

**United Nations**

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**CAT**/C/59/D/606/2014

**Convention against  
torture and other  
punishments or cruel,  
inhumane or degrading  
treatment**

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**Provisional unedited Version**

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**Committee against Torture  
Decision adopted by the Committee in virtue of article 22 of  
the Convention concerning communication no 606/2014\*;\*\***

*Presented by* : Mr Ennaâma Asfari

*In the name of* : the applicant

*State party* : Morocco

*Date of the application* : 4 March 2014 (initial letter)

*Date of the present decision* : 15 November 2016

*Subject* : Torture in detention

*Questions of procedure* : Internal appeals exhausted and abuse of the right to submit a complaint

*Questions of substance* : Torture or cruel, inhuman or degrading treatment; obligation of the State party to proceed to an impartial investigation; prohibition on invoking as proof declarations obtained under torture; protection against intimidation for having denounced acts of torture.

*Articles of the Convention* : 1; 12; 13; 14; 15 and 16

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\* Adopted by the Committee at its fifty ninth session (7 November-7 December 2016)

\*\* The following members of the Committee took part in the examination of the communication : Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller-Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang. In conformity with article 109 of the Internal Rules of the Committee,

Mme Essadia Belmir did not take part in the adoption of the present decision.

**CAT/C/59/D/606/2014 Provisional unedited Version**

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

- 1.1 The author of the communication dated 14 March 2014, is Mr Ennaâma Asfari, born in 1970 in Western Sahara where he resides alternately when not in France. He invokes the violation by Morocco of articles 1; 12; 13; 14; 15 and 16 of the Convention against Torture and other punishments or cruel, inhuman and degrading treatments<sup>1</sup> The applicant is represented by ACAT-France and Maître Joseph Brehem, barrister<sup>2</sup>
- 1.2 On 27 January 2015, at the request of the State party, the Committee, acting through the intermediary of its Rapporteur on the new applications and interim measures, decided to examine the admissibility of the application separately from its merits. On 20 April 2015, the Committee declared the complaint admissible.<sup>3</sup>

**The facts as presented by the applicant**

- 2.1 The applicant presents himself as a defender of human rights and peaceful activist for the independence of Western Sahara. He has been married since 2003 to a French citizen. As a result of his activities denouncing human rights violations in Western Sahara under Moroccan administration, he claims that he was the victim of police and judicial harassment by the authorities of the State party. He testifies to having been arrested, maltreated and sentenced on several occasions in 2006, 2008, 2009 and the beginning of 2010.
- 2.2 On 9 October 2010 and afterwards, thousands of Saharawis living in that part of Western Sahara left their homes to set up temporary camps

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<sup>1</sup>Morocco has declared its recognition of the competence of the Committee against Torture to receive and examine individual communications in conformity with article 22 of the Convention on 19 October 2006.

<sup>2</sup>The mandate with ACAT-France and Maître Brehem to represent the applicant before the Committee was drawn up by his wife. Since the applicant is currently in custody at the Salé2 prison in Morocco, it is alleged that he was unable to sign the representation warrant directly.

<sup>3</sup>See Communication 606/2014, *Ennaâma Asfari v Morocco*, decision of 20 April 2015.

on the outskirts of the towns, including the camp of Gdeim Izik near Laayoune. This move aimed to denounce the economic and social discriminations of which the Saharawis consider themselves the victim by the State party. The applicant was entrusted with presenting the camp of Gdeim Izik and its demands to foreign visitors and journalists.

2.3 On 7 November 2010 during the day, the applicant was approached twice by plain clothes emissaries of the government who asked him to make the camp evacuate. The applicant replied that this was not in his power. In the evening, the applicant noticed that there were police near the house where he was staying and let his wife in France know of his fears. During that same evening, while the applicant was out visiting the family of friends, the forces of order broke into the house and beat the members of that family. They then proceeded to arrest the applicant in a violent manner whereas he was not posing any resistance, he was violently pushed to the ground, handcuffed, blindfolded and beaten until he lost consciousness. According to the applicant, plain clothed agents from the Directorate General for Territorial Surveillance (DGST) and the General Intelligence were present. During a 30 minute journey, he was forced to remain with his head between his legs and was punched and hit with a walkie-talkie on his back and head. He was taken to the Laayoune police station where he was detained from 20.00 hours until 05.00 hours the next morning.

2.4 During those several hours of detention at the Laayoune Police Station, the applicant was forced to maintain a motionless posture while being handcuffed and blindfolded. He was hit any time he moved or tried to change position. He was insulted, accused of being a traitor and a mercenary. He was then interrogated by senior police officers about his involvement in the Gdeim Izik camp of which the applicant was presumed to be the organiser. During this interrogation he received slaps, punches on his face, suffered the torture of the falaqa with a stick (being struck under the feet) and was hit with a stick on his buttocks. After about forty minutes, they took off his trousers and t-shirt and forced him to remain kneeling without moving on the pain of being hit. At dawn on 8 November 2010, the applicant was transferred to the Laayoune gendarmerie, still handcuffed and blindfolded.

2.5 The applicant remained in detention at the Laayoune gendarmerie until 12 November 2010, without knowing where he was. During those days he was blindfolded all the time, his wrists handcuffed behind his back and sitting on a mattress without being able to move. It was not

allowed to stretch out until after the last call to prayer of the day. He had eaten practically nothing and could only drink twice a day. He could not go to the toilet except accompanied by two agents and even then, he remained handcuffed. He was interrogated daily on his relations with the Polisario Front, his contacts within the movement, political parties in Morocco, his childhood, the Gdeim Izik camp and his activities in France.

2.6 In the night of 11-12 November 2010, the applicant was transferred with other detainees, still blindfolded, to the Appeal Court of Laayoune to be presented to the instructing magistrate. While he was waiting in the corridors of the Court, an officer of the gendarmerie struck him and threatened him to sign his name in a notebook without seeing what it was about<sup>4</sup>. After that he was escorted back to the Gendarmerie without even seeing the magistrate.

2.7 On 12 November 2010 in the evening, the applicant was taken with several detainees to the Laayoune airport and was transferred to a military aeroplane to Rabat, lying on his stomach being threatened by a knife and with plastic handcuffs which were lacerating his wrists. On arrival at Rabat, he was taken to the military court to be heard by a judge who did not allow him to speak even though he was showing marks from having been struck and had blood on his face. From that date on, the applicant was placed in provisional detention in the prison of Salé 2 where he spent the first night attached by handcuffs to a large door adorned with iron bars, first standing, then lying on the ground. He was still blindfolded and was hit every time he moved. On 18 November 2010, he was placed in isolation for 4 months without permission to exercise. The applicant went on hunger strike and was then granted the first medical examination since his arrest. On 9 December 2010, the applicant saw for the first time his lawyers and then a visit from his wife, who had been informed of his arrest by parents of other Saharawi detainees. In April 2011, the applicant was allowed to read but was not permitted to receive or send mail.

[sic – para 2.8 is missing in the original – note of translator.]

2.9 At the two hearings of 12 January and 12 August 2011, the applicant told the judge that he had been tortured. The applicant has always denied the acts of which he was accused in relation to violence which took place during the dismantling of the Gdeim Izik camp and he

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<sup>4</sup>The applicant supposes that must be confessions which were later present to the judge having been signed by the applicant during interrogation.

explained that he had been forced to sign a document without knowing its contents. In his decision of 22 December 2011, the military instructing magistrate closed the investigation and remitted the case for trial to the military court. The applicant was convicted on 16 February 2013 by the Permanent Military Tribunal of the Royal Armed Forces of Rabat to thirty years' imprisonment for the formation of a criminal gang and participation in violence resulting in the premeditated death of members of the public forces in the exercise of their duties during the dismantling of the Gdeim Izik camp. Twenty four other Saharawis were prosecuted for the same acts and were convicted at the end of the trial that the applicant has denounced as thoroughly unfair and marked by flagrant irregularities such as the falsification of documents, in particular as regards the date of his arrest: the authorities declared that the applicant was arrested on 8 November at the end of the dismantling of the Gdeim Izik camp, whereas he had been arrested the day before the events in which he had therefore not been able to have any part. The sentence was not subject to appeal.

### **Content of the complaint**

3.1 The applicant alleges a violation of articles 1, 12, 13, 14, 15, and 16 of the Convention by the State party.

3.2 He submits that the physical abuse suffered at the time of his arrest and during his interrogation in the police station and then in the gendarmerie of Laayoune between 7 and 12 November 2010, as well as during his transfer by plane constitute acts of torture, because of the seriousness of the violence inflicted on him. He refers in particular to violence undergone in the night of 7 to 8 November 2010 in order to obtain information on his involvement in the Gdeim Izik camp and on his relations with the Polisario Front movement. The applicant submits that this violence caused him acute suffering for months because of the lack of medical treatment and constitute a violation of article 1 of the Convention.

3.3 The applicant alleges having been tortured during his hearings by the examining military magistrate then by the military court. He notes that no inquiry has been opened on this point. During his hearing of 12 November 2010, the instructing judge took no measure although the applicant, who was appearing without his lawyer, presented traces of blows and had blood on his face, and that he had shown the bruised soles of his feet. The judge did not record these facts in the minutes. The

applicant furthermore denounced the acts of torture suffered during the hearings before the military investigating judge on 12 January and 12 August 2011 and has repeated his complaint during the trial before the military court. He notes that no medical expertise was ordered by the military investigating judge, which was also denounced by his lawyer at the trial. In so doing the judicial authorities denied the applicant the right to obtain justice, compensation, treatment including psychological treatment and guarantees of non-repetition of the crime. The applicant considers that these facts constitute a violation of articles 12, 13 and 14 of the Convention.

3.4 The applicant considers also that his conviction by the military court is based on his so-called confession, which he denies having made, and on the confessions of his co-accused which were obtained under torture. He recalls that he admitted nothing, but that he was forced to sign a document without being able to read its contents. The applicant submits that the State party has violated article 15 of the Convention because it has failed to ensure that any declaration obtained through torture cannot be invoked as evidence in the proceedings against him.

3.5 The applicant also denounces the whole of the treatment which has been inflicted on him in the course of the judicial proceedings which, if they do not constitute acts of torture, should be classed as inhuman and degrading treatment under article 16 of the Convention, including the conditions of his detention during the first months at the Salé prison in Rabat. In particular, he denounces his continued detention on the basis of confessions obtained through torture. The applicant alleges that, on his arrival in pre-trial detention on 12 November 2011 [*According to para 2.7 the year should be 2010. Note of translator.*], he spent the night tied up by the handcuffs to a large door decorated with iron bars, first standing then lying on the floor. He was blindfolded and was kicked and insulted by the guards each time he moved. From 18 November 2010, he was placed in an isolation cell. He remained for three months in a cell without permission to walk and with no possibility of communicating with the other detainees except through a window. He could only get a medical examination after going on hunger strike and could only receive a visit from one of his lawyers on 9 December 2010. He could not see his wife until after a month of detention. During these first four visits he was not allowed to see her alone and was therefore not able to tell her what he had been through.

3.6 The applicant contends that he has exhausted internal remedies. He has denounced the torture suffered on many occasions and before a witness to the judicial authorities, and his complaints have been recorded in the minutes. Nevertheless no investigation has been opened on this subject. The refusal of the Moroccan authorities to investigate the applicant's allegations of torture have never been officially notified, the judicial authorities have not taken any action. This refusal is not subject to appeal. In the course of the hearing on 8 February 2013, the applicant's lawyer asked the military investigating judge to interview the editors of the minutes of the interrogations to determine the conditions under which the confessions were obtained. His request was rejected. In its interim order of 8 February 2013, the military court, while noting accusations of torture, failed to follow up on these allegations. Impunity concerning torture was denounced by the Committee in its concluding observations on Morocco.<sup>5</sup>

3.7 Military justice does not have a double degree of jurisdiction and therefore the military court's decision is not subject to appeal. The applicant appealed on points of law in cassation in February 2013, but more than a year after his appeal has still not received a reply. Even if cassation were granted, the judge would not reopen the case on the merits because under articles 568 and 586 of the Code of Moroccan Penal Procedure, the Court of Cassation can only "say the law" and not "say the fact". In his case the powers of the Court of Cassation are all the more limited in that the torture was not submitted to the military court for review by the act of referral to the public prosecutor who holds the monopoly of prosecutions. The magistrates of the seat could therefore not take the initiative on the question of torture, the military judges should have denounced these facts to the public prosecutor for an investigation.

3.8 The Court of Cassation cannot therefore question the sovereign assessment of the judges and is not competent to determine if the applicant's confession was obtained under torture or to order a new investigation into torture.

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<sup>5</sup>CAT/C/MAR/CO/4, par. 16. The applicant also quotes the report of the Special Rapporteur on torture and other punishments or cruel, inhuman or degrading treatment, Juan Mendez, A/HRC/22/53/Add 2, par.28-29

## **Observations of the State party on admissibility**

4.1 On 4 August 2014, the State party contested the admissibility of the complaint for failure to exhaust domestic remedies and abuse of the right to submit a complaint.

4.2 The State party begins by mentioning that the applicant was arrested on 8 November 2010 in the context of the dismantling of the Gdeim Izik camp, set up some weeks prior by persons, including the applicant, who were affiliated with Saharawi separatists in the proximity of Laayoune. It alleges that a campaign aiming to incite the local population to move in and set up camp was thus launched in order to put pressure on the authorities to give them social benefits.

4.3 The State party submits that the applicant created a militia armed with knives with the purpose of not letting the occupants leave the camp. At the approach of the forces of order who were coming to dismantle the camp and re-establish public order, the applicant planned and supervised attacks with knives, Molotov cocktails and exploding gas canisters. 11 members of the forces of order died as a result of these confrontations which resulted in the prosecution and conviction of the instigators and officials.

4.4 The State party states that the intervention of the security services was based on the precise instructions of the public prosecutor's office, the usual summonses were scrupulously respected. The applicant was arrested with 69 other persons on 8 November 2010 during the dismantling operation. He was taken to the premises of the judicial brigade of the Royal Gendarmerie of Laayoune, where he was placed in police custody, in accordance with the law and under the effective control of the Attorney General of the King at the Laayoune Court of Appeal. He was brought before the Military Investigating Judge on 12 November 2010.

4.5 The applicant was formally charged with the crimes committed in the context of the dismantling of the camp and sentenced on 17 February 2013 by the Permanent Military Tribunal of the Royal Armed Forces.

4.6 The State party notes that almost 4 years elapsed between the alleged facts and the date of the filing of the complaint with the Committee in March 2014, which it considers to be excessive. The State

party further submits that the complaint contains a number of contradictions.

4.7 With regard to the exhaustion of domestic remedies, the State party notes that following his conviction by a military court, the applicant appealed to the Court of Cassation. To date, the Court of Cassation has not yet ruled on the case. Furthermore, the applicant has not lodged a complaint before any national court or authority with regard to the allegations of torture and/or ill-treatment allegedly suffered during his detention in police custody or afterwards: whether at the preliminary hearing on 12 November 2010, or at the hearing on 12 January 2011, the applicant, assisted by a lawyer, did not raise the fact that he had been exposed to acts of torture and/or ill-treatment.

4.8 Moreover, at the February 2013 trial, which was open to national and international observers, the defense of all the accused raised four allegations of torture or ill-treatment without reference to the applicant. A medical opinion was requested from the judge concerning the four accused in question. The applicant merely asserts that the authorities have never consented to an investigation even though he has not taken any steps to that effect. Nor has the applicant demonstrated that the domestic proceedings would be excessively long or ineffective. In accordance with the Committee's jurisprudence, mere doubts as to these elements do not absolve the applicant from exhausting domestic remedies.<sup>6</sup>

4.9 The State party considers that the applicant's communication is part of a political agenda on the sidelines of the UN Security Council resolution on the mandate of MINURSO. It considers that his allegations are vague, general and unfounded and that the documents presented are more likely to be "reporting" on a general situation, disclosing the purely political reasons for the complaint.

4.10 Finally, the State party invokes an abuse of the complainant's right of complaint which, without awaiting the decision of the Court of Cassation, brought the matter before the Committee and the French criminal courts under universal jurisdiction.

### **Comments by the applicant on the State party's observations**

5.1 On 20 September 2014, in reply to the observations of the State party, the applicant recalls that the subject matter of his complaint relates

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<sup>6</sup> The State party does not cite any specific jurisprudence.

to the circumstances of his arrest and period of custody, as well as Morocco's compliance with the Convention but not the reasons for his conviction, since that question was not the responsibility of the Committee.

5.2 The applicant alleges that he was arrested on 7 November 2010 at his friends' house, without a warrant and with violence. He considers that the pleading indicating that his arrest took place on 8 November 2010 demonstrate that the date of his arrest was falsified by the Moroccan authorities. He points out that his request does not concern the actions taken by the security forces during the dismantling of the Gdeim Izik camp, since he had been arrested the day before and was therefore not there. The applicant disputes the State party's allegations that he was to the Royal Gendarmerie of Laayoune immediately after his arrest and notes that the State party does not call into question that he was subjected to torture.

5.3 The applicant refutes the failure to exhaust domestic remedies, since the cassation, the last appeal he has undertaken and is awaiting the decision, is not the third degree of jurisdiction and does not reopen the case on the merits. In accordance with articles 568 and 586 of the Code of Criminal Procedure, the Court will rule on the observance of the law by the military court but not on the allegations of torture which were not examined by the military court.

5.4 Under Moroccan law, the prosecution has a monopoly over prosecution. The magistrates of the Court could not therefore take up the question of torture : the court should have denounced these facts to the public prosecutor so that he could carry out an investigation, which he clearly rejected by refusing to follow up on the allegations of the victims and in expressing the view that that applicant had not been subjected to torture or inhuman or degrading treatment.<sup>7</sup>

5.5 The applicant adds that the review of the appeal in the Court of Cassation is not limited in time: the Court could thus to give its decision in ten years' time. He considers that the ineffectiveness of the domestic

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<sup>7</sup>The applicant refers to the order and judgement of the military court of 8 February and 17 February 2013.

remedies in his case is manifest and has been recognized in reports by Human Rights Watch<sup>8</sup> and the working group on arbitrary detention.

5.6 The applicant also challenges the State party's argument that he has not filed a complaint, although he has denounced the torture to the judicial authorities on several occasions. The applicant acknowledges that he did not request a medical examination<sup>9</sup> However, he recalled that during his first visit to the military investigating judge on 12 November 2010, he had bruises on his face, blood on his right eyebrow and showed the judge the bruised soles of his feet. The judge did not record these marks of abuse in the minutes. On 12 January 2011 the applicant, assisted by his lawyer, informed the judge of the torture suffered, which he explicitly denounced during the trial, as evidenced in the minutes of the hearing of 8 February 2013 and provisional order of the Military Court of the same date. The judgement of the military court dated 17 February 2013 does not take up any of these allegations and decides on the culpability of the accused, including the applicant, to be sentenced to imprisonment<sup>10</sup>.

5.7 The applicant adds that according to the Committee's jurisprudence on Article 13, it is sufficient for the victim to bring the facts to the attention of the State authority so that the latter has an obligation to initiate an immediate and impartial investigation<sup>11</sup>.

5.8 The applicant considers that the arguments of the State party relating to the political motive of his complaint and the abuse of the right to complain are recurrent accusations against human rights defenders and demonstrate that the State party does not intend to conduct a serious, prompt, independent and impartial investigation. In response to the State party's argument that the complaint was unfounded, the complainant

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<sup>8</sup>Report of the Working Group on Arbitrary Detention, Mission to Morocco, A/HRC/27/48/Add.5; and Human Rights Watch, Country Summary, January 2014 (reports attached to the complaint).

<sup>9</sup> The minutes of the hearing of 8 February 2013 and the provisional order of the Military Court in Rabat refer to the allegations submitted by the applicant that he was allegedly tortured. The allegations of torture at the police station are also included in the decision of the First Board of Examiners, who referred the case to the Military Court of Rabat.

<sup>10</sup> See judgement of the Military Court of 17 February 2013.

<sup>11</sup> See, for example, Communication No 6/1990, Henri Unai Parot v Spain, decision of 13 October 1990, para 10.4; Communication No. 59/1996, Encarnacion Abad v. Spain, decision of 14 May 1998, para. 8.6; and communication No. 189/2001, Bouabdallah Ltaief v. Tunisia, decision of 17 November 2003, para. 10.6.

recalls that the United Nations Working Group on Arbitrary Detention considered his case to be serious and substantiated and referred to it in his submission. Report on Morocco in 2013<sup>12</sup> recommending that the State party promptly investigate all allegations of ill-treatment in connection with the arrests made during and after the demonstrations as well as the prison of Laayoune; to avoid arbitrary detentions; to prosecute those responsible and to compensate the victims.

5.9 The applicant asks the Committee to demand compensation from the State party in the form of his release and immediate cessation of all forms of violation of article 15. He claims the right to retrial by excluding information obtained under coercion and demands compensation for physical, psychological and moral damages, as well as for property damage and loss of income and loss of earnings potential. It also requires payment of compensation for costs incurred in judicial proceedings, expert opinions and consultations with medical, psychological and social services, as well as access to appropriate and free rehabilitation as soon as possible. Finally, the complainant asks for measures of satisfaction consisting in a prompt, independent, serious and impartial investigation into allegations of torture and guarantees of non-repetition.

### **Supplementary information supplied by the applicant**

6.1 On 4 February 2015, the applicant and his counsel inform the Committee that they were the subject of intimidation by Moroccan authorities. They indicate that in March 2014, shortly after the complaint was lodged with the Committee, the Moroccan and French media announced the decision of the Moroccan Ministry of Justice to file a complaint against the applicant, his counsel and two other torture victims in Morocco, in particular for defamation and slanderous denunciation. In June 2014, the media announced that a complaint had been filed against the applicant and his counsel by the Moroccan Ministry of the Interior<sup>13</sup> The applicant, his counsel and the other persons concerned by the charges did not hear of this procedure until the end of January 2015, when the counsel of one of the victims represented by ACAT France received a

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<sup>12</sup> A/HRC/27/48/Add.5, para.68 “The Working Group notes with concern that the allegations of torture and ill-treatment during the period of almost two years which preceded the trial have not been investigated. The fact that the case is before a military rather than a civil court contributes to the lack of transparency and the refusal to investigate allegations of ill-treatment.”

<sup>13</sup><http://www.afrik.com/affaire-hammouchi-le-maroc-depose-plainte-et-fustige-la-justice-francaise> Wednesday 11

June 2014.

summons to appear before an investigating judge of the tribunal of Rabat for defamation, slanderous denunciation, insult to the constituted bodies, use of manoeuvre and fraud to incite and to make false testimony, complicity and public insult.

6.2 These offenses are punishable by imprisonment and the accused may also be liable for a fine and payment of damages and interests. The counsel considers this complaint to be a violation of the Convention, in particular article 13.

6.3 The Counsel is concerned that the Moroccan authorities will carry out their threats of prosecution following the complaint by the Moroccan Ministry of the Interior, as they have done against another person, WC, a member of the Moroccan movement 20 February and the Moroccan Association for Human Rights (AMDH). WC was sentenced on 20 October 2014 to two years' imprisonment for slanderous denunciation following a complaint of torture and abduction she filed with the Tangier public prosecutor on 30 April 2014. Three days earlier, following a demonstration in which she taken part, the young woman was abducted and then beaten, insulted and threatened before being abandoned on the outskirts of the city. On 23 July 2014. Another AMDH activist who denounced torture was convicted of slanderous denunciation for three years in prison and a fine.

6.4 The applicant considers that the convictions of these activists and the prosecution against him and his counsel and the two other persons mentioned above are the first steps in a general policy of intimidation of victims of torture announced by the Minister of Justice in a press release of 10 June 2014: the Minister promised to investigate the allegations of torture, but also to prosecute the authors of "slanderous" denunciations. In practice, to date, only the second part of the announcement has been followed with concrete effect.

6.5 In these circumstances, the applicant asks the Committee to find a violation of article 13 of the Convention and to take a decision as soon as possible on his case. It also requests the Committee to urge the State party to cease such intimidation immediately.

6.6 On 18 February 2015 the counsel asks the Committee to organise a hearing of the parties, as was done on 8 May 2012 in the case of Toirjon

Abdussamatov and others against Kazakhstan<sup>14</sup> at the request of the State party.

6.7 The applicant considers that, as the State party's observations accusing the applicant and his counsel of instrumentalising the complaints mechanism to the Committee for political purposes illustrate, the trial with 23 co-defendants is highly politicised. It requires that the debate be refocused by a strictly legal approach to the situation.

6.8 He also informs that since he addressed his complaint to the Committee, numerous articles have appeared in the Moroccan press, delegitimizing the steps taken by the applicant and his counsel. The applicant is often presented as a threat to the State, as an Algerian agent or as a murderer who seeks to evade his responsibilities.

6.9 On 6 March 2015, counsel added that the Moroccan lawyer from ACAT-France went to the High Court (tribunal de grande instance) in Rabat and tried to obtain a copy of the complaint from the Moroccan Ministry of the Interior. The judge refused to give him the requested copy but confirmed that the complaint was also against the applicant.

### **Supplementary information supplied by the State party**

7.1 On 12 March 2015, the State party replied that, since the Committee had decided to consider only the admissibility of the communication at this stage, it considered it inappropriate to rule on a possible violation of article 13 of the Convention. The State party wishes to reassure the Committee that the complaint against the applicant and his counsel cannot be interpreted as a reprisal. He denounced a series of criminal reprehensible acts imputable to the NGO ACAT-France, in the form of a "slandorous" campaign and affirms that it is in this respect that the Moroccan authorities considered themselves obliged to file a complaint for defamation, slanderous denunciation and contempt towards constituted bodies. The State party asserts that this does not call into question the possibility for the complainant to submit his complaint to the Committee.

7.2 As regards the request for hearings by the parties, the State party is surprised by such an approach, which can in principle only be taken by the State party and not by the counsel, as was done in the case to which

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<sup>14</sup>Communication No 444/2010, Toirjon Abdussamatov and others v Kazakhstan, decision of 1 June 2012, para. 9.1.

the applicant refers. It adds that such a procedure is not provided for in the Committee's Rules of Procedure with regard to complaints under article 22 of the Convention.

7.3 On 16 April 2015, in response to the Council's letter of 6 March 2015, the State party notes that access to the criminal file is organised in two stages. The first is a preliminary phase in which it is not possible to access the criminal file<sup>15</sup>. The second is the detailed hearing during which access to the criminal file is possible<sup>16</sup>. During this phase, parties may be heard in the presence of counsel. In the present case, the judge refused to provide a copy of the criminal file to the Moroccan Council of ACAT-France because it had applied for it prematurely. The State party adds that in the meantime, counsel has been notified of this decision, which he appealed on 16 March 2015.

7.4 The State party reiterates that the complainant has not exhausted domestic remedies as he has not complained about torture before the domestic courts.

### **Decision of the Committee on admissibility**

8.1 On 20 April 2015, during its fifty-fourth session, the Committee considered the admissibility of the application and considered it admissible in so far as it raised questions concerning articles 1; 12; 13; 14; 15 and 16 of the Convention. The Committee concluded that the State party had not demonstrated that the existing remedies to denounce acts of torture had in practice been made available to the applicant in order to assert his rights under the Convention.

8.2 The Committee concluded that the one-year period elapsing between the judgement of the Military Court and the submission of the application to the Committee could not be regarded as constituting an abuse of the right to submit a complaint.<sup>17</sup>

### **Observations supplied by the State party on the merits**

9.1 On 18 September 2015, the State party reiterates plea of inadmissibility of the communication as the applicant has not been finally

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<sup>15</sup> See article 134 of the Code of the penal procedure.

<sup>16</sup> See article 139 of the Code of penal procedure.

<sup>17</sup>The Committee recalled that neither the Convention nor the internal rules of the Committee establishes a time limit to submit a complaint.

tried: the Court of Cassation has still not yet ruled on his case and may decide to refer the case to the relevant substantive court. In the event of such a referral, all substantive, procedural and enforcement issues may be raised. The State party therefore requests the Committee to reconsider the decision on the admissibility of the complaint.

9.2 On 24 September 2015, the State party reiterates its request for the revocation of the Committee's decision on admissibility. It alleges that the applicant was arrested in flagrante delicto by the Royal Gendarmerie and not by the police on 8 November 2010 during the dismantling of the camp because of serious and consistent evidence of his involvement in the commission of the criminal offences committed on this occasion. By claiming that he was arrested by the police on 7 November 2010 and tortured, the applicant seeks only to exonerate himself from the very serious acts for which he was arrested on 8 November 2010. No request for an inquiry into allegations of torture which he claims to have suffered was submitted or presented to the judicial authorities or other national mechanisms for the protection of human rights. Moreover, the respondents have never claimed to have been subjected to torture or ill-treatment during the various stages before the competent judicial authorities. Furthermore, neither the Attorney-General of the King, the investigating judge of the Laayoune Court of Appeal, the Military Prosecutor, or the military investigating judge found any signs of brutality that would lead to an investigation ex officio.

9.3 The State party adds that large sums of money were seized in the applicant's tent at the time of his arrest. It also disputes the applicant's allegation that he was arrested on 7 November at the home of one of his friends, Mehdi Toubali. The State party adds that at the hearing of 8 February 2013 the defence formally requested the judge to order medical examinations for four of the accused, but not for the applicant, who merely asserts that the authorities have never agreed to open an inquiry into the acts of torture to which he claims to have been subjected. The authorities reiterate that the complainant's motives are purely political, that the allegations of arbitrary arrest and torture are not based on any tangible facts, and have no other purpose than to help him avoid the punishment to which he was sentenced. The State party therefore considers that the author's allegations concerning the violation of articles 1 and 16, 12, 13, 14 and 15 of the Convention are unfounded.

9.4 On 4 December 2015, the State party provides further observations in which it maintains that the communication is inadmissible because the

Committee has not been in a position to ensure that all domestic remedies have been exhausted. In the absence of a complaint lodged by the applicant on the allegations of torture, the Committee's decision of 21 May 2015 circumvented that condition in order to place itself on the ground of the applicant's effective remedies.

9.5 The State party draws attention to the characteristics and consequences of the current cassation appeal and informs that a new Military Justice Code entered into force on 1 June 2015, which provides for the possibility for the Court of Cassation to refer a case to a civil court (the Court of Appeal) in case it decides to quash the judgement of the Military Court. In this case, the Court would also be called upon to rule on the merits of the case. One of the pleas raised by the defence in the cassation appeal relates specifically to allegations of torture. As the applicant applied to the Court of Cassation, which provides an effective remedy, the applicant's communication is therefore inadmissible.

9.6 On 20 February 2014, the applicant filed a criminal complaint in France. He filed a complaint with the Dean of Investigating Judges at the TGI of Paris with a civil party for torture. The State party adds that the Committee cannot validly intervene on the issue of the availability of local remedies when the complainant has lodged a complaint of torture in a country other than the State party. In that regard, the argument relating to the obligation of the State party to investigate mere allegations of the applicant without formal filing of a complaint must be expressly rejected. If he had applied to the Moroccan court, like some of the co-defendants, the journalists present at his trial would not have failed to inform the public. His allegations of inaction by the State party's authorities are therefore unfounded.

9.7 Upon the entry into force of the Protocol additional to the Convention on mutual assistance in criminal matters between France and Morocco signed on 6 February 2015, the State party emphasizes that the complaint lodged by the applicant in Paris should be the subject of a transmission to the competent Moroccan judicial authority to decide on the follow-up to be given. A Moroccan court would thus be called upon to investigate allegations of torture. The State party therefore reiterates that the domestic remedies have not been exhausted.

### **Commentary of the author on the merits**

10.1 On 12 November 2015, the applicant submits his commentaries to the observations of the State party. He alleges that he and his family are still suffering from the consequences of the torture. With regard to the challenge to the Committee's decision declaring his application admissible, he recalled that, according to the Committee, the State party had not produced sufficient evidence to prove the non-exhaustion of domestic remedies. On the appeal to the Court of Cassation, he stated that in his case the Court of Cassation had not been seized of the acts of torture which the investigating judge did not wish to refer to the military court for review. The applicant recalls that he was prosecuted and convicted for murder. He adds that he and his co-accused continued to denounce acts of torture and inhuman and degrading treatment and to challenge the veracity of confessions obtained by torture before the investigating judge, as well as during the hearing before the military court. As no Moroccan judge had ever wished to examine his accusations, the Court of Cassation does not have jurisdiction to rule on the merits of the allegations of torture which he presented.

10.2 The applicant recalls that the appeal to the Court of Cassation has been pending since February 2015, It is not only useless with regard to the allegations of torture, but also goes beyond a reasonable time-frame. As regards the prosecution of the victim and his representative, the applicant regrets that the State party "takes pride in the judicial harassment of the victim and the NGO assisting him", to declare the complaint lodged before the committee inadmissible. He further notes that the investigation into slander and other offenses initiated against him and ACAT appears to have stalled since he has never been heard by the investigating judge. He adds that the great majority of Saharawis arrested in connection with the dismantling of the Gdeim Izik camp have been prosecuted since 2010 and are on temporary release but have never been tried.

10.3 Finally, the applicant repeats that his arrest definitely took place on 7 November 2010. He refers also to the communication of 20 February 2014 detailing the numerous allegations of torture he presented to the Moroccan judicial authorities, without any actual follow-up. The applicant reiterates that he was tortured at the hearing before the Military Investigating Judge on 30 September 2011, as evidenced by the record of the hearing. Concerning the place of arrest, the applicant maintained that he had been arrested while at a friend's house and confirmed the applicant's version when he was summoned as a witness by the military court.

10.4 On 1 February 2016, the applicant reiterated that he had been arbitrarily detained for five years and three months on the basis of confessions obtained under torture. The Committee considers that the State party's latest observations are dilatory and do not provide substantive new information.

10.5 The author considers that the complaint presented in France with his wife does not alter the fact that the State party has violated the Convention in several respects. He states that he presented this complaint because it was impossible for him to obtain justice in Morocco. He specifies that the additional Protocol to the Convention on Mutual Assistance in Criminal Matters between France and Morocco does not oblige the French judge to transmit the applicant's complaint to the Moroccan courts.

#### **Additional Observations by the State Party**

11.1 On 27 July 2016, the State party submitted additional observations informing the Committee that "...the Court of Cassation, on 27 July 2016, declared admissible the appeal in cassation filed by the defence of Mr Ennaâma Asfari and decided to refer the case to the Court of Appeal of Rabat (Criminal Chamber)". The authorities reiterated that the complainant has not exhausted domestic remedies.

11.2 At the request of the Committee to provide details of the decision of the Court of Cassation of 27 July 2016<sup>18</sup>, the State party sent a copy of the decision on 20 September 2016 stating that, in accordance with article 554 of the Code of Criminal Procedure (CCP), the Court of Appeal "must comply with the judgement of the Court of Cassation on the point of law decided by the latter". The State party submits that, by virtue of the principle of the devolutive effect of the appeal, the Court will re-examine the case in its entirety and guarantee the rights of the defence, by examining all the argument of the parties, including allegations of torture and ill-treatment. On 4 November 2016, the State party informed that the

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<sup>18</sup> The Committee invited the State party to provide the following information: (a) to provide a complete copy and full references to the decision of the Court of Cassation dated 27 July 2016; (b) to specify the points of law and facts to be decided by the Rabat Court of Appeal in the context of the reference and the approximate time within which the review of the reference should take place; and (c) to clarify the provisions of the new Military Justice Code, which entered into force on 1 June 2015, whereby the Court of Cassation may refer a case to a civil court (the Court of Appeal) when it decides to overturn the judgement of the Military Tribunal.

Applicant's case was enlisted by the Court of Appeal for a hearing on 26 December 2016.

11.3 Regarding the provisions of the new Code of Military Justice, the State party states that "since its entry into force on 1 July 2015, the military court has no jurisdiction to try civilians prosecuted for common law offences. Judgements given before 1 July 2015 by these courts are referred to the civil courts. As regards the decisions which have been quashed by the Court of Cassation, the latter may, in accordance with the provisions of article 550 of the CCP, determine the court to which the case is referred.

### **Supplementary Information from the applicant**

12.1 On 13 September 2016, at the Committee's request to provide some comments on the cassation of the applicant's sentence and his transfer before a civil court of appeal, the applicant submits that the observations of the State party bring no information on the merits of the case. He recalls that the Committee has already ruled on the admissibility of the complaint on 21 May 2015 and expressed concern that the State party's letter should have been sent precisely at the moment when the Committee was due to adjudicate on the merits.

12.2 The applicant further recalls that the State party has exceeded the reasonable time limit to do justice in his case : almost six years have elapsed since the events and the presentation of the first allegations of torture repeated on several occasions, and no investigation has been initiated. The Court of Cassation has changed nothing in this state of affairs and the applicant is still being detained solely on the basis of his confessions signed under duress. In additional comments dated 13 October 2016, the applicant reiterates all of his arguments.

12.3 On 26 October 2016 the applicant informed the Committee that his wife – Mrs Claude Mangin, had not been authorised to enter Morocco on 19 October 2016 and was therefore not allowed to visit him in prison.

### **Deliberations of the Committee**

#### *Examination of the merits*

13.1 In accordance with paragraph 4 of article 22 of the Convention, the Committee examined the present application taking into account all the information communication by the parties.

13.2 The Committee notes the applicant's allegation according to which the physical abuse suffered during his arrest, during the interrogation in the police station, then at the gendarmerie, as well as the treatment he underwent during his plane transfer in order to extort confessions from him constitute acts of torture because of their seriousness. The Committee notes that during his hearings on 12 November 2010, 12 January and 12 August 2011, the applicant complained of the treatment, but that the investigating judge did not take into account his allegations and his injuries and did not ask for a medical opinion. The Committee also notes the applicant's allegations that this violence, which caused him severe suffering for several months, constitutes a violation of article 1 of the Convention. The Committee further notes the observations of the State party that during the hearings neither the applicant nor his lawyer complained of torture. The Committee recalls its jurisprudence that all persons deprived of their liberty must have prompt and independent legal and medical assistance and must be able to contact their families in order to prevent torture<sup>19</sup>. Taking into account that, according to the applicant, he did not have access to any of these guarantees and in the absence of convincing information from the State party calling into question these allegations, the Committee considers that the physical abuse and injuries sustained by the applicant during his arrest, interrogation and detention are, as presented, constituting torture within the meaning of article 1 of the Convention.

13.3 The Committee must also determine whether the fact that no investigation has been opened into the allegations of torture which the applicant has submitted to the judicial authorities constitutes a violation by the State party of its obligations under article 12 of the Convention. The Committee takes note of the applicant's allegations that he appeared with visible signs of torture such as traces of blows and blood on his face before the military investigating judge on 12 November 2010 (para 3.3), who did not record these facts in the minutes; that the author then expressly denounced the torture before the investigating judge on 12 January and 12 August 2011; that these same allegations were raised before the military court in the presence of the prosecutor and that at no

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<sup>19</sup> General observation no 2 (2007) on the application of article 2 by the State parties, *Official Documents of the General Assembly, sixty third session, Supplement no 44 (A/63/44)*, annexe VI.

time did the prosecutor carry out an investigation. The Committee also notes the applicant's argument that an appeal to the Court of Cassation cannot be considered as a useful and effective remedy since it can only pronounce on the law and on the basis of the case brought before it, namely the acts of which the applicant is accused. The Committee further notes the State party's submission that the applicant did not raise the allegations of torture before the competent authorities. It also notes that on 27 July 2016 the Court of Cassation adopted a decision on the appeal brought by the applicant and his co-accused in February 2013, referring the case to the Rabat Court of Appeal, which exercises civil jurisdiction. The Committee also notes the information provided by the State party, dated 4 November 2016, according to which the applicant's case was enlisted by the Court of Appeal for a hearing on 26 December 2016. The Committee also notes that, according to the information provided, the appeal to the Court of Cassation, which has been pending for more than three years had as its purpose to evaluate the correct application of Moroccan law to the present case and does not relate to the allegations of torture that are the subject of the present application, which have remained without any investigation for nearly 6 years. Furthermore, the information available does not support the conclusion that the Rabat Court of Appeal would have jurisdiction to rule on the allegations of torture presented by the applicant, in particular because no instructions were given to the Court of Appeal to investigate allegations of torture. The information submitted to the Committee shows that the Court of Cassation referred the case back to the Court of Appeal for re-determination because the military court did not clearly establish whether the applicant had incited the commission of criminal acts, the party or the persons targeted, as well as his criminal intent; which rendered the judgement null and void. In these circumstances the Committee considers that the likelihood of the Court of Appeal reviewing the allegations of torture is low.

13.4 The Committee further notes that no medical examination was required by the military investigating judge when the applicant was clearly showing signs of physical violence and that no investigation was carried out into the matter. Furthermore, the military court ignored the applicant's allegations of torture when deciding on his conviction and the State party denies that such allegations were made in the course of the proceedings. The Committee also notes that the State party has gone far beyond the reasonable time to render justice in the applicant's case : nearly 6 years have elapsed since the events and the presentation of the first allegations of torture, and no investigation has been opened. The

Court of Cassation did not change that situation and the applicant is still being detained solely on the basis of coerced confessions. In the light of the foregoing, the Committee considers that the absence of any investigation of the allegations of torture in the author's case is incompatible with the obligation of the State party under article 12 of the Convention to ensure that the competent authorities immediately conduct an impartial investigation whenever there are reasonable grounds to believe that an act of torture has been committed.

13.5 In these circumstances, the State party has also failed to fulfill its obligation under Article 13 of the Convention to guarantee the complainant the right to complain, which presupposes that the authorities provide an adequate response to such a complaint by a prompt and impartial investigation.<sup>20</sup> The Committee recalls that article 13 also provides that measures must be taken by the State party to protect the complainant and witnesses from any ill-treatment or intimidation caused by the complaint or from any evidence given. The Committee notes that the applicant has been the subject of threats following the complaint by the Moroccan Ministry of the Interior and that his lawyer was arrested and deported from Morocco in March 2016 when he was representing his client in the context of proceedings relating to the reporting of acts of torture allegedly committed. The State party has not provided any information that would refute this part of the communication. The Committee concludes that the facts of the case also violate Article 13 of the Convention.

13.6 With regard to the applicant's allegations under Article 14 of the Convention, the Committee recalls that this provision recognizes the right of the victim of an act of torture to be fairly and adequately compensated and requires party States the obligation to ensure that he receive compensation for all the harm suffered. The Committee recalls that compensation must cover all the damages suffered and include cessation, compensation and measures to ensure non-repetition of the violations, always taking into account the circumstances of each case<sup>21</sup>. In the present case, the Committee notes the complainant's allegation that he

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<sup>20</sup>Communication No. 376/2009, Bendib v. Algeria, Decision of the Committee of 8 November 2013, para. 6.6. See also Henri Unai Parot v. Spain, Encarnacion Abad v. Spain, and Bouabdallah Ltaief v. Tunisia.

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<sup>21</sup>Idem, par. 6.5. see also Bendib c. Algérie.

suffers from physical and psychological after-effects of the abuse. The Committee also notes that the fact that the Military Investigating Judge did not order medical expertise prevented the applicant from receiving rehabilitation, compensation, treatment and guarantees of non-repetition of the crime. The Committee therefore considers that the lack of an inquiry promptly and impartially deprived the complainant of the possibility of relying on his right to compensation in violation of Article 14 of the Convention<sup>22</sup>.

13.7 The applicant further alleges that he was the victim of a violation of Article 15 of the Convention on account of his conviction on the basis of confessions obtained under torture. The Committee notes that the applicant states that he admitted nothing but was forced to sign a document the contents of which he did not know.

13.8 The Committee recalls that the generality of the terms of Article 15 of the Convention derives from the absolute nature of the prohibition of torture and consequently entails an obligation for each State party to verify whether statements forming part of a procedure for was not obtained under torture<sup>23</sup>. In the present case, the Committee notes that, according to the applicant, the statements he signed under torture served as the basis for accusing him and justifying his continued detention for more than six years; And that through his counsel he challenged the probative force of confessions signed under torture at various stages of the proceedings against him without success. The Committee notes that the Court did not take into account the allegations of torture at the time of the applicant's conviction on the basis of his confession, denying that the allegations had been made in the course of the proceedings<sup>24</sup>. The Committee considers that the State party was under an obligation to

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<sup>22</sup> See communication n° 514/2012, *Niyonzima c. Burundi*, Décision du Comité du 21 novembre 2014, par. 8.6.

<sup>23</sup> See communications n° 419/2010, *Ktiti v. Maroc*, decision adopted on 26 mai 2011, by. 8.8; and n° 193/2001, *P. E. c. France*, decision adopted om 21 november 2002, par. 6.3.

<sup>24</sup> These denunciations were made before witnesses and were recorded in the minutes which the applicant attached to his communication before the Committee. Nevertheless, the request of the applicant's lawyer at the hearing of 8 February 2013 before the Military Examining Magistrate to examine the drafters of the interrogation minutes to ascertain the conditions under which the confessions were obtained were Rejected.

verify the content of the author's allegations. By not carrying out any verification and using such statements in the judicial proceedings against the applicant, the State party has manifestly violated its obligations under Article 15 of the Convention. In this regard, the Committee recalls that in its concluding observations on the fourth periodic report of Morocco,<sup>25</sup> it expressed concern that, in the investigative system in force in the State party, confession often evidence on the basis of which a person may be prosecuted and convicted, thereby creating conditions that may favor the use of torture and ill-treatment of the suspected person<sup>26</sup>.

13.9 As regards the complaint under Article 16 of the Convention, the Committee takes note of the applicant's allegations that all the bad treatment inflicted on him during the judicial proceedings, including the deplorable health conditions of his detention during the first months in the Salé prison in Rabat, are considered as inhuman and degrading treatment. The Committee also notes the allegations that the applicant spent the night in handcuffs on a large iron door, that he received kicks and insults from the guards every time he tried to change his position, and that access to a doctor, his lawyer and his wife was restricted for several weeks. The applicant further alleges that he was placed in solitary confinement for four months as of 18 November 2010 and remained in a cell for three months without permission to exercise and without the possibility of communicating with the other detainees other than through the window. In the absence of relevant information from the State party in this regard, the Committee concludes that the facts disclose a violation by the State party of its obligations under article 16<sup>27</sup>.

14 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, decides that the facts before it reveal a violation by the State Part of Articles 1, 12; 13; 14; 15 and 16 of the Convention.

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<sup>25</sup>See CAT/C/MAR/CO/4, par. 17.

<sup>26</sup>See communication no 503/2012, Ntikarahera v Burundi, decision adopted on 12 May 2014, par. 6.6. See also Niyonzima v. Burundi, Decision of the Committee on 21 novembre 2014, par. 8.8.

<sup>27</sup>See Niyonzima c. Burundi, Decision of the Committee on 21 November 2014, par. 8.8.

15 In accordance with rule 118, paragraph 5, of its rules of procedure, the Committee urges the State party to: (i) provide adequate and fair compensation to the applicant, including the means necessary for the fullest possible rehabilitation; (ii) to initiate an impartial and thorough investigation into the events in question, in full conformity with the Istanbul Protocol guidelines, with a view to prosecuting those who might be responsible for the treatment of the victim; (iii) to refrain from any act of pressure, intimidation or retaliation likely to harm the physical and moral integrity of the complainant and his family which would otherwise constitute a violation of the State party's obligations under The Convention to cooperate in good faith with the Committee for the implementation of the provisions of the Convention and to allow the complainant to receive visits from the family to prison; And (iv) to inform it, within 180 days of the date of transmission of this Decision, of the measures it has taken in accordance with the above findings.