



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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 839/2017^{*, **}

<i>Communication submitted by:</i>	G.J. (represented by counsel, Gema Fernández Rodríguez de Liévana)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Spain
<i>Date of complaint:</i>	24 May 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 4 September 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	27 July 2021
<i>Subject matter:</i>	Trafficking in persons
<i>Procedural issue:</i>	Examination of the same matter under another procedure of international investigation or settlement
<i>Substantive issues:</i>	Torture; cruel, inhuman or degrading treatment; trafficking; lack of investigation
<i>Articles of the Convention:</i>	1, 2 (1), 3, 12, 13 and 16

* Adopted by the Committee at its seventy-first session (12–30 July 2021).

** The following members of the Committee participated in the consideration of the communication: Essadia Belmir, Claude Heller, Erdoğan İşcan, Liu Huawen, Ana Racu, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing. Pursuant to rule 109, read in conjunction with rule 15, of the Committee's rules of procedure, and paragraph 10 of the guidelines on the independence and impartiality of members of the human rights treaty bodies (the Addis Ababa guidelines), Diego Rodríguez-Pinzón did not participate in the examination of the communication.



1. The complainant is G.J., a Nigerian national born in 1985. She claims that the State party has violated her rights under article 2 (1), read in conjunction with articles 1, 3, 12, 13 and 16 of the Convention. The State party has made the declaration pursuant to article 22 of the Convention, effective from 21 October 1987. The complainant is represented by counsel, Gema Fernández Rodríguez de Liévana.

Facts as submitted by the complainant

2.1 In October 2006, the complainant was captured by a trafficking network in Benin City. The network tricked her with promises of domestic work and the opportunity to study. In November 2006, the complainant reached Spain in a small boat. Upon arrival, she was informed that she had incurred a debt of €20,000 and that in order to pay it off, she would have to engage in prostitution because her lack of documentation meant that she would be unable to work in any other capacity. In addition, she was subjected to voodoo rituals.

2.2 On 23 November 2006, under pressure from the network of traffickers, and on their instructions, the complainant applied for asylum. The network wanted her to regularize her situation so that it could continue sexually exploiting her. The trafficking network told her to claim that she was a Sudanese national and that she had fled the Sudan because she had been subjected to religious persecution. According to the complainant, this approach is commonly used by trafficking networks in Spain. On 22 January 2007, the Ministry of the Interior rejected her application without having identified her as a victim of trafficking. The administrative appeal she lodged to challenge the decision was rejected on 20 June 2007.

2.3 For three years, the complainant was sexually exploited against her will. In addition, she was forced to have unprotected sex, which resulted in her becoming pregnant. Although she made it clear that she did not agree, on 12 February 2010, she was taken to a clinic where she was made to sign a document consenting to the termination of her pregnancy. However, on 18 February 2010, before the procedure could be performed, the complainant was detained in an immigration check during an appointment at the Immigration Office in Coslada, where she intended to submit an application for a residence and work permit on the grounds of social ties. The complainant was immediately admitted to the Migrant Detention Centre in Madrid. On 24 February 2010, while she was still at the Centre, the complainant again applied for asylum, claiming that she had experienced religious persecution and feared being killed by the person who had helped her reach Spain and to whom she still owed money. The Office of the United Nations High Commissioner for Refugees (UNHCR) reviewed her application and found that her claims indicated that she had been and might still be a victim of trafficking in persons for the purposes of sexual exploitation. On that basis, it requested that her application for international protection be granted.¹ On 2 March 2010, the complainant's application was rejected because of inconsistencies in her account or a lack of substantiation of the facts as reported and because the story was very similar to the one in her first asylum application. On 3 March 2010, the complainant requested a reconsideration of her application, providing further details and arguing that the earlier decision had not been duly reasoned. On 5 March 2010, the complainant's request for reconsideration was also rejected.

2.4 On 11 March 2010, while the complainant was still at the Migrant Detention Centre, she met with the lawyer who is representing her before the Committee and stated that she wished to be represented by her. The lawyer attempted to find a notary to draft a public document authorizing her to represent the complainant. However, her attempts were unsuccessful; notaries are systematically denied access to the Centre and therefore consider it futile to travel there. This difficulty in obtaining access was recognized on 22 April 2010 by the courts of first instance responsible for monitoring the Centre.² Given the circumstances, the complainant signed a private contract with the lawyer who is representing her before the Committee, granting power of attorney with regard to her application for the period of recovery and reflection provided for in article 59 bis of Organic Act No. 4/2000 of 11 January on the rights, freedoms and social integration of foreigners in Spain, as well as all other

¹ The complainant attaches a copy of the report.

² The complainant attaches an agreement issued by the three courts allowing notaries to have access to the Centre 24 hours a day, following an incident in which entry had been refused.

proceedings relating to that application.³ The recovery and reflection period, a mechanism provided for in national legislation, is designed to give victims of trafficking time to consider whether they wish to assist the authorities in the prosecution of the criminal network.

2.5 During the interview with her lawyer, the complainant stated that she was fearful of returning to Nigeria while pregnant and without having paid her debt. She was also afraid for her unborn child, aware that the children of trafficking victims became the property of the network. She also explained that during the time she had spent at the Migrant Detention Centre, she had not been provided with any pregnancy-related medical assistance or any psychological support. The complainant points out that physical and psychological violence was widespread at the detention centre in Aluche and that racism and discrimination were, and to a large extent still are, rife there.

2.6 On 12 March 2010, the complainant submitted a request for the period of recovery and reflection accorded to victims of trafficking. That same day, the Office of the Ombudsman was made aware of the complainant's case by her lawyer and issued a resolution addressed to the General Commissariat for Immigration and Borders and to the Government Delegation in the Community of Madrid suggesting that the complainant's expulsion from Spain, which was scheduled for that night, should be delayed and that the necessary procedures should be initiated to grant her the period of recovery and reflection provided for in article 59 bis (2) of Organic Act No. 2/2009 of 11 December.

2.7 Upon submission of the request, the complainant was interviewed by police officers, to whom she provided all the information she had about her traffickers, including names, telephone numbers and other details. The complainant claims that this information was never investigated or reviewed during the consideration of her application.

2.8 On 16 March 2010, the Government Delegation in Madrid denied the complainant's request for a period of recovery and reflection and she was expelled that night. This decision was not communicated to the complainant and her lawyer until 17 March 2010, after the expulsion had been carried out.

2.9 On 31 March 2010, the complainant's lawyer filed an administrative appeal on her behalf, challenging the decision made by the Government Delegation in Madrid on 16 March 2010 to expel her and requesting judicial protection of her fundamental rights as an individual. In the appeal, it was argued that the fact that she had been expelled before her legal representative had been notified that the request for a reflection period had been rejected had prevented the complainant from having effective access to a judicial review of the decision. On 5 April 2010, Madrid Administrative Court No. 14 requested the submission of a power of attorney and declared the private document signed by the complainant to be inadmissible. On 7 May 2010, an application for reconsideration was submitted, in which it was claimed that the applicant's lack of a power of attorney was a direct consequence of her expulsion and the State's violation of her fundamental rights. It was also claimed that, once she had been expelled, she was unable to grant power of attorney before the court itself. A request was made for the private document to be recognized or, alternatively, for the organization Women's Link Worldwide to be deemed entitled to act as the holder of legitimate rights and interests in the case. In a decision issued on 7 June 2010, the Court rejected the application for reconsideration, stating that it was possible for the complainant to grant a power of attorney at a consulate. On 8 July 2010, the complainant's counsel lodged a written submission in respect of the decision of 7 June. On 3 August 2010, after a public hearing, the Court again ruled against the complainant's claims. That decision was appealed. On 27 May 2011, the Madrid High Court of Justice rejected the appeal on the basis that, despite the known difficulties persons held at the Migrant Detention Centre faced in obtaining the services of a notary, there was no evidence that the complainant had attempted to obtain such a service. The Court also found that the complainant could submit a power of attorney through the consular authorities in her country and that the organization Women's Link Worldwide was not entitled to be a party to the proceedings or to prosecute the case.

³ The complainant provides a copy of the contract.

2.10 On 8 July 2011, an application for *amparo* (protection) was filed with the Constitutional Court. On 7 March 2012, the Court dismissed the application, citing a lack of special constitutional significance.

2.11 In parallel to the national proceedings, on 21 April 2010 the case was brought to the attention of the Special Rapporteur on trafficking in persons, especially women and children, through the individual complaints procedure. The Special Rapporteur found the complaint admissible and sent questions to the Spanish Government in August 2010. At the time of writing, almost seven years later, the State party has not responded to her requests.

2.12 On 18 December 2012, an application was lodged with the European Court of Human Rights. On 21 June 2016, a chamber composed of seven judges found the application inadmissible and did not proceed to consider the merits. The decision of inadmissibility was based on the absence of a general power of attorney issued by a notary in relation to the proceedings; the Court found that the private power of attorney agreement signed by the complainant was not sufficient.

2.13 The complainant has been in contact with her lawyer following her expulsion. She reported that, predictably, she had once again fallen into the hands of her traffickers just as she had feared. In March 2011, Women's Link Worldwide sent an expert on trafficking in women to Nigeria to undertake a fact-finding mission on trafficking commissioned by the Office of the Ombudsman. During her trip, she located the complainant and spoke to her by telephone to try to arrange a meeting. The complainant was not able to respond to the invitation or attend a face-to-face meeting because a man took the phone from her and hung up on the expert. Suspecting that she had spoken to the authorities, the network had totally restricted her freedom of movement and punished her severely using multiple forms of violence. The organization continued to search for her and subsequently obtained information indicating that she had again been taken out of Nigeria and that the network was planning for her to travel back to Europe via Libya in order for her to repay her debt, thus trafficking her for a second time.

Complaint

3.1 The complainant claims that the State party has violated her rights under article 2 (1), read in conjunction with articles 1, 3, 12 and 13 of the Convention. Alternatively, if the Committee were to find that the facts as reported did not constitute acts of torture within the meaning of article 1, she claims a violation of article 16 of the Convention.

3.2 The complainant claims that the facts as reported constitute a violation of article 2 (1) of the Convention, read in conjunction with article 1. She emphasizes that the international community has recognized that certain forms of violence against women and girls committed by private individuals, such as trafficking in women, can constitute torture. She notes that in most cases, trafficking is perpetrated by private individuals. However, she points out that, in its general comment No. 2 (2007), the Committee has established that States can be held responsible when acts of torture have been committed by private actors if the State authorities knew or had substantial grounds for believing that such acts were being committed. The complainant considers that the elements of the definition of torture are present in her case. Firstly, with respect to the State's involvement, it acted negligently in failing to intervene and stop the acts of torture to which she was subjected as a victim of trafficking. A number of Spanish authorities were aware of her situation but did not identify it as exploitation. The State, through its indifference and inaction, encouraged her continued sexual exploitation and de facto authorized it, which constitutes torture. After she applied for asylum and the period of recovery and reflection while at the Migrant Detention Centre, there were no longer simply indications of trafficking; rather, the complainant herself had confirmed these in a witness statement which was corroborated by reports from two organizations working on the issue of trafficking and from UNHCR. The State again acted negligently in disregarding the complainant's allegations, judging them to be implausible and perpetuating gender and racial stereotypes in its assumption that women in her situation lie. Secondly, as to the severity of her pain and suffering, for three years the complainant was subjected to psychological coercion by her traffickers, who forced her to prostitute herself against her will. In addition, she was subjected to harassment in the form of constant calls and threats made by her exploiter and the madam who controlled her. They pressured her to engage in prostitution to

pay off the debt she had incurred by travelling to Spain and forced her to have sex without a condom in order to earn more money, which eventually led to her pregnancy. In addition to the harm and suffering inflicted by the network, the complainant also suffered institutional violence owing to the failure of the authorities to correctly identify her as a victim of trafficking while she was at the Migrant Detention Centre. Thirdly, the suffering was inflicted for the purposes of sexual exploitation, which involved intimidation, punishment and coercion. The trafficking-related acts described by the complainant are clearly linked to gender-based discrimination, since she is a Nigerian migrant woman with few resources and without education or employment who was coerced for the purposes of sexual exploitation. The complainant also suffered discrimination with regard to the enjoyment of her rights and guarantees as a victim of trafficking, including the right to a reflection period. Her personal circumstances and the context in Nigeria were not taken into account, and her irregular administrative status was prioritized over her rights. Fourthly, the perpetrators' intent is evidenced by the fact that they subjected the complainant to sexual exploitation and kept her in a permanent state of fear. Furthermore, the complainant was left powerless: she was de facto deprived of her liberty and subjected to continuous threats, coercion and ill-treatment by the network, which prevented her from fleeing or asking for help to escape its control. The authorities' inaction in response to this situation and her placement in a detention centre caused the complainant serious anguish and suffering, and she was extremely afraid for her own life and that of the baby she was carrying.

3.3 In the alternative, should the Committee find that any of the elements of torture set out above have not been sufficiently substantiated, the complainant claims that the treatment she suffered should be considered to constitute a violation of article 16 of the Convention. The situation of trafficking for the purposes of exploitation described by the complainant implies, at the very least, a violation of the right not to be subjected to cruel, inhuman or degrading treatment.

3.4 The complainant also claims that her expulsion to Nigeria violated the obligation of non-refoulement set forth in article 3 of the Convention. In that regard, she recalls that the Committee, in line with its general comment No. 2 (2007), has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking. In this case, the Spanish State violated article 3 of the Convention because it neither identified the complainant as a victim of trafficking for the purposes of sexual exploitation nor, as a result, correctly assessed the likelihood of her facing a risk of torture if she was returned to her country of origin, namely Nigeria, which she did indeed face when she was trafficked for a second time. The complainant claims that the European Court of Human Rights has recognized that victims of trafficking who are returned to Nigeria risk being trafficked again if the authorities are not informed of their return and do not therefore provide them with assistance.⁴ In the complainant's case, the authorities were not informed. The complainant adds that the Department of State of the United States of America also published a report on Nigeria in 2011 which asserted that Nigerian women victims of trafficking who were returned to the country might be forced into prostitution by the security forces themselves.⁵ Lastly, she claims that due process was not ensured during the proceedings, giving rise to a procedural violation of article 3 of the Convention. Certain key decisions were not sufficiently reasoned and, most importantly, there is no effective remedy in Spain to challenge identification procedures in which due process has not been applied, nor is there an effective remedy with automatic suspensive effect that guarantees the non-expulsion of a victim of trafficking, even in cases where the expulsion itself violates a fundamental right. In fact, the complainant's expulsion was carried out before her legal representative was notified, clearly leaving her without the opportunity to defend herself and preventing her from having effective access to a judicial review of the administrative decision. The complainant's defence was hindered because, from the time she was admitted to the Migrant Detention Centre, she was unable to communicate with the outside world. Her mobile phone was confiscated, she was never provided with access to a computer or the Internet, and there was an insufficient number of telephone booths. It should be noted in this regard that the situation remained unchanged and

⁴ European Court of Human Rights, *V.F. v. France*, Application No. 7196/10, p. 14.

⁵ See United States Department of State, *Trafficking in Persons Report 2011*.

that in a similar case, Madrid Investigating Court No. 6, which is responsible for monitoring the Migrant Detention Centre, issued a decision on 27 February 2012 requiring that detainees be given at least 12 hours' notice of their expulsion, including details of the time of departure and arrival, flight number and destination. By order of the same Court, this decision was reiterated to the Director of the Centre on 26 June 2015. In addition, the complainant did not receive a medical check-up to ensure that she was fit to travel. Lastly, it was not possible to challenge the expulsion decision before any judicial body. In addition, the complainant recalls that during the few days she spent at the Migrant Detention Centre in Aluche, no notaries were prepared to go there so that she could grant a general power of attorney for litigation.

3.5 The complainant also claims a violation of articles 12 and 13 of the Convention, read in conjunction with article 2 (1), owing to the failure to conduct a prompt and impartial investigation into the complaints she made to the police regarding torture or ill-treatment. She claims that the State party should have initiated an investigation into her situation as soon as it became aware of her presence in Spain. The complainant reiterates her allegations with regard to the negligence of the State party's authorities in identifying and protecting her (see para. 3.2 above). The only action taken by the administration was the interview carried out as part of her application for the period of recovery and reflection. Moreover, according to the complainant, the information she provided during the interview was obtained irregularly, since the authorities should not have had access to it until the period of recovery and reflection had been granted, and then only if she had decided to cooperate with them.⁶ In any event, once she had put herself at risk in that way, the authorities should have provided her with greater protection. However, instead of applying a human rights approach, the police applied immigration rules and prioritized the fact that she was a foreign national with irregular administrative status. The body responsible for reviewing her application adopted a similar approach and did not take any steps to clarify the circumstances she reported, but simply based its assessment on the interview, without taking into account the reports of the organizations specializing in trafficking. In addition, articles 12 and 13 were violated as a result of the breach of the rights to complain and to have one's case promptly and impartially examined by the competent authorities.

State party's observations on admissibility and the merits

4.1 On 27 September 2020, the State party submitted its observations on the admissibility and merits of the communication. It concluded that the communication is inadmissible on the grounds that it had been submitted to another procedure of international investigation or settlement, that the complainant's lawyer did not have sufficient power of attorney and that the submission was manifestly unfounded and abusive.

4.2 The State party notes that the European Court of Human Rights declared the complaint inadmissible on the grounds that it had not been established that the complainant had any intention of applying to the Court. The State party emphasizes that the Court, in accordance with its own jurisprudence, considered whether an exception to this requirement could be made, for example on the basis of the complainant's agreement to be represented before the domestic authorities or the extreme vulnerability of the applicant.⁷ The State party further recalls that the complaint brought before the European Court contained the same allegations and was submitted on behalf of the complainant. The State party concludes that since the European Court found, following a thorough analysis of the case file, that the complainant was not especially vulnerable and that no exception could therefore be made to the requirement to provide a specific power of attorney for the Court, the communication should be considered inadmissible under article 22 (5) (a) of the Convention.

4.3 With regard to the allegations of inadmissibility *ratione personae*, the State party recalls that the arguments used by the complainant's representative with regard to her capacity to represent her have already been examined by the European Court of Human

⁶ Spain, Report of the Office of the Ombudsman, *La trata de seres humanos en España: víctimas invisibles*, Madrid, 2012, p. 167.

⁷ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]*, Application No. 47848/08, paras. 104–114.

Rights, which took into account the fact that the complainant had been represented before the Spanish authorities by two different lawyers and that the lawyer representing the complainant had had only indirect contact with her. The European Court concluded that the testimony of the trafficking expert who spoke to the complainant during a trip to Nigeria and maintained that she had consented to have her case brought before international bodies was not a sufficient basis to establish that she was aware of and agreed with the lawyer's intention to file a complaint. In addition, the State party cites the Committee's jurisprudence, according to which alleged victims must expressly authorize the author of a communication to act on their behalf before the Committee, unless it is impossible for them to do so given their situation. If it is not proven to have been impossible, especially if proceedings have been brought at the domestic level in connection with the same facts, the Committee considers that the author is not competent to represent the victim.⁸ The State party therefore requests that the communication be declared inadmissible *ratione personae* under rules 104 (2) (c) and 113 (a) of the Committee's rules of procedure.

4.4 The State party further submits that the communication is unfounded and abusive as the complainant made no mention of trafficking until 4 March 2010. In her two asylum applications, she had claimed to be fleeing religious persecution. She presented herself as a Sudanese national in the first application and as a Nigerian national in the second one. The State party recalls that these asylum applications were duly analysed and were rejected on the grounds that the complainant's account was not proven. The State party considers it disproportionate to assume, solely on the basis of the statements the complainant made on 4 March and which directly contradicted her earlier claims, that all elements of her account that date from 2006 are true. With regard to the complainant's allegations that the State party violated articles 3, 12 and 13, read in conjunction with article 2, of the Convention because it failed to identify the complainant as a victim of trafficking, neglected to investigate the case and expelled her from its territory, the State party considers it abusive to require the authorities to take action that does not correspond to the complainant's own account, in which she claimed to have fled her country of origin because of religious persecution.

4.5 The State party also considers that the Committee should not act as an additional appeal body and that it is generally for the courts of States parties to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice. In this regard, it considers that there can be no question of any negligence in the authorities' dealings with the complainant during the years she spent in its territory in an irregular situation, nor of any arbitrary action or denial of justice.

4.6 On the merits, the State party maintains that there is no indication of any violation of the Convention. The State party finds it difficult to entertain the account set forth in the communication, because to do so would be to accept that the complainant and her lawyers misled the Spanish authorities in the two asylum proceedings and that only the statement made when the second asylum application was re-examined was true. The State party's actions in the three domestic procedures clearly show that the State party acted diligently.

Complainant's comments on the State party's observations on admissibility and the merits

5.1 On 21 May and 28 November 2019, the complainant submitted her comments on the State party's observations. Firstly, the complainant considers that the proceedings before the European Court of Human Rights did not have the same purpose, as they focused on the application of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), whereas the communication to the Committee focuses on the establishment of the facts alleged to constitute torture under the Convention against Torture. Furthermore, she disagrees with the assertion that the European Court has examined the case, since the Court considered only the formal admissibility criteria and did not give sufficient consideration to the merits. In particular, the complainant recalls that the Committee has taken decisions of inadmissibility⁹ in cases where the European Court

⁸ *J.H.A. v. Spain* (CAT/C/41/D/323/2007), para. 8.3.

⁹ *M.T. v. Sweden* (CAT/C/55/D/642/2014), para. 8.2.

stated that an application did not disclose any appearance of violation of the European Convention. In her case, however, the Court did not make such a statement, giving rise to the conclusion that the Court did not examine the merits of the case. The complainant reiterates that the decision refers only to inadmissibility *ratione personae*.

5.2 In relation to the allegations of inadmissibility *ratione personae*, the complainant argues, firstly, that the decision of the European Court of Human Rights was taken according to procedural rules that differ from those governing the mechanism of the Committee. The complainant notes that while the European Court requires in rule 45 of its Rules of Court “a power of attorney or written authority”, the Committee’s rules of procedure require “appropriate authorization”. The complainant also considers that the Committee has developed a different approach in its jurisprudence, focusing on whether it can be established in some manner that victims have consented to being represented. The complainant underlines the fact that the jurisprudence referred to by the State party consists of cases in which the Committee was unable to conclude that it would not have been possible for the representatives to make contact with the alleged victims.¹⁰ It is recalled that a relationship of trust was established between the complainant and her representative, which led to the granting of power of attorney. This power of attorney could not be made official before a notary because the Spanish authorities hindered access to the Migrant Detention Centre. Furthermore, the fact that it was subsequently not possible to obtain a power of attorney specifically for international bodies is also attributable to the State party, which expelled the complainant without giving her advance notice and without notifying her legal representative. In this regard, the jurisprudence of international human rights mechanisms considers that in individual communications procedures, a State cannot benefit from its own negligence.¹¹ The contract grants the complainant’s representative power of attorney in all administrative and judicial proceedings arising from the applications for a reflection period and for a stay of the expulsion proceedings. Moreover, the complainant reiterated her preference when she spoke to her representative by telephone and stated that she consented to the continuation of legal action, in particular with regard to submitting complaints to international bodies. Furthermore, it is argued that the complainant’s situation, given that she is once again being controlled by the trafficking network, prevents her from making contact with her representatives. In the jurisprudence of the Human Rights Committee,¹² such a situation has been sufficient to give complainants’ representatives *locus standi*. This interpretation is fully applicable to the present case. However, the complainant’s representative reiterates that the authorization provided complies with the formalities required under the rules of procedure. The complainant’s representative considers that it has been sufficiently substantiated that the complainant cannot submit the communication on her own, that any perceived deficiencies in the authorization granted are due to the State party’s actions and omissions, that the complainant is not in a position to provide further express consent and that the communication before the Committee constitutes a continuation of the proceedings arising from the request for a reflection period, thus remaining within the authority granted by the complainant. For this reason, and because of the particular importance of this communication, the representative considers that the communication should be considered admissible *ratione personae*.

5.3 With regard to the allegations that the communication is abusive and is not sufficiently substantiated, the complainant notes that the State party has neither argued for, nor proven, a lack of substantiation. With regard to the claim that the communication is abusive, the complainant considers that, according to the Committee’s jurisprudence,¹³ submissions are deemed abusive only when a complaint amounts to malice or a display of bad faith or intent at least to mislead, or is frivolous, or the acts or omissions referred to have nothing to do with the Convention. The State party has not proven that the complaint constitutes an act of malice or bad faith or an intention to mislead or is frivolous. With regard to the possibility that the complaint is beyond the scope of the Convention, the complainant refers to the following

¹⁰ *J.H.A. v. Spain*, para. 8.3.

¹¹ Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*, judgment of 23 November 2009, Mexico (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 209, para. 197.

¹² Human Rights Committee, *Ndong Bee et al. v. Equatorial Guinea* (CCPR/C/85/D/1152), para. 5.2.

¹³ *Ben Salem v. Tunisia* (CAT/C/39/D/269/2005), para. 8.4.

allegations on the merits, which demonstrate that the complaint falls fully within the purview of the Committee. For all these reasons, the complainant considers that the communication is in no way abusive and is sufficiently substantiated.

5.4 The complainant reiterates that the State party is responsible for a violation of article 2 of the Convention for failing to act with due diligence in protecting her from the acts of torture to which she was subjected in its territory. She considers this lack of protection to have resulted from the State's application of gender and racial stereotypes during the identification process and her expulsion. The State party makes no mention of any mechanisms in place to ensure that the authorities identify victims of trafficking on the basis of objective grounds and without prejudice or stereotyping based on the gender and origin of persons who claim to be victims of trafficking. This discriminatory treatment is reflected in the failure to give reasons for the refusal of her application for a period of reflection.

5.5 The complainant notes that the State party argues that the authorities have acted diligently in all three proceedings initiated by her. However, it has not demonstrated how the authorities exercised due diligence to prevent her trafficking situation, in particular with regard to any action taken to investigate the evidence she provided. The complainant recalls that, according to the Committee's jurisprudence, the State has an obligation to investigate signs of ill-treatment.¹⁴ Moreover, the State party provides no other justification for its inaction. Although the State party considers that the facts relating to the complainant's asylum claims were not proven and that the account was implausible and inconsistent, it does not specify where the inconsistencies lay, nor does it take into account the fact that inconsistencies are common in the accounts of persons who have been victims of torture. The complainant considers that it can be concluded from this that she has been the victim of a violation of articles 12 and 13 of the Convention, read in conjunction with article 2 (1).

5.6 The complainant insists that her expulsion constituted a violation of article 3 of the Convention, as her risk of being tortured upon return to her country of origin was not assessed. The complainant considers that in her case there was a clear risk of her being trafficked again and facing retaliation from her traffickers because, in addition to traffickers operating with impunity in Nigeria and trafficking being prevalent in her region of origin, she was vulnerable as a young woman who had been a victim of trafficking and who had become pregnant as a result of the exploitation she suffered. Lastly, the complainant points out that there is no mechanism for appealing against the refusal of the reflection period, a decision which was communicated after her expulsion had taken place, and considers that when a possible violation of the principle of non-refoulement is alleged, an effective remedy must have suspensive effect. The complainant also claims that there have been other recent cases of trafficked persons being returned without having been properly identified.¹⁵

5.7 The complainant further reiterates that article 14 of the Convention has been violated in her case, as she has been unable to obtain redress or have access to an effective remedy or compensation. She also notes that in the State party, attacks against women are considered gender-based violence only if they are perpetrated by partners or former partners. Therefore, victims of trafficking are not considered victims of gender-based violence, despite the gravity of the offences committed against them. The complainant requests the Committee to recommend comprehensive reparation measures that incorporate a gender perspective and a transformative and corrective approach, as well as measures of satisfaction and guarantees of non-repetition. Therefore, she requests: (a) the adoption of all necessary measures to locate her and subsequently provide her with comprehensive protection as a victim of torture and trafficking in persons for the purposes of sexual exploitation; (b) full compensation for acts of torture suffered in Spain, as well as in Nigeria as a result of her expulsion; (c) the opening of an effective investigation for the identification, prosecution and, where appropriate, punishment of the persons responsible for planning and perpetrating the offence of trafficking and acts of torture against the complainant; (d) the investigation, by the competent public institutions, of the officials who might be responsible for irregularities in the identification and expulsion of the author, as well as the application of the corresponding administrative,

¹⁴ *Sonko v. Spain* (CAT/C/47/D/368/2008), para. 10.6

¹⁵ The complainant provides press clippings reporting on the return of two young Vietnamese men who were allegedly trafficked.

disciplinary or criminal sanctions; and (e) compensation for the harm caused. The complainant also requests guarantees of non-repetition: (a) the establishment of an effective remedy with automatic suspensive effect that guarantees that a victim of trafficking will not be expelled until the risk of an attack on his or her life or physical and psychological integrity has been assessed; (b) the removal of all barriers that prevent victims of trafficking from exercising their right to full redress and from being protected against acts of torture and other inhuman, cruel and degrading treatment without discrimination on the basis of their administrative status; (c) the provision of regular mandatory training with a gender and human rights perspective for the relevant police, administrative and judicial authorities on the implementation of the legal framework to combat torture, cruel, inhuman and degrading treatment and trafficking in human beings; (d) the creation of an independent follow-up mechanism to measure the effectiveness of the institutions and policies established by the State to regulate and monitor prevention and protection work in the area of trafficking in Spain through the collection of statistical data and periodic reports with recommendations; and (e) the standardization of the protocols, manuals, investigation criteria and the expert and judicial services employed in the investigation of offences of trafficking, disappearances and sexual violence against women, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), the Minnesota Protocol on the Investigation of Potentially Unlawful Death and international standards on the search for missing persons, and incorporating a gender perspective.

5.8 The complainant attaches to her communication a letter from the World Organisation Against Torture, which states that certain legal loopholes and poor institutional practices in the State party mean that some persons protected under the Convention are left without a defence, in particular persons held in migrant detention centres. The World Organisation Against Torture states that serious deficiencies in the application of basic safeguards, such as access to remedies against expulsion and the means to communicate with the outside world and with public defenders continue to be identified in migrant detention centres.¹⁶ Mechanisms for the identification and protection of victims of trafficking are insufficient.¹⁷ The World Organisation Against Torture reports that it is common for appeals to be settled or appeal decisions to be announced after a complainant has been expelled,¹⁸ even in cases involving alleged victims of trafficking. It is very common for expulsions to be carried out very quickly or in an irregular manner. The World Organisation Against Torture also highlights the vulnerability of victims of trafficking, since, in addition to the general fear that victims of gender-based violence may have of possible reprisals against them if they file a complaint, there is also the fear that if they do file a complaint, the authorities will launch punitive proceedings against them in connection with their irregular residence in the State party, which might lead to their expulsion.¹⁹ A 2011 amendment to the Migration Act establishes a safeguard to prevent expulsions of women who report gender-based domestic violence; however, this provision does not cover victims of trafficking.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention.

6.2 The Committee notes the State party's claim that the communication should be considered inadmissible under article 22 (5) (a) of the Convention since the same matter was brought before the European Court of Human Rights, which, after a thorough analysis of the file, found that the complainant was not particularly vulnerable and that no exception could be made to the requirement to provide a power of attorney in line with all the formal requirements of the Court. The Committee notes the complainant's assertion that the European Court considered only the formal admissibility criteria and did not give sufficient

¹⁶ A/HRC/23/56/Add.2, para. 73.

¹⁷ *Ibid.*, para. 74.

¹⁸ Servicio Jesuita a Migrantes España, *Informe CIE 2018*, p. 11.

¹⁹ *Ibid.*, pp. 45–46.

consideration to the merits. It also notes that the European Court declared the application inadmissible in a decision adopted on 21 June 2016 by a chamber composed of seven judges, which found the case to be incompatible *ratione personae* under articles 35 (3) and (4) of the European Convention on Human Rights. The Committee recalls its jurisprudence that, in accordance with article 22 (5) (a) of the Convention, a communication is not considered admissible if the substance of the communication has been examined under another procedure of international investigation or settlement.²⁰ The Committee notes that the European Court carried out a detailed examination of the facts of the communication and, in particular, the complainant's alleged vulnerability. The Committee considers that, in the specific circumstances of this case, the examination of the complainant's vulnerability was closely linked to the examination of the substance of the alleged violations of the Convention. Accordingly, the Committee considers that, in this case, the examination conducted by the European Court amounted to an examination of the matter raised by the complainant under another procedure of international investigation or settlement and concludes that the communication is inadmissible under article 22 (5) (a) of the Convention.

²⁰ *S v. Sweden* (CAT/C/59/D/691/2015), paras. 7.2–7.6. and *H.A. v. Sweden* (CAT/C/63/D/744/2016), paras. 6.3–6.6.