Migration Board acknowledged his torture but said that it did not believe that the reason for the third complainant's torture was his father. It further stated that his frequent travels to and from Egypt from 2004 to 2007 disclosed that the authorities were not very interested in him. It also noted that the third complainant failed to exhaust any Egyptian domestic remedies with regard to the alleged torture.

2.17 On 29 July 2008, the legal aid counsel, Per Andersson, received powers of attorney from the first, second and third complainants, S.S.Y. and S.M.A.M.A. (the fourth complainant). Thereafter, he was also the legal representative of the family members.

2.18 On 6 August 2008, the decision of the Migration Board was appealed to the Migration Court. Counsel supplemented the appeal with a petition on 11 November 2008, requesting an oral hearing. In a further submission of 8 December 2008, counsel stated who would be examined at the hearing and about what. For example, the first complainant would be examined about what happened when he was arrested by the security police in Egypt, what he was asked about while being subjected to torture and whether in his own view he was still of interest to the security police in Egypt. In addition, he would also be questioned about his family, presenting and going through his family tree from the Internet site geni.com and Facebook correspondence. Before the oral hearing, the Migration Board issued an opinion dated 12 January 2009, in which it considered, inter alia, that the evidence cited by the family before the Migration Court could probably be rejected as superfluous. It argued that the evidence value of pages from Facebook and the Internet site geni.com was neither stronger nor weaker than if the person concerned gave the information directly. The Migration Board was prepared to attest that there were instances

of the Egyptian police committing abuse and the general picture was that there could be instances of torture in Egypt. It stated, however, that this information did not alter the assessment of what individual risks the complainants could face if they were to return.

2.19 The oral hearing in the Migration Court was held on 27 January 2009. The first, second, third and fourth complainants were present together with their counsel. The Court noted that the family members had stated that certain information was covered by secrecy between them and the complainants were examined separately. Counsel submitted a copy of a medical certificate concerning the fourth complainant from the Children and Young Persons' Clinic in Skelleftea, dated 18 December 2008. The certificate stated that the fourth complainant was treated for hyperthyroidism and needed an operation. Counsel also submitted a certificate concerning the third complainant dated 7 November 2008 and issued by a psychotherapist working at the Red Cross Centre for Victims of War and Torture. According to the certificate, the third complainant had been in touch with the psychotherapist since 18 October 2007. The third complainant had described the abuse he was subjected to by the Egyptian security police when he was studying at the University of Cairo in 2004–2007. The bulk of the certificate consisted of the third complainant's description of the abuse and a statement that he had contacted an Egyptian lawyer to seek redress. The certificate also stated that psychotherapy was needed to enable the third complainant to move on.

2.20 On 17 February 2009, the Migration Court rejected the complainants' appeal in four judgments. While acknowledging the probability of the first complainant's torture by the authorities, the Court ruled that the events happened too long ago that the authorities would continue to be interested in the family. It further noted that, in the absence of passports, which the family reportedly left to the smuggler on their arrival to Sweden, it could not confirm their identity. It further maintained that their unproblematic application for passports at the Egyptian embassy in Oman also confirmed that the authorities were not interested in the family. With regard to the second complainant, the Migration Court stated, *inter alia*, that she has not been able to prove her story using documents or other evidence, although the information she has given was coherent and did not conflict with known facts.

2.21 The complainants appealed the judgments to the Migration Court of Appeal. On 8 March 2009, their counsel presented detailed argumentation as to why the Migration Court of Appeal ought to grant leave to appeal. He argued, *inter alia*, that the first and third complainants had been subjected to grave torture and severe abuse. The Migration Court had made an incorrect interpretation of the legal rules in assessing that the threats to the first complainant have disappeared, since the abuse took place so long ago. Counsel stated that this assessment had no support in the country information about Egypt and asked the Migration Court of Appeal to provide guidelines as to what facts may be required for previous threats to disappear. The complainants claimed that conditions in Egypt had not changed for 20 years; the same state of emergency was still in force then as in the 1980s.

2.22 Counsel further argued that the events of the 1980s still shaped the behaviour of the Egyptian authorities towards persons who were suspected of involvement with Islamists. The first complainant had been accused of having a link to such a group and had, as a result, been subjected to torture and abuse. The reason was that he had close ties with his cousins Khalid Islambouli, who allegedly killed President al-Sadat, and Mohammed Islambouli, who had fled Egypt and became a well-known person in Al-Qaida. The first complainant belonged to a noble family that was part of the power elite at the time of the Presidents Nasser and Al-Sadat, which reinforced the assumption that the security police was interested in him. Furthermore, the Migration Court had not taken account of the fact that the first complainant fled Egypt in 1987, even though he was required to report to the police and had a travel ban. It was, therefore, probable that he would be of interest again if he were to return. Counsel added that it was rather remarkable that the Migration Court

concluded that the third complainant had not shown that it was probable that the abuse took place because of his father's activities. He argued that the third complainant should have been given the benefit of the doubt, since the only information to emerge was that he was arrested and tortured on account of his father. Moreover, the Migration Court of Appeal should explain how to assess the situation in Egypt in respect of the risk of torture and other inhuman treatment. Counsel noted that emergency laws were in force in Egypt, which permitted torture in certain situations.

2.23 On 20 May 2009, the Migration Court of Appeal issued four decisions, refusing to grant leave to appeal. The Court found that nothing that had emerged in the case constituted grounds to grant leave to appeal.^b

2.24 On 11 June 2009, the complainants applied for an examination by the Migration Board of impediments to the enforcement of the expulsion orders and requested, *inter alia*, residence permits, refugee status and travel documents. The Migration Board was also asked to stay enforcement of the expulsion orders and to appoint a legal aid counsel with a technical understanding of the Internet for the family. Among the grounds for examination and a stay of enforcement invoked by the complainants was the claim that the first complainant belonged to a group of intellectuals who thought that the murder of President al-Sadat was a conspiracy staged by President Hosni Mubarak and his faction. He believed that it had not been proven that his cousin, Khalid Islambouli, was the assassin. Since coming to Sweden, the first complainant had run a campaign to get the United Nations to investigate the murder of President al-Sadat and clear his cousin. The first complainant had started several blogs, where he had released information about the murder to which only he had access. The first complainant has checked the visitors' Internet Protocol addresses and found that most of them were from Egypt. One series of Internet Protocol addresses could be traced to the Egyptian authorities. The first complainant believed that it was probably the security police, which was known for searching for dissidents on the Internet. Since the information could be traced to the first complainant, the security police was probably aware that he had posted it. There was, therefore, a strong risk that he would be prosecuted and given a disproportionately severe penalty, probably a capital punishment, for spreading this information. It had not been possible for him to submit this fact earlier, since it had only happened in 2009.

2.25 On 23 June 2009, the Migration Board rejected the requests for a stay of enforcement and for the appointment of a legal aid counsel. On 3 July 2009, the Migration Board decided not to grant residence permits under chapter 12, section 18, of the Swedish Aliens Act (Act) and not to grant a re-examination of the question of residence permits under chapter 12, section 19, of the Act.^c The Board determined that political activity in the country of flight, directed at the regime in the country of origin, could not provide grounds for asylum, unless it was shown to be probable in the individual case that the activity might lead to persecution or harassment from the authorities of the country of origin upon return. Case-law has established that if the measures taken by an asylum seeker in Sweden have not been assessed as having any purpose other than to influence his or her right to stay in Sweden, it has been considered that this fact alone ought not to be assigned decisive importance in the assessment of the need for protection. Furthermore, a person who

^b Reference is made to chapter 16, section 12, of the Swedish Aliens Act, under which leave to appeal may be granted in the Migration Court of Appeal if it is of importance for guidance in the application of the law that the appeal is heard by the Migration Court of Appeal or if there are other extraordinary reasons to hear the appeal.

^c Rules regarding lasting impediments to enforcement of refusal-of-entry and expulsion orders that have become final and non-appealable are laid down in chapter 12, sections 18 and 19, read together with chapter 12, sections 1–3, of the Act.

engaged in political activity in his country of flight before the question of a residence permit had been resolved with final effect did not himself or herself view the risks upon return to his or her country of origin as particularly great.

2.26 The Migration Board further held that the fact that the first complainant was convinced that it was the Egyptian security police that was checking his website was a new fact that had not been cited before. The Board found, however, that no new grounds have emerged that presented impediments to the enforcement under chapter 12, section 18, of the Act. Furthermore, the new facts were not such that there could be assumed to be an impediment to the enforcement of the kind referred to in chapter 12, sections 1–3, of the Act with respect to the family. The Board, therefore, considered that there were no reasons to examine the question of the residence permits under chapter 12, section 19, of the Act.

2.27 On 3 November 2009, the complainants asked for a review by the Migration Board and requested residence permits, refugee status and travel documents. The grounds for the review included the presence of exceptionally distressing circumstances, for the children especially, but also for the rest of the family. The submission to the Migration Board stated that the family had applied to the Committee for a review of the expulsion orders and that the Committee had accepted the communication for review. The complainants added that if the family was granted a residence permit, the communication before the Committee could be withdrawn. On 4 November 2009, the Migration Board found that there was no reason to alter the previously issued decision.

The complaint

3.1 The complainants claim that they remain of interest to the security police because the first complainant's cousin, Khalid Islambouli allegedly assassinated President al-Sadat, that the Muslim Brotherhood linked to this assassination is today named Egyptian Islamic Jihad with links to Al-Qaida and that the first complainant's other cousin, Mohammed Islambouli, is suspected of belonging to this group and of attempting to assassinate President Mubarak in 1995. The complainants maintain that the described family link together with the fact that the first complainant is known to be a "nasserist", who is in opposition to the Egyptian authorities, and a member from an influential family exposes them to a personal risk of being tortured if they were forced to return to Egypt. They argue, therefore, that the enforcement of the orders to expel them to their country of origin would violate articles 3 and 16 of the Convention.

3.2 The complainants further submit that they should be treated as a family, i.e., if the first complainant has enough reasons to be granted asylum, his children should be granted asylum as well. In particular, the second and third complainants state that they have a well-founded fear of persecution and of being subjected to serious abuse, both as a result of the first complainant's previous political activity and of their family relationship with the alleged murderer of President al-Sadat. They add that no protection is available for them in Egypt and they fear being killed, tortured, raped or subjected to other inhuman or humiliating treatment or punishment.

State party's observations on the admissibility and the merits

4.1 By note verbale of 24 February 2010, the State party submits its observations on the admissibility and the merits. As to the admissibility, it states that it is not aware of the same matter having been or being subject to another procedure of international investigation or settlement. With reference to article 22, paragraph 5 (b), of the Convention, the State party acknowledges that all available domestic remedies have been exhausted in the present communication.

4.2 The State party submits that, should the Committee conclude that the communication is admissible, the issue before the Committee on the merits is whether the expulsion of the complainants would violate the obligation of Sweden under article 3 of the Convention, not to expel or return a person to another state where there are *substantial grounds*^d for believing that he or she would be in danger of being subjected to torture. In this respect, the State party refers to the Committee's jurisprudence,^e according to which the aim of the determination of whether the forced return of a person to another country would constitute a violation of article 3 of the Convention, is to establish whether the individual concerned would be *personally at risk*^f of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. For a violation of article 3 to be established, additional grounds must exist showing that the individual concerned would be personally at risk.

4.3 As far as the general human rights situation is concerned, the State party submits that Egypt has signed/ratified all key United Nations human rights treaties, including the Convention. It has not, however, ratified or signed the Optional Protocol to the Convention. Since 1996, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has unsuccessfully requested permission to conduct a visit. A national Human Rights Council has been established under the leadership of Boutros Boutros Gali. The State party adds that much remains to be done concerning the treatment of arrestees and detainees and the occurrence of torture at police stations, especially in cases relating to political arrests, and refers to a number of reports assessing the general human rights situation in Egypt.^g

4.4 The State party states that, while it does not wish to underestimate the concerns that may legitimately be expressed with respect to the human rights situation in Egypt, there can be no doubt that the circumstances referred to in the above-mentioned reports do not in themselves suffice to establish that the complainants' forced return to Egypt would entail a violation of article 3 of the Convention. Against this background, the State party holds that it cannot be said that the situation in Egypt is such that there is a general need of protection for asylum seekers from Egypt. The Committee, therefore, should determine the complainants' personal risk of being subjected to torture, as defined in article 1 of the Convention, following their removal to Egypt.

4.5 The State party submits that the Swedish migration authorities and courts apply the same test in assessing the risk of being subjected to torture when considering an asylum application under the Act, as the Committee would apply when examining a subsequent communication under the Convention. The State party adds that it must be appreciated that the national authority conducting the asylum interviews is in a very good position to assess the information submitted by the asylum seeker and to assess the credibility of his or her claims. In the present case, the Migration Board has conducted a number of interviews with the complainants and there also was an oral hearing before the Migration Court. In view of

^d Emphasis is added by the State party.

^e Communication No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3; and communication No. 213/2002, *E.J.V.M. v. Sweden*, Views adopted on 14 November 2003, para. 8.3.

^f Emphasis is added by the State party.

^g Reference is made to the UK Border Agency, *Arab Republic of Egypt* (Home Office, 2009); U.S. Department of State, *2008 Country Report on Human Rights Practices – Egypt* (Bureau of Democracy, Human Rights and Labour, 2009); Human Rights Watch, *World Report 2009*; and the Swedish Ministry for Foreign Affairs report on human rights in Egypt in 2007 (2008).

the above, the State party argues that as a general rule, great weight must be attached to the opinions of the Swedish migration authorities.

4.6 The State party notes that, in the present case, both the Migration Board and the Migration Court have generally accepted the statements of facts invoked by the complainants and it has no reason to make a different evaluation in this respect. The assessment of whether the complainants are personally at risk of being subjected to torture in breach of article 3 of the Convention if expelled to their country of origin today should, therefore, be made using the complainants' own statements as a point of departure. In this regard, the State party affirms that it has no reason to question that the first complainant in the present communication has been exposed to the treatment he has described before the Swedish migration authorities and the Committee, or his family relationship with the convicted murderer of President al-Sadat. In view of this, it appears not unlikely that he still would attract the interest of the Egyptian authorities, even though the events took place a long time ago. In addition, his Internet activities in Sweden, questioning whether the real murderers of President al-Sadat were convicted and punished, should also be taken into account in this context.

4.7 As a consequence, the State party considers that it cannot be excluded that the rest of the family would also attract the interest of the Egyptian authorities. It recalls that the second complainant has allegedly been subjected to harsh and unpleasant treatment by the Egyptian security police. In addition, the third complainant has allegedly been repeatedly raped by police officers while in Egyptian custody. He has given an explanation of why he has not been able to provide any medical certificate showing that these rapes have taken place. He has also provided an explanation of why he did not dare to report these events to the Egyptian authorities. The State party notes that it is not possible to fully exclude that he would be exposed to similar treatment if returned to Egypt.

4.8 The State party concludes that, in the light of the first complainant's background and the nature of the other complainants' allegations, it leaves it to the Committee to assess whether an enforcement of their expulsion orders would amount to a violation of articles 3 and 16 of the Convention.

The complainants' comments on the State party's observations

5. On 17 June 2010, the complainants submit that, judging from the observations on the admissibility and the merits, they confirm with satisfaction that the State party has understood their case correctly. In particular, the State party concludes that it appears not unlikely that the complainants would attract the interest of the Egyptian authorities and that it is not possible to fully exclude that the third complainant would be exposed to torture or similar treatment if returned to Egypt. Therefore, the complainants do not wish to add anything to the State party's observations, except from submitting a number of recent reports that support their claims and show that the situation in Egypt for persons considered to be connected with the Muslim Brotherhood is dangerous.^h The complainants conclude

^h Reference is made to Human Rights Watch, *World Report 2009*; Research Response prepared by the Research and Information Services Section of the Refugee Review Tribunal (Australia) on the attitude of the Egyptian authorities towards the Muslim Brotherhood, dated 30 June 2009; Amnesty International, *Egypt – Systematic abuses in the name of security* (London, 2007); International Federation for Human Rights, *Egypt: Counter-terrorism against the background of an endless state of emergency* (2010); Human Rights Watch, "Egypt: Free Arbitrarily Detained Brotherhood Members", 10 February 2010; and U.S. Department of State, *2009 Country Report on Human Rights Practices – Egypt*, (Bureau of Democracy, Human Rights and Labour, 2010).

that the State party supports their case and that it is clear that they have been subjected to a violation of the Convention.

The complainants' further submission

6.1 In a further submission dated 26 October 2011, the complainants submit that, despite political changes, they consider the situation in Egypt still to be extremely dangerous for them. Even if President Mubarak and his Government had to leave, the military and security police are still the same organizations as before the revolution. Since the complainants have been interrogated and tortured by the military police, it cannot be excluded that they would be exposed to similar treatment if returned to Egypt. They add that the Egyptian authorities consider the first complainant to be connected with the Islamist terror groups. Therefore, he and his family would still attract the interest of the Egyptian authorities.

6.2 The complainants recall that the first complainant is an active blogger and has criticized the military regime in Egypt. The Supreme Council of the Armed Forces has warned news organizations that it was illegal to criticize the military in the press. A military court sentenced a blogger, Maikel Abil, to three years' imprisonment for insulting the military. Others have criticized the Supreme Council over press reports that female detainees in military custody were subjected to "virginity tests" by doctors. Military police has occasionally clashed with protestors, leading to one death on 8 April 2011 and hundreds of arrests.ⁱ The complainants argue, therefore, that it cannot be excluded that the first complainant would be exposed to similar treatment if returned to Egypt.

6.3 Finally, the complainants emphasize that the first complainant's cousin, Khalid Islambouli, was found guilty of killing President al-Sadat in 1982 and this fact alone makes the first complainant a well-known suspect for the military and security police for life. For this reason, he will be of interest for them whenever he enters Egypt.

State party's further submission

7.1 In a further submission dated 3 January 2012, the State party notes, like the complainants, that major developments took place in Egypt during 2011. However, it cannot find that the general situation in Egypt calls for a change of position as far as the present case is concerned.

7.2 The State party adds that, on 13 September 2011, the Migration Board decided to reject a request from the complainants for a re-examination of their case pursuant to chapter 12, sections 18 and 19 of the Swedish Aliens Act (Act).^j The complainants submitted that there were impediments to the enforcement of their expulsion orders, inter alia, in the light of the significant deterioration of the situation in Egypt. However, the Board was of the view that the general situation as such did not prevent the enforcement of the expulsion orders. Nor did it give rise to a significant change of the previously made individual assessments regarding the possibility of the complainants' return to Egypt. Consequently, the conditions for granting a re-examination of their case were not met, as no "new circumstances" within the meaning of the Act were considered to be at hand. On 7 November 2011, the Migration Court rejected the complainants' appeal against the decision of the Migration Board, essentially on the basis of the Board's line of reasoning.

ⁱ Reference is made to the Congressional Research Service, 17 June 2011.

^j See footnote c.

7.3 Finally, the State party notes that, since 14 September 2011, there is a separate case regarding impediments to the enforcement of the expulsion order in relation to J.M.A.M.A. pending before the Migration Board.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b) of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the instant case, the State party has recognized that the complainants have exhausted all available domestic remedies.

8.3 The Committee notes that the complainants have invoked a violation of their rights under article 16 of the Convention, without however submitting any arguments or evidence in substantiation of this claim. It concludes, therefore, that this claim has not been substantiated for the purposes of admissibility. This part of the communication is thus inadmissible.

8.4 Accordingly, the Committee finds no further obstacles to the admissibility and declares the communication admissible. Since both the State party and the complainants have provided observations on the merits of the communication, the Committee proceeds immediately with the consideration of the merits.

Consideration of the merits

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

9.2 The issue before the Committee is whether the expulsion of the complainants to Egypt would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.3 The Committee notes the complainants' assertion that they should be treated as a family, i.e. if the first complainant has enough reasons to be granted asylum, his family members should be granted asylum as well, and decides to examine first his claims that he faces a personal risk of being subjected to torture if forced to return to Egypt due to his previous political activity and his close family relationship with the alleged murderer of President al-Sadat. To this end, the Committee must evaluate whether there are substantial grounds for believing that he would be personally in danger of being subjected to torture upon return to his country of origin. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows 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. 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 specific circumstances.

9.4 The Committee recalls its general comment No. 1 (1996) on the implementation of article 3, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being “highly probable”,^k the Committee recalls that the burden of proof generally falls on the complainant, who must present an arguable case that he faces a “foreseeable, real and personal” risk.^l The Committee further recalls that, in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,^m while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

9.5 In the present case, the Committee notes that the State party has acknowledged and taken into account the fact that much remained to be done in Egypt concerning the treatment of arrestees and detainees and the occurrence of torture at police stations. However, while not underestimating the concerns that may legitimately be expressed with respect to the human rights situation in Egypt, the State party held that it could not be said that the situation in Egypt at the time of consideration of the first complainant’s case by the national authorities was such that there was a general need of protection for asylum seekers from Egypt.

9.6 As to the State party’s position in relation to the assessment of the first complainant’s risk of being subjected to torture, the Committee notes that the State party has accepted that it appeared not unlikely that he would still attract the interest of the Egyptian authorities due to his family relationship with the convicted murderer of President al-Sadat, even though the events took place a long time ago. Furthermore, his Internet activities in Sweden, questioning whether the real murderers of President al-Sadat were convicted and punished, should also be taken into account in this context. Finally, the State party has accepted that it could not be excluded that the rest of the family would also attract the interest of the Egyptian authorities. It specifically pointed out that the second complainant had allegedly been subjected to harsh treatment by the Egyptian security police and the third complainant had allegedly been repeatedly raped by police officers while in Egyptian custody. Consequently, it was not possible to fully exclude that he would be exposed to similar treatment if returned to Egypt.

9.7 The Committee acknowledges the fact that, owing to the first complainant’s background and the nature of the other complainants’ allegations, the State party leaves the assessment of whether an enforcement of their expulsion orders would amount to a violation of the Convention to the Committee. In the light of the State party’s acceptance that it was likely that the first, second and third complainants would attract the interest of

^k The Committee’s general comment No. 1 (1996) on the implementation of article 3 of the Convention, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX, para. 6.

^l *Ibid.* See also, communication No. 203/2002, *A.R. v. The Netherlands*, Views adopted on 14 November 2003, para. 7.3.

^m See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

the Egyptian authorities, taken together with the first complainant's background and the nature of his allegations, the Committee concludes that the first, second and third complainants have established a foreseeable, real and personal risk of being tortured if they were to be returned to Egypt at the time of submission of the communication.

9.8 The Committee further notes that, in its further submission of 3 January 2012, the State party has acknowledged that although major developments took place in Egypt during 2011, they did not call for a change of its position, as far as the present case was concerned. Consequently, the Committee concludes that the first, second and third complainants have established a foreseeable, real and personal risk of being tortured if they were to be now returned to Egypt.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, therefore concludes that the enforcement of the order to expel M.A.M.A., N.M.A.M.A. and Ah. M.A.M.A. to their country of origin would constitute a violation of article 3 of the Convention.

11. As the cases of M.A.M.A.'s wife and their four children, who were under age at the time of the family's asylum application in Sweden, are dependent upon his case, the Committee does not find it necessary to consider these cases individually.

12. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in accordance with the above observations.

Communication No. 393/2009: E.T. v. Switzerland

Submitted by: E.T. (represented by counsel, Tarig Hassan)

Alleged victim: The complainant

State party: Switzerland

Date of complaint: 27 July 2009 (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 23 May 2012,

Having concluded its consideration of complaint No. 393/2009, submitted to the Committee against Torture by Tarig Hassan on behalf of E.T. 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, her 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 27 July 2009 is E.T., born on 30 August 1963 in Ethiopia. She claims that her deportation to Ethiopia would constitute a breach by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel, Tarig Hassan.

1.2 On 31 July 2009, under rule 114 (former rule 108) of its rules of procedure (CAT/C/3/Rev.5), the Committee requested the State party not to deport the complainant to Ethiopia while her complaint was under consideration by the Committee. On 3 August 2009, the State party confirmed compliance with the Committee's request for interim measures.

The facts as presented by the complainant

2.1 The complainant belongs to the Amhara ethnic minority, mostly living in the central highlands of Ethiopia. She left her home country due to political problems and arrived in Switzerland on 31 July 2003, where she filed an asylum claim.

2.2 On 14 June 2005, the Federal Office for Migration rejected her asylum request and ordered her to leave Switzerland. On 9 August 2007, the Federal Administrative Court rejected her appeal on the basis that it was not well established that the complainant's political activities in Switzerland have exposed her to such an extent as to attract the attention of the Ethiopian authorities.

2.3 While in Switzerland, the complainant continued her political work within the Ethiopian diaspora. She became an active member of the diaspora opposition political organization KINIJIT/Coalition of Unity and Democracy Party Switzerland (CUDP) and participated in numerous demonstrations and political rallies. According to the author, CUDP is one of Ethiopia's leading opposition movements. In Ethiopia, CUDP regularly

faces political repression from the Government and its members continue to be persecuted. The complainant gives the example of Birtukan Mideksa, chairperson of CUDP, who was arrested on 28 December 2008 and convicted of attempting to overthrow the constitutional order. She was sentenced to life imprisonment. About a month before her arrest, Ms. Mideksa had visited the Swiss section of KINIJJIT in Geneva. At that time, the complainant met her personally and helped her to organize her meetings.

2.4 For many years, the complainant helped organize gatherings for her political movement in Switzerland. Various pictures of her as part of crowds in demonstrations have appeared in the media. Besides her activity with KINIJJIT, the complainant joined the Association des Ethiopiens de Suisse (AES), an important community and discussion forum for the Ethiopian diaspora, that organizes cultural and political events. Since 2004, the complainant has been a member of the executive committee. She further appeared in public in an Ethiopian radio programme on a Swiss local radio station speaking in Amharic to her fellow citizens.

2.5 On 5 October 2007, the complainant submitted a second asylum request based on her recent political activities in Switzerland. The Federal Office for Migration forwarded her request to the Federal Administrative Court, which considered it a revision request. The Court rejected her request on 12 June 2009, for lack of evidence proving a real risk upon return to Ethiopia, and ordered her expulsion.

The complaint

3.1 The complainant claims that her forcible deportation to Ethiopia by Switzerland would amount to a violation of article 3 of the Convention because she risked being arrested and tortured as a result of her political activities in Switzerland. The complainant emphasizes that the Federal Administrative Court, in considering the merits of previous asylum requests submitted by the Ethiopians active in KINIJJIT, has acknowledged that the Ethiopian security authorities monitors the activities of Ethiopians in exile and records them in an electronic database. The complainant adds that in a similar case, the Federal Court had recognized that there was a high risk that Ethiopians living abroad, who were active in or merely sympathizers of the CUDP, would be identified by the Ethiopian authorities.^a

3.2 The complainant submits that her activities go far beyond those of a passive sympathizer. Indeed, not only does she participate regularly in political events, but she publishes critical articles on the Internet and has become an important voice within the Ethiopian diaspora. She has contacts with important opposition leaders, as indicated by her meeting with Ms. Mideksa. She claims that such exposure puts her in a prominent position and makes her a target for the Ethiopian security forces.

3.3 The complainant maintains that the Federal Administrative Court did not examine in detail whether her political activity would lead to a risk of torture if she was forcibly returned to Ethiopia. She further maintains that Ethiopia is well known for its human rights abuses against opposition leaders, and reliable reports confirm that the Ethiopian authorities monitor the activities of Ethiopians in the diaspora.^b As such, the complainant claims that she would be exposed to a real risk of arrest and torture if she were returned to Ethiopia.

^a Federal Administrative Court of Switzerland, unpublished judgement E-368/2009 of 12 February 2009.

^b Amnesty International Report 2009, Ethiopia.

3.4 According to human rights organizations, the Ethiopian Government intensified its efforts to suppress dissent political organization.^c The Ethiopian Parliament is currently debating the draft of a new anti-terrorism proclamation with the objective of cracking down on all forms of opposition in the country, assimilating political activities, including peaceful political demonstrations, to terrorist acts. The complainant submits that the draft law would also permit long-term imprisonment and the death penalty for offences such as damage to property or disruption of any public service for the purpose of advancing a political, religious or ideological cause. She further submits that a person need only threaten to commit such a crime to be prosecuted as a terrorist. The complainant maintains that due to her political background and her prominent role within CUDP/KINIJJIT, she fears persecution and claims that she would be exposed to a high risk of torture if she returns to Ethiopia.

State party's observations on the admissibility and the merits of the complaint

4.1 On 27 January 2010, the State party submits its observations on the admissibility and the merits. The State party submits that according to article 3 of the Convention, States parties are prohibited from expelling, returning or extraditing a person to another State where there exist substantial grounds to believe that he/she would be subjected to torture. To determine the existence of such grounds, the competent authorities must take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.^d The existence of gross, flagrant or mass violations of human rights is not in itself a sufficient basis for concluding that an individual might be subjected to torture upon his/her return to his/her country of origin or that additional grounds must exist for the risk of torture to qualify, under the meaning of article 3, as "foreseeable, real and personal".

4.2 Regarding the general human rights situation in Ethiopia, the State party submits that the elections in Ethiopia in May 2005 and August 2005 have strengthened the representation of opposition parties in Parliament. It acknowledges that although the Ethiopian Constitution explicitly recognizes human rights, there are many instances of arbitrary arrests and detentions, particularly of members of opposition parties. In addition, an independent judiciary is lacking. However, being a member or supporter of an opposition political party does not, in itself, lead to a risk of persecution. The situation is different for a person who holds a prominent position in an opposition political party.^e In the light of the above information, the competent Swiss asylum authorities have adopted a differentiated approach to determine the risk of persecution. Persons, who are suspected by the Ethiopian authorities to be members of the Oromo Liberation Front or the Ogaden National Liberation Front are considered at risk of persecution. With regard to persons belonging to other opposition groups, such as the Coalition for Unity and Democracy (CUD or KINIJJIT or CUPD), the risk of persecution is assessed on a case-by-case basis, in accordance with the above criteria. With regard to monitoring political activities of Ethiopians in exile, the State party submits that according to the information available to it, the Ethiopian diplomatic and consular missions do not have the personnel nor structural resources to systematically monitor the political activities of opposition members in Switzerland. However, active and/or important members of the opposition as well as

^c Human Rights Watch, "An analysis of Ethiopia's draft anti-terrorism law," updated 30 June 2009.

^d The State party refers to the Committee's general comment No. 1 (1996) and communications No. 94/1997, *K.N. v. Switzerland*, para. 10.2; and No. 100/1997, *J.U.A. v. Switzerland*, paras. 6.3 and 6.5.

^e The State party refers to United Kingdom Border Agency, "Operational Guidance Note: Ethiopia," issued March 2009, para. 3.7.9.

activists of organizations campaigning for the use of violence run the risk of being identified and registered and, therefore of being persecuted if returned to Ethiopia.

4.3 The State party notes that the complainant has not claimed to have suffered torture or to have been arrested or detained by Ethiopian authorities. It therefore recalls the conclusions of the Federal Office for Migrations of 22 March 2007, and those of the Federal Administrative Court of 9 August 2007, which held that the complainant's allegations with regard to her arrest in Ethiopia were not credible. It also notes that the complainant, who allegedly was being persecuted for her political activities in Ethiopia, left the country with a valid exit visa.

4.4 As to the complainant's political activities in her home country, the State party summarizes the conclusions of the domestic authorities, who had examined the complainant's case in detail, and concluded that her claim regarding her engagement in political activities lacked credibility. In support of her claim before the domestic authorities, the complainant submitted three summonses and a document from the federal police, which were assessed as lacking authenticity with regard to the signatures, stamps and authorities who supposedly issued the documents. Furthermore, in the domestic proceedings, the complainant contradicted herself on important issues.

4.5 The State party notes that the complainant claims to belong to the Association des Ethiopiens en Suisse (AES) and that as a member of the executive committee, she was in charge of organizing numerous political activities, including demonstrations. The State party argues that according to the commercial registry, AES is a politically neutral organization and the complainant is not registered as a member of the executive committee. The State party further notes that the complainant had submitted a letter of confirmation by the President of the "Council of Europe, Africa and Australia Kinijit Support Chapters" and a photo showing her with Birtukan Mideksa. The State party argues that, according to that letter, the complainant's activity was limited to the preparation of the visit of a delegation of the CUPD to Switzerland. It submits that none of the documents submitted by the complainant showed political engagement beyond participation in demonstrations, an activity of most politically active Ethiopians in Switzerland. The State party also submits that, in view of their limited resources, the Ethiopian authorities are focusing their attention on individuals whose activities go beyond the "usual behaviour," or who exercise a particular function or activity that could pose a threat to the Ethiopian regime. The case of Birtukan Mideksa is an example thereof. However, the complainant presented no such political profile when she arrived in Switzerland and the State party deems it reasonable to exclude that she subsequently developed such a profile. The State party maintains that the documents produced by the complainant do not show any activity in Switzerland that would attract the attention of the Ethiopian authorities. According to the complainant, she participated in four demonstrations between 2005 and 2006 and four CUDP/KINIJIT assemblies between 2007 and 2008. The fact that the complainant is identified in photographs or videos of participants in certain demonstrations is not sufficient to demonstrate a risk of persecution if returned. The State party maintains that numerous political demonstrations take place in Switzerland, that photographs or video recordings showing sometimes hundreds of people are made publicly available by the relevant media and that it is unlikely that the Ethiopian authorities are able to identify each person, or that they even have knowledge of the affiliation of the complainant with the above organization.

4.6 The State party further argues that the complainant's claim that she spoke in Amharic on a local Swiss radio station to her fellow citizens does not change the above appreciation of the case, in particular as the radio station contradicted the complainant's assertion and stated that the complainant's activity was limited to sending two articles to the responsible editor.

4.7 The State party submits that there is no evidence that the Ethiopian authorities have opened criminal proceedings against the complainant, or that they have adopted other measures towards her. Accordingly, the State party's immigration authorities did not qualify as convincing the claim that the complainant has a function within the Ethiopian diaspora in Switzerland that would attract the attention of the Ethiopian authorities. In other words, the complainant has not established that if returned to Ethiopia she would run a risk of ill-treatment because of her political activities in Switzerland.

4.8 The State party submits that, in the light of the above, there is no indication that there are substantial grounds for fearing that the complainant's return to Ethiopia would expose her to a foreseeable, real and personal risk of torture and invites the Committee against Torture to find that the return of the complainant to Ethiopia would not constitute a violation of the international commitments of Switzerland under article 3 of the Convention.

Complainant's comments on the State party's observations

5. On 26 March 2010, the complainant reiterates her initial submission and submits that she continues to be politically engaged and that she has participated in numerous activities of CUDP/KINIJJT. She notes in particular that she had participated in a meeting of the GINBOT 7 and can be seen in photographs with the well-known founder of the movement, Berhanu Nega. She further published an article on the WARKA forum criticizing the new anti-terrorist legislation. The complainant reiterates that she is a very active member of the dissident movement of Ethiopians in Switzerland and that she had met Birtukan Mideksa before her arrest. She has organized several meetings and participated in numerous demonstrations, as well as posted several articles exposing her political views on the Internet. Citing the assessment of the NGO, Human Rights Watch, the complainant notes that the Ethiopian authorities have increased their surveillance of political opponents, including on the Internet.^f She therefore maintains that she would face an imminent, personal and real risk of torture if deported to Ethiopia.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the instant case, the State party has recognized that the complainant has exhausted all available domestic remedies. As the Committee finds no further obstacles to the admissibility, it declares the communication admissible.

^f Human Rights Watch, "One hundred ways of putting pressure: Violations of freedom of expression and association in Ethiopia," March 2010.

Consideration of the merits

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

7.2 The issue before the Committee is whether the removal of the complainant to Ethiopia would violate the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person 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 must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Ethiopia. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

7.3 The Committee recalls its general comment No. 1 (1996)^g on the implementation of article 3 of the Convention, according to which "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" (para. 6), but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.^h The Committee recalls that under the terms of its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided for in article 22, paragraph 4, of the Convention, of free assessment of the facts, based on the full set of circumstances in every case.

7.4 The Committee has noted the complainant's submissions about her involvement in the activities of KINIJI/CUDP Switzerland and in the Association des Ethiopiens de Suisse. It also notes her claim that she helped to organize meetings of a well-known Ethiopian opposition politician during her visit to Switzerland, and that she has been visible on the Internet, during demonstrations and on a local radio station. The Committee further notes that the complainant has not claimed to have been arrested or ill-treated by the Ethiopian authorities, nor has she claimed that any charges have been brought against her under the anti-terrorist or any other domestic law. The Committee further notes the complainant's submission that the Ethiopian authorities use sophisticated technological means to monitor Ethiopian dissidents abroad, but observes that she has not elaborated on this claim or presented any evidence to support it. In the Committee's view, the complainant has failed to adduce sufficient evidence about the conduct of any political activity of such significance that would attract the interest of the Ethiopian authorities, nor has she submitted any other tangible evidence to demonstrate that the authorities in her home country are looking for her or that she would face a personal risk of being tortured if returned to Ethiopia.

7.5 The Committee concludes accordingly that the information submitted by the complainant, including the unclear nature of her political activities in Ethiopia and the low-level nature of her political activities in Switzerland, is insufficient to establish her claim that she would personally be exposed to a substantial risk of being subjected to torture if

^g See HRI/GEN/Rev.9.

^h See, inter alia, communications No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005, and Nos. 226/2003, *T.A. v. Sweden*, decision adopted on 6 May 2005.

returned to Ethiopia. The Committee is concerned at the many reports of human rights violations, including the use of torture in Ethiopia,ⁱ but recalls that for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In the light of the foregoing, the Committee concludes that such a risk has not been established.

8. In the light of the above, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the complainant to Ethiopia would not constitute a breach of article 3 of the Convention.

ⁱ The Committee notes that Ethiopia is also a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and recalls its 2011 concluding observations (CAT/C/ETH/CO/1), paras. 10–14.

Communication No. 396/2009: *Gbadjavi v. Switzerland*

Submitted by: Combey Brice Magloire Gbadjavi
Alleged victim: The complainant
State party: Switzerland
Date of complaint: 18 August 2009 (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 1 June 2012,

Having concluded its consideration of complaint No. 396/2009, submitted to the Committee against Torture by Combey Brice Magloire Gbadjavi 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 is Combey Brice Magloire Gbadjavi, a national of Togo born in 1969. He claims that his deportation to Togo would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel, Guido Ehrler.

1.2 Under rule 108, paragraph 1, of its rules of procedure, the Committee requested the State party not to expel the complainant to Togo while his complaint was under consideration.

The facts as submitted by the complainant

2.1 In 1994, the complainant joined the Union des Forces de Changement (UFC) as an active member of its security team. His role was to protect party members, distribute leaflets and make statements. In 1999, he was arrested by the Togolese authorities for providing friends in Germany with information on the political situation in Togo. While being questioned at the gendarmerie, he was beaten until he almost lost consciousness. He was then taken to his home in Békpotá (a residential district of Lomé) so that it could be searched by gendarmes. During the search, the gendarmes found documents relating to UFC and, on that basis, they decided to take him back to the gendarmerie, where he was chained to an object and then beaten and left for dead. Subsequently, he was put in a cell which he shared with two other detainees for a week. During that time, they were forced to walk on their knees over gritty soil. He was then transferred to the Adidogomé prison, where the ill-treatment continued. During physical exercise, detainees were beaten if they showed signs of fatigue or fell. The complainant was forced to do push-ups with sandbags on his back. After two months of this treatment, the complainant had blood in his urine and was so seriously ill that he was released.

2.2 On 18 July 1999, talks were held between the opposition (UFC) and the ruling party, during which it was agreed that the complainant would provide security for Mr. Gilchrist Olympio, the UFC president, on his journey from the Ghanaian border to the capital.

However, on the eve of the talks, the Ministry of the Interior decided that Togolese forces should be responsible for ensuring his safety. The UFC security team, made up of supporters such as the complainant, objected to the Ministry's decision and clashes broke out. Faced with the threat of imprisonment, the complainant decided to flee to Ghana. In 2002, he returned to Togo after being introduced to a minister, Mr. H.O. Olympio, who gave him a signed business card and a permit ensuring his safety.

2.3 During the 2003 elections, the complainant denounced a voter for trying to vote twice for the Rassemblement du Peuple Togolais (RPT) candidate in a polling station. This led to clashes during which the complainant lost his wallet with the business card and permit given to him by Mr. H.O. Olympio along with other papers, including his identity card. Some RPT members subsequently told his wife they were going to kill him. The complainant therefore decided to leave the country again and take refuge in Benin. He returned to Togo in January 2004. On 16 April 2005, during a gathering organized by UFC in Atikomé, the security forces opened fire on the crowd. That evening they went to the complainant's home to arrest him, but he was not there. On 28 March 2006, the complainant and his sister were arrested on their way from Lomé to Agouegan and the complainant was taken by gendarmes to the office of the head of the Zébé camp. The complainant was beaten and locked up. During questioning, he was asked about the nature of his relationship with Mr. H.O. Olympio, who was suspected of instigating an attack on a gendarmerie camp on 26 February 2006. The complainant was threatened with death and beaten during his time in detention. On 19 April 2006, the complainant managed to escape from the prison after his brother-in-law bribed a guard. He went to Ghana, but, as he was afraid of being detained by the Togolese secret services in Ghana, he fled by plane to Italy under a false identity. He subsequently travelled to Switzerland, where he arrived on 30 April 2006.

2.4 On 7 November 2006, the complainant's wife and children were forced to flee to Benin because they were still facing persecution.

2.5 On 8 September 2006, the Federal Office for Migration rejected the claimant's asylum application, maintaining that his testimony was not credible and that the threats had occurred too far in the past (1999–2002) to establish a well-founded fear of persecution. The Office also disputed the fact that Mr. H.O. Olympio had been a minister and that the gendarmerie camp had been attacked on 26 February 2006. The complainant appealed the decision on 11 October 2006 and filed a document proving that Mr. H.O. Olympio had been a member of the Government until August 2003 and a newspaper article reporting the attack on the gendarmerie camp on 26 February 2006. He also produced various UFC documents confirming his active involvement with the party. In a statement issued on 9 November 2006, the Federal Office for Migration did not dispute that the claimant had been an active UFC member or that the gendarmerie had been attacked on 26 February 2006. However, the Office considered that the complainant's claims that he would be prosecuted by the Togolese authorities were not credible.

2.6 In his appeal to the Federal Administrative Court the complainant produced a medical certificate confirming trauma resulting from torture and subsequent psychiatric treatment. He also produced a document testifying to the distress caused to his wife by his situation and her own situation in Benin and stating that she had attempted to commit suicide on 5 February 2008. On 1 April 2009, the Court rejected the complainant's appeal, maintaining that the situation in Togo had improved since his departure and that his fear that he would be a victim of a violation of article 3 of the Convention was unfounded. The Court ruled that the medical treatment required by the complainant could be provided in Togo, but it failed to check the evidence produced by the complainant such as medical certificates attesting to post-traumatic stress and his poor state of health, and documents confirming his active participation in UFC as its vice-president in Aargau, Switzerland.

Following the Court's ruling against the complainant, the complainant's wife committed suicide on 30 April 2009.

2.7 On 19 May 2009, the Federal Office for Migration rejected the complainant's request for his application to be reconsidered. On 3 June 2009, the complainant filed an appeal with the Federal Administrative Court in which he reported that he had been hospitalized on an emergency basis by the psychiatric services of the canton of Solothurn on 29 May 2009, as he wanted to commit suicide because of his fear of being deported to Togo and tortured to death there. He also stated that he had requested a medical report, which would subsequently be made available to the judicial authorities.^a In his appeal, the complainant asked the Court to order an effective and thorough investigation. The complainant also submitted a report from the Swiss Refugee Council on the political situation in Togo dated 18 May 2009. On 10 June 2009, the Federal Administrative Court ruled that his appeal was manifestly unfounded. As the complainant was unable to pay an advance on the costs of the proceedings, the case was discontinued.

The complaint

3.1 The complainant submits that the authorities of the State party have not disputed that he was tortured in 1999, that he was an active member of the UFC security team or that he fled to Ghana and Benin. He also submits that the medical certificates confirm that he has been seriously traumatized for many years. The complainant refers to reports from organizations such as Amnesty International, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Swiss Refugee Council indicating that he is likely to be tortured on his return. Although the situation in Togo has improved following the election of some UFC members to parliament, the situation for ordinary UFC members who are not in parliament remains dangerous, with secret arrests, threats and torture.^b On 27 April 2009, the army dispersed a peaceful demonstration by UFC members. The complainant further submits that the administrative courts of Brunswick (Braunschweig) and Lower Saxony (Niedersachsen) in Germany ruled on 25 February 2009 and 22 June 2009, respectively,^c that a fugitive could not be deported to Togo because the risk of his being prosecuted or tortured again could not be ruled out. Those courts suggested that the democratization process should be monitored for a further period in order to establish whether persons deported to Togo were no longer at risk of being prosecuted or tortured.

3.2 The complainant adds that, according to the case law of the European Court of Human Rights, the principle of non-refoulement requires an effective and thorough official investigation to be conducted into credible allegations of inhuman treatment.^d In the present case, neither the Federal Office for Migration nor the Federal Administrative Court carried out a thorough and effective investigation. The Court concluded that there was no risk on the basis of Amnesty International reports and a 2008 Swiss Refugee Council report, whereas the complainant produced a subsequent report from the Swiss Refugee Council

^a A medical report from the psychiatric services of Solothurn dated 29 May 2009 was sent to the Swiss authorities in support of his appeal.

^b The report from the Swiss Refugee Council notes that UFC members of the opposition with a low political profile may still be subjected to Government reprisals and that those who fled from Togo to Benin and Ghana are viewed with more mistrust, see report "Togo: Mitgliedschaft bei der Union des Forces du Changement (UFC), Auskunft der SFH-Länderanalyse", Alexandra Geiser, Bern, 18 May 2009, p. 6.

^c Decisions of the Administrative Court of Brunswick, Germany, of 25 February 2009, and the Higher Administrative Court of Germany, of 22 June 2009, regarding an asylum seeker fearing deportation to Togo (annexed to the submission to the Committee).

^d The complainant does not cite specific case law.

dated 18 May 2009 confirming that individuals in the complainant's situation were at risk. The State party has thus violated the spirit and intent of article 3 of the Convention. Furthermore, the Court merely confirmed the Federal Office for Migration's decision without conducting its own review of the additional elements included in the file. Lastly, the Office's decision of 19 May 2009 rejecting the request to reconsider the application and the 10 June 2009 ruling by the Court upholding that decision show that no investigation took place, since the medical certificates attested to the fact that the complainant had been subjected to torture but were not considered by these two bodies as carrying sufficient weight to warrant reconsideration of the asylum application.

State party's observations on the merits

4.1 On 17 February 2010, the State party submitted its observations on the merits. It notes that the complainant has not provided the Committee with any new elements. On the contrary, the complainant first contests the domestic authorities' assessment of the facts, then describes in general terms the human rights situation in Togo before claiming, on the basis of his own assessment of the facts, that he would face a real, personal and immediate risk of being tortured in the event of his removal to Togo.

4.2 Recalling the provisions of article 3 of the Convention, the State party emphasizes the criteria established by the Committee in general comment No. 1 (1996), on the implementation of article 3 of the Convention in the context of article 22,^e in particular paragraphs 6 ff., which require the complainant to prove that he is in personal, present and substantial danger of being tortured if deported to his country of origin.

4.3 According to the State party, the situation in Togo has improved considerably since the complainant left the country. In August 2006, the five main opposition parties signed a global political accord with the ruling party, the Rassemblement du Peuple Togolais (RPT), establishing a Government of national unity. This led to the appointment of a long-standing member of the opposition to the post of Prime Minister, the establishment of a Government that included opposition parties and the formation of the Independent National Electoral Commission, in which the Union des Forces de Changement (UFC) was represented, even though it was still in opposition. The State party adds that a tripartite agreement between Togo, Ghana and Benin was concluded in April 2006 under UNHCR auspices. Under the agreement, the Togolese Government undertook to take all measures to ensure a dignified and safe return for refugees. In June 2008, some of those who had fled Togo during the presidential elections returned to their country, with no persecution being reported. They included Gilchrist Olympio, the UFC president, who returned to Togo after eight years in exile.

4.4 The State party goes on to say that legislative elections were held on 14 October 2007 and that, according to several independent sources, the electoral process was on the whole satisfactory. The State party considers that this development and the improvement of the human rights situation in Togo led the European Commissioner for Development and Humanitarian Aid to consider that the conditions for re-establishing full cooperation between the European Union and Togo had been fulfilled.

4.5 The improvement of the human rights situation in Togo does nothing to favour the complainant's case. Even assuming that his testimony is credible, the mere fact of the complainant's arrest and detention in 1999 and his political involvement in UFC do not now constitute substantial grounds for believing that he would face torture if he returned to Togo. In its decision of 1 April 2009, the Federal Administrative Court reached this

^e *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44).*

conclusion, referring to various independent sources. The main reason why the Administrative Court of Brunswick in Germany and the Higher Administrative Court of Germany^f offered a different assessment of the situation in Togo, while acknowledging the progress made, is that those courts applied the criteria of German law regarding the revocation of refugee status, and not the requirements of article 3 of the Convention.

4.6 The complainant alleges that he was tortured in 1999 following his arrest. However, as the Federal Office for Migration noted in its decision of 8 September 2006, it is not strictly necessary to rule on the allegations, since there is no causal link between the alleged acts of torture and the complainant's departure for Switzerland. Furthermore, the medical certificates and reports submitted by the complainant, which were dated at least eight years after the facts, make no mention of acts of torture, but are based explicitly on the complainant's testimony.

4.7 The latest Swiss Refugee Council report notes that less well-known UFC members are at some risk of being arrested, threatened or tortured. However, during the asylum application procedure, the complainant claimed that he benefited from the protection of Mr. H.O. Olympio's family. Thus he cannot be considered to be an ordinary UFC member. With regard to the complainant's activities outside his country of origin, he claims that he has taken part in UFC demonstrations in Switzerland and that he has co-written an article on its activities. However, these are activities that are engaged in by most of the politically active Togolese nationals in Switzerland. In view of the political developments in Togo (see paragraphs 4.3 and 4.4 above) and the complainant's allegation that he is a well-known UFC member, his political activities in Switzerland could not give rise to a risk of torture, especially given that numerous political demonstrations take place in Switzerland, that many of his compatriots also take part in them and that photographs or video recordings, many of them showing large numbers, even hundreds, of demonstrators, are made publicly available by the relevant media.

4.8 In its decision of 8 September 2006, the Federal Office for Migration considered that the complainant's testimony was clearly implausible. It maintained that his allegations were contrary to general experience and not logical. That applied in particular to his alleged arrest on 28 March 2006. At that time, the complainant was in hiding in Agouegan and was wanted by the security forces and young members of the RTP. He claims to have feared for his life. However, despite his fears, he visited his wife in Lomé regularly. Furthermore, the police officer who stopped his car and arrested him is reported to have recognized him immediately. According to the complainant, his arrest was related to the loss in 2003 of his wallet containing a document given to him by Mr. H.O. Olympio. As the Federal Office for Migration pointed out, it is surprising that, several years later, the police were still looking for him so actively that he was recognized immediately. Another element that raises doubts about the complainant's testimony concerns the circumstances surrounding his release in April 2006. The complainant, wanted for several years and suspected of attacking a gendarmerie in Lomé on 26 February 2006, claims to have been released by a soldier who had been bribed by his brother-in-law. Yet, the perpetrators of the attack on the gendarmerie were arrested and tried on 19 May 2006. The complainant's fears are therefore not justified.

4.9 Furthermore, the complainant made contradictory statements with respect to certain key points. At the registration centre, he stated that he had lived in Benin between 1999 and 2002 and in Agouegan from 1 April 2004 until his departure. In addition, he claims that, in 2002, he received a signed business card from Mr. H.O. Olympio, which he lost in 2003. However, to the cantonal authorities he stated that he had lived in Lomé from the age of 6,

^f Op. cit.

that he had gone occasionally to Agouegan and that he had fled to Benin again after his return in 2002 and spent six months there. Moreover, he initially said that Mr. H.O. Olympio had given him a permit, but later declared that he had lost his wallet containing the permit and the business card.

4.10 As to the events surrounding the 2003 elections and the meeting organized by UFC on 16 April 2005, the State party notes that these points, which the complainant apparently considers to be crucial, were not made until late in the proceedings. There are too many inconsistencies and contradictions to be reasonably explained by the fact that a person is facing persecution. Furthermore, they relate to key points and the complainant has failed to set them out in a plausible manner. Consequently, there are no substantial grounds for believing that the complainant would be in danger of being tortured if he returned to Togo.

Complainant's comments on the State party's submission

5.1 On 14 June 2010, the complainant stated that the campaign of repression against UFC party members in Togo was ongoing. According to Amnesty International, the day before the presidential election of 4 March 2010, two members of the opposition party and a dozen other activists were arrested and charged with jeopardizing State security. On 8 March 2010, the Government banned demonstrations on working days. On 9 March 2010, during a protest march against election irregularities, UFC members were stopped and questioned. A UFC office was raided and material evidence of fraud was stolen. In the wake of the presidential elections, demonstrations continued to be violently put down. On 14 April 2010, about 70 people were arrested, including UFC representatives. The International Federation for Human Rights (FIDH) condemned the arrest of political activists and called for civil and political rights to be observed in Togo in the post-election period. The complainant personally took part in a protest on 10 April 2010 outside the United Nations office against the irregularities that had occurred during the presidential election and the ensuing violence. In an article dated 29 April 2009 in the newspaper *Le Triangle des Enjeux*, he had already accused the gendarmerie of presenting falsified evidence when Kpatcha Gnassingbé, the President's brother, was arrested.

5.2 Contrary to the assertions of the State party, the political situation has not improved and the campaign of repression against UFC members was stepped up during the run-up to the presidential election on 3 March 2010. Furthermore, by publishing an article in *Le Triangle des Enjeux* on 29 April 2009, the complainant demonstrated publicly his opposition to the current Government in Togo. Those activities could put the complainant at risk if he returned to his country.

5.3 As to the alleged inconsistencies identified by the State party, the complainant refutes the State party's contention that he went to Lomé to go into hiding. In fact, at the time, his wife was living in the village of Devego in the suburbs of Lomé. Furthermore, surprising as it may seem, a police officer did nonetheless recognize him on 28 March 2006, many years after the events in question. With regard to the attack on the gendarmerie in Lomé on 26 February 2006, the Federal Office for Migration initially disputed that it had happened, but it did not repeat the argument in its statement of 9 November 2006, which proves that it has accepted that the event did occur. The fact that two perpetrators of the attack have already been arrested and tried proves that if the complainant was arrested, he too would suffer a similar fate. Furthermore, there was no inconsistency regarding the complainant's place of residence in Togo. The Federal Office for Migration acknowledged in its decision of 8 September 2010 that he had been in hiding in Agouegan. At the registration centre, the complainant had been questioned about his last address, which explains why it did not match his official address in Lomé.

5.4 The complainant refutes the allegation that he mentioned the problems he faced in 2003 only at a late stage in the proceedings since he had already mentioned the report he

had made about a person attempting to vote twice in 2003 during the first hearing at the registration centre. He had also mentioned at that time the events surrounding the meeting of 16 April 2005.

5.5 The complainant concludes that the statements and evidence submitted show that if he returned to Togo he would be subjected to treatment contrary to article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee further notes that domestic remedies have been exhausted pursuant to article 22, paragraph 5 (b), and that the State party does not contest admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

Consideration of the merits

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

7.2 The issue before the Committee is whether the expulsion of the complainant to Togo would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

7.3 Regarding the complainant's allegations under article 3, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such analysis is to determine whether the complainant runs a personal risk of being subjected to torture in Togo. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture if expelled to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.^g

7.4 The Committee recalls its general comment No. 1, which states that the risk of torture need not be highly probable, but it must be personal and present. In this regard, the Committee has established in previous decisions that the risk of torture must be "foreseeable, real and personal".^h As to the burden of proof, the Committee also recalls that

^g See communication No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; *T.I. v. Canada*, communication No. 333/2007, decision adopted on 15 November 2010; and *A.M.A. v. Switzerland*, communication No. 344/2008, decision adopted on 12 November 2010.

^h See *A.R. v. Netherlands*, communication No. 203/2002, decision adopted on 21 November 2003, para. 7.3; *A.A. et. al v. Switzerland*, communication No. 285/2006, decision adopted on 10 November 2008, para. 7.6; and *R.T.-N. v. Switzerland*, communication No. 350/2008, decision adopted on 3 June 2011, para. 8.4.

it is normally for the complainant to present an arguable case, and the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

7.5 In assessing the risk of torture in the present case, the Committee notes the complainant's claims that he is an active member of UFC; that his role was to protect party members, distribute leaflets and make statements; that he was first arrested in 1999 for sending information on the political situation in Togo to friends in Germany; that he was tortured and held in inhuman conditions for two months and then released; that following clashes on 18 July 1999 he fled to Ghana to escape arrest; and that he returned to Togo in 2002 after being introduced to Mr. H.O. Olympio, who gave him a permit and his business card. The Committee notes the complainant's claim that during the 2003 presidential elections he reported fraudulent voting practices; that, following death threats, he fled to Benin; that he returned to Togo in January 2004; that he was arrested by gendarmes on 28 March 2006 and transferred to the Zébé camp, where he was beaten, threatened with death and accused of taking part in the attack on the Lomé gendarmerie on 26 February 2006; that on 19 April 2006, he managed to escape thanks to bribes paid to a guard by his brother-in-law; and that he subsequently fled to Ghana, from where he departed for Switzerland via Italy. The Committee notes the complainant's argument that the situation in Togo has not improved for ordinary UFC members, who are at risk of being imprisoned and tortured, as confirmed by the Swiss Refugee Council report of 18 May 2009; and that this report also establishes that those who fled Togo for Benin and Ghana are viewed with greater suspicion. Lastly, it notes his claim that the Swiss authorities have failed to fulfil their obligation to conduct an effective and thorough official investigation into credible allegations of treatment that violates article 1 of the Convention, such as that evidenced by the medical reports submitted by the complainant, including the report of the psychiatric services of Solothurn dated 29 May 2009.

7.6 The Committee notes the State party's argument that the complainant has not provided the Committee with new information and that he has merely contested the domestic authorities' assessment of the facts. The Committee notes the State party's argument that the situation in Togo has improved considerably since the complainant left the country; that, although it is in opposition, UFC is represented in parliament; and that some of those who had fled Togo have returned to their country, with no persecution being reported. The Committee notes the State party's argument that, even assuming that his testimony is credible, this alone does not constitute substantial grounds for believing that he would face torture if he returned to Togo; that there is no causal link between the complainant's arrest in 1999 and his departure from Togo for Switzerland; that the medical reports written eight years after the alleged facts make no mention of acts of torture and that they are based explicitly on the complainant's account; that the Swiss Refugee Council report establishing that some UFC members are at risk of torture refers to members who are not well known whereas the complainant claims he played a key role in UFC and even enjoyed the protection of Mr. H.O. Olympio; and that he cannot therefore be considered to be an ordinary UFC member. The Committee notes that the State party alleges that the complainant's credibility is undermined by inconsistent and contradictory information, in particular regarding his place of domicile, his arrest on 28 March 2006 and his release from the Zébé camp. Lastly, the Committee notes that, according to the State party, many Togolese nationals in Switzerland take part in the same political activities as the complainant and that such activities do not constitute an additional risk for the complainant in the event of his being returned.

7.7 Having taken account of the arguments presented by the parties, the Committee considers that the complainant has submitted sufficient elements to suggest that he would be at risk of receiving treatment that violates article 1 of the Convention if he were returned to Togo. This conclusion is based primarily on the complainant's claim, as corroborated by the Swiss Refugee Council report of 18 May 2009, that members of the opposition UFC

with a low political profile may still be subjected to Government reprisals and that those who, like the complainant, fled Togo for Benin and Ghana are viewed with greater suspicion. Thus, regardless of whether he is a well-known or ordinary member of UFC, since UFC continues to be the main opposition party in Togo, the risk of torture is still present. The Swiss authorities have not contested the fact that the complainant has been an active member of UFC in Togo and Switzerland. The serious human rights violations committed during and after the presidential elections of 24 April 2005 have still not been the subject of a judicial inquiry, which creates a climate of impunity conducive to a recurrence of such violations.ⁱ The Committee also notes that, despite its recommendations, Togo has still not adopted legislation that explicitly defines and criminalizes torture, which encourages impunity in respect of such practices.^j

7.8 As to the medical certificates and reports submitted in support of the complainant's asylum application, the three medical certificates of 25 July 2007, 7 March 2008 and 29 April 2009 confirm the precarious mental health of the complainant, which is connected to his past experiences. As to the medical report of 18 May 2009 issued by the psychiatric services of Solothurn, the Committee notes that it mentions terrorism or torture as a possible cause of the post-traumatic stress disorder that the complainant was diagnosed as having. The Committee is of the view that such elements should have caught the attention of the State party and constituted sufficient grounds for investigating the alleged risks more thoroughly. The Federal Administrative Court simply rejected them because they were not likely to call into question the assessment of the facts made in previous rulings. By proceeding in thus without considering those elements, even though they were submitted at a late stage in the proceedings, the Swiss authorities failed in their obligation to ensure that the complainant would not be at risk of being subjected to torture if he were returned to Togo.

7.9 On the basis of all the information submitted to it and in the absence of a thorough investigation by the State party showing otherwise, the Committee is of the view that the complainant has provided sufficient evidence for it to consider that his return to his country of origin would put him at a real, present and personal risk of being subjected to torture.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the return of the complainant to Togo would constitute a breach of article 3 of the Convention.

9. In conformity with rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps taken by the State party to respond to this decision.

ⁱ See concluding observations of the Human Rights Committee (CCPR/C/TGO/CO/4), para. 10.

^j See concluding observations of the Committee against Torture (CAT/C/TGO/CO/1), para. 10; and concluding observations of the Human Rights Committee (CCPR/C/TGO/CO/4), para. 15.

Communication No. 413/2010: A.A.M. v. Sweden

Submitted by: A.A.M. (represented by counsel, E.P.)

Alleged victim: The complainant

State party: Sweden

Date of complaint: 19 February 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 23 May 2012,

Having concluded its consideration of complaint No. 413/2010, submitted to the Committee against Torture by E.P. on behalf of A.A.M. 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, her counsel and the State party,

Adopts the following:

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

1.1 The complainant is A.A.M., a national of Burundi born on 3 December 1982 in the village of Mbuye in Muramvya province, Burundi; she currently resides in Sweden. She claims that an enforcement of her expulsion order to Burundi^a would violate article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). The complainant is represented by counsel, E.P.

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 2 March 2010, to refrain from expelling the complainant to Burundi while her communication is under consideration by the Committee.

Factual background

2.1 The complainant comes from a family belonging to the Tutsi ethnicity. Her parents, E.N. and C.B., were killed in 1993 by Hutu militia in the village of Mbuye. Thereafter, her only sibling, an older brother, J.F.N., became active in the Tutsi militia known as the “Sans Échec”. He was engaged in looting and gunfights against Hutus. Due to the fact that the complainant’s brother had a high position in the Sans Échec and was well-known, he received death threats. On 3 September 2006, the complainant’s brother was killed in his home by Hutu soldiers from the national army. At that specific moment, she was outside of the house and could hear her brother being ill-treated inside the house and the soldiers asking him about her whereabouts, which she understood as a death threat.

2.2 The complainant ran from the house to a friend who lived 10 minutes away. The following day the complainant’s friend went back to the house and found the brother brutally tortured and executed. A few days later, the complainant met her former maid, who

^a Burundi acceded to the Convention on 18 February 1993 and accepted the Committee’s competence to receive and consider individual communications in accordance with article 22 of the Convention on 10 June 2003.

told her that the Hutu militia was searching for her. The complainant stayed at her friend's house for two months. According to her, the authorities are unable to offer her protection and she cannot receive protection in another part of the country. She does not have any family members in Burundi, nor does she have a social network there. Thus, she fled Burundi on 28 November 2006, helped by smugglers and a friend, who arranged the travel.

2.3 The complainant arrived in Sweden on 29 November 2006 and applied for asylum the next day. Upon application, she presented a Burundian identity card to the Migration Board. On 23 November 2007, the Migration Board held an interview with the complainant, in the presence of her legal aid counsel. The complainant stated, *inter alia*, that she had never had a passport or been abroad. She also stated that she had never belonged to a party or organization, and that she had never been subjected to threats or harassments, apart from the events that happened when her brother was killed.

2.4 In February 2008, the Migration Board learned that an application for a visa had been presented in 2006 to the Swedish embassy in Algiers, by an individual with almost identical personal data as the complainant. The Migration Board requested all documentation for the application from the Swedish embassy in Algiers. The application had been made and signed by a person named A.A.U., born on 3 December 1982 in Bujumbura, Burundi. The application was signed on 16 July 2006 in Algiers and the applicant's purpose for going to Sweden was to visit a friend and to explore the possibility of conducting further studies. Both the applicant and the friend, who was also the reference person in the application, stated that they had gotten to know each other in Niger in 2002–2003 when the applicant was working there. The friend also stated that the applicant planned to go to Niger after the visit to Sweden. The applicant further stated that she was a student at the university in Algiers, which was confirmed by her friend, and listed a home address in Algiers. She also stated that she had valid Algerian travel insurance and health travel insurance for the journey. The applicant supported herself through study allowances and economic support from her family.

2.5 Under the section of personal particulars of parents and brothers/sisters in the application, the applicant stated that her father's name was E.B., her mother's name was P.N., and that they lived together in Rohero, Bujumbura. The applicant further stated that she had two sisters and a younger brother. Furthermore, the applicant stated that she had a national passport and had had three previous stays in France between July 2003 and October 2005. The information contained in the application form was corroborated by the attached copies of the Burundian passport, which had been renewed at the Burundian embassy in Paris on 20 August 2004. The application for a visa was refused by the Migration Board on 7 August 2006.

2.6 After the required documentation relating to the application for a visa arrived at the Migration Board in Sweden, which was at that time examining the complainant's application for asylum, the Board investigated whether the person in the photo attached to the application for a visa was the same as the person having claimed asylum in Sweden, *i.e.* the complainant. The report, issued and signed on 3 March 2008 by an expert within the department for identity, stated that the result of the comparison of the photos strongly suggested that they represented the same person.

2.7 On 6 June 2008, an additional interview with the complainant was held at the Migration Board, based on the information in the application for a visa that had come to light. During the interview, the complainant stated that she had never left Burundi. She had given her passport to a friend from the Congo, who studied in Algeria and whom she had met in Burundi. Somehow the passport had been used by this friend and the application for a visa had been submitted without her being involved or aware of it. The complainant did not know who had applied for the visa to Sweden. She confirmed that her correct name was A.A.M. and that the only real name in her passport was her first name. Being asked by the

Board whether that meant that the passport was false, the complainant stated it was not but that someone else, John, had helped her to apply for the passport. Her motive for applying for the passport was to help her friend from the Congo. Asked by the Migration Board whether she could explain why her photo was on the application for a visa to Sweden, the complainant stated that it was the same photo as in her passport. When the Migration Board asserted that it was not the case, the complainant then stated that her friend might have used another photo but that she did not know.

2.8 On 23 August 2008, the Migration Board rejected the complainant's asylum application, declaring that based on the written information in the file and the expert report from the Board's department for identity, she was the same person who applied for a Swedish visa in Algiers. The Board further stated that the complainant had not been able to present a trustworthy and coherent explanation as to why an application for a visa together with her passport containing a photo of her, her date of birth and her first name, had been presented in Algeria. The Board also noted that even if the complainant had been in Algeria in July 2006 presenting the application for a visa, that did not rule out that she could have been in Burundi at the time of the murder of the brother. The Board considered that in the event of this alternative, there was no reasonable explanation presented by the complainant as to why she had not informed the Board that she had applied for a Swedish visa and that she had been abroad previously. Therefore, the Board questioned the claims presented by the complainant. The Board concluded that the complainant had not proved her identity, country of origin and citizenship, but decided to try the matter and her asylum application against Burundi. Apart from the lack of credibility in the details presented by the complainant, the Board considered that her claims were not such that she had substantiated that she risked being subjected to persecution, ill-treatment or punishment, as she had not been subjected to such acts while in Burundi. She had indirectly heard that she had been asked for by the militia but remained in the country for a relatively long time after her brother was killed without being subjected to threats or other harassments.

2.9 On 13 October and 14 November 2008, the complainant appealed against the decision by the Migration Board to the Migration Court, claiming that the latter should grant her a residence permit, refugee status and a travel document. She added that she had given a coherent and credible explanation as to why an application for a visa had been presented in Algeria. The complainant's legal aid counsel pointed out that this issue should not overshadow his client's grounds for requesting asylum. Since the Migration Board did not question the fact that her brother had been executed, the threats directed at the complainant herself should be taken seriously. Legal aid counsel argued that his client was vulnerable to abuse and persecution due to her brother's high position within the *Sans Échec*. The threats directed at him also included the complainant.

2.10 The Migration Board was given a possibility to present observations on the complainant's appeal. The Board stated that the complainant's explanations in relation to her departure from Burundi were not trustworthy. Moreover, the Board considered that the lack of credibility in her information regarding the application for a Swedish visa reduced the credibility of the other statements presented by her. Therefore, the complainant's statements could not be considered sufficiently substantiated for granting her protection.

2.11 On 19 May 2009, the Migration Court rejected the complainant's appeal. The Migration Court stated that the author had neither proven her identity nor established as probable that she was from Burundi. Even assuming that she was from Burundi, the Court stated that the general situation in that country did not constitute grounds for asylum or protection. It considered her explanation as to how an application for a visa in her name had been presented in Algeria acceptable. Nevertheless, the Migration Court found that the complainant had not substantiated her claim that she risked being subjected to persecution, ill-treatment or punishment if she returned to Burundi. In its examination, the Migration

Court noted particularly that she had not been involved in the Tutsi militia in which her brother had been engaged and that she had not been party to her brother's activities. The Migration Court further noted that the event which the complainant claimed was the direct cause for her to flee Burundi occurred nearly three years ago, a period that was considered to be relatively long.

2.12 On 8 June 2009, the complainant appealed the Migration Court's judgement and, on 27 July 2009, the Migration Court of Appeal refused leave to appeal against the Migration Court's judgement. The decision to expel the complainant thus gained legal force.

2.13 On 7 September 2009, a letter from the complainant was registered with the Migration Board. In the letter, she claimed that in June 2009 she had forwarded documents to her legal aid counsel, stating, *inter alia*, that she had been sentenced in Burundi to 20 years' imprisonment. The complainant attached copies of the summons from the police in Burundi dated 8 October 2007,^b an arrest warrant in her name dated 19 November 2007^c and a judgement of 20 years' imprisonment dated 16 December 2008.^d

2.14 In the light of the information presented in the complainant's letter and the attached copies, the Migration Board decided, on 24 September 2009, not to grant her a residence permit under chapter 12, section 18 of the 2005 Swedish Aliens Act, or to re-examine the matter under chapter 12, section 19.^e The Migration Board noted, *inter alia*, that the attached documents were copies and that consequently their value as evidence was low.

2.15 The Migration Board's decision was appealed by the complainant to the Migration Court. After the Migration Court had asked her questions in relation to the documents presented, the complainant stated in writing that in March or April 2009 she had learned from an acquaintance working in Burundi as a secretary in a court that she had been notified, searched for and sentenced for having helped her brother to kill people and plunder their belongings. The complainant was shocked to hear this but assumed that if she told her legal aid counsel or the Swedish authorities about it, they would ask her to prove it. Therefore, she asked the acquaintance in Burundi to send her the documents from the court file in Burundi. In the beginning of June 2009, the documents arrived and the complainant immediately handed over copies of them to her legal aid counsel, who, however, did not submit them to the Migration Board or the courts.

2.16 On 16 November 2009, the Migration Court rejected the complainant's appeal. It held that the information that the complainant had been sentenced to imprisonment and searched for by the police were new circumstances according to the Aliens Act and, therefore, had not been examined before. However, the complainant's statement that she had received this information from an acquaintance in Burundi could not, in the absence of any further corroboration, be considered sufficiently substantiated to conclude that the new circumstances constituted lasting impediments to the enforcement of her expulsion order under chapter 12, section 19, of the Aliens Act. The documents, which were presented in original to the Migration Court, were of questionable quality and consequently had a low value as evidence. Regardless of this, the Migration Court concluded that the complainant

^b The request addressed to the complainant to appear for questioning about her involvement in theft is signed by the criminal police in Bujumbura, Burundi.

^c An inquiry in relation to the suspicion about the complainant's involvement in murder and theft, as well as her failure to appear for questioning, is signed by a criminal police officer in Bujumbura, Burundi.

^d The complainant was found guilty of aiding murder and theft.

^e Rules regarding lasting impediments to enforcement of refusal-of-entry and expulsion orders that have become final and non-appealable are laid down in chapter 12, sections 18 and 19, read together with chapter 12, sections 1–3, of the Act.

was aware of the documents that were going to be sent to her already by the end of April or early May 2009, i.e. before the Migration Court's judgement of 19 May 2009 in relation to her application for a residence permit. Before that time, she had been aware of the information that she had been sentenced and searched for by the police in Burundi. Consequently, she had had a possibility to present this information during the proceedings on her initial asylum application but decided not to do it. The reason given by the complainant, i.e. that she would have been asked to submit proof, was not considered by the Migration Court as a valid excuse under chapter 12, section 19, of the Aliens Act for not presenting the new circumstances at an earlier stage.

2.17 On 9 December 2009, the Migration Court of Appeal refused leave to appeal against the Migration Court's judgement. This decision is not subject to appeal.

The complaint

3.1 The complainant claims that there exists a consistent pattern of gross, flagrant or mass violations of human rights in Burundi. She refers to the sixth report of the Secretary-General on the United Nations Integrated Office in Burundi (S/2009/611), and to a 2009 report by Amnesty International USA regarding the poor human rights record in Burundi, including the use of torture against detainees in prison, unlawful killings by the security forces, widespread rape and sexual violence, and impunity. In the light of the above, the complainant submits that due to her association with the deceased brother's activities and the expected imprisonment for aiding murder and theft, her expulsion from Sweden to Burundi would expose her to harsh and life-threatening prison conditions, torture and other forms of abuse, such as rape and sexual violence. She claims, therefore, that her forcible return to Burundi would constitute a breach by Sweden of her rights under article 3 of the Convention.

3.2 The complainant submits that she is at personal risk of being tortured upon her return to her country of origin. She argues that a close family member has already been killed and she fears that in case of her expulsion to Burundi she may face the same fate, and there is an obvious risk that she will be subjected to ill-treatment, torture and rape while imprisoned. In this connection, the complainant states that she is innocent and has not committed the acts for which she was convicted. The background for her conviction is ethnic contradictions in Burundi and her brother's involvement with the *Sans Échec*.

State party's observations on the admissibility and the merits

4.1 By note verbale of 2 September 2010, the State party submitted its observations on the admissibility and the merits. As to the admissibility, it states that it is not aware of the same matter having been or being subject to another procedure of international investigation or settlement. With reference to article 22, paragraph 5 (b), of the Convention, the State party acknowledges that all available domestic remedies have been exhausted in the present communication.

4.2 Irrespective of the outcome of the Committee's examination of the issues relating to article 22, paragraphs 5 (a) and (b), of the Convention, the State party maintains that the complainant's assertion that she is at risk of being treated in a manner that would amount to a breach of the Convention fails to attain the basic level of substantiation required for the purposes of admissibility. It submits that the communication is manifestly unfounded and, thus, inadmissible under article 22, paragraph 2, of the Convention and rule 113, subparagraph (b) (former rule 107, subparagraph (b)), of the Committee's rules of procedure.

4.3 The State party submits that, should the Committee conclude that the communication is admissible, the issue before the Committee on the merits is whether the

expulsion of the complainant would violate the obligation of Sweden under article 3 of the Convention, not to expel or return a person to another state where there are *substantial grounds*^f for believing that he or she would be in danger of being subjected to torture. In this respect, the State party refers to the Committee's jurisprudence,^g according to which the aim of the determination of whether the forced return of a person to another country would constitute a violation of article 3 of the Convention is to establish whether the individual concerned would be *personally at risk*^h of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. Furthermore, the State party submits that its obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as set out in article 1 of the Convention. It follows from the Committee's jurisprudenceⁱ that the issue of whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.

4.4 As far as the general human rights situation in Burundi is concerned, the State party submits that it can still be described as very unstable after the long civil war between the Tutsi-dominated Government and its army and the Hutu-dominated rebel groups. As a result of the war, many civilians have lost their lives and both parties to the conflict are responsible for severe violations of the human rights of the civilian population. The human rights record of the Government of Burundi remains poor. Members of the army (Force de Défense Nationale, FDN), the police and the National Intelligence Service (Service National de Renseignement, SNR) have been responsible for killings, torture and beatings of civilians and detainees, including suspected supporters of the National Forces of Liberation (Forces Nationales de Libération, FNL).^j Security forces have continued to harass members of the opposition. Despite the ceasefire agreed in May 2008, abuses by the FNL against civilians have continued and occurred primarily in the traditional FNL strongholds, including Bujumbura Rural. While civilian authorities have generally maintained effective control of security forces, there have been instances where elements of the security forces have acted independently. Although government security forces, especially the FDN, have taken some steps to prosecute the perpetrators of human rights abuses, most individuals have acted with impunity.^k

4.5 The State party adds that since 2005 a new Constitution has been in force, establishing terms by which the two ethnic groups will share power and recognizing fundamental human rights for all Burundians. The Constitution guarantees a multiparty system and freedom of speech and the press. Also in 2005 general elections were held and the National Council for the Defence of Democracy — Forces for the Defence of Democracy (Conseil National pour la Défense de la Démocratie — Forces pour la Défense

^f Emphasis added by the State party.

^g Communications No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3; and No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

^h Emphasis added by the State party.

ⁱ Reference is made to communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.5.

^j Formerly Party for the Liberation of the Hutu People.

^k Reference is made to the 2008 "Human rights report: Burundi" by the United States Department of State and section 1 of the 2007 "Country report on human rights practices in Burundi" presented by the Swedish Ministry for Foreign Affairs.

de la Démocratie, CNDD-FDD) became the ruling party. In April 2009, the FNL was formally transformed to a political party. With the disarmament of the FNL movement and its accreditation as a political party, any acts of violence by them are now treated as crimes and the number of abuses attributed to them has declined.¹ Impunity remains prevalent and justice, which is not granted in the courts, “tends to be claimed in the streets”.^m The State party submits that the said assessment is the essence of how the situation in Burundi is described in the reports referred to by the complainant before the Committee (see para. 3.1 above).

4.6 The State party states that while it does not wish to underestimate the concerns that may legitimately be expressed with respect to the current human rights situation in Burundi, there can be no doubt that the circumstances referred to in the above-mentioned reports do not in themselves suffice to establish that the complainant’s forced return to Burundi would entail a violation of article 3 of the Convention. The Committee, therefore, should determine the complainant’s personal risk of being subjected to torture, as defined in article 1 of the Convention, following her removal to Burundi.

4.7 The State party submits that the Swedish migration authorities and courts apply the same test in assessing the risk of being subjected to torture when considering an asylum application under the Aliens Act as the Committee would apply when examining a subsequent communication under the Convention.ⁿ The State party adds that it must be appreciated that the national authorities are in a very good position to assess the information submitted by an asylum seeker and to appraise his or her statements and claims in view of the fact that they have the benefit of direct contact with the asylum seeker concerned. In light of the above, the State party contends that great weight must be attached to the assessment made by the Swedish migration authorities.

4.8 Concerning the assessments of the credibility of the complainant’s statements, the State party relies mainly on the reasoning contained in the decision of the Migration Board, which has had two interviews and face-to-face contact with the complainant. In addition, the State party considers it pertinent to emphasize that there exist extensive credibility gaps in the details that the complainant has presented to the migration authorities and the Committee. The Migration Board has maintained throughout the proceedings in the present case that the complainant is the same person as the one who presented the application for a visa to the Swedish embassy in Algiers in 2006, and this is expressed both in its decision to reject the complainant’s asylum application and in its observations to the Migration Court after the complainant appealed the Board’s decision. The State party concurs fully with this conclusion. It argues that the complainant’s explanation as to how an application for a Swedish visa was made in her name in Algiers in 2006 is not trustworthy, as it is vague and incoherent.

4.9 The State party submits that a photo that is attached to a visa application must not be older than six months. The visa application must be filled in and signed personally by the applicant and the documents that should be attached to the application must be in the original. These facts, in the State party’s view, raise further doubts in relation to the complainant’s explanation that she did not take part in presenting the application to the Swedish embassy in Algiers. Moreover, until she was confronted with the details of the

¹ Reference is made to the report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her office in Burundi (A/HRC/12/43), para. 22.

^m *Ibid.*, para. 68.

ⁿ Reference is made to chapter 4, sections 1 and 2, of the Act and the Committee’s general comment No. 1 (1996) on the implementation of article 3 of the Convention (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1), annex IX*).

visa application, she had stated that she had never had a passport. During the interview, when she was confronted with the visa application, the complainant stated however that she was the holder of a passport and that it was not false. The State party contends that the complainant's statement that the only real name in the passport is her first name is not trustworthy, nor is her explanation that someone else, a man called John, helped her to apply for the passport or that she applied for it to help her friend. In addition to the consideration that the complainant's explanations regarding the application for a visa and her passport are not credible, one of the experts on identity within the Migration Board certified that a comparison of the complainant's photo taken when she applied for asylum and the photo attached to the application for a Swedish visa in Algiers shows that they represent the same person.

4.10 As the State party, like the Migration Board, considers it evident that the complainant is the same person who applied for a Swedish visa in Algiers, it follows that the visa application had been filled in by the complainant and, therefore, has to be considered while examining her claim for asylum. In this regard, the State party contends that the statements made by the complainant in her application for a Swedish visa and her application for protection are contradictory for the following reasons:

(a) According to the application for a Swedish visa, the complainant's parents are living together in Rohero, Bujumbura and she has two sisters and one brother. The brother is said to have been born in 1990. In the application for asylum, the complainant stated that her parents were killed in 1996. Further, according to the application for asylum, the complainant stated that her brother was born in 1975 and, therefore, would have been 31 years old when he was killed. Also, the application for asylum contains no information stating that the complainant has sisters; and

(b) Information in the application for a Swedish visa shows that the complainant was working in Niger in 2002–2003. The information also shows that she left Algeria, entered France and returned to Algeria three times between July 2003 and October 2005. During the visit to France in July 2004, the complainant renewed her passport at the Burundian embassy in Paris.

4.11 The State party argues that although the details regarding exits and entries to Algeria and France do not in themselves prove that the complainant was living in Algeria during 2003, 2004 and 2005, they show that she was at least travelling between Algeria and France during this time. Furthermore, she had not hesitated to contact the Burundian embassy in Paris. Moreover, this information, together with the details that she worked in Niger in 2002–2003, and consequently lived there, also shows that she had no problems with leaving Burundi during this time. As the complainant stated in the visa application that she was a student at a university in Algiers, listing a home address in the town, it must be assumed that she was living in Algiers at least during parts of 2006. In the light of these circumstances, the State party concludes that it is evident that the complainant had been abroad several times before arriving in Sweden in late 2006 to ask for protection, contrary to what she has stated in her asylum application.

4.12 The State party also contends that details in the complainant's statements in her asylum application are in themselves contradictory. The complainant's information that she was close enough to hear the Hutu militia asking her brother about her, at the time she claims he was killed, without being discovered by the soldiers lacks credibility. The State party also considers the complainant's information as to how she managed to run away from the house on that occasion and stay with a friend, only a short distance away, for two months without being searched for or discovered there, as lacking in credibility. It is also clear, in the State party's view, that the complainant has lied about the fact that she was the holder of a passport, as she revealed this when she was confronted with the information about the visa application.

4.13 In the light of the above and the weakness in the complainant's description of the preparations and departure from Burundi, the State party concludes that the credibility of the complainant's statements and claims regarding her asylum case before the Swedish migration authorities and before the Committee is very weak. Accordingly, the State party submits that she cannot be given "the benefit of the doubt" in the present communication. The State party further concludes that, given the low credibility of the complainant's claim for asylum, there is no information or evidence in support of her statement that she risks being subjected to ill-treatment and rape by Hutu militia in Burundi, because of her brother's alleged previous activities in the Sans Échec.

4.14 The State party further argues that, correspondingly, her statement that she was sentenced to imprisonment, notified and searched for in Burundi, is not credible. It adds that the complainant's explanation as to how she obtained the documents stating that she was notified, searched for and sentenced in Burundi is very incoherent and difficult to grasp, despite the fact that it was presented by her in writing to the Migration Court. Furthermore, the State party concurs with the conclusion that the Migration Board drew after having examined the documents of the sentence, the notification and the search warrant, that they are of questionable quality and, consequently, have a low value as evidence. As to the complainant's statement that her legal aid counsel neglected to forward the documents in question to the migration authorities, the State party submits that a statement of that kind should be substantiated and preferably be confirmed or refuted, or at least communicated to the counsel. It notes that no such information has been presented by the complainant. Given that there are several statements made by the complainant that the State party considers to be untrustworthy, that consideration applies to her general credibility. Consequently, the State party does not consider the complainant's statement regarding her counsel credible.

4.15 The State party argues that no other statements or information presented by the complainant shows that she would be at risk of being subjected to ill-treatment or rape if returned to Burundi. Her statement in the asylum application that she lacks a social network in Burundi contradicts her own statements regarding her family in the application for a Swedish visa. According to the latter, her parents, her older sister and her younger sister and brother live in Burundi. Furthermore, according to what the complainant has alleged in relation to her whereabouts in Burundi just before she left the country, it is apparent that she has a social network. The State party concludes that the circumstances invoked by the complainant do not suffice to show that the alleged risk of torture fulfils the requirements of being foreseeable, real and personal. Therefore, the complainant has not shown substantial grounds for believing that she would run a real and personal risk of being subjected to treatment contrary to article 3 of the Convention if deported to Burundi.

4.16 Finally, the State party submits that under chapter 12, section 22, of the Aliens Act, an expulsion order expires four years after the order becomes final and not subject to appeal. In the present communication, the decision on the complainant's expulsion became final and not subject to appeal on 27 July 2009, when the Migration Court of Appeal refused leave to appeal. Accordingly, the expulsion order in question will become statute-barred on 27 July 2013.

The complainant's comments on the State party's observations

5.1 On 15 December 2010, the complainant reiterated her initial statements in relation to her identity, country of origin and events that led to her departure from Burundi. As to the entanglements with the alleged passport and visa application, she submits that she fell in love with a man, whom she met in Burundi. When he asked her to give him her passport and photos, she did so. The complainant has never applied for a visa nor has she been in Algeria or France or anywhere else as claimed by the Migration Board and others. She was

not subjected to persecution, ill-treatment or punishment while she remained in Burundi after her brother's killing, because she was in hiding. She left Burundi with the help of smugglers and for this reason she has no information about the passport on which she travelled to Sweden. The only thing she cared about was leaving her country of origin and getting to a safe place.

5.2 As to the merits, the complainant submits that since she has provided a high level of details and information to substantiate her claims, the burden of proof should shift from her to the State party.^o The complainant argues that she would be imprisoned upon her return to Burundi and imprisonment would lead to her being subjected to torture within the meaning of this term, as set out in article 1 of the Convention. She reiterates that, based on the current situation in Burundi, combined with her reasons for asylum and protection as presented to the Swedish migration authorities and in the communication to the Committee, her expulsion to Burundi would constitute a violation of article 3 of the Convention.

5.3 The complainant contests the State party's assertion that it applies the same test when considering an asylum application under the Aliens Act as the Committee will apply when examining a subsequent communication under the Convention. She submits that the Swedish migration authorities, when considering an asylum application under the Act, must start out by examining whether the applicant is a refugee (under the Convention relating to the Status of Refugees (Refugee Convention)), thereafter the authorities examine whether the applicant might be in need of protection due to other circumstances or if there are grounds of exceptionally distressing circumstances and the applicant should be granted a residence permit on one of those grounds. The complainant argues, therefore, that the authorities' assessment is characterized by the refugee status determination in accordance with the Refugee Convention and not the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

5.4 The complainant submits that the Refugee Convention is both broader and narrower than article 3 of the Convention against Torture. It is broader, as a "refugee", a person with a right to non-refoulement under article 33 of that Convention, is a person who faces a "well founded fear of persecution" on particular grounds in a receiving State. "Persecution" may fall short of "torture", so the Refugee Convention applies in circumstances where one fears a lesser form of ill-treatment in a receiving State. On the other hand, the reasons why one might face torture are irrelevant for the purposes of assessment under article 3 of the Convention against Torture, whereas reasons why one might face persecution are relevant under the Refugee Convention. Furthermore, the rights under article 3 of the Convention against Torture are absolute, whereas refugee rights can be denied. In this regard, the complainant states that the assessments of the Swedish migration authorities and the State party in relation to whether or not the complainant's expulsion would violate article 3 of the Convention against Torture are most likely made on the basis of the same assessment as when determining refugee status under the Refugee Convention.

State party's further observations

6.1 By note verbale of 13 April 2011, the State party submitted further observations. It states that contrary to what is claimed by the complainant, the application to her case of chapter 4, section 2, in conjunction with chapter 5, section 1, of the Aliens Act provided the same protection against refoulement as the Convention against Torture. To be entitled to protection against refoulement, the reasons why the alien would risk being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment were

^o Reference is made to communication No. 149/1999, *A.S. v. Sweden*, Views adopted on 24 November 2000, para. 8.6.

not relevant and it was not necessary that the alien be considered a refugee within the meaning of the Refugee Convention. Furthermore, chapter 12, section 1, of the Act provides an absolute prohibition against enforcement of a decision on expulsion where there is a fair reason to assume that enforcement of the expulsion order would put the alien in danger of being sentenced to death or subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment in the intended country of return, or where there is fair reason to assume that the alien is not protected from being sent on to a third country in which he or she would be in such danger. The State party also submits that chapter 12, section 1, of the Act was adopted to ensure compliance with article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides a stronger protection against refoulement than article 3 of the Convention against Torture. The State party adds that it is evident from the initial observations of 2 September 2010 that its consideration of the present communication is based on article 3 of the Convention against Torture.

6.2 As to the burden of proof, the State party reiterates its earlier argument that it is for the complainant to show that there are substantial grounds for believing that she faces a foreseeable, real and personal risk of being tortured in Burundi. It is only after evidence has been presented which shows that there is such a risk that the burden of proof shifts to the State party. It contests that the complainant has managed to present evidence sufficient to shift the burden of proof and submits that no actual judgement has been submitted by the complainant showing that she was sentenced to 20 years' imprisonment, only a document titled "proof of service of a judgment". Further, the State party argues that the documents submitted in support of her claims are of very limited value as evidence, since they are very simple documents which are easy to produce. Additionally, the "arrest warrant" and the "notice" both lack any kind of case number or other identification.

6.3 The State party further states that the documents submitted by the complainant are claimed to be in the original. It notes in this regard that the documents consist of printed forms which have all been filled out by hand with blue ink pen and have blue stamps. The State party finds it peculiar that the complainant would have received the originals of the forms and not — as is customary — certified copies. Furthermore, the story presented by the complainant as to how she obtained the documents is highly improbable and fails to explain why there is no copy of the actual judgement if the person helping her was asked to send copies of all the documents in the court file. The State party concludes that the documents cannot be considered to substantiate the complainant's claims.

6.4 The State party strongly contests the complainant's assertion that she has provided a high level of detail and information to substantiate her claims and argues that, on the contrary, she has submitted a story which lacks detail and is improbable. It has been established that the complainant has knowingly submitted untruthful information to the migration authorities, which affects her general credibility. Furthermore, the information submitted by the complainant in the asylum application is contradictory, which further diminishes her credibility and the reliability of the account submitted by her. The State party maintains that the circumstances summarized in paragraphs 2.4–2.8 and 4.8–4.10 strongly speak in favour of the conclusion that the complainant submitted the visa application in Algiers herself. Moreover, the facts submitted in the said application lead to the conclusion that the complainant's story regarding her brother's involvement in Sans Échec and his subsequent killing cannot be true. In the light of the lack of reliable written evidence in support of the claims, as well as the strong reasons for questioning the complainant's credibility and the veracity of her claims, the State party maintains that the complainant has not fulfilled her burden of proof to show that she faces a foreseeable, real and personal risk of being tortured in Burundi. Consequently, the burden of proof has not shifted to the State party. It adds that there is no basis for maintaining the interim measure

requested under rule 114 of the Committee's rules of procedure, since the enforcement of the expulsion order would not cause the complainant any irreparable damage.

The complainant's comments on the State party's further observations

7. On 17 July 2011, the complainant reiterated her initial claims that there are substantial grounds for believing that she will be tortured in Burundi if she has to return. She submits that these claims have been corroborated by, *inter alia*, documents and that she has explained how she managed to obtain them. The complainant adds that she cannot give a better explanation as to why there is a visa application in "her" name and why her passport has been used by someone else, since she does not know what happened. She is "just telling the truth".

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b) of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the instant case, the State party has recognized that the complainant has exhausted all available domestic remedies.

8.3 The State party submits that the communication is inadmissible as manifestly unfounded. The Committee considers, however, that the arguments put forward by the complainant raise substantive issues, which should be dealt with on the merits. Accordingly, the Committee finds no further obstacles to the admissibility and declares the communication admissible. Since both the State party and the complainant have provided observations on the merits of the communication, the Committee proceeds immediately with the consideration of the merits.

Consideration of the merits

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

9.2 The issue before the Committee is whether the expulsion of the complainant to Burundi would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person 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 notes that the issue of whether a State party has an obligation to refrain from expelling a person who might risk torture or ill-treatment inflicted by a non-governmental entity falls within the scope of article 3 of the Convention in cases in which there is consent or acquiescence of the State's authorities in the country of return to such conduct.^p However, while the complainant alleges that she initially fled Burundi because of

^p In this respect, the Committee recalls its jurisprudence, as reflected in its general comment No. 2 (2007) on the implementation of article 2 of the Convention by States parties (*Official Documents of*

her fear of harm by Hutu militias, she has not provided any evidence to support a claim that she would face a risk of harm by such militias if returned at the present time.

9.3 With regard to the complainant's claims that she risks imprisonment in Burundi and that imprisonment is inevitably followed by ill-treatment, torture and rape, the Committee must evaluate whether there are substantial grounds for believing that she would be personally in danger of being subjected to torture upon return to her country of origin. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows 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. 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 specific circumstances.

9.4 The Committee recalls its general comment No. 1 on the implementation of article 3, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being "highly probable",⁹ the Committee recalls that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a "foreseeable, real and personal" risk.[†] The Committee further recalls that in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,[§] while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

9.5 In the present case, the Committee notes that the State party has acknowledged and taken into account the fact that the human rights record of Burundi remained poor[‡] and that the general human rights situation in Burundi was still very unstable after the long civil war between the Tutsi-dominated Government and the Hutu-dominated rebel groups. However, while not underestimating the concerns that may legitimately be expressed with respect to the current human rights situation in Burundi, the State party's migration authorities and the courts established that the prevailing circumstances in that country did not in themselves suffice to establish that the complainant's forced return to Burundi would entail a violation of article 3 of the Convention.

9.6 The Committee also notes that the State party has drawn attention to numerous inconsistencies and serious contradictions in the complainant's account of the facts and

the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44), annex VI, para. 18), that States parties bear responsibility for acts of torture or ill-treatment committed by private actors on the basis of having consented or acquiesced to such torture where the authorities know or have reasonable grounds to believe that such acts are being committed and fail to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators.

⁹ General comment No. 1, para. 6.

[†] See, for example, communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3.

[§] See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

[‡] Conclusions and recommendations of the Committee against Torture: Burundi (CAT/C/BDI/CO/1).

submissions which call into question her general credibility and the veracity of her claims. The Committee also takes note of the information furnished by the complainant on these points.

9.7 In relation to the complainant's assertion that she was sentenced to 20 years' imprisonment for aiding murder and theft, acts she claims she did not commit, the Committee notes the State party's argument that no actual judgement has been submitted by the complainant, only a document titled "proof of service of a judgment". Further, the State party stated that the documents submitted in support of her claims were of very limited value as evidence, since they were very simple documents which were easy to produce and lacked any kind of case number or other identification. Furthermore, the State party raised questions as to why the complainant would have received the originals of the documents in the court file and not — as is customary — certified copies. The complainant has not refuted these observations, nor has she submitted any evidence to the contrary or additional arguments, even though she was given the opportunity to do so.

9.8 In the light of the foregoing, the Committee finds that the complainant has not established that in case of her expulsion to the country of origin she would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

10. Accordingly, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's removal to Burundi by the State party would not constitute a breach of article 3 of the Convention.

Communication No. 414/2010: N.T.W. v. Switzerland

Submitted by: N.T.W. (represented by counsel, Tarig Hassan)

Alleged victim: The complainant

State party: Switzerland

Date of complaint: 18 March 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 16 May 2012,

Having concluded its consideration of complaint No. 414/2010, submitted to the Committee against Torture by N.T.W. 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 is N.T.W., a national of Ethiopia, born in 1974. The complainant is an asylum seeker, whose application for asylum was rejected. He claims that his forced return to Ethiopia would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Tarig Hassan.

1.2 On 24 March 2010, under former rule 108, paragraph 1, of the Committee's rules of procedure,^a the Committee requested the State party not to expel the complainant to Ethiopia while his complaint was under consideration by the Committee.

The facts as presented by the complainant

2.1 The complainant is an Ethiopian citizen of Oromo ethnicity who grew up in Addis Ababa and worked as a building constructor after studying architecture. During the electoral campaign in 2005, he became interested in politics and joined the supporters of the Coalition for Unity and Democracy party (CUD; abroad often referred to as CUDP or KINIJJIT). He actively campaigned for the candidates of that party and was placed on its formal list of supporters. According to the complainant, after the elections resulted in a KINIJJIT success, the governing party began a crackdown on the opposition party, and several members of the opposition were killed. The complainant was warned by a friend, who had connections with the governing party, that he was a target and that the police were looking for him. He left Ethiopia for Sudan in November 2005 and travelled from Khartoum via Germany to Switzerland, where he arrived in June 2006 and applied for asylum.

^a Rule 114, paragraph 1, of the current rules of procedure (CAT/C/3/Rev.5).

2.2 The complainant submits that he continues to be politically active in Switzerland, that he is one of the founding members of KINIJJIT Switzerland. He states that his political interest is genuine and has participated in various demonstrations against the regime in Addis Ababa since 2006. He writes Internet commentaries on recent political developments and expresses his political opinions in online forums, including a well-known forum for Ethiopian politics.

2.3 The complainant submitted his first asylum request, based on his activities in Ethiopia, on 23 June 2006. The Swiss asylum authorities rejected his application on 18 August 2006 and on appeal on 18 July 2008. On 11 March 2009, the complainant lodged a second asylum request. The request was rejected by the Federal Office for Migration on 30 April 2009 and by the Federal Administrative Court on 10 February 2010. Following the latter judgement, the complainant was requested to leave Switzerland by 15 March 2010. The complainant submits that if he failed to leave voluntarily, he would be forcibly returned to Ethiopia.

2.4 The complainant submits that the Court found his position within the KINIJJIT movement and the nature of his involvement not sufficiently prominent to cause a well-founded fear of persecution, although it acknowledged that the complainant was a founding member of KINIJJIT Switzerland and that he participated in various demonstrations and political activities. The Court also stated that it cannot be presumed that his involvement was of such nature that the Government of Ethiopia would perceive him as a threat to the regime. It concluded that he faced no real risk of torture or other inhumane and degrading treatment were he to return to Ethiopia.

2.5 The complainant submits that his activities relating to the election campaign in 2005 and the fact that he openly expressed his political opinion in discussions with governing party officials, as well as the fact that he was an educated professional resulted in him being noticed and targeted by the Government in Ethiopia. He maintains that the arrests made by the Government of Ethiopia are not limited to high-level politicians and that the Government is closely monitoring opposition movements,^b both within Ethiopia and in exile. He submits that, following recently adopted anti-terrorism legislation, the Government's crackdown on political dissidents had intensified. A provision of the above-mentioned legislation provides for 20 years of imprisonment for "whosoever writes, edits, prints, publishes, publicizes, disseminates, shows, makes to be heard any promotional statement encouraging, supporting or advancing terrorist acts",^c and one analysis states that "the legislation conflated political opposition with terrorism".^d The complainant also refers to an analysis by Human Rights Watch in relation to this law, which states that "government opponents and ordinary citizens alike face repression that discourages and punishes free expression and political activity".^e

2.6 The complainant claims that after his arrival in Switzerland he intensified his political activism and that he had presented numerous pictures testifying to his involvement in demonstrations and political happenings, all published on the Internet. He claims that through his continued and resolute activism he has become a highly visible figure within the Ethiopian exile movement. He stresses that both his long absence from Ethiopia and his political views would put him at a real risk of being persecuted in case of return to his

^b The complainant refers to the United States Department of State 2009 Country Reports on Human Rights Practices: Ethiopia.

^c The complainant refers to a report of the Committee to Protect Journalists, "Attacks on the press 2009: Ethiopia".

^d Ibid.

^e The complainant refers to Human Rights Watch, *World Report 2009* (New York, 2009), p. 71.

home country. The complainant refers to United States Department of State reports that state that Ethiopian police use torture methods against political opponents and critics. He also refers to reports of the Committee to Protect Journalists^f and a report by Human Rights Watch which states that detainees and convicted prisoners alike face torture and other ill-treatment, and he mentions a statement by the same organization that refers to the use of torture by Ethiopian police and military officials in both official and secret detention facilities across Ethiopia. He further refers to the Freedom House report “Freedom of the press 2009: Ethiopia” of May 2009, which states that the Government of Ethiopia monitored and blocked opposition websites and blogs, including news websites run by Ethiopians living abroad.

The complaint

3. The complainant claims that his forcible return to Ethiopia would constitute a violation by Switzerland of his rights under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, since he risks being subjected to torture or other inhumane and degrading treatment by the Ethiopian authorities if returned.

State party’s observations on admissibility and on the merits of the complaint

4.1 On 30 March 2010, the State party informed the Committee that the complainant will remain in Switzerland while his case is under consideration by the Committee or until the interim measures are lifted.

4.2 The State party submits that the complainant filed an initial application for asylum in Switzerland on 23 June 2006. He claimed that he feared being harassed as a supporter of Coalition for Unity and Democracy after the 2005 elections. This request was denied by the Federal Office for Migration on 18 August 2006. The appeal against that decision was dismissed by the Federal Administrative Court on 18 July 2008. On 10 March 2009, the complainant filed a second asylum application, claiming that his political activities in Switzerland were of such nature that the Ethiopian authorities would likely have a strong interest in arresting him. On 30 April 2009, the Federal Office for Migration rejected the application. In his appeal to the Federal Administrative Court, the complainant explicitly recognized that the decision of 18 July 2008 had entered into force and motivated his application only with political activities in which he participated in Switzerland. By its decision of 10 February 2010, the Federal Administrative Court rejected the appeal.

4.3 The State party submits that the complainant argues before the Committee that he would run a personal, real and serious risk to be subjected to torture if returned to his country, because of his political activities in Switzerland. He does not present any new elements that would call into question the 10 February 2010 decision of the Federal Administrative Court, which was made following a detailed examination of the case, but rather disputes the assessment of the facts and evidence by the Court. The State party submits that it will demonstrate the validity of the Court’s decision, in the light of article 3 of the Convention, the jurisprudence of the Committee and its general comments, and maintains that the deportation of the complainant to Ethiopia would not constitute a violation of the Convention by Switzerland.

4.4 The State party submits that according to article 3 of the Convention, the States parties are prohibited from expelling, returning or extraditing a person to another State

^f The complainant refers to the report of the Committee to Protect Journalists, “Attacks on the press 2009: Ethiopia”.

where there exist substantial grounds for believing that he or she would be subjected to torture. To determine the existence of such grounds, the competent authorities must take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.^g The existence of gross, flagrant or mass violations of human rights is not in itself a sufficient basis for concluding that an individual might be subjected to torture upon his return to his country, and additional grounds must exist for the risk of torture to qualify under the meaning of article 3 as “foreseeable, real and personal”.

4.5 Regarding the general human rights situation in Ethiopia, the State party submits that the elections in Ethiopia in May 2005 and August 2005 have strengthened the representation of opposition parties in the Parliament. It recognizes that, although the Ethiopian Constitution explicitly recognizes human rights, there are many instances of arbitrary arrests and detentions, particularly of members of opposition parties. In addition, there is a lack of an independent judiciary. However, being a member or supporter of an opposition political party does not, in principle, lead to a risk of persecution. It is different for persons who hold a prominent position in an opposition political party.^h In the light of the above information, the competent Swiss asylum authorities have adopted differentiated practices to determine the risk of persecution. Individuals who are suspected by the Ethiopian authorities to be members of the Oromo Liberation Front or the Ogaden National Liberation Front are considered at risk of persecution. With regard to persons belonging to other opposition groups, such as CUD, the risk of persecution is assessed on case-by-case basis, in accordance with the above criteria. With regard to monitoring political activities in exile, the State party submits that according to the information available to it, the Ethiopian diplomatic or consular missions lack the personnel and structural resources to systematically monitor the political activities of opposition members in Switzerland. However, active and/or important members of the opposition, as well as activists of organizations who are campaigning for the use of violence, run the risk of being identified and registered and, therefore, of being persecuted if returned.

4.6 The State party notes that the complainant does not claim to have suffered torture, or to have been arrested or detained by Ethiopian authorities.

4.7 As to the political activities in which the complainant engaged in his home country, the State party submits that the complainant appears to have been interested in politics, but that the work he had actually done in the context of the May 2005 elections was not of a nature to make him a person of interest for the Ethiopian regime. The State party reiterates the Federal Administrative Court argumentation that the complainant has not presented in a convincing manner that he would have been persecuted by the authorities after those elections. The Court had based its conclusion on the contradictions between the statements of the complainant of 18 July 2006 and of 26 July 2006ⁱ and on the fact that it was not clear from the case file whether the complainant had participated in the 2005 demonstrations. In

^g The State party refers to the Committee’s general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22 (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1), annex IX*), paras. 6 and 8, and the Committee’s jurisprudence in communications No. 94/1997, *K.N. v. Switzerland*, Views adopted on 19 May 1998, para. 10.2, and No. 100/1997, *J.U.A. v. Switzerland*, Views adopted on 10 November 1998, paras. 6.3 and 6.5.

^h The State party refers to the UK Border and Immigration Agency’s Operational Guidance Note on Ethiopia of March 2009, para. 3.7.9.

ⁱ It appears from the annexes to the State party’s submission that the complainant gave different versions of his political involvement as well as of why he was being sought and by whom (members of a political party or the police).

view of the above the domestic asylum authorities had concluded that the complainant could not present credible evidence that he was wanted by the authorities after the 2005 elections due to his political activities or that the Ethiopian authorities would have taken any action against him because of his activities. The State party maintains that this conclusion was emphasized by the fact that the complainant could not explain what identity he used to fly to Europe (from Khartoum, Sudan to Frankfurt, Germany, then to Milan, Italy).

4.8 The State party notes that the complainant claims before the Committee to be a founding member of KINIJIIT Switzerland. However, before the domestic authorities, he had stated that he became a member of this organization, which was founded before his arrival in Switzerland, in August 2006. According to the complainant, he was an active member of KINIJIIT Switzerland, he participated in particular in some demonstrations and in meetings of KINIJIIT Switzerland and contributed to the cyberethiopia.com forum between December 2008 and February 2009. The complainant had not claimed to have engaged in activities going beyond those or to have occupied a leadership position in the organization. The State party notes that the complainant's claims were the subject of extensive analysis by the Federal Administrative Court and that the latter noted in particular his extremely limited political involvement in Switzerland. The State party also submits that, in view of their limited resources, the Ethiopian authorities are focusing all their attention on individuals whose activities go beyond "the usual behaviour", or who exercise a particular function or activity that could pose a threat to the Ethiopian regime. However, the complainant presented no political profile when he arrived in Switzerland and the State party deems it reasonable to exclude that he has subsequently developed such a profile. The State party maintains that the documents produced by the complainant do not show activity in Switzerland able to attract the attention of the Ethiopian authorities. The fact that the complainant is identified in photographs of participants in certain demonstrations and has published texts on the Internet is not sufficient to demonstrate a risk of persecution if returned. The State party maintains that numerous political demonstrations take place in Switzerland, that photographs or video recordings showing sometimes hundreds of people are made publicly available by the relevant media and that it is unlikely that the Ethiopian authorities are able to identify each person, or that they even have knowledge of the affiliation of the complainant with the above organization.

4.9 The State party submits that there is no evidence that the Ethiopian authorities have opened criminal proceedings against the complainant or that they have adopted other measures towards him. Accordingly, the State party's immigration authorities did not qualify as convincing the claim that the complainant has a function within the Ethiopian diaspora in Switzerland able to attract the attention of the Ethiopian authorities. In other words, the complainant has not established that if returned to Ethiopia he would run a risk of ill-treatment because of his political activities in Switzerland.

4.10 The State party submits that, in the light of the above, there is no indication that there are substantial grounds for fearing that the complainant's return to Ethiopia would expose him to a foreseeable, real and personal risk of torture, and invites the Committee against Torture to find that the return of the complainant to Ethiopia would not constitute a violation of the international commitments of Switzerland under article 3 of the Convention.

Complainant's comments on the State party's observations

5.1 On 30 August 2010, the complainant submitted that the Swiss immigration authorities have recognized themselves that he had a thorough political interest and that it was likely that he had engaged in critical political discussions in 2005. He reiterates that he was actively campaigning for KINIJIIT during the electoral campaign in 2005 and that he

was a well-informed advocate for the opposition movement. He maintains that he combines several qualities that would make him a potentially destabilizing factor to the Ethiopian regime and that accordingly it is very likely that the latter would take his dissident activism in exile seriously. He further submits that not only has he steadily continued his political activism in KINIJJIT by participating in demonstrations and writing in Internet forums, but he also serves as the cantonal representative for KINIJJIT for the canton of Zurich.

5.2 The complainant maintains that the Ethiopian authorities have at their disposal “very modern means of monitoring the activities of the opposition in exile”. In case of return, Ethiopian members of the opposition movement are screened and risk imprisonment, because of their activities in exile. The complainant refers to the case of Judge Birtukan Mideksa, a former chairperson of the Unity for Democracy and Justice Party who, on an unspecified date, was arrested upon return to Ethiopia after travelling in Europe and making comments critical of the public regime. The author submits that he has published several critical comments on dissident Ethiopian websites and, considering the “much more advanced technical monitoring means” at the disposition of the Ethiopian authorities, it is very likely that he has been identified as an active member of the opposition in exile, especially given his position as cantonal representative of KINIJJIT in Zurich.

5.3 The complainant further submits that the regime in his home country is extremely hostile to criticism and opposition in general. With the recent anti-terrorist legislation, repression of political speech and peaceful protest has been legalized. Detention of persons suspected of maintaining links with the opposition parties is common. The complainant maintains that upon his return to Ethiopia, he will be apprehended and interrogated, that prison conditions are among the worst in the world and that torture is employed frequently. The complainant further makes reference to a case in which the Swiss immigration authorities had granted refugee status to an Ethiopian national who had been working for the Ethiopian Human Rights Council and was then active as a cantonal representative of the CUPD. He claims that his case is similar and therefore maintains that the State party’s allegations that it is unlikely that the complainant had been registered by the Ethiopian authorities provide no guarantee “against the likely mistreatment the complainant will suffer”. He reiterates that if Switzerland forcibly returns him to Ethiopia, it will violate its obligation under article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that in the instant case the State party has recognized that the complainant has exhausted all available domestic remedies. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

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

7.2 The issue before the Committee is whether the removal of the complainant to Ethiopia would violate the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person 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 must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Ethiopia. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

7.3 The Committee recalls its general comment No. 1, 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" (para. 6), but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.^j The Committee recalls that under the terms of its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

7.4 The Committee has noted the complainant's submissions about his involvement in the electoral campaign in 2005 and in the activities of KINIJIT Switzerland. The Committee also notes the complainant's submission that in 2005 he was warned by a friend, who had connections with the governing party, that the police were looking for him. The Committee, however, observes that the complainant has not submitted any evidence that the police or other authorities in Ethiopia had been looking for him since. The Committee also notes that the complainant has never been arrested or ill-treated by the authorities during or after the 2005 election, nor does he claim that any charges have been brought against him under the anti-terrorist or any other domestic law. The Committee further notes the complainant's submission that the Ethiopian authorities use sophisticated technological means to monitor Ethiopian dissidents abroad, but observes that he has not elaborated on this claim or presented any evidence to support it. In the Committee's view, the complainant has failed to adduce sufficient evidence about the conduct of any political activity of such significance that would attract the interest of the Ethiopian authorities, nor has he submitted any other tangible evidence to demonstrate that the authorities in his home country are looking for him or that he is at a personal risk of being tortured if returned to Ethiopia.

7.5 The Committee finds accordingly that the information submitted by the complainant, including the low-level nature of his political activities in Ethiopia and his subsequent activities in Switzerland, is insufficient to establish his claim that he would personally be exposed to a substantial risk of being subjected to torture if returned to Ethiopia. The Committee is concerned at the many reports of human rights violations, including the use of torture in Ethiopia,^k but recalls that for the purposes of article 3 of the Convention the individual concerned must face a foreseeable, real and personal risk of

^j See, inter alia, communications No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005, and No. 226/2003, *T.A. v. Sweden*, decision adopted on 6 May 2005.

^k The Committee notes that Ethiopia is also a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and recalls its 2011 concluding observations (CAT/C/ETH/CO/1), paras. 10–14.

being tortured in the country to which he or she is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

8. In the light of the above, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the complainant to Ethiopia would not constitute a breach of article 3 of the Convention.

Communication No. 424/2010: M.Z.A. v. Sweden

Submitted by: M.Z.A. (represented by counsel, Emma Persson)
Alleged victim: The complainant
State party: Sweden
Date of complaint: 3 June 2010

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

Meeting on 22 May 2012,

Having concluded its consideration of complaint No. 424/2010, submitted to the Committee against Torture by M.Z.A. 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 and the State party,

Adopts the following:

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

1.1 The complainant is M.Z.A., born in 1957. He claims that his deportation to Azerbaijan would constitute a breach by Sweden of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel, Emma Persson.

1.2 On 14 June 2010, the State party was requested, pursuant to rule 114, paragraph 1 (formerly rule 108, para. 1), of the Committee's rules of procedure, not to expel the complainant while his complaint is under consideration by the Committee.

The facts as presented by the complainant

2.1 The complainant studied to become a teacher and graduated in 1979 at the "Teacher's Institute" in Baku. While living in Azerbaijan, the complainant claims he and his family had economic problems because he struggled to get a job due to his political beliefs and membership in the Azerbaijan National Party (AMIP). The complainant claims that he was an active member responsible for the party programme and recruiting new members. He contends that as a result of his commitment to the party he was monitored by the authorities.

2.2 The complainant submits that he participated in a number of political demonstrations from 1998 until 2003. Some of the demonstrations were in connection with the holding of elections and were held on the so-called "Freedom Square" in the central part of Baku. During one of these demonstrations, in response to the elections of 15 October 2003, authorities attempted to repress the protesters and the complainant claims that he managed to escape and not get arrested only because his father-in-law worked as a prosecutor in Baku. He then went into hiding at his friends' and acquaintances' homes. He claims that his wife told him that the police had searched for him in January 2004 and that they had threatened to arrest her if they did not locate him. These circumstances and his fear of persecution and other abuses caused him to leave Azerbaijan. The complainant

submits that he left Azerbaijan with his wife and children on 8 January 2004 and travelled to Dagestan. The complainant submits that his wife and his children stayed in Dagestan.^a

2.3 The complainant travelled to Moscow, where he has a brother, and then he continued to Poland, where he got help from smugglers to continue to Hamburg. From Hamburg he got help to buy a train ticket to Copenhagen and then to Stockholm. The complainant applied for asylum on 19 January 2004, three days after he entered Sweden.

2.4 On 13 May 2004 the Migration Board rejected the complainant's application for asylum. The refusal was based on the conclusion that the complainant had not engaged in much political activity and did not have a high enough position within the opposition party to be of particular interest to the Azerbaijani authorities. The Migration Board concluded that the complainant did not persuasively show how his return to Azerbaijan would endanger his life. There were, according to the Board, no grounds to allow the complainant to settle in Sweden for humanitarian reasons. The complainant appealed the decision. The Aliens Appeals Board rejected the appeal on 18 April 2004.

2.5 On 22 May 2006 the complainant submitted a new letter to the Migration Board stating again that he could not return to Azerbaijan and submitting that his fears about returning to Azerbaijan had increased since the decisions of the Migration Board and Aliens Appeals Board in 2004. The complainant also added that he had been in Sweden for two years and five months and that he had adapted well to Sweden. On 13 June 2006 the Migration Board rejected the complainant's application and refused him a residence permit. The complainant wrote yet another letter to the Migration Board, repeating his claim that he could not return to Azerbaijan since there he faced persecution and other forms of abuse, and even death. On 27 August 2006, the Migration Board rejected his request and referred to its earlier findings.

2.6 On 20 April 2009, four years after the Aliens Appeals Boards decision became final, the complainant applied for asylum again. During these new proceedings the complainant stated that in addition to his previously stated grounds for asylum he also had become active in politics in Sweden. To prove this, the complainant submitted his membership card in the Azerbaijani opposition party Musavat. The complainant became a member on 25 June 2007 and became president of a local branch in Stockholm. On 20 April 2009, after assessing the new circumstances described by the complainant, the Migration Board again rejected his request, finding insufficient evidence of a threat to the complainant that would call for asylum or protection.

2.7 On 7 January 2010 the complainant appealed the decision to the Migration Court. On 6 April 2010 the Court rejected the complainant's appeal. The Court agreed with the Migration Board and noted that the general situation in Azerbaijan does not constitute grounds for asylum or protection. The Court highlighted that the complainant's reasons for requesting asylum had in part been previously examined in connection with his first asylum application and that the new circumstances he presented were insufficient to grant him asylum in Sweden as a refugee. The Court decided to make the complainant subject to exclusion orders and as a result he was taken into custody on 18 January 2010. The complainant sought leave to appeal to the Migration Court of Appeal. On 29 April 2010 the Migration Court of Appeal denied leave to appeal.

^a The complainant does not specify the whereabouts of his family now; nor does he explain how and when he travelled from Dagestan to Moscow. He states that he could not stay in Dagestan since there is an extradition treaty with Azerbaijan.

The complaint

3. The complainant claims that his forcible deportation to Azerbaijan by Sweden would amount to a violation of article 3 of the Convention. He will be exposed to a real risk of arrest, detention and torture in case of return.

State party's observations on admissibility and merits

4.1 On 30 December 2010, the State party provided its observations on the admissibility and merits. It presented detailed information on the pertinent Swedish asylum legislation and further submitted the following information concerning the facts of the complainant's case, based primarily on the case files of the Swedish Migration Board and the migration courts. The complainant's application for asylum has been examined in several sets of proceedings, including under the 1989 Aliens Act, the temporary amendments to the 1989 Aliens Act, and the 2005 Aliens Act, as described in detail below.

4.2 The State party submits that M.Z.A. was interviewed on 21 January 2004 by the Migration Board. M.Z.A. stated that he had no identity documents because during his journey to Sweden, he lost his bag which contained his passport. M.Z.A. did have a birth certificate and a teacher's diploma. He claimed to be a member of the AMIP party. As a member of the party, M.Z.A. participated in demonstrations and meetings. He could not find employment due to his membership in AMIP. He had recently purchased a shop for US\$ 16,000, but did not get the shop, and did not get his money back. M.Z.A. and his family concluded he should travel to Europe, in order to "find a solution there". M.Z.A. decided to do just that, "in order to take his responsibility as a father".

4.3 The State party claims that on 2 April 2004 M.Z.A. submitted a statement through his legal aid counsel to the Migration Board. In that statement, M.Z.A. claimed that he left Azerbaijan because of his involvement with AMIP and his position as a party chairman in the area where he resided. M.Z.A. claimed to have participated in a number of demonstrations, including a large demonstration on 15 and 16 October 2003. M.Z.A. claimed that thanks to his mother-in-law, who worked as a prosecutor and had some contacts with the police, he was taken away from the demonstration and avoided being battered and arrested. After this, M.Z.A. went into hiding. In January 2004, he learned from his wife and his mother-in-law that he was wanted by the police. M.Z.A. also claimed that the Azerbaijani mafia was involved in his case and supported the police's search efforts. M.Z.A. submitted a copy of his identity card and a membership card of the opposition party.

4.4 The State party submits that on 13 May 2004, the Migration Board rejected M.Z.A.'s application for the residence and work permit. The Migration Board rejected the complainant's application because, inter alia, he had not referred to any persecution before the October 2003 demonstration. The Board also decided that it was not likely that M.Z.A. would be of any interest to the police in Azerbaijan due to his insignificant political involvement.

4.5 The State party submits that on 23 May 2004, the complainant appealed the Migration Board's decision to the Aliens Appeals Board. The complainant added to his previous claims that it was actually his father-in-law who worked as a prosecutor, and not his mother-in-law, as submitted previously. M.Z.A. also claimed that the Migration Board underestimated his involvement in the opposition party. M.Z.A. said that he was convinced that if he was sent back to Azerbaijan, he would be arrested and subjected to serious harassment and assaults. On 18 April 2005, the Aliens Appeals Board rejected M.Z.A.'s appeal and, instead, agreed with the earlier findings of the Migration Board.

4.6 The State party contends that M.Z.A. and his wife and daughter submitted another application for a residence permit to the Aliens Appeals Board. On 23 April 2005, the

Aliens Appeals Board rejected the application, stating that no new circumstances had been invoked by the complainant. M.Z.A. further submitted a number of applications for a residence permit, which were all rejected. The last decision was issued on 29 April 2010 by the Migration Court of Appeal, which triggered an order to expel M.Z.A. to Azerbaijan.

4.7 The State party acknowledges that the complainant has exhausted all available domestic remedies, but argues that the complaint is inadmissible as it is manifestly ill-founded. If the Committee considers the complaint admissible, the State party denies that it would violate the Convention by deporting the complainant back to Azerbaijan.

4.8 The State party refers to the Committee's jurisprudence that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be at risk of being subjected to torture upon his return to that country. The State party argues that additional grounds must exist to show that the individual would be personally at risk.^b Therefore, the State party submits, the Committee should consider both the general situation with human rights in Azerbaijan and the personal risk of the complainant being subjected to torture upon his return.

4.9 The State party further submits that Azerbaijan has signed all important United Nations conventions, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since 2006 Azerbaijan has been a member of the Human Rights Council. The State party refers to several reports,^c and claims that they all arrive at the same conclusion: that the mere membership or other involvement in an opposition party in Azerbaijan does not necessarily mean that a person will be subjected to torture or ill-treatment.

4.10 The State party also argues that the individual concerned must face a foreseeable, real and personal risk of being tortured if returned to the country of his origin.^d The State party also submits that according to general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22,^e it is up to the complainant to present an arguable case, and the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, although it does not have to meet the test of being highly probable.

4.11 The State party submits that great weight must be attached to the decisions of the Swedish migration authorities. The State party submits that the complainant has presented certain contradictory statements. Inter alia, the complainant first submitted that it was his mother-in-law who worked as a prosecutor, only to claim later that it was his father-in-law who was a prosecutor. Additionally, the complainant provided different reasons for leaving Azerbaijan. First, he stated that he was not able to obtain employment due to his political activities, and that he did not want his brothers to support him. After two months he

^b The State party refers to communications No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3; and No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

^c Swedish Ministry for Foreign Affairs, "2007 country report on human rights: Azerbaijan"; United States Department of State, "2009 human rights report: Azerbaijan"; Human Rights Watch, *World Report 2010* (New York, 2010); "Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Azerbaijan 1–5 March 2010" (29 June 2010).

^d The State party refers to communication No. 103/1998, *S.M.R. and M.M.R. v. Sweden*, Views adopted on 5 May 1999, para. 9.7.

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

changed his story, and claimed that he was forced to leave Azerbaijan because he was sought by the police.

4.12 The State party submits that the complainant has not submitted any evidence that he had been wanted for or accused of any crimes in Azerbaijan. In addition, M.Z.A. has not claimed to have been arrested or interrogated while in Azerbaijan. The complainant has provided very vague information concerning the alleged threats against him. The State party submits that there is no evidence or any other reason to believe that the complainant would be subjected to torture if returned to Azerbaijan.

Complainant's comments on the State party's observations

5.1 On 18 March 2011, the complainant commented on the State party's submission of 30 December 2010. He reiterates his position that it was his father-in-law who helped him to avoid being arrested. Because of this, the complainant had to escape from Azerbaijan. This decision was made in consultation with his father-in-law, who, according to the complainant, confirmed that he was wanted by the police.

5.2 The complainant further reiterates that he was politically active as a member of the AMIP party in Azerbaijan, and became active with the Musavat party while in Sweden. He submits that his political beliefs are well known to the authorities in Azerbaijan. The complainant claims he has submitted extensive written evidence to prove his political beliefs and activities.

5.3 The complainant further argues that once he has provided a certain level of detail and information, the burden of proof then shifts to the State party.^f In order to further verify his claims, the complainant submits a certificate from the Popular Front Party of Azerbaijan. The certificate provides that the complainant has written more than 150 comments in the *Azadliq* newspaper and appeared in several online videos. The complainant submits that despite some improvements with the human rights situation in Azerbaijan, there still exists a pattern of gross, flagrant and mass violations.

5.4 The complainant claims that he has provided sufficient information and details about his need for asylum and protection in Sweden or elsewhere outside of Azerbaijan. He further argues that his story is confirmed by the written evidence that he has presented. The complainant reiterates that if he is returned to Azerbaijan, he will be arrested for his political beliefs, and tortured.

State party's further observations

6.1 By note verbale of 7 November 2011, the State party submitted its further observations, stating that while the situation in Azerbaijan as regards freedom of expression, freedom of press and freedom of assembly remains problematic, it does not change the assessment of the complainant's need for protection. The State party disputes that the complainant provided sufficient information for the burden to shift to the State party.

6.2 The State party also submits that the authenticity of the certificate from the Popular Front Party is questionable. The certificate states that the complainant was subjected to numerous persecutions, yet the complainant has never himself made such claims. The State party reiterates its position that the expulsion of the complainant would not be in violation of article 3 of the Convention.

^f The complainant refers to communication No. 149/1999, *A.S. v. Sweden*, Views adopted on 24 November 2000.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

7.2 The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

7.3 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the complainant has exhausted all available domestic remedies. The Committee notes the State party's acknowledgment that domestic remedies have been exhausted and thus finds that the complainant has complied with article 22, paragraph 5 (b).

7.4 The State party submits that the complaint is "manifestly ill-founded" and should not be examined on its merits. The Committee is of the opinion that the arguments before it raise substantive issues which should be dealt with on the merits and not on admissibility considerations alone.

7.5 Accordingly, the Committee finds the communication admissible and proceeds to its consideration on the merits.

Consideration of the merits

8.1 The issue before the Committee is whether the complainant's removal to Azerbaijan would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

8.2 In assessing the risk of torture, the Committee takes into account all relevant considerations, including the existence in the relevant State of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such determination is to establish whether the individual concerned would be personally at risk in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

8.3 The aim of the present exercise is to determine whether the complainant would be personally at risk of being subjected to torture in Azerbaijan after his return.^g The Committee recalls its general comment No. 1 on article 3, which states that the Committee is obliged to assess whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable, it must be foreseeable, real and personal.^h The Committee further recalls that under the

^g Azerbaijan has accepted the Committee's competence under article 22 of the Convention and has ratified the Optional Protocol to the Convention.

^h See, inter alia, communications No. 296/2006, *E.V.I. v. Sweden*, decision adopted on 1 May 2007,

terms of its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

8.4 The Committee notes the claim that there is a risk that the complainant would be tortured or ill-treated if deported to Azerbaijan because of his past political activities. The Committee notes that the complainant has failed to adduce any evidence that he was wanted for his political activities in Azerbaijan. In this regard, the complainant has not presented a copy of an arrest warrant or proof that there is an ongoing investigation and that he is personally the subject of such investigation. The Committee notes that the complainant has not claimed that he was detained or tortured in the past.

8.5 As to the complainant's alleged involvement in political activities, the Committee notes that although it is uncontested that he was a member of the AMIP and later of Musavat, which are registered parties in Azerbaijan, it does not appear that he was in a leading position in either of those parties, and would not attract the particular interest of the Azerbaijani authorities if returned. Nor is there any evidence that while in Sweden he has been involved in any activity which would attract the interest of the same authorities several years after he left Azerbaijan.

8.6 The Committee considers, on the basis of all the information before it, that there is no ground to conclude that the complainant would face a foreseeable, real and personal risk of being subjected to torture if returned to Azerbaijan. The Committee therefore concludes that his removal to that country would not constitute a breach of article 3 of the Convention.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's removal to Azerbaijan by the State party would not constitute a breach of article 3 of the Convention.

and Nos. 270 and 271/2005, *E.R.K. and Y.K. v. Sweden*, decision adopted on 30 April 2007.

Communication No. 428/2010: *Kalinichenko v. Morocco*

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)

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 Morocco^a 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.

1.3 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.

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

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.^b 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

^b 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.

reported the complainant to the police for having embezzled the client's funds from their personal accounts in Global Gamin Expo.^c 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.

2.6 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.

^c 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.

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.^d 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

^d Date stamped in his passport by the Italian authorities.

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,^e 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,^f 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 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

^e Article 152.

^f Article 198.

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.^g 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.^h 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.ⁱ

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,^j 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 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.^k

^g 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).

^h 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.

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

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

^k See communications No. 63/1997, *Arkauz Arana v. France*, decision adopted on 9 November 1999,

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 3.¹ 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.^m

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 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

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.

¹ See *Agiza v. Sweden* (footnote j 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.

^m 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.

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.¹¹

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 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

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

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.^o

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

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

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.^p 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",^q but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.^r By making a

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

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

^r See, inter alia, communications No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November

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.^s 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 with the international standards. The Committee welcomes this undertaking and requests

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.

^s 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.

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.

Communication No. 433/2010: *Gerasimov v. Kazakhstan**

Submitted by: Alexander Gerasimov (represented by the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law)

Alleged victim: The complainant

State party: Kazakhstan

Date of complaint: 22 April 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 24 May 2012,

Having concluded its consideration of complaint No. 433/2010, submitted to the Committee against Torture by Alexander Gerasimov 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 complainants, their counsel and the State party,

Adopts the following:

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

1. The complainant is Alexander Gerasimov, a Kazakh national born in 1969. He claims to be a victim of a violation by Kazakhstan^a of articles 1, 2, 12, 13, 14 and 22, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law.^b

The facts as presented by the complainant

2.1 On 27 March 2007, the complainant went to the local police station, the Kostanai City Southern Department of Internal Affairs, where his stepson A. had been detained. The complainant was taken to an office on the third floor and was locked in there for approximately 30 minutes.

2.2 At around 8 p.m., five police officers entered the office and demanded that he confess to the murder of an elderly woman living in his neighbourhood. While acknowledging that he knew the woman, he denied any involvement in her death. Over about an hour, the complainant was interrogated and advised to confess the crime. He

* The decision was adopted by vote. Nine members voted in favour and one member, Xuexian Wang, abstained.

^a Kazakhstan made the declaration under article 22 of the Convention against Torture on 21 February 2008.

^b A power of attorney, dated 22 February 2010 and signed by the complainant, is enclosed with the complaint.

continued to deny the allegations. One of the officers inflicted several heavy blows to his kidneys. The officers then threatened him with sexual violence.

2.3 He was thereafter forced to the floor, chest down. The officers tied his hands behind his back using his belt. Four officers held his legs and torso so that he could not move. The fifth officer took a thick clear polypropylene bag and placed it over his head. This officer then forced his right knee into his back, and began to pull the plastic bag backwards, suffocating him until he bled from his nose, ears and from the abrasions on his face (technique known as “dry submarino”) before finally losing consciousness. When the complainant started losing consciousness, the bag was loosened. This process was repeated multiple times.

2.4 As a result of such treatment, the complainant became disoriented and stopped resisting. At some point, his blood became visible on the polypropylene bag and on the floor. His eyebrow area, nose and ears were all bleeding. Upon seeing the blood, the officers stopped the torture. The complainant spent the night in a chair, under the supervision of a police officer.

2.5 The complainant’s detention on 27 March 2007 was not registered and he was not provided with a lawyer. On 28 March 2007, he was interrogated by the police investigator, who hit him on the head with a large book. At 6 p.m., he was released without being charged with any offence. Immediately following his release, he suffered from severe headaches and nausea. Once home, he continued to have severe headaches and the same evening was admitted to the Neurosurgical Department at the Kostanai City Hospital, where he was diagnosed with a major closed craniocerebral trauma, brain contusion, contusions to the right kidney, the lumbar region, and the soft tissue of the head, and a contused wound to the right superciliary arch.^c He remained in the hospital for 13 days, and after discharge continued to experience strong headaches, pain in his kidney areas, and hand and eye tremors.

2.6 On 29 March 2007, the complainant’s stepson submitted a complaint both on his own behalf and on behalf of the complainant to the Prosecutor’s Office for the City of Kostanai (City Prosecutor’s Office). On 5 April 2007, the complainant himself submitted a complaint to Southern Department of Internal Affairs, which is the police station where the alleged torture occurred. In April 2007, the Southern Department of Internal Affairs undertook a preliminary inquiry and took statements from the complainant, his stepsons and three police officers. The police officers who were interviewed stated that the complainant and his stepsons were questioned at the police station but that they did not observe any injuries. Other officers suggested that they were never even brought to the police station.

2.7 On 23 April 2007, a medical examination was conducted to evaluate his health. This document has never been provided to the complainant or his legal representatives. Between April and August 2007, the complainant was treated by a neurologist. He began to suffer from hallucinations and a sense of insurmountable and indeterminate fear. On 7 August 2007, he was diagnosed with post-traumatic stress disorder. He was referred to a psychiatric hospital for further examination and treatment, where the diagnosis was confirmed, and he underwent treatment from 8 August to 3 September 2007.

2.8 On 8 May 2007, the investigator decided not to initiate a criminal investigation. The decision was upheld by the Senior Assistant Prosecutor for Kostanai City on 30 May 2007,

^c Discharge note available on file. The complainant’s injuries are also depicted in the photographs provided. A DVD, containing the complainant’s oral testimony about his torture, is also available on file.

but thereafter quashed by the City Prosecutor's office on 10 June 2007 who ordered the Department of Internal Security within the Kostanai Regional Department of Interior Affairs to investigate the complainant's allegations.

2.9 In June 2007, the complainant received several anonymous phone calls from unknown people who threatened him with initiation of a criminal case against him unless he withdrew his complaint. The complainant feared for his and his family's safety and filed a complaint regarding the threats on 13 June 2007. On 12 June 2007, he had already filed a complaint to the Regional Prosecutor's Office because police officers had offered his stepsons 500,000 tenge (approximately 4,000 USD) in exchange for the withdrawal of their complaints and their stepfather's complaint.

2.10 On 19 June 2007, the Regional Prosecutor's office for Kostanai Region (Regional Prosecutor's Office) informed him that his complaint had been sent to the Department of Internal Security of the Regional Department of Internal Affairs for further review. On 28 June 2007, the Regional Department of Internal Affairs informed him that the review had resulted in finding a violation of the obligation to register a detainee and that disciplinary sanctions, up to removal from their positions, were to be taken against a number of staff. It also stated that criminal charges had been brought against staff of the Southern Department of Internal Affairs under article 308, part 4 (a), of the Criminal Code of Kazakhstan, which criminalizes actions taken in excess of official authority or involving the use or threat of violence.^d

2.11 On 16 July 2007, a scientific examination was conducted on the clothes worn by the complainant and three police officers present in the Southern Department of Internal Affairs on the night of 27 March 2007. Neither the complainant nor his lawyer knew about this examination. The examination concluded that fibers found on the complainant's clothes were not similar to those found on the officers' clothing. However, the results of the examination appear to have been compromised as the officers had washed their clothes.

2.12 In July, the Regional Prosecutor's Office reversed the Regional Department of Internal Affairs decision to open a criminal investigation and sent the case to the Department for Combating Economic Crimes and Corruption for the Kostanai Region (DCECC) for further examination. On 5 September 2007, DCECC refused to initiate criminal proceedings for lack of evidence establishing a link between the police officers' actions and the complainant's injuries. On 12 September 2007, the complainant appealed the DCECC decision to the Regional Prosecutor's Office, which reversed the DCECC decision on 24 September 2007 and referred the case back for further examination.

2.13 On 3 December 2007, the Regional Department of Internal Affairs reported on its investigation, stating that a number of flagrant violations of laws and regulations had been found, that 10 police officers had been removed from their positions and that a follow-up investigation was being conducted. On 1 February 2008, DCECC refused to initiate criminal proceedings on grounds that it was not possible to prove involvement of the police officers. On 19 March 2008, the Regional Prosecutor's Office upheld the DCECC decision. A further appeal to the Second Court of the City of Kostanai (City Court) was rejected on 25 March 2008. On 20 May 2008, the complainant further requested the General Prosecutor's Office to initiate a criminal investigation in view of deficiencies of the DCECC investigation;^e the request was rejected on 11 June 2008. As the City Court had already rejected the appeal, no further challenge to this decision was made.

^d These charges appear to have been dropped when the case was transferred to the Department for Combating Economic Crimes and Corruption (DCECC) in September 2007.

^e The complainant's lawyer argued that: (a) the examination of the complaint was superficial and

2.14 The complainant claims that he has exhausted all domestic remedies with numerous complaints to the prosecution authorities and to the court, including four appeals against the refusal to start a criminal investigation. Although the decision of the City Court suggested that there was a further appeal to the Regional Court, that appeal was not effective in practice. Article 109 (9) of the Criminal Procedure Code of Kazakhstan allows for only three days in which to appeal a decision of the City Court to the Regional Court, counted from the date of the decision. However, the lawyer received the decision only after the three-day period for appeal had expired.

2.15 In addition, there is a real risk of threats and violence against himself and his family if he were to continue his complaint domestically, in view of the threats he has already received in connection with his complaint. Furthermore, the procedure has now become unreasonably delayed such that there is no duty to pursue it further. Given the gravity of the violations against him, only a criminal investigation and prosecution would constitute an effective remedy. The failure of the State party to open a criminal investigation has hindered his ability to invoke any other available remedy.

The complaint

3.1 The complainant claims that the treatment inflicted upon him by police amounted to torture, in violation of article 1. Although the acts of torture complained of preceded the entry into force of the Convention, the violation has a continuous nature. Recalling the Committee's jurisprudence,^f he claims that the violation has since been affirmed by the State party by act or clear implication, due to its willful failure to acknowledge responsibility for the torture, to make any changes to the legal system that permitted the torture and its continuing failure to conduct an adequate investigation. In addition, he continues to suffer from post-traumatic stress disorder as a result of the torture, which means that the previous violation continues to have an effect upon him, which itself amounts to a violation of the Convention.

3.2 The complainant claims that the State party has failed to establish adequate safeguards to prevent ill-treatment and torture, in breach of article 2 of the Convention. His detention was not registered nor was he provided with access to a lawyer and independent examination by a medical doctor.

3.3 In violation of articles 12 and 13, no prompt, impartial and effective investigation was carried out into his allegations of torture. The investigation was not conducted by an independent and impartial body, since it was entrusted to the Southern Department of Internal Affairs who were alleged to have committed the torture and thereafter to the body hierarchically superior, the Regional Department of Internal Affairs. Furthermore, the preliminary investigation commenced only one month after the complaint and the scientific examination of the complainant's clothes was conducted three months after the alleged

biased; (b) the forensic medical examination did not appear to consider the complainant's subsequent outpatient care; (c) even if the complainant's injuries were "light", that did not rule out the possibility that he had been tortured; (d) the investigation ignored important contradictions in police officers' testimony; (e) two police officers confirmed that the complainant had been detained and questioned, as his interrogation was recorded at the Regional Department of Internal Affairs on 28 March 2007 and his wife's visit is recorded in the admission log; (f) the investigation failed to exhaust all avenues to identify the persons who inflicted the complainant's injuries. In particular, the police did not interview: the complainant's co-workers; V.P., who notified the complainant's wife that their son had been detained; the medical personnel at the City Hospital where the complainant was treated and other patients in his ward who observed police officers visiting the complainant.

^f Communication No. 247/2004, *A.A. v. Azerbaijan*, inadmissibility decision adopted on 25 November 2005.

torture. The investigation failed to interview key witnesses and he was excluded from effective participation in the investigative process and never consulted on the substance of the investigation. The investigation failed to ascertain and attribute criminal responsibility for the torture inflicted on him. Although his attempts to bring about an effective investigation continued after the entry into force of the Convention, no investigation has been undertaken that satisfies the requirements of the Convention.

3.4 He further claims that the domestic law effectively prevents him from bringing civil proceedings for compensation in violation of article 14 of the Convention, as the right to compensation is recognized only after conviction of the officials by a criminal court. As a result, he has not obtained compensation or medical rehabilitation for his torture.

State party's preliminary observations

4.1 On 18 January 2011, the State party provided its preliminary observations. It submits that, on 6 December 2010, the General Prosecutor's Office quashed the DCECC decision of 1 February 2008 refusing to initiate criminal proceedings and opened a criminal case against the police officers of the Southern Department of Internal Affairs pursuant to article 347-1, part 2 (a), of the Criminal Code (torture).

4.2 The State party further refers to a number of decrees, policies and plans of actions to combat torture that have been adopted in response to torture allegations, including the regular monitoring of places of detention with the participation of representatives of non-governmental organizations, as well as to the organization of training sessions, round tables and seminars on the prevention of torture and ill-treatment for law enforcement personnel.

Representatives' comments

5.1 On 28 February 2011, the complainant's representatives confirmed that, on 6 December 2010, in response to the complaint submitted to the Committee, the General Prosecutor's Office opened a criminal case under article 347-1, part 2 (a), of the Criminal Code (torture).^g

5.2 On 8 January 2011, a psychiatric examination of the complainant was ordered. In view of the anxiety caused by the renewed investigation and interrogations, the complainant's health deteriorated and on 14 January 2011 a doctor prescribed his hospitalization. Therefore, he requested that the examination be postponed. Nevertheless, the psychiatric examination was held on 18 January 2011. On 2 February 2011, the complainant's counsel was allowed to see the psychiatric report, but was not given a copy.

5.3 In the course of the renewed investigation, the complainant was questioned in the presence of a lawyer on at least four occasions: on 19 January, 21 January, 25 January and 2 February 2011. Prior to 19 January 2011, he was questioned without a lawyer. During questioning on 19 January 2011, he gave a detailed statement about the torture to which he had been subjected, consistent with his earlier statements. He again described the physical injuries that he had sustained and the treatment he had suffered.

5.4 The legal representatives further recall the threats that were made against the complainant in 2007 and state that the circumstances of the renewed investigation have led to renewed intimidation. In late January 2011, the complainant's wife informed the Kazakhstan International Bureau for Human Rights and the Rule of Law that the family had received a call from a prosecutor named A.K. threatening to reopen the murder case that was the cause of the initial arrest and torture of the complainant. The prosecutor

^g A copy of the decision of 6 December 2010 is available on file.

confirmed to the Bureau during a phone conversation that he had called the family in an attempt to ensure that they give evidence. When asked to refrain from putting pressure on the family, he claimed that he was conducting a thorough investigation. The complainant told a representative of the Bureau on several occasions that his family, in particular his wife, were very “tired” of his complaints, they want to “forget everything and just live”. He also mentioned on 18 February 2011 that his family was putting pressure on him to withdraw his complaint. He repeated several times that his wife was very worried about possible retaliation against their family.

5.5 On 21 February 2011, the prosecutor informed the Kazakhstan International Bureau for Human Rights and the Rule of Law that the renewed investigation had been terminated in accordance with article 37 of the Criminal Procedure Code (circumstances excluding criminal investigation) and that, on 5 February 2011, the complainant refused the services of his lawyer, stating that he had no claims against the police.

5.6 The complainant’s representatives claim that the renewed investigation lacks independence, is delayed, is not effective and has not resulted in any criminal prosecutions, and refer to the Committee’s jurisprudence that an investigation must be commenced promptly and conducted expeditiously.^{h i} In this case, the domestic investigation was suspended on 5 September 2007. By the time the investigation was reopened, almost four years had passed. The restarting of the investigation after the lapse of three years did not constitute an effective investigation.

5.7 The primary focus of the reopened investigation appeared to be the repeated interrogations of the complainant and his family, including a compulsory psychiatric evaluation of him against his will and forcing him to engage in confrontations with the police officers. No charges have been brought against any of the officers responsible for the torture and the investigation has again been closed.

5.8 The complainant’s representatives welcome the general measures to combat torture outlined by the State party, but note that the State party has not explained how any of these new measures relate to the complainant’s case. These measures are not sufficient to remedy his complaint in the absence of proper reparations, which would have to include recognition of responsibility for the violations, a proper investigation, compensation and rehabilitation. Only the creation of an independent commission of inquiry, having all the characteristics stipulated in chapter III of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol, paras. 2, 85 and 86), with full powers to summon witnesses and recommend a criminal prosecution, will be sufficient to remedy the violation of the Convention.

5.9 In response to the complaint to the Committee, the State party questioned the complainant’s mental health and ordered a psychiatric evaluation. The renewed investigation has the characteristics of an attempt to intimidate the complainant into withdrawing his petition, a practice widely used in Kazakhstan.^j Any such intimidation

^h Communication No. 59/1996, *Blanco Abad v. Spain*, Views adopted on 14 May 1998, para. 8.7.

ⁱ Committee against Torture, concluding observations on Kazakhstan, CAT/C/KAZ/CO/2, para. 24.

^j Reference to the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, on his mission to Kazakhstan, A/HRC/13/39/Add.3. The pattern and practice of intimidation of those who make complaints of torture represent a particular problem in Kazakhstan: “Many of the detainees interviewed by the Special Rapporteur indicated that they had been threatened with further charges, longer imprisonment and, in some cases, sexual violence by fellow inmates in order to make them withdraw complaints or sign declarations that they did not have any complaints or statements that they had sustained injuries while resisting arrest ... Such behaviour, besides going counter to international standards, renders any complaints system

hinders the right of individual petition, as established in articles 13 and 22 of the Convention. By making the declaration under article 22 of the Convention in 2008, Kazakhstan implicitly undertook not to interfere with the right of individuals to communicate with the Committee, as to do so would render the right which it had recognized ineffective in practice.

5.10 Legal representatives are concerned about the request by the prosecutor to subject the complainant to psychiatric evaluation, since the purpose was not to establish the effect of torture but to establish the complainant's mental state "since there was a doubt about his ability to correctly perceive the circumstances relevant to the case".^k The purpose of the evaluation thus appears to have been to discredit or intimidate the complainant.

5.11 In the light of the above, the State party has violated the complainant's rights under articles 1, 2, 12, 13, and 14, of the Convention.

Complainant's further submission

6. In March 2011, the complainant provided the Committee with a notarized letter in Russian (with a copy to the Ministry of Foreign Affairs of Kazakhstan), dated 18 February 2011 and accompanied by an English translation, by which he requested the withdrawal of the complaint submitted on his behalf on 22 April 2010, since he has not personally prepared or signed any submission, it having been prepared by the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law on the basis of his power of attorney.^l He further stated that the complaints against the police officers were written "in a temper, in a painful nervous condition" and that he had no claims against them.^m

State party's observations on admissibility and merits

7.1 On 14 April and 6 May 2011, the State party provided further observations. It submits that, on 27 March 2007, the complainant and his two stepsons were suspected of having committed the murder of an elderly woman and were taken to the Southern Department of Internal Affairs. On 30 March and 2 April 2007, they filed complaints to the City Prosecutor's Office against officers of the Department of Internal Affairs (A., B. and M.), claiming that they had been mistreated in order to make them to confess to the murder. On 30 May 2007, the Senior Assistant Prosecutor for Kostanai City refused to open a criminal case for lack of evidence. The decision was quashed on 10 June 2007 by the City Prosecutor's Office due to incomplete investigation.

7.2 On 12 and 13 June 2007, the complainant filed complaints to the Regional Prosecutor's Office, claiming that he was receiving threats from unknown persons to withdraw his complaints. On 18 June 2007, the respective complaints were forwarded to the Department of Internal Security within the Regional Department of Internal Affairs. On 25 June 2007, the Department of Internal Security opened a criminal case against police officers under article 308, part 4 (a), of the Criminal Code (abuse of power or official authority with aggravating circumstances). The case was closed on 29 June 2007, for lack

meaningless and should be addressed in a determined manner." (para. 59); "it appears that most detainees refrain from filing complaints because they do not trust the system or are afraid of reprisals" (para. 51), and that detainees had suffered intimidation in preparation for his visit (paras. 22 and 73). As a result, he identified a need for the State to take measures to "protect complainants against reprisals" (para. 80 (c)).

^k Decision of 8 January 2011 ordering a psychiatric examination (available on file).

^l See footnote b above.

^m The notarized letter is dated 18 February 2011 and is signed by the complainant.

of evidence. On 27 June 2007, eight police officers, including Mr. A., Mr. B. and Mr. M., were subject to various disciplinary sanctions for violations of the internal regulations that resulted in the unlawful detention of the complainant and his stepsons.

7.3 On 3 July 2007, a criminal case was reopened by the Department of Internal Security, decision which was quashed by the Regional Prosecutor's Office on 18 July 2007, who transmitted the case file to DCECC for further investigation. DCECC decided on two occasions not to open a criminal case for lack of evidence; however, those decisions were quashed by the Regional Prosecutor's Office due to incomplete investigation. On 1 February 2008, DCECC again refused to open a criminal case for lack of evidence. Excepting the complainant's contradictory and inconsistent testimonies and the findings of the forensic medical examination, no other evidence in support of his allegations was found. All avenues for collection of additional evidence have been exhausted.

7.4 On 6 December 2010, in order to verify the allegations presented by the complainant to the Committee, the DCECC decision of 1 February 2008 was quashed by the General Prosecutor's Office and a criminal case was opened against the police officers under article 347-1, part 2 (a), of the Criminal Code (torture).

7.5 During his interrogation, the complainant stated that, on 27 March 2007, when he attended the police station because of his stepson's detention, he was taken to the third floor where three policemen mistreated him in order to obtain a confession to the murder of his neighbour. He spent the night on a chair under the supervision of a policeman and was interrogated by the investigator the next morning. Upon release on 28 March 2007, he was hospitalized in the Kostanai City Hospital.

7.6 During their questioning as witnesses, the complainant's wife, his stepsons and their friend refused to testify, requesting the closure of the investigation and mentioning that they have no claims against police, although during the preliminary inquiry the complainant's stepsons claimed that they had been ill-treated by policemen in order to make them confess to the murder of their neighbour.

7.7 In the course of the preliminary inquiry, the complainant gave contradictory statements. During the confrontation with policemen, the complainant stated that Mr. A only suffocated him with the plastic bag. He also declared that Mr. M only recorded his personal information. He did not identify the third officer, Mr. B., and declared that the persons who ill-treated him were not among these three police officers. During their interrogation as suspects, officers denied the allegations of mistreatment and beatings. Other officers of the Southern Department of Internal Affairs interrogated as witnesses did not confirm the fact of torture.

7.8 The medical personnel of the Kostanai City hospital were also questioned and stated that, at the end of March 2007, the complainant was taken to the hospital by ambulance, where he was diagnosed with a cerebral contusion and bruises to the lumbar region, which he claimed he had sustained at the hands of police. The forensic medical examination attested the following injuries: brain contusion, facial abrasions, contused wound on the right supraorbital ridge, contusion of the right kidney and bruises on the body.

7.9 According to the medical records made available to DCECC, the complainant has been under psychiatric supervision since 1978 with the diagnosis of mild mental retardation. On 8 August 2007, in view of the acute reaction of the complainant to stress, his diagnosis was complemented with reactive psychosis and depressive-paranoid syndrome. Based on this, a forensic psychiatric evaluation was ordered on 8 January 2011.

7.10 On 14 January 2011, the complainant requested postponement of investigative actions due to health reasons, which request was denied pending the conduct of the forensic

psychiatric examination which, *inter alia*, was called upon to evaluate if he was fit for participation in investigative actions.

7.11 On 18 January 2011, the psychiatric examination concluded that the complainant presented signs of short-term depressive reactions and was fit to participate in investigative actions. The complainant and his legal representative were acquainted with the findings and contested them, without however indicating the grounds.

7.12 The complainant was summoned to testify nine times between 19 December 2010 and 6 February 2011. No pressure was exerted on the complainant and his family. On 19 January 2011, the complainant declined, in writing, the State party's offer for measures of protection because of absence of threats.

7.13 On 3 February 2011, the complainant filed a written statement refusing the services of his lawyer.ⁿ On 5 February 2011 the Prosecutor of the Kostanai Region received the complainant's written declaration, dated 3 February 2011, by which he had retracted his previous statements since he had a nervous breakdown when testifying and refused to testify because of the amount of time that had passed since the events.^o On 6 February 2011, the complainant was interrogated about the circumstances in which he wrote the respective letter, and he stated that it was written by him without any external pressure. He refused to testify further because he could not remember the circumstances of the case and he had no claims against the police.^p

7.14 On 6 February 2011, the Assistant Prosecutor for Kostanai Region closed the criminal case for lack of evidence. The decision is well-founded because of the complainant's contradictory and inconsistent statements given in the course of the investigation, the written refusals of his wife and stepsons to testify,^q the complainant's retraction of his testimonies and refusal to testify further and the forensic psychiatric examination's findings of 18 January 2011.

7.15 The State party argues that it was impossible to prove the guilt of police officers because of the length of time (three years and eight months) that has passed since the infliction of bodily injuries, the complainant's contradictory statements and the subsequent retraction of those statements, the refusal of the complainant's wife and his stepsons to testify and the denial of torture allegations by police officers.

7.16 The State party contends that the communication should be declared inadmissible on the following grounds: (1) the events complained of occurred on 27 March 2007 and the last procedural decision on the case was taken on 1 February 2008, *i.e.* before Kazakhstan recognized the Committee's competence under article 22; (2) the complainant failed to appeal in court, as provided for under article 109 of the Criminal Procedure Code, the decision of 1 February 2008 (refusal to open a criminal case) and of 6 February 2011 (closure of the criminal case) – thus, he has not exhausted all available domestic remedies; (3) in March 2011, the Ministry of Foreign Affairs received a notarized letter by which the complainant withdrew his complaint before the Committee. In the light of the complainant's withdrawal of the complaint submitted to the Committee by third parties, the Committee should not examine it.

7.17 The State party states that the claims advanced by the complainant's representatives are unfounded. The allegations of torture have not been confirmed in the course of the investigation. Furthermore, the complainant declared that he had not submitted any

ⁿ Copy available on file.

^o *Ibid.*

^p *Ibid.*

^q *Ibid.*

complaint to the Committee and did not insist on further investigation of the criminal case. Although the State party has taken all measures to ensure that an objective investigation is carried out, it is not possible to criminally prosecute the police officers in view of insufficient evidence and the position of the complainant himself. However, eight police officers were subject to various disciplinary sanctions (see para. 7.2). It also submits that, according to domestic legislation, the issue of compensation for torture is decided only after conviction of the officials by a criminal court.

Representatives' comments on admissibility and merits

8.1 On 15 July 2011, the complainant's representatives submitted comments on admissibility and merits. With regard to the State party's argument that the violations are not within the temporal jurisdiction of the Committee, they reiterate the argument that the torture of the complainant in 2007 has been affirmed by the State party by act or clear implication due to its wilful failure to acknowledge responsibility for the torture and its continuing failure to conduct an adequate investigation also after Kazakhstan made the declaration under article 22 of the Convention on 21 February 2008. The State party ignores the attempts by the complainant to obtain an effective investigation from March to June 2008 by claiming that the last procedural decision was on 1 February 2008. It has still not undertaken an investigation that satisfies the requirements of articles 12 and 13 of the Convention, which constitutes an ongoing violation. The failure to prevent torture and failure to provide adequate remedies for torture are also ongoing violations.

8.2 As to the complainant's alleged failure to appeal the decisions of 1 February 2008 and of 6 February 2011, representatives note that he filed appeals to prosecutors' offices, as well as a judicial appeal to the City Court which was rejected on 25 March 2008. Any further appeal under article 109 was not available or effective in practice. Given the intimidating manner in which the renewed investigation was conducted, it would be unreasonable to expect him to restart the new round of appeals to the same bodies that have already considered his case repeatedly.

8.3 Concerning the complainant's purported withdrawal letters from February 2011 invoked by the State party, none of the incidents relied upon can be seen as a "spontaneous, voluntary repudiation" of the complaint to the Committee. The State party has failed to mention the numerous occasions in January 2011 when, under interrogation, with his lawyer present, the complainant repeated his allegations. Instead, it has focused on the subsequent occasion when, under highly questionable circumstances — i.e. being questioned by the police without a lawyer present — he was intimidated into writing a short letter refusing to testify further. Without a free and unequivocal withdrawal, the Committee should continue to consider the communication as it is in the interests of justice to do so.

8.4 With regard to the complainant's letter dated 3 February 2011 which states that he refuses to testify further and that he recants his testimonies, it does not indicate any wish to withdraw the complaint before the Committee. The complainant wrote this letter after testifying that he was under pressure to withdraw his case. At around the same time, an investigator showed him statements from the police officers who tortured him promising not to accuse him of libel if he withdrew. The State party also mentions that the complainant was interrogated by police on 6 February 2011 about the circumstances of writing the 3 February letter, and the record of the interrogation in which the complainant purportedly refuses to testify further confirms that this interrogation was held without a lawyer, as the police obtained from him a statement refusing the services of his lawyer.

8.5 As to the typed, notarized letter dated 18 February 2011, in Russian and English, and signed by the complainant, which stated that he wished to withdraw his complaint to the Committee as he had acted "in a temper, in a painful nervous condition", legal representatives consulted the complainant and were not instructed to withdraw the

complaint before the Committee. The so-called withdrawal letter has been obtained in the following circumstances: following a visit from two police investigators, the complainant had written the 3 February letter and, a few days later, one of the police investigators took him to the notary's office where he was given a printed document which he quickly looked at and signed. Thus, the typed letter dated 18 February 2011 and sent to the Committee was prepared by the State party, rather than by the complainant himself, was altered in a significant way from the original handwritten letter, and was signed as a result of the same pressure.

8.6 The purported withdrawal letter relied upon by the State party is in contrast to the repeated, detailed and consistent testimony which the complainant has given of the torture to which he was subjected. The power of attorney signed by the complainant on 22 February 2010 confirms that he authorizes the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law to be his representatives before the Committee and to submit applications and other filings on his behalf. Furthermore, he personally signed each page of his statement which was filed with the complaint.^r In the circumstances, neither the 3 February letter, the 6 February interrogation, nor the 18 February letter constitutes a free and unequivocal expression of intent to withdraw his complaint, and therefore should not bar the Committee from considering the substance of the complaint.

8.7 None of the arguments presented by the State party undermine the consistent accounts which the complainant has given of his torture, but rather corroborate key elements of his narrative and confirm that the renewed investigation was not effective. The State party agrees that the complainant and his stepsons promptly made statements complaining that the police had inflicted physical and mental suffering on them to try and obtain confessions. The complainant maintained this consistent account during many of the questioning sessions in the renewed investigation in January 2011 and the State party concedes that he testified that he was mistreated by police. It is uncontested that he immediately sought medical attention and told the doctors that he had sustained injuries at the hands of police. However, the State party arbitrarily rejects the evidence, failing to respond to the numerous consistent statements made in the original investigation and in January 2011, but instead attempts to dismiss the complainant's evidence as "inconsistent" or being given "in a fit of anger" or "in a nervous condition".

8.8 It is recalled that the psychiatric evaluation of 18 January 2011, ordered "to establish the mental state of the victim, since there is a doubt in his ability to correctly perceive the circumstances relevant to the case", was carried out against the complainant's will. Furthermore, the State party, while merely referring to a 1978 mental health record, does not explain its relevance to this complaint. No mention was made of this document in the domestic proceedings. Rather than reviewing the clear medical evidence that supports the allegations of ill-treatment, the first response of the authorities was to submit the complainant to a compulsory psychiatric evaluation seemingly aimed at showing that he was mentally ill.

8.9 Kazakhstan has violated its obligations under articles 1, 2, 12, 13 and 14, of the Convention. The renewed investigation of December 2010 was closed again in February 2011 without any meaningful progress or any finding of responsibility and did not provide the complainant with an effective remedy. The first reason given by the State party for closing the renewed investigation is that proving the guilt of the police officers was difficult because of the amount of time that had passed since the infliction of the bodily injuries (3 years and 8 months), thus appearing to admit that the delay had had a direct

^r The author indeed signed each page of the Russian version of his complaint to the Committee.

impact upon the investigation. The renewed investigation did not meet the requirements of independence and impartiality. Its biased nature is confirmed by the fact that, while forcing the complainant to undergo numerous interviews, the investigators were immediately satisfied with the bare denials offered by the police officers involved in the incident.

8.10 The State party has failed to hold anyone accountable for the torture of the complainant or provide access to effective remedies, including compensation, rehabilitation, and adequate reparation for the torture, contrary to articles 12, 13 and 14 of the Convention. The State party does not address the failure to provide redress, but confirms that the complainant is unable to obtain restitution or compensation for his torture because no one has been prosecuted and found guilty.

8.11 The State party has sought to intimidate the complainant into dropping his complaint by forcing him to undergo a psychiatric examination, encouraging his family to pressure him to drop the case and repeatedly interrogating him until, without a lawyer, the police managed to obtain a short note from him refusing to testify further. Given the history of intimidation against the complainant, the Committee should find that there has been a failure of the duty to protect complainants from intimidation (art. 13) and to give effect to the right of individual petition (art. 22).

Additional observations by the State party

9.1 By note verbale dated 24 October 2011, the State party submits that the Open Society Justice Initiative and the Kazakhstan International Bureau for Human Rights and the Rule of Law are not authorized to represent the complainant before the Committee, in the light of his notarized letter of 18 February 2011 by which he voluntarily withdrew the complaint submitted to the Committee. The arguments of the organizations that they have consulted the complainant and were not instructed to withdraw the complaint, as well as that the notarized letter and the letter addressed to the Prosecutor of the Kostanai Region were written under pressure, are unfounded and not corroborated by documentary evidence.

9.2 It further reiterates its previous arguments that the complainant failed to exhaust all domestic remedies and contests the continuous character of the alleged violations of the complainant's rights in view of the fact that he is no longer in detention and cannot be subjected to any kind of torture. The State party concludes that the complainant's allegations are unfounded and requests the Committee not to examine the complaint on the merits.

Additional comments by the representatives

10. By letter of 6 December 2011, complainant's representatives refer to their previous comments, and add that the State party appears not to understand the continuing violation arguments, as of course it is not alleged that the complainant is still being tortured, but that the failure to investigate is ongoing.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claims contained in a complaint, the Committee must decide whether or not it is admissible under article 22 of the Convention.

11.2 The Committee notes that the State party contests the Committee's competence *ratione temporis* on grounds that the torture complained of (27 March 2007) and the last procedural decision of 1 February 2008 refusing to open a criminal case occurred before Kazakhstan made the declaration under article 22 of the Convention. The Committee recalls that a State party's obligations under the Convention apply from the date of its entry

into force for that State party. It can examine alleged violations of the Convention which occurred before a State party's recognition of the Committee's competence under article 22 if the effects of these violations continued after the declaration, and if the effects constitute in themselves a violation of the Convention. A continuing violation must be interpreted as an affirmation, after the formulation of the declaration, by act or by clear implication, of the previous violations of the State party.^s The Committee notes that Kazakhstan made the declaration under article 22 of the Convention on 21 February 2008. Although the events complained of occurred before, the DCECC decision of 1 February 2008 (refusal to open a criminal case against police officers) was upheld by the Regional Prosecutor's Office on 19 March 2008, and the complainant's further appeal to the Second Court of the Kostanai city was rejected on 25 March 2008, i.e., after Kazakhstan made the declaration under article 22. Furthermore, the General Prosecutor's Office upheld the DCECC decision on 11 June 2008 by refusing to initiate a criminal investigation. Therefore, the State party's failure to fulfil its obligations to investigate the complainant's allegations and to provide him with redress continued after the State party recognized the Committee's competence under article 22 of the Convention. In the circumstances, the Committee is not precluded *ratione temporis* from considering the present complaint.

11.3 The Committee takes note of the State party's contention that it should not examine the present complaint in view of the complainant's notarized letter of withdrawal dated 18 February 2011. It considers that, in order for the withdrawal of a complaint submitted to the Committee to be valid, the text of the request for withdrawal must be unequivocal and it must be established that such a request has been made voluntarily. The Committee does not consider it necessary, as demanded by the State party, that documentary evidence be submitted to challenge the probative value of the notarized letter. Indeed, the Committee has the power of free assessment of the facts based upon the full set of circumstances in every case.^t In this case, the circumstances in which the complainant signed the letter, as related by the complainant's representatives, give the Committee substantial reason to doubt that the letter was produced voluntarily. In the circumstances, the Committee considers that the letter of 18 February 2011 cannot be regarded as a voluntary withdrawal of the complaint and therefore does not preclude the Committee from considering the present complaint.

11.4 The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

11.5 With respect to the exhaustion of domestic remedies, the Committee notes that the State party challenges the admissibility on the grounds that the complainant failed to appeal in court the decisions of 1 February 2008 and of 6 February 2011. It observes, however, that the complainant appealed against the decision of 1 February 2008 to the Second Court of the Kostanai city, which rejected the appeal on 25 March 2008. It further takes note of the complainant's uncontested argument that, although a further appeal to the Regional Court was in principle available, it was not available in practice because the lawyer received the decision after the deadline for appeal had expired. As to the complainant's failure to appeal the decision of 6 February 2011, the Committee notes that the renewed investigation was launched on 6 December 2010, almost four years after the alleged incidents had taken place. Therefore, the Committee considers that domestic proceedings

^s See communication No. 247/2004, *A.A. v. Azerbaijan*, inadmissibility decision adopted on 25 November 2005, para. 6.4.

^t See also the Committee's general comment No. 1 (1996) on the implementation of article 3 of the Convention, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX, para. 9 (b).

have become unreasonably delayed^u and that the complainant is thus not required to pursue them further. In the light of the above, the Committee concludes that it is not precluded by the requirements of article 22, paragraph 5 (b), of the Convention, from considering the communication.

11.6 With reference to article 22, paragraph 4, of the Convention and rule 111 of the Committee's rules of procedure, the Committee finds no other obstacle to the admissibility of the communication and proceeds to its examination on the merits.

Consideration of the merits

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

12.2 The Committee notes that the complainant has alleged a violation of article 2, paragraph 1, of the Convention, on the grounds that the State party failed in its duty to prevent and punish acts of torture. These provisions are applicable insofar as the acts to which the complainant was subjected are considered acts of torture within the meaning of article 1 of the Convention.^v In this respect, the Committee notes the complainant's detailed description of the treatment he was subjected to while in police custody and of the medical reports documenting the physical injuries inflicted on him and the long-lasting psychological damage. The Committee considers that this treatment can be characterized as severe pain and suffering inflicted deliberately by officials with a view to obtaining from the complainant a confession of guilt. The State party, while not contesting the medical evidence, denies any involvement by police. It is uncontested that the complainant was in the custody of the police at the time his injuries were incurred, and that he sought medical treatment for his injuries promptly after his release from their custody. Under these circumstances, the State party should be presumed liable for the harm caused to the complainant unless it provides a compelling alternative explanation. The State party has provided no such explanation, and thus the Committee must conclude that the police officers inflicted the complainant's injuries. The Committee also notes the uncontested failure to register the complainant's detention, to provide him with a lawyer and with access to an independent medical examination.^w Based on the detailed account which the complainant has given of his torture and medical documentation corroborating his allegations, the Committee concludes that the facts, as reported, constitute torture within the meaning of article 1 of the Convention, and that the State party failed in its duty to prevent and punish acts of torture, in violation of article 2, paragraph 1, of the Convention.

12.3 The complainant also claims that no prompt, impartial and effective investigation has been carried out into his allegations of torture, that those responsible have not been prosecuted and that he and his family received threats and were subject to intimidation, in violation of articles 12 and 13 of the Convention. The Committee notes that, although the complainant reported the acts of torture several days after the events, a preliminary inquiry was initiated only after a month and resulted in a refusal to open a criminal investigation. Thereafter, following the complainant's appeals, the investigation was repeatedly restarted and closed several times by different prosecutorial and investigative bodies, and resulted in

^u See communication No. 119/1998, *V.N.I.M. v. Canada*, decision adopted on 12 November 2002, para. 6.2.

^v See communication No. 269/2005, *Salem v. Tunisia*, decision adopted on 7 November 2007, para. 16.4.

^w The Committee expressed concern about insufficient safeguards to prevent torture in detention in its concluding observations on the State party's second periodic report (CAT/C/KAZ/CO/2, para. 9).

closure of the investigation with no criminal responsibility being attributed to police officers due to lack of evidence.

12.4 The Committee recalls that an investigation in itself is not sufficient to demonstrate the State party's conformity with its obligations under article 12 of the Convention if it can be shown not to have been conducted impartially.^x In this respect, it notes that the investigation was entrusted to the police department (Southern Department of Internal Affairs) where the alleged torture had been committed and thereafter to the body hierarchically superior (the Department of Internal Security of the Regional Department of Internal Affairs). The Committee recalls its concern that preliminary examinations of complaints of torture and ill-treatment by police officers are undertaken by the Department of Internal Security, which is under the same chain of command as the regular police force, and consequently do not lead to impartial examinations.^y

12.5 Article 12 also requires that the investigation should be prompt, impartial and effective, promptness being essential both to ensuring that the victim cannot continue to be subjected to such acts and because, in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.^z The Committee notes that a preliminary investigation was started a month after the reported facts of torture, while the medical examination of the complainant was not conducted until 23 April 2007, three weeks after his discharge from the hospital. The scientific examination of the clothes worn by the complainant and the officers accused of torture was carried out only on 16 July 2007, i.e., more than three months after the alleged torture, the result of the examination being compromised because the officers' clothes had been washed. The Committee also notes that the investigation relied heavily on the testimony of the police officers who denied any involvement in the torture and attached little weight to the complainant's consistent statements and the uncontested medical evidence documenting the injuries inflicted on him. Furthermore, although in the course of the renewed investigation of December 2010, the complainant reconfirmed his allegations during numerous interrogations, and despite the General Prosecutor's Office's concluding in its decision of 6 December 2010 that the allegations were substantiated and corroborated by medical evidence and witness testimonies, the investigation was terminated in February 2011 without any criminal charges being brought against the perpetrators or any remedy being provided to the complainant.

12.6 The Committee also notes the complainant's allegations that during the investigation of his case in 2007 he and his family suffered threats, attempts at bribing him in order to withdraw his complaints, and that intimidation tactics – including a psychiatric evaluation against his will, pressure on his family to persuade him to drop his claims – were also part of the renewed investigation of 2010–2011. The State party did not provide any information in respect of these allegations other than a blanket denial of use of any pressure or intimidation against the complainant. The Committee notes that the complainant reported the intimidation acts to the Regional Prosecutor's Office in June 2007 and that eventually no action was taken following such complaints. It also notes that such allegations are consistent with the findings of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on the existence of a pattern and

^x See communication No. 257/2004, *Keremedchiev v. Bulgaria*, decision adopted on 11 November 2008, para. 9.4.

^y See Committee's concluding observations on Kazakhstan, CAT/C/KAZ/CO/2, para. 24.

^z Communication No. 59/1996, *Blanco Abad v. Spain*, Views adopted on 14 May 1998, para. 8.2.

practice of intimidation of those who make complaints of torture in Kazakhstan.^{aa} In the light of the psychiatric evaluation conducted against the complainant's will during the renewed investigation, the pressure exercised on his family in order to persuade him to drop his complaints and the incidents of intimidation that had taken place in 2007, the Committee considers that the letters of February 2011 — by which the complainant refused the services of his lawyer and thereafter refused to testify further, retracted his previous statements and declared that he had no claims against the police — cannot be regarded as a result of his free and voluntary consent, without any intimidation or coercion.

12.7 In the light of the above findings, and based on the materials before it, the Committee concludes that the State party has failed to comply with its obligation to carry out a prompt, impartial and effective investigation into the allegations of torture and to take steps to ensure that he and his family, as the main witnesses, were protected from intimidation as a consequence of their complaints and testimonies given during the investigation, in violation of articles 12 and 13 of the Convention.

12.8 With regard to the alleged violation of article 14 of the Convention, the Committee notes that it is uncontested that the absence of criminal proceedings deprived the complainant of the possibility of filing a civil suit for compensation since, according to domestic law, the right to compensation for torture arises only after conviction of the responsible officials by a criminal court. The Committee recalls in this respect that article 14 of the Convention recognizes not only the right to fair and adequate compensation, but also requires States parties to ensure that the victim of an act of torture obtains redress. The redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case.^{bb} The Committee considers that, notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. It considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available independently of the criminal proceeding and necessary legislation and institutions for such civil procedures should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence or undue delay of those criminal proceedings constitute a failure on behalf of the State party to fulfil its obligations under the Convention. The Committee emphasizes that disciplinary or administrative remedies without access to effective judicial review cannot be deemed to constitute adequate redress in the context of article 14. On the basis of the information before it, the Committee concludes that the State party is also in breach of its obligations under article 14 of the Convention.^{cc}

12.9 The Committee reaffirms that, within the framework of the procedure for individual communications set out in article 22, the State party is required to cooperate with the Committee in good faith, to refrain from taking any action that might hinder this process^{dd} and to abstain from any acts of intimidation or reprisal against complainants, their families and/or authorized representatives, made in connection with a complaint before the Committee. Such acts may include, but are not limited to, any forms of direct or indirect

^{aa} See the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, on his mission to Kazakhstan, A/HRC/13/39/Add.3, paras. 51 and 59.

^{bb} See communication No. 269/2005, *Salem v. Tunisia*, decision adopted on 7 November 2007, para. 16.8.

^{cc} See e.g. communication No. 207/2002, *Dimitrijevic v. Serbia and Montenegro*, decision adopted on 24 November 2004, para. 5.5.

^{dd} See communication No. 341/2008, *Hanafi v. Algeria*, decision adopted on 3 June 2011, para. 9.8.

threats, coercion and other improper acts aimed at dissuading or discouraging complainants or potential complainants from submitting their complaints or at pressuring them to withdraw or modify their claims. Any such interference would render the individuals' right of petition under article 22 meaningless.

12.10 The Committee notes that, before signing the withdrawal letter dated 18 February 2011, the complainant signed several other letters by which he refused the assistance of his lawyer, retracted his previous statements and refused to testify further. Thereafter, the only claims against the police remained the ones before the Committee. The Committee observes that the notarized withdrawal letter was sent to the Committee with a copy to the Ministry of Foreign Affairs, with a translation from Russian into English. The Committee takes note of the pressure to which the complainant and his family were subjected at national level, taking also into account the arguments advanced by the complainant's representatives about the circumstances in which the notarized letter was produced and, with reference to its finding that the facts before it disclose a violation of article 13 of the Convention, concludes that the State party's interference with the complainant's right of petition amounts also to a violation of article 22 of the Convention.

13. The Committee, acting under article 22, paragraph 7, of the Convention, is of the view that the facts before it disclose violations of article 1 in conjunction with article 2, paragraph 1, and of articles 12, 13, 14 and 22, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. The Committee urges the State party to conduct a proper, impartial and effective investigation in order to bring to justice those responsible for the complainant's treatment, to take effective measures to ensure that the complainant and his family are protected from any forms of threats and intimidation, to provide the complainant with full and adequate reparation for the suffering inflicted, including compensation and rehabilitation, and to prevent similar violations in the future. Pursuant to rule 118, paragraph 5, of its rules of procedure, the State party should inform the Committee, within 90 days from the date of the transmittal of this decision, of the action it has taken in response to the present decision.

Communication No. 444/2010: *Abdussamatov et al. v. Kazakhstan*

<i>Submitted by:</i>	Toirjon Abdussamatov and 28 other complainants (represented by counsel, Christine Laroque, ACAT-France)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Kazakhstan
<i>Date of complaint:</i>	24 December 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 1 June 2012,

Having concluded its consideration of complaint No. 444/2010, submitted to the Committee against Torture by Christine Laroque on behalf of Toirjon Abdussamatov and 28 other complainants 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 complainants, their counsel and the State party,

Adopts the following:

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

1.1 The complainants are 27 Uzbek and 2 Tajik nationals:^a Torjon Abdussamatov; Faizullohon Akbarov; Shodiev Akmaljon; Suhrob Bazarov; Ahmad Boltaev; Shuhrat Botirov; Mukhitdin Gulamov; Shukhrat Holboev; Saidakbar Jalolhonov; Abror Kasimov; Olimjon Kholduraev; Sarvar Khurramov; Oybek Kuldashiev; Kobiljon Kurbanov; Bahridin Nurillaev; Bahtiyor Nurillaev; Ulugbek Ostonov; Otabek Sharipov; Tursunboy Sulaimonov; Abduazimhuja Yakubov; Uktam Rakhmatov; Alisher Khoshimov; Oybek Pulatov; Maruf Yuldoshev; Isobek Pardaev; Ravshan Turaev; Dilbek Karimov; Sirojiddin Talipov and Fayziddin Umarov. The complainants claim that their extradition to Uzbekistan would constitute a violation by Kazakhstan of article 3 of the Convention against Torture. They are represented by counsel, Christine Laroque, Action by Christians for the Abolition of Torture (ACAT France).

1.2 Under rule 114 (former rule 108) of its rules of procedure, the Special Rapporteur on new complaints and interim measures acting on behalf of the Committee requested the State party, on 24 and 31 December 2010 and 21 January 2011, not to extradite the complainants to Uzbekistan while their communication was under consideration by the Committee. On 6 May 2011 and 9 June 2011, the request for interim measures was reiterated. Nevertheless, the complainants were extradited to Uzbekistan on 29 June 2011.

1.3 On 15 November 2011, at its 47th session, the Committee decided that, by breaching the Committee's request under rule 114 of its rules of procedure, the State party had failed in its obligations to cooperate in good faith under article 22, of the Convention; and that the communication was admissible insofar as it raised issues with respect to article 3 of the

^a While in Kazakhstan, all complainants gave power of attorney to counsel.

Convention. The Committee accepted the State party's request for an oral hearing, and, accordingly decided to invite State party representatives together with the complainants' counsel to an oral hearing on the merits of the communication, to take place at the Committee's forty-eighth session, in May 2012.

1.4 On 1 June 2012, the Committee decided to make public its admissibility decision of 15 November 2011. The present decision reproduces only a summary of the facts as presented by the complainants, the complaint and the parties' submissions on the merits. For the parties' submissions on admissibility and the Committee's decision see *Abdussamatov et al. v. Kazakhstan*, communication No. 444/2010, decision of admissibility adopted on 15 November 2011.

Summary of the facts as presented by the complainants

2.1 The complainants are practitioners of Islam and fled Uzbekistan for fear of persecution for practising their religion. Twelve (12) complainants were recognized as mandate refugees by the Office of the United Nations High Commissioner for Refugees (UNHCR) between 2005 and March 2010. In January 2010, a new Law on Refugees came into force in Kazakhstan, requiring all asylum seekers, as well as mandate refugees recognized by UNHCR, to register with the Government of Kazakhstan and no longer with UNHCR. The complainants duly registered with the migration police in May 2010.

2.2 Between 9 and 11 June 2010, the complainants were arrested by the Kazakh migration police and by plainclothes agents believed to be from the Committee for National Security (KNB). No arrest warrant was shown at the time of the arrest; some of the complainants, however, saw it later. In May 2010, the Central Committee for Determination of Refugee Status (CDRS) conducted interviews with the complainants without the assistance of a lawyer or a translator. On 11 and 27 August 2010, CDRS rejected their asylum applications, regardless of the previous status of UNHCR mandate refugee of 12 complainants. The decisions merely stated that the cases did not satisfy the criteria for refugee status, without providing any other explanations.

2.3 On 8 September 2010, the Office of the Prosecutor in Almaty announced that, further to a request from the Uzbek authorities and in accordance with the bilateral agreement of 22 January 1993 (the Commonwealth of Independent States (C.I.S.) Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters (the Minsk Convention)) and the 2001 Shanghai Convention, the complainants would be extradited to Uzbekistan, as they were involved in "illegal organizations" and accused of "attempts to overthrow the constitutional order" in Uzbekistan. However, neither the order of extradition nor any other written notification was given to them.

2.4 On 6 December 2010, court No. 2 of the Almalinsk district of Almaty decided to deal jointly with the complainants' appeals against the CDRS decisions.

Summary of the complaint

3.1 The complainants refer to the concluding observations by the Human Rights Committee for Uzbekistan, in which it expressed concerns about the limitations and restrictions on freedom of religion and belief and about the use of criminal law to penalize the apparently peaceful exercise of religious freedom, including for members of non-registered religious groups and the persistent reports of charges and imprisonment of such individuals,^b as well as to a report by Human Rights Watch stating that Uzbek authorities

^b CCPR/CO/83/UZB, para. 22 and CCPR/C/UZB/CO/3, para. 19.

have targeted and imprisoned Muslims and other religious believers who practise their faith outside official institutions or who belong to unregistered religious organizations.^c

3.2 The complainants further submit that Uzbekistan's record on torture and ill-treatment has been well documented and that in 2010 the Human Rights Committee noted with concern the continued reported occurrence of torture and ill-treatment.^d ACAT-France, counsel for the complainants, has been closely following up dozens of cases of torture victims and notes that torture practice remains systematic in Uzbekistan and that Muslims practising their faith outside official State controls are significantly targeted for acts of torture and other forms of mistreatment in custody.

Summary of the State party's observations on the merits

4.1 On 24 June 2011, the State party submits its observations on the merits and informs the Committee on the extradition of 19 complainants. It recalls that from 9 June to 14 December 2010, 19 foreigners for whom arrest warrants for serious crimes had been issued in Uzbekistan were arrested. Four of them were asylum seekers and 15 had been granted refugee status by UNHCR. As of 1 January 2010, matters concerning asylum seekers and refugees were regulated by the new Refugee Act and therefore refugee statuses formerly issued by UNHCR were withdrawn. A special commission under the Ministry of Labour and Social Affairs (Ministry of Interior as of 30 September 2010) reviewed the 19 complainants' refugee status. An expert from UNHCR in Geneva participated in the examination and had access to all meetings and documentation. The commission also reviewed material provided by Uzbekistan. The commission rejected the asylum claims and withdrew the refugee status of all 19 complainants. From 10 to 29 December 2010, court No. 2 of the Almalinsk district of Almaty reviewed the complainants' claims and endorsed the commission's decision rejecting refugee status. In a hearing from 2 February to 29 March 2011, the Almaty City court rejected the complainants' appeal. The cassation appeals of 28 complainants^e were rejected and the commission's decision became final. The complainants also instituted proceedings under article 531-1 of the Criminal Procedure Code against the decision by the General Prosecutor to extradite them to Uzbekistan. On 15 March 2011, court No. 2 of Almalinsk district rejected their complaint. The Almaty city court also rejected their appeal and the decision of the General Prosecutor to extradite them became final.

4.2 The State party submits that during the judicial proceedings, monitoring was carried out by a representative of UNHCR and of the State party's Human Rights Office. There were no complaints about the proceedings before the commission. The proceedings were transparent and impartial and followed international standards, including the 1951 Convention relating to the Status of Refugees. The complainants' requests for refugee status were examined pursuant to the law on refugees and the complainants appealed the negative decision to all instances. Legal representation of the complainants was guaranteed before all instances. The decision of the commission on migration was based on the fact that the complainants would pose a threat to the State party and could cause significant damage to the security of other countries. The complainants did not receive refugee status pursuant to Article 1 F (c) of the 1951 Convention relating to the Status of Refugees. The State party further submits that Uzbekistan is a party to the International Covenant on Civil

^c Human Rights Watch report, *Creating Enemies of the State: Religious Persecution in Uzbekistan* (2004), available from: <http://www.hrw.org/en/reports/2004/03/29/creating-enemies-state-0>.

^d CCPR/C/UZB/CO/3, para. 11.

^e It is not clear from the State party's observations if they address only 19 complainants (which ones is not clear) or if they address 28 complainants; in this case it is not clear what happened to the remaining complainant.

and Political Rights and the Convention against Torture; therefore the criminal investigation against the complainants will be made according to Uzbek national law and to the country's international obligations.

4.3 The complainants were extradited pursuant to the Minsk Convention. The Uzbek authorities guaranteed to respect their rights and freedoms, and that no torture or cruel, inhuman or degrading treatment would harm them. The State party therefore submits that the present communication is without merits.

Summary of the complainants' comments on the State party's observations on the merits

5.1 On 5 August 2011 counsel notes, first, that the State party refers to only 19 complainants out of 29. Further she reiterates her view that the remedies provided to the complainants in the context of their asylum applications were not effective.^f Counsel notes that according to the State party, the asylum requests of the complainants were rejected on the basis of section 12 of the Refugee Act, pursuant to which refugee status is not granted if there are serious doubts as to whether the asylum seekers were or are members of forbidden religious organizations. This provision of the law was criticized as being contrary to international refugee law.^g

5.2 Counsel notes that after their removal to Uzbekistan, the complainants were detained incommunicado. The complainants were extradited on 9 June 2011, disregarding the Committee's request for interim measures of protection, with the knowledge that the complainants would be in danger of being subjected to torture upon return, and depending on "unreliable diplomatic assurance" reportedly provided by Uzbekistan. The State party has officially acknowledged the removal of 28 individuals; counsel requests clarifications about the whereabouts and the status of the one remaining individual.

5.3 Counsel notes that the complainants' extradition took place on the basis of the Minsk Convention, which, however, does not refer to the non-refoulement obligation arising from the State party's adherence to the Convention against Torture, and its provisions cannot release the State party from its obligations not to return an individual if a risk of torture exists in the receiving State.

5.4 Counsel further contends that the State party was aware of the existence of a risk for the complainants of being subjected to torture in Uzbekistan. She points out that several public reports on the widespread use of torture in Uzbekistan were released by United Nations institutions, and international and national non-governmental organizations

^f In this context, counsel refers to paragraph 19 of the concluding observations of the Human Rights Committee concerning the examination of the initial report of Kazakhstan in July 2011 (CCPR/C/KAZ/CO/1), noting with concern that despite the enactment of new refugee legislation in 2010, its application does not guarantee the rights protected under the Covenant, and that individuals, in particular Uzbek nationals [...], have no protection under the principle of non-refoulement. Counsel also refers to a submission prepared by several Kazakh NGOs in June 2011, expressing similar concerns and referring expressly to the situation of the complainants in the present case (Kazakh NGOs joint report to the Human Rights Committee, available from http://www2.ohchr.org/english/bodies/hrc/docs/ngos/Almaty_report_HRC102.pdf).

^g Counsel refers to a report prepared by FIDH in October 2009: "Kazakhstan/Kyrgyzstan: Exploitation of migrant workers, protection denied to asylum seekers and refugees". Finally, counsel explains that Kazakh NGOs criticize the role of UNHCR as participating in the determination of asylum status in the State party (Kazakhstan Coalition of Nongovernmental Organizations (NGOs) against Torture, 2010 Report, p. 11, <http://www.bureau.kz/news/download/175.pdf>), and notes that the Human Rights Committee expressed similar concerns in its concluding observations on Kazakhstan in July 2011.

(NGOs).^h In their asylum applications, the complainants had provided details of their personal risk of torture in Uzbekistan; a number of them also referred to torture previously suffered there. All of the complainants are charged with serious crimes in Uzbekistan, such as belonging to a prohibited religious movement, and as such, all of them belong to a group systematically exposed to ill-treatment. In addition, many of the complainants had been previously granted refugee status in Kazakhstan, by UNHCR, prior to the entry into force of the new refugee law.

5.5 Finally, on the issue of diplomatic assurances, counsel explains that the Human Rights Committee, in its concluding observations concerning Kazakhstan in July 2011, has specifically warned the State party to exercise utmost care in relying on diplomatic assurances when considering the return of foreign nationals to countries where they are likely to be subjected to torture or serious human rights violations. In the present case, no appropriate follow-up mechanism exists for the monitoring of the situation of the complainants in Uzbekistan, and there is no access to the complainants there.

Summary of additional information by the State party

6.1 On 23 September 2011, the State party reiterates that all proceedings concerning the asylum applications of the complainants before the Migration Commission were lawful and that the authorities' decision not to grant asylum to the complainants was well founded and lawful. The Migration Commission was provided with all extradition materials received from the Uzbek authorities.

6.2 All refusals to grant asylum to the complainants, as well as the decisions to extradite them to Uzbekistan were examined and confirmed by a court, including on appeal. All proceedings were transparent and held in an impartial manner. All complainants were offered the services of lawyers, at all stages of the trial, including representing their interests on appeal.

6.3 The State party emphasizes that the decisions of the Migration Commission were based on the existence of reliable and verified information to the effect that the complainants' presence in Kazakhstan constitutes a threat for the State party and could also cause irreparable harm to the security of other countries. Article 1 F (c) of the 1951 Convention relating to the Status of Refugees provides that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that "he has been guilty of acts contrary to the purposes and principles of the United Nations". Pursuant to article 12 of the Refugee Act, refugee status cannot be granted where there are serious grounds to believe that the interested individuals participate or had participated in the activities of forbidden religious organizations. On this ground, having studied the materials on file, UNHCR has decided to annul the refugee certificates previously issued to a number of the complainants.

6.4 As to the complainants' situation in Uzbekistan, the State party reiterates that Uzbekistan is a party to the basic international human rights instruments and that criminal prosecutions there are conducted in accordance with national law and in light of the international obligations of Uzbekistan. Uzbekistan provided guarantees regarding respect for the basic rights and freedoms of the complainants, and that the latter would not be subjected to torture or other forms of cruel, inhuman or degrading treatment.

^h Reference is made to the concluding observations on Uzbekistan by the Committee against Torture (CAT/C/UZB/CO/3), those of the Human Rights Committee (CCPR/CO/83/UZB), and a report by the Special Rapporteur on the question of torture (A/HRC/13/39/Add.6), as well as public reports concerning Uzbekistan prepared by ACAT France, Amnesty International, and Human Rights Watch, and Uzbek NGOs.

The complainants' further submission on the merits

7.1 On 29 February 2012, counsel submits further information with regard to the complainants' reasons for seeking protection in Kazakhstan. Counsel points out that she was not able to contact the complainants in detention in Kazakhstan or in Uzbekistan upon their extradition; therefore the information is based on the complainants' asylum application, the appeals and legal motions lodged by their lawyers in their judicial proceedings before the State party's courts in 2010 and 2011, and the Kazakh court rulings. All complainants signed a power of attorney for counsel in the framework of the present communication.

Toirjon Abdussamatov

7.2 In May 1999, the complainant joined the Islamic Movement of Uzbekistan in Tajikistan. After one month, he escaped from the camp and surrendered to the police in Uzbekistan. In April 2000, he was convicted to 20 years' imprisonment. In February 2005, he was amnestied, however the police threatened him with re-arrest if he did not agree to spy on several Muslims at the mosque. In November 2005, his brother was arrested in Kazakhstan and forcibly returned despite his asylum application, and thereafter the family's house was under surveillance. In December 2005, the complainant arrived in Almaty and in July 2007 he was granted UNHCR refugee status. After the complainant's departure, his brother-in-law was arrested and beaten in police custody and the Uzbek authorities sent his mother and brother to look for him and pressured them to bring the complainant back.

Faizullohon Akbarov

7.3 On 18 June 2009, the complainant was arrested by officers from the National Security Service (SNB). In custody, he was severely beaten and put under psychological pressure, and threatened with being charged with terrorism. After a local NGO contacted the Ministry of Internal Affairs, he was transferred to a centre for homeless persons and then released on 22 June 2009. On 24 June 2009, he fled Uzbekistan and applied for asylum in Kazakhstan, where he was granted UNHCR refugee status.

Shodiev Akmaljon

7.4 The complainant, a Tajik national, had worked in Uzbekistan from 2000 to 2003. In 2007, when working in Russia, the complainant received a call from his brother informing him that an arrest warrant had been issued against him in Uzbekistan for membership of an extremist and religious organization. He applied for asylum in Russia, which was rejected. On 9 July 2009, after his return to Tajikistan, he was arrested and the security services threatened to extradite him to Uzbekistan. Through his network and by means of a bribe, the complainant's father-in-law obtained his release, after which he fled to Kazakhstan.

Suhrob Bazarov

7.5 The complainant regularly attended prayers at the mosque. SNB agents questioned him several times and threatened him with arrest. His house was regularly searched by armed officers. In 2009, a friend of his invited him to a party where he met someone called Umar. In August 2009, his friend was arrested due to his relationship with Umar. The complainant was also questioned by the police. Fearing arrest, he left Uzbekistan and obtained UNHCR refugee status on 26 November 2009.

Ahmad Boltaev

7.6 On 2 April 2000, the complainant was arrested, during a massive wave of arrests of Muslims after the 1999 bomb blasts in Tashkent. He was beaten with truncheons in police

custody and police officers planted heroin in his clothes and fabricated a case against him. He was beaten and tortured for 26 days until he agreed to sign a false confession, after which he was transferred to the Tashkent pretrial detention centre, where he was tortured again. On 15 May 2000, he was sentenced to 20 years' imprisonment for terrorism, incitement to racial, religious or ethnic hatred, attempts to overthrow the constitutional order and possession of drugs. In prison, he was coerced into running while naked and doing gruelling physical exercises; he was also regularly beaten and interrogated by SNB agents. On 27 December 2003, due to the critical state of his health, he was released from prison and requested to report to the local Ministry of Interior Department on a bi-weekly basis, when he was regularly beaten. On 13 September 2006, he was informed that several family members had been arrested. The complainant went into hiding, until he left for Kyrgyzstan in November 2007. On 17 March 2009, he went to Almaty and was granted UNHCR refugee status in August 2009.

Shuhrat Botirov

7.7 The complainant regularly attended Friday prayers at the mosque and was several times threatened with arrest by the local community authorities. In April 2010, two of his friends with whom he used to attend Friday prayers were arrested by the SNB. They were convicted to 9 and 20 years' imprisonment. The complainant was afraid for his life and decided to leave Uzbekistan. On 5 April 2010, he arrived in Kazakhstan, where he was granted UNHCR refugee status.

Mukhitdin Gulamov

7.8 In 1999, three of his friends with whom he used to attend the mosque were arrested and his house was searched. In 2001, in a new wave of arrests targeting the mosque he was attending, police searched his house in his absence. After this, the complainant went into hiding until 2004. When he came out of hiding, he was summoned by the Prosecutor's office and questioned about his acquaintances. From 2005 to 2007, he was in hiding again, after several friends were convicted. In early 2007, he left Uzbekistan and obtained UNHCR refugee status in Kazakhstan in March 2007.

Shukhrat Holboev

7.9 In November 1999, friends of the complainant were arrested and forced to sign documents alleging that the complainant was advocating overthrowing the constitutional regime. In December 1999, the complainant was arrested and forced to sign a confession. In February 2000, he was sentenced to six and a half years' imprisonment for attempts to overthrow the constitutional order and illegal possession of weapons, ammunition and explosives. On 14 January 2004, he was amnestied. In August 2009, several of his friends were arrested. On 9 October 2009, he fled to Kyrgyzstan and on 11 January 2010, he arrived in Almaty and applied for asylum under the 2010 Kazakh Refugee Act.

Saidakbar Jalolhonov

7.10 In 1995, several religious leaders were arrested and the mosque the complainant used to attend was forcibly closed. He therefore decided to go to Russia. In Russia, he resumed his religious classes and became an Imam. He visited Uzbekistan once a year. In 2001, he was informed that his former teacher had been arrested and under torture revealed the names of all his students, including that of the complainant and that the SNB had come to his house several times to question his parents about him. The complainant immediately returned to Russia. In 2004, he was summoned by the Russian Federal Security Services, who informed him that he was on the Uzbek black list. Subsequently, he was denied renewal of his work permit and advised to leave Russia; otherwise he would be deported to

Uzbekistan. He moved to Kyrgyzstan and then to Kazakhstan, where he was granted UNHCR refugee status on 26 August 2009.

Dilbek Karimov

7.11 The complainant worked at a factory in St. Petersburg. He started studying Islam. In 2009, his mother told him that his uncle and several friends had been arrested and accused of membership of an extremist religious group. She also told him that the SNB had come to his parents' apartment and that she, under pressure, had given them the complainant's address in St. Petersburg. The complainant was informed that the Uzbek authorities were looking for him for membership of a religious extremist organization. On 6 January 2010, he sought asylum in Kazakhstan. From 10 to 25 April 2010, his father was detained by the Uzbek SNB in an effort to pressure the complainant to return to Uzbekistan.

Abror Kasimov

7.12 In June 2007, the SNB arrested 55 people in Kokand, including one of the complainant's friends, who was forced to incriminate him in a case. On 10 July 2007, the complainant fled to Russia. In his absence, his house was searched and documents confiscated. His wife and parents were also regularly interrogated by the SNB. In April 2009, he arrived in Kazakhstan, where he sought asylum.

Olimjon Kholturaev

7.13 The complainant had been studying the Koran in Arabic since 2004. In 2008, his friend was arrested and revealed the name of the complainant. On 23 November 2008, the complainant went into hiding. After the conviction of another friend, who had returned to Uzbekistan from the United Kingdom, the complainant decided to seek asylum in Kazakhstan.

Alisher Khoshimov

7.14 On 27 January 1998, the complainant was arrested and, after drugs had been planted in his pocket, he was charged with drug possession. In pretrial detention, he was interrogated about an Imam whom he knew and he was tortured by alleged inmates in his cell, who incited him to testify against the Imam for attempts to overthrow the constitutional regime. On 26 January 2001, he was released. In June 2009, one of his relatives was interrogated about him and was later convicted to six years' imprisonment. In September 2009, the complainant fled to Kazakhstan. In his absence, the police came to his house and asked about his whereabouts. His 17-year-old son, his brother and his nephew were arrested and his son was convicted to 15 years' imprisonment.

Sarvar Khurramov

7.15 The complainant belongs to a Muslim family and for his wedding, he organized a religious service. After the arrest of a friend (the same as Mr. Kholturaev's friend, see above), SNB agents came to his parents' house for questioning. In February 2010, the complainant was granted UNHCR refugee status in Kazakhstan.

Oybek Kuldashev

7.16 The complainant regularly attended the local mosque. In April 2010, two of his friends were arrested and later convicted to 9 and 20 years' imprisonment. Afraid for his life, the complainant left Uzbekistan and was granted UNHCR refugee status on 8 April 2010. He was informed that his two brothers and a close friend had been arrested and interrogated about him during his absence. They were severely beaten.

Kobiljon Kurbanov

7.17 After the 1999 bombings in Tashkent, the complainant began to be harassed. In 2001, the complainant was convicted for distribution of illegal leaflets that the police planted in his bag. In 2004, he was arrested for illegal possession of a weapon that the police had hidden at his house. In 2009, he was illegally detained for seven days and severely beaten by the police. On 26 February 2010, he sought asylum in Kazakhstan.

Bahriddin and Bahtiyor Nurillaev

7.18 Several members of the complainants' family were arrested because of their religious practices. Their brother was tortured over a period of five months and forced to sign false confessions. Four of their cousins were also tortured and forced to sign confessions stating that they belonged to extremist organizations. Afraid of being subjected to the same treatment, the brothers fled to Kazakhstan, where they were granted UNHCR refugee status in October and November 2009.

Ulugbek Ostonov

7.19 In 1999, the complainant became a practising Muslim and hosted a discussion group about Islam at his house. In March 2004, after the bomb blasts in Tashkent, three members of the group were convicted to 16 and 18 years' imprisonment. The complainant was placed under surveillance and his wife was regularly questioned and tortured in connection with him by SNB agents. Fearing for his safety, the complainant went to Russia and then to Kazakhstan in October 2008. He was informed that his brother had been held incommunicado for three months, during which time he was tortured and told that he would be released if the complainant came back to Uzbekistan. On 13 January 2010, the complainant obtained UNHCR refugee status in Kazakhstan.

Isobek Paradaev

7.20 In 2006, the complainant started practising Islam and in 2009, he got married in a religious service, following which he was placed under surveillance as a potential extremist. In April 2010, two of his friends were arrested at the mosque he was attending. The complainant left for Kazakhstan, where he was granted refugee status in May 2010.

Oybek Pulatov

7.21 In 2009, friends of the complainant with whom he attended the mosque were arrested and the complainant's house and shop were placed under surveillance. In April 2010, a very close friend was arrested, held incommunicado for five months and severely tortured. Worried by these arrests, the complainant left for Kazakhstan.

Uktam Rakhmatov

7.22 The complainant was meeting his friends twice a month to study the Koran. In 2008, he was informed that his name appeared on the list of alleged suspects. In 2009, after several friends were arrested, he was approached by the SNB several times. After his departure for Kazakhstan on 5 April 2010, his parents were notified that the police were looking for him.

Otabek Sharipov

7.23 On 7 June 2000, the complainant was interrogated, kicked and punched and asked to confess that he belonged to an extremist religious group, which he refused to do. Over a period of 20 days he was severely tortured and asked to sign a confession, which he finally did. On 11 December 2000, he was convicted to nine years' imprisonment. On 15 January

2003, after having been regularly tortured in detention, he was released on an amnesty. In 2007, the complainant went to work in St. Petersburg and returned to Uzbekistan in December 2007. In February 2008, several of his colleagues were arrested after they returned to Uzbekistan. On 21 August 2009, he arrived in Kazakhstan.

Tursunboy Sulaimonov

7.24 The complainant is Muslim and a Tajik national. On 29 March 2004, the day of the Tashkent bombings, his three brothers-in-law were arrested. Four days later, 12 police officers came to his house. His wife managed to warn him and he fled to Tajikistan. A few days later, the Tajik authorities arrested him and accused him of taking part in the March bombings in Tashkent and of gun smuggling. He was tortured for three days but was released following a significant bribe. In September 2004, a trial started against 33 defendants, including the complainant. He was described as the leader of the extremist organization which carried out the Tashkent bombings and the Uzbek authorities issued an international arrest warrant for him. On 6 March 2009, the complainant arrived in Kazakhstan after living in hiding in Tajikistan and Kyrgyzstan.

Sirojiddin Talipov

7.25 The complainant regularly attended prayers. In 2007, the complainant went to Russia to work and, during one of his visits to Uzbekistan, he was informed that his house was under surveillance and that many of his friends had been arrested. In 2010, his family told him that he should not return to Uzbekistan as he would be arrested. He therefore went to Kazakhstan and sought asylum.

Abduazimhuja Yakubov

7.26 A colleague of the complainant was placed under SNB surveillance and was later assassinated. In 2009, the complainant and every man in his family were summoned by the SNB. On 28 January 2010, the complainant arrived in Kazakhstan. He was informed that his sister and nephew had been convicted to 9 and 17 years' imprisonment respectively and that he was charged with belonging to an extremist religious group allegedly founded by his father-in-law, who was later killed by the police.

Maruf Yuldoshev

7.27 In 2009, the complainant started attending the mosque. In April 2010, one of his friends was arrested and he was advised by another friend that he was in danger of arrest and torture. He fled Uzbekistan and arrived in Kazakhstan on 5 April 2010.

7.28 Counsel submits that she does not have any information on Ravshan Turaev and Fayziddin Umarov, as she was not able to access the complainants in detention in Kazakhstan or Uzbekistan upon their extradition.

State party's further observations on the merits

8.1 On 30 April 2012, the State party submits further observations with regard to the extradition of the 29 complainants. It notes that from June to December 2010, the complainants were extradited to Uzbekistan, where they were wanted on charges of terrorism, establishment and membership of religious, extremist, separatist, fundamentalist and other prohibited organizations, murder, membership of criminal organizations and other crimes. The decision to extradite them was taken in accordance with the provisions of the International Covenant on Civil and Political Rights, and also taking into account the gravity of the charges, to avoid the individuals escaping and to ensure public security on the territory of the State party.

8.2 The State party refers to its earlier submissions with regard to the legality of the extradition decision and the complainants' allegations of ill-treatment and torture by the State party's authorities. It reiterates that it had received written guarantees from the General Prosecutor's Office of Uzbekistan that the complainants' rights and freedoms would be respected after the extradition and that they would not be subjected to torture or ill-treatment. The Uzbek authorities also assured the Committee that international organizations, such as the International Committee of the Red Cross (ICRC), the World Health Organization (WHO) and a number of international human rights organizations have free access to monitor detention facilities and to carry out interviews with detainees.

8.3 The State party explains that after the authorities' decisions on the complainants' claims against their extradition and concerning their refugee status had become final, it did not have any legal grounds to keep them in detention, and that, moreover, it could not release them as they constituted a threat to Kazakh public interests and security.

8.4 The State party recalls that Uzbekistan is a party both to the International Covenant on Civil and Political Rights and the Convention against Torture. Therefore, the criminal proceedings against the complainants are carried out in line with the domestic legislation and the international obligations of Uzbekistan. Pursuant to the Minsk Convention, the State party obtained information on the criminal investigations against 26 complainants, who have been sentenced only for crimes which figured in the extradition request. None of them was sentenced to death or to life imprisonment.

8.5 The State party notes that Mr. Rakhmatov was sentenced to three years' corrective labour. Similar sentences which do not involve imprisonment were given to Mr. Pulatov and Mr. Yuldoshev. The criminal case against Mr. Jalolhonov was closed pursuant to an amnesty act. Mr. Abdussamatov was sentenced to 12 years' imprisonment on 26 September 2011 for attempts to overthrow the constitutional order. The State party explains that it will be informed by Uzbekistan of the outcome of all criminal proceedings against the complainants. Finally, the State party submits that its embassy personnel met with the Uzbek authorities regarding the complainants' conditions of detention and their claims of torture and ill-treatment and that it will provide further clarifications in this regard.

Oral hearing of the parties

9.1 On 8 May 2012, at the request of the State party, the Committee held an oral hearing with both parties. The State party explained that the decision to extradite the complainants was taken for a number of reasons: firstly, according to article 534 of the Criminal Procedure Code, the maximum duration of imprisonment on extradition arrest is one year and the complainants had completed that year; secondly, there were no legal grounds for their release or for granting them refugee status in Kazakhstan, and it appeared to be impossible to relocate them to a third country; thirdly, according to foreign partners' information, the complainants were involved in the establishment of a network of international terrorist organizations, of which two such organizations are prohibited in the State party and are on the list of the United Nations Security Council Counter-Terrorism Committee.

9.2 The State party further noted that UNHCR had revoked the complainants' refugee status after their experts had studied their files for two months. The State party could not allow further infiltration of religious extremism from Central Asia to other countries and made a conscious decision not to respect the Committee's request for interim measures in order to protect its citizens and those of other countries.

9.3 With regard to the complainants' criminal proceedings in Uzbekistan and their health, the State party explained that, according to the information from the Uzbek General Prosecutor of 5 May 2012, 25 complainants have been found guilty of crimes and

sentenced; three of them were sentenced to corrective labour for three years and were released after the court hearing. One complainant was amnestied. The State party notes that there is no reason to believe that the complainants would be subjected to torture, inhuman or degrading treatment in Uzbekistan. According to the Uzbek authorities, the complainants are held in adequate conditions and they are not subjected to torture. The State party notes that every year, about 10,000 illegal migrants enter its territory from Uzbekistan, some 5,000 of whom are sent back. The State party cooperates with Uzbekistan and extradites an average of 40 individuals per year in relation to criminal proceedings. Since 2007, UNHCR has resettled 215 Uzbek citizens to third countries.

9.4 Answering the Committee members' questions, the State party noted that, according to article 18 of the Refugee Act and article 532 of the Criminal Procedure Code, nobody can be sent back to a third country if there is a threat to life or liberty and a risk of torture. On fair trial of the complainants in Kazakhstan, the State party reiterated its written observations and noted that documentary evidence proved that lawyers and interpreters took part in the proceedings and no complaints were submitted by the complainants, their lawyers, the representatives of UNHCR or the State party's Human Rights Office. With regard to the proceedings in Uzbekistan, the State party noted that all complainants were defended by lawyers of their choice and that no claims of torture have been made.

9.5 With regard to the situation in Uzbekistan and the risks for the complainants, the State party observed that the Kazakh authorities worked together with their Uzbek counterparts to receive assurances that none of the complainants would be subjected to torture and that international organizations would be allowed to visit them. In case of failure to observe these guarantees, the State party has reserved its right to review its cooperation with Uzbekistan. It also stated that it is aware of international non-governmental organizations' human rights reports on Uzbekistan, reports by United Nations Special Rapporteurs and General Assembly resolutions. It referred to other reports indicating that the human rights situations in Uzbekistan had improved. It also submitted that Mr. Yakubov was sentenced to 18 years of imprisonment and Mr. Boltaev to 12, rather than 30 as mentioned in the media.

9.6 With regard to the whether the complainants figure by name on the United Nations Security Council Counter-Terrorism Committee list, the State party noted that the two organizations it mentioned are on the list. One has around 5,000 members and not all of the members are listed.

9.7 The State party further explained that it regularly monitors the complainants' situation and that it has been informed that the complainants were not subjected to torture on return to Uzbekistan.

9.8 The State party confirmed that it had an anti-terrorism law but that it decided to extradite the complainants in light of the threat they represented to national security and security in the region or other countries.

9.9 With regard to the complainants' whereabouts, the State party stated that four of them have been released and the others are either in prison or in pretrial detention.

10.1 The complainants' counsel stated that the State party has not explained its failure to comply with the interim measures of protection constituting a violation of article 22 of the Convention,ⁱ thereby shifting the burden of proof to the State Party, which needs to justify the complainants' extradition.

ⁱ See communication No. 249/2004, *Dar v. Norway*, decision adopted on 11 May 2007, para. 16.4.

10.2 Counsel notes that before the extradition of the complainants, the State party had ample information regarding the substantial risk of torture upon their return. The abysmal record of Uzbekistan on torture has been well documented by international NGOs, such as Human Rights Watch,^j by the United Nations Special Rapporteur on torture, the Human Rights Committee in its concluding observations on Uzbekistan in 2010 and in European Court of Human Rights judgments against Russia.^k It is well known that there is a consistent and systematic use of torture against detainees in Uzbekistan and that individuals held on religious or terrorism grounds face higher risks. Counsel reiterates that the complainants are all devout followers of Islam and were charged on the basis of article 244 of the Uzbek Criminal Code (“publishing, storing and distributing of materials containing ideas of religious extremism” and “participating in a religious extremist, separatist, fundamentalist or other banned organization”) and article 159 of the Uzbek Criminal Code (“attempt to overthrow the constitutional order”). Like thousands of other believers peacefully practising their religion outside strict State controls in Uzbekistan, they were targeted in a government crackdown and branded as “religious extremists” and “members of banned religious organizations”. Many of the complainants were detained and tortured before fleeing their country.

10.3 Counsel notes that the complainants detailed their personal backgrounds and established their individual risk of torture upon return in their appeals before the State party’s courts and constantly referred to the Convention against Torture, European Court of Human Rights case-law and NGOs reports on torture in Uzbekistan. The State party’s courts however did not make an individual assessment of their risks of torture. Furthermore, international NGOs, such as ACAT-France, Amnesty International, Human Rights Watch and others submitted numerous letters and appeals to Kazakh authorities, between 2010 and 2011, requesting prevention of their extradition in light of the risk of torture. Counsel argues that the State party was aware of the danger faced by the complainants.

10.4 Counsel observes that the non-refoulement principle is a non-derogable and fundamental principle which shall prevail over bilateral extradition conventions. Counsel also notes that withdrawal of refugee status is not a relevant consideration for assessment of the risk of torture. Even terrorists have the right not to be tortured.

10.5 With regard to the diplomatic guarantees allegedly provided by Uzbekistan, counsel considers them unreliable and notes that there is no independent and effective post-extradition monitoring mechanism in Uzbekistan.^l She notes that the United Nations Special Rapporteur on Torture and the European Court of Human Rights have both found that diplomatic assurances from the Uzbek Government do not release States from their obligation not to return an individual to a risk of torture. The United Nations Human Rights Committee, in its concluding observations on Kazakhstan, recommended that the State party exercise the “utmost care in relying on diplomatic assurances”. She also notes that Kazakhstan did not provide a copy of these alleged guarantees to the Committee. With regard to the alleged monitoring mechanisms, counsel observes that the mandate and confidentiality rules of the International Committee of the Red Cross prevent any report on conditions in Uzbekistan from being submitted to Kazakhstan. Moreover, WHO, when contacted by counsel denied having received any instruction from the Uzbek authorities to monitor the situation of the complainants and noted that it does not have access to prisons.

^j Human Rights Watch, “Nowhere to turn: torture and ill-treatment in Uzbekistan”, 2007.

^k European Court of Human Rights, *Ismailov and others v. Russia*, Application No. 30352/03, 6 November 2008; *Sultanov v. Russia*, Application No. 15303/09, 4 November 2010.

^l ECHR, *Ergashev v. Russia*, Application No. 12106/09, 20 December 2011, para. 114.

“Other international human rights organizations” do not have any access to places of detention in Uzbekistan.^m

10.6 Counsel endeavoured to monitor the complainants’ situation, but no one has been able to visit them or to provide any information regarding their whereabouts and their treatment. According to press articles, five of the complainants were given long sentences between August and November 2011.ⁿ For example, Ahmad Boltaev was convicted to 13 years’ imprisonment. Others were tried, but the outcome is unknown as there is no media coverage or independent trial monitoring. Counsel states that she believes that the complainants were not assisted by independent lawyers and that their right to a fair trial was breached.

10.7 Counsel also considers that the State party failed to take effective measures to prevent acts of torture in this case, in violation of article 2 of the Convention against Torture. It also failed to provide the complainants with access to an effective remedy against their extradition, in violation of article 22 of the Convention.^o

10.8 With regard to the fight against terrorism, counsel notes that it should be carried out in compliance with human rights law^p and the State party’s obligation not to expel individuals who risk torture is absolute. If the complainants constituted a danger to the security of the State party, the authorities should have charged them with a crime and tried them in their courts.

10.9 With regard to the remedies, counsel refers to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims^q and requests that the State party be ordered to ensure the return of the complainants,^r and compensation and rehabilitation pursuant to article 14 of the Convention should be given to them. The State party should also review its system of diplomatic assurances and its judicial system with a view to avoiding similar violations in the future.^s

State party’s further information

11.1 On 11 May 2012, pursuant to a request by the Committee during the oral hearing, the State party submitted copies of the guarantees by the Uzbek authorities as well as some of the District Court decisions^t. From the documents, it transpires that, on 6 September 2010, the State party requested guarantees for the 29 complainants, in particular that the prosecution would not be based on political motives and that they would not be subject to any discrimination, torture, inhuman or degrading treatment or punishment, and that, if

^m Human Rights Watch was the last international NGO operating in Uzbekistan and the Government closed their office in June 2011.

ⁿ Ozodlik, 18 August 2011, Ўзбекистонга экстрадиция қилинган қочқинлар устидан ҳукм ўқилди (in Uzbek) ; <http://www.ozodlik.org/content/article/24301128.html>; Radio Free Europe, 23 August 2011, Uzbeks Extradited From Kazakhstan Stand Trial For Extremism (in English) http://www.rferl.org/content/extradited_uzbeks_tried_for_extremism/24305622.html; Radio Ozodlik, 30 September 2011, Ўзбекистонга қайтарилган уч қочқинга ҳукм ўқилди (in Uzbek), <http://www.ozodlik.org/content/article/24344491.html>.

^o See communication No. 319/2007, *Singh v. Canada*, decision adopted on 30 May 2011, para. 8.

^p Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Ten areas of best practices in countering terrorism (A/HRC/16/51), principle 1.

^q General Assembly resolution 60/147.

^r See communication No. 249/2004, *Dar v. Norway*, decision adopted on 11 May 2007.

^s See communication No. 327/2007, *Boily v. Canada*, decision adopted on 14 November 2011, para. 15.

^t The State party provided court decisions of the first instance court for 11 complainants.

necessary, the State party's authorities could visit the complainants at any time during the criminal proceedings to verify that their rights were being upheld. On 7, 11, 12 and 20 October 2010 and 10 January 2011, the General Prosecutor of Uzbekistan provided guarantees for each one of the complainants, stating that Uzbekistan is a party to the Covenant on Civil and Political Rights and the Convention against Torture. It further noted that, according to articles 16 and 17 of the Uzbek Criminal Code, justice is carried out according to the principle of equality of arms, without discrimination, and nobody can be subject to torture, inhuman or degrading treatment. Any act or decision against human dignity, causing a threat to someone's health, or physical or mental pain is forbidden. It also authorized the authorities of Kazakhstan to visit each one of the complainants in detention and to receive information on their criminal proceedings. The Uzbek authorities further guaranteed that the complainants' criminal proceedings were in conformity with the provisions of the Uzbek Criminal Procedure Code and its international obligations.

11.2 On 5 May 2012, the General Prosecutor of Uzbekistan informed the State party that out of the 29 extradited individuals, 25 have been sentenced. Mr. Rakhmatov, Mr. Yuldoshev and Mr. Pulatov were sentenced to three years of non-custodial correctional labor.^u The Uzbek authorities provided legal aid for all complainants and some of them had their own lawyers. One complainant refused legal aid and defended himself.^v No complaints of torture or ill treatment have been raised. The criminal proceedings were public. They also state that they are currently considering the possibility that the Kazakh authorities may visit the complainants in detention. The Uzbek authorities further mention that they have set up a mechanism to implement the recommendations of United Nations treaty bodies.

Counsel's further comments

12.1 On 16 May 2012, counsel submitted further comments, noting that the communication was submitted in December 2010 and that at that time, all the documents presented by the State party on 11 May 2012 were already in its possession and the State party has not explained why it submitted the documents only at this late stage of the proceedings.

12.2 With regard to the court decisions, counsel notes that it provides evidence that the complainants raised the issue of non-refoulement and the risk of ill-treatment upon their return to Uzbekistan; however that their arguments were rejected summarily without examination. Counsel further notes that the court did not rebut the complainants' arguments about fair trial violations and the State party did not address these allegations.

12.3 Counsel further submits that the diplomatic assurances have been submitted belatedly and that they are vague, not specific, and do not provide for any effective follow-up mechanism. The guarantees were given in response to the State party's Prosecutor General's request, in which he states that the authorities have no doubt that Uzbekistan would comply with its international commitments. Furthermore, the text of the assurances sought were included in the letter by the Kazakh Prosecutor General and therefore constituted pure formality, without having any impact on the State party's decision with regard to extradition of the complainants.

12.4 Counsel further argues that the right to visit the complainants by the State party's authorities was provided mostly in October 2010; however it was only in its further submission of 11 May 2012 that the State party informed the Committee that it was

^u The State party does not provide information regarding the sentences of the remaining 23 complainants.

^v No name is mentioned.

considering the possibility of visiting the complainants. It has not provided any explanation as to why it has not visited them earlier. Counsel cites European Court of Human Rights case-law^w and notes that the only case in which diplomatic assurances were considered a sufficient guarantee against torture was when the monitoring in the place of detention was delegated to an independent human rights NGO.

Issues and proceedings before the Committee

Consideration of the merits

13.1 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.

13.2 The Committee must determine whether the forced removal of the complainants to Uzbekistan 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 takes 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 for assessing the information, which the State party actually had or should have had at the time of extradition.

13.3 In assessing whether the extradition of the complainants to Uzbekistan 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. 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.

13.4 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', but it must be personal and present". In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.^x

13.5 The Committee notes counsel's arguments that the complainants and other individuals returned to Uzbekistan pursuant to extradition requests were held in incommunicado detention and therefore subjected to a risk of torture and ill-treatment. It also notes counsel's claim that use of torture and ill-treatment in Uzbekistan remains systematic and Muslims practising their faith outside official State control, as well as persons charged with religious extremism and attempts to overthrow the constitutional order have been specifically targeted. The Committee also notes that the State party rejected the complainants' request for asylum or reinstatement of their revoked refugee status^y on the grounds that they would pose a threat to the State party and could cause significant damage to its security and that of other countries. It also notes counsel's

^w ECHR, *Othman v. the United Kingdom*, judgment of 17 January 2012.

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

^y 12 of the complainants had UNHCR refugee status until August 2010.

argument that the proceedings in the State party leading to the extradition of the complainants were not fair, as no interpreter was provided, they had limited access to lawyers and the lawyers did not have access to the files. It further notes the State party's assertion that its proceedings were monitored by UNHCR and officials of the State party's Human Rights Office who did not receive any complaints, and that legal representation and interpretation was guaranteed. With regard to the complainants' allegation that they risk torture in Uzbekistan, the Committee notes the State party's argument that Uzbekistan is party to the International Covenant on Civil and Political Rights and to the Convention against Torture and that Uzbekistan issued diplomatic assurances guaranteeing that the complainants would not be subjected to torture or cruel, inhuman or degrading treatment. It also notes that according to the State party, Uzbekistan assured it that international organizations could monitor the detention facilities. The Committee notes that counsel has rejected this assertion and noted that the rules of ICRC did not allow any reports to be made to the State party's authorities and that the other organizations mentioned did not have access to places of detention. The Committee further notes counsel's claim that in the cases of four of the 29 complainants UNHCR was against their extradition and that counsel did not have access to information about the UNHCR position in other cases.

13.6 With regard to the existence of a consistent pattern of gross, flagrant or mass human rights violations, the Committee recalls its concluding observations on Uzbekistan's third periodic report,^z in which it expressed its concern about numerous, ongoing and consistent allegations of routine use of torture and other cruel, inhuman or degrading treatment or punishment by law enforcement and investigative officials or with their instigation or consent, and that persons who sought refuge abroad and were returned to the country have been kept in detention in unknown places and possibly subjected to breaches of the Convention.

13.7 The Committee notes that all 29 complainants are Muslims reportedly practising their religion outside of official Uzbek institutions or belonging to religious extremist organizations. It also notes that the complainants were extradited pursuant to a request from Uzbekistan accusing them of serious crimes, including religious extremism and attempts to overthrow the constitutional order, and on the basis of the State party's assessment that they posed a security threat to its citizens and citizens of other countries. The Committee reiterates its concern, expressed in its concluding observations, about forcible returns to Uzbekistan in the name of regional security, including the fight against terrorism, to unknown conditions, treatment and whereabouts.^{aa} It also notes that the non-refoulement principle in article 3 of the Convention is absolute and the fight against terrorism does not absolve the State party from honouring its obligation to refrain from expelling or returning ("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.^{bb} In this context, the Committee also observes that the non-refoulement principle in article 3 of the Convention is absolute even if after an evaluation under the 1951 Convention relating to the Status of Refugees, a refugee is excluded under article 1 F (c).

13.8 In the circumstances of the present case, the Committee considers that in its own concluding observations, as well as in the information presented to it, the pattern of gross, flagrant or mass violations of human rights and the significant risk of torture or other cruel, inhuman or degrading treatment in Uzbekistan, in particular for individuals practising their

^z CAT/C/UZB/CO/3.

^{aa} CAT/C/KAZ/CO/2, para. 15.

^{bb} See communications No. 39/1996, *Paez v. Sweden*, Views adopted on 28 April 1997, No. 110/1998, *Núñez Chipana v. Venezuela*, Views adopted on 10 November 1998, para 5.6, and No. 297/2006, *Singh Sogi v. Canada*, Views adopted on 16 November 2007.

faith outside of the official framework, has been sufficiently established. In addition, it observes that the complainants argued that they were subjected to religious persecution, in some cases including detention and torture, before they fled to Kazakhstan.

13.9 The Committee recalls that under the terms of its general comment No. 1 on the implementation of article 3 it will give considerable weight to findings of fact that are made by organs of the State party concerned, but that the Committee is not bound by such findings and has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.^{cc} In the present case, the Committee notes that the State party has not provided evidence either in writing or orally refuting the complainants' claims that their extradition proceedings did not satisfy minimum fair trial requirements (e.g. sufficient time to prepare the defence, limited access to lawyers and interpretation) and that there was no individualized risk assessment of each complainant's personal risk of torture upon return to Uzbekistan. The Committee observes that whereas the first instance court (some decisions have been provided to the Committee) referred to the domestic legislation, as well as to the 1951 Convention relating to the Status of Refugees, it did not carry out an individualized risk assessment pursuant to article 3 of the Convention or the non-refoulement principle in the domestic legislation. Moreover, the State party failed to respect the interim measures requested by the Committee. Nor did the State party examine the arguments raised by the complainants on the absence of a fair trial and their risk of torture upon return to Uzbekistan. The Committee concludes that the State party has not properly examined the complainants' claims that they would face a foreseeable, real and personal risk of torture upon return to Uzbekistan. In the context of the case, taking into account the written and oral submissions by the parties, the Committee concludes that the complainants, who have all been charged with religious extremism or membership of extremist or terrorist organizations in Uzbekistan and were extradited by the State party on the basis of those charges, have sufficiently demonstrated their foreseeable, real and personal risk of torture upon return to Uzbekistan. Accordingly, the Committee concludes that in the circumstances of the present case, the State party's extradition of the complainants to Uzbekistan was in breach of article 3 of the Convention.

13.10 Moreover, the State party has invoked the procurement of diplomatic assurances as sufficient protection against this manifest risk. The Committee recalls that diplomatic assurances cannot be used as an instrument to avoid the application of the principle of non-refoulement. The Committee notes that the State party failed to provide any sufficiently specific details as to whether it has engaged in any form of monitoring and whether it has taken any steps to ensure that the monitoring is objective, impartial and sufficiently trustworthy.

14. 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 reveal a breach by the State party of articles 3 and 22 of the Convention.

15. In conformity with article 118, paragraph 5, of its rules of procedure, the Committee urges the State party to provide redress for the complainants, including return of the complainants to Kazakhstan and adequate compensation. It wishes to be informed, within 90 days, of the steps taken by the State party to respond to these Views.

^{cc} General comment No. 1 (see note x above) and inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010.

Communication No. 453/2011: Gallastegi Sodupe v. Spain

<i>Submitted by:</i>	Oskartz Gallastegi Sodupe
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of complaint:</i>	20 January 2011 (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 23 May 2011,

Having concluded its consideration of complaint No. 453/2011, submitted to the Committee by Oskartz Gallastegi Sodupe 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 pursuant to article 22, paragraph 7, of the Convention:

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

1. The complainant is Orkatz Gallastegi Sodupe, a Spanish national born on 7 June 1982. He claims to be the victim of a violation by Spain of articles 12, 14 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel, Ms. Iratxe Urizar and Mr. Julen Arzuaga.

The facts as submitted by the complainant

2.1 On 24 October 2002, when he was 20 years of age, Mr. Gallastegi Sodupe was arrested by the Ertzaintza (Basque autonomous police force) in Berango (Bizkaia) during a police operation in which five other youths were also arrested on charges connected with sabotage and damage to public property.

2.2 The complainant was arrested in a violent manner at 5 a.m. in his home by masked police. He was thrown to the ground and handcuffed, and his house was searched for three hours.^a He was then placed in a white van without police markings. With his hands handcuffed behind his back, he was taken by the police to Arkaute central police station.

2.3 It was determined at the police station that the charges against the complainant fell within the scope of anti-terrorism laws and that he should therefore be held incommunicado, thereby depriving the complainant of contact with family members, a lawyer or a doctor trusted by the detainee. The complainant asserts that the charges, although related only to the destruction of public property with home-made inflammable

^a The Committee notes that, according to a written statement submitted by the complainant to the Donostia-San Sebastián police court on 29 January 2003, a court registrar appeared during the police operation, showed him a warrant for his arrest and informed him that he would be charged with the offence of terrorism. Subsequently, the house search began.

substances and, therefore, bearing no direct relation with the activities of armed groups, are deemed to fall within the scope of anti-terrorism laws because they are politically motivated, which in turn leads automatically to placement in incommunicado detention. Counsel for the complainant appearing before the judge requested the application of the so-called “Garzón Protocol”, a series of measures designed to prevent ill-treatment or torture, such as by permitting access to a doctor trusted by the detainee, informing family members of the detainee’s condition and whereabouts and allowing the detainee to confer with a lawyer in private. The complainant alleges that the request was denied.

2.4 The author was subjected to ill-treatment in Arkaute police station. He was obliged to remain in uncomfortable positions to the point of exhaustion. He was kept in a cell measuring 4 by 2 metres, with no windows and no furniture other than a cement bed. Whenever the police called at the door or entered the cell, they forced him to stand against the wall in uncomfortable positions and with his eyes closed. He received blows to all parts of his body and was kicked in the genitals. They would sit him down, cover his head with clothes and beat him senseless. He was prevented from sleeping by the loud music being played and lights being kept on constantly. Moreover, when he was taken to the interrogation room, he had to lower his head and keep his eyes shut; otherwise they would bang him against the corridor wall. The same kind of treatment was also meted out during questioning. Whenever he fell over or lost consciousness, he was forced to drink water, even when he resisted. He was also subjected to psychological torture, being threatened with death and told that his family would be harmed. He heard the cries of detainees in neighbouring cells and was told that his brother had also been detained and was receiving the same treatment because of him. All of this, in addition to being held incommunicado for three days, left him in a serious state of anxiety.^b

2.5 On 25 October 2002, the day following his detention in Arkaute police station, the complainant was examined by a forensic doctor, to whom he reported the ill-treatment to which he was being subjected. The doctor merely made a written note of the information, without examining the complainant closely or showing concern for his condition. On 26 October 2002, the complainant again told the doctor that he was being tortured, but the doctor made no mention of it in his report.^c

2.6 During the three days in which the complainant was held incommunicado, he was subjected to questioning designed to extract a statement confirming that he was guilty of the charges laid against him. One police officer told him to confess and he was forced to

^b The application for constitutional *amparo* submitted by the complainant to the Constitutional Court on 22 April 2004 states that he was also threatened with sexual assault.

^c In his written statement of 29 January 2003 to the Donostia-San Sebastián police court, the complainant recounts: “I was twice taken to see the forensic doctor, the first time because of back pain and the second because of a knee injury [...]. They told me that they would take me to hospital but that did not happen. I was hoping that they would hurt me badly enough for me to be transferred to hospital and left in peace for a while. But they had everything worked out and knew just how, when and what to do at any given time. Even so, I realized on some occasions that they were worried about the state I was in. On the other hand, in a written statement submitted to the Second Examining Magistrate’s Court of Vitoria-Gasteiz on 10 February 2004, it is stated that: “Mr. Gallastegi did not tell the forensic doctor who examined him in Arkaute about the treatment he was receiving in the custody of the Ertzaintza. Only later, when he was out of their reach, did he dare to do so before the judge and forensic doctor of the National High Court.” In the complaint submitted to the Committee, no reference is made to this last medical examination. According to the ruling of 4 December 2006 by the second criminal division of the Supreme Court, the complainant was examined for a third time by a forensic doctor of the First Central Examining Magistrate’s Court of the National High Court on 28 October 2002. On that occasion, the complainant allegedly refused to undress and stated that nothing was wrong with him.

learn self-incriminating statements by heart. The complainant was forced to practise his testimony. In one practice run he was beaten and threatened because the police officers were not satisfied with his performance. They lifted him by his hair and forced him to read out the statement until he did so correctly. His statement was taken under duress on three occasions before the police investigator. The complainant was not properly defended because, although assigned counsel was present, counsel took no active part in the proceedings and the complainant was given no opportunity to confer with him in private and inform him of the circumstances under which his statement to the police was made.^d

2.7 As a result of the torture, the complainant admitted that he was guilty of destroying public property and of association with and membership in a terrorist organization, in connection with the murder of a Bilbao Provincial High Court judge, José María Lidón Corbi, carried out by members of the Euskadi Ta Askatasuna (ETA) organization on 7 November 2001. The complainant stated that, at the request of an ETA member and childhood friend, he had kept various public officials, including Judge Lidón Corbi, under surveillance and passed information on to the organization.

2.8 On 28 October 2002, the complainant was brought before the Fourth Examining Magistrate's Court of the National High Court. In the course of the proceedings, the complainant recounted that, during his three days of detention in Arkaute police station, he had been forced to stand facing the wall and in uncomfortable positions, been beaten even when he fainted, been deprived of sleep, food and water, except when forced to drink, and been subjected to threats. He added that he had informed the forensic doctor of his ill-treatment. The complainant retracted all the statements he had made while in police custody and denied involvement in the acts of which he had been accused, namely the gathering of information for ETA with a view to murdering Mr. Lidón Corbi. He stated that he knew one member of ETA, but only "by sight", and that he had never passed any information on to him.

2.9 The complainant was held in pretrial detention in Soto del Real prison (in the Madrid region) for several months. He was later moved to the prisons of Alcalá Meco (Madrid region), Alicante and Valdemoro (Madrid region) and was being held in Castellón prison, 686 kilometres from his place of residence, at the time that his complaint was submitted to the Committee.

2.10 On 29 January 2003, he filed a complaint before the police court of Donostia-San Sebastián against the police officers who had been involved in his arrest, custody and questioning for the torture and ill-treatment to which he had been subjected. He requested that the reports made by doctors to whom he had been taken while in detention, in national police stations in Vitoria-Gasteiz and Madrid, be made available, that the forensic doctors give evidence, that he be allowed to testify as the aggrieved party, and that the Directorate General of the Basque Police be ordered to reveal the identity of the officers who had carried out investigations or otherwise had contact with him during his period in detention. The case was subsequently referred to the Second Examining Magistrate's Court of Vitoria-Gasteiz, as the competent court to hear complaints in the location in which the alleged facts took place. On 3 October 2003, the Court ordered a stay of proceedings. It made the ruling after receiving the medical forensic reports and without conducting any further inquiries.

2.11 On 27 October 2003, the complainant filed an application for review with subsidiary appeal before the same Second Examining Magistrate's Court of Vitoria-Gasteiz. He requested that hitherto unheard evidence should be gathered, including taking testimony

^d In his written statement of 29 January 2003 to the police court in Donostia-San Sebastián, the complainant states that the assigned counsel "remained silent, even when I said that I had been tortured".

from the complainant and the police officers involved in his arrest, custody and inquiry proceedings that preceded his statement to the police. He claimed that the medical forensic reports did not comply with the medical protocol established by the Ministry of Justice for the examination of detainees and that they were therefore insufficient or inadequate. He stated that the Court's decision was not properly substantiated and that it failed to state clearly its reasons for ordering the stay of proceedings. On 3 February 2004, the Court dismissed the application for review but admitted the subsidiary appeal, requesting a formal submission from the complainant. In its ruling, the Court stated: "The complaint of alleged torture, which if substantiated should lead to the prosecution and punishment of those responsible, is one matter, and the results of investigations, in other words the forensic examinations, which suggest that no torture took place, are quite another. The presumption of innocence, which applies to the accused members of the security forces, must prevail over an accusation for which there is not the slightest evidence to justify any further investigation of the allegations."

2.12 On 10 February 2004, the complainant made a written submission in support of the appeal and requested that proceedings revert to the investigation stage, to permit the taking of evidence needed to establish the facts.

2.13 On 30 March 2004, the Provincial High Court of Álava dismissed the appeal without gathering any further evidence. The Court ruled that the stay of proceedings had been ordered after the necessary inquiries had been made to verify whether the victim's statements were confirmed by circumstantial evidence; that the forensic medical reports, even the one carried out in Madrid, had revealed no sign of ill-treatment or torture as alleged; and that the failure to comply with Ministry of Justice guidelines did not compromise their probative value. As a result, the Provincial High Court ruled that there was no need to request from the police the identity of the persons involved in the arrest and custody of the complainant, even more so given that the safety of the officers themselves could be compromised.

2.14 On 22 April 2004, the complainant filed an application for *amparo* before the Constitutional Court for violations of his rights to mental and physical integrity, effective legal protection, a fair trial and the use of pertinent evidence. He reiterated that the Second Examining Magistrate's Court of Vitoria-Gasteiz had ordered the case to be shelved on the basis of a single inquiry and receipt of the brief reports of forensic examinations made while he was in detention. The complainant questioned the probative value of those medical reports and stated that neither the Court nor the Provincial High Court had taken his testimony or had requested that the Arkaute police station identify the officers who had been involved in his arrest, custody and questioning so that they could be called upon to testify.

2.15 On 23 June 2005, the Constitutional Court declared the application inadmissible, pointing out that the complainant had not complied with its requirement, set forth on 28 April, 3 June and 19 July 2004, that his legal representative submit credentials establishing his qualifications to represent the complainant in court, but had merely made written submissions requesting time extensions, without providing a credible explanation as to why he could not comply with the Court's requirement.

2.16 In November 2005, the complainant was brought before the National High Court to face criminal charges as an accessory to a murder carried out by terrorists. The complainant retracted the statements he had initially made to the police and claimed that they had been obtained as a result of psychological threats, pressure and physical ill-treatment. He claimed that, if he did not say what the police officers wanted, he was beaten and compelled to stand in uncomfortable positions, although they never left any marks on his body. They threatened to arrest his mother and brother and on no occasion allowed him access to a lawyer. When he could bear no more, the complainant said he would make

whatever statement the police officers wanted, but even then the ill-treatment and threats continued. Moreover, the documents relating to his statements to the police contained affirmations that he had not made. He questioned the credibility of statements by the police officers who had interrogated him at the police station and who denied having committed acts of torture, given that they took part in trial proceedings under false identification numbers that did not correspond to their professional badge numbers and thereby prevented their identification as witnesses. That measure did not comply with witness protection regulations, under which the clerk of the court is supposed to establish the correlation between real and false identification numbers. The complainant points out that the report of 21 January 2005 by the information and analysis unit of the Basque autonomous police force, submitted by the Public Prosecution Service, linked the gathering of information to the murder of Mr. Lidón Corbi, although the ETA member who allegedly received the information denied having anything to do with the complainant.

2.17 On 12 December 2005, the complainant was found guilty and sentenced to 26 years in prison. He considers that the conviction was based on his self-incriminating statements and the testimony of the police officers who questioned him. He also points out that the authorities were eager to find a guilty party and could not afford to leave the crime unpunished, given its considerable impact in certain political and police circles, as well as on public opinion. The Court may also, without perverting the course of justice or compromising its independence, have ceded to a sense of collegial solidarity, given that the victim of this heinous crime was a judge.

2.18 The complainant lodged an application for cassation before the Supreme Court for, *inter alia*, a violation of his fundamental right to defence and a fair trial, given the wrongful application of the Organic Law No. 19/1994 on the protection of witnesses and experts in criminal cases. He also claimed that his right to presumption of innocence had been infringed, since the prosecution's evidence — his statement to the police and the police report submitted during the trial — had been obtained without due regard for constitutional guarantees.

2.19 On 4 December 2006, the Supreme Court dismissed the application and upheld the sentence of the National High Court. According to the complainant, the Supreme Court supported the conclusion of the National High Court that his self-incriminating statements, given when he was held incommunicado at the police station, constituted sufficient evidence.^e In its decision, the Supreme Court underlines the validity of the self-incriminating statement, given that the courts had investigated the complainant's claim of torture and ill-treatment and found that no crime had been committed and, moreover, that the complainant's self-incriminating statements were corroborated by evidence presented during the investigative stage of proceedings and before the National High Court itself, which included, in particular, testimony by: the police officers who took part in his questioning at the police station; the complainant's assigned counsel; the forensic doctor who examined him; the ETA member and co-defendant who had confirmed that he knew the complainant; and Judge Lidón Corbi's widow. The Court found no irregularity in the application of Organic Law No. 19/1994 and noted that the police witnesses had testified at the behest of the Public Prosecution Service with provisional identification numbers provided by the police for the purpose of the examination of the police report by the court and in line with the National High Court's assent to legal protection measures designed to safeguard their right to life. According to the decision, the complainant's defence counsel

^e It is stated in the decision that: "As is faithfully recorded in the appealed sentence, the accused retracted his statement before the examining magistrate [...] claiming that, on arrest, he had been subjected to mental and physical violence, all of which he had reported to the forensic doctor [...] at trial he also denied the facts confessed."

exercised the right to question witnesses in a normal fashion and recognized the validity of the report prepared by the Basque autonomous police, which showed that the complainant's statement was supported by circumstantial evidence.

2.20 Two members of the Supreme Court expressed dissenting opinions. The first questioned the acceptability as admissible evidence of self-incriminating statements contained in a police report and verified neither during court proceedings nor when evidence is heard. It pointed out that statements taken in police stations could not be submitted in court in the form of depositions by the police officers who had taken those statements, because that infringed the right of the accused not to testify against him or herself or to remain silent. It stated that police officers may not speak for the person who made the statement if that person is present in court. The opinion concluded that self-incriminating statements made legally in a police station by a person facing charges can and must be investigated and that the information obtained may be treated as a source of evidence, without being taken as probative of the facts being judged. The second dissenting opinion also concluded that statements made to the police by the accused may not be submitted in court as testimony by the police officers who took them. Such testimony must not be treated as incriminating evidence, but solely as evidence of information and facts witnessed by those officers, such as the fact that the confession took place and the circumstances in which the statement was made.

2.21 The complainant filed an application for *amparo* before the Constitutional Court contesting the decision of the Supreme Court. On 31 March 2008, the Constitutional Court ruled the application inadmissible because it manifestly lacked content that would justify a decision on the merits.

The complaint

3.1 The complainant alleges that the State party violated article 12, read in conjunction with article 16, of the Convention. The reaction of the courts to his claim of having been subjected to torture and ill-treatment was unsatisfactory. A prompt, independent and impartial investigation was not carried out. The competent courts failed utterly to act on his repeated claims of having been subjected to ill-treatment and torture while held incommunicado, thereby making it impossible to shed light on the reported incidents, and dismissed his complaint without investigation. Similarly, the examining magistrate of the National High Court failed to order an investigation into his allegations of having been subjected to ill-treatment and torture while he was held incommunicado. The regime of incommunicado detention for five days, extendable by a further eight days, permitted under the law of the State party has been criticized repeatedly by the Committee against Torture,^f the Human Rights Committee and other international bodies that have recommended its abolition. The State party has not taken the necessary steps to effectively prevent acts of torture throughout the territory under its jurisdiction, thereby failing to comply with its obligations under article 16 of the Convention.^g

3.2 Notwithstanding the complainant's allegations of torture and ill-treatment and his repeated requests to the courts that they conduct inquiries, they ignored their duty to investigate, failing to take any action or rejecting his requests. As a result, there was a violation of article 14 of the Convention, given that the State party should have redressed the wrong he had suffered as a victim of torture and taken steps to ensure that such acts did

^f The complainant refers to the Committee's concluding observations on the fourth and fifth periodic reports of Spain (CAT/C/CR/29/3 and CAT/C/ESP/CO/5, respectively).

^g The complainant refers to the Human Rights Committee's concluding observations on the fourth and fifth periodic reports of Spain (CCPR/C/79/Add.61 and CCPR/C/ESP/CO/5, respectively).

not happen again. According to the complainant, remedial measures cover all the damages suffered by the victim, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as well as prevention, investigation, and punishment of the persons responsible.

3.3 With regard to article 15 of the Convention, the complainant asserts that the trial leading to his conviction was unfair. His self-incriminating statements, obtained under torture in a police station, were used as proof leading to his conviction for the crime of terrorist murder. He maintains that his trial and conviction were based on those self-incriminating statements, submitted to the court by the authorities in the form of testimony by the police officers who had taken part in the investigation. His confession in the police station could at most be considered an element of circumstantial evidence. He concludes that direct or circumstantial evidence obtained in violation of fundamental rights may not be used in criminal proceedings.

3.4 The complainant alleges that his right to effective legal protection has been infringed, given that the application for cassation he filed before the Supreme Court does not constitute a second hearing because it does not entail a full review of the evidence and proven facts. Moreover, the complainant alleges violations of articles 7, 9 (para. 3) and 14 (paras. 1 and 2) of the International Covenant on Civil and Political Rights.

3.5 The complainant requests that the State party: provide redress for all damages, including financial compensation of €30,000; conduct a prompt and impartial investigation of his claims of torture and ill-treatment; review his conviction, which was based on a confession obtained under torture; and guarantee that no statement obtained under torture may be invoked as evidence in any legal proceedings.

3.6 With regard to the exhaustion of domestic remedies, the complainant maintains that he applied for all the remedies available before the domestic courts under Spanish law, including two applications for constitutional *amparo*, the first of which he filed with a view to settling his torture claim, and the second in order to challenge his conviction of the crime of terrorist murder.

State party's observations

4.1 In a note verbale of 5 September 2011, the State party submitted its observations.

4.2 With regard to the complainant's claim of having been subjected to torture and the ensuing proceedings before domestic courts, it states that his application for *amparo* to the Constitutional Court was dismissed on 23 June 2005 because the complainant failed to appear with a legal representative, in spite of the court's repeated requests. It states that the complainant did not have recourse to any international body or the Committee against Torture thereafter, and did so only once the Constitutional Court dismissed his application for *amparo* against his criminal conviction. It also considers references by the complainant to the International Covenant on Civil and Political Rights to be irrelevant.

4.3 The complaint is based on an imprecise presentation of the facts. Force was used during the complainant's arrest to the degree needed to subdue him, following normal arrest procedure. There was a warrant for his arrest and he remained under the supervision of court officials throughout proceedings. The regime of incommunicado detention applied in line with the State party's law restricted only his right to choose a lawyer to assist him initially at the police station and the right to inform persons of his choice that he had been arrested. Family members, however, were in fact aware of his arrest. He was held incommunicado for only a short period of time, from 24 to 28 October 2002, after which he was handed over to the judicial authorities. The complainant's allegations that the criminal proceedings and his conviction had been motivated by the interest shown in his case in political circles and by the public, and the judges' sense of collegial solidarity, were

baseless, given that at no time did he object to the participation of any of the judges responsible for trying him.

4.4 With regard to the alleged violation of article 15 of the Convention, the complainant has failed to provide even circumstantial evidence that his statement was made under torture, but simply alleged that the State party did not duly investigate his claim of having been tortured.

4.5 The criminal division of the National High Court did look into whether the complainant's statement to the Basque police was obtained under torture. It noted that the complainant retracted his statement in court. It concluded that a judicial investigation of the facts had been conducted and confirmed that there was nothing to indicate that such a crime had been committed. Five police officers testified separately that the complainant had been represented by a lawyer and informed of his rights, including the right to draft or dictate his statement or some of his replies. He did not complain of being ill-treated or tortured in between statements, which were read by the detainee and lawyer without comment. It was also established that the police officers testified during the trial proceedings under "precautionary numbers", as provided for in article 4.1 of Organic Law No. 19/1994 on the protection of witnesses and experts in criminal cases. The lawyer who assisted the complainant at the police station on 26 and 27 October indicated in three statements that he had not witnessed any irregularities, and that otherwise he would have reported them; that the detainee had replied freely and spontaneously to questions; that the complainant had provided detailed replies in his third statement on information gathered about the routine movements of Judge Lidón Corbi; and, lastly, that both had read and signed the statement. The medical report of 25 October 2002 referred to the complainant's claim that, at the time of his arrest, he had been thrown to the ground, kicked in the head several times and kept in uncomfortable positions that had made him feel nauseous. However, according to that report, no signs had been found of kicks to the back of the neck or of any other blows to the body. Nor did the forensic medical report of 26 October reveal any symptoms of ill-treatment or injuries. Indeed, during an examination on 28 October 2002, after his release from police custody, by the forensic doctor of the First Central Examining Magistrate's Court of the National High Court, the complainant refused to undress to be examined and, appearing calm and clear-headed, stated that there was nothing wrong with him. The complainant's defence counsel participated fully throughout the proceedings in the National High Court.

4.6 The two dissenting opinions in respect of the Supreme Court decision of 4 December 2006 on the complainant's application for cassation do not maintain that the complainant's statement was obtained under torture. Rather, the judges discuss in their opinions whether, in general, statements made in police stations that are subsequently retracted in court can be considered as sufficiently conclusive evidence to convict a defendant.

4.7 With regard to the alleged violations of article 12, read in conjunction with article 15, of the Convention, the domestic courts carried out the necessary investigations and examined the medical reports from the defendant's time in custody. However, they did not find sufficient evidence that the alleged crime had been committed. When it tried the complainant, the National High Court again looked at the circumstances in which he had been questioned. The complainant's lawyer, chosen by him, was present during questioning but submitted no evidence to support the complainant's allegations. It was noteworthy that the complainant filed his claim of having been tortured three months after his arrest and that he did not have recourse to any international body until after his conviction for the offence of terrorism.

4.8 The complainant does not explain how article 14 of the Convention has been violated. He has never demanded redress or compensation from the authorities of the State

party, despite the fact that, under the law, the shelving of criminal proceedings does not preclude civil or administrative actions to claim compensation. Moreover, it is within the Committee's powers to award compensation to the complainant, even if it were to find a violation of the Convention.

Complainant's comments on the State party's observations

5.1 On 29 November 2011, the complainant submitted comments on the State party's observations.

5.2 The violations of articles 12 and 15 of the Convention should be taken as a whole. The failure to investigate the torture claim is neither a mere matter of procedure nor incidental. Articles 12 and 15 were infringed in succession.

5.3 As far as violations of article 12 of the Convention are concerned, he contends that he exhausted all the legal options available in the State party to have his claims investigated and to have those responsible for acts of torture punished. That the State party should conclude that sufficient evidence that acts of torture had been committed was lacking can be explained only by the failure of the courts to investigate his claims. It was only at the complainant's request that the Second Examining Magistrate's Court of Vitoria-Gasteiz admitted forensic reports as evidence. However, the Court turned down his plea to allow him to testify and to identify the police officers involved in the matter and to have them testify, and subsequently closed the case. The presence of legal counsel assigned by the State party while he made his statement to the police was a mere formality. He was unable to choose a lawyer he trusted at the time of his arrest because antiterrorism laws did not allow it. The Provincial High Court of Álava stated that the complainant's torture claims needed to be corroborated by supporting evidence. However, at no time did it suggest that the Second Examining Magistrate's Court of Vitoria-Gasteiz gather such evidence or look into evidence that might bear out the complainant's claims.^h

5.4 With regard to the alleged violations of article 15 of the Convention, it is true that the judges who expressed dissenting opinions in respect of the Supreme Court decision do not conclude that the self-incriminating statement was the result of the torture to which the complainant had been subjected, but nor do they rule it out. They note that his conviction was based on no evidence other than his self-incriminating statement, that the statement could be a source of evidence but not proof that the offences in question had been committed, and that it could not be submitted in court as testimony by the police officers who took it or heard it while it was being given. Under the case law of the Supreme Court, statements made in police stations do not in themselves constitute sufficient evidence. It was also incongruous that the Supreme Court should find that the complainant's statements and alleged links with the ETA member to whom he had supposedly passed on information about the movements of Judge Lidón Corbi were insufficient as evidence to convict that person.

5.5 The complainant requests the Committee to rule that he is entitled to fair redress, including compensation, in conformity with article 14 of the Convention.

^h The Provincial High Court of Álava indicated that the victim's statements could be considered as evidence for the prosecution, but that his claims needed to be backed up by supporting evidence, which in the case in question not only was lacking, but had been ruled out in the forensic medical reports. As a result, it was unnecessary to request that the Ertzaintza identify the persons involved in the questioning of the complainant, especially given the potential threat to the safety of those officers, whose well-being the courts also had a duty to safeguard.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any complaint unless it has ascertained that the complainant has exhausted all available domestic remedies. In the present case, the Committee takes note of the complaint of torture lodged by the author on 29 January 2003, the decision to stay the proceedings, the subsequent appeals against that decision and the decision of 30 March 2004 by the Provincial High Court of Álava to dismiss his subsidiary appeal. The Committee also takes note of the application for *amparo* for violations, inter alia, of his right to mental and physical integrity, filed by the complainant on 22 April 2004. This application was ruled inadmissible by the Constitutional Court on 23 June 2005, because the complainant's legal representative had failed to comply with the requirement that he submit his credentials as the complainant's legal representative. The complainant gives no explanation for the non-compliance with that requirement.

6.3 With regard to the criminal proceedings against the complainant, the Committee takes note of the conviction handed down by the National High Court on 12 December 2005 and of the Supreme Court's ruling of 4 December 2006 on his application for cassation, which indicate that the complainant claimed at his trial by the Fourth Examining Magistrate of the National High Court and in his application for cassation to the Supreme Court that he had incriminated himself as a result of being tortured by the police. On 31 March 2008, the Constitutional Court rejected the application for *amparo* filed in response to the Supreme Court decision.

6.4 The Committee notes that the complainant did not exhaust domestic remedies in respect of his claim of having been tortured, because he did not comply with the legal requirements for the application for *amparo* to Constitutional Court. Nevertheless, the Committee notes that the complainant informed the competent courts during criminal proceedings against him that he had been tortured. Given that torture is an offence that must be prosecuted ex officio, in conformity with article 12 of the Convention, the Committee considers that there is no impediment under article 22, paragraph 5 (b), of the Convention to the admissibility of the communication. Given that the other admissibility requirements have been met, the Committee finds the communication admissible and proceeds to consideration of its merits.

Consideration of the merits

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

7.2 The complainant claims to have been the victim of a violation of article 12 of the Convention because the allegations he made to the courts of having been subjected to torture and ill-treatment while being held incommunicado did not lead to a prompt, independent and impartial investigation. The State party indicates that the courts carried out the necessary inquiries and examined the medical reports from his time in detention, but did not find sufficient evidence that torture had taken place. The Committee notes that the complainant lodged a complaint of torture and ill-treatment, which was examined by the

Second Examining Magistrate's Court of Vitoria-Gasteiz. On the basis of forensic medical reports, which did not support the complainant's allegations, the Court ordered a stay of proceedings. The Provincial High Court of Álava subsequently dismissed the complainant's appeal, also on the basis of the forensic medical reports. The Committee also notes that the complainant requested that further evidence be taken, but that his request was turned down by the courts, which considered this unnecessary. The Committee further notes that, during committal proceedings against the complainant by the Fourth Examining Magistrate's Court of the National High Court and the subsequent trial in that court, the complainant stated that he had incriminated himself as a result of the torture and ill-treatment to which he had been subjected. Neither the information contained in the file before the Committee nor the State party's observations indicate that the courts took measures to investigate the complainant's allegations. The National High Court, in particular, merely examined the evidence before it, including the self-incriminating statement, in order to establish the complainant's responsibility. The Supreme Court also failed to act on the claim of torture made by the complainant as part of his application for cassation.

7.3 The Committee considers that the points outlined in the previous paragraph indicate a failure to investigate on the part of the authorities mentioned therein that is incompatible with the obligation on the State, under article 12 of the Convention, to ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed. The Committee can find nothing in the file before it to justify the failure of the courts to take other evidence aside from the forensic medical reports. The Committee considers that such additional evidence was relevant, given that, although forensic medical reports are generally important for determining whether acts of torture have taken place, they are often insufficient and need to be compared with other sources of information.ⁱ The Committee therefore concludes that the facts before it reveal a violation by the State party of article 12 of the Convention.

7.4 The complainant claims to be the victim of a violation of article 15 of the Convention, in that self-incriminating statements made by him under torture in the police station were used as evidence leading to his conviction. The Committee notes that, under that provision, the State party must ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. In the view of the Committee, the rulings by the National High Court and Supreme Court show that the complainant's self-incriminating statement was lent substantial weight in proceedings against him. Nevertheless, the Committee considers that the complainant has not provided information, such as additional medical certificates issued on the basis of examinations requested by him or statements by witnesses, that would allow it to conclude that his self-incriminating statement was in all probability a result of torture.^j The Committee therefore concludes that the information before it does not reveal a violation of article 15 of the Convention.

7.5 The complainant claims to be a victim of a violation of article 14, in that the State party should have acted to ensure that he received redress for the harm suffered as a victim of torture. With regard to this claim, the Committee also considers that the information provided by the complainant, as stated in the previous paragraph, is not sufficient to allow it to conclude that his self-incriminating statement was in all probability a result of torture.

ⁱ See communication No. 59/1996, *Blanco Abad v. Spain*, decision of 14 May 1998, para. 8.8. See also general comment No. 32 (2007) of the Human Rights Committee, on the right to equality before courts and tribunals and to a fair trial (art. 14 of the Covenant) (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I [A/62/40 (vol. I)], annex VI), para. 41.

^j Communication No. 219/2002, *G.K. v. Switzerland*, decision of 7 May 2003, para. 6.11.

The Committee therefore concludes that the information before it does not reveal the existence of a violation of article 14 of the Convention.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention, is of the view that the facts before it reveal a violation of article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

9. Pursuant to article 12 of the Convention, the Committee considers that the State party is under an obligation to provide the complainant with an effective remedy, including a full and thorough investigation of his claims. The State party is also under an obligation to prevent similar violations in the future.

10. Pursuant to article 118, paragraph 5, of its rules of procedure, the Committee requests the State party to inform it, within 90 days of notification of this decision, of the action taken in response.

B. Decision on admissibility

Communication No. 365/2008: *S.K. and R.K. v. Sweden*

Submitted by: S.K. and R.K. (unrepresented)
Alleged victims: The complainants
State party: Sweden
Date of the complaint: 19 November 2008 (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 21 November 2011,

Having concluded its consideration of complaint No. 365/2008, submitted to the Committee against Torture by S.K. and R.K. 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 complainants and the State party,

Adopts the following:

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

1.1 The complainants are R.K., born in 1981, and S.K., born in 1980, both brothers and nationals of Afghanistan, currently awaiting deportation from Sweden to Afghanistan. They claim that their removal to Afghanistan would constitute a violation by Sweden of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They are unrepresented.

1.2 On 21 January 2009, the State party was requested, pursuant to rule 115, paragraph 1 (formerly rule 108, para. 1), of the Committee's rules of procedure (CAT/C/3/Rev.5), not to expel the complainants while their complaint is under consideration by the Committee.

The facts as presented by the complainants

2.1 In 1980, during the war with the former Union of Soviet Socialist Republics, the complainants' family left Afghanistan for the Islamic Republic of Iran. At that time, S.K. was 6 months old, while his brother, R.K., was born in Iran.

2.2 In 1990, due to the harsh living conditions in the Islamic Republic of Iran, the family decided to leave for Pakistan, where they lived as refugees in Quetta from 1990 to 1995. In 1995, the complainants' father died from a heart attack and left them with no means to survive. In the same year, the family moved back to seek asylum in Iran.

2.3 In 2000, the complainants began to working illegally in the Islamic Republic of Iran. They claim that Afghan refugees in Iran were always denied formal employment. In September 2000, Iranian police arrested the complainants for working illegally and kept them detained for 20 days. The complainants submit that during their detention Iranian police ill-treated and tortured them.

2.4 In December 2000, the complainants were deported to Afghanistan and were threatened with death by Iranian police if they returned to the Islamic Republic of Iran. After arrival in Afghanistan, the complainants were arrested by the Taliban and taken to Kandahar, where they were allegedly tortured, beaten, ill-treated and insulted. The complainants were subjected to torture on a daily basis for about two weeks, which included being electrocuted on their genitals, forced to be naked at night, beaten and dragged through the mountains blindfolded, and threatened with death. They claim that they still have physical and psychological scars as a result of the torture inflicted. The Taliban considered them as enemies of the State, infidels of Islam, and spies, because they grew up in Iran and did not speak Pashto (the language spoken in most areas of Afghanistan).

2.5 The complainants managed to escape the Taliban and fled to Quetta in Pakistan, where they lived for some time with one of their sisters and her husband. In Pakistan, they learned that their mother and other sisters, who had stayed in the Islamic Republic of Iran, had resettled as refugees in Sweden on 30 December 2000. The complainants' mother advised them to travel to Tehran and apply for family reunification at the Swedish embassy. They travelled to Tehran to start the application process at the Swedish Embassy.

2.6 In May 2001, the complainants had their first interview at the Swedish embassy. After one year, the Swedish embassy informed them that their application for family reunification was rejected because they were no longer minors. According to the complainants, some unidentified officials at the Swedish embassy as well as an official representing the Office of the United Nations High Commissioner for Refugees (UNHCR) in Tehran advised them to travel to Sweden illegally and to seek asylum there.

2.7 In the Islamic Republic of Iran, R.K. was arrested on an unspecified date by Iranian police and deported back to Afghanistan. According to the complainant, when the Afghan police saw the documents from the Swedish embassy, they reacted brutally, and beat him on his head with a Kalashnikov to the point that he almost lost his life. He claims that he was imprisoned, beaten and tortured again in Afghanistan. After a few weeks in jail, he managed to escape by bribing prison guards and returned to Pakistan to join his brother and sister. S.K. travelled back to Quetta, Pakistan as well.

2.8 In July 2003, the complainants' mother and two of their sisters visited them in Quetta. Their mother obtained false identity papers for both complainants and arranged their marriage with their own sisters so that they could travel to Sweden. They reached Sweden and admitted to the Swedish Migration Board that they carried false identity papers and were married to their own sisters. On an unspecified date, the Swedish Migration Board withdrew their permits to stay in Sweden and they applied for asylum under their real identities.

2.9 On 31 March 2006, both complainants were granted a residence permit by the Swedish Migration Board for one year. After one year, these residence permits were not extended. Their expulsion order was issued on 3 October 2008.

2.10 The complainants submit that they fear for their lives as they are considered as traitors by people in Afghanistan. R.K. claims that he is allegedly "blacklisted" in Afghanistan for his work at the Swedish integration unit as a translator for refugees and asylum seekers, many of whom were Afghans. He claims that he receives telephone calls from unknown persons questioning him on his work as a translator and asking why he is interrogating people from Afghanistan in Sweden. He explains that he only translates from the Iranian language as he hardly speaks Pashto. He claims that he has received several threatening phone calls from unknown people. They claim that they are certain to be arrested in Afghanistan for having sought asylum, which is considered a crime.

2.11 On 20 January 2009, the complainants submitted that their financial situation in Sweden had worsened, that they had lost their jobs, and have no means to live or right to health care. They submitted that one of the reasons why they had to leave the Islamic Republic of Iran initially was that their father, who was a lawyer and Member of Parliament, had made many enemies in Afghanistan, who are now officials in the present Government, and they fear to be killed if returned, simply on the basis of their name.

The complaint

3. The complainants claim that their forcible return to Afghanistan, where there is a real risk that they will be tortured, would amount to a breach by Sweden of their rights under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

State party's observations on admissibility

4.1 On 26 January 2009, the State party contested the admissibility of the complaint on the grounds of failure to exhaust domestic remedies. It submits that under chapter 12, sections 18 and 19 of the Aliens Act of 2005, an alien may be granted a residence permit even if a refusal-of-entry or expulsion order has gained legal force. If during enforcement of such an order, information comes to light that may constitute an impediment to the enforcement, the Swedish Migration Board may grant a permanent residence permit if the impediment is of a lasting nature, or a temporary residence permit if the impediment is of a temporary nature. This may be the case, where, for example, new circumstances emerge on the basis of which there are reasonable grounds for believing that an enforcement of the order would put the alien in danger of being sentenced to death or of being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment. In such cases, the Migration Board may issue an order staying the enforcement case.

4.2 The State party submits that under chapters 14 and 16 of the Aliens Act, the Migration Board's decision can be appealed to a Migration Court with a further appeal to the Migration Court of Appeal, subject to leave to appeal to be granted. On 6 March 2008, the Migration Court decided, due to, *inter alia*, the deterioration of the situation in the complainants' country of origin, to grant them a re-examination of the question of residence permits and therefore remitted the matter to the Migration Board. On 3 October 2008, the Board, taking into account the possibility of an internal flight alternative, rejected the complainants' application for residence permits. The complainants appealed against the decisions of the Board to the Migration Court, which rejected their appeals in judgements dated 3 December 2008. The complainants did not appeal against the Migration Court's judgements, which gained legal effect on 29 December 2008.

4.3 According to the State party, before even the Migration Court delivered its judgements, the complaint was lodged with the Committee. Thus, domestic remedies had not been exhausted at that time. Furthermore, the State party argues that the complainants did not appeal to the Migration Court of Appeal, which if successful, could have led to the granting of residence permits. They did not thereby give the domestic authorities the full possibility of examining the new circumstances invoked. In the light of the foregoing, the State party maintains that the complainants have not exhausted all domestic remedies available to them. Consequently, the complaint should be declared inadmissible pursuant to article 22, paragraph 5 (b), for failure to exhaust domestic remedies.

The complainants' comments on admissibility

5.1 On 6 March 2009, the complainants indicated their surprise at the State party's argument that they had not exhausted domestic remedies as, prior to being granted interim measures of protection, they had received several summonses to meetings to organize their

deportation. In their view, they must have exhausted domestic remedies if the State party was in a position to deport them. They recall that the situation in Afghanistan is critical. Therefore, they express their surprise that the Migration Board, after having re-examined the question of residence permits, advocates an internal flight alternative, particularly in a country where there is so much violence.

5.2 The complainants believe that they have the right to live peacefully in Sweden instead of being expelled to a country where they endured torture, faced imprisonment and their father was subjected to persecution and retaliation by his enemies who currently hold the power in Afghanistan. They also maintain that their names are blacklisted in Afghanistan because of their father's past activities, as explained thoroughly by their mother who is a refugee in Sweden.

State party's observations on admissibility and merits

6.1 On 30 September 2009, the State party provided its observations on the admissibility and merits. It presents detailed information on the pertinent Swedish asylum legislation and further submits the following information concerning the facts of the complainants' case, based primarily on the case files of the Swedish Migration Board and the migration courts. The complainants' applications for asylum have been examined in several sets of proceedings, including under the 1989 Aliens Act and under the temporary amendments to the 1989 Aliens Act. Furthermore, they have applied for permanent residence permits on several occasions under the 2005 Aliens Act, arguing that there were lasting impediments to the enforcement of the expulsion orders. These applications have been examined by the Migration Board, and as regards the second complainant, also once by the Migration Court, without being accepted for a re-examination. After the latest application, a re-examination of the matter of a residence permit was granted by the Migration Court. The Migration Board and the Migration Court subsequently undertook a re-examination of the matter.

6.2 The two complainants are brothers, born in 1981 (the first complainant) and 1980 (the second complainant). They are both citizens of Afghanistan. They applied for residence permits at the Swedish embassy in Tehran on 25 April 2001. Their applications were based on the fact that their mother and four of their eight siblings resided in Sweden. The applications were rejected by the Migration Board on 29 January 2002. It made the assessment that no special relationship of dependence had existed between the complainants and their relatives at the time when the latter moved to Sweden. The appeal was rejected by the Aliens Appeals Board.

6.3 In July 2003, the complainants applied for residence permits in Sweden under false identities. The applications were based on the allegation that they had married two women with residence permits in Sweden. On 18 June 2004, they were granted temporary residence permits for six months under their false identities. They arrived in Sweden on 30 June 2004. The State party submits that the complainants have incorrectly stated in their complaint to the Committee that they willingly revealed their real identities to the Migration Board once in Sweden. During the process of extending the temporary residence permits, the Migration Board found out that the complainants had been granted residence permits under false identities and that their alleged wives were in fact their own sisters. They admitted to this only after having been confronted with this information by the Migration Board. As a result, the Migration Board initiated a process of ordering their expulsion to the country of origin and appointed a legal counsel for them. It also reported the complainants to the police.

6.4 The complainants lodged applications for asylum on 7 June 2005. Interviews were held on 14 December 2005 in the presence of their counsel and an interpreter. The first complainant stated that he was born in the Islamic Republic of Iran but he is an Afghan citizen. He has lived in Iran his entire life, with the exception of a few years when he lived

in Pakistan. Being a national of Afghanistan, he could not get a work permit in Iran and he was not allowed to go to school. In Iran, he was arrested twice due to lack of a residence permit. On both occasions he spent a few months in a refugee camp in Iran, where he was maltreated, and on both occasions he was sent to Afghanistan and spent a few weeks there. He never had any problems with Afghan authorities. He had no problems entering the country. The only question posed by Afghans was whether he was Afghan and whether he had been to Iran. He cannot return to Iran or Pakistan. He cannot return to Afghanistan since he has no connection to that country. He went to Sweden because his family is there.

6.5 The second complainant stated that he was born in Afghanistan and that he left Afghanistan for the Islamic Republic of Iran together with his family when he was six months old because of the war against the former Soviet Union. He has lived in Iran his entire life, with the exception of six years when he lived in Pakistan. He had a temporary residence permit in Iran and he worked there under harsh conditions. The Iranian authorities interned him and his brother in a refugee camp, where a soldier hit him on one of his knees. Since then, he has had problems with the knee. He does not know anyone in Afghanistan and he does not speak the language. He cannot return to Iran or Pakistan since he will not be given a residence permit. The reason for giving false information about his identity was that he wanted to join his family in Sweden.

6.6 On 19 December 2005, the Migration Board rejected the complainants' applications for residence permits, work permits, declarations of refugee status and travel documents, and ordered that they be expelled to Afghanistan, unless they could show that some other country was willing to receive them. They were prohibited to return to Sweden without the permission of the Migration Board for a period of two years from the date of the decision. The Migration Board initially stated that the complainants' applications were to be considered in relation to Afghanistan due to their Afghan citizenship. It found no reasons to examine their applications in relation to Pakistan or the Islamic Republic of Iran, since they had allegedly no residence permits there. According to the Board, the general situation in Afghanistan was not in itself sufficient reason for granting residence permits in Sweden. The complainants had failed to substantiate that they were to be regarded as refugees or aliens otherwise in need of protection and therefore entitled to asylum. Furthermore, the Board found no reasons to deviate from the assessment previously made by both the Board and the Aliens Appeals Board regarding residence permits based on their relationship to their mother and siblings residing in Sweden. There were no humanitarian or other reasons to grant the complainants residence permits. Due to the fact that they had appeared under different identities, used false documents, withheld important information and stated reasons for residence permits that were substantially incorrect, the expulsion orders were combined with a prohibition to return to Sweden for a period of two years. The decision was appealed to the Aliens Appeals Board. On 28 March 2006, the Appeals Board decided to strike the case from its list after the complainants had withdrawn their appeals. The Migration Board's decision thereby gained legal force.

6.7 On 31 March 2006, the Migration Board decided to grant the complainants temporary residence permits valid for one year according to the temporary amendments to the 1989 Aliens Act, on grounds that, due to the situation in Afghanistan, Sweden did not expel people there by force. However, it was envisaged that it would likely be possible to expel single men in the foreseeable future since they would have good chances of reintegrating into the Afghan society. The Board also stated that UNCHR did not oppose forcibly expelling persons to Afghanistan. Therefore, the orders to expel the complainants were not repealed.

6.8 The complainants applied for an extension of their temporary residence permits. Their applications were rejected by the Migration Board on 30 May and 13 June 2007

respectively. The Board considered that the circumstances presented by the complainants could not be considered as lasting impediments to the enforcement of the expulsion orders.

6.9 In an application of 14 June 2007, the first complainant requested to be granted a residence permit, stating that he had settled down in Sweden and his entire family was here. He was a Shia Muslim and hence particularly vulnerable in Afghanistan. Upon return he would be forced to join the army. On 21 June 2007, the Migration Board rejected the application. The first complainant appealed against the decision to the Migration Court. The appeal was rejected on 6 July 2007 on grounds that the individual circumstances stated by the complainant had already been examined. Even considering the situation in Afghanistan, no new circumstances had been brought forward that could be considered as lasting impediments to the enforcement of the expulsion order.

6.10 In subsequent applications, the complainants again requested, through their legal counsel, that they be granted residence permits, maintaining their previous claims and adding that they originate from Kandahar, which is a very dangerous place. There was also a clear risk that they would be forced to perform military service or to join militia forces. It had been argued that their mother suffered from senile dementia because of her sons' problems in obtaining residence permits. The second applicant also added that he had undergone a knee surgery and had still not completely recovered. He was likely to need further surgery which he could not get in Afghanistan. The Migration Board rejected the applications on 25 September 2007.

6.11 In applications submitted on 18 January 2008, the complainants reiterated their previous claims and added that the second complainant suffers from depression as documented by a medical report attached to their applications. They also referred to their adaptation to Sweden and the general situation in Afghanistan, and maintained that they would not be let into Afghanistan, should their expulsion be enforced. On 30 January 2008, the Migration Board rejected their applications and decided not to re-examine them. It noted that the scope of taking into account medical obstacles or adaptation to Sweden is very limited and shall only apply in exceptional situations. The Board considered that a return to Kandahar province in the south of Afghanistan was not possible at that moment, however it was reasonable to demand that the complainants seek protection internally, for example in Kabul. Although the situation in Kabul was difficult with regard to maintenance and housing, the investigation did not show anything other than that the complainants would be received in Afghanistan and that they had the right to apply for work in Kabul. The complainants appealed against this decision to the Migration Court, claiming that there was a political impediment to the enforcement of the expulsion orders, namely the Migration Board's general decision not to expel persons originating from the south of Afghanistan.

6.12 On 6 March 2008, the Migration Court decided to grant a re-examination of the matter of residence permits and therefore remitted the matter to the Migration Board. The Court found that the situation in Kandahar province constituted an impediment to the enforcement of expulsion orders to that particular province. On 13 March 2008, the Migration Board decided to stay the enforcement of the expulsion orders regarding the complainants.

6.13 The Migration Board held supplementary interviews with the complainants on 3 September 2008. The complainants claimed that they do not know anyone in Afghanistan and they do not know where to turn. They would be hungry, with no work or place to live. To survive they would perhaps have to participate in the armed conflict or to sell drugs. They do not speak the language of Afghanistan. They speak Dari, but they speak the dialect used in the Islamic Republic of Iran. Due to this, they would risk being killed. They also risk being killed by the Taliban because they are Shia Muslims. Their mother is ill and it

would be a great danger to her health if they were expelled to Afghanistan. The second complainant also stated that he is not feeling well, that he sleeps badly and is stressed.

6.14 On 3 October 2008, the Migration Board rejected the complainants' applications for residence permits. The Board based its decision on a judgment of the Migration Court of Appeal in a similar case, according to which the Migration Board shall determine whether it is reasonable to apply an internal flight alternative. The prerequisite for applying internal flight alternatives is that the alien will be received in the country of return and is entitled to apply for work there. If the alien would be exposed to undue hardship, internal flight is not a reasonable alternative. This determination should be made on a case-by-case analysis. Not only the general situation in the country is to be considered, but also the alien's possibility to settle down in a new place where he or she lacks a social network. In this evaluation such circumstances as gender, age and state of health may be of relevance. The Migration Court of Appeal stated that the situation in Kabul was not such that a person risked serious abuse due to internal armed conflict or other severe conflicts. The security situation in Kabul was much better than in the countryside, above all due to the presence of the International Security Assistance Force (ISAF). In addition, national and international humanitarian organizations were established in Kabul. The Migration Board then noted that the Government of Sweden, the Government of Afghanistan and UNCHR had concluded an agreement of readmission of Afghan nationals. According to the agreement, a person voluntarily returning to Afghanistan would receive financial assistance upon arrival in Kabul. Taking this into consideration, the Migration Board concluded that the complainants could not be considered to risk undue hardship if returned to Afghanistan. As men, they could move freely within the country and had the option of settling down elsewhere than in Kandahar province. There were no reasons to believe that they would not be received in Afghanistan or that they would be expelled from the country. It did not appear likely that it would be difficult for them to acquire identity documents. The Board added that in an examination of impediments to the enforcement of an expulsion order that had gained legal force, there is very little scope for taking into consideration an alien's state of health or adaptation to Sweden. Thus, it found the circumstances presented by the complainants not lasting impediments and considered that internal flight was an alternative for them. They had not given probable cause to believe that they were to be regarded as refugees or as aliens otherwise in need of protection and therefore entitled to asylum.

6.15 The complainants appealed against the decision to the Migration Court. They maintained their previous claims and added that there was no internal flight alternative. They claimed that, according to a report issued by UNHCR on 5 October 2008, people should no longer be sent to Kabul, especially those without any connection to Kabul. The Taliban were only a few kilometres away from Kabul. Their expulsion would constitute a personal disaster for their mother. The Migration Court rejected their appeals on 3 December 2008. The Court stated that there was no scope, within the assessment of the lasting impediments, to consider humanitarian aspects such as the health of the complainants' mother or their adaptation to Sweden. As to the internal flight alternative, the Court relied on a judgment rendered by the Migration Court of Appeal in a similar case (see para. 6.14, above) and pointed out that the complainants were young, healthy and capable of working, and that Kabul was a reasonable alternative for internal flight. The complainants did not appeal against the Migration Court's judgment, and as a result the judgment gained legal force on 29 December 2008.

6.16 The complainants submitted their complaint to the Committee in November 2008, i.e. before the Migration Court had rendered its judgments. On 26 January 2009, the Migration Board decided to stay the enforcement of the expulsion orders regarding the complainants, as requested by the Committee.

6.17 As regards the admissibility of the complaint, the State party submits that it is not aware of the present matter having been or being subject to any other international investigation or settlement. With regard to the exhaustion of all domestic remedies, as required under article 22, paragraph 5 (b), of the Convention, it maintains its position that the complainants have not exhausted all available domestic remedies, and therefore the complaint is inadmissible for failure to exhaust domestic remedies. Irrespective of the Committee's examination relating to article 22, paragraph 5 (a) and (b), of the Convention, the State party maintains that the complainants' assertion that they are at risk of being treated in a manner that would amount to a breach of the Convention fails to attain the basic level of substantiation required for purposes of admissibility, and therefore the complaint is manifestly unfounded and inadmissible under article 22, paragraph 2, of the Convention.^a

6.18 With regard to the merits, should the Committee consider the complaint admissible, the issue before it is whether the forced return of the complainants to Afghanistan would violate the obligation of Sweden under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. It recalls that, when determining whether the forced return of a person to another country would constitute a violation of article 3, the Committee must take into account all relevant considerations including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in that country. However, as the Committee has repeatedly emphasized, the aim of the determination is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. For a violation of article 3 to be established, additional grounds must exist, showing that the individual concerned would be personally at risk.^b

6.19 With regard to the human rights situation in Afghanistan,^c the State party submits that the country's human rights record remains poor due to insurgency, weak governmental and traditional institutions, corruption, drug trafficking, and the country's long-term conflict. The human rights violations include torture and unlawful killings by the Government and its agents and the Taliban and other insurgent groups.^d During the 2008 and 2009 the situation has worsened, and 2008 was the most violent year since 2001. The conflict has spread from southern, south-eastern and eastern regions to areas that had been relatively stable in the recent past, including Kabul's surrounding central provinces as well as part of the northern and western regions.^e However, the situation in Kabul is better than in other parts. In Kabul, police authorities are generally willing to enforce the law, although

^a The State party refers to communication No. 216/2002, *H.I.A. v. Sweden*, decision adopted on 2 May 2003, para. 6.2.

^b Communications No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3; and No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

^c The State party makes reference to the Report on Human Rights issued by the Swedish Ministry for Foreign Affairs; the United States Department of State, "2008 Human Rights Report: Afghanistan", 2008 Country Reports on Human Rights Practices (25 February 2009); the United Kingdom of Great Britain and Northern Ireland, Home Office, "Country of origin information report on Afghanistan" (26 June 2009); the United Kingdom, Home Office, "Operational guidance note on Afghanistan" (8 April 2009); the Amnesty International Annual Report; the Human Rights Watch World Report; and the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (July 2009).

^d United Kingdom, Home Office Operational Guidance Note, para. 2.11.

^e UNCHR Eligibility Guidelines, p. 42.

their ability to do so is limited by inadequate resources and dependent to some extent on the loyalties of the officers. In Kabul, ISAF (led by NATO), assists the Government in providing and maintaining security. Based on the existence of a limited judicial and legal system, the willingness of police authorities to enforce the law and the presence of ISAF, a sufficiency of protection is generally available in Kabul.^f An independent human rights commission (the Afghanistan Independent Human Rights Commission) has been established and is working actively trying to improve the human rights situation in Afghanistan.^g On 23 June 2007, the Government of Sweden, the Government of Afghanistan and UNCHR concluded a memorandum of understanding concerning the return of Afghan nationals from Sweden. The major purpose of the agreement is to facilitate the voluntary return of asylum seekers, but the agreement does not exclude forced return. The agreement expired on 30 April 2009 and has not yet been renewed.

6.20 As to the complainants' personal risk of torture upon return to Afghanistan, the State party notes that the obligation of non-refoulement is directly linked with the definition of torture as laid down in article 1 of the Convention,^h and recalls the Committee's jurisprudence to the effect that the obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention. Furthermore, according to the Committee's jurisprudence, for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is to be returned.ⁱ The requirement of necessity and predictability should be interpreted in the light of its general comment No. 1 (1996) on the implementation of article 3 of the Convention, according to which it is for the complainant to present an arguable case, i.e. to collect and present evidence in support of his or her account of events.^j In this context, the State party recalls that the Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee will apply when examining a complaint under the Convention. The national authority conducting the asylum interview is in a very good position to assess the information submitted by an asylum seeker and to evaluate the credibility of his or her claims. In the present case, the Migration Board held two interviews for each of the complainants regarding their applications, thus the Board had sufficient information, including the facts and the documentation available on file, so as to ensure that it had a solid basis for its assessment of the complainants' need for protection in Sweden. Their applications for residence permits have been examined several times by the migration authorities, including the Migration Court of Stockholm. Therefore, great weight must be attached to the assessment made by the Swedish migration authorities. With regard to the merits of the complaint, the State party relies on the decisions rendered by the Migration Board and the Migration Court.

6.21 The complainants argue that, if deported to Afghanistan, they would risk being tortured or even killed, and invoke the following grounds: they do not speak the language of Afghanistan and they do not share the same culture; they were tortured in Afghanistan after being deported there by the Iranian police; their deportation would put them at risk of

^f United Kingdom, Home Office Operational Guidance Note, para. 3.6.6.

^g Report on Human Rights issued by the Swedish Ministry for Foreign Affairs.

^h Communication No. 83/1997, *G.R.B. v. Sweden*, decision adopted on 15 May 1998, para. 6.5.

ⁱ Communication No. 103/1998, *S.M.R. and M.M.R v. Sweden*, decision adopted on 5 May 1999, para. 9.7.

^j *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1)*, annex IX, para. 5. See communications No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.4; and No. 265/2005, *A.H. v. Sweden*, decision adopted on 16 November 2006, para. 11.6.

being tortured and killed by “tribal fighters” and the Taliban, who will regard them as traitors and disloyal, and Afghan authorities will not guarantee their safety; they will be arrested for having sought asylum in Sweden, which is considered a serious crime in Afghanistan; the first complainant worked as an interpreter for asylum seekers in Sweden and he has therefore been registered by the Afghan secret police and is “blacklisted” in Afghanistan; their father, who was a lawyer and a Member of Parliament, had several enemies in Afghanistan and some of them are officials in the present Government, therefore they will be killed because they bear the same name.

6.22 The State party recalls that it is up to the complainants to present an arguable case. In this regard, in the present case the complainants’ claims are vague and unsubstantiated. They have not presented any evidence in support of their claims. Furthermore, there is also a clear contradiction in the first complainant’s story. During the asylum proceedings, he stated that he had had no problems with the Afghan authorities when he was expelled there by the Iranian authorities, which occurred twice. In the Islamic Republic of Iran, on the other hand, he was brutally treated. From his statement to the Migration Board, it seems that the Afghan authorities took very little interest in him. This is in sharp contrast to what is contained in the complaint submitted to the Committee, where the complainants state that the Afghan police had reacted so brutally when they saw documents from the Swedish embassy, which the first complainant brought with him, that he almost lost his life.

6.23 The complainants’ story has escalated considerably from the first asylum interviews held in December 2005 until the present complaint, which was submitted to the Committee towards the end of 2008. Their applications in Sweden were based mainly on the difficult security situation in Afghanistan and the fact that they had never lived there and that their mother and siblings lived in Sweden. Before the Committee they have invoked totally new circumstances. During the interviews held in December 2005, the complainants neither mentioned that they had been tortured in Afghanistan, nor did they express any fear of the Afghan police or other Afghan authorities. During the interviews held in September 2008 (see para. 6.13 above), both complainants stated that they risked being killed by the police because they speak the dialect of Dari used in the Islamic Republic of Iran, and by the Taliban because they are Shia Muslims. In the complaint before the Committee there is further escalation, since they mention for the first time that they have been tortured in Afghanistan. They both claim that they have been tortured by the Taliban and the first complainant also claims to have been tortured by the Afghan police. They invoke entirely new grounds against their expulsion to Afghanistan: first, that they sought asylum in Sweden, which is considered to be a serious crime in Afghanistan; second, that the first complainant is registered with the Afghan secret police because of having worked as an interpreter for asylum seekers in Sweden; third, that some of their father’s old enemies are officials in the present Government and they will be killed because their name is known.

6.24 In view of the foregoing, there are reasons to question the credibility of the complainants’ claim that they would risk torture upon return to Afghanistan. The general credibility is also undermined by the fact that they obtained residence permits in Sweden based on false identities and untrue statements. In addition, their allegation before the Committee that they willingly told the Swedish authorities that they had lied about their identities is incorrect. They admitted to having lied only after being confronted with this information, which happened more than nine months after their arrival in Sweden. This factor further undermines their credibility.

6.25 As regards the complainants’ allegation that they are at risk of being tortured and killed by “tribal fighters” and the Taliban, it follows from article 1 of the Convention and the Committee’s jurisprudence that the risk of being subjected to ill-treatment by a non-governmental entity or by private individuals, without the consent or acquiescence of the

Government of the receiving country, falls outside the scope of article 3. In any event, the complainants have not substantiated their claim that they would run such a risk.

6.26 There is nothing to indicate that the Afghan authorities would have any particular interest in the complainants. In making the risk assessment, it must be taken into account that the complainants have never lived in Afghanistan, that their parents left the country nearly 30 years ago and that (like more than six million other Afghans) they escaped from Afghanistan because of the war with the former Soviet Union. It is noteworthy that more than one million Afghan refugees have returned from the Islamic Republic of Iran to Afghanistan. In addition, the complainants' own stories as told to the Migration Board do not convey the impression that the Afghan authorities would take any real interest in them. The first complainant expressly stated that he had not had any problems with the Afghan authorities when he was deported there, and the second complainant did not mention that he had been to Afghanistan. Furthermore, two of the reasons given for why the Afghan authorities would take an interest in them — the registration with the secret police of the first complainant and the position within the Government of their father's enemies — are unsubstantiated and lacking in detail and were never presented to the Swedish authorities despite the fact that the complainants had several opportunities and plenty of time to do so. Moreover, with regard to the explanation given by the first complainant that he has been registered with the secret police because of his work as an interpreter for asylum seekers in Sweden, the Swedish embassy in Kabul has reported that it has no knowledge of the present Afghan security service engaging in "asylum espionage" or if its registers contain information on Afghan asylum seekers. The third reason, i.e., that the fact that they have sought asylum in Sweden is a very serious crime in Afghanistan, was not presented to the Swedish authorities either. The Swedish embassy in Kabul has reported that it is not aware that seeking asylum in another country would be a criminal offence under the Afghan law. In this context, the State party recalls that the Government of Sweden, the Government of Afghanistan and UNCHR have concluded a memorandum of understanding on the readmission of Afghan asylum seekers, which would not have been concluded if seeking asylum had been a criminal offence.

6.27 The complainants allege before the Committee that they were tortured in Afghanistan. This claim is wholly unsubstantiated and it was not presented to the Swedish authorities. Notwithstanding this, it is recalled that the Committee has observed that, while past torture is one of the elements to be taken into consideration when examining a claim under article 3, the aim of the Committee's examination is to determine whether the complainants would risk being subjected to torture now, if returned to their home country.^k

6.28 As to the complainants' claim before the Committee that they do not speak the language of Afghanistan, it should be noted that Afghanistan has two official languages, Dari and Pashto, which both belong to the Iranian group of languages. Dari is spoken by about 50 per cent of the population, while Pashto is spoken by about 35 per cent; in Kabul the majority speaks Dari. There is no doubt that both complainants speak Dari, given that the asylum interviews were conducted in this language. In addition, there is certain information indicating that the first complainant, at least, speaks Pashto. When he was interviewed in Islamabad in connection with his application for residence permit in Sweden on account of his alleged marriage to a woman living in Sweden, there was interpretation to and from Pashto and it was stated in the report that the complainant speaks Pashto. In the light of the foregoing, the complainants would have no real language problems if returned to Afghanistan. There is no indication that they would be exposed at any particular risk of

^k Communication No. 61/1996, *X., Y. and Z. v. Sweden*, decision adopted on 6 May 1998, para. 11.2.

torture or of being killed only because they speak a dialect of Dari used in the Islamic Republic of Iran.

6.29 The Swedish Migration Board and the Migration Court of Stockholm both concluded that an alternative of internal flight is available to the complainants, especially in Kabul. The human rights situation is better in Kabul than in other parts of the country. In case of voluntary return it could be possible for the complainants to obtain financial support under the Regulation Relating to Re-establishment Support for Certain Foreigners. Such financial support amounts to 30,000 Swedish krona for an adult who is over 18 (equivalent to about 3,000 euro). It can be granted to aliens who are returning voluntarily to a country where establishment is difficult due to the prevailing situation. Afghanistan is considered to be one of these countries.

6.30 In conclusion, the State party contends that the present complaint should be declared inadmissible (a) under article 22, paragraph 5 (b), for failure to exhaust all domestic remedies; or (b) under article 22, paragraph 2, as being manifestly unfounded, since the circumstances invoked by the complainants do not suffice to show that the alleged risk of torture fulfils the requirements of being foreseeable, real and personal: the complainants have not shown substantial grounds for believing that they would run a real and personal risk of being subjected to treatment contrary to article 3 if deported to Afghanistan, and therefore the complaint fails to attain the basic level of substantiation required for purposes of admissibility.

State party's further observations

7.1 By note verbale of 19 April 2010, the State party informed the Committee that, according to chapter 12, section 22 of the 2005 Aliens Act, an expulsion order that has not been issued by a general court on account of a criminal offence expires four years after the order became final and non-appealable. The Migration Board's decision regarding the expulsion of the complainants became final and non-appealable on 28 March 2006 when the Aliens Appeals Board decided to strike the case from its list of cases after the complainants had withdrawn their appeal. The decision on expulsion hence became statute-barred on 28 March 2010.

7.2 When a decision on expulsion expires, the alien is summoned to a meeting at the Migration Board. At that meeting, the alien is informed that the decision on expulsion has expired and will be encouraged to re-apply for a residence permit. A new application after the original decision has become statute-barred entails a full examination of the reasons for asylum and residence permit put forward by an alien at that time. In principle, a residence permit is granted in cases where a decision on expulsion has become statute-barred without the alien being responsible for that fact by, for example, going into hiding to avoid enforcement of the decision. A rejection of the new application is subject to appeal to the competent migration court and further to the Migration Court of Appeal.

7.3 In the present case, the significance of the decision on expulsion being statute-barred is twofold: firstly, the decision against which the complaint before the Committee is directed is no longer enforceable, i.e. the complainants are no longer under a threat of expulsion; secondly, their new application for asylum and residence permits and the reasons put forward in support thereof will be re-examined in full, and a negative decision is subject to appeal to the Migration Court.

7.4 In the light of the above, the State party requests that the Committee discontinue the examination of the complaint, provided that the complainants withdraw their complaint before the Committee. Should the complainants decide not to withdraw their complaint, the State party maintains its position that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. Considering that the original decision on expulsion is

statute-barred, a new application to the Migration Board with the possibility to appeal to the Migration Court must be seen as an effective remedy against the alleged risk of a violation of article 3. Furthermore, the State party refers to rule 110, paragraph 2, of the Committee's rules of procedure,¹ according to which a decision on inadmissibility for non-exhaustion of domestic remedies may be reviewed upon receipt of a request by or on behalf of the complainant containing information to the effect that the reasons for inadmissibility no longer apply, and states that it will be possible for the complainants to have their case examined by the Committee if their new application for asylum and residence permits is rejected.

Complainants' comments on the State party's observations

8.1 In a letter dated 11 March 2011, the complainants state that the situation in Afghanistan is worsening and that the risk to which they would be exposed in case of their deportation is well known, claiming that they will be imprisoned and extrajudicially executed if they were to return to Afghanistan. They add that they lived in Afghanistan for a very short period of time, and during that time they were subjected to persecution and ill-treatment. During many years, they lived in the Islamic Republic of Iran as refugees and they have no connection to Afghanistan. They further claim that they originate from a dangerous region where terrorists, military and other armed groups are waging war. The complainants submit that their mother, brother and sisters live in Sweden and they want to live peacefully in Sweden, close to their relatives, and to continue their studies and plan for their future.

8.2 On 21 March 2011, the complainants commented on the State party's submission of 19 April 2010. They maintain that Sweden rejected their asylum applications despite their claims being well founded. They believe Sweden is determined to deport them to a country which they barely know and where they do not have any siblings. The complainants further state that they have lost their confidence in the Swedish migration authorities and therefore decided not to re-apply for asylum as recommended by the State party, fearing that their new asylum applications would be automatically rejected and that Sweden would proceed to their deportation to Afghanistan without further notice.

Additional submission by the State party

9. On 27 April 2011, in the light of its previous submission of 19 April 2010 (see paras. 7.1–7.4 above), the State party reiterated its position that the examination of the present complaint should be discontinued or it should be declared inadmissible for failure to exhaust domestic remedies, since, after the decision on the complainants' expulsion has become statute-barred, they have now the possibility of submitting new asylum applications to the Migration Board with the possibility of an appeal to the Migration Court and further to the Migration Court of Appeal.

Additional comments by the complainants

10. By letter of 24 June 2011, the complainants maintained that Sweden is still deporting asylum seekers to war-torn zones in Afghanistan, despite their claims being supported by objective and accurate evidence. Therefore, they have no trust in the migration authorities and they do not want to resume the asylum process in Sweden. They fear that, if they restart any procedural contacts with the Swedish Migration Board, their applications would be turned down and their cases would be automatically referred to

¹ New rule 116, para. 2.

police for initiation of deportation measures. They maintain that they are at risk of inhuman treatment, extrajudicial execution and torture if forcibly returned to Afghanistan.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

11.2 The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention that the same matter has not been, and is not being examined under another procedure of international investigation or settlement.

11.3 Article 22, paragraph 5 (b), of the Convention precludes the Committee from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief. The Committee notes the State party's contention that the complainants failed to appeal against the Migration Court's decision of 3 December 2008 to the Migration Court of Appeal (see para. 6.15 above). The complainants have provided no arguments to the effect that an appeal to the Migration Court of Appeal would have been unlikely to bring any relief but merely argue that domestic remedies must have been exhausted as their deportation was being organized. The Committee also notes the State party's uncontested information, according to which the complainants have never mentioned during the asylum proceedings that they have been tortured in Afghanistan, this claim being presented for the first time in their complaint to the Committee (see para. 6.23 above). Furthermore, it takes note of the information provided by the State party that the decision regarding the complainants' expulsion became statute-barred on 28 March 2010, therefore it is no longer enforceable and the complainants are no longer under a threat of being expelled to Afghanistan. Moreover, they have now the possibility of submitting new asylum applications which will be re-examined in full by the Migration Board, with a possibility of an appeal to the Migration Court and further to the Migration Court of Appeal, if needed. The Committee observes, however, that the complainants have not initiated new asylum proceedings arguing that their applications would be automatically turned down and the Swedish authority will proceed to enforce the deportation without further notice. In this respect, the Committee recalls its jurisprudence, according to which mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such a remedy.^m The Committee is of the view that there is nothing to indicate that this new procedure cannot bring effective relief to the complainants, especially noting that they have now the possibility to raise before the migration authorities the claim that they have been tortured in Afghanistan in the past, which they have never done before in the context of the asylum procedure.

11.4 In the light of the foregoing, the Committee concludes that this communication is inadmissible under article 22, paragraph 5 (b), of the Convention for failure to exhaust domestic remedies: (a) because the complainants did not appeal against the Migration Court's decision of 3 December 2008 to the Migration Court of Appeal; (b) because they have never raised their claim of torture in domestic asylum proceedings; and (c) because they have not initiated new asylum proceedings since the decision regarding their expulsion became statute-barred, although they have been given such an opportunity.

^m See communication No. 202/2002, *Jensen v. Denmark*, decision of inadmissibility adopted on 5 May 2004, para. 6.3.

12. The Committee therefore decides:

(a) That the communication is inadmissible under article 22, paragraph 5 (b), of the Convention;

(b) That this decision may be reviewed under rule 116, paragraph 2, of the Committee's rules of procedure upon receipt of a request by or on behalf of the complainants containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the complainants and to the State party.
