Strategische Prozessführung im Flüchtlingsrecht

18. November 2016

Universitätshauptgebäude
Aula
Ludwigstraße 23
35390 Gießen

REFUGEE LAW CLINIC

JUSTUS-LIEBIG-UNIVERSITÄT GIESSEN

Pro Bono

Programm

9.00 Begrüßung durch Dekanin des Fachbereich Rechtswissenschaft
Prof. Dr. Marietta Auer
Einführung in das Tagungsprogramm
Dr. Stephan Hocks, RLC Gießen, Rechtsanwalt Frankfurt

9.30 Strategische Prozessführung im Zivilprozess aus anwaltlicher Sicht
Dr. Martin Mekat, Rechtsanwalt Freshfields Bruckhaus Deringer Frankfurt

10.15 Strategische Prozessführung für Flüchtlinge aus der Sicht eines deutschen Anwalts:
Realität, Rahmenbedingungen, Bedürfnis?
Dr. Reinhard Marx, Rechtsanwalt Frankfurt

11.00 Pause

11.30 Asylprozess aus richterlicher Perspektive – Erwartungen des Gerichts an den anwaltlichen Sachvortrag, die Schwerpunktsetzung und Argumentation
Dr. Ulrich Maidowski, Richter des Bundesverfassungsgerichts

12.30 Der Menschenrechtsschutz an den EU-Außengrenzen durch den Europäischen Gerichtshof für Menschenrechte
Carsten Gericke, European Center for Constitutional and Human Rights

13.30 Mittagspause

14.30-16.00 Workshops

16.00 Kaffeepause

16.30 Podiumsdiskussion: Strategische Prozessführung – ein (neuer) Ansatz für die Durchsetzung der Rechte von Schutzsuchenden und Migrant*innen?

Dr. Constantin Hruschka
Leiter Protection, Schweizerische Flüchtlingshilfe
Dr. Reinhard Marx
Stephanie Motz
Barrister London und Zürich
Max Pichl
Juristischer Referent, Pro Asyl

18.00 Umtrunk

WORKSHOP I

Verfahren vor dem EGMR und dem UN-Ausschuss gegen Folter zum Non-Refoulement- Prinzip – Zugang, Chancen und Risiken im Vergleich
Dr. Fanny de Weck,
Juristische Mitarbeiterin
Münch Singh Rechtsanwälte, Zürich

WORKSHOP II

„Campaigning“ und „Litigation PR“: die mediale Begleitung eines Falles aus Sicht der Aktivist*innen und aus Sicht des Gerichts
Dr. Ralph Göbel-Zimmermann,
Vizepräsident VG Wiesbaden
Max Pichl
Dr. Lars Rademacher
Hochschule Macromedia, München

WORKSHOP III

Wunschliste - für welche Fälle wünschen wir uns eine Leitentscheidung und wie kommen wir da hin?
Maria Bethke, Diakonie Hessen – Referentin für Asylverfahrensberatung und Erstaufnahme
Adriana Kessler, LL.M. Projektleitung „JUMEN - Juristische Menschenrechtsarbeit in Deutschland“

Anmeldung bis zum 04.11.2016 per Mail an *Laura.Hilb@recht.uni-giessen.de*

Die Tagungsgebühr von 50 € ist am Veranstaltungstag bar zu entrichten. Für Studierende ist der Eintritt frei.

Teilnahmebescheinigungen zur Vorlage bei der jeweiligen Rechtsanwaltskammer werden vergeben.

Präsentationen und Materialien

Strategische Prozessführung aus der Sicht eines Wirtschaftsanwalts

Eine Einführung

Dr. Felix Netzer, 18. November 2016

Strategische Prozessführung aus der Sicht eines Wirtschaftsanwalts

Was ist strategische Prozessführung?

Wann ist strategische Prozessführung denkbar?

Welche prozesstaktischen Erwägungen gibt es?

Fazit

Was ist strategische Prozessführung?

Terminologie

I. Strategische Prozessführung

„[…] rechtliches Vorgehen […], das die (zivil-) gerichtliche Auseinandersetzung wählt, um durch Musterverfahren oder mit Präzedenz-Entscheidungen zunächst rechtliche und im Gefolge politische, wirtschaftliche oder soziale Veränderungen über den Einzelfall hinaus zu erreichen“

Harald Koch, Grenzüberschreitende strategische Zivilprozesse, KJ, Jahrgang 47 (2014), Heft 4, S. 432-449 (432)

II. Unterscheidung zwischen

- Strategischer Prozessführung (Wirkung über den Einzelfall hinaus) und
- Prozesstaktik oder Prozessstrategie (Wirkung im Einzelfall)

Wann ist strategische Prozessführung denkbar?

Strategische Prozessführung

Fallgruppen

I. Test Case Litigation (Sammel- bzw. Musterklagen)

- z.B. Kapitalanlagefälle
- Produkthaftung
- andere Massenverfahren (z.B. im Energiesektor)

II. Impact Litigation

- Rechtsfortbildung und Reform
- Publizitätswirkung
- z.B. Klagen von Interessensverbänden (z.B. Verbraucherschutz)

Strategische Prozessführung

Voraussetzungen und Grenzen

I. Individualrechtsschutz als „Mobilisierungsbarriere“

- Gegensatz zu Common Law Jurisdiktionen (z.B. US-Sammelklagen)
- Rechnung tragen durch Musterprozesse (z.B. KapMuG)
- Probleme: Rechtskraftwirkung, Kostenregelungen

II. Gefährdung der Individualinteressen?

- BVerfG: „Art. 1 Abs. 1 GG, … verbietet, den Menschen zum Objekt eines staatlichen Verfahrens herabzuwürdigen“
- Aufklärung des Mandanten!

III. Chance-Risiko-Abwägung

- Prozessniederlage und Bezug dieser Niederlage auf die ganze Gruppe (nicht nur auf den konkreten Einzelfall)
- Erledigung der (restlichen) Verfahren durch Vergleich

Welche prozesstaktischen Erwägungen gibt es?

Auswahl prozesstaktischer Erwägungen

Was ist vor und bei Klageerhebung zu beachten?

Welche taktischen Mittel gibt es im laufenden Verfahren?

Was ist bei Rechtsmitteln und der Vollstreckung zu beachten?

Auswahl prozesstaktischer Erwägungen

Klageerhebung

I. Wer klagt?

- Auswahl eines Musterfalles oder Sammelklage
- Prozessstandschaft / Verbandsklagen
- Kostenregelung / PKH / Prozessfinanzierung / Erfolgshonorare

II. Gegen wen?

III. Wo (*forum shopping*)?

- Gibt es eine Gerichtsstands- oder Schiedsvereinbarung?
- Bietet sich ein ausländisches Forum an? (Torpedoklagen; *forum non conveniens;* Vorteile der *lex fori/lex causae*)
- Wo könnte vollstreckt werden?

Auswahl prozesstaktischer Erwägungen

Klageerhebung

IV. Woraus?

- Klageart (Unterlassungs-, Feststellungs- oder Leistungsklage?)
- Schlüssigkeit und Beweislast
- Streitwert (ggf. mit Blick auf Rechtsmittel)

IV. Mit welchem Prozessvertreter?

V. Sonstiges

- Einstweiliger Rechtsschutz
- Vergleichsverhandlungen
- Pressearbeit

Auswahl prozesstaktischer Erwägungen

Im laufenden Verfahren

I. Öffentlichkeit / Vertraulichkeit

II. Beweisführung

- *Pre-trial discovery*
- Dokumentenherausgabe (*document production*)
- Zeugen

III. Amicus curiae-Stellungnahmen / Anträge von Nicht-Parteien

Auswahl prozesstaktischer Erwägungen

Rechtsmittel und Vollstreckung

I. Zurückweisungsbeschluss gemäß § 522 Abs. 2 ZPO

II. Sprungrevision gemäß § 566 ZPO

III. Anerkennung und Vollstreckung

- Im In- und/oder Ausland? (EuGVVO, HGÜ, NYÜ)
- Vollstreckungsgegenstand (Forderungen, Rechte, Mobiliarvollstreckung)
- Feststellungs-, Verbots- und Unterlassungsurteile

Fazit

Fazit

I. Unterscheidung zwischen strategischer Prozessführung und Prozesstaktik

II. Strategische und taktische Überlegungen abhängig vom Einzelfall

III. Think outside the box

Vielen Dank!

Materialien aus dem Workshop mit Fanny de Weck

Verfahren vor dem EGMR und dem UN-Ausschuss gegen die Folter zum Non-Refoulement-Prinzip

Zugang, Chancen und Risiken im Vergleich

United Nations CAT/C/50/D/430/2010

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

Distr.: General
16 July 2013
English
Original: French

Committee against Torture

Communication No. 430/2010

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

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)
Date of decision:	21 May 2013
Subject matter:	Expulsion from Germany to Tunisia
Procedural issues:	Matter examined under another procedure of international settlement and exhaustion of domestic remedies
Substantive issue:	Risk of torture following extradition
Articles of the Convention:	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 cases[3] 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 consideration[4] 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 letters[5] 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 measures[6] 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 Zaied, 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 Zaied 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]

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

[8] 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 Zaied] 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.]

United Nations CAT/C/56/D/613/2014

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

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Committee against Torture

Communication No. 613/2014

Decision adopted by the Committee at its fifty-sixth session (9 November-9 December 2015)

Submitted by:	F.B. (represented by counsel Joëlla Bravo Mougán)
Alleged victim:	The complainant
State party:	The Netherlands
Date of complaint:	12 June 2014 (initial submission)
Date of present decision:	20 November 2015
Subject matter:	Deportation to Guinea
Procedural issues:	None
Substantive issues:	Non-refoulement; risk of torture upon return to country of origin
Articles of the Convention:	3

GE.16-00305(E)

Annex

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

concerning

Communication No. 613/2014*

Submitted by:	F.B. (represented by counsel Joëlla Bravo Mougán)
Alleged victim:	The complainant
State party:	The Netherlands
Date of complaint:	12 June 2014 (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 20 November 2015,

Having concluded its consideration of complaint No. 613/2014, submitted to it by F.B. under article 22 of the Convention,

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 (7) of the Convention

1.1 The complainant is F.B., a national of Guinea born on 28 December 1987, who is currently living in the Netherlands. She claims that her deportation to Guinea by the State party would constitute a violation of her rights under article 3 of the Convention. She is represented by counsel.

1.2 On 18 June 2014, pursuant to rule 114, paragraph 1, of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from returning the complainant to Guinea while her complaint was being considered by the Committee. On 10 July 2014, the Immigration and Naturalization Service informed the complainant that it would refrain from removing her in accordance with the Committee's request.

The facts as presented by the complainant

2.1 The complainant was born in Monrovia, Liberia. Her father is Guinean and her mother is Liberian. Together with her parents, she moved to Guinea when she was a baby.

* The following members of the Committee participated in the consideration of the present communication: Alessio Bruni, Satyabhoosun Gupt Domah, Abdoulaye Gaye, Jens Modvig, Sapana Pradhan-Malla, George Tugushi and Kening Zhang.

The complainant belongs to the Peul (Fula or Pular) ethnic group. She speaks and understands French, Pular, Malinke and Soussou. In Guinea, the complainant lived with her paternal stepgrandmother, F.D., her stepgrandmother's brother, M.S.D., and his wife, M.B. She lived in the Simbaya Cosa neighbourhood, in Conakry, where she attended primary school. In 2001, she was forced to undergo female genital mutilation by her stepgrandmother, in poor hygienic conditions, without anaesthesia/painkillers and disinfected scissors. Afterwards, the complainant left school and was forced to sell water and corn. On 5 August 2003, she was forced to marry her stepgrandmother's brother, because his then wife had not given birth to any children. The complainant claims that her stepgrandmother's brother sexually abused her.

2.2 In October 2003, at the age of 16 years, the complainant arrived in the Netherlands with the help of a travel agent. Upon her arrival, she was forced to have sex with the travel agent, but she managed to escape after one week and instantly reported the incident to the police. On 20 October 2003, she filed an application for asylum with the Immigration and Naturalization Service, which was rejected on 23 December 2005. Her application for judicial review against the Immigration and Naturalization Service's decision was dismissed by the Regional Court of 's-Hertogenbosch on 27 June 2007, as her accounts were not found to be credible. Afterwards, on 11 August 2008, she submitted a second application for asylum to the Immigration and Naturalization Service, which was rejected on 6 January 2009. Her subsequent application for judicial review and appeal were rejected by the Regional Court of Utrecht and the Administrative Jurisdiction Division of the Council of State on 27 October 2009 and 28 January 2010, respectively. In both applications for asylum, the complainant claimed that she feared being forced to continue the marriage with her stepgrandmother's brother. In addition, in her second application, she also submitted that she feared to be subjected to further female genital mutilation.

2.3 In April 2013, the complainant underwent reconstructive genital surgery in the State party.

2.4 On 25 July 2013, the complainant filed a third application for asylum before the Immigration and Naturalization Service. She claimed, for the first time, that she had been forced to undergo female genital mutilation and to marry an old man when she was in Guinea; and that she feared being forced to suffer such mutilation again after undergoing reconstructive genital surgery in the Netherlands. She submitted as documentary evidence a statement of the plastic surgeon who had carried out the surgery. In the interview held with the Immigration and Naturalization Service on 29 July 2013, she described the mutilation she had undergone in Guinea. She argued that it caused her severe physical damage and anxiety; that she did not like her body and was unable to establish a relationship with a man; that, therefore, she had decided to undergo a reversal surgery in the State party; that she was afraid of her stepgrandmother and of her husband if she returned to Guinea, because they would treat her even worse since they would assume that she had been working as a prostitute in the Netherlands; and that she would be forced to undergo such mutilation again.

2.5 On 1 August 2013, her third asylum request was denied by the Immigration and Naturalization Service, which also imposed on the complainant a two-year entry ban. According to her, the Immigration and Naturalization Service stated that her fear of being subjected to female genital mutilation again was not a new fact or circumstance as required by article 4:6 of the General Administrative Law Act and the relevant case law. The complainant appealed against this decision before the Regional Court of The Hague.

2.6 On 6 September 2013, the Regional Court of The Hague rejected the complainant's appeal. It stated that, as found in the ruling of the Regional Court of Utrecht of 29 October 2009, the complainant did not prove it plausible that she could not have pleaded her fear of female genital mutilation earlier and that this claim, including the medical statement that

she had submitted, was not based on a new fact or changed circumstance that required a new examination of the case. Moreover, it found that she had not sufficiently supported with documentation her argument that she did not belong to the group of 5 per cent of women who could avoid female genital mutilation; and that her allegations were too speculative and uncertain to assume that there was a realistic and foreseeable risk of torture if returned to Guinea. In this regard, it stated that the fact the she was a victim of female genital mutilation was not sufficient to conclude that she would be a victim again, since, inter alia, she had not proved that potential perpetrators were aware of the restorative surgery that she had undergone in the Netherlands. The complainant appealed the Regional Court's ruling before the Council of State.

2.7 On 16 January 2014, the Administrative Jurisdiction Division of the Council of State declared her request for higher appeal manifestly ill-founded.

The complaint

3.1 The complainant submits that the Netherlands would violate her rights under article 3 of the Convention by forcibly removing her to Guinea. She claims that the State party's authorities failed to assess adequately the risk she would be subject to if returned. The State party's authorities arbitrarily considered that her fear was speculative and did not take into account that that she is a victim of female genital mutilation and that such mutilation is widespread in Guinean society.

3.2 The complainant points out that the Office of the United Nations High Commissioner for Refugees (UNHCR) has stated that a woman or girl who has already undergone the practice of female genital mutilation before she seeks asylum, may still have a well-founded fear of future persecution. Depending on the individual circumstances of her case and the particular practices of her community, she may fear that she could be subjected to another form of [female genital mutilation] and/or suffer particularly serious long-term consequences of the initial procedure.[1] In her case, she went through the horrific experience of being the victim of such mutilation in Guinea prior to her departure. Furthermore, since she underwent reconstructive genital surgery in the State party, the risk of being revictimized is even higher.

3.3 The complainant points out that about 96 per cent of women in Guinea have undergone such mutilation — with a prevalence of 94 per cent or above in four out of the five regions of the country — and submits that this phenomenon constitutes a consistent pattern of gross, flagrant or mass violations of human rights.[2] The pressure to undergo such mutilation does not solely come from direct family members but is a common feature of Guinean society. In this regard, she highlights that Guinea is a strictly patriarchal society; that a woman is considered immoral if she does not live with her family; that a Guinean man will not marry a woman who is not circumcised and will demand her to be circumcised; and that female genital mutilation is considered a requirement for any woman's participation in Guinean society.[3] In the light of the foregoing, the complainant claims that she runs a real and foreseeable risk of being forced to undergo such mutilation

[1] The complainant refers to UNHCR, "Guidance note on refugee claims relating to female genital mutilation" (2009), paras. 13-15.

[2] The complainant refers to United Nations Children's Fund (UNICEF), *Female Genital Mutilation/Cutting: a statistical overview and exploration of the dynamics of change* (2013), pp. 26-28.

[3] The complainant refers to United Nations Population Fund/UNICEF, *Joint programme on female genital mutilation/cutting: Accelerating change - Annual Report 2012*; and the Human Rights Committee's findings in communication No. 1465/2006, *Kaba v. Canada*, Views adopted on 25 March 2010, para. 10.2.

again and of a treatment contrary to article 3 of the Convention, should she be returned to Guinea.

State party's observations on admissibility and the merits

4.1 On 8 August 2014, the State party informed the Committee that it did not wish to challenge the admissibility of the complaint.

4.2 On 18 February 2015, the State party provided its observations on the merits. As to the facts of the case, the State party points out that the date on which the complainant entered the Netherlands is unknown and that, on 20 October 2003, she submitted an asylum application pursuant to section 28 of the Aliens Act 2000. According to the State party, she based her application for asylum on the forced marriage to her stepgrandmother's brother. After a first interview, on 20 October 2003 the complainant was informed that the Dutch Ministry of Foreign Affairs would initiate an investigation in Guinea to verify her statements. She had a second interview to give her an opportunity to elaborate on her asylum application. The interviews were carried out in Fula and French with the help of an interpreter. The complainant could also make written substantive changes and/or additions to the reports of the interviews.

4.3 On 12 March 2004, a person-specific report was issued by the Ministry of Foreign Affairs. Since the complainant stated that she lived near a small restaurant called Feu Rouge in the Petit Simbaya neighbourhood of Conakry from the age of 3 (in 1990) until her departure, the investigation carried out in Guinea included this neighbourhood, where a restaurant/nightclub called Feu Rouge was found. However, neighbourhood residents did not recognize the complainant from her passport photograph. Likewise, none of the neighbourhood residents or representatives of the local authorities asked knew the people whom the complainant claimed to be her relatives, i.e. her stepgrandmother, F.D., the complainant's husband, M.S.D., his first wife, M.B., and their adopted child, M.B. Furthermore, not a single house in which the complainant could have lived was found in the vicinity of the Feu Rouge restaurant. The information that the complainant provided about her school turned out to be incorrect as well. She stated that she had attended the Batonga School in the Simbaya Cosa neighbourhood from 1994 to 2001. According to the person-specific report, the primary school called Bantonka (not Batonga) in Simbaya Cosa in Conakry closed in 1989. The building that originally housed the school has been used as a police station since then. No one living in that area recognized the complainant from her passport photograph. The State party further notes that the complainant was unable to provide evidence to successfully refute the findings set out in the person-specific report of the Ministry of Foreign Affairs. On 22 November 2005, the complainant was notified of the authorities' intent to deny her asylum application, and given an opportunity to provide comments, which she did in a letter dated 16 December 2005. On 23 December 2005, her asylum application was rejected by the Immigration and Naturalization Service, since the authorities gave no credence to her assertion that she had been forced to marry her stepgrandmother's brother. Nor did it consider her statements about her family circumstances credible.

4.4 On 17 July 2006, the District Court of The Hague, sitting in 's-Hertogenbosch, decided that the restrictions that had been placed on the complainant's access to the documents on which the person-specific report was based were justified pursuant to section 8:29, subsection 3, of the General Administrative Law Act. The State party points out that this decision was made by a different judge from the one who, on 27 June 2007, declared unfounded the complainant's application for judicial review. The State party maintains that the complainant did not lodge an appeal against the district court's judgement with the Administrative Jurisdiction Division of the Council of State.

4.5 On 13 August 2008, the complainant submitted a new asylum application pursuant to section 28 of the Aliens Act 2000, which was finally dismissed by the Administrative Jurisdiction Division of the Council of State on 28 January 2010. The State party points out that, although she was specifically asked about her mutilation in the first asylum procedure, this was the first time that she had claimed that she feared being forced to undergo female genital mutilation again.

4.6 On 21 April 2010, the complainant filed a criminal complaint as a victim of human trafficking. The criminal complaint was automatically considered an application for a regular residence permit under the B9 arrangement set out in the Aliens Act 2000 Implementation Guidelines. On 28 April 2010, a decision was taken to grant the complainant a temporary residence permit under the B9 arrangement. However, on 7 June 2010, it was decided that the complainant's criminal complaint did not warrant a prosecution and her temporary residence permit was subsequently revoked. The objection, application for review and appeal lodged by the complainant in respect of the revocation decision were declared unfounded.

4.7 As to the third application for asylum lodged by the complainant, the State party maintains that, during the interviews, she upheld that when she was 3 years old, her father took her to his stepmother in Guinea. She was raised by her stepgrandmother and she never saw her parents again. When the complainant was approximately 13 years old, her stepgrandmother forced her to undergo female genital mutilation. Two weeks before fleeing Guinea, the complainant was forced to marry her stepgrandmother's brother. She tried to persuade them not to marry her, without success. She then appealed to the district leader, but he said that she should resign herself to accepting tradition. She also claimed that she was sexually abused by her stepgrandmother's brother. She thus decided to flee and left Guinea in September 2003.

4.8 The State party provides a detailed description of the asylum procedure. An alien may file an application for judicial review to the District Court of The Hague against a denial of asylum by the Immigration and Naturalization Service. In principle, the applicant may await the result of the application for review in the Netherlands. Afterwards, the person can appeal the district court's judgement to the Administrative Jurisdiction Division of the Council of State. However, an alien who lodges this appeal may not, in principle, await the decision in the Netherlands.

4.9 The State party points out that, according to the country-specific asylum policy of the Ministry of Foreign Affairs for Guinea, discrimination and violence against women are widespread, despite the condemnation by the Government of Guinea of these practices. A victim of violence, domestic or otherwise, can report the violence to the police, but in practice the police hardly ever take action. Most victims of rape do not report the crime to the police because of the social stigma associated with rape. In the asylum policy, it is also stated that:

> Genital mutilation is practised by all religious and ethnic groups and in every region. It is prohibited by law, but the social pressure to submit to it is very high, and it is virtually impossible for women in rural areas to escape genital cutting. However, in the cities there are potentially ways to avoid it. Women who are economically independent, highly educated or have a partner who respects their choice not to allow their body to be mutilated have a better chance of avoiding it. If a woman has not undergone genital cutting and cannot avoid it in her country of origin, there might be a real risk of a violation of article 3 of the European Convention on Human Rights (ECHR). In that case, a temporary asylum residence permit might be issued

pursuant to the Aliens Act 2000. The individual concerned needed not have sought the protection of the authorities.[4]

4.10 The State party also highlights that its country-specific asylum policy for Guinea also states that when a woman demonstrates that she has a credible fear of violence or female genital mutilation, there is not a reasonable case for assuming that she can rely on the protection of the authorities. According to various public sources, such mutilation is widespread in Guinea, affecting 96.9 per cent of all girls and women, despite the fact that the practice is prohibited by law.[5] It occurs across all religious and ethnic groups and geographical areas. The percentage of women who have been cut is highest among the Peul, the ethnic group to which the complainant belongs. At the same time, the Guinean authorities are working to eradicate this practice through information and prevention campaigns in cooperation with international organizations, such the United Nations Children's Fund (UNICEF) and the World Health Organization. Some of the campaigns have led to positive, albeit modest, improvements. The State party points out that the incidence of such mutilation is falling in urban areas and, although to a lesser extent, in rural areas. According to the population survey of 2012, genital mutilation had been carried out on 14 per cent of girls aged 0-4 at the time, 51 per cent of girls aged 5-9 and 80 per cent of girls aged 10-14 (75 per cent in urban areas and 82 per cent in rural areas). There were differences between the Kissi (64 per cent) and Peul (91 per cent) ethnic groups; between uneducated (81 per cent) and educated (74 per cent) women; and between poor (92 per cent) and rich (68 per cent) women. It is highly unlikely that the oldest girls in the 10-14 age group who have not been cut will ever be subjected to genital mutilation. There is no age limit, but figures show that only 2.4 per cent of women are subjected to genital mutilation when aged 15 or older. Among the 15-19 year olds surveyed, 1.2 per cent were subjected to genital mutilation while in this age category.

4.11 Furthermore, according to public sources girls who are 14 years old or older can avoid female genital mutilation, especially those who live in cities, where there is less social control than in the villages. Today, more and more parents, especially those who live in cities and those who are well educated, do not want their daughters to be cut and so they protect them until they are grown. Once grown, the young woman can decide for herself whether she wishes to undergo genital cutting. According to the sources consulted for the country report issued on 20 June 2014, the situation for girls and women in Guinea who have not been cut and wish to avoid genital mutilation has improved somewhat since the country report of March 2013. Many girls who wish to avoid the social pressure of village life move in with relatives in the city. A girl who goes to the city but has no family there is directed to the district leader. He finds her a community in the city that will take her in (even if only temporarily) and help her to find a job.

4.12 As to the complainant's case, the State party points out that the authorities conducted an investigation in her country of origin to confirm her statements, thereby alleviating the burden of proof placed upon her to establish the veracity of her accounts. In this connection, she was interviewed several times during her asylum application procedures and questioned on the facts and circumstances of her departure from Guinea. She was also given the opportunity to submit corrections and additions to the reports of these interviews, and to respond to the notifications of intent to deny her asylum

[4] The State party points out that, at the moment its observations were submitted, the most recent country report on Guinea was dated 20 June 2014.

[5] The State party refers to: Committee against Torture, concluding observations on Guinea in the absence of its initial report (CAT/C/GIN/CO/1), para. 17; United States of America, Department of State, "Country report on human rights practices for 2013: Guinea", 27 February 2014; and the Netherlands, Ministry of Foreign Affairs, country report dated 20 June 2014.

applications. The asylum procedures thus offered her sufficient opportunities to satisfactorily establish the veracity of her accounts. Those accounts were carefully assessed by the Immigration and Naturalization Service and reviewed by an independent court as well as by the Administrative Jurisdiction Division. Although the human rights situation in Guinea gives cause for concern, in view of information from various public sources,[6] the State party maintains that there is no reason to conclude that the complainant's expulsion to Guinea would in itself involve a risk of contravention of article 3 of the Convention.

4.13 The State party refers to the investigation conducted by the Ministry of Foreign Affairs, as reflected in the person-specific report of 12 March 2004, and maintains that, owing to the incorrect information provided by the complainant to the authorities, her allegations that she was the victim of a forced marriage to her stepgrandmother's brother and her accounts about her family circumstances are not credible. It also did not allow its authorities to investigate various aspect of her alleged fear of being forced to undergo female genital mutilation again.

4.14 The State party also submits that the complainant is unlikely to be subjected to female genital mutilation again upon returning to Guinea. It maintains that it has no reason to doubt that the complainant was forced to undergo such mutilation when she was 13 years old, as stated during her second asylum application. Nor does it dispute that she had corrective surgery in the Netherlands. However, since she has already been subjected to such mutilation in accordance with her country's tradition, it is unlikely that she would be subjected to it again as an adult, as she has already undergone the procedure and repeat procedures are extremely rare in Guinea. There is no evidence to suggest that, upon returning to Guinea, she would be forced to submit to an examination that would reveal that she has had corrective surgery; or that her stepgrandmother's brother or any other relative or member of her ethnic group would force her to undergo such mutilation again. As an alternative, she can settle elsewhere, in a city, for example. With or without the assistance of the district leader, she can build a life for herself without her family having to know that she is back in Guinea. Furthermore, a long time has passed since the complainant left Guinea and there is no reason to believe that her stepgrandmother and husband would still be actively looking for her. As to the complainant's allegations about the risk of being forced to undergo female genital mutilation owing to social pressure, the State party maintains that only 1.2 per cent of genital mutilation procedures are carried out on women over the age of 19. This information implies that young adult women may decide themselves whether or not to undergo genital mutilation.

4.15 In conclusion, the State party notes that the fact alone that the complainant was a victim of female genital mutilation in the past, like 96.9 per cent of girls and women in Guinea, does not mean that her return would be contrary to article 3 of the Convention. She has provided no convincing arguments to support her claim that she would be subjected to genital mutilation again. Furthermore, there is no reason to believe that she could not settle in a different area to where she had been living when she underwent the procedure and where she might encounter those who cut her.

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

5.1 On 9 June 2015, the complainant provided her comments on the State party's observations. In those comments, she claims that the assessment of her credibility carried

[6] See the Netherlands, Minister of Foreign Affairs, country report dated 20 June 2014; and United States, Department of State, "Country report on human rights practices for 2013: Guinea", 27 February 2014.

out in the proceedings concerning her first and second asylum requests, including the person-specific report, are not relevant in the light of the corrective surgery she underwent in the State party, as that surgery should be considered a new fact. She claims that she has refuted the findings as to the credibility of her account in the first asylum application; and that she has provided many details, some of which have been confirmed. In particular, it is not challenged that she is a woman from Guinea who belongs to the Peul ethnic group; that 95 per cent of women in Guinea are subjected to female genital mutilation; that she was forced to undergo such mutilation; and that she underwent reconstructive surgery. These facts are sufficient to conclude that there are substantial grounds to show that she would be subjected to mutilation if returned to Guinea.

5.2 The complainant reiterates her allegations and points out that, according to the plastic surgeon who practised the reconstructive surgery, she may be perceived as a woman who did not previously undergo any form of female genital mutilation. Hence, her fear of such mutilation is the same as that of a person who would undergo it for the first time. She further argues that her situation is very exceptional and that, therefore, the State party's observations that refer to information concerning the practice of further or repeated genital mutilation in Guinea is not relevant to her case. The fact that the complainant already underwent such mutilation is a strong indication of the high probability that she will be forced to undergo it again.[7]

5.3 The complainant submits that the State party's observation that girls or women over 14 years are unlikely to be forced to undergo female genital mutilation and the observation regarding alternative relocation rely on information from its country report about such mutilation in Guinea. Although the country information is of paramount importance, it lacks substantiation, since it does not indicate the sources of this information. The State party's argument should be supported by objective and verifiable sources.

5.4 The fact that the applicant's relatives may not be aware of the reconstructive surgery or that they would not submit her to a medical examination upon return is not sufficient to conclude that she would not be at risk, since she fears genital mutilation by any member of Guinean society.

5.5 The information on the percentage of female genital mutilation performed on girls and women above the age of 14 years corresponds with the undisputed fact that the practice's prevalence in Guinea is over 95 per cent and that such mutilation it is practised on girls before they turn 14 years old. Furthermore, evidence of the high percentage of women who were victims thereof does not correspond with the State party's argument that the complainant may relocate to another part of Guinea and avoid genital mutilation.

State party's additional observations

6.1 On 24 July 2015, the State party submitted additional observations, in which it reiterates its previous observations and maintains that the information to which it referred in those observations is derived from the country report issued by the Ministry of Foreign Affairs. A country report is drafted on the basis of multiple sources, including reports by international organizations (inter alia, UNHCR reports), other States and well-known non-governmental organizations with a presence in the field.

[7] The complainant refers to: the Committee's general comment No. 1 (1997) on the implementation of article 3, para. 8; and article 4 (4) of directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

6.2 The State party points out that the complainant's situation is not similar to those of women and girls who were never subjected to female genital mutilation. She already underwent mutilation and there is no evidence to suggest that upon return she would be subjected to a medical examination that would reveal the surgery undergone. Furthermore, no individual circumstances have been brought forward by her to indicate that, in her case, there is a real risk of this occurrence. Although female genital mutilation is widespread in Guinea, this does not change the fact it is usually instigated by the girl's parents, usually the mother. If the mother does not wish to have her daughter circumcised, other female relatives may instigate it. This, however, in no way supports the complainant's allegation that she would be at risk from other members of Guinean society.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any 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 (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 notes that, in the present case, the State party has not objected to the admissibility of the complaint and considers that all the admissibility criteria have been met. Accordingly, the Committee declares the communication admissible and proceeds to its consideration of the merits.

Consideration of the merits

8.1 In accordance with article 22 (4) of the Convention, the Committee has considered the communication in the light of all the information made available to it by the parties.

8.2 In the present case, the issue before the Committee is whether the return of the complainant to Guinea 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.

8.3 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 return to Guinea. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (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.

8.4 The Committee recalls its general comment No. 1 (1997) 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. While the risk does not have to meet the test of being highly probable (para. 6), 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.[8] Although, under the terms of its general comment No. 1, the Committee is free to assess the facts on the basis of the full set of circumstances in every case, considerable weight is given to the findings of fact that are made by organs of the State party concerned (para. 9).[9]

8.5 In the present case, the Committee takes note of the complainant's allegations that, should she be returned to Guinea, she would be subjected to female genital mutilation by her relatives or other members of Guinean society. In support of her claims, the complainant points out that it is not refuted that she belongs to the Peul ethnic group; that female genital mutilation is widespread in Guinea, in particular among this ethnic group; that she was forced to undergo such mutilation in Guinea when she was 13 years old; and that, in 2013, she had genital reconstructive surgery while living in the State party. She also argues that, owing to this genital reconstructive surgery, she could be perceived as a woman who had never undergone female genital mutilation; and that the pressure to undergo such mutilation is not limited to direct relatives but is a common feature of Guinean patriarchal society.

8.6 The Committee also takes note of the State party's arguments that its authorities have thoroughly examined the complainant's allegations when examining her three asylum requests, finding that her accounts were not credible; that the fact she was a victim of female genital mutilation and that she underwent genital reconstructive surgery are not sufficient to conclude that she is at risk of being subjected to this practice again; that there is no evidence that she may be subjected to examination upon return to Guinea that would reveal the reconstructive surgery; that the country report of the Ministry of Foreign Affairs indicates that such mutilation is mainly practised on girls before they turn 14 years old; and that only 1.2 per cent of women above 19 years old are subjected to it.

8.7 The Committee observes that, although female genital mutilation is forbidden by law in Guinea, it is still widespread in the country, with a prevalence of approximately 95 per cent among girls and women and 91 per cent among members of the Peul ethnic group. The State party maintains that only 1.2 per cent of female genital mutilations are carried out on women over the age of 19. This figure, however, could be explained by the fact that the vast majority of mutilations happen when the victims are under the age of 14 and not yet married. It does not reduce the risk faced by unmarried women over 19 perceived not to have been subjected to it during their childhood or adolescence. In this connection, the Committee notes that such mutilation causes permanent physical harm and severe psychological pain to the victims, which may last for the rest of their lives, and considers that the practice of subjecting a woman to female genital mutilation is contrary to the obligations enshrined in the Convention.

8.8 In the present case, the Committee recognizes the efforts made by the State party's authorities to verify the complainant's accounts by carrying out an investigation in Guinea as part of the first asylum proceedings. Although the complainant has failed to provide elements that refute this investigation's outcome, as reflected in the person-specific report of 12 March 2004 (see para. 4.3 above) that concluded that the information provided by her about her and her family's circumstances in Guinea was incorrect, the Committee considers that such inconsistences are not of a nature as to undermine the reality of the prevalence of female genital mutilation and the fact that, owing to the ineffectiveness of the relevant laws,

[8] See also complaint No. 203/2002, *A.R. v. the Netherlands*, decision adopted on 14 November 2003, para. 7.3.

[9] See, inter alia, complaint No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

including the impunity of the perpetrators, victims of female genital mutilation in Guinea do not have access to an effective remedy and to appropriate protection by the authorities.[10] In the complainant's case, she has already been subjected to it on one occasion, with severe consequences to her physical and psychological integrity. She undertook reconstructive plastic surgery since she did not like her body and was unable to establish a relationship with a man (see para. 2.4 above). Against the background of the situation faced by girls and women in Guinea, as reflected in reports provided by the parties, the Committee is of the view that in assessing the risk that the complainant would face if returned to her country of origin, the State party has failed to take into due consideration the complainant's allegations regarding the events she experienced in Guinea, her condition as a single woman in the Guinea society, the specific capacity of the authorities in Guinea to provide her with protection so as to guarantee her physical and mental integrity and the severe anxiety that her return to Guinea may cause her within this context. Accordingly, the Committee finds that, taking into account all the factors and in the particular circumstances of this case, substantial grounds exist for believing that the complainant will be in danger of treatment contrary to article 1 of the Convention if returned to Guinea.

9. In the light of the above, the Committee, acting under article 22 (7) of the Convention, concludes that the complainant's removal to Guinea by the State party would constitute a breach of article 3 of the Convention.

10. The Committee is of the view that the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the complainant to Guinea or to any other country where she runs a real risk of being expelled or returned to Guinea. 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.

[10] See Committee's concluding observations on Guinea (CAT/C/GIN/CO/1), para. 17. See also Committee on the Elimination of Discrimination against Women, concluding observations on the combined seventh and eighth periodic reports of Guinea (CEDAW/C/GIN/CO/7-8), paras. 28 and 30.

Tagung der Refugee Law Clinic Gießen, 18. November 2016, Gießen

Strategische Prozessführung im Flüchtlingsrecht

Workshop III

“Wunschliste – für welche Fälle wünschen wir uns eine Entscheidung und wie kommen wir da hin?“

Maria Bethke und Adriana Kessler

„Die Erfahrungen aus der Beratungs- und Anwaltspraxis sind wichtige Informationen, denn sie helfen nah an der Realität zu bleiben.“

Fälle und "was hat Sie bisher daran gehindert, diese Fälle hochzubringen?„

- Strafanzeige wegen Familientrennung bei Abschiebung (Sachsen)
- Misshandlungen in Ungarn
- UMF, subsidiärer Schutz, Familienzusammenführung
- Überstellungsfrist Dublin: Kirchenasyl als Untertauchen?

Fälle (weiter)

- Konzept der Sicheren Herkunftsstaaten (Verfassungskonformität des Gesetzes)
- Situation von Roma aus den Westbalkanstaaten (insbes. kumulative Diskriminierung)
- Menschen aus Maghreb-Staaten: keine Zuweisung aus EAE
- Qualitätsstandards für Dolmetschende bei Anhörung (+ ggf. Haftung)
- Fehlende hinreichende Finanzierung von Verfahren, wenn immer PKH versagt wird
- Attestanforderungen Asylpaket II
- Italien-Abschiebungen (Tarakhel, aber andere Personengruppen?)
- Rückwirkung von Verpflichtungserklärungen
- Abschiebung UMF ohne vorherige Beteiligung des Vormunds

„Je besser wir die Erfahrungen aus der Praxis der Beratungsstellen dokumentieren, desto bessere Strategien können wir für die weitere Arbeit entwickeln.“

„Strategische Prozesse betreiben einige Akteure, aber noch nicht vernetzt und systematisch.“

„Wenn die Ebenen der Beratungspraxis und der anwaltlichen Arbeit mit der menschenrechtlichen Argumentation zusammengebracht werden, kann daraus eine starke Bewegung entstehen.“

„An bestehende Strukturen anzudocken ist wichtig, um Wissen und Energie zu bündeln.“

„Strategische Prozessführung umfasst gezielte Klagen, um höchstrichterliche Entscheidungen zu erreichen, aber nicht nur… Ziel ist es, soziale Veränderung zu bewirken.“

„Kommunikation und Pressearbeit sind wichtig, um Breitenwirkung zu erzielen.“

„Finanzierung ist wichtig, um professionell arbeiten zu können.“

Danke!

Kontakt: Maria Bethke
Diakonie Hessen
maria.bethke@diakonie-hessen.de

Adriana Kessler
JUMEN – Juristische Menschenrechtsarbeit in Deutschland
info@jumen.org