



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

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**Committee against Torture**

**Communication No. 511/2012**

**Decision adopted by the Committee at its 53rd session  
(3–28 November 2014)**

<i>Submitted by:</i>	Z. (represented by Norman Gibson)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	29 September 2011 (initial submission)
<i>Date of decision:</i>	26 November 2014
<i>Subject matter:</i>	Right to compensation for acts of torture committed extraterritorially by officials of another State
<i>Procedural issues:</i>	Admissibility
<i>Substantive issues:</i>	
<i>Article of the Convention:</i>	14



## Annex

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

concerning

#### **Communication No. 511/2012**

*Submitted by:* Z. (represented by Norman Gibson)

*Alleged victim:* The complainant

*State party:* Australia

*Date of complaint:* 29 September 2011 (initial submission)

*The Committee against Torture*, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Meeting on 26 November 2014,*

*Having concluded* its consideration of complaint No. 511/2012, submitted to the Committee against Torture by Z. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Having taken into account* all information made available to it by the complainant and the State party,

*Adopts* the following:

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

1. The complainant is Z., an Australian national, born on 13 May 1962. The complainant claims to be a victim of a violation by the State party of article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the Convention”). The complainant is represented by Norman Gibson.

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

2.1 The complainant was born in Shanghai, China, and is of Chinese descent. On 2 December 1991, the complainant left China for Australia, and became an Australian citizen in October 1996.

2.2 In 1995, the complainant began suffering from a condition known as rheumatoid arthritis, and was effectively bedridden as a result. She tried all kinds of treatment and medications, but nothing seemed to help her. In March 1997, the complainant’s husband learned about Falun Gong. The Falun Gong practitioners told them about the principles of “truthfulness, compassion and forbearance”. After learning more about these principles, the complainant and her husband started practicing Falun Gong. Within a few days, the complainant’s pain stopped, and she was able to lead a normal life again.

2.3 Because of her gratitude to Falun Gong, the complainant felt a need to support this movement. In December 1999, she tried to get a visa to go to China, but her visa application was denied. Having heard from a friend that it was easier to obtain a visa for Hong Kong, China the complainant flew to Hong Kong, China and obtained a visa upon arrival, and thereafter went to China.

2.4 The complainant stayed in Beijing for one week, visiting Tiananmen Square every day. On one such occasion, a policeman approached her and asked her if she practised Falun Gong. She did not answer him and walked away. On 29 December 1999, she met a fellow Falun Gong practitioner who was also from Australia in Tiananmen Square. He took the complainant to a place where many practitioners gathered to discuss their beliefs. One morning, the complainant and her fellow practitioner from Australia saw several police officers in the lobby of the hotel where they were staying. The police officers followed them as they went to the railway station. Along the way, the complainant's luggage was stolen. She went to the Australian Consulate in Beijing, where she informed the consulate staff of her situation. They helped her to escape through a back door.

2.5 On 31 December 1999, at around 7.30 a.m., the complainant took a bus tour to Tiananmen Square to watch the flag-raising ceremony. At the square, she went over to greet three Australians who were also Falun Gong practitioners. Suddenly, in front of hundreds of sightseeing tourists, the complainant was violently grabbed from behind by three police officers in plain clothes, who twisted her arms, pulled her hair, and dragged her to a police van parked nearby. In the van, she was beaten by the three police officers. They punched her and kicked her. One police officer used a hard object wrapped with newspaper to hit her on the head, causing her to bleed profusely. There were already a dozen other Falun Gong practitioners in the van. They were all taken to the Beijing Police Department Administration Office. The complainant was put in a small room measuring 4–5 square metres. More than 20 other Falun Gong practitioners were standing in the corridor. The police officer present hit the practitioners' heads and told the complainant to hand over her Falun Gong books. When she refused, the policeman proceeded to inspect the complainant's entire body, and the complainant cried. Upon discovering her Australian passport, the police officials sent her to the Exit and Entry Administration Department of the Ministry of Public Security. There, the complainant was locked in a basement garage measuring around 12–13 square metres. About a dozen Falun Gong practitioners were already detained in the room. Until the afternoon of 1 January 2000, during a span of over 30 hours, the police did not provide them with any food or water. Later on 1 January 2000, the Beijing police escorted the complainant to the airport and sent her back to Hong Kong, China.

2.6 The complainant stayed in Hong Kong, China for two weeks, living on the street with other Falun Gong practitioners, in front of the Liaison Office of the Central People's Government, in order to "clarify the truth about Falun Gong to people on the street". Feeling that she could not yet return to Australia because she had not achieved her goal, the complainant returned to China on 23 January 2000. She visited her brother's home in Shanghai with another Falun Gong practitioner. The next morning, the complainant discovered that the police had visited her brother's home and had questioned his wife. The complainant and her fellow practitioner felt they had no choice but to quickly set off for Beijing in the middle of the night. There, they stayed with a friend. The complainant contacted her husband in Australia, and, out of worry for her safety and out of esteem for and faith in Falun Gong, he took leave from his job and made the necessary arrangements to fly to China to join her.

2.7 On 26 January 2000, at about 6 a.m., the complainant, her husband and five other Falun Gong practitioners were seized by three or four police officers at Rendinghu Park in Beijing. The police officers jumped out from a police car and, without giving any reason,

started arresting all of the Falun Gong practitioners. They forcefully pulled and dragged them up to the car, without showing an arrest warrant or documents to prove their affiliation with the police. All the practitioners were taken to a nearby police station and were severely beaten by the police officers. One of the police officers interrogated the complainant, asking her to provide “the names of practitioners at [her] practice place”. The complainant did not respond. During the questioning, the policeman physically assaulted the complainant, repeatedly beating her on her head and face and causing her to become dizzy and faint. She does not remember how many times he hit her. He also kicked her and trampled her until he was tired and could not continue.

2.8 On the same night, at around 1 or 2 a.m., the police transferred the complainant to Beijing Xicheng District Police Department Detention Centre. There, she was locked up with approximately 17 criminals in a cell of 13–14 square metres. The police forbade her to sleep during the night: she was forced to stand facing the wall and recite the rules and regulations of the prison. If she dozed off and the prison supervisor saw her from the surveillance camera, the supervisor would scold loudly or order the criminals in the cell to take turns watching over the complainant. The criminal prisoners forced her to bend her back at a right angle and stand with both her arms raised high behind and with her head bent towards the floor. They called this position “flying the aeroplane”. As a result of being inverted, the complainant’s face swelled up, her waist and arms began to hurt, and her legs shook. If she changed position a little, the prisoners would beat her. The police officers also confiscated her money, taking the cash that she had on her as compensation for her prison blanket. When the police officers brought the blanket to the cell, the other prisoners hid it and she did not obtain a replacement blanket. The police officers, while interrogating her on both days of her detention, forced her to squat for long periods, causing her legs to go numb and then feel painful. They only gave her small steamed buns and black vegetable soup to eat.

2.9 On the night of 28 January 2000, the complainant was escorted back to Rendinghu police station. The police officers arranged for three males, who did not wear the police uniform, to monitor her and prevent her from sleeping. They also followed her to the toilet.

2.10 The complainant managed to escape from the Rendinghu police station on 29 January 2000. At around 5 a.m., she went to the washroom, opened the window, and jumped out quietly from the second floor. She reached the ground without any injuries. She walked away, in view of the guards at the entrance. By coincidence, she saw a taxi waiting outside the station and took it. She then contacted her husband and reunited with him.

2.11 On 4 February 2000, the complainant, her husband and three friends were celebrating the traditional spring festival over lunch in a restaurant in Maquan when several plain-clothes police officers swarmed the restaurant and arrested all five friends, including one non-practitioner. They were sent to the Hai Dian District National Security Department, where they were prevented from sleeping during the night. The next day, they were sent to the Beijing Police Department Detention Centre, which was generally regarded as a place for criminals having committed the most serious offences. The complainant and her husband were separated into gender-specific cells. The police forced the complainant to remove her shoes and stand on the frozen cement floor in the cold winter temperatures. Three or four police officers took turns interrogating her over a period of 24 hours. They padlocked her to a chair and handcuffed her arms so that she could not move. When she closed her eyes out of fatigue, the police officers would scold her loudly. On 5 February 2000, Chinese New Year’s Day, the Secretary of the Central Political and Legislative Committee of the Chinese Communist Party, Luo Gan, came to the detention centre and accused the complainant of “disrupt[ing] public order, destroy[ing] China’s stability and unity” by going to Tiananmen Square on Chinese New Year’s Eve. She immediately responded, “Tiananmen Square belongs to the people; everyone has the right to go. Some

people like to go to Tiananmen Square to sing and dance to welcome the New Year. We Falun Gong practitioners go to Tiananmen Square to practise the exercises and display Falun Gong symbol and slogans, what's wrong with that?" Luo Gan verbally abused the complainant and ordered the policemen to take turns monitoring her at night. During the seven days of her detention, she asked to meet with the Australian consul each day, but was consistently refused. One day, four or five police officers surrounded her to compel her to write a declaration stating that she would renounce her Australian citizenship. They stated that if she did not do so, they would kill her family members. She refused to write the statement and went on a hunger strike in protest for about three or four days. On 11 February 2000, the police forcibly confiscated the plane tickets that the complainant and her husband had in their possession, and forced them to spend another 10,000 yuan to buy new plane tickets, "in order to devastate [them] financially". The police escorted the complainant and her husband onto a plane bound for Australia on 11 February 2000.

2.12 On 5 March 2000, the complainant again tried to travel to China from Australia, via Hong Kong, China. She wished to deliver a letter to the leaders of the Government of China to tell them the truth about Falun Gong. Before her departure, she gave her bank card and medical card to her husband and asked him to take good care of their young daughter, because she thought she might not be able to return. The complainant travelled from Hong Kong, China to Shenzhen, China, where a border inspector searched her handbag and found the letter that she had written for the Chinese leaders. The inspector flew into a rage and hit her so hard that her vision became blurry and she became dizzy. As a result of the beating, she lost her hearing for a few days. Border inspector soldiers then detained seven Falun Gong practitioners, including the complainant, in an army camp. They forced the seven of them to stand in the field of the army camp. Over 10 soldiers armed with guns surrounded the practitioners and took turns interrogating them until late in the night, in the cold and without providing them any food. They were then sent to the local detention centre. The complainant was locked up in a crowded and dark cell. She was interrogated and beaten several times a day in order to force her to renounce Falun Gong. The complainant refused to give up her belief in Falun Gong and made requests to see the Australian consul, to have her Falun Gong books returned to her, and to be allowed to practice Falun Gong exercises. All of these requests were denied.

2.13 After 10 days had passed in detention, the complainant began a hunger strike on 16 March 2000. On 31 March 2000, the complainant met the Australian consul from Guangzhong in prison. Weak and thin after 16 days of her hunger strike, the complainant told the consul what she had endured in jail. The police officer tried to interrupt the conversation many times. After the consul left, there was no change in the complainant's situation. After more than 50 days of her hunger strike, the complainant was emaciated. The police officers showed no sympathy. During her strike, the complainant relied on practising Falun Gong exercises and performed meditation in order to supply energy to her body. When the police officers saw her performing the exercises, they would beat and curse her, pull her hair, pour cold and dirty water on her, and hit her with hard objects. She felt too much pain to be able to sleep at night. The officers shackled her to prevent her from meditating and verbally abused her. The officers forced her to wear dirty and rusty iron shackles weighing more than 10 kilograms in order to prevent her from practising Falun Gong. The shackles pressed against her ankles, causing her severe pain and blisters.

2.14 The cell in which the complainant was detained was dim, wet and congested. The complainant was not permitted to walk outside for several months during detention and did not get any sunlight. Her hair began to fall off in clumps, and her skin became infected with inflamed rashes and ulcers. She was not permitted to sleep on the bed in the cell and had to sleep on the cold cement floor. On one occasion, the police officers told her she should pack her things, as she was being released; they then proceeded to throw her in a cell with only male prisoners, where she was detained for two months. During this time, the guards

and male prisoners could see her when she took a shower and changed clothes. After intervention from the Australian consul, the prison officers transferred her to all-female cells, and allowed her to sleep on a bed and walk around outside twice. The complainant continued to practise Falun Gong. One day, she used toothpaste to write on her dark red shirt: "Whoever persecutes Falun Gong today, tomorrow you would be a sinner condemned by history". When the police officers arrived to interrogate her, they were enraged and cursed at her, pushing her into the cell and violently removing her only shirt. They encouraged other prisoners to beat her and, on one such occasion, a female prisoner saw her meditating and pushed her to the ground, stepping on and grinding her hand so hard that she felt as though the bones were broken. The prisoner was praised by the police officers and released after a few days. The complainant and the other detainees were all forced to work more than 10 hours a day, seven days a week, making products that would then be exported. The officers used electric batons to shock them into continuing to work.

2.15 After detention of nearly five months, the complainant was sent for a hearing before the Intermediary Court of Guangdong, which sentenced her to eight months' imprisonment. She returned to prison and continued to endure torture, inhumane conditions and forced labour. The complainant wrote to her husband, who began lobbying the Government of Australia for her release. The Australian consul negotiated the complainant's release for early August 2000; however, on the eve of the scheduled release, then-President of China Jiang Zemin called the Shenzhen police and instructed them to detain her for another three months.

2.16 On 4 November 2000, police officers escorted the complainant to the Guangzhou airport for her deportation to Australia. At the airport, the complainant displayed a t-shirt bearing a pro-Falun Gong poem she had written. Because they were in public, the police officers did not retaliate.

2.17 On 12 January 2001, the complainant and her husband again flew to Hong Kong, China to participate in the "Falun Dafa Experience Sharing Conference".<sup>1</sup> They arrived at the airport early on 13 January 2001, and were detained along with other Falun Gong practitioners. The complainant again went on a hunger strike until she was deported back to Australia on 14 January 2001. The complainant has been blacklisted by Hong Kong, China and is no longer allowed to obtain a visa to enter China.

2.18 Since her return to Australia, the complainant continues to suffer an itchy rash on over 70 per cent of her body due to the treatment she endured in prison in China. She has bloody lesions and sores on her body, and suffers from psychological distress as well. She was withdrawn from others after her return and was not able to return to work. She became forgetful, defensive and ill-tempered. She also had nightmares and insomnia.<sup>2</sup>

2.19 On 14 March 2007, the complainant filed a tort claim for damages before the Supreme Court of New South Wales in Australia.<sup>3</sup> The claim was filed against former President of China, Jiang Zemin, Luo Gan and the Falun Gong Control Office. The complainant invoked ordinary territorial jurisdiction because she is a resident of New South Wales. She claimed to have suffered loss of amenity, economic loss, as well as pain and suffering. The complainant submits that the representatives of the Chinese Embassy were

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<sup>1</sup> The complainant states that Falun Gong is also known as Falun Dafa.

<sup>2</sup> The complainant attaches two letters (dated 10 October 2001 and 20 March 2006) written by her doctor to attest to the physical harm she continued to suffer after her return to Australia. She also provides a psychological report.

<sup>3</sup> The complainant provides a copy of the decision, which states that she alleged "damages for acts of torture and human rights abuses allegedly committed by the defendants upon the plaintiff on various occasions between December 1999 and August 2000".

properly served with a notice to appear, but the respondents did not appear for the court hearing. On 14 November 2008, the Supreme Court of New South Wales ruled that it lacks jurisdiction over the respondents. On 5 October 2010, the complainant appealed that decision before the New South Wales Court of Appeal, which dismissed the appeal on the ground that, under the Foreign States Immunities Act of 1985, foreign government officials enjoy immunity from civil liability for torture. The complainant sought special leave to appeal to the High Court of Australia, which dismissed her application on 13 May 2011.<sup>4</sup> Accordingly, the complainant claims to have exhausted all available remedies in Australia, and further claims that there is no remedy possible in China.<sup>5</sup>

### The complaint

3.1 The complainant alleges that the State party has violated article 14 of the Convention by failing to provide her with an enforceable right to redress and compensation for the State-inflicted torture she endured in China. The complainant argues that the protections of article 14 are not limited to acts of torture committed within a State party's territory, because: (a) there is no express territorial limitation anywhere in the text of article 14; (b) the context of the Convention as a whole suggests that no territorial qualification was intended, since elsewhere express words are used to indicate a territorial limitation,<sup>6</sup> and since clear extraterritorial obligations are not indicated with express wording such as "whether committed within the State party's territory or not";<sup>7</sup> (c) the object and purpose of the Convention support extraterritorial application of article 14, since the preamble sets forth the purpose of making "more effective" the struggle against the acts proscribed in the Convention; (d) the *travaux préparatoires* do not support reading a territorial qualification into article 14, because the words "committed in any territory under its jurisdiction" after the word "torture" were deleted from the text of article 14 during drafting, and nothing in the drafting history indicates that article 14 protects solely against proscribed acts committed in the territory of the respective State party;<sup>8</sup> (e) the Committee has pronounced in favour of the extraterritorial scope of article 14;<sup>9</sup> and (f) the extraterritorial interpretation of article 14 enjoys widespread support among experts.<sup>10</sup>

<sup>4</sup> The complainant provides a copy of the Court of Appeal decision.

<sup>5</sup> To support her claim that she is unable to obtain redress in China, the complainant provides a statement dated 8 March 2007 from Yuan Hongbing, a law professor who states that "it is absolutely impossible for Falun Gong practitioners to seek for any legal remedy or protection of law in China".

<sup>6</sup> The complainant refers to articles 2, paragraph 1; 5, paragraph 1 (a); 11; 12; 13; and 20, paragraph 1.

<sup>7</sup> The complainant refers to articles 6, paragraph 1; 10; and 15.

<sup>8</sup> The complainant cites Manfred Nowak, "Torture and Enforced Disappearance", in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Turku College of Human Rights, Abo Akademi University, 2009), pp. 169–170; and J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff, 1998), p. 94.

<sup>9</sup> The complainant cites CAT/C/SR.646/Add.1, paras. 41–44, 74 (referring to the Committee's consideration of Canadian compliance with article 14 following the country's decision in *Bouzari et al. v. Islamic Republic of Iran* (2004) 71 OR (3d) 675, para. 80); concluding observations on Canada, CAT/C/CR/34/CAN (7 July 2005), paras. 4 (g) and 5 (f); and an unspecified working document on article 14 issued at the Committee's forty-sixth session between 9 May and 3 June 2011, section 20 (stating that obligations under article 14 are not limited to victims who were harmed in the territory of the State party).

<sup>10</sup> The complainant cites Christopher Keith Hall, "The Duty of States Parties to the Convention against Torture to provide procedures permitting victims to recover reparations for torture committed abroad", *European Journal of International Law*, vol. 18, No. 5 (2008), p. 921; K.C. Randall, *Federal Courts and the International Human Rights Paradigm* (Durham and London, Duke University Press,

3.2 The complainant further submits that if article 14 is interpreted as obliging State parties to provide a means of legal redress in its courts for victims of acts of torture committed in a foreign State, then State parties to the Convention (including China) must be considered to have waived any claim to State immunity if they do not provide any means of victim redress in their own legal systems.

3.3 The complainant also maintains that, by denying her fair compensation, the State party provided “blanket immunity” to the perpetrators of torture. Therefore, the complainant contends that the immunity provided by the Foreign States Immunities Act of 1985 is inconsistent with the obligations of Australia under the Convention. The complainant submits that the State party should issue a regulation removing blanket immunity. She maintains that the State party should allow her, as a national and resident, to file a claim against the persons responsible for torturing her in China, where the courts do not allow any effective alternative remedy.

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

4.1 In its submission dated 15 February 2013, the State party adds to the factual background of the communication, stating that it made representations to senior officials in the Government of China to request the complainant’s release and to ensure that Australian consular officials were afforded their right to provide consular assistance to the complainant when she was in detention. During court proceedings in Australia, the complainant did not raise arguments under article 14 of the Convention until she filed a special leave application to appeal to the High Court of Australia. The special leave application was denied on the basis that article 14 had not been raised before the lower courts.<sup>11</sup>

4.2 The State party considers that the communication should be found inadmissible *ratione personae* because the complainant requests the Committee to consider only whether article 14 imposes an obligation on the State party to provide its nationals and residents the right to pursue foreign perpetrators of torture in Australian courts in circumstances where the courts of the country of the place of torture do not allow any effective alternative remedy, thereby requiring the Committee to consider whether China itself has violated article 14 by allegedly not providing an effective remedy to the complainant. Under article 22, paragraphs 1 and 2, of the Convention, a complaint may only be submitted against a State party to the Convention by an individual who claims to be a victim of a violation by that State party. Further, a communication is inadmissible *ratione personae* if it concerns a State party to the Convention that has not made the optional declaration under article 22, paragraph 1. This position is consistent with the views of the Human Rights Committee<sup>12</sup> and the International Court of Justice,<sup>13</sup> the latter of which has found that

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1990), p. 7; Alexander Orakhelashvili, “State immunity and hierarchy of norms: why the House of Lords got it wrong”, *European Journal of International Law*, vol. 18, No. 5 (2008), pp. 960–963; and David Matas, “Immunity in Australia from Torture”, remarks to a press conference on 4 November 2010 in Sydney, Australia, available online.

<sup>11</sup> The State party does not, however, contest the admissibility of the communication on the ground of non-exhaustion of domestic remedies.

<sup>12</sup> The State party cites Human Rights Committee communications No. 319/1988, *García v. Ecuador*, inadmissibility decision of 18 October 1990; No. 1638/2007, *Wilfred v. Canada*, inadmissibility decision of 30 October 2008.

<sup>13</sup> The State party cites *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment of 15 June 1954, *I.C.J. Reports* 1954, p. 19; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, *I.C.J. Reports*, p. 240; *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports* 1995, p. 90.



claims are inadmissible if they require the Court to first rule on the actions of, or make a determination on the international responsibility of, a State that has not consented to jurisdiction. Accordingly, because China has not made the declaration under article 22 of the Convention, the State party considers the communication inadmissible.

4.3 The State party further considers that the communication is without merit because it relates to an alleged act of torture by a Chinese official in China, and article 14 does not impose an obligation on a State to provide civil jurisdiction with respect to acts of torture committed by a foreign official in a foreign State.<sup>14</sup> The State party bases this interpretation on the following considerations: (a) because article 14 must be interpreted in the light of its ordinary meaning, the omission of the words “in any territory under its jurisdiction” does not mean that article 14 applies regardless of where the torture took place and by whom it was perpetrated;<sup>15</sup> (b) the ordinary meaning of the phrase “obtains redress and has an enforceable right to fair and adequate compensation” is directed at *enforceable* civil remedies, and the State party is in no position to enforce any judgment its courts render against the defendants in China, given the absence of any connection of the defendants with the jurisdiction of Australia;<sup>16</sup> (c) the ordinary meaning of article 14 must be considered in its context, the key to which is contained in article 2, paragraph 1, which provides that a State party must take effective measures “to prevent acts of torture in any territory under its jurisdiction”; (d) although the complainant relies on article 5, paragraph 1, this provision only imposes an obligation on State parties to assert criminal jurisdiction over certain extraterritorial acts “if that State considers it appropriate”, and does not support finding a broader obligation with respect to civil proceedings;<sup>17</sup> (e) the *travaux préparatoires* indicate that the question of a broad, “universal” civil jurisdiction was not discussed by the State parties at all; thus, it is inconceivable that such jurisdiction was intended to be imposed;<sup>18</sup> (f) in the light of the clear link between the right to redress in article 14 and the rights to investigation, complaint and examination in articles 12 and 13,<sup>19</sup> the reference in the latter two articles to “in any territory under its jurisdiction” provides relevant context to the interpretation of article 14 and supports the view that it does not apply to acts of torture committed by a foreign official outside the State party’s territory; (g) contrary to the complainant’s argument, there is no contextual link between article 14, which is focused on the act of torture itself, and articles 6, paragraph 1; 10; and 15, which are concerned with measures relating to an act of torture (namely, police custody measures, provision of training to persons within a State’s control, and use of evidence in proceedings); (h) articles

<sup>14</sup> The State party cites the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980. The State party also states that, while it does not necessarily accept all the facts set forth by the complainant, for the purpose of responding to the author’s arguments concerning the interpretation of article 14, it does not seek to dispute these facts.

<sup>15</sup> The State party cites the Vienna Convention on the Law of Treaties, article 31, paragraph 1.

<sup>16</sup> The State party cites the Committee’s general comment No. 3 (2012) on implementation of article 14 by States parties, paras. 5, 6, 27 and 37; the Committee’s working document on article 14 for comments: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the obligation of States parties to implement article 14 (forty-sixth session, 9 May–3 June 2011), para. 25 (referring to the obligation to provide an “enforceable right”).

<sup>17</sup> The State party cites *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and ORS* (2006) UKHL 26 (Jones) (finding that article 14 was confined to acts of torture occurring within a State’s territory and noting the relevance of article 5 in reaching this conclusion). The State party also submits that if the drafters had intended States to be obliged to afford the type of civil remedy requested by the author, they would have explicitly provided for it in the text, in a similar manner to the qualifications set out in article 5.

<sup>18</sup> The State party cites Committee against Torture, summary record of the second part (public) of the 646th meeting, held on 6 May 2005, CAT/C/SR.646/Add.1, paras. 41–45.

<sup>19</sup> The State party cites general comment No. 3, para. 23.

6, paragraph 1; 10; and 15 relate to circumstances where the State party has the ability to enforce the obligation in question, which would not be the case if article 14 applied to acts committed extraterritorially; (i) although articles 6, paragraph 1; 10; and 15 may relate to acts that may occur outside the State party's territory despite the absence of express wording to this effect, their extraterritorial application is clear from a plain and ordinary reading of those articles,<sup>20</sup> which is not the case for article 14; (j) if the drafters of the Convention had intended article 14, paragraph 1, to impose an obligation to provide for universal civil jurisdiction, they would not have included the "savings clause" contained in article 14, paragraph 2, which provides that nothing in article 14 shall affect any right of the victim or other persons to compensation which may exist under national law;<sup>21</sup> (k) State practice supports the State party's position,<sup>22</sup> as demonstrated by views expressed by the United States<sup>23</sup> and Canada,<sup>24</sup> and in foreign jurisprudence; (l) article 14 should be interpreted in accordance with the rule of customary international law under which States enjoy immunity from civil proceedings in the courts of foreign jurisdictions, subject to certain inapplicable exceptions;<sup>25</sup> (m) although the author draws inferences from the fact that the words "committed in any territory under its jurisdiction" were deleted from the text of article 14 during drafting, these words may have been deleted by mistake,<sup>26</sup> and the *travaux préparatoires* shed little light on the question of whether article 14 allows for extraterritorial application;<sup>27</sup> (n) the Committee's views expressed on the extraterritorial application of article 14 do not reflect the proper interpretation of this article;<sup>28</sup> (o) although the author cites publicists who agree with her interpretation of article 14, others have indicated a different view;<sup>29</sup> and (p) if article 14 does apply extraterritorially as alleged by

<sup>20</sup> Concerning article 6, paragraph 1, the State party refers to International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, paras. 79–88. With respect to article 10, the State party cites the first instance decision of *Bouzari et al. v. Islamic Republic of Iran*, 124 I.L.R. 427 (Can. Ont. Sup. Ct. J. 2002) (Bouzari, First Instance), para. 49.

<sup>21</sup> The State party cites Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, Oxford, 2008), p. 494 (referring to the Alien Tort Claims Act under United States law and stating that the inclusion of the aforementioned clause in article 14, paragraph 2, "seems to indicate that the drafters of the Convention did not wish to preclude States from adopting a universal approach to redress such as that adopted by the United States").

<sup>22</sup> The State party cites Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, second edition, 2007), p. 241; *US-France Air Services Arbitration*, 1963 (54 ILR 303), para. 69.

<sup>23</sup> The State party cites the declaration made by the United States with respect to article 14: "That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State party."

<sup>24</sup> The State party cites CAT/C/SR.646/Add.1, paras. 41–45 (in which Canada indicated its view that article 14 only imposed an obligation with respects to acts of torture within a State party's territory).

<sup>25</sup> The State party cites, inter alia, the Australian Foreign States Immunities Act (1985); European Court of Human Rights, *Al Adsani v. United Kingdom*, application No. 35763/97, judgment of 21 November 2001, para. 61.

<sup>26</sup> The State party cites the statement of David P. Stewart, Assistant Legal Adviser for Human Rights and Refugee Affairs, United States Department of State, Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary, 101st Congress, 2nd session (1990), p. 26.

<sup>27</sup> The State party cites, inter alia, Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, p. 492.

<sup>28</sup> The State party refers, inter alia, to general comment No. 3, para. 22; CAT/C/CR/34/CAN, paras. 4 (g) and 5 (f).

<sup>29</sup> The State party cites Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, p. 502.

the complainant, then it would, on its terms, apply to all victims, no matter how transient their connection to the forum State, and even if the courts of the alleged State are not able to provide an effective remedy; it would also apply to the victims' dependants by virtue of the second sentence of article 14, paragraph 1.

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

5.1 On 19 April 2013, the complainant submits that the State party's observations on inadmissibility are misplaced, as the issue of whether an effective remedy is available in China is irrelevant to the author's submissions that: (a) article 14 applies irrespective of the places of the acts of torture; and (b) article 14 requires the forum State to afford an enforceable right to fair and adequate compensation *unless it finds* that there exists an effective remedy in another State or forum, and the Australian courts have not, in this case, declined jurisdiction on ordinary *forum non conveniens* grounds.

5.2 Concerning the merits, the complainant refutes the State party's observation that compensation under article 14 should be limited to cases where a State party is in a position to enforce judgment. Specifically, the complainant asserts that the right to a civil remedy under article 14 is an enforceable right because it addresses both a substantive guarantee as well as a *procedural* right to proceed against perpetrators in a forum State's courts, irrespective of whether the judgment is actually satisfied.<sup>30</sup> The complainant also argues that the State party errs in relying on article 2, paragraph 1, of the Convention, because this provision expressly refers to acts of torture in any territory, whereas article 14 does not. The complainant further maintains that reading a territorial limitation into article 14 leads to anomalous results, because it means that if a State party tortures one of its citizens abroad, it has no obligation under article 14 to provide the victim either redress or an enforceable right to compensation in its own courts. The complainant also contests the State party's argument that article 14 was not intended to provide universal civil jurisdiction, which the complainant asserts is less intrusive than the universal criminal jurisdiction that is clearly provided for in the Convention. The complainant further rejects the State party's argument that article 14 is linked to articles 12 and 13, because the latter articles limit obligations to torture committee within a state's jurisdiction, whereas article 14 does not.

5.3 The complainant also disputes the State party's reliance upon State practice in its interpretation of article 14. The complainant asserts that in order to be considered, the State practice must rise to the level of establishing the agreement of all parties,<sup>31</sup> and maintains that State practice concerning article 14 is equivocal at best.<sup>32</sup> The complainant further argues that the deletion of the words "committed in any territory under its jurisdiction" from the text of article 14 was a mistake.<sup>33</sup>

5.4 The complainant further asserts that the State party mistakenly relies on customary international law. The complainant reasons that, while State immunity cannot be overridden by a claim that a breach of a *jus cogens* norm is involved, this is irrelevant to the

<sup>30</sup> The complainant cites Nowak, "Torture and Enforced Disappearance" in Krause and Scheinin (eds.), *International Protection of Human Rights: A Textbook*.

<sup>31</sup> The State party cites *Bouzari et al. v. Islamic Republic of Iran* (2004) 71 OR (3d) 675, para. 78.

<sup>32</sup> The complainant cites, inter alia, Committee against Torture, second periodic report of the United States of America, CAT/C/48/Add.3, 29 June 2005, para. 82; Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, pp. 460–461.

<sup>33</sup> The complainant cites, inter alia, Craig Scott (ed.), *Torture as Tort: Comparative Perspectives of the Development of Transnational Human Rights Litigation* (Oxford Portland Oregon, Hart Publishing, 2001).

determination of the proper interpretation of article 14, which is regarded as providing victims with rights which may not exist as a matter of customary international law.<sup>34</sup>

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee against Torture must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that in the instant case the State party does not contest that the complainant has exhausted all available domestic remedies.

6.3 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* under article 22 of the Convention because the communication requires the Committee to consider whether China itself has violated article 14 by allegedly not providing an effective remedy to the complainant, and China has not made the declaration under article 22 of the Convention. The Committee also notes the complainant's assertion that article 14 applies irrespective of the places of the acts of torture; and that, because the Australian courts have not declined jurisdiction on the ground of *forum non conveniens*, the State party is required to afford an enforceable right to fair and adequate compensation. The Committee recalls its general comment No. 3 (2012) on the implementation of article 14 by States parties, in which it considers that "the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party" and that "article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress".<sup>35</sup> However, the Committee observes that, in the specific circumstances of this case, the State party is unable to establish jurisdiction over officials of another State for alleged acts committed outside the State party's territory.<sup>36</sup> Accordingly, the Committee considers that, in the case under review, the complainant's claim to redress and compensation is inadmissible.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 22, paragraph 2, of the Convention;
- (b) That this decision shall be communicated to the complainant and to the State party.

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<sup>34</sup> The complainant cites, inter alia, International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy)*, *Judgments*, I.C.J. Reports 2012.

<sup>35</sup> General comment No. 3, para. 22.

<sup>36</sup> See communication No. 176/2000, *Roitman Rosenmann v. Spain*, inadmissibility decision of 30 April 2002, para. 6.6.