



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12-30 March 2007

DECISION

Communication No. 1359/2005

Submitted by: Mario Esposito (represented by counsel Mr. Emilio Ginés Santidrián)

Alleged victim: The author

State party: Spain

Date of communication: 8 July 2003 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 8 February 2005 (not issued in document form)

Date of adoption of decision: 20 March 2007

Subject matter: Extradition of a member of a Mafia-like organization from Spain to Italy

* Made public by decision of the Human Rights Committee.

- Procedural issues:* Failure to exhaust domestic remedies; insufficiently substantiated claims; abuse of the right to submit a communication; incompatibility *ratione materiae*
- Substantive issues:* Prohibition of torture and cruel, inhuman or degrading treatment; prison conditions; violation of the right to due process
- Articles of the Covenant:* 7; 10, paragraph 1; and 14, paragraph 3 (d)
- Articles of the Optional Protocol:* 1, 2, 3 and 5, paragraph 2 (b)

[ANNEX]

Annex

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE
OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Eighty-ninth session

concerning

Communication No. 1359/2005*

Submitted by: Mario Esposito (represented by counsel Mr. Emilio Ginés Santidrián)

Alleged victim: The author

State party: Spain

Date of communication: 8 July 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2007,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 8 July 2003, is Mario Esposito, an Italian citizen born in 1959, who is currently serving a life sentence in Italy. He claims to be the victim of a violation by Spain of articles 7, 10, paragraph 1, and 14, paragraph 3 (d), of the Covenant. He is represented by counsel, Mr. Emilio Ginés Santidrián. The Optional Protocol entered into force for the State party on 25 April 1985.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Factual background

2.1 On 30 June 1994, Interpol notified Spain's Central Magistrates' Court No. 5, the duty court, of the pretrial detention of the author and his imprisonment in Barcelona on the grounds of his alleged membership, as organizer and leader, of an armed Mafia-like organization known as the "Muzzolini clan". This organization, whose activities were linked to the Camorra, was active around Sessa Aurunca, Carinola and Cellole, with the objective of controlling businesses and shops in the region through the intimidation and extortion of the owners. The organization was disbanded in July 1993.

Proceedings in Spain

2.2 By note verbale of 1 July 1994, the Italian authorities submitted a request for the author's extradition to stand trial in Italy on one charge of association with organized crime and two charges of extortion (under Italian law; under Spanish law, these would be the equivalent of charges of unlawful assembly and making criminal threats, respectively). On the same date, the investigating judge in the case decided to upgrade the author's detention to pretrial imprisonment, setting in motion extradition proceedings against him in the Criminal Division of the National High Court.

2.3 By a decision of 10 July 1995, the National High Court acceded in part to Italy's request, agreeing to the extradition of the author to stand trial on one charge of association with organized crime and one of extortion, under Italian law. The National High Court rejected one of the charges of extortion, deeming it to be time-barred.

2.4 By note verbale of 17 March 1995, the Italian authorities had submitted a request to extend the grounds for extradition to enable the author to be tried in Italy for the offence of illegal possession of arms and a further offence of extortion (equivalent to the offences of storing weapons of war and making criminal threats, respectively, under Spanish law). By a decision of 9 October 1995, the National High Court acceded to the extended extradition request.

2.5 By a further note verbale of 30 October 1995, the Italian authorities submitted a second extended extradition request to enable the author to be tried in Italy on a new charge of murder and one of possession of arms.

2.6 In accordance with article 12 of the Passive Extradition Act,¹ the author appeared on 22 January 1996 before Central Magistrates' Court No. 5 and challenged the extradition order. On 30 January 1996, the investigating judge decided to refer the case to the Criminal Division of the National High Court. The author's defence attorney repeatedly objected to proceeding with the hearing in the National High Court, arguing that documentation was needed from the Italian Court of Cassation. The hearing was finally set for 14 January 1997 but was held in the absence of the author, who had already been extradited to Italy on 11 July 1996. During the hearing, the author's defence attorney repeated his objection to the extradition and pointed

¹ Act No. 4/1985 of 21 March.

out that it was neither normal nor common for a requesting State to submit further extradition requests concurrently to back up the first one. The National High Court, however, held that this kind of procedure was relatively common in extradition proceedings and was permitted by the European Convention on Extradition, to which the States members of the Council of Europe, including Spain and Italy, were parties.²

2.7 By a decision of 16 January 1997, the National High Court declared that the second extended request for the author's extradition was valid.

2.8 The author points out that he did not submit an appeal for *amparo* to the Spanish Constitutional Court because, according to the Court's jurisprudence, life imprisonment was compatible with the Spanish Constitution, so that such an appeal would have been ineffective in his case.

Proceedings in Italy

2.9 On 9 February 2000, the author was sentenced by the Corte di Assise di Santa Maria CV in Italy to:

- (a) Nine years' imprisonment for association with organized crime, making criminal threats and possession of arms;
- (b) Life imprisonment for murder, with nine months' daytime solitary confinement.

2.10 The author maintains that he was not present at the trial at the Corte di Assise di Santa Maria CV and that the sentence did not mention any of the three extradition procedures initiated against him in Spain, even though he could only be tried for the offences mentioned in the three decisions of the Spanish National High Court.

2.11 The author appealed against the sentence handed down by the Corte di Assise di Santa Maria CV, but the appeal was rejected by the Naples appeal court (Corte di Assise di Apelo di Napoli) on 29 April 2002. The first claim raised in the appeal was that the sentence passed by the court of first instance was null and void, as the trial court had no jurisdiction in the case. It was also argued in the appeal that Spain had granted the second extended extradition request, which was based on a murder charge, on certain conditions, one of which was that any sentence must not exceed 30 years' imprisonment.

2.12 By a ruling of 13 March 2003, the Italian Supreme Court dismissed the author's appeal in cassation.

² European Convention on Extradition of 13 December 1957, ratified by Spain on 21 April 1982.

The complaint

3.1 The author claims to be the victim of a violation of article 7, as the imposition of life imprisonment constitutes, in his view, cruel, inhuman or degrading treatment. He points out that although life imprisonment is not specifically mentioned in the European Convention on Extradition or in Spain's Passive Extradition Act, both instruments prohibit the subjection of convicted offenders to cruel, inhuman or degrading treatment. He adds that, in cases of extradition for offences punishable in the requesting State with life imprisonment, the Spanish National High Court, the organ responsible for dealing with extradition requests in Spain, has been demanding guarantees that the sentence will not exceed 30 years' imprisonment, the maximum allowed under the Spanish Criminal Code. According to the author, this practice is in line not only with the Spanish Constitution, which prohibits the imposition of inhuman or degrading punishment, but also with the jurisprudence of the European Court of Human Rights. Moreover, in recent bilateral extradition treaties, Spain has included life imprisonment as a reason for automatically rejecting extradition, unless the requesting State guarantees that that penalty will be replaced by a term of imprisonment with a maximum limit.

3.2 The author maintains that the penalty imposed by the Corte di Assise di Santa Maria CV involves a violation of article 10, paragraph 1, taken in conjunction with article 7, paragraph 4, of the Covenant, on account of both the length of the sentence and the circumstances of its enforcement. He believes that Italy is failing to comply with the Standard Minimum Rules for the Treatment of Prisoners.

3.3 He also claims a violation of article 14, paragraph 3 (d), in that he was denied the right to be present at the hearing on 14 January 1997 before the Criminal Division of the Spanish National High Court, at which the second extended extradition request, based on one charge of murder and one of possession of arms, was considered. The reason for this was that he had already been extradited to Italy on 11 July 1996 pursuant to the National High Court's decision on the first extended extradition request. Nor was he present at his trial in Italy, despite the seriousness of the charges against him. He points out that the right to be present at your own trial means that the authorities have a duty to notify the accused and the defence attorney, with sufficient notice, of the date and place of the trial and to request that they appear, which was not done. He points out that, although extradition proceedings do not involve a judgement on a person's guilt, they are still a judicial procedure in which the court must guarantee the fundamental rights of the person facing extradition, especially when the extradition request could result in life imprisonment.

3.4 The author adds that Spain had granted the extradition request without insisting that any custodial sentence must not exceed 30 years and that the conditions in which it was to be served must not amount to inhuman and degrading punishment, in accordance with resolution (76) 2 of the Committee of Ministers of the Council of Europe, of 17 February 1976, on the treatment of long-term prisoners. He maintains that the Spanish authorities, in proceeding with his extradition, were obliged to prevent any possible violation of his fundamental rights by the Italian authorities.

State party's observations on admissibility and the merits

4.1 In its observations of 12 April 2005, the State party points out that the events referred to had taken place almost 10 years earlier, given that the author was extradited in 1996. According to the State party, while the Covenant does not set a time limit for submitting communications under the Optional Protocol, the communication in question should be declared inadmissible for being an abuse of the right to submit communications, taking into account the passage of such a long period of time.

4.2 The State party also points out that the alleged violations referred to by the author mostly concern Italy, and that Spain cannot respond to allegations of violations of human rights by other countries.

4.3 According to the State party, the author appears not to realize that the person facing extradition is not on trial in extradition proceedings, in which one State simply cooperates with another in pursuing criminal proceedings with all due process, so that the communication is incompatible *ratione materiae* with the Covenant.

4.4 With regard to the sole allegation concerning Spain, namely, the one relating to the National High Court's ruling that the second extended extradition request was valid, the author had not, in the State party's view, exhausted all available domestic remedies. The State party points out that an appeal could have been lodged with a higher court against the National High Court's decision of 16 January 1997 on the second extended extradition request, and that ordinary remedies would have been available to challenge the decision in such an appeal. Moreover, the author had not filed an appeal for *amparo* with the Constitutional Court.

4.5 The State party maintains that the arguments put forward by the author with regard to his absence from the hearing before the National High Court on 14 January 1997 are manifestly groundless. It points out that his presence at such a hearing is not required under Spain's Passive Extradition Act, article 12 of which provides only for the person facing extradition to appear before the investigating judge to agree to or challenge the extradition. This appearance took place on 22 January 1996. The State party adds that the author was not present at the hearing dealing with the second extended extradition request because he was in prison in Italy, serving a sentence passed in that country. In any case, the author's representative was present at the hearing.

Additional State party's observations

5.1 In its observations of 2 August 2005, the State party reaffirms its claim that the communication is inadmissible on grounds of abuse of the right to submit a communication, incompatibility *ratione materiae* with the Covenant, failure to substantiate the complaint and failure to exhaust domestic remedies.

Author's comments

6.1 In his comments of 3 March 2006, the author informs the Committee that his stay in the Italian prison is still governed by the emergency legislation on the prison regime regulated by article 41 bis et seq. of Act No. 354 of 26 July 1975, which means that he is in constant solitary

confinement, with no visits or contact with his family allowed, which violates article 10 of the Covenant and the basic principles for the treatment of prisoners, as set out by the Council of Europe (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) and the United Nations.

6.2 He insists that his current situation is the result of Spain's decision to extradite him to Italy without any of the guarantees stipulated in the European Convention on Extradition and without requiring that the sentence be in line with Spanish legislation, which does not provide for life imprisonment or the solitary confinement or prison restrictions imposed by Italy. He points out that, after he had been extradited to Italy, a new extended extradition request based on new facts was granted without his being present to defend himself and without notifying him of the new proceedings.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The State party maintains that the submission of the communication almost 10 years after the author's extradition to Italy constitutes an abuse of the right to submit a communication. The Committee notes that the author was extradited in July 1996 and submitted his complaint in July 2003. While in other circumstances the Committee might expect a reasonable explanation from the author for the substantial delay in submitting the communication, in the circumstances of the present case, and bearing in mind, in particular, that the author has been kept virtually incommunicado since he went to prison, the Committee considers that the passage of seven years after his deportation is not on its own sufficient to substantiate an abuse of the right to submit a communication.

7.4 As for the requirement that domestic remedies be exhausted, the Committee takes note of the State party's assertion that remedies were available in the domestic courts but the author made no use of them. However, the Committee observes that, once the author had been extradited, the remedies referred to would not have been effective for the purposes of a complaint by him about irregularities in the procedure followed in the National High Court, which culminated in the decision of 16 January 1997 to grant the second extended request for the author's extradition on one charge of murder and one of possession of arms.³ Consequently, the Committee considers that article 5, paragraph 2 (b), does not prevent it from examining the communication.

³ See the Views of the Committee in the case of *Weiss v. Austria*, adopted on 3 April 2003 (communication No. 1086/2002, para. 8.2).

7.5 The Committee takes note, however, of the State party's claim that the alleged violations referred to by the author are mainly attributable to Italy, not Spain. The Committee notes that the author's complaint in relation to articles 7 and 10 that the penalty imposed by the Corte di Assise di Santa Maria CV involved, by virtue of its duration and circumstances, cruel, inhuman or degrading treatment, refers to acts that took place outside the jurisdiction of the State party. It recalls that article 2 of the Covenant requires that States parties ensure to all individuals subject to their jurisdiction the rights recognized in the Covenant. Generally speaking, if a person is legally extradited, the State party concerned bears no responsibility under the Covenant for any violations of that person's rights that occur under the other State party's jurisdiction, and a State party can in no way be required to guarantee the rights of a person in another jurisdiction. Nevertheless, if a State party takes a decision regarding a person under its jurisdiction and the necessary and foreseeable consequence of that decision is the violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.⁴ In the present case, it cannot be asserted that the subjection of the author to treatment that violated the Covenant was the necessary and foreseeable consequence of his extradition to Italy. Consequently, the Committee considers that the communication is inadmissible with regard to articles 7 and 10, in accordance with article 1 of the Optional Protocol.

7.6 As for the complaint of a violation of article 14, paragraph 3 (d), the author alleges that there were certain irregularities on the part of the Spanish authorities with regard to the successive postponements of the hearing before the Criminal Division of the National High Court, which may explain why the author was extradited before it was held. The Committee notes that the author was not charged or found guilty of any offence in the State party, and that the decision to extradite him did not constitute a punishment resulting from a criminal procedure. The Committee therefore concludes that the extradition proceedings against the author do not constitute the determination of a criminal charge within the meaning of article 14 of the Covenant, and that the complaint relating to article 14, paragraph 3 (d), is inadmissible *ratione materiae*, in accordance with article 3 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 3 of the Optional Protocol;
- (b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish 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.]

⁴ See the Views of the Committee in the case of *Kindler v. Canada*, adopted on 30 July 1993 (communication No. 470/1991, para. 6.2).