



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

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Committee against Torture

Communication No. 430/2010

Decision adopted by the Committee at its fiftieth session (6–31 May 2013)

<i>Submitted by:</i>	Inass Abichou (née Seifeddine), represented by Action by Christians for the Abolition of Torture (ACAT-France)
<i>Alleged victim:</i>	Onsi Abichou (the complainant's husband)
<i>State party:</i>	Germany
<i>Date of complaint:</i>	25 August 2010 (initial submission)
<i>Date of decision:</i>	21 May 2013
<i>Subject matter:</i>	Expulsion from Germany to Tunisia
<i>Procedural issues:</i>	Matter examined under another procedure of international settlement and exhaustion of domestic remedies
<i>Substantive issue:</i>	Risk of torture following extradition
<i>Articles of the Convention:</i>	3 and 22, paragraph 5 (a)

Annex

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

concerning

Communication No. 430/2010

Submitted by:

Inass Abichou (née Seifeddine), represented by Action by Christians for the Abolition of Torture (ACAT-France)

Alleged victim:

Onsi Abichou (the complainant's husband)

State party:

Germany

Date of complaint:

25 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 21 May 2013,

Having concluded its consideration of communication No. 430/2010, submitted by Inass Abichou 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, Inass Abichou (née Seifeddine), born on 22 August 1983 in Beirut, Lebanon, and residing in France, submits the complaint on behalf of her husband, Onsi Abichou, born on 21 August 1982 in Zarzis, Tunisia, who is of French nationality and was detained in Saarbrücken prison in Germany at the time of the submission of the complaint to the Committee. She contends that the extradition of Mr. Abichou to Tunisia would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by Action by Christians for the Abolition of Torture (ACAT-France).¹

1.2 Under rule 114 (former rule 108) of its rules of procedure (CAT/C/3/Rev.5), on 25 August 2010 the Committee requested the State party not to extradite Mr. Abichou to Tunisia while this complaint is under consideration by the Committee.

¹ On 19 October 2001, Germany recognized the competence of the Committee to receive and consider individual complaints under article 22 of the Convention.

1.3 On 26 August 2010, the complainant's counsel informed the Committee that the State party had extradited Mr. Abichou to Tunisia on 25 August 2010. In the same correspondence, counsel confirmed the complainant's desire to have the Committee continue with its consideration of the communication.

1.4 On 21 January 2011, the Rapporteur on new complaints and interim measures, acting on behalf of the Committee, decided that the admissibility of the complaint should be examined together with its merits.

The facts as submitted by the complainant

2.1 On 17 October 2009, Onsi Abichou, a French citizen, was arrested by German police during an identity check in Germany, where he had gone for professional reasons. After confirming his identity, the police officers arrested him on the grounds that he was subject to an international arrest warrant issued by Tunisia on 14 March 2008. Mr. Abichou was subsequently held in the Saarbrücken remand prison. The detention order against him was renewed several times by the Regional High Court on the grounds that, taking into account the severe penalty to which he would be subject in Tunisia, there was a substantial risk that he would flee if granted provisional release.

2.2 The case against Mr. Abichou in Tunisia involves the following events: On 15 February 2008, a person named Mohamed Jelouali was arrested at the port of Goulette, Tunisia, as he was about to board a ship to Genoa. At the time he was behind the wheel of a lorry from which customs officials had just seized some cannabis. During his interrogation, Mohamed Jelouali revealed the name of one of his alleged accomplices, Mohamed Zaied, who was arrested on that same day at Tunis airport as he was about to board a flight to France. During his interrogation, Mohamed Zaied, "confessed",² quite possibly under duress, to having made a similar shipment of cannabis in October–November 2007 with the help of Mr. Abichou.

2.3 Following the interrogations, legal proceedings were brought against five people, only two of whom, Mohamed Jelouali and Mohamed Zaied, were in fact arrested; the other suspects were deemed to have absconded by the presiding judge. The suspects are to be tried in two different cases³ dealing with the same facts and events.

2.4 On 14 March 2008, the deputy public prosecutor issued two international arrest warrants for Mr. Abichou in the two cases. At that time, Mr. Abichou was in France and had not been troubled in any way by the judicial authorities. On 28 April 2008, the Interpol office in Tunis sent the Interpol General Secretariat a request for his arrest and extradition to Tunisia.

2.5 On 27 June 2009, the Tunis court of first instance (the Fourth Criminal Chamber) sentenced Mr. Abichou in the two cases under consideration⁴ to life imprisonment and to a 5-year immediately enforceable, non-deferrable term of imprisonment for forming a gang in Tunisia and abroad for the purpose of committing drug-related offences.

2.6 On 24 October 2009, following the arrest of Mr. Abichou by the German police, the investigating judge of the Eighth Bureau of the Tunis court of first instance sent a request from the Tunisian authorities addressed to the German judicial authorities for the extradition of Tunisian citizen Onsi Abichou. On 25 March and 6 May 2010, the State party sent two notes verbales to Tunisia requesting diplomatic assurances that Mr. Abichou's

² In inverted commas in the original complaint.

³ Cases No. 17911/09 and No. 17946/09.

⁴ See paragraph 2.3. The judge decided to combine the two sentences pursuant to article 56 of the Tunisian Criminal Code.

rights would be protected in the event of his extradition to Tunisia. In response, the Tunisian Ministry of Foreign Affairs sent two letters⁵ in which it provided diplomatic assurances that the proceedings that would be initiated upon Mr. Abichou's extradition would be conducted in accordance with the International Covenant on Civil and Political Rights, which has been ratified by Tunisia, and, in the event of a conviction, Mr. Abichou would serve his sentence in a prison that abided by the United Nations Standard Minimum Rules for the Treatment of Prisoners.

2.7 On 20 May 2010, the Saarland Regional High Court determined that the extradition would be lawful, thereby authorizing the German Ministry of Foreign Affairs to formally order the extradition of Mr. Abichou. Assisted by his counsel, Mr. Abichou challenged the decision of 20 May 2010 on the grounds that the Regional High Court had failed to rule on several lines of argument that he had put forward, notably those dealing with the risk of torture. Although the appeal had no suspensive effect, the prosecuting authorities agreed not to extradite Mr. Abichou until the Court had ruled on these points.

2.8 On 8 July 2010, the German Ministry of Foreign Affairs sent a note verbale to the Tunisian embassy in Berlin in which it confirmed the Government's consent to the extradition of Mr. Abichou. It was not until 19 August 2010 that, at his request, the counsel of Mr. Abichou was apprised of the contents of this correspondence.

2.9 On 12 July 2010, the Saarland Regional High Court upheld its decision of 20 May 2010 on the grounds that, although aware of reports from international non-governmental organizations concerning the risk of torture in Tunisia, the Court put its trust in the Tunisian Government. Furthermore, the Court cited a lack of evidence of any direct threat to the applicant.

2.10 On 22 July 2010, Mr. Abichou submitted an urgent appeal to the German Constitutional Court for interim measures and requested it to set aside the Regional High Court's decision. This petition was rejected on 28 July 2010. The Saarbrücken prosecuting authorities then sent a letter to the central office of the German Criminal Investigation Department in Wiesbaden requesting that it make arrangements for Mr. Abichou's extradition.

2.11 On 20 August 2010, Mr. Abichou submitted a request for interim measures⁶ to the European Court of Human Rights pursuant to rule 39 of the Rules of Court. The application was rejected by the Court on 23 August 2010, with no reason for the rejection being given.

2.12 On 25 August 2010, the complainant learned that the extradition of her husband, Mr. Abichou, would take place on that same day at 1 p.m. The extradition was carried out as planned on 25 August 2010.

The complaint

3.1 The complainant refers to the concluding observations of the Human Rights Committee on the report of Tunisia, adopted on 28 March 2008,⁷ and states that torture is

⁵ The dates of which are illegible (apparently dated 13 May 2010).

⁶ In her subsequent comments on the State party's observations on the merits, the complainant went on to specify that the two requests for interim measures were made on 3 and 19 August 2010.

⁷ According to which the Committee was shown to be "concerned about serious and substantiated reports that acts of torture and cruel, inhuman or degrading treatment or punishment are being committed in the territory of the State party. According to some of these reports: (a) some judges refuse to register complaints of ill-treatment or torture; (b) some inquiries ordered subsequent to such complaints take an unreasonable amount of time; and (c) some superiors responsible for the conduct of their agents, in violation of article 7 of the Covenant, are neither investigated nor prosecuted"

routinely used in Tunisia as an investigation method in cases involving prisoners of conscience and ordinary prisoners. The latter are almost invariably subjected to cruel, inhuman or degrading treatment, including kicks, slaps and punches, during interrogation. Uncooperative suspects are subsequently subjected to torture.⁸ Torture is used to extract confessions from ordinary prisoners concerning alleged crimes and to conclude unsolved cases.

3.2 According to the complainant, the assurances given by the Tunisian Government in its two notes verbales that it would safeguard the physical and psychological integrity of Mr. Abichou are of no value, as Tunisia has failed to honour its diplomatic assurances to a State from which it was requesting the extradition or return of one of its citizens in the past.⁹ Furthermore, during a telephone conversation with the complainant's counsel, the lawyer of Mohamed Jelouali, a defendant in the same case, said that his client claimed to have been assaulted by the customs officials who had arrested him, then tortured by police officers at the Goulette police station, to whom he had been handed over on the same day. He was repeatedly punched, kicked and beaten with truncheons for five days following his arrest. He was interrogated during the course of his first night in custody in order to deprive him of sleep. He was not brought before an investigating judge until 25 days after his arrest, in violation of Tunisian law, which limits the duration of police custody to 6 days. Mohamed Jelouali and his lawyer gave this information to the investigating judge, the judges of the court of first instance and the appeal judges, but none has taken appropriate action to address these gross violations of the victim's rights. According to his lawyer, the second defendant in the same case, Mohamed Zaïed, suffered similar treatment. The two decisions of 27 June 2009 delivered by the Tunisian court of first instance both referred to the use of torture against Mohamed Zaïed and Mohamed Jelouali, which had been reported by their lawyers and used as an argument for the defence. However, the judge, without providing any substantive reasons, refused to take the use of torture into account in the two cases.¹⁰

⁸ (CCPR/C/TUN/CO/5, 28 March 2008, para. 11).

⁹ The complainant refers to a report by the World Organization against Torture (OMCT) and the Tunisian Association against Torture (ALTT) ("Note sur le suivi des recommandations du Comité des droits de l'Homme par la Tunisie", published in August 2009), which refers to what it describes as the very frequent use of torture by police officers and prison wardens against persons who have been arrested or convicted and detainees in ordinary criminal cases.

⁹ The complainant refers to the case of Sami Ben Khemais Essid, who was extradited from Italy in June 2008 and tortured by State security officials in the Ministry of the Interior a few months after his arrival in Tunisia. The Italian authorities had cited the Tunisian Government's diplomatic assurances as justification for the extradition (European Court of Human Rights, *Ben Khemais v. Italy*, Case No. 247/07, 24 February 2009).

¹⁰ Case No. 17946: Whereas the defence rests its case on the claim that the confession made by the accused [Mohamed Zaïed] during the preliminary investigation was obtained under duress and is unsubstantiated, this confession is corroborated by circumstantial evidence consisting principally of the items seized from the accused and their arrest after the events that are the subject of the present case. The Court is therefore entitled to refuse to set it aside, given the weakness of the argument (Tunis court of first instance, Case No. 17946, hearing of 27 June 2009, p. 22 of the sworn translation of the judgement supplied for inclusion in the case file by the complainant). Case No. 17911: Whereas the defence rests its case on the claim that the incriminating testimony recorded by the investigator was obtained by force and is unsubstantiated, this testimony has been corroborated by circumstantial evidence consisting principally of the items seized and confiscated and the quantity of drugs that had been expertly loaded into a lorry and were ready for export. The Court has therefore rejected this argument (Tunis court of first instance, Case No. 17911, hearing of 27 June 2009, p. 27 of the sworn translation of the judgement supplied for inclusion in the case file by the complainant).

3.3 In view of the frequent use of torture in Tunisia, and considering the ill-treatment of the two defendants arrested in the same case, there is a substantial risk that Mr. Abichou would also be subjected to torture or inhumane or degrading treatment in the event of his extradition to Tunisia, in violation of article 3 of the Convention.

State party's observations on admissibility

4.1 On 19 October 2010, the State party contested the admissibility of the communication under article 22, paragraph 5 (a), of the Convention.

4.2 The State party notes that Onsi Abichou, of French and Tunisian nationality, was sentenced in absentia to life imprisonment on several counts of large-scale smuggling and drug trafficking. Mr. Abichou was the subject of an Interpol notice, which led to his arrest in Saarbrücken on 17 October 2009. Tunisia had requested his extradition so that he could be made to serve his sentence. In accordance with the State party's extradition procedures, the extradition was approved by the Saarbrücken Regional High Court, which determined that Tunisian law allowed appeals in cases where a verdict had been delivered in absentia and that, even though Mr. Abichou had been sentenced to life imprisonment, he could be eligible for parole after 15 years in prison. Consequently, the German Government had authorized the extradition. The Tunisian Government had been notified of this decision by note verbale on 8 July 2010.

4.3 Mr. Abichou appealed against this decision before the German Constitutional Court, arguing that he would face a substantial risk of torture if extradited to Tunisia and that the judgement against him was based on evidence obtained under torture. The Constitutional Court rejected the appeal. Consequently, on 23 August 2010,¹¹ Mr. Abichou submitted an application to the European Court of Human Rights (Application No. 33841/10) under articles 3 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] and under Protocol No. 7 of that same Convention, although it has not been ratified by the State party. In the same application, Mr. Abichou also submitted a request for interim measures under rule 39 of the Rules of Court. The Court rejected his request, however.

4.4 According to the State party, it was only once the European Court of Human Rights had rejected Mr. Abichou's request to have the State party suspend the extradition proceedings that he turned to the Committee and submitted the present communication. The Rapporteur on new complaints and interim measures requested the State party to refrain from proceeding with the extradition of Mr. Abichou to Tunisia. This request was conveyed to the State party on 25 August 2010. However, it did not reach the competent authorities of the State party until after Mr. Abichou had been extradited. Consequently, the State party was not in a position to comply with the Committee's request for interim measures. According to the State party's records, the Permanent Mission of the State party in Geneva received the Committee's request for interim measures on 25 August 2010 at 12.05 p.m. The person responsible for such matters immediately (at 12.10 p.m.) sent the information to the Human Rights Unit of the Ministry of Foreign Affairs in Berlin by e-mail. At that stage the message was handled directly by the Ministry departments responsible for international legal matters. At 1.39 p.m. the Ministry of Justice was informed of the Committee's request. The appropriate person immediately contacted the regional authority in charge of extradition proceedings (Saarland Ministry of Justice). This person was informed that Mr.

¹¹ According to the complainant's initial communication, the matter had been referred to the European Court of Human Rights on 20 August 2010. [The complaint is annexed to the case file but is not dated and was apparently submitted to the Court on 19 August 2010 and rejected on 23 August 2010.]

Abichou had been handed over to the Tunisian authorities at Frankfurt airport at around 1.15 p.m.

4.5 The State party is of the view that the amount of time taken for the transmission of the Committee's request for interim measures on behalf of Mr. Abichou was entirely reasonable, taking into account the time required to alert the competent authorities at the State level. Under the circumstances, the amount of time allowed for a response from the State party was too short. The State party believes in the necessity of acting promptly in matters relating to article 3 of the Convention and reaffirms its commitment to comply with the requests of the Rapporteur on new complaints and interim measures under rule 108 of the Committee's rules of procedure.

4.6 The State party adds that the communication is inadmissible *in limine* under article 22, paragraph 5 (a), of the Convention,¹² since Mr. Abichou had submitted an application to the European Court of Human Rights concerning the same events. Furthermore, the Court had rejected his request for interim measures. That case was based on the same argument as the one made before the Committee, namely that Mr. Abichou would face a substantial risk of torture if returned to Tunisia. The fact that Mr. Abichou alleged additional violations of the European Convention on Human Rights in his application to the European Court of Human Rights is of no consequence. The State party adds that interim measures should not be used in cases which are clearly inadmissible under article 22, paragraph 5 (a), of the Convention.

Complainant's comments on the State party's submission

5.1 On 23 December 2010, the complainant commented on the State party's observations. She rejects the State party's argument that the communication should be declared inadmissible under article 22, paragraph 5 (a), of the Convention on the grounds that Mr. Abichou had requested interim measures before the European Court of Human Rights, under rule 39 of the Rules of Court, whereby Germany would be instructed to stay the extradition order pending the matter's referral to the Court and the Court's ruling on the merits of the case.

5.2 According to the complainant, the application submitted to the European Court of Human Rights by Mr. Abichou, through his counsel, is entitled "Rule 39 application". Consequently, the Court's decision to reject the request related only to the application made under rule 39. According to the complainant, at no point had a request seeking a reversal of the German judicial officials' authorization of the extradition of Mr. Abichou to Tunisia been referred to the Court or had the Court rendered its views on the merits of such an application. Only the Committee against Torture had received such a request, so it could be concluded that "the same matter has not been, and is not being, examined under another procedure of international investigation or settlement", as required by article 22, paragraph 5 (a), of the Convention.

5.3 Regarding the issue of the State party's non-compliance with the Committee's request for interim measures, which the State party attributed to an overly short deadline, the complainant states that it was only on the morning of 25 August 2010 that Mr. Abichou learned he would be extradited that same afternoon, even though the German judicial authorities had requested the judicial police to provide the date of extradition two weeks in

¹² The State party refers to communication No. 305/2006, *A.R.A. v. Sweden*, decision adopted on 30 April 2007, para. 6.2.

advance.¹³ According to the complainant, the fact that the authorities decided to expedite the extradition left her with no other choice but to refer the matter to the Committee a few hours before the extradition took place.

State party's observations on the merits

6.1 On 19 April 2011, the State party submitted its observations on the merits of the communication. The State party refers, first of all, to the admissibility of the communication. It rejects the complainant's argument that the application submitted by Onsi Abichou to the European Court of Human Rights was no more than a request for interim measures and that, as a result, the Court did not consider the case on the merits, thus not precluding the admissibility of the communication for consideration by the Committee under article 22, paragraph 5 (a), of the Convention. According to the State party, the complainant's interpretation is erroneous, since the procedures of the European Court of Human Rights do not allow for the separate consideration of a request for interim measures. Such protection measures serve merely to suspend an expulsion order while the case is being considered by the Court. Moreover, it is apparent that the application was filed with the Court in due form by Onsi Abichou under article 34 of the European Convention on Human Rights.¹⁴ In any event, this was the only way to submit a request for interim measures to the Court, and Onsi Abichou's lawyer could not have been ignorant of this fact. On 12 August 2010, the European Court of Human Rights informed Onsi Abichou that his request for interim measures had been denied. On 24 August 2010, the Court informed him that his application would be presented to the Court as soon as possible. His lawyer had to have known that his submission to the Court was considered to be an application on the merits and would be treated as such. The State party adds that it requested and, on 7 February 2011, obtained confirmation from the Court that Onsi Abichou's petition was indeed a complete application that was pending before the Court. It was only at that time that the complainant, realizing that the Committee would not remain unaware of these facts for much longer, decided to withdraw the application from the European Court of Human Rights. This demonstrates that the complainant knew that the application was pending before the Court. According to the State party, what is at issue is a deliberately false statement on the part of the complainant and, consequently, an abuse of the right to submit a communication within the meaning of article 22, paragraph 2, of the Convention. Therefore, the State party asks the Committee to reject the complaint on the ground that it constitutes an abuse of the right to submit a communication, as well as on the basis of article 22, paragraph 5 (a), of the Convention.

6.2 With regard to the merits of the case, and while specifying that it submits these observations even though it remains convinced that the communication has no legal basis, the State party points out that the extradition procedure provides for two different screening procedures. Any extradition request must first be approved by a higher regional court, which bases its decision on information from a variety of sources, including non-governmental ones, about the human rights situation in the requesting State. The person concerned is free to submit any information about the potential risks to which he or she

¹³ The complainant refers to a message dated 28 July 2010 sent by the Saarbrücken prosecutor to the Wiesbaden investigative police concerning the procedures to be used for Mr. Abichou's extradition (see para. 2.10).

¹⁴ The pertinent paragraph of the application reads as follows: "The applicant submits an application alleging a violation by Germany of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 4 of Protocol No. 7 to the same Convention and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (para. 11).

claims to be exposed. After the approval of a request by a higher regional court, the Government of the State party must still decide whether to authorize the extradition. The Ministry of Justice considers whether the requirements for extradition — including the State party's obligations under international law — have been met. The Ministry of Foreign Affairs must also approve the extradition. At all stages of the proceedings, reports from both governmental and non-governmental sources are consulted in order to arrive at a realistic assessment of the situation in the requesting State. If necessary, conditions may be attached to the approval of the extradition.

6.3 The State party indicates that it is familiar with the reports cited by the complainant in her complaint, which give rise to serious concerns about the human rights situation in Tunisia. The decision to extradite Onsi Abichou was taken following a scrupulous, detailed evaluation of the specific risks to which he would be exposed. The Ministry of Foreign Affairs requested diplomatic assurances from the Tunisian authorities that, *inter alia*, Onsi Abichou would be entitled to a retrial in which the rights set out in the International Covenant on Civil and Political Rights would be upheld and that, in the event of a new conviction, he would be incarcerated in a detention facility that complies with the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Tunisian Ministry of Foreign Affairs provided such assurances to the State party on 8 May 2010.¹⁵ In arriving at its decision, the Saarbrücken Regional High Court, which had jurisdiction to approve the extradition request, took into consideration reports relating to the human rights situation in Tunisia from the State party's Ministry of Foreign Affairs, Amnesty International and the United States Department of State. On the basis of these reports, the Court found that it could not rule out the possibility that suspects in Tunisia were subjected to illegal treatment, but that there was no indication that the Tunisian authorities had instigated or acquiesced to such treatment, at least not in connection with crimes that did not have to do with terrorism.

6.4 As to the claims that individuals who provided testimony leading to Onsi Abichou's conviction had been tortured, the Saarbrücken Regional High Court considered that those allegations had not been substantiated. In addition, Mr. Abichou's conviction had been based on other corroborating evidence. Furthermore, since Mr. Abichou's right, under Tunisian law, to request a trial de novo had been explicitly confirmed by the Tunisian authorities in the assurances that they provided to the State party, the Court considered that there was no reason to think that Onsi Abichou would not receive a fair trial. The State party adds that the Saarbrücken Regional High Court also took note of the concerns relating to conditions of detention in Tunisia that were described in the above-mentioned reports, but considered that the assurances provided by Tunisia, to the effect that Onsi Abichou would be incarcerated in a detention facility that complies with the United Nations Standard Minimum Rules for the Treatment of Prisoners, ruled out such risks. The competent courts and authorities of the State party thus carefully considered the risks entailed by the extradition of Onsi Abichou to Tunisia. In addition, the German Embassy in Tunis followed up on these diplomatic assurances, and officials from the French Embassy in Tunis (given

¹⁵ The assurances which were provided were as follows: (i) If the judicial decisions constituting the basis for the request for Mr. Abichou's extradition are challenged, the ensuing proceedings will provide for the consideration of all the relevant facts of the case; (ii) The proceedings to be undertaken will be such as to ensure that the defendant is able to question the witnesses against him and his co-defendants; (iii) The proceedings to be undertaken will be conducted in accordance with the International Covenant on Civil and Political Rights, which has been ratified by Tunisia; (iv) If Mr. Abichou is convicted, he will serve his sentence in a prison that complies with the United Nations Standard Minimum Rules for the Treatment of Prisoners; (v) In accordance with the rule of speciality, Mr. Abichou will not be tried on any charges other than those indicated in the extradition request of 24 October 2009; and (vi) Mr. Abichou will be eligible for parole under articles 353 ff. of the Code of Criminal Procedure.

Mr. Abichou's French citizenship) took over Onsi Abichou's case.¹⁶ Moreover, the German Embassy followed the progress of his new trial at first instance, as well as the appeal procedure.¹⁷ There has been no indication that Onsi Abichou has been subjected to torture or to other inhuman treatment.

6.5 On the question of exposure to the risk of torture, the State party states that it is aware of the substantial risk to which certain groups of suspects are exposed and that this may be regarded as constituting a systematic practice. Nevertheless, in the view of the Government of Germany, Onsi Abichou does not belong to any of the groups that could be considered to be exposed to such a risk. The complainant refers to the judgement of the European Court of Human Rights in the case of *Ben Khemais v. Italy*, in which the Court explicitly enumerated the specific risks faced by persons suspected of terrorist activities. Onsi Abichou does not fall into that category. If charges of that nature had been brought against him, it is very unlikely that he would have been extradited. The Committee will be able to draw its own conclusions from the fact that the European Court of Human Rights, taking due account of its jurisprudence over the question of extradition to Tunisia, nevertheless rejected Onsi Abichou's request for interim measures on several occasions.

6.6 The State party adds that the weight of diplomatic assurances differs depending on whether they are provided in connection with cases of extradition or of deportation. It is reasonable to assume that a requesting State will wish to avoid jeopardizing future extradition requests by failing to respect the assurances it extends to another State. This is all the more true in cases not involving any political overtones or suspected terrorist activity, as in the present instance, which is a simple case of drug trafficking. For these reasons, the State party maintains that its courts and authorities correctly assessed the risk to which Onsi Abichou would be exposed as a result of his extradition to Tunisia. At the time of the decision, there was no indication that Mr. Abichou would be subjected to torture, that the Tunisian authorities would fail to honour their assurances or that they would fail to act if a complaint of that nature were to be made. Consequently, this decision does not contravene article 3 of the Convention. The State party therefore requests that the Committee rule that the complaint is inadmissible on the ground that it constitutes an abuse of the right to submit a communication or, alternatively, that it constitutes a violation of article 22, paragraph 5 (a), of the Convention. Should the Committee decide that the complaint is admissible, the State party requests that the Committee declare it to be unfounded.

State party's additional submission

7.1 On 27 May 2011, the State party submitted additional information to the Committee, informing it that, on 19 May 2011, the Tunis Court of Appeal had acquitted Onsi Abichou of all charges against him and that he had been released. The German Embassy followed the proceedings, and it appears that Onsi Abichou was released on the basis of statements made by defence witnesses.

7.2 According to the State party, these facts demonstrate that the Tunisian authorities honoured their diplomatic assurances, which bears out the State party's previous observations on the admissibility and merits of the communication.

¹⁶ The State party does not elaborate on this point.

¹⁷ The Tunis Court of Appeal handed down its decision on 19 May 2011 (see para. 7.1 below).

Complainant's comments on the State party's observations on admissibility and on the merits

8.1 In her comments of 26 June 2011, the complainant argues that, at the time of the submission of her initial complaint to the Committee on 25 August 2010, the subject matter dealt with in her application had not been examined by the European Court of Human Rights and that neither Onsi Abichou nor his lawyer knew that an application was pending before that body. The complainant recalls the distinction that must be made, in her opinion, between a communication and a request for interim protection measures. Article 22, paragraph 5 (a), of the Convention precludes the Committee from considering any communication that has been or is being examined under another international procedure, but it does not apply to requests for interim protection measures for obvious reasons related to the need to give priority to protecting a person's physical and mental integrity, over and above any other procedural consideration.

8.2 At the request of ACAT-France (counsel for the complainant), on 3 and 19 August 2010, the law firm of William Bourdon submitted requests for interim measures to the European Court of Human Rights pursuant to rule 39 of the Rules of Court, in which he requested that the Court ask Germany to stay Onsi Abichou's extradition to Tunisia.¹⁸ On 12 and 23 August 2010, the Court rejected these requests.¹⁹ The Court's decisions concerned only the requests made under rule 39 (interim measures) of the Rules of Court. Hence, the Court never ruled on the claim currently under consideration by the Committee. Therefore, it cannot be argued that the subject matter dealt with in the claim contained in the communication submitted to the Committee has already been examined under another international procedure.

8.3 When the second request for interim measures was rejected, an official of the Court called Mr. Bourdon on the telephone to ask if he wished the Court to consider the application on the merits, to which Mr. Bourdon replied in the negative, in keeping with the wishes of ACAT-France and Onsi Abichou's family. Mr. Bourdon did not make any further submissions to the Court concerning the matter, and since then has not dealt with Onsi Abichou's case, which is being handled exclusively by ACAT-France. It was only after Mr. Bourdon's law firm received the letter addressed to the German Government by the European Court of Human Rights, on 7 February 2011, that Mr. Bourdon and ACAT-France realized that, contrary to their instructions, the case remained pending before the Court.

8.4 ACAT-France thereupon asked Mr. Bourdon to rectify this mistake as a matter of urgency, which he did by drafting a letter to the Court on 8 March 2011 in which he reminded it that, after its rejection of the second request for interim measures, he had informed the Court of his wish for it not to examine the application on the merits. In a letter dated 25 March 2011, the registrar of the Court replied that Mr. Bourdon should have withdrawn the application in writing and that, because of his failure to do so, the application had been maintained. On 7 April 2011, at the express request of Mr. Bourdon, the Court finally struck Onsi Abichou's application off its list of cases. Since ACAT-France did not take part in the exchanges between Mr. Bourdon's firm and the registry of the European Court of Human Rights, it is not in a position to determine who is responsible for the misunderstanding, and it requests that the Committee ensure that Onsi Abichou, who bears no responsibility whatsoever for this misunderstanding, does not suffer as a result of it.

¹⁸ Since the person in charge of Onsi Abichou's case at ACAT was not a lawyer, the services of a lawyer had been sought.

¹⁹ The complainant attaches the Court's decision of 12 August 2010.

8.5 As to the merits, the complainant challenges the State party's assertions that the reports it consulted did not establish that Onsi Abichou faced a substantial risk of torture because he was not being prosecuted in connection with terrorism-related offences. The complainant refers in this regard to numerous reports (mostly from non-governmental sources)²⁰ that were sent to the European Court of Human Rights on 19 August 2010 along with the request for interim measures in respect of Onsi Abichou, which mention the use of torture against prisoners prosecuted for ordinary criminal offences. The complainant refers once more to the judgement of the European Court of Human Rights in the case of *Ben Khemais v. Italy*, which was cited by the State party in an effort to show that the risk of torture applies only to persons suspected of terrorist activities. The fact that this judgement concerns a person who was suspected by the Tunisian authorities of having participated in terrorist activities and who was subjected to torture does not mean, conversely, that persons in Tunisia under prosecution for other types of offences do not run the risk of being subjected to torture. Many credible sources have documented the use of torture against political opponents, trade unionists, journalists and others arrested in connection with events unrelated to the struggle to combat terrorism.²¹

8.6 Regarding the issue of diplomatic assurances, the complainant observes that three of the diplomatic assurances provided to the State party by Tunisia were not honoured: (1) "In the new trial, the right of the accused to question, through the presiding judge, the witnesses against him and his co-defendants will be guaranteed pursuant to section 143 of the Code of Criminal Procedure." At Mr. Abichou's new trial, which was granted following his extradition by Germany, the Tunisian judge Mehrez Hammami (who was relieved of his duties following the Tunisian revolution) refused to allow the confrontation of witnesses. He sentenced the accused to life imprisonment on 11 December 2010 solely on the basis of confessions obtained under torture from his alleged accomplices. Allowing Onsi Abichou to confront his alleged accomplices would have provided them with an opportunity to describe the torture to which they had been subjected during questioning.²² (2) "The new trial will be in accordance with the standards set forth in the International Covenant on Civil and Political Rights, which was ratified by Tunisia pursuant to Act No. 30 of 29 November 1968, thus affording the accused an effective defence." Onsi Abichou was sentenced on 11 December 2010, the day of the first hearing, without his lawyer, Radhia Nasraoui, having been permitted to submit arguments in respect of the merits. (3) "If convicted, Onsi Abichou will serve his sentence in a prison that complies with the United Nations Standard Minimum Rules for the Treatment of Prisoners." As noted by the United

²⁰ Report of 2009 of the United States Department of State, cited by the State party in its observations, which refers to the case of Abdelmottaleb Ben Marzoug, who was tortured on 12 March 2009 by security forces who wished to coerce him into confessing that he had participated in a fight in a coffee shop; 2009 report of the World Organization Against Torture (OMCT) and the Tunisian Association against Torture (ALTT), which makes repeated references to the torture of prisoners convicted of ordinary criminal offences; 2010 report of ACAT-France, *A World of Torture*, which notes that persons suspected of having committed an ordinary criminal offence are almost routinely subjected to cruel, inhuman or degrading treatment, such as being kicked, slapped or punched during questioning. The report goes on to say that, according to statements gathered from victims and lawyers, the vast majority of arrested persons are subjected, at a minimum, to insults, slaps and kicks during questioning at police or national guard stations. It also states that recalcitrant suspects may be subjected to torture [<http://unmondetortionnaire.com/Tunisie-rapport-2010>] (statement by lawyer Mohamed Abbou, dated 18 August, concerning the use of torture against persons suspected of drug trafficking).

²¹ United States Department of State, Amnesty International, ACAT-France, International Federation for Human Rights (FIDH), Human Rights Watch and World Organization Against Torture (OMCT).

²² The complainant refers to the ACAT-France press release of 15 November 2010 entitled "Another parody of justice in Tunisia".

States Department of State in its 2009 report, which was consulted by the authorities of the State Party, “prison conditions generally did not meet international standards”. This finding was confirmed by ACAT-France in its 2010 report entitled *A World of Torture*.²³

8.7 The complainant rejects all aspects of the State party’s assertion that Onsi Abichou’s acquittal on appeal and subsequent release on 19 May 2011 demonstrate that Tunisia honoured its assurances. If Onsi Abichou was able to receive a fair trial on appeal, it was not as a result of the diplomatic assurances provided by the former Tunisian Government but rather a consequence of the positive changes that came in the wake of the revolution of 14 January 2011 and the efforts of ACAT-France and Radhia Nasraoui, the lawyer of the accused, to focus attention on the case. These efforts had made it possible to exercise the right to confront witnesses – an unprecedented procedure in Tunisian legal practice. The State party deliberately fails to take into account the radical political change that made Onsi Abichou’s acquittal possible and overlooks the unfair trial to which he was subjected at first instance, one month before the revolution. The complainant refers to the error committed by the Saarbrücken Regional High Court, which had held that Onsi Abichou’s conviction was also based on other corroborating evidence, rather than solely on statements by witnesses who had been tortured. According to the complainant, Onsi Abichou’s acquittal by the Tunisian judge who heard the appeal demonstrates that this was not true.

8.8 Lastly, in response to the argument advanced by the State party that the allegations of acts of torture perpetrated against Onsi Abichou’s alleged accomplices were not substantiated,²⁴ the complainant refers to two written records of interviews conducted in the Mornaguia prison on 21 March 2011 by ACAT-France with prisoners Mohamed Zaied and Mohamed Jelouali. These records attest to the torture inflicted on Onsi Abichou’s alleged accomplices during the investigation.²⁵ She also cites the complaint of torture prepared by Mohamed Abbou, Mohamed Zaied’s lawyer, and filed with the public prosecutor attached to the Tunis court of first instance on 19 April 2011. The complainant concludes by reiterating that these records, which are corroborated by numerous documentary sources, attest to the use of torture in Tunisia and are sufficient to prove that Onsi Abichou was exposed to a substantial and serious risk of torture at the time of his extradition to Tunisia. Most of this information was available to the State party at the time when it carried out the

²³ ACAT-France, *A World of Torture* (2010), p. 187: Conditions of detention in Tunisian prisons are deficient in every respect. Overcrowding is a recurring problem. According to former inmates’ accounts compiled by ACAT-France, prisoners are often required to sleep two or three to a bed, or else on the floor. Sanitation facilities, consisting of a faucet and a toilet, are shared by some one hundred prisoners. Normally each prisoner is entitled to shower once a week, but this right is sometimes denied, either because there are too many prisoners or in order to punish an inmate. Owing to poor conditions of hygiene, diseases spread very quickly. Access to treatment is limited and deprivation of care is often used as a punishment, especially for political prisoners.

²⁴ See para. 6.4 above.

²⁵ [Attached to the case file] According to witnesses, the two prisoners were beaten at the time of their arrest on 15 February 2008 and then were savagely tortured during the 10 days that they were held in police custody at the border station. They were finally brought before the investigating judge prior to being transferred to Mornaguia prison. For the purposes of an additional investigation requested by the judge, the two prisoners were brought back to the Kabaria anti-drug brigade, where they were tortured again. The two were ultimately sentenced to life imprisonment by the Tunis court of first instance, presided over by Judge Mehrez Hammami, who was discharged from his duties following the revolution. Mohamed Jelouali reportedly spoke to the investigating judge about the torture to which he had been subjected; the judge reportedly replied that he deserved what he got. For his part, Mohamed Zaied appears to have been clearly dissuaded by the doctor who saw him upon his admission to Mornaguia prison from speaking about the fact that he had been tortured. Mohamed Zaied and Mohamed Jelouali are suffering from serious physical and psychological sequelae of the torture to which they were subjected.

extradition. The fact that Onsi Abichou was not tortured upon arriving in Tunisia — no doubt due in large part to the attention focused on his case, especially by the media — cannot retrospectively justify the actions of the State party. For these reasons, the complainant invites the Committee to find that the State party acted in violation of article 3 of the Convention and of the interim measures requested by the Committee.

Issues and proceedings before the Committee

Failure to comply with the Committee's request for interim measures pursuant to rule 114 of its rules of procedure

9.1 The Committee regrets that its request for interim measures was not respected. It recognizes the State party's efforts to transmit the Committee's request for interim measures as expeditiously as possible, given the circumstances, and concludes that, in the present instance, the State party cannot be said to have failed to meet its obligations under article 22 of the Convention.

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. In this regard, the Committee notes that Onsi Abichou submitted an application (registered under No. 33841/10) to the European Court of Human Rights and that this application related to the same matter as the one before the Committee. Nevertheless, the Committee notes that the application was withdrawn and struck off the Court's list of cases on 7 April 2011 before having been considered on the merits by that instance. Consequently, the Committee considers that the provisions of article 22, paragraph 5 (a), of the Convention do not preclude its consideration of the complaint.²⁶

10.2 In the absence of any further obstacle to the admissibility of the communication, the Committee proceeds with the consideration of the merits under article 3 of the Convention.

Consideration of the merits

11.1 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.

11.2 The Committee must determine whether, by extraditing the alleged victim to Tunisia, the State party failed to fulfil its obligation under article 3, paragraph 1, of the Convention to refrain from expelling or 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. The Committee stresses that it must take a decision on this 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 in assessing what information the State party actually had or should have had at the time of extradition.²⁷

11.3 The Committee recalls that the aim of such a determination is to establish whether the person in question was personally at a foreseeable and real risk of being subjected to

²⁶ See communication No. 215/2002, *M.J.A.G.V. v. Sweden*, decision adopted on 11 November 2003, para. 6.1.

²⁷ See communication No. 428/2010, *Kalinichenko v. Morocco*, para. 15.2 and communication No. 233/2003, *Agiza v. Sweden*, decision adopted on 20 May 2005, para. 15.2.

torture upon his return to Tunisia. The Committee also recalls its general comment No. 1 (1997) 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. However, the risk does not have to meet the test of being highly probable”²⁸ but must be personal and present. In this regard, the Committee has determined that the risk of torture must be foreseeable, real and personal.²⁹ The Committee further recalls that, pursuant to its general comment No. 1, it gives considerable weight to findings of fact made by organs of the State party concerned,³⁰ but that it is not bound by such findings and instead is empowered, by virtue of article 22, paragraph 4, of the Convention, to undertake a free assessment of the facts based on the full set of circumstances in each case.

11.4 In assessing whether the State party’s extradition of the alleged victim to Tunisia was in violation of article 3 of the Convention, 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. However, the Committee recalls that the aim of such a determination is to establish whether the individual concerned was personally at risk of being subjected to torture in the country to which he was to 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; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances. By arriving at a determination on the existence of a foreseeable, real and personal risk of torture, the Committee expresses no opinion as to the veracity or gravity of the criminal charges against Onsi Abichou at the time of his extradition.

11.5 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.³¹ While taking note of the follow-up measures implemented by the State party, the Committee recalls that diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention.³² The Committee takes note of the arguments advanced by the complainant to the effect that, in view of the frequent use of torture in Tunisia and the ill-treatment inflicted on the two other defendants arrested in the same case, there was a substantial risk that Onsi Abichou would also be subjected to torture or to inhuman or degrading treatment in the event of his extradition to Tunisia. The Committee also takes note of the State party’s argument that Onsi Abichou did not belong to groups that were exposed to such a risk, since he did not face charges linked to terrorism. The State party has also pointed out to the Committee that the extradition request was accompanied by diplomatic assurances from Tunisia indicating that Onsi Abichou would be afforded a trial de novo in which the rights

²⁸ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44)*, annex IX, para. 6.

²⁹ See, inter alia, communication No. 258/2004, *Mostafa Dadar v. Canada*, decision adopted on 23 November 2005, and communication No. 226/2003, *T.A. v. Sweden*, decision adopted on 6 May 2005.

³⁰ See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

³¹ 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.

³² See communication No. 444/2010, *Abdussamatov et al. v. Kazakhstan*, decision adopted on 1 June 2012, para. 13.10.

recognized in the International Covenant on Civil and Political Rights would be respected and that, in the event of a new conviction, he would be incarcerated in a detention facility that complied with the United Nations Standard Minimum Rules for the Treatment of Prisoners.

11.6 Notwithstanding the diplomatic assurances that were provided, the Committee must consider the actual human rights situation in Tunisia at the time of the extradition of the complainant's husband. The Committee refers to its concluding observations of 1998, issued in connection with the second periodic report of Tunisia (CAT/C/20/Add.7), in which it states that it is "particularly disturbed by the reported widespread practice of torture and other cruel and degrading treatment perpetrated by security forces and the police, which, in certain cases, resulted in death in custody".³³ More recently, in 2008, the Human Rights Committee, following its consideration of the periodic report of Tunisia (CCPR/C/TUN/5), indicated that it was "concerned about serious and substantiated reports that acts of torture and cruel, inhuman or degrading treatment or punishment are being committed in the territory of the State party".³⁴ The Human Rights Committee further noted that it was "concerned by reports that, in practice, confessions obtained through torture are not excluded as evidence in a trial".³⁵ This information is corroborated by numerous non-governmental sources cited both by the complainant and by the State party, the latter having acknowledged the worrisome human rights situation prevailing in Tunisia at the time of Onsi Abichou's extradition, going so far as to consider that the "illegal treatment of suspects in Tunisia could not be ruled out".

11.7 Therefore, the authorities of the State party knew or should have known at the time of Onsi Abichou's extradition that Tunisia routinely resorted to the widespread use of torture against detainees held for political reasons and against detainees charged with ordinary criminal offences. The Committee further takes note of the complainant's claim that two other defendants in the same case were tortured in order to extract confessions from them, not only when they were being held in police custody, but also, after the investigating judge ordered that further inquiries be conducted, during the time that their trial was being held. The Committee gives due weight to the information provided and documented by the complainant on this subject, including the testimony of the two defendants themselves and the complaints of torture that they lodged with the Tunisian courts, which were dismissed without verification or investigation. The acts of torture that were presumably inflicted on these two individuals served only to increase the personal risk to which Mr. Abichou was exposed, since, once extradited to Tunisia, he was given a new trial and was therefore subject to further judicial proceedings, including further inquiries, and, given the circumstances, thus stood a real risk of being subjected to torture or ill-treatment. The fact that diplomatic assurances were obtained was not sufficient grounds for the State party's decision to ignore this obvious risk, especially since none of the guarantees that were provided related specifically to protection against torture or ill-treatment. The fact that Onsi Abichou was ultimately not subjected to such treatment following his extradition cannot be justifiably used to call into question or minimize, retrospectively, the existence of such a risk at the time of his extradition. The Committee concludes that the complainant has demonstrated that Onsi Abichou faced a foreseeable, real and personal risk of being subjected to torture at the time of his extradition to Tunisia. It follows that his extradition from the State party constituted a violation of article 3 of the Convention.

³³ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 44 (A/54/44)*, para. 72.

³⁴ CCPR/C/TUN/CO/5, para. 11 (see footnote 7 above).

³⁵ *Ibid.*, para. 12.

12. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the information before it discloses a violation by the State party of article 3 of the Convention.

13. In conformity with rule 118 (formerly rule 112), paragraph 5, of its rules of procedure, the Committee urges the State party to provide redress to Onsi Abichou, including adequate compensation. The Committee also wishes to be informed, within 90 days, of the steps taken by the State party to give effect to the present decision.

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