

## COMMITTEE AGAINST TORTURE

### P. E. v. France

Communication No 193/2001

21 November 2002

CAT/C/29/D/193/2001

### VIEWS

*Submitted by: Ms. P.E. (represented by counsel)*

*Alleged victim: Ms. P.E.*

*State party: France*

*Date of complaint: 24 September 2001*

*Date of decision: 21 November 2002*

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

Meeting on 21 November 2002,

Having considered complaint No. 193/2001, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account the information made available to it by the author of the complaint and the State party,

Adopts the following:

#### Decision under article 22, paragraph 7, of the Convention

1.1 The complainant, P.E., a German national, born on 26 May 1963 in Frankfurt, was extradited by France to Spain on 7 November 2001. She claims that she was the victim of a violation by

France of article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the complaint to the State party on 5 December 2001. At the same time, in pursuance of rule 108 of its rules of procedure, the Committee requested the State party not to extradite the complainant to Spain while her complaint was under consideration by the Committee. 1/

### **The facts as submitted**

2.1 In November 1996, 2/ the complainant was arrested in the Landes region in the company of her partner, Juan Luis Agirre Lete, during a French customs check, and placed in pre-trial detention in Paris. Following her arrest, she was sentenced to 30 months' imprisonment on 23 February 1999 on charges of participating in a conspiracy as an alleged member of the Basque separatist organization, Euskadi Ta Askatasuna (ETA). 3/

2.2 As soon as she was arrested, in November 1996, the Spanish authorities made a first request for her extradition, but the request was later withdrawn on grounds of mistaken identity. A second request for extradition was lodged by the Spanish authorities a year later, alleging cooperation with an armed group, on the basis of evidence that was claimed to be questionable but was given a favourable reception by the French authorities.

2.3 A third request for extradition 4/ was lodged by Spain on the basis of a statement made by a certain Mikel Azurmendi Penagarikano, who was arrested in Seville on 21 March 1998 by the Spanish Civil Guard and who is alleged to have suffered a variety of treatments in breach of the Convention while being held. The complainant adds that Mr. Azurmendi's partner was arrested at the same time as he was and also suffered treatment in breach of the Convention.

2.4 While in custody, Mikel Azurmendi is reported to have made two statements under duress to the Civil Guard on 23 and 24 March 1998. In these statements, which are said to contain many contradictions and implausibilities, the complainant was implicated, with some 30 others, as a member of ETA's "Madrid Commando", and accused of carrying out, together with others, surveillance and checks on the route taken in Madrid by a van belonging to the general staff of the Spanish air force, with the aim of carrying out an act of violence, and of participating, together with others, in the preparation of an explosive device placed on board a vehicle that was used by other members of the commando in an attempted act of violence on 25 January 1994. The complainant nevertheless maintains that she had long since left Madrid at the time of the events.

2.5 Concerning the circumstances in which these statements were made, the complainant produces an excerpt from Mr. Azurmendi's testimony:

I am writing this letter to you to denounce the treatment inflicted by the Spanish security forces, more specifically the Civil Guard, at the time of my arrest (in Seville), and during the transfer to the Madrid station and my stay there. Concerning my arrest, it occurred on José Laquillo Street, No. 5, first floor, door B. They immobilized me and handcuffed me,

they didn't stop rubbing my nose in the dirt, they beat me and continuously threatened me. After having read me my rights, one person (a prison inspection judge) ordered them to change my handcuffs. They did so in front of him and just after taking me down to the car, they put other handcuffs on me, tightening them as much as possible, hurting my wrists and causing injuries which are still visible. They only took them off once we arrived at the police cells. Apart from the pain caused by the handcuffs, they beat me on the head and the ribs, and squeezed my testicles; they pretended to fire a gun, pressing the barrel against my head and firing several times. They beat me to the point of causing a sprained ankle. All that happened during the journey from Seville to Madrid.

Once we arrived in Madrid, they made me walk, but my leg was no longer working and every time I tried, I fell down. They continued to beat me because of that, forcing me to try again each time I was on the ground, until they saw that I could no longer walk and they led me to the cells. There they told me they were leaving me for a moment so that my blood circulation could return to normal.

A little later, they came and forced me to get up, still with my eyes blindfolded. From then on, they began to beat my ankle, slapped me, hit me on the nape of the neck and made all kinds of threats. After a time, I can't say how many hours, they took me to casualty to have my ankle injury examined. Once I was there, I was diagnosed with a sprain, they put a bandage on me and advised me to put ice on it to relieve the pain and keep my foot raised.

When the Civil Guards took me back to the Civil Guard station, they beat me again, causing a further injury, and pushed me and hit me so much on the injured foot that they broke my big toe.

They subjected me to a long session of questioning, including beatings, pulling out tufts of my beard and using an object which gave me electric shocks in the penis, the stomach and the chest. And as if that wasn't enough, they used another method - the plastic bag. This involved putting a plastic bag over my head, tightening it round my neck and suffocating me. They did this several times, together with the electric shocks. Each time I passed out, they left me alone for a while to recover, then they started again.

After all of that, they took me to casualty, a different place from before, because the journey was much shorter, I guessed it must be close to the police station. During the journey, they constantly threatened me, telling me: "You don't know where we are taking you", "You're going to the hills to dig your own grave" [...].

When we got back, they continued to threaten me. This time, they mentioned my sister: if I didn't talk, they would go and fetch her and she would pay because of me - it was up to me [...].

Then they started to make threats against my partner Maite PEDROSA (arrested at the same time as I was), that they were going to rape her, that she was in a very bad way, [...] with threats like: "we are filling the bath". And that if I continued to show off [sic], they

would give me the bath treatment. The beatings never stopped during the time I spent in the police station, especially blows to my sprained ankle, and beatings and slaps to the head.

At the end, they told me that they were taking me to the National High Court to make a statement and that in the afternoon I would have to go back with them to look at some photos, and that the treatment would therefore depend on what I said in my statement in court.

During almost all the time I was being questioned, I was blindfolded, and when I wasn't, they forced me to lower my head, even though I was able to see the head of one of them twice and I could recognize him. Alcala de Henares prison, 7 April 1998.

2.6 At the end of his period in custody, on 25 March 1998, Mr. Azurmendi appeared before examining magistrate No. 6 of the National High Court in Madrid. He lodged a complaint relating to the torture to which he had been subjected during his time in custody and retracted his earlier statements. This complaint is still being investigated.

2.7 While being held in Madrid prison, Mr. Azurmendi was also examined by the prison medical services, and a court-ordered medical report was delivered on 18 October 1998. These medical reports and the testimony of a number of detainees arrested on the same day as Mr. Azurmendi corroborate his allegations of torture and ill-treatment.

2.8 After the complainant had been implicated in the statements made by Mr. Azurmendi on 23 and 24 March 1998, the Spanish procurator's office stipulated that proceedings against the complainant would be subject to the evidence. As the results were negative, Mr. Ismael Moreno Chamaro, central examining magistrate No. 2 attached to the National High Court in Madrid, issued an order on 29 October 1998 that the complainant should be imprisoned and committed for trial. On that basis, the judge issued a request for the extradition of the complainant on 22 December 1998. By means of a note verbale dated 10 March 1999, the Spanish Government, through its embassy, requested the French authorities to extradite the complainant. On 15 June 1999, she was placed in detention pending extradition in Fresnes prison. The request for extradition was heard in public session on 24 May 2000 by the first indictment division of the Paris Court of Appeal which, on 21 June 2000, ruled partially 5/ in favour of extradition in respect of the acts described by Spain as 19 attempted terrorist murders.

2.9 The complainant emphasizes that the request for extradition did not contain a copy of the statement that Mr. Azurmendi made on 25 March 1998 to the examining magistrate of the National High Court. In that regard, the complainant's counsel argued before the indictment division of the Paris Court of Appeal that it was unacceptable that, since the charges carried very severe prison terms, the requesting State had not mentioned the statement in which Mr. Azurmendi retracted everything that he had said and also stated that he did not know the complainant.

2.10 The counsel also argued:

[T]he medical examinations carried out while Mr. Azurmendi was in custody and was

being transported to the hospital casualty department, the statements made on 25 March 1998, the official medical observations recorded on his arrival at Madrid prison, the medical report provided on 18 October 1998, the complaint lodged and the testimony of certain persons detained the same day show that he was subjected to ill-treatment while being questioned by the Civil Guard. Such treatment, apart from being clearly in violation of domestic instruments in any State governed by the rule of law, is further prohibited by the international conventions that France has ratified, in particular by article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that no one shall be subjected to cruel, inhuman or degrading treatment. Still more specifically, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides (art. 15) that: "Each State party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." In this case, the statements made by Mr. Azurmendi, who is established to have been subjected to ill-treatment while held in custody, clearly cannot serve as a legal basis for proceedings against [P.E.].

2.11 The indictment division of the Paris Court of Appeal replied as follows in its decision of 21 June 2000:

In view of the fact that it is not the task of the court to find whether the factual elements cited by the requesting authority have been proven, but to consider whether those elements constitute a criminal offence in the requesting State and in the requested State; [...] in view of the fact that, while it is true that Azurmendi implicated [P.E.], he did not do so as a result of violence but, according to the evidence supplied by the requesting State, in the Civil Guard station, in the presence of a lawyer; in view of the fact that the court cannot seek to secure the documents forming part of the Spanish proceedings in order to substitute itself for the authorities of the requesting State in their analysis; it is sufficient that, as in the present case, the court should possess sufficiently precise information to enable it to determine the existence of suspicions so as to allow it to apply the principle of dual criminality.

2.12 On 17 May 2000, the German section of Action of Christians for the Abolition of Torture (ACAT) wrote to the French Government requesting it not to extradite the complainant to Spain. On 23 May 2000, many organizations, associations and public figures sent an open letter to the French authorities along the same lines.

2.13 On 29 September 2000, the French Government issued a decree granting extradition of the complainant to the Spanish authorities. On 3 January 2001, the complainant appealed against the decree to the Council of State. In a statement of case presented to the Council of State, counsel for the complainant reiterated the arguments presented to the indictment division, adding:

[I]n response to the argument concerning a breach of French public order, the (French) Minister (of Justice) does not dispute any of the circumstances described by the plaintiff, in particular:

- The fact that Mr. Azurmendi's statements made while being questioned by the Civil Guard authorities, which inter alia implicated Ms. [P.E.], were subsequently retracted before the examining magistrate;

- That Mr. Azurmendi was transported to casualty at the end of his period in custody because he had been subjected to ill-treatment during questioning by the Civil Guard.

According to the administration's statement of case, Mr. Azurmendi's statements did not constitute a breach of French public order because they were taken freely in the presence of a lawyer from the Madrid bar. In fact, there is nothing to confirm that this was the case, or even that a lawyer was continuously present while he was held in custody, from the beginning to the end of the questioning;

So that, while a lawyer from the Madrid bar may have assisted the person concerned at some time while he was being held in custody, this circumstance in no way rules out the possibility that the suspicions against the plaintiff were gathered in a manner contrary to French public order.

The Council of State rejected this appeal by a decision dated 7 November 2001. The complainant was handed over to the Spanish authorities on the same day.

### **The complaint**

3.1 The complainant considers that her extradition to Spain constitutes a violation of article 15 of the Convention insofar as the charges brought against her by the Spanish authorities were based on statements made as a result of torture.

3.2 Article 15 of the Convention is one of the corollaries of the absolute prohibition of torture on which this Convention against Torture is based. The first part of the article is designed to deprive the practice of torture of any value when inflicted on a person for such purposes as obtaining from him or a third person information or a confession. In that context, statements obtained as a result of torture must be declared absolutely null.

3.3 This provision is applicable to any court or non-court proceedings, particularly penal or administrative proceedings. Hence it is applicable in this case to extradition proceedings.

3.4 The complainant holds that several criteria must be satisfied if a State party is to be found to have violated article 15 of the Convention.

- It must be established that the statement cited as evidence in the proceedings in question was obtained as a result of torture.

- The statement in question must be an essential element of the charges brought against the author of the communication.

- Article 15 of the Convention imposes an absolute obligation on the courts and authorities of the State in question to assemble and examine, in an objective, fair and thorough manner, all the elements needed to establish that the statement was obtained unlawfully.

- It follows from article 15 of the Convention that the statement at issue should be declared absolutely null by the courts and authorities of the State in question.

- It is also necessary, in extradition proceedings, to determine whether torture is practised in the requesting State, and to examine the circumstances in which the statement at issue was obtained and whether statements obtained as a result of torture are customarily accepted by the courts of the requesting State.

3.5 In this case, all these criteria have been satisfied:

3.5.1 According to the complainant, it has been established beyond all reasonable doubt that *Mr. Azurmendi's statements cited as evidence in the proceedings in question were obtained as a result of torture.*

3.5.2 As regards the assistance of a court-appointed lawyer while Mr. Azurmendi was being held in custody - the argument invoked by the State party to refute these allegations - the complainant emphasizes that, under Spain's special anti-terrorist legislation, Mr. Azurmendi was arrested and held in custody incommunicado, that is, cut off from any contact with a lawyer of his choice or a close relative. This status was extended even when he appeared in court on 25 March 1998.

3.5.3 The complainant explains in this regard that the machinery for protecting persons implicated in terrorist cases and held by the Spanish security forces is well known to be inadequate:

- Such persons have no access to a lawyer of their choice while in custody or even, in some cases, when appearing before the examining magistrate;

- During the period of custody, the court-appointed lawyer is present only when "official" statements are made before members of the Spanish security forces; the court-appointed lawyer is never present throughout the period of custody; specifically, he does not attend all the questioning sessions.<sup>6/</sup>

3.5.4 In this regard, after considering the third periodic report submitted by Spain, on 18 and 19 November 1997, the Committee against Torture made the following observations:

The Committee continued to receive frequent complaints of acts of torture and ill-treatment during the period covered by the report. [...] Notwithstanding the legal guarantees as to the conditions under which it can be imposed, there are cases of prolonged detention incommunicado, when the detainee cannot receive the assistance of a lawyer of his choice, which seems to facilitate the practice of torture. Most of these complaints concern torture inflicted during such periods. The Committee is also concerned about reports that although,

in accordance with article 15 of the Convention, judges do not accept as incriminating evidence statements regarded as invalid because they have been obtained under duress or torture, they nevertheless accept those same statements as incriminating other co-defendants. [...] Consideration should be given to eliminating instances in which extended detention incommunicado and restrictions of the rights of detainees to be assisted by a defence lawyer of their choice are authorized.

3.5.5 The observations made by the Committee against Torture on 9 November 1999 in connection with communication No. 63/1997 submitted by Josu Arkauz Arana against France should also be borne in mind. In this decision, which was made public on 1 December 1999, the Committee noted in particular

[D]uring the consideration of the third periodic report submitted by Spain under article 19 of the Convention, it had expressed its concern regarding the complaints of acts of torture and ill-treatment which it frequently received. It also noted that, notwithstanding the legal guarantees as to the conditions under which it could be imposed, there were cases of prolonged detention incommunicado, when the detainee could not receive the assistance of a lawyer of his choice (emphasis added), which seemed to facilitate the practice of torture. Most of the complaints received concerned torture inflicted during such periods. Similar concerns had already been expressed during the consideration of the second periodic report by the Committee, as well as in the concluding observations of the Human Rights Committee regarding the fourth periodic report submitted by Spain under article 40 of the International Covenant on Civil and Political Rights. Furthermore, the European Committee for the Prevention of Torture (CPT) also reported complaints of torture or ill-treatment received during its visits to Spain in 1991 and 1994, in particular from persons detained for terrorist activities. The CPT concluded that it would be premature to affirm that torture and severe ill-treatment had been eradicated in Spain.

3.5.6 After considering the fourth periodic report submitted by Spain, the Human Rights Committee emphasized, in its observations dated 3 April 1996:

[...] 12. The Committee expresses concern at the maintenance on a continuous basis of special legislation under which persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days, may not have a lawyer of their own choosing and are judged by the Audiencia Nacional without possibility of appeal. The Committee emphasizes that these provisions are not in conformity with articles 9 and 14 of the Covenant. [...]

#### E. Suggestions and recommendations

[...] 18. The Committee recommends that the legislative provisions, which state that persons accused of acts of terrorism or suspected of collaborating with such persons may not choose their lawyer, should be rescinded. It urges the State party to abandon the use of incommunicado detention and invites it to reduce the duration of pre-trial detention and to stop using duration of the applicable penalty as a criterion for determining the maximum



duration of pre-trial detention.

3.5.7 Similarly, the European Committee for the Prevention of Torture (CPT) considers that there are serious inadequacies in protection against torture and other severe ill-treatment of persons held in custody by the Spanish security forces as a part of anti-ETA operations. In that regard, the Committee places particular emphasis on recognition of three rights denied by the Spanish authorities to persons held by the security forces:

- The right of the person concerned to inform a close relative or another third party of his or her situation;
- The right of access to a lawyer of one's choice;
- The right to be examined by a doctor of one's choice.

In the view of CPT, these rights constitute three fundamental safeguards against ill-treatment that should apply from the outset of custody (that is, as soon as the security forces deprive the person concerned of his or her freedom of movement).

3.5.8 According to the complainant, *the statement at issue is the essential element of the charge against her*. It is clear from a study of the proceedings that the sole item of evidence produced by the Spanish authorities in requesting the extradition of the complainant for the third time is based on the statements made by Mr. Azurmendi on 23 and 24 March 1998 while being held in custody by the Civil Guard. It was on the basis of these statements obtained as a result of torture that the indictment division of the Paris Court of Appeal ruled in favour of extradition on 21 June 2000 and the French Government issued an extradition decree on 29 September 2000.

3.5.9 According to the complainant, *the French authorities and courts failed to assemble and examine, in an objective, fair and thorough manner, all the elements needed to establish that the statement at issue was obtained unlawfully*. It is clear that the complaint concerning torture made by Mr. Azurmendi on 25 March 1998 when he appeared before the examining magistrate was ignored by the French courts and authorities. Similarly, the medical evidence establishing beyond a doubt that the statements made by Mr. Azurmendi while in custody were obtained as a result of torture were systematically ignored by the French authorities and courts. Moreover, the French courts systematically refused to approach the Spanish authorities in order to obtain any additional information that might have confirmed that the statements in question had not been obtained as a result of torture.

3.5.10 According to the complainant, *Mr. Azurmendi's statements were not declared to be absolutely null by the French authorities and courts*. Although it has been established that Mr. Azurmendi's statements were obtained as a result of torture, these statements form the basis of the 21 June 2000 ruling handed down by the indictment division of the Paris Court of Appeal in favour of the Spanish authorities' third request for extradition, and the extradition decree issued by the French Government on 29 September 2000. Yet under article 15 of the Convention against Torture, these unlawfully obtained declarations should have been declared absolutely null.

3.5.11 Lastly, it is also necessary in extradition proceedings to determine *whether torture is practised in the requesting State, and whether statements obtained as a result of torture are customarily accepted by the courts of the requesting State.*

3.5.12 According to the complainant, it has been established that the infliction of torture and ill-treatment by the Spanish security forces is an "administrative practice" incompatible with the Convention against Torture, since it involves the repetition of acts that are contrary to article 1 of the Convention, as well as official tolerance on the part of the authorities. The practice of torture and ill-treatment has been corroborated in numerous reports on Spain by international bodies over many years, and persists to the present day. In its conclusions relating to the supplementary report of Spain, the Committee against Torture expressed its concern at "the increase in the number of complaints of torture and ill-treatment, at delays in the processing of such complaints and at the impunity of a number of perpetrators of torture". As the European Committee for the Prevention of Torture emphasized, "it would be premature to conclude that the phenomenon of torture and severe ill-treatment had been eradicated" in Spain.

3.5.13 The risks of torture and ill-treatment are also corroborated by many recent reports from international bodies concerning Spain:

- The views and recommendations of the Human Rights Committee during its consideration of reports submitted by Spain under article 40 of the International Covenant on Civil and Political Rights;
- The reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concerning visits to Spain, issued on 4 March 1996 and 12 April 2000. In its reports, CPT notes that torture and other very severe forms of ill-treatment are still practised, particularly by the members of the Civil Guard against Basque nationals suspected of belonging to or collaborating with ETA. In the report prepared between 22 November and 4 December 1998, CPT notes that "those allegations involved blows to various parts of the body and, in some cases, more serious forms of physical ill-treatment, including sexual assault of female detainees by male police officers, and asphyxiation by placing a plastic bag over the head". In certain cases, the reports include medical certificates consistent with the victims' allegations;
- The reports of Mr. Kooijmans and Mr. Rodley, United Nations Special Rapporteurs on the question of torture;
- The views of the Committee against Torture during its consideration of periodic reports submitted by Spain under article 19 of the Convention. Moreover, on 9 November 1999, the Committee against Torture communicated its views concerning communication No. 118/1998 submitted by the complainant, Josu Arkauz Arana, under article 22 of the United Nations Convention against Torture, against France.
- Reports prepared by Amnesty International, the Association for the Prevention of Torture,

the World Organization against Torture, and International Prison Watch. Moreover, it should be pointed out that, in 1990, the Government of Spain broke its agreement with the International Committee of the Red Cross (ICRC), which permitted ICRC to visit political detainees in Spain, particularly many Basque prisoners. In spite of the many requests made to the Spanish authorities, those authorities have not yet re-established the agreement.

3.5.14 Moreover, reliable reports from international human rights bodies indicate that the ill-treatment regularly inflicted by Spanish officers, intentionally and with professionalism, in order to obtain confessions or information or to cause terror, are serious enough to be classified as torture under article 1 of the Convention against Torture and the jurisprudence of the European Court of Human Rights.

3.5.15 The impunity enjoyed by torturers on the part of the Spanish authorities is an additional risk factor. Indeed, such impunity encourages perpetrators of torture and ill-treatment to persist in their acts of violence. Often, victims' complaints are filed away and never followed up; the proceedings are very long; sentencing of torturers is very rare; when sentences are handed down by Spanish courts, torturers are most often pardoned by the authorities; certain torturers have even been promoted. The fact that officers who practise torture are not punished creates a feeling of impunity, which encourages the persistence of the practice of torture.

3.5.16 As the Committee against Torture has already noted, statements obtained as a result of torture are accepted by Spanish courts, particularly the National High Court, which is a special court that deals with crimes and acts of terrorism. Moreover, the judgements handed down by the National High Court are not subject to appeal, in contravention of article 14, paragraph 5, of the International Covenant on Civil and Political Rights; only an appeal for cassation is possible before the Supreme Court, which refuses to re-examine the lawfulness of the evidence accepted in first instance by the National High Court.

3.5.17 Finally, concerning the situation in Spain, it should be recalled the Committee against Torture stated that, pursuant to article 2, paragraph 2, of the Convention, "no exceptional circumstances whatsoever, whether ... internal political instability or any other public emergency, may be invoked as a justification of torture". Thus, the situation of acute conflict in the Basque Country cannot be invoked to justify the practice of torture by the Spanish security forces and the use by Spanish courts of evidence obtained as a result of torture.

### **The State party's observations**

4.1 The State party submitted its views in a note verbale dated 29 April 2002.

4.2 The State party notes that the complainant had been arrested for possession of weapons and was suspected of being a member of ETA. The complainant was sentenced by a judgement of the Paris Correctional Court to two and a half years' imprisonment for offences involving the transport and possession of weapons, the holding of false administrative documents and participation in a conspiracy with a view to preparing an act of terrorism.

4.3 The first request to extradite the complainant, dated 15 September 1997, 7/ was based on her membership of ETA and on the fact that she had created the infrastructure of the "Madrid Commando", which carried out attacks in the Spanish capital. For this reason, the complainant had been placed in detention pending extradition on 21 October 1997 in Fresnes prison. By a judgement of 18 March 1998, the indictment division of the Paris Court of Appeal issued a ruling in favour of her extradition and the Court of Cassation rejected her appeal against that ruling on 23 June 1998.

4.4 The complainant was the subject of an additional extradition request on 10 March 1999. While the examination of that additional request was in progress and criminal proceedings were being undertaken by the French courts, the authorities of the State party decided not to proceed directly with the first extradition. According to the indictment and the evidence produced by the Spanish authorities in support of that additional extradition request:

[A] complaint was brought against P.E., as a member of the terrorist organization ETA, for having, together with other members of that organization, in Madrid, sought information on, monitored and verified the route taken by a van belonging to the general staff of the Spanish air force, with the aim of carrying out an act of violence. On 30 November 1993, an Opel vehicle had been stolen and its number plates had been changed. The person whose extradition is sought, together with her accomplices, constructed an explosive device consisting of two "casseroles", each containing an explosive charge of approximately 45 kilos. On 24 January 1994, two of her accomplices drove the car bomb to the intersection of the Paseo of La Ermita and Avenida del Manzanares in Madrid. On 25 January 1994, at approximately 0800 hours, as the military van passed by, Angel Azurmendi Penagarikano activated the device without managing to explode it. He then fled together with Arri Pascual d'Alvaro [...]. [Several moments later, the police attempted to carry out a controlled explosion. They failed, and the] device exploded, injuring 19 persons and causing serious damage to buildings and parked vehicles.

4.5 Following the additional request, the complainant was placed in detention pending extradition on 15 June 1999. After ordering additional information with a view to verifying whether part of the accusation had not been subject to a statute of limitations, on 21 June 2000 the indictment division ruled in favour of extradition for acts qualified by the requesting State as attempted terrorist murder, after having found that the statute of limitations for prosecution had expired under French law.

4.6 The complainant requested her release on 21 October 1997. The request was granted by the indictment division on 22 March 2000. In the context of the additional extradition request, the complainant also requested her release on 4 September 2000. The request was granted on 18 October 2000, but accompanied by a measure that placed the complainant under judicial supervision.

4.7 In those circumstances, the Prime Minister granted extradition on the basis of the first extradition request and the additional request, in a decree dated 29 September 2000. The complainant was handed over to the Spanish authorities on the day on which the Council of State

took its decision to reject her appeal against the decree, on 7 November 2001.

4.8 With regard to the merits of the complaint, the State party notes that the sole complaint made by the complainant deals only with the additional extradition request. It in no way questions the first extradition request, which was based on separate facts that in themselves would have been sufficient to justify a decision to extradite the complainant, after the indictment division ruled in favour of extradition on 18 March 1998. Thus, the extradition order itself had not been questioned, but only the fact that the State party's decision to extradite the complainant had not been accompanied by a reservation concerning the facts related to Mr. Azurmendi's statements.

4.9 Under the State party's legislation, the Act of 10 March 1927 applies in cases of requests for extradition made by Spain. Pursuant to article 16 of the Act, the indictment division must verify whether or not the legal conditions for extradition have been met. In this regard, it must verify whether or not the file has been properly prepared, whether or not there has been an "obvious error" with respect to the identity of the requested individual and whether it is clear that the individual could not have participated in the acts of which he is accused. However, the indictment division, pursuant to a general principle of French extradition law, may not assess whether or not prosecution is founded or if all of the charges are sufficient.

4.10 The indictment division then issues a ruling that may, if it is favourable, be accompanied by reservations or be partially favourable. If the opinion is unfavourable, it is final. Any review that the Court of Cassation may later conduct relates solely to the procedure and the rules governing the procedure.

4.11 On the basis of a favourable ruling by the indictment division, the Government adopts, when necessary, an extradition decree, which is subject to appeal before the Council of State, which monitors "procedural irregularities of the extradition decree and [...] the legality of the extradition measure in domestic law in the light of international law and international conventions, in order to verify whether, particularly after the indictment division has examined the case, the Government had been able to decide legally that conditions for extradition, for the offences involved, had been met". The State party emphasizes that it was in this context that, on 15 February 1999, the Council of State annulled an extradition decision on the grounds of a breach of article 3 of the Convention against Torture.

4.12 With regard to the complainant's allegations that Mr. Azurmendi's statements had been obtained as a result of torture, the indictment division decided that "while it is true that Azurmendi implicated [P.E.], he did so not under duress but, as indicated in the evidence submitted by the requesting State, on Civil Guard premises, in the presence of a lawyer". For its part, the Council of State, on the basis of the same evidence, considered that those allegations had not been accompanied by any prima facie evidence. The Council of State also stressed "that it follows from the general principles of the law applicable to extradition that it is not up to the French authorities, except in the case of an obvious error, to rule on the correctness of the charges against the person claimed; that, in the case at hand, it does not appear that an obvious error has been committed both with respect to the offence of belonging to an armed group and with respect to the crime of complicity in attempted murder, of which Ms. [P.E.] has been accused".

4.13 The State party maintains that the State party's obligation under article 15 of the Convention applies only if it is "established" that the statement in question had been obtained as a result of torture. The wording of this provision is very different from that of article 3 of the Convention, which prohibits a State party from returning or expelling a person to another State where there are substantial grounds for believing that he "would be in danger" of being subjected to torture. In the present case, the complainant has not established that Mr. Azurmendi's statements were obtained as a result of torture, and the presence of a lawyer at his side during custody casts sufficiently serious doubt on those allegations.

4.14 Moreover, the State party maintains that article 15 of the Convention in no way binds it to make enquiries of a third State in order to assess the validity of allegations of torture. With regard to extradition, it has never been accepted that a State should interfere in the course of adjudicatory proceedings taking place in a third country. The burden of proof can therefore fall only on the author of the allegations.

4.15 Since the obligation contained in article 15 applies only to situations where it is established that a statement has been obtained as a result of torture, the proof can result from a sufficiently consistent body of circumstantial evidence. In the case at hand, it should be noted that the circumstantial evidence adduced by the complainant is tenuous. She refers to a consultation in a hospital following custody and Mr. Azurmendi's retraction the next day before the examining magistrate. The complainant did not supply the least prima facie evidence of the deterioration of Mr. Azurmendi's health during custody or of a causal link between the deterioration of his health and the physical abuse to which he was allegedly subjected. Mr. Azurmendi's retraction before the examining magistrate may be explained by the fact that, at the time, he was not subjected to any pressure and that he therefore was able very quickly to diminish the significance of his previous statements.

4.16 With regard to the presence of a court-appointed lawyer and the fact that Spanish legislation does not permit persons held in custody to choose their lawyer, the fact that the lawyer who was present when the statements were made was appointed by the court does not in itself constitute grounds for suspecting him of having seriously failed in his professional duty by not reporting, immediately or subsequently, that the statements had been obtained under torture.

4.17 In addition to the fact that the complainant's additional explanations concerning custody conditions in Spain are very general, the State party emphasizes that communications containing allegations similar to those made by the complainant have already been rejected by United Nations bodies. Thus, in opinion No. 26/1999, the Working Group on Arbitrary Detention considered:

[I]ncommunicado detention, when justified by insuperable problems in the investigation of the offence concerned, especially when crimes as serious as terrorism are involved, cannot in itself be regarded as contrary to the Covenant. [...] The Group considers charges of terrorism and conspiracy to represent an exceptional circumstance which, according to Spanish legislation, authorizes incommunicado detention for a brief period. [...] The same may be said of the right to choose a legal counsel, to be assisted by counsel during the trial

and to meet with counsel, as set forth in the above-mentioned Body of Principles, adopted by the General Assembly, by consensus, in 1988. As Mikel Egibar did not ask to be interrogated in the presence of a lawyer of his own choosing and had accepted the presence of a court-appointed lawyer, his rights were not violated, especially since, as soon as the incommunicado detention was ordered, he was able to designate a lawyer whom he has kept throughout the rest of the proceedings. [...]

Secrecy of inquiry proceedings in the early stages of the investigation is a measure authorized not only by Spanish law, but by nearly all bodies of legislation, as a measure designed to avoid the results of the trial being affected. It does not infringe the rights of the defence, which at the trial stage will have access to all procedural documents and will be able to challenge any irrelevant or illegally obtained evidence. Thus it cannot be considered that any right essential to the defence of the accused has been violated.

In the present case, the complainant could not claim that Mr. Azurmendi was deprived of his right to choose a lawyer.

4.18 Finally, with regard to the Committee's Views in the Akauz Arana case, the State party maintains that that complaint differed from the present complaint in that it claimed a violation of article 3, and not of article 15, of the Convention, which explains why the Committee provided a long list of reasons that should have led the State party to fear that the author might be subjected to torture if he was deported, and why the Committee criticized France for having carried out the deportation, which was later found to be illegal by French courts, and which entailed a direct handover from police to police without respect for the detainee's rights; this is not the case in the present complaint, where an extradition procedure was carried out in accordance with the relevant regulations and where the complainant had in no way been deprived of asserting her rights before French courts.

### **The complainant's comments**

5.1 In a letter of 23 June 2002, the complainant commented on the State party's observations on the merits of the complaint. In her comments, the complainant maintains her allegations and reiterates the arguments set out in her complaint.

5.2 In order to demonstrate the relevance of her arguments that the States parties to the Convention must respect article 15 of the Convention, including in cases of extradition or expulsion, the complainant draws the Committee's attention to the fact that two other European Union countries, Belgium and Portugal, recently refused to extradite three alleged members of ETA pursuant to article 15 of the Convention on the grounds that the requests for extradition were based on evidence obtained as a result of torture.

5.3 The complainant considers that the claim that French courts were under no obligation to make enquiries of a third State in order to assess the validity of the allegations of torture is an extremely restrictive interpretation, which is contrary to the purpose of the Convention. Such an interpretation undermines the founding principle of the Convention, namely the absolute prohibition of torture, and one of its major corollaries, the unlawfulness of evidence obtained as a

result of torture. Since the present case involves a serious and well-founded allegation that evidence obtained as a result of torture was used as the basis for a procedure, the State party must use the means at its disposal to ascertain the veracity of such allegations. In the case in question, the French courts could, for example, have requested additional information from the Spanish authorities, since this procedure is quite common in extradition cases. Such a request would have allowed the French authorities to assemble and examine, in an objective, fair and thorough manner, all the elements needed to establish that the aforementioned statement had been obtained unlawfully.

5.4 With respect to the elements needed to support the allegations that Mr. Azurmendi had made his statements as a result of torture, the complainant refers to a CPT report that deals with the very period during which the statements at issue were made and according to which:

[B]oth before and during the visit, the CPT received reports from other sources containing a considerable number of allegations of ill-treatment by the National Police, the Civil Guard and the Basque Autonomous Police (the Ertzaintza) relating to periods of custody during 1997 and 1998. Those allegations involved blows to various parts of the body and, in some cases, more serious forms of physical ill-treatment, including sexual assault of female detainees by male police officers, and asphyxiation by placing a plastic bag over the head. In certain cases, the reports included medical certificates recording injuries or conditions consistent with the allegations made by the persons concerned.

Many of the above-mentioned reports related to persons detained in the Basque Country or the Navarre region as terrorist suspects or in connection with terrorist-linked public order offences. It would appear that, in a number of those cases, the persons concerned or their relatives have lodged formal complaints, including before the relevant judicial authorities, about the manner in which they have been treated." (Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 November to 4 December 1998, document CPT/Inf (2000) 5, para. 12; the report was made public on 13 April 2000).

5.5 More precisely, and contrary to the State party's assertions, in his report submitted on 2 February 2000, the Special Rapporteur on the question of torture indicates that:

Mikel Azurmendi Peñagarikano was arrested in Seville on 21 March 1998 by the Guardia Civil and is currently in the Madrid-2 prison (Alcalá de Henares). Mr. Azurmendi has alleged that during his detention he was subjected to ill-treatment and torture which involved being stamped on and kicked, blows to the ribs, head and testicles, electrodes on the penis, stomach and chest, mock executions, being prevented from seeing, and threats to his family and his partner Maite Pedrosa, who was also arrested. Since entering prison, Mr. Azurmendi has reportedly been suffering from ankle pains which have prevented him from engaging in any physical activity (E/CN.4/2000/9, p. 183).

5.6 With regard to the presence of a court-appointed lawyer when the statements at issue were made, the complainant also refers to a more recent report of the Special Rapporteur on the question



of torture, according to which:

It has been noted that most of them have allegedly been subjected to interrogation without the presence of a lawyer or have been assigned a lawyer by the court who, at the time when their statements were taken, allegedly agreed with their detention. In this regard, the Special Rapporteur has been informed that the Criminal Procedures Act provides that, during preventive incommunicado detention, the lawyer is appointed by the court; that the detainee may not consult with him in private; and that family members or any other person with whom the detainee wishes to communicate are informed neither of their detention nor of the place where they are being held (E/CN.4/2002/76/Add.1, 14 March 2002).

5.7 The complainant also emphasizes that the French authorities did not hesitate to accept the statements made by Mr. Azurmendi on 23 and 24 March 1998 when he was in custody, while they completely disregarded his later statements before the examining magistrate. The authorities of the State party therefore attached an irrebuttable presumption of validity to the confessions obtained on 23 and 24 March 1998.

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

6.1 Before considering any claim contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. 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. In the present case, the Committee also notes that all domestic remedies have been exhausted and that the State party has not objected to the admissibility of the communication. It therefore considers that the communication is admissible. Since both the State party and the author have made observations as to the merits of the communication, the Committee proceeds to the examination to the merits of the case.

6.2 The Committee notes the complainant's allegations concerning the circumstances in which Mr. Azurmendi's statements were made, the evidence that she adduced in support of the allegations and the arguments put forward by the parties concerning the obligations of States parties under article 15 of the Convention.

6.3 The Committee considers in this regard that the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations.

6.4 The Committee notes that the French authorities, both judicial and administrative, examined

the complainant's allegations and found that they had not been sufficiently substantiated. The Committee also notes that Mr. Azurmendi's complaint concerning the treatment to which he was allegedly subjected during custody is still being considered by the Spanish judicial authorities, which are expected to rule, at the end of the judicial proceedings, on whether Mr. Azurmendi's confession was obtained in an unlawful manner. The Committee considers that only this judicial ruling should be taken into consideration, and not the simple retraction by Mr. Azurmendi of a confession which he had previously signed in the presence of counsel.

6.5 The Committee reiterates in this regard that it is for the courts of the States parties to the Convention, and not the Committee, to evaluate facts and evidence in a particular case. It is for the appellate courts of States parties to the Convention to examine the conduct of the trial, unless it can be ascertained that the manner in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice, or that the trial judge had clearly violated his obligation of impartiality.

6.6 The Committee, bearing in mind that it is for the author to demonstrate that her allegations are well founded, considers that, on the basis of the facts before it, it cannot conclude that it has been established that the statements at issue were obtained as a result of torture.

6.7 Accordingly, the Committee is of the opinion that the facts before it do not enable it to establish that there has been a violation of article 15 of the Convention.

## **Notes**

1/ As the complainant had been extradited to Spain on 7 November 2001, the State party was unable to comply with the Committee's request of 5 December 2001 regarding interim measures.

2/ The complainant does not specify the exact date of her arrest.

3/ In this regard, the complainant stresses that her relations with her partner have always remained strictly at the personal level.

4/ This is the request referred to by the State party as an "additional request" - see paragraphs 4.4 ff.

5/ The State party explains in its observations (see paragraphs 4.1 ff.) why the ruling is partially in favour of extradition.

6/ The complainant explains that "the very manner in which the period of custody as a whole takes place offers no guarantees that the detainee can make a statement freely, even if a court-appointed lawyer is present when "official" statements are made. According to reliable testimony from all the victims of torture and serious ill-treatment in Spain, the nature of the period in custody is as follows:

"(a) Torture and ill-treatment begin from the time of arrest, including during transfer to the

facilities of the Spanish security forces;

"(b) During the initial hours and initial days of the period of custody, violence is used to condition the detainee so that he or she will make the statements the torturers wish; the violence and the questioning take place continuously, day and night, without let-up; the methods customarily used by the members of the Spanish security forces, separately or in combination, cause pain and acute physical and/or mental suffering and can be described as torture within the meaning of article 1 of the Convention against Torture. They include: repeated beatings, electric shocks, la bolsa (asphyxiation using a plastic bag placed over the head), exhausting physical exercise, deprivation of sleep and/or food, sexual abuse, including rape, humiliating and degrading treatment, constant threats and insults against the individual and/or his or her family;

"(c) When the detainee's physical resistance and morale have been broken and destroyed, the required statements are dictated by the interrogators and the detainee must learn them by heart; a number of sessions are held to ensure that the person will make the statement required. If the person resists or does not make the required statement before the court-appointed lawyer, the torturers threaten the person being questioned with further or resumed torture. In particular, before the "official" statement is made, the person is threatened with further torture if he or she does not recite the "lesson" to the letter when making the statement in the presence of the court-appointed lawyer. If the statement is not "right", the torture starts again until the torturers obtain the result they desire.

"[...] In these circumstances, it has been established that the presence of a court-appointed lawyer while official statements are being made before the Spanish security forces by no means constitutes sufficient protection that will guarantee that the statement has been made freely. Moreover, whenever persons have been tortured in Spain while in custody, they have made such statements in the presence of a court-appointed lawyer, which has never prevented torture from taking place or the statements from being obtained as a result of violence. In addition, the totality of the testimony and the observations of human rights protection bodies show that the court-appointed lawyer displays a passive attitude and that, even if the person being questioned bears traces of ill-treatment or appears disoriented and extremely tired, the court-appointed lawyer in most cases fails to report the fact."

7/ The State party does not mention the existence of another, earlier "first" extradition request, which the complainant refers to in paragraph 2.2.