



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

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## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 813/2017\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	M.Z. (represented by counsel, Wolfgang Kaleck, European Centre for Constitutional and Human Rights)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Belgium
<i>Date of complaint:</i>	11 January 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 17 March 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	2 August 2019
<i>Subject matter:</i>	Complicity in acts of torture while the complainant was in detention at Guantanamo Bay; lack of investigation
<i>Procedural issues:</i>	Admissibility – the same matter; admissibility – exhaustion of available domestic remedies; admissibility – manifestly ill-founded
<i>Substantive issues:</i>	Torture and cruel, inhuman or degrading treatment or punishment during detention; lack of prevention; lack of adequate investigation
<i>Articles of the Convention:</i>	2, 6 (1) and (2), 7 (1), 10, 12, 13 and 14

1.1 The complainant is M.Z., a national of Belgium and of Morocco, born on 3 August 1978. He claims a violation of his rights under articles 2, 6 (1) and (2), 7 (1), 10, 12, 13 and 14 of the Convention in relation to his detention at Guantanamo Bay. The State party (Belgium) recognized the competence of the Committee against Torture to receive and consider communications from individuals pursuant to article 22 of the Convention on

\* Adopted by the Committee at its sixty-seventh session (22 July–9 August 2019).

\*\* The following members of the Committee participated in the examination of the communication: Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sébastien Touzé and Bakhtiyar Tuzmukhamedov. Pursuant to rule 109, read in conjunction with rule 15, of the Committee's rules of procedure, Essadia Belmir, Felice Gaer and Diego Rodríguez-Pinzón recused themselves.

\*\*\* Pursuant to rule 119 of the Committee's rules of procedure, an individual opinion (dissenting) by Committee member Abdelwahab Hani is annexed to the present decision.



25 June 1999. The complainant is represented by counsel, Wolfgang Kaleck, of the European Centre for Constitutional and Human Rights.

1.2 On 17 May 2017, the State party requested that the admissibility of the complaint be examined separately from the merits. On 6 March 2018, the Committee decided, in accordance with rule 115, paragraph 3, of its rules of procedure, to examine the admissibility of the complaint together with its merits.

### **The facts as submitted by the complainant**

2.1 The complainant submits that he was detained in the military base of the United States of America at Guantanamo Bay, Cuba, between 15 February 2002 and 25 April 2005. The complainant explains that during his detention he was subjected to various acts of torture and ill-treatment, such as: physical violence, including beatings on his head with metal chairs, against the back of his neck, and with sticks on his hands and feet, as well as having his head banged against a wall and the floor; psychological abuse, such as death threats, humiliation, and allegations about his sexual behaviour; sensory deprivation through blindfolding, exposure to extreme temperatures, stress positions, exposure to loud music, and sleep deprivation. The complainant explains that as a result of this situation, he suffered and continues to suffer from chronic post-traumatic stress disorder as well as paranoia and other psychotic symptoms.<sup>1</sup>

2.2 The complainant submits that the detention centre at Guantanamo Bay was intended to be a facility beyond the reach of the law and that the detention programme was orchestrated by senior United States government officials.

2.3 The complainant explains that during his detention at Guantanamo Bay he was held without charge, he was never told why he was being detained, and he did not know when or whether he would be released. He further explains that he was never medically examined during the whole period of his detention and that the five letters he received from his family had all been heavily censored.

2.4 The complainant submits that a Belgian Federal Police liaison officer named Luc Clareboets came to see him at Guantanamo Bay on 16 and 17 April 2002.<sup>2</sup> From April 2002 onwards, Mr. Clareboets, as well as national magistrate Hilde Van der Voorde, knew about the complainant's detention at Guantanamo Bay and participated in his interrogations.

2.5 The complainant submits that his lawyer contacted the Belgian Ministry of Foreign Affairs and the Belgian State Security Services repeatedly requesting information about the circumstances of the complainant's detention. The complainant's lawyer also requested the Belgian authorities to request the United States to transfer the complainant to Belgium, and denounced the complainant's lack of access to a lawyer and the impossibility for him to contact his family.

2.6 On 3 December 2002, and on 16 and 19 February 2004, Mr. Clareboets interrogated the complainant at Guantanamo Bay with the consent of the Belgian Federal Prosecutor's Office. The complainant submits that the Belgian authorities shared unverified incriminating information about him with the United States authorities.<sup>3</sup>

2.7 The complainant submits that on 25 April 2005, he was finally released by the United States authorities from the naval base at Guantanamo Bay and returned to Belgium.<sup>4</sup> Upon his arrival, he was put under arrest and brought before an investigative judge, Daniel Fransen, and was interrogated for the entire night by the Federal Prosecutor's Office without being informed about his rights. On 26 April 2005, Judge Fransen ordered his conditional release.

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<sup>1</sup> The complainant includes a psychiatric report by Dr. Audenart, dated 18 June 2010.

<sup>2</sup> The complainant explains that on 7 February 2002 the Belgian Crown Prosecutor was informed by the Belgian Federal Police Force that the complainant had been detained in Kandahar, Afghanistan, under United States authority.

<sup>3</sup> The complainant includes a letter from the Belgian State Security Services, dated 28 March 2003.

<sup>4</sup> The complainant includes the agreement of release between the United States authorities and M.Z., dated 20 April 2005.

On 30 April 2009, the charges against the complainant were formally dismissed by the Brussels Court of First Instance.

2.8 The complainant explains that on 28 April 2005, Mr. Clareboets was questioned by the Belgian investigative judge about the interrogations of the complainant and of another Belgian detainee at Guantanamo Bay (in the course of a criminal investigation being carried out against the complainant). According to Mr. Clareboets, the two detainees had complained that the circumstances of their detention had been very difficult: they were unaware of the reasons for their detention at Guantanamo Bay, and its estimated duration; they had not been charged with any offence, but had been subjected to many interrogations by the United States forces; and they did not have access to a lawyer for the entire duration of their detention.

2.9 The complainant claims that despite their knowledge – and the information available – about his unlawful detention at Guantanamo Bay, none of the Belgian authorities involved took any effective steps towards his release, nor carried out any genuine investigation into the complainant’s allegations of torture inflicted by the United States authorities. The complainant adds that he was not released from Guantanamo Bay despite the fact that Mr. Clareboets had actually advised the Belgian authorities that he would not pose any threat to the national security of Belgium if he were returned to that country.<sup>5</sup>

2.10 The complainant claims to have exhausted all available domestic remedies. On 22 November 2011, he filed a civil party complaint before the investigative judge at the Brussels Court of First Instance, against Mr. Clareboets and other unknown persons (marked in the complaint as “X”).<sup>6</sup> The complainant denounced the fact that Belgian authorities had remained inactive for years despite their clear obligations to intervene as they knew about the acts of torture perpetrated at Guantanamo Bay against the complainant. In two decisions, dated 18 January 2012 and 5 October 2012, the complaint was declared inadmissible, since one of the unknown suspects marked in the complaint as “X” was undoubtedly a member of the Federal Prosecutor’s Office who enjoyed “jurisdictional privilege”.<sup>7</sup>

2.11 The complainant explains that the investigative judge ordered the file to be sent to the Crown Prosecutor “to act as he should”, and that it appears that the Crown Prosecutor sent the file to the Federal Prosecutor. On 8 August 2013, the Federal Prosecutor requested the Brussels Court of First Instance to declare the complaint inadmissible, to relieve the investigative judge of his duties and to transfer the responsibility for the investigation to the Federal Prosecutor’s Office.

2.12 At the hearing of 10 December 2013 before the Brussels Court of First Instance, the complainant’s lawyers submitted that a decision to relieve the investigative judge of his duties and to transfer the file to the Federal Prosecutor’s Office would amount to a violation of articles 3, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) since it would result in the Federal Prosecutor’s Office having to investigate itself.

2.13 On 7 January 2014, the Brussels Court of First Instance declared the complaint inadmissible, referring in its reasoning to the “jurisdictional privilege” exemption, and decided to relieve the investigative judge of his duties and to transfer the file to the Federal Prosecutor’s Office.<sup>8</sup>

2.14 The complainant further explains that on 20 March 2014, the Brussels Chamber of Indictment partially dismissed his appeal against the decision of the Brussels Court of First Instance. It confirmed the inadmissibility of the complaint, but concluded that the file should be transferred to the Prosecutor-General of the Court of Appeal rather than to the Federal Prosecutor since the latter should not be investigating his own case.

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<sup>5</sup> The complainant includes a report by Mr. Clareboets to the Federal Public Prosecutor, dated 20 April 2005.

<sup>6</sup> The complainant attached the civil party complaint, dated 22 November 2011.

<sup>7</sup> The complainant includes both decisions, dated 18 January 2012 and 5 October 2012. Both have exactly the same content and were issued by the same investigative judge, P. van Aelst.

<sup>8</sup> The complainant annexed the decision, which is dated 7 January 2014.

2.15 The complainant submits that on 3 April 2014 a new Prosecutor-General was appointed, who was the same person who had served as Federal Prosecutor from 2007 to 2014 (Johan Delmulle), invoking a conflict of interest on the part of the latter.

2.16 The complainant submits that on 6 October 2015 the Prosecutor-General dismissed his complaint, arguing that there was no basis to find that a criminal offence had been committed by the defendants or others. The complainant claims that there is no further remedy available in Belgian law against such types of decisions.

2.17 The complainant submits that on 4 April 2016 he filed an application against Belgium before the European Court of Human Rights, claiming a violation by the State party of its obligations under articles 3 and 13 of the European Convention on Human Rights. On 2 June 2016 the Court ruled the case inadmissible in a single-judge decision, pursuant to articles 34 and 35 of the European Convention on Human Rights. The decision did not contain any details or specific reasons for dismissing the case.

2.18 The complainant affirms that his complaint has not been, and is not being, examined under another procedure of international investigation or settlement.

### **The complaint**

3.1 The complainant claims that the State party has violated its obligations under the Convention in several respects. Firstly, he argues that the State party failed to take all effective measures to prevent and/or to stop the acts of torture perpetrated against him when he was detained in Guantanamo Bay, contrary to article 2 of the Convention.

3.2 The complainant also submits that the State party has failed to investigate and prosecute the Belgian public officials who were complicit in the acts of torture committed against him when he was detained at Guantanamo Bay, even though the said public officials have been present and continue to be present in the State party's territory, contrary to articles 6 (1) and (2) and 7 (1) of the Convention.

3.3 The complainant also considers that the State party has failed to educate, train and inform its law enforcement personnel, public officials and other personnel involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment with regard to the absolute prohibition of torture, contrary to article 10 of the Convention.

3.4 Furthermore, the complainant considers that the State party has failed to ensure that its competent authorities proceed to a prompt and impartial investigation, despite the reasonable grounds for believing that torture was committed against the complainant in a territory and against a person who was under the State party's jurisdiction, pursuant to article 12 of the Convention.

3.5 The State party has also failed to ensure that the complainant has the right to complain to, and to have his allegations of torture promptly and impartially examined by, its competent authorities pursuant to article 13 of the Convention, notwithstanding the repeated requests in this regard.

3.6 The complainant submits that the State party has failed to ensure that he obtains effective redress and remedies under Belgian law for the acts of torture he was subjected to in Guantanamo Bay, including for the failure by the State party's authorities to promptly and impartially investigate his allegations upon his return to the State party of having been tortured, contrary to article 14 of the Convention.

### **State party's observations on admissibility**

4.1 On 17 May 2017, the State party submitted that since the same matter had been considered by the European Court of Human Rights, the present complaint to the Committee should be considered inadmissible.

4.2 The State party submits, referring to article 22 (5) (a) of the Convention, that "the Committee shall not consider any communications from an individual under this article unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement".

4.3 The State party observes that on 2 June 2016, the European Court of Human Rights adopted an inadmissibility decision in relation to an application submitted by the complainant concerning the same facts as those underlying his complaint to the Committee. The Court found that “considering all the elements... the admissibility criteria in articles 34 and 35 of the Convention had not been met”.

4.4 The State party submits that, according to the practice of the European Court of Human Rights, it can be presumed that the Court found the complaint inadmissible for reasons related to the merits of the case rather than on procedural grounds. The State party therefore considers that the Court has examined the complainant’s claims in the sense of article 22 (5) (a) of the Convention.

#### **Complainant’s comments on the State party’s observations**

5.1 On 11 September 2017, the complainant confirmed that his application to the European Court of Human Rights had been dismissed on 2 June 2016 by a single judge. The Court’s decision only mentioned that “the Court considers that the admissibility criteria in articles 34 and 35 of the Convention had not been met”. It was also stated in the decision that the judgment was final and could not be appealed to the Grand Chamber.

5.2 Regarding the argument that the communication is not admissible under article 22 (5) (a) of the Convention because of the European Court of Human Rights decision, the complainant submits that that Court’s decision does not preclude the Committee from examining his complaint since the “blanket dismissal” of the case by a single judge of the Court does not amount to an examination of the case within the meaning of article 22 (5) (a) of the Convention. The complainant refers to the Committee’s decision of 27 January 2017 in *S. v. Sweden*.<sup>9</sup> In that case too, the European Court of Human Rights issued a decision by a single judge, using the same reasoning. The Committee determined that this “succinct reasoning... does not allow the Committee to verify the extent to which the Court examined the complainant’s application, including whether it conducted a thorough analysis of the elements related to the merits of the case”. It concluded that it was not precluded by article 22 (5) (a) of the Convention from examining the communication. The complainant holds that the same reasoning should be applied in the present case.

5.3 The complainant further argues that his case was not examined within the meaning of article 22 (5) (a) of the Convention, as it was dismissed for procedural reasons only, without a decision being taken on the merits of the case. The complainant refers to the jurisprudence of the Human Rights Committee, according to which a case cannot be deemed to have been examined “where a complaint to another international instance, such as the European Court of Human Rights, was dismissed on procedural grounds without examination of the merits”.<sup>10</sup> Only when the European Court of Human Rights bases a finding of inadmissibility not only on procedural grounds, but also on grounds arising from some degree of consideration of the substance of the case, would a case that had been deemed inadmissible be precluded under article (5) (2) (a) of the Optional Protocol of the International Covenant on Civil and Political Rights.<sup>11</sup>

5.4 The complainant asserts that it is necessary to determine whether the inadmissibility decision of the European Court of Human Rights included considerations concerning the merits of the case. In the present case, that Court dismissed his complaint by broadly stating that the admissibility criteria in articles 34 and 35 of the European Convention on Human Rights had not been met. He explains that those articles contain a variety of admissibility criteria, including, principally, formal criteria such as the exhaustion of local remedies, as well as criteria that involve a substantial examination of the case. The complainant submits that it is impossible to determine whether the case was declared inadmissible by the Court for procedural reasons only or also on substantive grounds.

<sup>9</sup> *S v. Sweden* (CAT/C/59/D/691/2015), paras. 7.2–7.6. See also *H.A. v. Sweden* (CAT/C/63/D/744/2016), paras. 6.3–6.6.

<sup>10</sup> See, for example, *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 8.1.

<sup>11</sup> *Aarrass v. Spain* (CCPR/C/111/D/2008/2010), para. 9.3.

5.5 Finally, the complainant submits that the decision of the European Court of Human Rights did not concern “the same matter” contained in his complaint to the Committee within the meaning of article 22 (5) (a) of the Convention. He refers to the jurisprudence of the Committee, according to which a case concerns “the same matter” if it is related to “the same parties, the same facts, and the same substantive rights”.<sup>12</sup> The complainant claims that his complaint to the Committee presented a broader range of violations committed by the State party than those that he brought to the attention of the European Court of Human Rights, referring to the fact that he also invoked a violation of article 10 of the Convention before the Committee, whereas the European Convention on Human Rights does not contain a similar provision.

#### **State party’s observations on admissibility and the merits**

6.1 On 6 August 2018, the State party submitted its observations on the admissibility and the merits of the case, recalling that the complainant had been detained at Guantanamo Bay from 15 February 2002 to 25 April 2005.

6.2 According to the State party, the complainant claims that Belgium has not taken necessary measures to prevent, stop and investigate the acts of torture against him, that it has not investigated and prosecuted the officials implicated in the acts of torture, and that it has not taken measures of education or instruction for personnel involved in the detention, interrogation or treatment of persons detained or imprisoned. He also claims a violation of articles 12 and 13 of the Convention on the basis of the failure of Belgian authorities to carry out a prompt and impartial investigation into the acts of torture against an individual under the jurisdiction of the State party, and a violation of article 14 of the Convention by failing to provide him, as a Belgian national, with adequate reparation for acts of torture.

6.3 The complainant requests the Committee to find a violation of the Convention articles referred to, to request an explanation for the actions of the Belgian authorities implicated in the decision not to investigate the torture of the complainant, and to request that Belgian authorities carry out a prompt and impartial investigation into the acts of torture, including a reopening of the criminal procedure against those suspected of complicity, and granting the complainant full compensation and rehabilitation.

6.4 The State party submits that the complainant was released by the United States authorities on 24 April 2005, following the agreement dated 20 April 2005, and that he returned to Belgium subsequently. On 18 June 2010, a medical certificate was issued by Dr. Audenaert, attesting the complainant’s symptoms of post-traumatic stress disorder, paranoia and psychotic behaviour, which can be attributable to his ill-treatment in Guantanamo Bay.

6.5 The State party reiterates that the complaint is inadmissible pursuant to article 22 (5) (a) of the Convention since the European Court of Human Rights on 2 June 2016 declared the complainant’s application inadmissible. The State party has deduced that such conclusion was reached for reasons related to the merits, rather than to procedure, since Belgium did not exercise any power or factual control over the Guantanamo Bay detention centre and hence the European Convention on Human Rights would not apply. In its view, the European Court of Human Rights has accepted extraterritorial jurisdiction only exceptionally, for example when in effective control of foreign territory. The European Court of Human Rights generally concludes inadmissibility of the applications in similar circumstances, due to the absence of a jurisdictional link between the victim of the alleged violations and the defendant State, when the latter did not exercise jurisdiction extraterritorially.<sup>13</sup> The State party also notes that the application could not be considered inadmissible on formal procedural grounds, since domestic remedies were duly exhausted and the application was submitted within the six-month time limit. Accordingly, the State party reiterates that the European Court of Human Rights has examined the complainant’s application on the merits.

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<sup>12</sup> See, for example, *A.R.A. v. Sweden* (CAT/C/38/D/305/2006), para. 6.2.

<sup>13</sup> See, for example, the decision of inadmissibility in *Bankovic et al. v. Belgium and 16 other States parties* (application No. 52207/99) or in *Khan v. United Kingdom* (application No. 6222/10).

6.6 Furthermore, the State party claims that the complainant's allegations are without any merit.

6.7 As regards claims under article 2, the State party objects to the claim that it encouraged or permitted the acts of torture or ill-treatment against the complainant in Guantanamo Bay. The State party never influenced the chain of command, which was at the origin of the complainant's treatment, and it did not have any means of securing his liberation before his release by the United States authorities on 20 April 2005.<sup>14</sup> Moreover, the Belgian authorities were neither directly nor indirectly involved in the complainant's arrest or his transfer to the United States authorities. The present complaint differs substantially from the cases of *Abu Zubaydah v. Lithuania*, *Al Nashiri v. Romania* and *El-Masri v. the former Yugoslav Republic of Macedonia*,<sup>15</sup> in which the States parties concerned exercised their jurisdiction by arresting and handing over the applicants. The fact that the liaison officer of the Belgian Federal Police, Mr. Clareboets, officially interrogated the complainant on three occasions between April 2002 and February 2004 cannot be considered as exercising direct or indirect effective control over the complainant. Moreover, the United States authorities refused the requests for consular visits by the Belgian authorities, with two exceptions, and only accepted visits by the Belgian police, judiciary or secret service. Since further diplomatic efforts were undertaken in order to visit the complainant, the fact that the Belgian authorities did not succeed in obtaining his release cannot be considered as complicity in torture by omission.

6.8 Moreover, the General Counsel sent a letter, dated 12 November 2002, to the United States authorities, accompanied by the request by the complainant's counsel for clarification of the circumstances of the complainant's detention and of the guarantees available to him. The United States Department of State avoided the questions and responded only generally that all "enemy combatants" were treated humanely, and in a manner consistent with the principles of the Geneva Conventions of 1949, and that the International Committee of the Red Cross could visit them individually and privately on a regular basis. The State party claims that conditions of detention similar to those of the complainant were not publicly known about at the end of 2002.

6.9 The State party admits that the absence of access to a legal counsel and the detention of the complainant without prosecution could appear as a violation of the right to a legal defence. However, the State party could not be held accountable for complicity in the acts of torture. The creation of a category of "enemy combatants", outside the framework of the Geneva Conventions, did not deviate from the provisions of the Third Geneva Convention of 1949 (arts. 99–108). The individual is either a prisoner of war<sup>16</sup> or a prisoner (detainee) under the general law. It would be unrealistic to expect that Belgium could force the United States to change this doctrine, which had already been heavily criticized. The State party was not in a position to have required that the United States ensure access of the complainant to a legal counsel, and its authorities could only seek information from their counterparts about the developments in the complainant's situation, while seeking guarantees of his rights.

6.10 In its response of 16 March 2004, the Belgian Ministry of Foreign Affairs described its efforts to ensure consular assistance, which had included discussion of a possible return to Belgium of the complainant and one other national detained in Guantanamo Bay, monitoring the medical conditions of the complainant and requesting his access to a dentist. In its letter of 11 August 2004, the Belgian Ministry of Foreign Affairs confirmed that the complainant's repatriation was under discussion, without mentioning any possible extradition, and stated that he was not on the list of persons to be transferred to Morocco. The complainant's chances of being transferred back to Belgium increased following the judgment of the Supreme Court of the United States in the *Hamdi* case. As confirmed by the Belgian Ministry of Foreign Affairs on 13 December 2004, "an Administrative Review Board

<sup>14</sup> The State party argues that the Amnesty International report denouncing the detentions in Guantanamo Bay, outside civil jurisdiction, is dated 25 May 2005, after the complainant's release.

<sup>15</sup> Respectively: application No. 46454/11, judgment of 31 May 2018; application No. 33234/12, judgment of 31 May 2018; and application No. 39630/09, judgment of 13 December 2012.

<sup>16</sup> The Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) does not guarantee to a prisoner of war the right to be assisted by legal counsel, unless he or she is prosecuted.

[will] evaluate the possibility of release or transfer of one or more of your nationals detained in Guantanamo Bay”.

6.11 The complainant bases his claims on the fact that Mr. Clareboets “shared the information from his interrogations of the complainant at Guantanamo Bay with both the United States and the Belgian authorities” to substantiate the alleged complicity of Belgium in violation of article 2 of the Convention. However, the complainant denies that the report by Mr. Clareboets was established in his favour, with a view to his liberation or transfer, and that it was transmitted together with the submission by the complainant’s family. Moreover, the Administrative Review Board confirmed the complainant’s absence of a criminal record in Belgium. Therefore, the report by Mr. Clareboets aimed to help the complainant while pleading in favour of his return. Mr. Clareboets attested, following the complainant’s interrogation of 28 April 2005: “He described numerous interrogations to which he was subjected by the Americans and the very harsh detention conditions, complaining that he was not informed about the expected length of his detention. In addition, he was not presented with any accusations against him, was not informed about his rights and could not enjoy the right of legal assistance. In this regard, we have always informed him that the Belgian authorities will stand by him.”<sup>17</sup>

6.12 In April 2004, the high-level delegation of Belgium was received at the United States Department of State, and expressed its intention to monitor the complainant and his co-detainee, if released. In September 2004, the United States authorities interrupted the negotiations and examined the possible removal of the complainant to his second country of nationality, Morocco, after having discovered contact between his brother Ahmed and the leadership of Al-Qaida. The two detainees were released on 25 April 2005, after an intervention by the Prime Minister of Belgium, Guy Verhofstadt, with the President of the United States, George Bush. The State party adds that its authorities have been in regular contact with the complainant’s counsel, including by telephone.

6.13 As regards allegations under articles 6 (1) and (2) and 7 (1) of the Convention, the State party claims that the Belgian alleged suspects have remained present in the territory of Belgium. It opposes the claim that it would have an obligation to conduct an inquiry in the absence of a complaint of torture. The State party submits that the complainant submitted a civil claim against two Belgian judges – Ms. Van de Voorde and Daniel Bernard – who had requested a visit to the complainant at Guantanamo Bay by Mr. Clareboets. The civil claim was, however, dismissed as it opposed judicial competence, and the investigations of the judges concerned were closed without hearing the Chief Commissioner for Anti-Terrorism of the Federal Police or a liaison officer who had visited the complainant. The State party rejects the complainant’s claims that the Belgian authorities contributed by their passivity to his exposure to torture as they had allegedly exercised partial de facto control over him during the visit, as manifestly ill-founded. The complainant’s claims against Mr. Clareboets and the Federal Public Prosecutor’s Office were twice transferred to the Royal Prosecutor, but the Court of First Instance ruled on 18 January 2012 that the investigations were to be carried out by the Federal Public Prosecutor’s Office. The State party refutes the complainant’s argument that the two-year delay in investigation could be considered as denial of justice. Following the complainant’s appeal, the investigation was finally transferred to the Federal Public Prosecutor’s Office on 2 July 2014.

6.14 The State party submits that both judges provided their written statements to the Federal Public Prosecutor. On 6 October 2015, the Court of Appeal affirmed that the federal judges and the liaison officer had not been implicated in the alleged acts of torture, and hence could not be held criminally liable. The investigation was carried out by an investigating judge, who is a member of the Court of First Instance, with due respect for independence and impartiality. The conclusions on the investigations have been made by two separate judicial institutions – the Chamber of the Council and the House of Charges. The complainant also questioned, without any evidence, the independence of the Federal Public Prosecutor, as the latter reportedly could not investigate effectively the complaint submitted against the members of the Federal Public Prosecutor’s Office. The State party submits that the alleged

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<sup>17</sup> Mr. Clareboets was heard as a witness in the criminal procedure against the complainant, not as a party to the complainant’s civil claim against Mr. Clareboets and others.



lack of impartiality cannot be justified by a hierarchical relationship between the prosecutors, and refutes that the investigation was based on written declarations by the two federal judges who had rejected their alleged lack of impartiality. Moreover, the State party objects to the claim that the prosecutor's investigations and findings would not be thorough and objective. Instead, it considers the complainant's allegations as made up since his claims of delays and incomplete investigations were not substantiated,<sup>18</sup> as the investigations were launched in 2014 and the testimonies by the officials and the complainant were considered as being of equal importance.

6.15 Finally, the State party denies that the Government violated its obligations emanating from the Convention by using Belgian law as an excuse for not establishing jurisdiction over Belgian suspects, and by not conducting a prompt and impartial investigation and prosecuting suspects for their complicity in the acts of torture.

6.16 As regards article 10 of the Convention, the State party affirms that the information on the absolute prohibition of torture was shared during the general human rights education, and during the training on the appropriate use of force by law enforcement officers.<sup>19</sup> Awareness about the detection and the prohibition of torture and ill-treatment is part of the basic and follow-up training for the police. Training of police personnel is subject to an annual training plan, and the police are continuing their efforts to strengthen the training of staff at all levels, including on the prohibition of torture. Over and above training, police officers are assessed on an ongoing basis on their respect for human rights, and where appropriate, the lack thereof is sanctioned through statutory assessment procedures or recourse to existing disciplinary and penal procedures. Prohibition of torture is also part of police ethics. The State party thus cannot agree with the complainant's conclusions about the absence of training for public officials, since Mr. Clareboets did not detect that the complainant had been subjected to torture.

6.17 With regard to the claims of violations of article 14, the State party objects that it would have failed in ensuring adequate reparation to the complainant, including rehabilitation for torture endured during detention, which would have required effective investigation into his allegations. The complainant claimed that he had been detained in Guantanamo Bay from 15 February 2002 to 25 April 2005 without any charges being brought against him and without being informed of the reasons for his detention or of its duration. States parties are required under article 14 of the Convention to undertake a prompt and impartial investigation into allegations of torture, and to recognize this duty officially, so to be able to offer an apology from the responsible authorities, to prosecute the presumed authors and to offer rehabilitation or financial compensation for the harm suffered. Despite the complainant's action against a civil party before the investigating judge of the Brussels Court of First Instance, the complainant has not received any form of compensation since his return to Belgium, and the investigative judge declared his complaint inadmissible on the basis of the jurisdictional privilege of the judges concerned. The complainant's request for a criminal investigation into the acts of torture was also dismissed by the Prosecutor-General, since the civil claims against the federal judges had been rejected. The complainant wishes to obtain full reparation from Belgium for complicity of the Belgian public officials, including Mr. Clareboets, Ms. Van de Voorde and Mr. Bernard. The State party claims that it is offended by accusations of complicity in torture suffered by the complainant at Guantanamo Bay, given that it had no direct or indirect control over the foreign territory. There is no reason to question the inadmissibility decisions of the investigative judge, who rejected the request for criminal investigation of the allegations of torture after duly hearing the federal judges pursued by the civil action. Given the lack of complicity in the complainant's detention by its agents, the State party considers the complaint manifestly unfounded and inadmissible. The State party concludes that it cannot be held liable under the Convention, reiterating that the complaint is also without merits.

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<sup>18</sup> The complainant also claimed that the Federal Public Prosecutor had failed to take into account the report by the United States Senate in regard to the programme of reinforced interrogations by the Central Intelligence Agency.

<sup>19</sup> The State party refers to CAT/C/BEL/2 and CAT/C/BEL/3.

### Complainant's comments on the State party's observations

7.1 On 20 February 2019, the complainant reiterated that the decision of 2 June 2016 of the European Court of Human Rights did not preclude the Committee under article 22 (5) (a) of the Convention from examining the present communication.

7.2 The complainant recalls that the European Court of Human Rights dismissed his application without an indication of specific grounds, referring generally to articles 34 and 35 of the Convention. The State party hence erroneously assumes that the Court deemed the case inadmissible for reasons related to the substance of the case rather than on purely procedural grounds. The State party wrongly assumed that the Court had examined the merits of the present case, inferring this from the fact that none of the procedural reasons for inadmissibility under the provisions of article 35 (1) and (2) of the European Convention on Human Rights would apply.

7.3 Moreover, the State party erroneously argued that the European Court of Human Rights eventually decided that the complainant's case was inadmissible on the basis of article 35 (3) (a), as the complainant's case did not fall under the jurisdiction of the Convention. Its arguments for denying jurisdiction over the complainant for the duration of the time that he spent in custody in Guantanamo Bay are irrelevant for the purposes of admissibility. The State party's arguments appear to be a contradictory attempt to avoid its absolute legal obligation under the Convention to ensure that there is no gap in protection of human rights due to inappropriate and artificial limits on territorial jurisdiction.<sup>20</sup>

7.4 The State party is not introducing any new element to argue that the Committee is precluded by article 22 (5) (a) of the Convention from examining the communication. Moreover, it does not contest the material facts initially submitted. The complainant restates that a general inadmissibility decision by another human rights body does not mean that the matter has in any way been considered on the merits, that is, examined within the meaning of article 22 (5) (a) of the Convention, as is confirmed by the Committee's jurisprudence. In *H.A. v. Sweden*,<sup>21</sup> the Committee concluded that "the succinct reasoning provided by the European Court of Human Rights... does not allow the Committee to verify the extent to which the Court examined the complainant's application, including whether it conducted a thorough analysis of the elements related to the merits of the case". Such a position is consistent with the well-established jurisprudence of other United Nations treaty bodies, including the Human Rights Committee.<sup>22</sup> Moreover, the present communication does not concern the "same matter" for the purposes of admissibility before this Committee,<sup>23</sup> since the range of violations alleged by the complainant is broader than the claims presented to the European Court of Human Rights.<sup>24</sup> Since that Court did not reach any substantive determination about the complainant's situation or about the violations by Belgium of its international obligations, the present communication should be considered admissible.

7.5 On the merits, the complainant submits that his claims fall under the State party's jurisdiction for the purpose of article 2 of the Convention – opposing the State party's argument that extraterritorial jurisdiction would remain an exception in international human rights law.<sup>25</sup> The Committee has considered that the scope of territory under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure, control over persons in detention, which reinforces article 5 (1) (b) requiring that a State party

<sup>20</sup> A/70/303, para. 13.

<sup>21</sup> See para. 6.5; see also *S v. Sweden*, para. 7.5.

<sup>22</sup> See, for example, *Yaker v. France* (CCPR/C/123/D/2747/2016), para. 6.2; and *Hebbadj v. France* (CCPR/C/123/D/2807/2016), para. 6.4.

<sup>23</sup> *A.R.A. v. Sweden*, para. 6.2; and *A.A. v. Azerbaijan* (CAT/C/35/D/247/2004), para. 6.8.

<sup>24</sup> For example, the present communication claims a violation of article 10 of the Convention, which is not included in the application submitted to the European Court of Human Rights on 4 April 2016.

<sup>25</sup> In a similar case – *Hicks v. Australia* (CCPR/C/115/D/2005/2010), para. 4.5 – the Human Rights Committee held that "the influence held by the State party cannot be seen as amounting to the exercise of power or effective control over the author, who was detained in a territory controlled by the United States that was not under the sovereignty or jurisdiction of the State party."

take measures to exercise jurisdiction “when the alleged offender is a national of the State”.<sup>26</sup> The “territory of a State” is not intended as being limited to its physical or geographical extension, but also as extending extraterritorially to include the State’s personal jurisdiction over persons in detention.<sup>27</sup> The complainant argues that the decision in *Hicks v. Australia* is not relevant in the present case, given the absolute and non-derogable character of the prohibition of torture, accepted as customary international law. Moreover, the interrogation at Guantanamo Bay carried out by the Belgian federal counter-terrorism investigators in their official capacity qualifies as intelligence activities carried out by Belgium which fully engage that State’s responsibility.<sup>28</sup>

7.6 As regards the argument that the Belgian authorities had no means of having the complainant released before the agreement dated 20 November 2005,<sup>29</sup> nor any direct or indirect authority, de facto or de jure, to obtain his transfer from Guantanamo Bay, the complainant reiterates that the State party has violated its obligations under article 2 (1) and (2) of the Convention. The Belgian authorities knew that acts of torture were being perpetrated against the complainant, a Belgian national, while he was detained at Guantanamo Bay, but failed to take any action to prevent or stop the torture of the complainant, including, at the very least, requesting his repatriation. In fact, Belgian authorities participated in the unlawful interrogation and related torture of the complainant by the United States, as the Belgian investigators immediately reported any information gathered from the complainant to the United States authorities. In general, the interrogations conducted by the Belgian investigators at Guantanamo Bay were in no way prompted by the purpose of having the complainant released or transferred or checking on his well-being.

7.7 Furthermore, the complainant refutes the State party’s allegation that the Belgian authorities had no reason to believe that the United States was torturing the complainant, pointing out that the Committee warned Belgium as early as in November 2001 of its non-derogable obligation as a State party to the Convention, in light of its various responses to the events of 11 September 2001.<sup>30</sup> As explained earlier, Belgian authorities were aware of the arrest of the complainant by Pakistani authorities and of his transfer into United States custody. Belgium was also promptly informed about the unlawful circumstances of his detention at Guantanamo Bay. Additionally, it knew that the United States was attempting to skirt its international obligations when it transferred detainees to non-United States territory and declared long-standing treaties and principles of humanitarian law nullified.

7.8 Regarding failure to take any action to prevent or stop the torture of the complainant, Belgium describes a number of visits and interrogations and frequent interactions with United States authorities carried out by Belgian officials, who insisted that they were all “in favour” of the complainant and had the objective of having him released or transferred. In particular, the State party emphasizes that the federal counter-terrorism investigator Mr. Clareboets shared information from his interrogations of the complainant at Guantanamo Bay with both United States and Belgian authorities in order to gain favour for the transfer or repatriation of the complainant. It would seem inexplicable that so many alleged diplomatic efforts, carried out over three years, did not succeed in securing the transfer or release of the complainant from detention at Guantanamo Bay. It appears that Belgium failed to take any meaningful measures to prevent its own authorities or other persons acting in an official capacity from consenting to or acquiescing in acts of torture or ill-treatment perpetrated at Guantanamo Bay, and in fact participated in the complainant’s torture by interrogating him, in violation of article 2 of the Convention.

<sup>26</sup> Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, paras. 16 and 24.

<sup>27</sup> Human Rights Committee, *López Burgos v. Uruguay*, communication No. 52/1979, paras. 12.1–12.3; and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10.

<sup>28</sup> CAT/C/USA/CO/2, para. 17.

<sup>29</sup> While the complainant referred to 20 November 2005, he may have meant 20 April 2005 (see footnotes 5 and 6 above).

<sup>30</sup> Statement of the Committee (CAT/C/XXVII/Misc.7) of 22 November 2001.

7.9 The Belgian authorities became complicit in the torture, first by sending federal counter-terrorism experts from the Belgian intelligence service to Guantanamo Bay to participate in the complainant's interrogations, and then by sharing unverified and incriminating information with United States authorities, instead of genuinely trying to establish diplomatic efforts. Upon invitation by United States authorities, and with the authorization of the Belgian Federal Prosecutor, the Belgian Federal Police liaison officer and counter-terrorism investigator stationed in Washington, D.C., Mr. Clareboets, interrogated the complainant several times during his three visits to Guantanamo Bay between April 2002 and February 2004. Similar involvement by other States' officials has been considered as a form of complicity in the mistreatment and torture of detainees abroad. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in his interim report of 2015, found that complicity itself could be extraterritorial, such as in cases where the individual suffering a violation was located in a territory outside the "complicit State's control" and under the control of the principal. Since Mr. Clareboets shared information from his interrogations of the complainant at Guantanamo Bay with both the United States and Belgian authorities, corresponding directly with the Belgian Federal Prosecutor's Office, the assertion that Mr. Clareboets reported the above-mentioned information in favour of the complainant in order to get him released is not substantiated. On the contrary, it appears from the factual evidence of the case that confidential, unverified and damaging information was shared.

7.10 The complainant reiterates that the State party violated its obligations under articles 6 (1) and (2) and 7 (1), read alone and in conjunction with articles 12 and 13 of the Convention, by failing to investigate and prosecute public officials who were complicit in acts of torture committed against the complainant while he was detained at Guantanamo Bay, even though the responsible Belgian public officials were present and continued to be present in Belgian territory. The State party also violated articles 12 and 13 of the Convention due to failure by the competent Belgian authorities to proceed with a prompt and impartial investigation, despite the existence of reasonable grounds to believe that torture had been committed against a person under the State party's jurisdiction, and for failure to have the complainant's case promptly and impartially examined by the State party's competent authorities, notwithstanding the repeated requests by the complainant.

7.11 The complainant explains that he was only able to submit his civil party claim in 2011, once he had received a psychiatric report on 18 June 2010 about the consequences of the treatment he had been subjected to. The State party failed to take the necessary measures to investigate and prosecute suspects for their role in acts of torture perpetrated against the complainant, as neither the Federal Magistrate, Ms. Van de Voorde, nor the Federal Prosecutor, Mr. Bernard, nor Judge Fransen, the investigative judge, carried out any genuine investigation into the complainant's allegations of torture inflicted on him by the United States authorities while in Guantanamo Bay. Furthermore, the complainant submits that his quest for justice in Belgium (a) was frustrated by unnecessary and complex procedural and jurisdictional hurdles and lack of judicial responsibility; (b) was not dealt with in an independent way, because the complaint against two members of the Federal Prosecutor's Office was first assigned to the very same Federal Prosecutor's Office, and then to the Prosecutor-General who had recently been transferred from the very same Federal Prosecutor's Office; (c) was not conducted in a thorough manner, considering, inter alia, that none of the people involved were questioned or investigated; and (d) because the Prosecutor-General decided to dismiss the case solely on the basis of the written observations of the two federal magistrates against whom the complaint was addressed, without hearing the two suspects or the complainant. Formal investigations were not opened until September 2014 – more than 12 years after the beginning of the complainant's detention and nine years after the complainant had been repatriated to Belgium. The Belgian authorities became active only after a civil party claim was submitted in November 2011.

7.12 The complainant adds that the State party has violated its obligations under article 10 of the Convention, for its failure to educate, train and inform its law enforcement personnel, public officials and other persons involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment about the absolute prohibition of torture – specifically concerning the detention, interrogation and inhuman treatment of the complainant at Guantanamo Bay. The State party also violated its obligations

under article 14 of the Convention as it failed to ensure that the complainant obtained redress, including rehabilitation, for torture committed against him while detained at Guantanamo Bay, particularly due to the failure of Belgian authorities to properly and genuinely investigate the complainant's allegations of torture.<sup>31</sup>

7.13 In conclusion, the complainant submits that he has never been recognized as a victim of torture by Belgium, a State that has a duty to protect him, but rather has been treated as an enemy. This began in Guantanamo Bay, where he was unfairly labelled and treated as an "unlawful enemy combatant", and continues to this day in Belgium, where he is stigmatized as a "former Guantanamo Bay detainee". The complainant's only desire is to try to put his life back together and live a normal life with his family. He requests that the State party provide him with full redress – as a victim of well-documented torture – for which Belgium bears significant responsibility.

#### **State party's additional observations**

8.1 On 5 April 2019, the State party submitted that the complainant had filed on 31 December 2018 a claim for civil extracontractual liability against Belgium before the Brussels Court of First Instance, due to the State party's unlawful actions, namely: collaborating actively with the United States authorities, and the absence of any effective assistance during the complainant's arbitrary detention and inhuman treatment in Guantanamo Bay, in violation of articles 3 and 5 of the Convention. The complainant also claimed that the State party had failed to undertake a prompt criminal investigation to establish accountability of the State party's officials, from 2011 to 2016, in violation of article 3, read together with article 13, of the European Convention on Human Rights.

8.2 The complainant requested provisional compensation of €200,000, to be increased for interest and the costs of the procedure. During the opening hearing, on 11 January 2019, a calendar was established for the exchange of views between the parties, and a plenary hearing was fixed for 5 June 2020. The State party submitted that since the complainant had seized the Brussels Court of First Instance with the same claims, the complaint should be considered inadmissible.

#### **Complainant's additional comments**

9.1 On 15 May 2019, the complainant submitted additional comments in response to the admissibility observations of the Government of Belgium, of 5 April 2019.

9.2 The complainant considers the State party's argument of inadmissibility due to pending parallel proceedings for extracontractual civil liability of Belgium as erroneous. The State party's position with regard to the civil claim filed on 31 December 2018 is that this would be barred by the statute of limitations, as the State party claimed that the time period of five years for claiming extracontractual damages would have elapsed. In the complainant's view, the State party is aiming to have both procedures closed for inadmissibility, rather than admitting the tort suffered by the complainant during his unlawful detention in Guantanamo Bay.

9.3 The State party's attempt to have the claim dismissed must be firmly rejected, as the claim is not supported by the provisions of the Convention. According to article 22 (5) (a) of the Convention, the Committee is not to consider any communications unless it has ascertained that "the same matter has not been, and is not being, examined under another procedure of international investigation or settlement". This means that only procedures on the same matter under international or regional human rights treaties are suitable for barring of the examination,<sup>32</sup> whereas the domestic civil claim filed by the complainant is not covered by that provision.

9.4 Article 22 (5) (b) requires the individual to have exhausted all available domestic remedies, unless the application of the remedies is unreasonably prolonged or is unlikely to

<sup>31</sup> See, for example, *Dimitrijevic v. Serbia and Montenegro* (CAT/C/35/D/172/2000), paras. 7.4–9.

<sup>32</sup> Manfred Nowak and Elizabeth McArthur, "The United Nations Convention against Torture: a commentary", *Oxford Commentaries on International Law* (2008), para. 4.13.

bring effective relief to the victim. The complainant elaborated on those issues in his comments of 11 September 2017, and the State party acknowledged the exhaustion of all domestic remedies by the complainant in its response dated 6 August 2018 (see p. 6 above). In addition, the Committee has found that if the State concerned does not raise any objections on the point, it will assume that all available remedies have been exhausted.<sup>33</sup>

9.5 Moreover, the Committee has stated that when multiple remedies are available, it is sufficient that one of those remedies is exhausted without success. The victim is not required to pursue multiple ways to seek a remedy, such as through both criminal and civil proceedings, which would have been directed essentially to the same end, in order to file a petition before the Committee. Therefore, the criminal complaint filed by the complainant is sufficient and adequate in order to meet the procedural requirements for the submission of a complaint to the Committee, which do not require civil proceedings to be exhausted as well.

9.6 Article 22 (5) (b) of the Convention requires complainants to exhaust effective remedies, as the Committee has stated that it is within the scope of its competence to evaluate whether the domestic remedies are appropriate remedies “for the determination of the author’s claims”.<sup>34</sup> The complainant argues that the civil pecuniary proceedings that have been initiated against Belgium would have been inadequate for the purpose that the complainant was seeking at the time, that is, to see those responsible for his ill-treatment brought to justice. Furthermore, only “effective remedies” must be exhausted. The case law in regard to torture requires bringing the matter to the public authorities’ attention so that it can be investigated and the State prosecutor can bring charges, exactly as the criminal suit filed by the complainant aimed to do; for such serious offences, the complainant is therefore not required to sue for damages because damages alone are not sufficient to constitute an effective remedy.<sup>35</sup>

9.7 When acts of torture are involved, the Committee may find a communication admissible – even when the complainant has not exhausted domestic remedies – if a State party’s courts have been informed and are aware that a person has been tortured. According to article 12 of the Convention, States parties have an obligation to initiate ex officio prosecutions wherever there are reasonable grounds to believe that an act of torture has been committed, that is, even if the victim does not press charges or initiate proceedings.<sup>36</sup>

9.8 In conclusion, the civil proceedings that have now been initiated by the complainant are neither a procedure of international investigation or settlement under article 22 (5) (a), nor a remedy that must be exhausted under article 22 (5) (b) of the Convention.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

10.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention.

10.2 The Committee recalls that, under article 22 (5) (a) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee recalls its jurisprudence that examinations by the European Court of Human Rights constitute such a procedure.<sup>37</sup>

10.3 The Committee considers that a communication has been or is being examined by another procedure of international investigation or settlement if the examination by the procedure relates or related to the same matter within the meaning of article 22 (5) (a). The same matter must be understood as relating to the same parties, the same facts and the same substantive rights.<sup>38</sup> The Committee observes that on 4 April 2016, the complainant

<sup>33</sup> See, for example, *M.S. v. Denmark* (CAT/C/55/D/571/2013), para. 6.2.

<sup>34</sup> See, for example, *M.A. v. Canada* (CAT/C/14/D/22/1995), para. 4.

<sup>35</sup> See, for example, *Kroumi v. Algeria* (CCPR/C/112/D/2083/2011), para. 7.4.

<sup>36</sup> See, for example, *Gallastegi Sodupe v. Spain* (CAT/C/48/D/453/2011), para. 6.4.

<sup>37</sup> See, for example, *A.A. v. Azerbaijan*, para. 6.7.

<sup>38</sup> *N.B. v. Russian Federation* (CAT/C/56/D/577/2013), para. 8.2.

submitted an application to the European Court of Human Rights against Belgium, invoking a violation of articles 3 and 13 of the European Convention on Human Rights (registered under No. 20232/16), which was declared inadmissible on 2 June 2016 by a single-judge decision (see paras. 2.17 and 4.3 above). The Committee observes the State party's argument that the same matter had already been considered since the European Court of Human Rights had deemed the case inadmissible for reasons related to the merits of the case rather than procedural grounds (see paras. 4.1–4.4 above). The State party argued that the European Court of Human Rights generally concluded inadmissibility if a defendant State did not exercise jurisdiction extraterritorially, while the State party asserted that formal procedural grounds for the admissibility of the application had been met (see para. 6.5 above). The Committee also notes the complainant's argument that the European Court of Human Rights declared the complainant's application inadmissible as the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met, without providing any explanation as to the specific reasons that had led it to such determination. The complainant held that such a "blanket dismissal" could not be considered as an examination of the case in the context of article 22 (5) (a), and that it was impossible to determine whether the case had been declared inadmissible by the European Court of Human Rights for procedural reasons only or also on substantive grounds (see paras. 5.1–5.5 and 7.2–7.4 above). The Committee observes that the complainant's application before the European Court of Human Rights appears to refer, except for the claims under article 10 of the Convention, to the same facts related to torture and lack of investigation as those raised in the present communication (see paras. 2.17 and 5.5 above). In this context, the Committee recalls that it is bound by the complainant's allegations of facts and evidence, while retaining discretion to assess legal claims stemming from the complaint.

10.4 While the Committee notes that the European Court of Human Rights, in its decision, does not set forth detailed reasoning for its finding of inadmissibility, the Committee observes that application No. 20232/16 was submitted to the European Court of Human Rights by the same complainant, was based on the same facts, and related predominantly to the same substantive rights as those invoked in the present communication. In these circumstances, the Committee considers that the same matter has been examined by another international procedure within the meaning of article 22 (5) (a), which it declared inadmissible for lack of substantiation. Accordingly, the Committee considers that the requirements of article 22 (5) (a) of the Convention have not been met in the present case and that the complaint is thus inadmissible.

10.5 In the light of the above finding, the Committee does not consider it necessary to examine separately the State party's arguments that the communication is also inadmissible as the domestic remedies remain pending, or that the complainant's claims are manifestly ill-founded.

10.6 The Committee therefore decides:

- (a) That the communication is inadmissible under article 22 (5) (a) of the Convention;
- (b) That the present decision shall be communicated to the complainant and to the State party.

## Annex

[Original: French]

### Opinion individuelle (dissidente) d'Abdelwahab Hani

1. Je ne suis pas d'accord avec la décision d'irrecevabilité de cette requête, qui dévie de la jurisprudence du Comité et menace la cohérence de ses décisions.
2. Conformément au paragraphe 5 a) de l'article 22 de la Convention, le Comité n'examine aucune requête sans s'être assuré que la même question n'a pas été examinée et n'est pas en cours d'examen par une autre instance internationale d'enquête ou de règlement.
3. Le Comité a forgé sa jurisprudence sur le principe selon lequel une requête a été ou est actuellement examinée par une autre instance internationale d'enquête ou de règlement si l'examen par cette instance portait ou porte sur la même question au sens du paragraphe 5 a) de l'article 22 de la Convention. Par la « même question », il faut entendre une question qui concerne les mêmes parties, les mêmes faits et les mêmes droits<sup>1</sup>.
4. Le 2 juin 2016, soit moins de deux mois après l'introduction de la demande du requérant devant la Cour européenne des droits de l'homme, cette dernière, siégeant en formation de juge unique, a déclaré cette demande irrecevable, au motif que les conditions de recevabilité prévues par les articles 34 et 35 de la Convention européenne des droits de l'homme n'étaient pas remplies, sans expliquer son analyse ni les raisons précises qui l'avaient conduite à une telle conclusion.
5. Il n'est donc pas possible pour le Comité de savoir dans quelle mesure la Cour européenne des droits de l'homme a examiné la demande du requérant, notamment si elle a procédé à une analyse approfondie des éléments liés au fond de l'affaire, ce qui est essentiel pour déterminer si la « même question » a été examinée<sup>2</sup>.
6. C'est la motivation claire de la décision de la Cour européenne des droits de l'homme qui aurait pu permettre au Comité de juger si la requête avait déjà été examinée, et non le « soupçon » d'examen basé sur une vague référence sommaire et abstraite aux articles procéduraux 34 et 35 de la Convention européenne des droits de l'homme.
7. En basant sa décision sur un « soupçon d'examen » par la Cour européenne des droits de l'homme, le Comité dévie de sa jurisprudence et menace la cohérence de ses décisions.
8. La Convention est assez claire dans la distinction entre les deux phases de recevabilité et d'examen de fond. Le paragraphe 1 de l'article 22 définit « la compétence du Comité pour recevoir et examiner des communications », tandis que le paragraphe 5 a) du même article précise que « la même question n'a pas été et n'est pas en cours d'examen ». Ce n'est que lorsque la même question a été dûment examinée ou est en cours d'examen, au fond donc, que le principe de litispendance s'applique au Comité.
9. Subsidiairement, la Convention couvre dans ses dispositions un spectre plus large de droits autonomes et d'obligations spécifiques, invoqués par le requérant, que l'article 3 de la Convention européenne des droits de l'homme.
10. Dans ces conditions, le Comité aurait dû déclarer la requête recevable et procéder à son examen quant au fond.
11. En ce qui a trait au fond de l'affaire, pour des raisons de limite de mots, seule la conformité aux articles 2 et 14 de la Convention sera évoquée.

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<sup>1</sup> *N. B. c. Fédération de Russie*, par. 8.2.

<sup>2</sup> *S. c. Suède*, par. 7.5 ; *Mozer c. Suisse* (CAT/C/57/D/584/2014), par. 9.4 et 9.5 ; et *H. A. c. Suède*, par. 6.3 à 6.6.



12. Pour évaluer la conformité à l'article 2 de la Convention, le Comité doit déterminer si l'État partie a exercé directement ou indirectement, de fait ou de droit, un contrôle sur le requérant et les autres nationaux détenus à Guantanamo (dans un autre territoire)<sup>3</sup>, et si les représentants de l'État partie<sup>4</sup> qui ont autorisé l'interrogatoire du requérant à Guantanamo et y ont participé exerçaient un contrôle suffisant sur lui<sup>5</sup>, par extension de la compétence personnelle de l'État partie à l'égard de ses nationaux détenus par une puissance étrangère.

13. Ayant à l'esprit les préoccupations qu'il exprime depuis 2002 concernant le régime juridique et le traitement des détenus de Guantanamo, le Comité réaffirme que si les autorités de l'État partie, ou toute autre personne agissant à titre officiel ou au nom de la loi, savent ou ont des motifs raisonnables de penser que des actes de torture ou des mauvais traitements sont infligés et n'exercent pas la diligence voulue pour prévenir de tels actes, mener une enquête ou engager une action contre leurs auteurs afin de les punir conformément à la Convention, l'État partie est tenu pour responsable et ses agents devraient être considérés comme les auteurs, les complices ou les responsables d'une quelconque autre manière, en vertu de la Convention, pour avoir consenti, expressément ou tacitement, à la commission d'actes interdits.

14. Dans les circonstances de l'espèce, l'État partie n'a pas fait preuve de la diligence voulue pour empêcher que le requérant soit soumis à la torture par les autorités américaines en toute impunité, ce qui peut être considéré comme une permission de fait assimilable à une complicité.

15. L'État partie devrait être tenu partiellement responsable de l'absence de mesures efficaces visant à empêcher que le requérant soit soumis à la torture, en violation des paragraphes 1 et 2 de l'article 2 de la Convention.

16. Enfin, les autorités belges ne sont sorties de l'inaction qu'après le dépôt d'une plainte au civil en novembre 2011, et aucune réparation n'a été accordée au requérant, qui n'a disposé d'aucun recours utile, ce qui constitue une violation de l'article 14 de la Convention<sup>6</sup>.

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<sup>3</sup> Observation générale n° 2 (2007) du Comité sur l'application de l'article 2, par. 5, 6 et 16.

<sup>4</sup> *Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie [publication des Nations Unies, numéro de vente : F.04.V.17 (Part 2)], Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite, p. 26 (art. 4).

<sup>5</sup> *Ibid.*, p. 26 (art. 7) et 27 (art. 17).

<sup>6</sup> Observation générale n° 3 (2012) du Comité sur l'application de l'article 14, par. 2, 7, 23 et 27.