



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

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COMMITTEE AGAINST TORTURE  
Twenty-third session  
(8-19 November 1999)

VIEWS

Communication No. 63/1997

Submitted by: Josu Arkauz Arana  
[represented by counsel]

Alleged victim: The author

State party: France

Date of communication: 16 December 1996

Date of present decision: 9 November 1999

[See annex]

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\* Made public by decision of the Committee against Torture.

Annex

VIEWS OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22,  
PARAGRAPH 7, OF THE CONVENTION AGAINST TORTURE AND OTHER  
CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

- TWENTY-THIRD SESSION -

concerning

Communication No. 63/1997

Submitted by: Josu Arkauz Arana  
[represented by counsel]

Alleged victim: The author

State party: France

Date of communication: 16 December 1996

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

Meeting on 9 November 1999,

Having concluded its consideration of communication No. 63/1997, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following decision:

1.1 The author of the communication is Josu Arkauz Arana, a Spanish national. He is represented by counsel. Mr. Arkauz applied to the Committee on 16 December 1996 claiming to be a victim of violations by France of articles 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because of his deportation to Spain.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 13 January 1997. At the same time, acting under rule 108, paragraph 9, of its rules of procedure, the Committee requested the State party not to expel Mr. Arkauz to Spain while his communication was being considered.

The facts as submitted by the author

2.1 The author, who is of Basque origin, states that he left Spain in 1983 following numerous arrests of persons reportedly belonging to ETA, the Basque separatist movement, by the security forces in his native village and nearby. Many of the persons arrested, some of whom were his childhood friends, were subjected to torture. During the interrogations and torture sessions, the name of Josu Arkauz Arana had been one of those most frequently mentioned. Sensing that he was a wanted person and in order to avoid being tortured, he fled. In 1984 his brother was arrested. In the course of several torture sessions the members of the security forces asked the latter questions about the author and said that Josu Arkauz Arana would be executed by the Anti-Terrorist Liberation Groups (GAL).

2.2 Several murders of Basque refugees and attempts on the lives of others took place close to where the author was working in Bayonne. The author further states that the officer in charge of the Biarritz police station summoned him in late 1984 to notify him of his fears that an attempt on his life was being prepared and that the author's administrative file, which contained all the information necessary to locate him, had been stolen. He was therefore obliged to leave his work and lead a clandestine existence. Throughout the period of his concealment, his relatives and friends were continually harassed by the Spanish security forces. In June 1987 his brother-in-law was arrested and tortured in an effort to make him reveal the author's whereabouts.

2.3 In March 1991 the author was arrested on the charge of belonging to ETA and sentenced to eight years' imprisonment for criminal conspiracy ("association de malfaiteurs"). He began serving his sentence in Saint-Maur prison and was due to be released on 13 January 1997. However, on 10 July 1992, he was further sentenced to a three-year ban from French territory. He filed an appeal against the decision to ban him with the Paris Court of Major Jurisdiction in October 1996, but no action was taken.

2.4 On 15 November 1996 the Ministry of the Interior commenced a proceeding for the author's deportation from French territory. A deportation order can be enforced by the administration *ex officio* and means that the person concerned is automatically taken to the border. The author applied to the Administrative Court of Limoges on 13 December 1996 requesting the annulment of the deportation order which might be made out against him and a stay of execution of such an order if it were to be issued. However, his application for a stay of execution was rejected by a ruling of 15 January 1997, the court having taken the view that handing over the author would not be likely to have irreversible consequences for him. An appeal from this ruling was not possible because the deportation measure had already been implemented.

2.5 On 10 December 1996 the author began a hunger strike to protest against his deportation. Later, because of his deteriorating health, the author was transferred to the local prison at Fresnes, in the Paris region, where he again went on strike, refusing to take liquids.

2.6 On 17 December 1996 the author was informed that the Deportation Board of the Indre Prefecture had rendered an opinion in favour of his deportation, considering that his presence in French territory constituted a serious threat to public order. The Board did, however, remind the

Ministry of the Interior of the law stipulating that an alien could not be removed to another country where his life or liberty might be threatened or where he could be exposed to treatment contrary to article 3 of the European Convention on Human Rights. Following this opinion, a ministerial deportation order was issued on 13 January 1997 and communicated that day to the author. He was at the same time notified of a decision indicating that the order of deportation to Spain was being put into effect. The deportation measure was implemented the same day, after a medical examination had concluded that Mr. Arkauz could be transported by car to the Spanish border.

2.7 By a letter of 17 March 1997 the author informed the Committee that his deportation to Spain had taken place on 13 January 1997. He reported having been ill-treated and threatened by the French police and described the incidents which occurred in Spain after his deportation.

2.8 The author claims to have suffered greatly during the journey to Spain because of his extreme weakness. He states that while being driven from Fresnes to the Spanish border, a distance of nearly 1,000 kilometres covered in seven hours, he was seated between two police officers, with his hands cuffed behind his back, and he experienced very considerable back pain because he suffers from degenerative discopathy. The police officers are said to have stopped at one point and ordered Mr. Arkauz to get out of the vehicle. Since he was unable to move, the police officers reportedly threw him to the ground and beat him. He adds that the police officers intimidated him throughout the journey and that the treatment to which he was subjected is contrary to article 16 of the Convention.

2.9 As soon as he had been handed over to the Spanish Civil Guard he was placed in incommunicado detention. A forensic physician is said to have examined him and pronounced him fit to travel on to Madrid under certain conditions, since his health had been very much affected by the hunger strike. He states that he was slapped on the ears and about the head during the journey of about 500 kilometres to Madrid. He also claims to have been constantly told that he would later be tortured and killed. On entering Madrid, the officials are said to have thrust his head between his knees so that he would not know where he was being taken, namely to the Civil Guard Headquarters in Madrid. He says that he fainted from exhaustion. When revived, he was reportedly subjected to long interrogation sessions. He was allegedly forced to remain seated, with his legs apart, in a position that caused him very considerable back pain. With his eyes covered, he was reportedly slapped all over his body. He was also allegedly subjected to loud hand claps and whistling close to his ears and told in detail about the methods and long sessions of torture that would be inflicted on him. At one point, the guards are said to have ripped his clothes off, while continuing to beat him. Later, with some guards holding his legs and others his arms, he was allegedly subjected to "la bolsa"<sup>1</sup> and at the same time beaten on the testicles. He reportedly then lost consciousness. When revived and still masked, he was reportedly again seated on a chair, with his legs spread apart and his arms held to his legs. The guards allegedly brought electrodes close to him. As he tried to move away, he reportedly received a direct shock.

2.10 Some officials reportedly tried to persuade him to cooperate with them, using emotional arguments concerning his wife and two children, but the author says that he refused to cooperate. He was reportedly then examined by a doctor. After the doctor left, he was reportedly masked again and beaten about the ears and the head. Another examination was made by a doctor, who

reportedly stated that the author was close to suffering from tachycardia. The interrogations and threats continued and a third visit was made by the doctor some hours later. Meanwhile, his wife met the judge on 15 January 1997. She expressed fears concerning her husband's state of health and asked to see him, but this request was denied. On the forensic physician's advice, the author was transferred to a hospital. After being injected with serum and undergoing various tests, he was returned to Civil Guard Headquarters. During the day of 16 January, out of fear of reprisals, he signed a statement before a designated lawyer which the Civil Guard officers had themselves dictated. That evening he was brought before the judge, who had just lifted the incommunicado order. He was also examined by a forensic physician appointed by the family.<sup>2</sup> This physician concluded that the allegations of ill-treatment represented coherent testimony.<sup>3</sup> On 17 January 1997, Mr. Arkaus was visited by a delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>3</sup> in Soto del Real prison. On 10 March 1997 he filed a complaint of torture.

#### The complaint

3.1 In his communication of 16 December 1996 the author stated that his forcible return to Spain and handing over to the Spanish security forces constituted a violation by France of articles 3 and 16 of the Convention against Torture.

3.2 The author referred first to article 22, paragraph 5 (b), of the Convention and claimed that the domestic remedies available against warrants of deportation were neither useful nor effective, since they had no suspensive effect and the courts would reach a decision long after the deportation had been carried out. In addition, the procedures were unreasonably prolonged. The admissibility requirement of exhaustion of domestic remedies was therefore said not to be applicable in this case.

3.3 The author submitted that his origin, political affiliation and conviction in France and the threats directed against him, his family and friends provided substantial grounds for fearing that he would be mistreated in custody and that the Spanish police would use every possible means, including torture, to obtain information about ETA activities from him. The danger was all the more real because the author had been portrayed in the press by the Spanish authorities as an ETA leader.

3.4 The handing-over of the author to the Spanish security forces was a "disguised extradition" for the purpose of his incarceration and conviction in Spain. It was an administrative procedure that did not arise from an extradition request made by the Spanish judicial authorities. The five days of police custody and incommunicado detention to which Mr. Arkaus could be subjected under the Spanish law on terrorism would be used to obtain from him the confessions needed for him to be charged. During this period he would not be given the protection of the judicial authorities to which he would have been entitled had he been extradited. The lack of jurisdictional guarantees thus increased the risk of torture.

3.5 In support of his claims, the author mentioned the cases of several Basque prisoners who had allegedly been tortured by the Spanish police between 1986 and 1996 after being expelled from French territory and handed over to the Spanish security forces at the border. In addition, he cited the reports of various international bodies and non-governmental organizations which

had expressed their concern at the use of torture and ill-treatment in Spain and at the Spanish legislation enabling persons suspected of belonging to or collaborating with armed groups to be held incommunicado for five days, as well as regarding the impunity apparently enjoyed by the perpetrators of acts of torture. The combination of these various factors (existence of an administrative practice, serious deficiencies in the protection of persons deprived of their liberty and lack of punishment for officials employing torture) provided substantial grounds for believing that the author was in real danger of being subjected to torture. Lastly, he expressed his fears regarding the conditions of detention to which he would be submitted if he was imprisoned in Spain.

3.6 In his communication of 16 December 1996 the author also stated that during his transfer to the border there was a risk that he would be subjected to ill-treatment contrary to article 16 of the Convention, since the police could use force and he would be completely isolated from his family and counsel.

3.7 In his letter of 17 March 1997, the author reiterates that there was a violation by the State party of articles 3 and 16 of the Convention and, subsidiarily, of articles 2 and 22. In seeking to justify his surrender to the Spanish security forces, France is said to have violated article 2 of the Convention. France reportedly sought to justify that action on the basis of necessary solidarity between European States and cooperation against terrorism. However, neither the situation of acute conflict prevailing in the Basque country, nor solidarity between European States, nor the fight against terrorism can justify the practice of torture by the Spanish security forces.

3.8 The author further submits that, by proceeding with his deportation and surrendering him to the Spanish security forces, despite the Committee's request not to expel him, the State party violated article 22 of the Convention because the individual remedy provided for by that article was rendered inoperative. He believes that the State party's attitude under those circumstances amounts to a denial of the binding nature of the Convention.

3.9 The author also criticizes the French authorities for the late notification of the deportation order and its immediate execution, the sole purpose of which, in his view, was to deprive him of any contact with his family and counsel, to prevent him from effectively preparing his defence and to place him at a psychological disadvantage. He submits that it was consequently impossible in practice for him to enter any appeal between the time of notification of the deportation order and its immediate execution.

#### State party's observations on admissibility

4.1 In a reply dated 31 October 1997, the State party disputes the admissibility of the communication. It indicates that on 13 January 1997, the day on which the deportation order was issued and carried out, it had not known of the Committee's request for a stay of execution, which was received on 14 January 1997, and it therefore could not have taken it into consideration. It adds that the immediate and rapid expulsion was necessary for reasons of public order.

4.2 The State party considers that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. If, in view of the nature of the alleged violation, the Committee were nevertheless to consider that the remedies actually sought before the administrative and judicial courts were not useful since they had no suspensive effect, it should be pointed out that other channels of recourse were open to the author. When notified of the deportation order and the order indicating Spain as the country of return, he could have applied to the administrative court for a stay of execution or for effect to be given to article L.10 of the Code of Administrative Courts and Administrative Courts of Appeal. The author could also, when notified of the two orders, have complained of a flagrant irregularity ("voie de fait") to the judicial court if he believed that his transfer to Spain had no legal justification and violated a fundamental freedom. According to the State party, such a remedy could have proved effective in view of the rapidity with which the judicial court is required to act and its recognized authority to put an end to a situation which constitutes a flagrant irregularity.

4.3 The State party further specifies that, in order to obtain a rapid decision, the complainant could have applied to the interim relief judge on the basis of article 485 of the new Code of Civil Procedure.<sup>4</sup> It grants that an application for interim relief is admissible only in support of an application in the main action, but argues that such an application could in the present case have been made for damages for the injury suffered as a result of the irregularity. Furthermore, the Prefect who signed the orders of deportation and return to Spain could not have opposed consideration of such an application by the judicial court pursuant to article 136 of the Code of Criminal Procedure.<sup>5</sup>

#### Comments by the author

5.1 In his comments on the State party's reply, the author recalls the facts and procedures explained in the previous communication and reiterates his observations concerning the admissibility of the communication. With regard to the merits of the case, he recalls his claims concerning the personal threat to him of his being deported to Spain, and the torture and ill-treatment he underwent.

5.2 With reference to the request for a stay of execution of the deportation order made by the Committee on 13 January 1997, the author disputes the claim by the French Government that it had not received the request until 14 January 1997 and therefore did not have time to take it into consideration. In fact, the Government's representative was informed by fax of the request made by the Committee on 13 January 1997, well before the author was notified of the deportation order late in the day on 13 January 1997. The author also says that he was handed over to the Civil Guard by the French police only on 14 January 1997. During the transfer, the French Government could, according to the author, have contacted its officials and deferred deportation.

5.3 The author further argues that even if the French Government had not received the Committee's request until 14 January 1997, it had the obligation, on receiving it, under article 3 of the Convention, to intercede with the Spanish authorities, through diplomatic channels, for example, to ensure that the author was protected against any possible ill-treatment. He specifies that he was tortured continuously up to 16 January 1997, long after the French authorities had received the Committee's request.

5.4 The author also contests the State party's claim that his immediate and rapid deportation was necessary for reasons of public order. Although he was in Fresnes prison, the French authorities chose to have him taken to the Franco-Spanish border, which was the furthest from Paris, yet as a European citizen Mr. Arkauz was entitled to stay and move freely in any part of the European Union, including countries with much less distant borders. According to the author, this is further evidence of the fact that the French authorities deliberately and consciously put him in the hands of the Spanish security forces.

5.5 With regard to domestic remedies, the author first of all submits that the rule of the exhaustion of domestic remedies concerns available, i.e. accessible, remedies. However, he was prevented from having access to the available remedies. The deportation order was carried out immediately by the French police, who allegedly forbade him to warn his wife and counsel. It would thus have been physically impossible for him to communicate with them to inform them that he had been notified of the deportation order and to ask them to file an immediate appeal against his deportation. Furthermore, the French authorities allegedly refused to give them any information on what had happened to him.

5.6 Secondly, Mr. Arkauz argues that, under article 22, paragraph 5 (b), of the Convention, the rule of the exhaustion of domestic remedies does not apply when their application is unreasonably prolonged. He adds that domestic remedies against deportation must have an immediate and suspensive effect. In the present case, however, no judge could have made a ruling within a "reasonable" time, since the decisions in question were enforced immediately the person concerned had been notified of them.

5.7 Thirdly, Mr. Arkauz submits that, under article 22, paragraph 5 (b), the rule of the exhaustion of remedies concerns effective and adequate remedies, and therefore does not apply if the remedies are unlikely to bring relief to the individual concerned. In the present case, neither the administrative remedy nor the judicial remedy proposed by the State party can be considered effective or adequate.

5.8 As regards the administrative remedy, the author points out that, as a preventive measure, he had applied to the Administrative Court of Limoges against his deportation and that the court had reached a decision on that application only after the deportation had been carried out. In response to the State party's argument that he could have reapplied to the administrative court, on being notified of the deportation order and of the order indicating Spain as the country of return, for a stay of execution or for the application of article L.10 of the Code of Administrative Courts and Administrative Courts of Appeal, Mr. Arkauz states that this remedy would have been no more effective than its predecessor.

5.9 As regards the judicial remedy, the author contests the theory of flagrant irregularity put forward by the State party. He states that this theory is applicable in French law only under exceptional circumstances, in particular when the administration has taken a decision which manifestly cannot be related to a power conferred upon it or when it has enforced a decision of its own volition although it manifestly did not have the authority to do so, which is not the case in the present instance. Mr. Arkauz quotes rulings of the Court of Conflicts to the effect that neither a deportation decision, even if illegal, nor a decision to enforce it may be termed flagrant irregularities, and hence only the administrative courts have jurisdiction in such matters.

The Committee's decision on admissibility

6.1 At its twentieth session the Committee considered the question of the admissibility of the communication. It ascertained that the same matter had not been, and was not being, examined under another procedure of international investigation or settlement. Insofar as the exhaustion of domestic remedies is concerned, the Committee noted that no decision regarding the application to the administrative court requesting the suspension of the deportation measure which might have been taken against the author had been reached when the measure was enforced. Furthermore, an appeal against the ministerial deportation order issued in respect of the complainant on 13 January 1997 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. The Committee therefore found that article 22, paragraph 5 (b), did not preclude it from declaring the communication admissible.

6.2 Accordingly, the Committee decided on 19 May 1998 that the communication was admissible.

Observations by the State party on the Committee's decision declaring the communication admissible

7.1 In a reply dated 4 January 1999 the State party provides information concerning the question of the exhaustion of domestic remedies. It maintains that the author's application to the Administrative Court of Limoges cannot be considered to be relevant, since it does not concern the decision challenged before the Committee. That application, filed on 16 December 1996 in the court registry, was directed not against the deportation measure in dispute, which had not yet been taken, but against a deportation measure that "might" have been taken. That wording alone was sufficient to render the application by Mr. Arkausz inadmissible, as the practice of the administrative courts consistently requires complainants to challenge current and existing decisions. Therefore, the fact that no ruling had been made on the application by 13 January 1997, when the deportation order was issued, does not appear to be decisive in the present case. The judgement was reached two days later, i.e. less than a month after registration of the application. The rendering of this court decision was obviously not a matter of the greatest urgency, since it related not to a current but to a possible measure.

7.2 The author failed to enter an appeal against the ministerial order of 13 January 1997 calling for his deportation from French territory and against the decision specifying Spain as the country of destination. An application for a stay of execution under article L.10 of the Code of Administrative Courts and Administrative Courts of Appeal, a possibility of which the complainant was clearly not unaware, was incontestably the appropriate and available remedy. It was not, however, used. The State party therefore submits that the Committee should declare the communication inadmissible under rule 110, paragraph 6, of its rules of procedure.

7.3 The State party argues that the execution of the deportation measure in question in no way stemmed from a desire on the part of the Government to obviate the right of recourse available to the person concerned, both at national and international level. More specifically as

regards the Committee's recommendation pursuant to rule 108 of its rules of procedure, it was physically impossible for the Government to have known on 13 January 1997, the day on which the deportation order was issued and put into effect, of the request for a stay of execution made by the Committee in its letter of 13 January 1997, that letter having been received the following day at the Permanent Mission of France to the United Nations in Geneva, as attested by the stamp placed on the said document when it arrived. It was therefore impossible for the request to be taken into consideration before the execution of the measure.

7.4 The deportation measure was implemented on 13 January 1997 since on that date the author had paid the sum he owed to the Treasury following his court conviction and there was then no reason, bearing in mind the threat that his presence would represent for public order after his release, to defer a decision to call for and proceed with his deportation. Although the author claims that it was physically impossible for him to enter an appeal, he offers no proof of this, and he certainly does not deny that the notice of the deportation order, which he refused to sign, included information about the procedures and time-limits for an appeal.

#### Comments by the author

8.1 The author states that when he was notified of the deportation order and of the decision indicating Spain as the country of destination, he was prevented by the authorities from communicating with his wife and counsel. Furthermore, when the latter asked the authorities for news about the author, no information was given to them. Thus, contrary to the State party's contention, it was made impossible for the author, after notification of the deportation order and before its execution, to apply for a remedy, to be brought before a person capable of receiving such an application or to communicate with persons who could have acted in his place.

8.2 The author indicates that the applications made to the Administrative Court of Limoges were referred, on 27 July 1998, for consideration by the Administrative Court of Pau, which rendered its judgement on 4 February 1999. The judgement states that while at the time of its submission the request was premature, the issuance of the orders of 13 January 1997 calling for the deportation of Mr. Arkauz and his return to Spain had the effect of regularizing the request. The Court also found the handing over of the author to the Spanish security forces to be illegal and therefore annulled that measure. However, an appeal to a French administrative court has no suspensive effect and the Administrative Court of Pau did not reach a decision on the author's request until two years after the actual implementation of the deportation order. The finding of the author's surrender to be illegal therefore has only a symbolic effect in the circumstances of the present case.

8.3 Concerning the Committee's request for the suspension of the deportation order, the author reiterates the arguments he had put forward in that connection.<sup>6</sup>

#### State party's observations on the merits

9.1 The State party notes that, on his arrival in France, the author was given temporary permits to stay as an asylum seeker but the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and the Refugee Appeals Board rejected his asylum request in 1981. Thereafter, he neither reapplied for refugee status, as he could have done, nor looked for another

country prepared to accept him, although his situation was irregular and he knew that he might be subject to an enforceable measure of banishment. In 1992 he was sentenced to eight years' imprisonment, a ten-year prohibition on residence and a three-year ban from French territory for conspiring with others to commit one or more offences, as well as for illegally bearing weapons, keeping explosives and munitions and using false administrative documents. That conviction automatically gave rise to the possibility of deportation.

9.2 The State party indicates that the real risks mentioned by the author were evaluated by the national authorities prior to implementation of the deportation procedure, according to the criteria defined in article 3, paragraph 2, of the Convention.

9.3 Two main points led the administration to believe that there was nothing to prevent implementation of the deportation measure. Firstly, the specialized bodies responsible for determining eligibility for political refugee status had rejected the author's application in 1981, feeling that the fears of persecution alleged by him were unfounded. Secondly, in view of the commitments made by Spain regarding the protection of fundamental freedoms, the French Government, although certainly not unaware that the person concerned might be subject to criminal prosecution in that country, could legitimately feel that there were no substantial grounds for believing that the author was in danger of being tortured. The legitimacy of that position was confirmed by the European Commission of Human Rights, which, in its inadmissibility decisions of 1998 in two cases where the points of fact and law were perfectly comparable, considered that the French Government had no substantial grounds for believing that the complainants would be subjected to torture in Spain. The Commission noted that there was a presumption favourable to that country concerning respect for human rights, in particular on account of its accession to the European Convention, the International Covenant on Civil and Political Rights and the Optional Protocol thereto. It also made reference to the report of the European Committee for the Prevention of Torture, which stated that torture could not be regarded as common practice in Spain.

9.4 The State party also indicates that, before being taken to the border, Mr. Arkauz underwent a medical examination, which concluded that he was in a fit state to be deported, and that after his arrest and detention by the Spanish authorities he was again seen by a doctor. Furthermore, the procedure initiated in Spain was conducted in accordance with the instructions of the examining magistrate who had issued international arrest warrants and authorized the transfer of Mr. Arkauz to Civil Guard Headquarters in Madrid, so that he could be heard in the presence of a lawyer.

9.5 If the author had indeed been the victim of acts contrary to article 3 of the Convention, a supposition which might be verified by the proceedings under way in Spain, those acts could only be regarded as having been committed by isolated individuals in breach of the guidelines laid down by the Spanish State. As such, they could not have been foreseen and the French Government cannot be blamed for having neither suspected nor prevented such an outcome.

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

9.7 As to the claim of a violation of article 16 of the Convention, the State party submits that the author cannot effectively invoke the provisions set forth in that article, which are inapplicable because the territory in which the violations of article 3 of the Convention were allegedly committed is not under the jurisdiction of the French State.

Comments by the author

10.1 The author reiterates that there were substantial grounds for believing that he would be in personal danger of being subjected to torture if he was deported to Spain. The existence of such a danger was confirmed by the following facts: the author and his family had been the targets of threats and harassment; the Anti-Terrorist Liberation Groups (GAL) were preparing an attempt on his life; and he had been handed over by the French police to Civil Guard personnel from the anti-terrorist sections of the Intxaurrondo barracks, which had been publicly accused, *inter alia*, of committing acts of torture. Furthermore, during his interrogation in January 1997 the Civil Guard personnel confirmed to him that they had prepared an assassination attempt against him while he was living in Bayonne; and he had been portrayed by the Spanish authorities as an important figure in ETA.

10.2 The author again states that the length and conditions of the police custody are conducive to the practice of torture and other forms of ill-treatment by the Spanish security forces and that the machinery for supervision and forensic medical assistance for detainees are seriously inadequate. Inquiries into the circumstances of torture are very difficult and when, on occasion, they are completed, the procedures are very long.

10.3 The State party maintains that the author should have asked for political refugee status on the grounds of the risks to his life and liberty in the event of his return to Spain. However, for political reasons, the French Government no longer grants such status to Basques applying for it. Furthermore, the protection arising under article 3 of the Convention concerns "everyone" and not just persons applying for or having the status of refugee.

10.4 According to the author, the State party is making an erroneous interpretation of the findings of the European Committee for the Prevention of Torture (CPT). The latter actually stated that "it would be premature to conclude that the phenomenon of torture and severe ill-treatment had been eradicated" in Spain.<sup>7</sup>

10.5 The fact that Spain is a party to the Convention and has recognized the competence of the Committee under article 22 does not, in the present case, constitute a sufficient guarantee of the author's safety.

10.6 Insofar as the violation of article 16 of the Convention is concerned, the State party has not denied that the author was subjected to ill-treatment during his transfer to the border post. Those acts should have been the subject of a prompt and impartial investigation by the competent authorities, in accordance with article 12 of the Convention. However, no such investigation was held. The State party does not dispute the fact that the author was illegally handed over to the Spanish security forces while in a state of extreme weakness, after 35 days of a hunger strike and five days of refusing to take liquids. The fact of handing over a person under such circumstances for prolonged interrogation in itself constitutes cruel, inhuman and degrading

treatment. In addition, at the time of the deportation, the medical file of the person concerned was transmitted by the French police to the Spanish Civil Guard officers. Moreover, the medical details contained in this file, and in particular the fact that the author was suffering from degenerative discopathy, were used during the police custody to aggravate the author's suffering, notably by forcing him to adopt postures designed to increase his back pain. The fact of having supplied the medical file also constitutes cruel, inhuman and degrading treatment.

#### Issues and proceedings before the Committee

11.1 In accordance with rule 110, paragraph 6, of its rules of procedure, the Committee reconsidered the question of admissibility in the light of the observations made by the State party concerning the Committee's decision declaring the communication admissible. The Committee notes, however, that the application made by the author to the Administrative Court of Limoges was relevant even if, at the time of its submission, the deportation measure had not yet been taken. This was confirmed by the judgement of the Administrative Court of Pau, which stated that the issuance of the orders of 13 January 1997 calling for the deportation of Mr. Arkauz and his return to Spain had the effect of regularizing the author's application. The Committee accordingly found no reason to revoke its decision.

11.2 The Committee notes the author's allegations that he was ill-treated by the French police officers while being driven to the Spanish border. The Committee considers, however, that the author has not exhausted the domestic remedies available in this respect. It therefore declares that this part of the communication is not admissible.

11.3 With regard to the substance of the communication, the Committee must determine whether the author's deportation to Spain violated the obligation of the State party, under article 3, paragraph 1, of the Convention, not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In doing so the Committee must take into account all relevant considerations with a view to determining whether the person concerned is in personal danger.

11.4 The Committee recalls that during the consideration of the third periodic report submitted by Spain under article 19 of the Convention, it had expressed its concern regarding the complaints of acts of torture and ill-treatment which it frequently received. It also noted that, notwithstanding the legal guarantees as to the conditions under which it could be imposed, there were cases of prolonged detention incommunicado, when the detainee could not receive the assistance of a lawyer of his choice, which seemed to facilitate the practice of torture. Most of the complaints received concerned torture inflicted during such periods.<sup>8</sup> Similar concerns had already been expressed during the consideration of the second periodic report by the Committee,<sup>9</sup> as well as in the concluding observations of the Human Rights Committee regarding the fourth periodic report submitted by Spain under article 40 of the International Covenant on Civil and Political Rights.<sup>10</sup> Furthermore, the European Committee for the Prevention of Torture (CPT) also reported complaints of torture or ill-treatment received during its visits to Spain in 1991 and 1994, in particular from persons detained for terrorist activities. The CPT concluded that it would be premature to affirm that torture and severe ill-treatment had been eradicated in Spain.<sup>11</sup>

11.5 The Committee notes the specific circumstances under which the author's deportation took place. First, the author had been convicted in France for his links with ETA, had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their incommunicado detention. The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police,<sup>12</sup> without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

12. In the light of the foregoing, the Committee is of the view that the author's expulsion to Spain, in the circumstances in which it took place, constitutes a violation by the State party of article 3 of the Convention.

13. Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee would wish to receive, within 90 days, information on any measure taken by the State party in accordance with these Views.

[Done in English, French, Russian and Spanish, the French text being the original version.]

#### Notes

<sup>1</sup> This form of torture consists in covering the head with a plastic bag to cause asphyxia.

<sup>2</sup> A copy of the medical report is attached to the communication.

<sup>3</sup> As of the time of adoption of these Views the CPT report on this visit had not been published.

<sup>4</sup> This article states that "an application for interim relief is made by way of summons to a hearing held on the customary day and at the customary time for such proceedings. If greater speed is required, however, the interim relief judge may allow a summons to be given effect at the time indicated, even on public holidays or non-working days, either in chambers or at his place of residence, in an open hearing".

<sup>5</sup> This article states that "in all cases of infringement of the freedom of the individual, the dispute cannot be taken up by the administrative authority and the judicial courts always have exclusive jurisdiction".

<sup>6</sup> See paras. 5.2 and 5.3.

<sup>7</sup> Reports to the Spanish Government on the visits which took place from 1 to 12 April 1991, 10 to 22 April 1994 and 10 to 14 June 1994, CPT/Inf (96) 9, paras. 25 and 206.

<sup>8</sup> A/53/44, paras. 129 and 131.

<sup>9</sup> A/48/44, paras. 456 and 457.

<sup>10</sup> CCPR/C/79/Add.61 of 3 April 1996.

<sup>11</sup> CPT/Inf (96) 9, paras. 208-209.

<sup>12</sup> At the time of the consideration of the second periodic report submitted by France pursuant to article 19 of the Convention, the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country (A/53/44, para. 143).

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