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COMMITTEE AGAINST TORTURE
Thirty-fourth session
2-20 May 2005

DECISION

Communication No. 194/2001

Submitted by:	I. S. D. (represented by counsel, Mr. Didier Rouget)
Alleged victim:	The author
State party:	France
Date of complaint:	8 August 2001
Date of the decision:	3 May 2005

[ANNEX]

* Made public by decision of the Committee against Torture.

** Re-issued for technical reasons.

Annex

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Thirty-fourth session

concerning

Communication No. 194/2001

Submitted by: I. S. D. (represented by counsel, Mr. Didier Rouget)

Alleged victim: The author

State party: France

Date of submission: 8 August 2001

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

Meeting on 3 May 2005,

Having concluded its consideration of communication No. 194/2001, submitted by Ms. I. S. D. 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, her counsel and the State party,

Adopts the following:

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

1.1 The complainant is I. S. D., born on 6 November 1972, a Basque of Spanish nationality who is currently being held in the Ávila II prison in Spain. She is represented by counsel. The complainant approached the Committee on 8 August 2001 stating that she had been a victim of violations by France of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by virtue of her expulsion to Spain.

The facts as submitted by the complainant

2.1 The complainant states that in 1997, fearing arrest and torture by the Spanish security forces, she took refuge in France. In November 1997, she was arrested by the French police,

who brought her before the examining magistrate in the Paris procurator's Anti-Terrorist Section. She was later charged with possession of false administrative documents and participation in a criminal association and was immediately imprisoned.

2.2 On 12 February 1999, the complainant was sentenced to three years' imprisonment, one of them suspended, for the above-mentioned offences. She appealed to the Paris Court of Appeal.

2.3 On 31 August 1999, the Minister of the Interior issued an order for her expulsion from French territory as a matter of absolute urgency, which was not served on her immediately.

2.4 On 12 October 1999, the Paris Court of Appeal sentenced her without the right to appeal to three years' imprisonment, one of them suspended, and five years' ban on entry into France, in respect of the charges against her.

2.5 The complainant was due to be released on 28 October 1999. She says that, fearing torture by the Spanish security forces and in order to prevent her expulsion to Spain, she began a hunger strike on 28 September 1999. She states that, as a result of her very poor state of health following her long hunger strike, she weighed only 39 kilos and was therefore taken to the Fresnes prison hospital.

2.6 At 6 a.m. on 28 October 1999, the day of the complainant's release, the French police served her with the expulsion order issued on 31 August 1999 by the Minister of the Interior, as well as a second decision taken on 27 October 1999 by the Prefect of Val de Marne, specifying Spain as the country of destination. The complainant was immediately taken in an ambulance by the French police from Fresnes prison to the Franco-Spanish border post of La Junquera for expulsion to Spain, and then taken to the Bellvitge hospital in Barcelona.

2.7 The complainant alleges that she was arrested by the Spanish Civil Guard at her home in Hernani, Gipuzkoa, on 30 March 2001 and that on the following day, while being held in custody, she was urgently transferred to the San Carlos hospital in Madrid, where she remained until 7 p.m., because of torture inflicted on her: beatings, *la bolsa*,[1] touching and attachment of electrodes to her body. She adds that she was subjected to 16 hours of questioning and continuous violence, and held in custody without contact with her lawyer or her family for more than five days before being brought before a judge.

2.8 The complainant alleges that on the same day, 31 March 2001, in the presence of an examining magistrate and a court-appointed lawyer, she was obliged to make a statement which the Civil Guards had forced her to learn by heart, by threatening further torture.

2.9 The complainant points out that on 4 April 2001, before the National High Court, she refused to enter a plea and complained of the torture she had suffered. An order to imprison her then arrived, and she was taken to the Soto del Real prison. Following her arrest, she was accused of participating in several acts of violence.

2.10 As far as the requirement of exhausting domestic remedies in France is concerned, the complainant states that she was unable to seek an effective remedy in the French courts against the expulsion order of 31 August 1999 or the decision of 27 October 1999, since they were served on her on 28 October 1999, the day of her release. She states that she had been cut off from all contact with her counsel, and that she had been immediately taken to the border post of La Junquera for expulsion to Spain and was therefore unable to seek an effective remedy against measures that had already been carried out. However, her counsel did lodge an appeal a posteriori, which was submitted on 23 December 1999 and received by the court on 27 December 1999, and is now pending before the administrative court, which has not yet delivered its judgement.

2.11 The complainant states that the same matter has not been submitted under any other procedure of international investigation or settlement.

The complaint

3.1 According to the complainant, France did not comply with its obligations under the Convention, since she was expelled to Spain although there were substantial grounds for believing that she would be in danger of being subjected to torture in Spain. She states, first, that she had taken refuge in France in 1997 for fear of torture in Spain, and, secondly, that she had been found guilty by the French authorities of being an alleged militant of the secessionist organization ETA and that, despite the serious accusations made against her, no request for her extradition had been made by the Spanish authorities. She adds that her expulsion to Spain meant that she could enjoy no protection from the courts.

3.2 The complainant states that she was the subject of an "extradition in disguise", since France was well aware of the risks she would face on Spanish soil, especially as attention had been drawn to those risks by certain public figures and international bodies, as well as several non-governmental organizations.

3.3 The complainant alleges that France infringed article 3, paragraph 2, of the Convention, since the practice of torture persists in Spain, and a State party to the Convention must bear such circumstances in mind when taking a decision regarding expulsion.

State party's observations on admissibility

4.1 In a reply dated 6 March 2002, the State party disputes the admissibility of the complaint on the grounds that domestic remedies have not been exhausted. It considers that the appeal against the expulsion order is still pending before the Paris administrative court, and that the complainant failed to lodge an appeal seeking the annulment of the order specifying Spain as the country of destination. Such an appeal would have enabled the competent administrative court to check whether the decision was in conformity with France's international commitments, in particular article 3 of the Convention.

4.2 The State party notes that such an appeal could have been lodged as soon as the decision had been notified; the decision contained an indication of the appeal procedure and deadlines. Moreover, the appeal could have been accompanied by an application for a stay of execution and

a request for the temporary suspension of the enforcement of the decision under article L.10 of the Code of Administrative Courts and Administrative Courts of Appeal, which was in force at that time.

4.3 The State party adds that although, in the decision of 9 November 1999 in relation to communication No. 63/1997, *Josu Arkauz Arana v. France*,[2] the Committee concluded that the complaint was admissible, in view of the fact that "an appeal against the … deportation order issued in respect of the complainant … would not have been effective or even possible, since it would not have had a suspensive effect and the deportation measure was enforced immediately following notification thereof, leaving the person concerned no time to seek a remedy[, and] … the Committee [against Torture] therefore decided … that the communication was admissible", the State party nevertheless invites the Committee to re-examine its position in the light of the following considerations. The possibility of automatic enforcement of expulsion measures on grounds of public order is allowed for under article 26 bis of the ordinance of 2 November 1945. It addresses the need to deport effectively and promptly aliens whose presence in France constitutes a threat to public order, insofar as allowing them to remain at liberty in France could not but lead to a resumption of their activities endangering public order. However, French law allows judges of administrative courts discretion to order a stay of execution of deportation measures or the temporary suspension of their application.

4.4 The State party also notes that the Act of 30 June 2000, which entered into force on 1 January 2001, enhanced the powers of interim relief judges by providing, in particular, for the stay of measures infringing on a fundamental freedom, the judge being required to rule within 48 hours from the lodging of the application.

The complainant's comments on the State party's observations

5.1 In her comments on the State party's reply, the complainant recalls that with regard to domestic remedies, it was only at 6 a.m. on 28 October 1999 that the authorities notified her of the content of the expulsion order issued on 31 August 1999 by the Minister of the Interior. The French authorities appear to have deliberately kept her in ignorance of the expulsion order issued against her two months previously. At the same time, the police notified her of the decision taken by the Prefect of Val de Marne to specify Spain as the country of destination.

5.2 The complainant adds that she had been held in Fresnes prison, cut off from any contact with her family and her counsel, and was absolutely unable to warn them of her imminent expulsion. She was thus materially prevented by the French authorities from lodging an appeal against the expulsion order and the Prefect's decision. Similarly, it was materially impossible for her, at 6 o'clock in the morning, to apply to an administrative court for a stay of execution or the temporary suspension of these two decisions. In addition, in that regard, the French Government refers to the Act of 30 June 2000, which was not in force at the time of the events.

5.3 The complainant states that domestic remedies cannot be considered to be effective and available, and that such remedies cannot give satisfaction to an individual who is a victim of a violation of article 3 of the Convention, since they cannot prevent the expulsion of the person concerned to a country where he or she faces a risk of torture. The complainant notes that, under article 22, paragraph 5 (b) of the Convention, the rule of the exhaustion of domestic remedies

does not apply. She adds that the application of domestic remedies is unreasonably prolonged, whereas judicial decisions are enforced immediately after the person concerned is notified of them.

5.4 The complainant points out in that regard that her complaint displays great similarities with the *Arana* case.[3] In this case too, domestic remedies cannot be regarded as effective and available since such remedies cannot give satisfaction to an individual who is the victim of a violation of article 3 of the Convention, as they cannot prevent the expulsion of the person concerned to a country where he or she faces the risk of torture. Hence she was unable to seek an effective remedy before the French courts against measures which had already been enforced or to apply to the judge of an administrative court for a stay of execution or for suspension.

5.5 Lastly, the complainant maintains that in her case the rule of the exhaustion of domestic remedies does not apply since the application of domestic remedies is unreasonably prolonged, whereas judicial decisions are enforced immediately after the person concerned is notified of them.

The Committee's decision on admissibility

6.1 At its twenty-ninth session the Committee considered the question of the admissibility of the complaint and ascertained that the same matter had not been and was not being examined under another procedure of international investigation or settlement. Concerning the question of whether domestic remedies had been exhausted, the Committee noted that it had been impossible for the complainant to seek an effective remedy against the expulsion order and the decision specifying Spain as the country of destination, as there had been no time to act between the serving of the orders and the enforcement of the expulsion. The Committee considered that in the present case, the criterion followed in the *Arkauz Arana* case[4] applied, since an appeal against the ministerial deportation order issued in respect of the complainant on 31 August 1999 but served on the very day of her expulsion, at the same time as the order indicating the country of destination, would not have been effective or even possible, since the deportation measure was enforced immediately following notification thereof, leaving the person concerned no time to seek a remedy. The Committee therefore found that article 22, paragraph 5 (b), did not preclude it from declaring the communication admissible.

6.2 Accordingly, the Committee against Torture decided on 20 November 2002 that the communication was admissible.

State party's observations on the merits

7.1 The State party, in its observations of 22 October 2003, notes that in accordance with the decision on admissibility in the *Arana* case,[5] the issue before the Committee in the present case is not whether the complainant was actually subjected to acts in breach of article 3 in March 2001 but whether, on the date of the enforcement of the removal measure, the French authorities could have considered that she would face real risks in the event of her return to Spain. But it was not possible to reach that conclusion on the basis of examination of her situation.

7.2 The State party adds that there is no reason to rule out sending members of ETA back to Spain as a matter of principle. There is no "consistent pattern of gross, flagrant or mass violations of human rights" within the meaning of article 3, paragraph 2, of the Convention in Spain. Spain conducts a policy of prevention and punishment of terrorist actions carried out by ETA, as is perfectly legitimate, provided that the measures taken in that regard comply with fundamental guarantees. The State party recalls that Spain is a State governed by the rule of law that has entered into international commitments relating to human rights, and respect for individual freedoms is ensured inter alia by the independence given to the judicial authorities. The State party further refers to a decision of 12 June 1998 handed down by the European Commission of Human Rights in a case concerning France, in which the Commission ruled that the mere fact of membership of ETA offered insufficient grounds for considering that, if sent back to Spain, the person concerned faced a serious risk of being subjected to treatment contrary to article 3 of the Convention.

7.3 The State party points out that no aspect of the consideration of the individual situation of the complainant led it to believe that she would be exposed to serious risks of torture or ill-treatment within the meaning of article 3 of the Convention if she were sent back to Spain. Moreover, the State party notes that the complainant did not apply to the French Office for the Protection of Refugees and Stateless Persons for refugee status or for the issue of a residence permit on grounds of territorial asylum. Since the complainant did not take those steps, she did not indicate the personal risks to which she now claims to have been exposed. Similarly, she did not during her detention take any steps to seek admission to another country, although she was aware of the fact that she had been banned from French territory under a judicial decision and that on leaving prison she would be liable to be sent back to Spain. The complainant was not the subject of any national or international arrest warrant, nor a request for extradition. No parallels can therefore be drawn with the Committee's decision in the Arana case. It has been shown that, on arrival in Spain, the complainant was not handed over to the police services as she claims, but was released to her family. According to newspaper articles, no proceedings were engaged against her in Spain at the time, thus explaining why she was left at liberty. It was not until 30 March 2001, 17 months after her return to Spain, that the complainant was arrested by the Spanish Civil Guard. She had remained in Spain for that entire period, during which she had furthermore been very openly engaged in political activity on behalf of the Basque cause, rather than attempting to find a refuge in order to escape the "serious risks" of torture she reports. The complainant merely alleges that she was subjected to police surveillance. She makes no claim to have been subjected to house arrest or prevented from leaving Spain. The State party notes that it is difficult to understand why the complainant remained voluntarily on Spanish soil for more than a year and a half and engaged in pro-Basque political action.

7.4 The State stresses the absence of any link between the complainant's expulsion from French territory and her arrest by the Spanish authorities more than a year and a half later after she had remained in Spain of her own free will. Her weak state during the period immediately following her return does not suffice to explain the delay between the date of her removal and the date of her arrest, nor the extended period she spent in Spain.

7.5 The State party adds that it is beyond the bounds of credibility to maintain, as the complainant does, that the purpose of returning her to Spain was to enable the Spanish police to question her about events prior to her flight to France in 1997 and her return to Spain late in 1999.

7.6 In view of the nature of the acts in which the press claims she may have been implicated - 20 or so acts of violence, some of them deadly - the Spanish authorities would not have waited 17 months to question her about those cases if they had seriously believed that she was involved. The mere fact of her weak state could not have delayed her interrogation for 17 months if that had been behind her expulsion to Spain. The State party therefore maintains that it is more likely that her arrest after such a period of time was due to new factors, subsequent to her return, that could not have been taken into account by France at the time when the removal measure was enforced. It also emerges from newspaper articles that the complainant's membership of the "Ibarra" commando was not known at the time of her expulsion, and she was arrested in March 2001 immediately after being implicated by another ETA member. The State party asserts that it could not have taken these facts into account at the time when the expulsion order was enforced.

7.7 For all the above reasons, no failure to comply with the provisions of article 3 of the Convention can be deemed to have been established.

Comments by the complainant

8.1 In a letter of 31 December 2003, the complainant maintains that special situations conducive to the practice of torture exist in a very large number of countries considered democratic by the international community. There is no irrebuttable presumption that torture cannot exist in the States of the European Union.

8.2 The complainant recalls the provision of article 2 of the Convention that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". She stresses that all the international human rights bodies have periodically and repeatedly observed persistent acts of torture and ill-treatment of persons suspected of acts of terrorism by members of the Spanish security forces, and have noted that the mechanism of incommunicado detention of persons held in police custody in Spain under its anti-terrorist legislation was conducive to the practice of torture. On several occasions officials found guilty of acts of torture have been pardoned by the Spanish Government, thus creating a climate of impunity and consequently encouraging the practice of torture. The complainant adds that all these observations are corroborated by NGOs and contradict the presumption put forward by the French Government that torture does not exist in Spain.

8.3 The complainant repeats that prior to her expulsion she informed the French authorities that she refused to be expelled to Spain. For that reason she had undertaken a long hunger strike. The French authorities had had to transfer her by ambulance with medical personnel in attendance because of the deterioration in the state of her health. Numerous NGOs and public figures had contacted the French Government in order to prevent her deportation to Spain, but without success.

8.4 The complainant refers to the recommendations of the Committee against Torture following its consideration of the second periodic report of France submitted on 6 May 1998, whereby the State party was to pay greater attention to the provisions of article 3 of the Convention, which applies equally to expulsion, refoulement and extradition.[6]

8.5 The complainant stresses that the fact that she was not arrested on arrival in Spain, nor interrogated by the security forces, was due to her very poor state of health after 31 days of hunger strike. She points out that it was incumbent on the State party to use every means to ensure the protection of individuals from torture. She further recalls that, in a letter of 11 January 2000 in reply to correspondence from a European Member of Parliament, the Minister of Justice of France asserted that there was a presumption that treatment in breach of article 3 of the European Convention on Human Rights would not take place in Spain. In this way the French Minister of Justice had given an official undertaking that the complainant would not be subjected to ill-treatment in Spain. This fact had encouraged her not to hide or flee, wrongly believing that she would not be subjected to ill-treatment. In March 2001, however, the Spanish authorities ordered her to be arrested and detained in custody, during which time she was subjected to ill-treatment. The undertaking by France that the complainant would not be tortured was thus not respected. There was a direct link between her expulsion by France to Spain and the torture to which she was subjected to in Spain.

8.6 Lastly, the complainant refers to the Committee's views concerning the complaint *T.P.S. v. Canada*,[7] whereby the fact that the complainant's fears were realized, and in particular the fact that he was actually subjected to torture after being removed to a country where he alleged that he was at risk of being subjected to ill-treatment of that nature, constituted a relevant factor in gauging the seriousness of his allegations. According to the complainant, it may be concluded from the fact that her fears were realized that her allegations that she would be personally at risk of being subjected to torture if she were deported to Spain were based on substantial, established and credible evidence. The State party's expulsion of the complainant to Spain therefore constituted a violation of article 3 of the Convention.

Issues before the Committee

9.1 The Committee must determine whether the expulsion of the complainant to Spain violated the State party's obligation under article 3, paragraph 1, of the Convention not to expel or return ("refouler") an individual to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In reaching its conclusion, the Committee must take into account all relevant considerations in order to establish whether the individual concerned would be at personal risk.

9.2 The Committee must determine whether the expulsion of the complainant to Spain constituted a failure by the State party to fulfil its obligation under that article not to expel or return ("refouler") an individual to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In reaching its conclusion, the Committee must, pursuant to article 3, paragraph 2, of the Convention, take into account all relevant considerations, including the existence in the State to which the complainant would be sent of a consistent pattern of gross, flagrant or mass violations of human rights, enabling the Committee to establish whether she was at personal risk. The purpose of the

exercise, however, is to determine whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. Hence the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist 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 is in no danger of being subjected to torture in the specific circumstances of his case.

9.3 The issue before the Committee is whether, on the date of the enforcement of the removal measure, the French authorities could have considered that the complainant would be exposed to real risks in the event of her expulsion. In making a determination, the Committee takes into consideration all the facts submitted by the author and the State party. Consideration of the facts shows that the author has failed to satisfy the burden of proof and demonstrate in that expulsion to Spain placed her at personal risk of torture at the time of her expulsion. In this regard the evidence submitted by the author is insufficient, in that the primary focus is an allegation that she was tortured 17 months after being expelled from the State party.

9.4 The fact of torture does not, of itself, necessarily violate article 3 of the Convention, but it is a consideration to be taken into account by the Committee. The facts as submitted to the Committee show that the author, on her return to Spain, recovered her health without any interference and took an active part in political developments in the country, promoting her views without any need for secrecy or flight. Some 17 months went by before the alleged acts of torture. The author offers no convincing explanation of why her certain risk of torture, inter alia because of her familiarity with intelligence of vital importance to the security of the Spanish State, did not lead to immediate action against her. Neither does the author submit evidence concerning events in Spain prior to her expulsion from French territory that might lead the Committee to establish the existence of a substantiated risk. The author has not demonstrated any link between her expulsion and the events that took place 17 months later.

9.5 There being insufficient evidence of a causal link between the expulsion of the complainant in 1999 and the acts of torture to which she claims to have been subjected in 2001, the Committee considers that the State party cannot be said to have violated article 3 of the Convention in enforcing the expulsion order.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention, consequently concludes that the expulsion of the complainant to Spain did not constitute a violation of article 3 of the Convention.

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

Notes

[1] This form of torture consists in covering the head with a plastic bag to cause asphyxia.

[2] Communication No. 63/1997, *Josu Arkauz Arana v. France*: Views adopted on 9 November 1999 (CAT/C/23/D/63/1997, document dated 5 June 2000, para. 11.5).

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] CAT, A/53/44 of 27 May 1998, para.145

[7] CAT/C/24/D/99/1997.
