



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

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**Committee against Torture**

**Communication No. 327/2007**

**Decision adopted by the Committee at its forty-seventh session, 31  
October to 25 November 2011**

<i>Submitted by:</i>	Régent Boily (represented by counsel, Christian Deslauriers and Philippe Laroche)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of the complaint:</i>	4 July 2007 (initial submission)
<i>Date of decision:</i>	14 November 2011
<i>Subject matter:</i>	Extradition of the complainant to Mexico to serve a prison sentence for drug trafficking
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; allegations insufficiently substantiated; failure to show prima facie violation of article 3; lack of a personal, real and specific risk of torture in Mexico
<i>Substantive issue:</i>	Risk of torture in the case of extradition of the complainant
<i>Articles of the Convention:</i>	3 and 22

## Annex

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

concerning

#### **Communication No. 327/2007**

<i>Submitted by:</i>	Régent Boily (represented by counsel, Christian Deslauriers and Philippe Laroche)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of complaint:</i>	4 July 2007 (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 14 November 2011,

*Having concluded* its consideration of complaint No. 327/2007, submitted to the Committee against Torture by Régent Boily 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, his counsel and the State party,

*Adopts* the following:

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

1.1 The complainant, Régent Boily, is a citizen of Canada born in 1944. In his complaint of 4 July 2007, he claimed that his extradition to Mexico would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Christian Deslauriers and Philippe Laroche.

1.2 On 6 July 2007, the Rapporteur on new communications and interim measures, pursuant to rule 108, paragraph 1, of the Committee's rules of procedure (CAT/C/3/Rev.4),<sup>1</sup> requested the State party not to extradite the complainant to Mexico while his complaint was under consideration.

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<sup>1</sup> New rule 115, para. 1 (CAT/C/3/Rev.5).

1.3 On 13 August 2007, the Rapporteur on new communications and interim measures, after thorough consideration of the observations submitted by the State party on 27 July 2007 and by the complainant, decided to withdraw the interim request.

1.4 On 17 September 2007, following a request by the complainant, the United Nations High Commissioner for Human Rights requested the State party to state what measures it had taken to ensure that Mexico would honour its diplomatic assurances.

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

2.1 In 1993, the complainant decided to move from Canada to live in Mexico, where he remarried and transferred all of his assets. In 1998, after losing half of his savings, he became involved in transporting marijuana. On 9 March 1998, the complainant was arrested by the police, who found 583 kg of marijuana in his vehicle. A police officer beat him and asked him to hand over US\$ 25,000 and half of his cargo in exchange for allowing him to continue on his way. At the police station, the complainant asserted, in vain, the right to be represented by a Canadian lawyer. One police officer threatened to kill him if he did not reveal the names of his accomplices and the origin and destination of his drugs. Having refused to provide that information, the complainant was smothered with a plastic bag, had various substances, including chilli sauce, inserted into his nose and was hit on the head with a book. Subsequently, the complainant was forced to sign a statement in Spanish, without knowing its contents. He was taken to prison that same day and received a medical examination but, fearing retaliation by the police officer present at the examination, did not mention the treatment he had received at the police station. After 72 hours in a cell with no light, the complainant was taken to the prison infirmary, where he met two police officers who had tortured him at the police station. They warned him not to report that he had been tortured and threatened to kill him.

2.2 On 10 November 1998, the complainant was sentenced to 14 years in prison for marijuana trafficking. The statement he had signed under torture was allegedly admitted as evidence.

2.3 On 9 March 1999, he organized an escape, during which one of the two guards assigned to him was killed. The complainant subsequently fled to Canada. On 1 March 2005, he was arrested at his home in Canada under a provisional warrant for his extradition to Mexico. Mexico requested his extradition to complete his sentence and to face a charge of homicide for the death of the prison guard and a charge of escape from legal custody. On 11 April 2005, the complainant submitted a request for bail, which was denied. The Court of Appeal also dismissed his application. On 22 November 2005, the complainant was imprisoned pending his extradition. On 23 January 2006, he presented his arguments to the Minister of Justice, including two reports from psychologists confirming that he had been tortured and that he showed symptoms of post-traumatic stress. He also submitted the results of a polygraph test done by the Ottawa police department, which showed he was telling the truth. On 24 May 2006, the Minister of Justice ordered his extradition in return for diplomatic assurances by Mexico. The Court of Appeal of Québec dismissed an appeal to have that decision reviewed and, on 5 July 2007, the Supreme Court of Canada refused to allow an appeal against it.

2.4 On 17 August 2007, after the Committee lifted interim measures, the complainant was extradited to Mexico and transferred to Zacatecas prison, the facility in which he was accused of having killed a guard. Between 17 and 20 August 2007, the complainant was tortured by prison guards and he was refused contact with the Canadian Embassy and his lawyer. Fearing retaliation, the complainant did not openly report the ill-treatment.

### **The complaint**

3.1 In his initial communication, the complainant claimed that his extradition to Mexico would constitute a violation of article 3 of the Convention. He submitted that he would be exposed to a foreseeable, real and personal risk of torture if extradited to Mexico, given that he had already been tortured by the Mexican authorities when he was arrested on 9 March 1998<sup>2</sup> and threatened with death by two police officers in the prison infirmary, and that independent medical opinions had vouched for the fact that he had been tortured. Moreover, he submitted that the seriousness of the crime with which he was charged, the fact that those responsible for committing the crime at the time of his escape had not been arrested and the prospect of being sent back to the prison from which he had escaped would expose him to a foreseeable, real and personal risk of torture in Mexico.

3.2 Moreover, the complainant underlined that diplomatic assurances from Mexico could not remove the risk of torture, especially as it was known that torture was systematic and endemic in Mexico and that the State of Mexico exercised little control over its security forces. He claimed that the uncertainty about the worth of the assurances only served to underline their ineffectiveness.<sup>3</sup> The complainant submitted that it was ingenuous to assume, as the assurances led to believe, that he would not be questioned about the two crimes that had not been dealt with in court, as those responsible still had not been arrested. He added that he was in a far more difficult position than in 1998, standing accused of a much more serious crime – one involving the death of a state official.

### **State party's observations on the measures taken to ensure observance of the diplomatic guarantees**

4.1 On 28 September 2007, the State party provided an update on the measures taken to ensure that the Government of Mexico honoured its diplomatic guarantees. According to the State party, when the complainant arrived in Mexico on 17 August 2007, he was met by a consular official and informed of the services available to him. At that meeting, the complainant reportedly expressed concern about his safety, given that he was being sent back to the prison from which he had escaped. On 20 August 2007, consular officials asked the Human Rights Commission of the State of Zacatecas to send representatives to visit the complainant. After receiving a letter in which it was claimed that the complainant had been tortured on 19 August 2007, the State party contacted senior Mexican officials and the Zacatecas prison administration on 22 August 2007 to remind them that the diplomatic assurances must be respected. That same day, consular officials visited the complainant. During that visit, the complainant again claimed that he had been tortured, but did not wish to lodge a complaint. The consular officials saw no evidence of wounds. At the inquiry held by the Mexican authorities, the director of Zacatecas prison denied the complainant's allegations of torture.

4.2 On 23 September 2007, the complainant was reportedly beaten by another inmate, but he stated that he had been properly treated for his wounds and that his assailant had been placed in solitary confinement. Subsequently, the State party asked the prison director for a report on the incident, as well as a medical report and an explanation of what measures had been taken to avoid a repetition of violence against the complainant. The State party emphasized, however, that the complainant did not wish to lodge a complaint

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<sup>2</sup> See communication No. 133/1999, *Falcon Ríos v. Canada*, decision adopted on 23 November 2004, para. 8.6.

<sup>3</sup> See communication No. 233/2003, *Agiza v. Sweden*, decision adopted on 20 May 2005; see also Human Rights Committee communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006, paras. 11.4 and 11.5.

and asked that the details of his allegations of torture not be revealed to the Mexican authorities. On 18 October 2007, the complainant, with the backing of a letter from the State party to the judge concerned, requested a transfer to the prison in the State of Aguascalientes.

### **State party's observations on the admissibility and the merits of the complaint**

5.1 On 5 February 2008 and 20 August 2008, the State party submitted its observations on the admissibility and merits of the complaint. According to the State party, the communication should be declared inadmissible because the complainant had neither demonstrated a prima facie violation of article 3 of the Convention nor sufficiently supported his allegation that he ran a serious and personal risk of being tortured if extradited to Mexico. The State party emphasized that the grounds for believing that the complainant was in danger of being subjected to torture if returned must go beyond mere theory or suspicion<sup>4</sup> and that it must be established that the individual concerned would be personally at risk.<sup>5</sup> The State party submitted that the complainant's allegations of torture were connected with his arrest and questioning by the police in 1998, and that he had never claimed that he had been tortured in prison. The complainant had therefore apparently failed to establish that if he was extradited to complete his sentence and stand trial he would be questioned by the police, and would thus be in danger of being tortured in Mexican prisons.

5.2 The State party argued that it could not be deduced from the additional grounds submitted by the complainant, such as international reports on torture in Mexico and the charges he faced for his part in the murder of a prison guard, that he would run a personal risk of being tortured if extradited. It underlined that the international reports, including the latest concluding observations of this Committee,<sup>6</sup> alluded to the problem of torture in police stations, but did not indicate that torture was endemic in the prison system. The State party also underlined that mechanisms for judicial and administrative review and for monitoring human rights<sup>7</sup> existed and were applied when people served prison terms. Mexico had also ratified the Optional Protocol to the International Covenant on Civil and Political Rights and recognized the competence of the corresponding Committee to examine individual complaints, therefore giving the complainant the option of lodging complaints against Mexico with either Committee.

5.3 The State party also submitted that the diplomatic assurances sufficed to eliminate the risk of torture. It pointed out that it had requested the following assurances of the Government of Mexico: that Mexico would take reasonable precautions to guarantee the safety of the complainant; that it would ensure that the complainant's lawyer and officials of the Canadian embassy could visit the complainant at any reasonable time and that he could communicate with them at any reasonable time; that it would do everything possible to ensure that the complainant's trial was held and completed without delay, and that any other complaint or request would be dealt with quickly. The State party emphasized that

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<sup>4</sup> See communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3.

<sup>5</sup> See communications No. 36/1995, *X. v. The Netherlands*, views adopted on 8 June 1996, para. 7.2; No. 15/1994, *Kahn v. Canada*, views adopted on 15 November 1994, para. 12.2; and No. 13/1993, *Mutombo v. Switzerland*, views adopted on 27 April 1994, para. 9.3.

<sup>6</sup> CAT/C/MEX/CO/4, adopted on 21 November 2006.

<sup>7</sup> When it ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Government of Mexico established the National Human Rights Commission, which has the power to investigate instances of human rights violations, including torture.

Mexico had agreed to such assurances in another case and that it would have every reason to respect the assurances provided in the light of its obligations under the extradition treaty and in order to avoid damaging its international reputation. Moreover, the State party claimed that it had put in place a mechanism for monitoring the complainant's situation in Mexico.<sup>8</sup>

5.4 With regard to the allegation of torture since his return to Zacatecas prison, the State party submitted that the complainant had not substantiated his claim or furnished any details to support it. It said that an inquiry held by Mexico had concluded that his allegations were "implausible".

5.5 The State party maintained that the complainant's allegations and the risk of torture at the time of his extradition had been examined closely by national courts and that, in the absence of obvious errors, procedural abuses, bad faith, bias or serious procedural irregularities, the Committee should not substitute itself for the national courts.<sup>9</sup>

5.6 Alternatively, the State party contended that, should the Committee admit the communication, it was without foundation for the reasons given.

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

6.1 On 25 April and 26 September 2008 and 6 April 2009, the complainant challenged the State party's observations and noted that the failure of the State party to question the worth of the diplomatic assurances provided by Mexico constituted a denial of justice. According to the complainant, the State party did not take sufficient account of the personal risk he ran of being tortured when it extradited him. Sending him back to the prison from which he had escaped, together with the fact that a guard of that prison had lost his life and the complainant's accomplices had never been identified, would expose him to a personal risk. That was underlined by the content of international reports and the latest periodic report of Mexico to the Committee against Torture, which made clear that the use of torture was endemic in Mexico.<sup>10</sup> In addition, his allegation of having been tortured in 1998 had never been refuted. With regard to the consideration of the events of 1998 by the State party, the complainant submitted that the Minister of Justice had deliberately misconstrued the sense of a letter received from the Mexican authorities, claiming that the complainant's allegations of torture were unfounded. The complainant contended that none of the relevant sections of the letter indicated that his allegations were groundless, as the Government of Mexico merely stated that the allegations had no legal basis and that his presence in Mexican territory would suffice to guarantee his human rights and freedoms. The complainant maintained that the State party acted in bad faith and based its decisions on a false premise by rejecting his credibility with regard to the personal risk he ran of being tortured. The rulings by the national courts were therefore unwarranted because they were not based on the evidence. Moreover, the fact that the state officials who tortured him in 1998 had not been punished no doubt heightened his personal risk.

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<sup>8</sup> See communication No. 199/2002, *Attia v. Sweden*, decision adopted on 17 November 2003, para. 12.3; and *Alzery v. Sweden* (footnote 3 above), para. 11.5.

<sup>9</sup> Communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006, para. 7.6; No. 193/2001, *P.E. v. France*, decision adopted on 21 November 2002, para. 6.5; No. 183/2001, *B.S.S. v. Canada*, decision adopted on 12 May 2004, para. 11.6; and *A.R. v. The Netherlands* (footnote 4 above), para. 7.6.

<sup>10</sup> See the fourth periodic report of Mexico (CAT/C/55/Add.12, para. 299), in which the Government of Mexico admits that torture continues to be a problem in its territory despite the legal arsenal put in place to combat it.

6.2 The complainant pointed out that the State party had not considered whether Mexico could effectively control its security forces and so guarantee that its diplomatic assurances would be respected. The complainant noted that the assurances were vague and did not, for example, stipulate that he not be sent back to the same prison facility from which he had escaped. He also submitted that the State party had failed to enquire after his well-being before 20 August 2007, though it was aware of his concerns and of the risks entailed in being returned to the same prison facility from which he had escaped. Considering that Canadian embassy officials in Mexico were informed of his case only two days before his extradition and were unaware of the diplomatic assurances until that very day,<sup>11</sup> the complainant challenged the assertion by the State party that it put in place a mechanism to ensure that Mexico would honour its diplomatic assurances.

6.3 The complainant submitted that on 17, 19 and 21 August 2007 two prison guards and the chief of security at Zacatecas prison had tortured him to avenge the death of their colleague, who had been killed at the time of his escape. They beat him on the back, shoved his head into a barrel of water as though to drown him, kept his head in a plastic bag until he collapsed and shoved chilli sauce into his nostrils.<sup>12</sup> Between his arrival at the Zacatecas prison on 17 August 2007 and 20 August 2007, the complainant was denied access to a telephone to contact anyone. Moreover, a telephone conversation between his sister and an embassy official on 20 August 2007 revealed that, in violation of the diplomatic assurances, the State party was unaware whether the complainant had access to a telephone. The complainant also submitted that it was only after a visit by consular officials on 22 August 2007 that the State party took steps to check on his safety.

6.4 According to the complainant, the extradition treaty between the State party and Mexico states explicitly in article III.1 that Canada is under no obligation to extradite its own nationals to Mexico, and the treaty allows Canada to try its own citizens for offences of which they are accused in Mexico. The complainant maintained that the State party took an unacceptable risk in extraditing him to Mexico, and so violated article 3 of the Convention.

#### **Additional comments by the State party**

7.1 On 28 August 2009, the State party reiterated its previous observations. It stated that assessment of the risk of torture prior to the complainant's extradition should not be confused with his allegations of ill-treatment once he was in the hands of the Mexican authorities. The State party maintained that it did not accept without reservation the truth of the allegations in the complainant's affidavit of 21 March 2009, which were insufficiently substantiated because, in the absence of the complainant's consent, neither the consular staff of the State party nor the staff of the Human Rights Commission of Zacatecas had been able to inquire into what had happened on 17, 19 and 21 August 2007. In addition, the State party submitted that, leaving aside the question of whether the allegations of torture contained in the complainant's affidavit were true, at the time of the extradition proceedings it was reasonable to extradite the complainant to Mexico on the basis of the diplomatic assurances and the absence of a serious personal risk of the complainant being tortured. It stated that claims made after the extradition did not affect the legitimacy of the

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<sup>11</sup> The complainant bases his claim on an exchange of e-mails between embassy officials and the Department of Foreign Affairs and International Trade.

<sup>12</sup> The complainant submitted an affidavit by a fellow inmate who reportedly saw the state in which the complainant was brought back to his cell on 17 August 2007. In it, he states that the complainant's face was all red and that he saw that he was weeping. The complainant had been carried to the cell by two guards. The following day, he had reportedly called the complainant's lawyer and sister to inform them of the treatment inflicted on the complainant.

decision to extradite the complainant. Furthermore, the State party said that it had put in place a mechanism to check that the diplomatic assurances were being respected and had responded appropriately when the complainant alleged that he had been tortured.

7.2 With regard to the extradition process, the State party explained that the Department of Justice was initially responsible for extradition cases, and that once an extradition order was confirmed the Department of Foreign Affairs and International Trade was responsible for following up the case abroad. The staff of the latter department therefore became involved in the case only from the time of the complainant's extradition. In this instance, the State party maintains that the Canadian embassy in Mexico was duly informed of the complainant's extradition on 15 August 2007. On 17 August 2007, the complainant was met by a consular official and given instructions so that he could communicate with the embassy. With regard to the complainant's allegation that Canadian officials did not know whether he could receive telephone calls, the State party said that each prison had its own rules on making telephone calls and that, unless there were valid reasons for doing so, it was not for the consular officials to interfere with those procedures; telephone contact between the consular officials and the complainant was established on 20 August 2007. The State party also maintains that until they learned of a potential breach of the diplomatic assurances, the consular officials were not obliged to do more than maintain contact with the complainant.

7.3 The State party refers to the Committee's jurisprudence, according to which the evaluation of the risks of torture prior to extradition is an exercise in projection and a decision resulting from it may not then be called into question as a result of subsequent unpredictable events.<sup>13</sup> It submits that the fact that ill-treatment subsequently occurred means only that the State party's actions to ensure the assurances were honoured could be called into question, not its decision to extradite the complainant in the first place. It recalls that the Minister of Justice had given due consideration both to the complainant's allegations of torture in 1998 and to the official denial of those allegations by the Mexican authorities; he had also studied various reports claiming that violations of human rights in Mexico were frequent, as well as the experiences of other Canadians tried in Mexico. Lastly, he had also taken into account the fact that a prison guard had been killed during the complainant's escape and the possibility that the prison authorities might seek revenge against the complainant. The Minister had been convinced that Mexico, given the importance it attached to respecting diplomatic relations and previous positive experience, would honour its diplomatic assurances. The conclusions of the Minister of Justice had been fully supported by the Court of Appeal.

#### **Additional comments by the complainant**

8.1 In additional comments submitted on 29 September 2009, the complainant reiterates that, throughout the extradition process, he stood by his claim that he had been tortured in 1998 and that this has never been questioned by the Canadian authorities.<sup>14</sup>

8.2 With regard to the extradition process, he also reiterates that Canadian officials in Mexico knew nothing about his case, as confirmed by the State party's observations, according to which the embassy had been informed on 15 August 2007, just 48 hours before he was extradited. The complainant emphasizes that the State party itself admitted

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<sup>13</sup> See *Agiza v. Sweden* (footnote 3 above), para. 13.2; and communications No. 194/2001, *I.S.D. v. France*, decision adopted on 3 May 2005, para. 9.3; and No. 297/2006, *Sogi v. Canada*, decision adopted on 16 November 2007, para. 10.6.

<sup>14</sup> The complainant cites the decision of the Court of Appeal, *Boily v. Canada (Minister of Justice)* 2007 QCCA 250, paras. 54 and 55.

that embassy officials merely reacted to events, and maintains that such an attitude is bewildering, especially as it had been deemed necessary to obtain diplomatic assurances from the destination country prior to extradition, and a visit by consular officials to the prison and a letter from the ambassador to the Governor of Zacatecas State had been enough to put an end to the ill-treatment. Referring to the State party's observations of 28 September 2007, the complainant underlines that the consular officials had not known that the State party had obtained diplomatic assurances, and so had taken no measures to make sure that the complainant could communicate with his lawyer and embassy officials. Moreover, Canadian officials never verified whether he could do so.

8.3 The complainant considers that the State party's assertion that he ran no risk of being tortured prior to his extradition stands in contradiction with the decision to request diplomatic assurances and with the fact that the Court of Appeal had lent more credence to his allegations of torture than to Mexico's outright denial. He also maintains that the previous case of extradition of a Canadian had been presented without any information that might allow comparison between the two cases and in no way diminished the existence of serious and personal risks of torture in the case of the complainant.

8.4 With regard to the quality of the diplomatic assurances, the complainant maintains that even if the Minister of Justice did take into account the possibility of retaliation against the complainant because of the accusations he faced over the murder of a prison guard, the diplomatic assurances contained no measures to prevent such retaliation. Moreover, the State party failed to take steps before he was extradited to ensure that he would be safe and allowed to communicate. He also disputes the claim that a mechanism had been put in place to monitor observance of the diplomatic assurances, and insists that the action taken by consular officials came only in response to his allegations of torture, and were not part of a monitoring mechanism. The complainant also reiterates that nine months passed between the moment the State party obtained the diplomatic assurances, on 16 November 2006, and 15 August 2007, when an official of the Department of Foreign Affairs and International Trade tried to obtain a copy of them. He points out that if embassy officials did not have a copy of the diplomatic assurances, then obviously the prison authorities and those of the State of Zacatecas would not have one either.

#### **Additional observations by the State party on admissibility**

9. On 26 April 2010, the State party submitted that the communication should be declared inadmissible on the grounds of non-exhaustion of domestic remedies because on 8 April 2010 the complainant had brought an action before the Federal Court related to the substance of the complaint before the Committee. The complainant claimed before the Federal Court that the State party had violated his rights by extraditing him to Mexico on 17 August 2007, having placed its trust in the diplomatic assurances provided, and having allegedly done nothing to ensure that those assurances were respected after the complainant was extradited. The State party maintains that the complainant had therefore not established a prima facie case for the purpose of admissibility of his communication.<sup>15</sup> Moreover, there were no grounds for believing that the domestic remedy would be unreasonably prolonged.

#### **Additional comments by the complainant**

10.1 In additional comments submitted on 30 June 2010, the complainant asserted that the action brought before the Federal Court and the communication before the Committee

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<sup>15</sup> See the Committee's general comment No. 1 (1996) on the implementation of article 3 (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1)*, annex IX).

were two different matters. In his complaint before the Committee, the complainant had invoked article 3 of the Convention, which prohibited his extradition to a country in which there was a serious risk of him being subjected to torture, and aimed to show that the State party had violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by extraditing him to Mexico on 17 August 2007. He reiterates that the foreseeable, real and personal nature of the risk of torture was based on the fact that a prison guard had been killed during the complainant's escape and that torture was a widespread practice in Mexican prisons. In his action before the Federal Court, the complainant sought to obtain compensation for having been tortured, not for the risk of being tortured. It was therefore wrong to suggest that the action before the Federal Court constituted a remedy yet to be exhausted.

10.2 The complainant maintains that the fact that a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also been invoked before the Federal Court does not mean that the communication may be dismissed for a failure to exhaust domestic remedies. Before the Committee, the violation of the Convention itself constituted the prejudice, while before the Federal Court it constituted one of a series of alleged errors for which the State party might incur liability. The complainant also maintained that the communication before the Committee had been lodged on 4 July 2007, before he was tortured in Mexico on 17, 19 and 21 August 2007. The action before the Federal Court was begun only one and a half months later, and therefore did not need to be exhausted. Moreover, a claim for damages in civil proceedings was not an effective means of preventing the extradition of the complainant, and could not be used to achieve the aims of this communication against the State party. The complainant reiterates that he had taken his challenge against the extradition order as far as the Supreme Court, beyond which there were no further domestic remedies.

#### **State party's supplementary submission on admissibility**

11.1 On 10 February 2011, the State party submitted that the domestic proceedings were linked to those before the Committee inasmuch as they dealt with the same facts. It argues that the chronological order of proceedings or distinctions between the kinds of redress sought are of little importance, given that the findings of the domestic courts were to be based on consideration of the same allegations that had been submitted to the Committee.

11.2 On 26 August 2010, the complainant had requested a stay of his action before the Federal Court. The State party itself had requested that the action be dismissed. On 6 December 2010, the Federal Court had denied the complainant's request for a stay of the action and granted the request for its dismissal, ruling that the question of the complainant's extradition had already been considered in all the appropriate courts and could no longer be used as a cause of action. The request for dismissal of the action was granted because of an abuse of process by the complainant. On 10 January 2011, the time limit set by the Court for filing an action aimed at obtaining compensation for the events that supposedly occurred after the extradition, the complainant had brought a new action before the Federal Court. The State party reiterates its observations of 26 April 2010 and maintains that the communication should be declared inadmissible because of a failure to exhaust domestic remedies.

11.3 With regard to follow-up by consular officials, the State party explains that, by monitoring mechanisms, it meant the usual consular follow-up measures that reflected the State party's concern for the physical and mental well-being of the complainant during his period of imprisonment in Mexico.

### **Additional comments by the complainant**

12.1 On 14 April 2011 the complainant confirmed that he had filed an application requesting compensation for the incidents that had taken place after his extradition. He emphasizes that the risks taken in violation of the Convention cannot be invoked as a basis for stating that State party acted responsibly. He submits that it is thus valid to challenge the legality of the decision to extradite him to Mexico before the Committee, the sole body dealing with the matter, and argues that clearly, a suit for damages filed subsequent to the torture he endured after extradition to Mexico cannot constitute an effective remedy that would have prevented his extradition and thus cannot be considered as an available means of domestic remedy.

12.2 As for the consular follow-up, the complainant states that at the time of his extradition in August 2007 the staff at the Canadian embassy in Mexico were unaware of the content of the diplomatic assurances, as demonstrated by the evidence he submitted, in particular by e-mails. He further points out that the diplomatic assurances were not accompanied with specific measures taken on the spot likely to reduce the real risk of torture, and submits that the State party's observations of 10 February 2011 confirm that the State party took no specific measures to try to prevent his torture. The usual consular follow-up measures were taken; no system of monitoring was put in place.

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

#### *Consideration of admissibility*

13.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, 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.

13.2 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; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention. The Committee notes that, on 6 December 2010, the Federal Court dismissed the action brought by the complainant and that, on 10 January 2011, the complainant brought another action before that court. It also notes that the State party disputed the admissibility of the communication on grounds of non-exhaustion of domestic remedies as a result of the action brought by the complainant before the Federal Court. The Committee recalls its jurisprudence<sup>16</sup> to the effect that the principle of exhaustion of domestic remedies requires the petitioner to use remedies that are directly related to the risk of torture in the country to which he would be sent. In this case, the application was launched on 10 January 2011 and seeks compensation for ill-treatment allegedly suffered by the complainant in Mexico. The Committee finds that this remedy was not available before the complainant was extradited and that it is highly unlikely to bring effective relief to the complainant, who claims to be a victim of a violation of article 3 of the Convention. The Committee also notes that on 5 July 2007 the Supreme Court refused to allow an appeal against the order to extradite the complainant. As a result, the Committee finds that, under the circumstances, article 22, paragraph 5 (b), of the Convention is not an obstacle to the admissibility of the communication.

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<sup>16</sup> *A.R. v. Sweden*, communication No. 170/2000, decision adopted on 23 November 2001, para. 7.1.

13.3 The Committee notes that the State party has contested the admissibility of the communication on the grounds that the complainant had not established a prima facie violation of article 3 of the Convention because he had not demonstrated that, should he be extradited, he ran a personal risk of being tortured in Mexican prisons, and that diplomatic assurances were sufficient to eliminate any risk. The Committee also notes the State party's argument that the Committee should not stand in for national courts if the consideration of the complainant's allegations by the State party has not been flawed by irregularities. However, the Committee is of the view that the arguments submitted to it raise questions that should be examined on the merits and not with regard to admissibility. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

*Consideration of the merits*

14.1 The Committee must determine whether the extradition of the complainant to Mexico would constitute a violation of the State party's obligation under article 3 of the Convention not to extradite, expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In evaluating the risk of torture, the Committee must take account of all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture if he were extradited to Mexico. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.<sup>17</sup> As to the burden of proof, the Committee also recalls its general comment and jurisprudence, according to which the burden is generally upon the complainant to present an arguable case, and the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

14.2 The Committee notes that the complainant submitted his arguments and supporting evidence to the various State party authorities. In this connection, it also recalls its general comment No. 1 (para. 9), which states that considerable weight will be given to findings of fact that are made by organs of the State party; however, the Committee is not bound by such findings and instead has the power, under article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case. While noting the complainant's contention that the courts of the State party based their decisions on false assumptions about the worth of the diplomatic assurances provided by Mexico, in particular with regard to the ability of the Mexican authorities to control the country's security forces and so lessen the risk of torture, the Committee concludes that the information before it does not indicate any obvious errors in the State party's consideration of the allegations and evidence provided by the complainant.

14.3 In assessing the risk of torture at the time of the complainant's extradition, the Committee notes that the complainant claimed to have been tortured when he was arrested and threatened with torture in the prison infirmary in Mexico in 1998 and that, in support of his allegations, he provided medical reports confirming that he suffered from psychological

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<sup>17</sup> General comment No. 1, para. 6.

disorders, including post-traumatic stress, together with the results of a polygraph test carried out by police in the State party indicating that his torture allegations were plausible. With regard to the real and personal risk of torture if he were extradited, the Committee notes that the complainant claimed to run a high risk of being tortured given that he would be sent back to the prison from which he had escaped and in which he had allegedly been threatened with torture by officers from the police station responsible for his arrest in 1998. The complainant contested the reliability of the diplomatic assurances, on the one hand because they came from a country in which torture was said to be widespread or its practice denied by the authorities, and on the other hand because it was unlikely that the complainant would not be subject to questioning by the police for the crime of which he was accused. With regard to the follow-up to the diplomatic assurances, the Committee notes that, after he was extradited, the complainant made allegations of having been tortured that are contested by the State party. The Committee also notes that the national courts of the State party considered that the risk the complainant ran of being tortured in prison would be minimal and that the complainant had failed to establish that he would be questioned by the police. The Committee notes the State party's assertion that the risk of torture was mitigated by the diplomatic assurances, whose worth had been assessed in consideration of the fact that a mechanism would be put in place to monitor the complainant's situation through regular visits by consular staff. That assertion is challenged by the complainant, who maintains that from 17 to 20 August 2007 the State party made no enquiries as to his safety.

14.4 The Committee concludes that the main issue is to determine whether, at the time the extradition took place, the complainant ran a foreseeable, real and personal risk of torture. Article 3 of the Convention obliges the State that decides whether or not to extradite a person under its jurisdiction to another State to take all necessary steps to prevent torture from occurring. This obligation means that it has the duty to examine carefully and take into account all existing circumstances that may reasonably be considered to indicate a risk of torture as previously defined. The standards that must be met to ensure prevention are still more stringent when the State decides to request diplomatic assurances before proceeding with extradition (or any other type of handover), given that such a request demonstrates that the extraditing State harbours concerns about the treatment that may be reserved for the extradited person in the destination country. Even when the evidence does not clearly indicate the existence of a risk of such nature, the circumstances of the case may demonstrate that there is a reasonable doubt that the receiving State would comply with the obligation to prevent torture under articles 1 and 2 of the Convention. In the instant case it is uncontested that the complainant had been previously subjected to torture. In these circumstances, the Committee must determine whether the diplomatic assurances in the specific case were of a nature to eliminate all reasonable doubt that the complainant would be subjected to torture upon his return. In this context the Committee must take into account whether the obtained diplomatic assurances include follow-up procedures that would guarantee their effectiveness.

14.5 In this case, the Committee is of the view that the State party did not take into account, before deciding on extradition, all of the circumstances indicating that the complainant ran a foreseeable, real and personal risk of torture. First, the State party gave no consideration to the fact that the complainant would be sent to the same prison in which a guard had died during the complainant's escape years before, and that the guard's death too was a subject of the extradition request. Second, the agreed system of diplomatic assurances was not carefully enough designed to effectively prevent torture. The diplomatic and consular authorities of the State party were not given due notice of the complainant's extradition and not informed of the need to stay in close and continuous contact with him from the moment he was handed over. In this case the diplomatic assurances and the foreseen consular visits failed to anticipate the likelihood that the complainant had the

highest risk of being tortured during the initial days of his detention. This risk proved to be true, as the complainant arrived in Mexico on 17 August 2007 and stated that he was subsequently tortured from 17 to 20 August 2007. However, the State party did not take steps to check on his safety until 22 August 2007. The Committee concludes therefore that the extradition of the complainant to Mexico in those circumstances constituted a violation by the State party of article 3 of the Convention.

14.6 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the extradition of the complainant to Mexico by the State party constituted a violation of articles 3 and 22 of the Convention.

15. The Committee requests that the State party, in accordance with its obligations under article 14 of the Convention, provide effective redress, including the following: (a) compensate the complainant for violation of his rights under article 3; (b) provide as full rehabilitation as possible by providing, inter alia, medical and psychological care, social services, and legal assistance, including reimbursement for past expenditures, future services, and legal expenses; and (c) review its system of diplomatic assurances with a view to avoiding similar violations in the future.

16. Pursuant to rule 118 (former rule 112), paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps the State party has taken in response to the views expressed above, including measures of compensation for the breach of article 3 of the Convention and determination, in consultation with Mexico, of his current whereabouts and state of well-being.

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

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