Marcos Roitman Rosenmann v. Spain, Communication No. 176/2000, U.N. Doc. A/57/44 at 210 (2002).

Decisions of the Committee Against Torture under article 22 of the

Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment

- Twenty-eighth session -

Complaint No. 176/2000

Complainant: Marcos Roitman Rosenmann

Represented by: Juan A. Garcés

State party concerned: Spain

Date of complaint: 25 October 2000

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

Meeting on 30 April 2002,

Having concluded its consideration of complaint No. 176/2000, 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 complainant, his counsel and the State party,

Adopts its Decision under article 22, paragraph 7, of the Convention.

Decision

1. The complainant is Mr. Marcos Roitman Rosenmann, a Spanish citizen of Chilean origin and professor of Sociology, at present residing in Madrid. He is represented by counsel. He alleges violations by Spain of articles 8, paragraph 4, 9, paragraphs 1 and 2, 13 and 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Spain is a party to the Convention, and gave the declaration under article 22 on 21 October 1987.

The facts as submitted by the complainant

2.1 The complainant claims that he was subjected to torture in Chile following the coup d'état of September 1973. On 4 July 1996, a group of alleged torture victims filed a complaint pursuant to the applicable provisions on *actio popularis* (arts. 19.1 and 20.3 of the LO del Poder Judicial, arts. 101 and 270 of the Ley de Enjuiciamiento Criminal, *acción popular*, art. 125 of the Spanish Constitution) with the Juzgado Central de Instrucción de Guardia de la Audiencia Nacional, requesting that criminal proceedings be opened against the former Chilean Chief of State, General Augusto Pinochet, for violations of human rights allegedly committed in Chile between September 1973 and March 1990, including violations of articles 1, 2, 4 and 16 of the Convention. On 7 May 1997 the complainant appeared before the Audiencia Nacional and gave testimony as a witness of torture in Chile.

2.2 On 16 October 1998 General Pinochet, who had travelled from Chile to the United Kingdom for medical treatment and was convalescing in London, was placed under detention by United Kingdom police authorities pursuant to a warrant issued on the basis of the criminal proceedings opened in Spain. After more than 16 months of legal, political and diplomatic actions, the United Kingdom Home Secretary allowed General Pinochet to return to Chile on 2 March 2000.

2.3 The complainant states that Spain has extraterritorial jurisdiction over crimes committed against Spanish citizens anywhere in the world, and that, accordingly, it had the right and the obligation to request the extradition of General Pinochet from the United Kingdom, in order to try him before the Spanish courts because of crimes committed against Spanish citizens in Chile.

2.4 On 8 October 1999 the Bow Street Magistrates Court in the United Kingdom decided that General Augusto Pinochet could be extradited to Spain. General Pinochet filed a writ of habeas corpus with the High Court, which was scheduled for a hearing on 20 March 2000. In the meantime, the Home Office, on its own initiative, ordered a medical examination of General Pinochet, which took place on 5 January 2000. On the basis of the results of this examination, the Home Secretary

informed the parties on 11 January 2000 that he was considering the possibility of discontinuing the extradition process for medical reasons and invited comments by 18 January. The Spanish Audiencia Nacional, through the Spanish Ministry for Foreign Affairs, informed the British Home Office on 13 January that it maintained its request for extradition. However, by note verbale of 17 January 2000, the Spanish Embassy in London indicated that Spain would not appeal a decision by the Home Secretary to discontinue the extradition process.

2.5 On 19 January 2000 the Audiencia Nacional prepared a document addressed to the (British) Crown Prosecution Service, counterpart of the Spanish judicial authorities in the extradition process, to file an appeal in case of a negative decision by the Home Secretary. However, the Spanish Ministry for Foreign Affairs did not forward this document to the Crown Prosecution Service.

2.6 In a report dated 20 January 2000, the Crown Prosecution Service requested instructions in order to prepare an appeal before 23 January. The Spanish Ministry of Foreign Affairs did not forward this report to the Audiencia Nacional until 10 February 2000. Other requests of the Crown Prosecution Service of 24 and 25 January never reached the Audiencia Nacional, as a result of which the Crown Prosecution Service was unable to intervene in the judicial hearings held on 26 and 27 January in connection with a claim filed by Belgium and others against the decision of the Home Secretary to keep the medical reports secret.

2.7 On 24 January the Audiencia Nacional informed the Spanish Ministry for Foreign Affairs of its intention to appeal in case the extradition was not granted. However, it was reported that the Minister for Foreign Affairs had made public statements indicating that he would not transmit such an appeal to the British authorities.

2.8 In a decision dated 15 February 2000, the High Court accepted the claim filed by Belgium in connection with the medical reports and asked the Home Office to send copy of them to the Audiencia Nacional in order to allow it to make a submission, if it so wished. On the same date the Home Office sent the reports to the Audiencia Nacional through the Spanish Ministry for Foreign Affairs. The Audiencia Nacional made its submission to the Home Office on 22 February 2000, including a medical report in which Spanish doctors questioned the conclusions reached by the British physicians who had examined General Pinochet on 5 January 2000.

2.9 On 1 March 2000 at 4 p.m. the Home Secretary informed the Spanish Ambassador in London through the Crown Prosecution Service, as well as the authorities of Belgium, France and Switzerland, that he would make public his decision concerning the extradition process on the following day at 8 a.m. The Spanish Ministry for Foreign Affairs, however, did not inform the Audiencia Nacional. At the same time the Home Office also sent a letter to the Crown

Prosecution Service asking it to inform the Home Office in advance in case it decided to file an appeal before the Courts on the following day. Copy of this letter was sent to the Audiencia Nacional by the Spanish Ministry for Foreign Affairs only on 2 March at 11:18 hours, after the Spanish press had reported on it. Without waiting to receive the letter, the Audiencia Nacional, on 2 March, issued an order instructing the Crown Prosecution Service to file an appeal against the decision to release General Pinochet. The order was faxed at 10 a.m. to the Spanish Foreign Minister, who decided not to forward it to the Crown Prosecution Service and informed the press accordingly. In view of the fact that an appeal had not been filed, the Home Secretary, at 2 p.m., authorized the departure of General Pinochet's flight for Chile.

2.10 With respect to the exhaustion of domestic remedies in Spain, the complainant states that he filed a complaint against D. Abel Matutes Juan, the then Minister for Foreign Affairs, before the Spanish Supreme Court for refusing to cooperate with the Judiciary. In a resolution dated 1 February 2000, the Spanish Supreme Court refused to examine the complaint. The complainant then filed an appeal against the Resolution, which was also rejected on 22 February 2000. On 24 February 2000, the complainant filed a new complaint against the Minister for Foreign Affairs for concealing documents relevant to the extradition process. The Supreme Court refused to examine this complaint in Resolutions dated 6 March and 13 April 2000. On 16 March 2000, the complainant filed a third complaint against the Minister for failing to transmit submissions of the Audiencia Nacional to the Crown Prosecution Service. This complaint was dismissed by Resolutions dated 28 April and 3 May 2000.

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

The complaint

3.1 The complainant argues that under Spanish law the judicial authorities are in control of the extradition process and that the Executive has the obligation to comply with the judicial authorities. He claims that in the case at hand, by failing to follow the instructions of the judicial authorities and promptly forward the relevant documents to the British counterpart, the Spanish Minister for Foreign Affairs obstructed the extradition process and did not act in an impartial manner, in contravention of articles 8, 9, 13 and 14 of the Convention.

3.2 The complainant claims, inter alia, that Spain violated its obligations under the Convention by not pressing with all due diligence its extradition request. In this context the complainant invokes article 13 of the Convention, which stipulates in part that "Each State party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent

authorities." It is argued that the deliberate obstruction of the extradition process violated the complainant's rights under article 13 of the Convention to have his case examined by competent authorities and to obtain compensation under article 14 of the Convention.

3.3 The complainant also invokes article 9, paragraph 1, of the Convention, which stipulates that "States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4 ". It is argued that Spain's handling of the extradition process failed to meet this requirement.

Observations by the State party

4.1 By note verbale of 6 February 2001, the State party submitted its observations, challenging admissibility on several grounds.

4.2 The State party considers the communication inadmissible because the complainant lacks the quality of "victim" and explains that in the Spanish judicial proceedings that led to the request by Spain for the extradition of General Pinochet, the complainant was involved not as a victim or as a civil party to the proceedings, but rather in his capacity as a witness. In this connection the State party quotes the original complaint which stated that "the witness can be interrogated about the general practice of torture against Spanish citizens and citizens of other countries".

4.3 The State party further argues that the communication is inadmissible because of non-exhaustion of domestic remedies, since at the time of submission the complainant was in the process of appealing certain Resolutions. Moreover, it is stated that the complainant failed to appeal to the Constitutional Court (Tribunal Constitucional) by way of *amparo*. It is submitted that appeals in*amparo* are effective remedies in Spain, and have been successful in many other cases of Resolutions dismissing complaints.

4.4 By note verbale of 5 June 2001 the State party reiterates the arguments contained in its earlier submission and submits that the complaint should be declared inadmissible because it falls outside the scope of the Convention, bearing in mind that (1) the complainant does not claim to be a victim of torture perpetrated by the Spanish authorities, (2) the complainant did not claim to be a victim of torture in the Spanish proceedings against General Pinochet. In this sense, the State party adds that the complaint is in the nature of a laboratory case in order to test the scope of the Convention. The State party submits that the communication is manifestly ill-founded, as the articles of the Convention do not impose such far-reaching obligations on State parties, and certainly not on State parties in whose territory the person accused of torture is not found. Moreover, with regard to a right to compensation under article 14 of the Convention, the State

party explains that since the complainant was not one of the civil parties in the Spanish criminal proceeding against General Pinochet, he would not have had any right to compensation under the Spanish proceedings.

4.5 As to the claim that the Spanish Minister for Foreign Affairs disobeyed a judicial order (*mandato judicial*), the State party indicates that this claim was brought by the complainant before the Tribunal Supremo, which dismissed the claim on the grounds that under Spanish law, as interpreted by the Tribunal Supremo, there was no such judicial order that the Minister was bound to obey. Moreover, in the Spanish democratic order, certain domains are properly within the political discretion of the Executive. The State party emphasizes that it was not the Spanish Government, but the British Government, which, in the exercise of its political discretion, decided not to extradite General Pinochet to Spain, Belgium or Switzerland, and decided instead to permit his return to Chile.

4.6 The State party further argues that the Convention against Torture does not impose upon any one State the exclusive or even preferential competence to try a person accused of torture, in theinstant case, an exclusive or preferential competence of Spain to try a Chilean citizen for crimes committed in Chile. Spain acted correctly in requesting extradition from the United Kingdom, but this extradition was not granted because of the exercise of political discretion by the United Kingdom.

Further comments by the complainant

5. In submissions dated 6 March 2001 and 18 October 2001, the complainant reiterates his prior statements of fact and arguments. He refers to his appearance as a witness in the case before the Audiencia Nacional on 7 May 1997, in which he declared that in 1973, when he was 17 years old, he and other engineering students had been arrested and taken to a football stadium converted into a detention centre, where they were subjected to various kinds of physical and mental abuse. The complainant appeared as a witness, but could have joined the criminal action against General Pinochet pursuant to articles 108, 111 and 112 of the Spanish Ley de Enjuiciamiento Criminal. He further claims that the Committee should consider that domestic remedies have been exhausted, since in the circumstances of the case, an appeal on *amparo* to the Constitutional Court would not be an effective remedy, bearing in mind that the Resolution of 30 May 2000 rejecting the complainant's appeal was not a summary dismissal but a reasoned judgement, and that the Constitutional Court recognizes the competence of the lower criminal courts to interpret the Spanish penal law.

Issues and proceedings before the Committee

6.1 Before examining the merits of a communication, the Committee Against Torture must determine whether the communication is admissible under article 22 of the Convention.

6.2 The Committee notes the complainant's allegations that the violation of the Convention lies in the refusal of the Spanish Minister for Foreign Affairs to transmit Resolutions adopted by the Audiencia Nacional to the relevant British authorities. The Committee has also noted the State party's response that the matter was raised by the complainant before the competent Spanish courts, which determined that there was no violation of Spanish law. The Committee considers that the interpretation of national laws is within the competence of the tribunals of States parties and that, accordingly, it is not in a position to make a finding with respect to the application or interpretation of Spanish law in matters of extradition. The Committee limits itself to examining the admissibility of the communication in the light of the criteria established by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

6.3 The Committee notes that the State party's objections to the admissibility of the communication are essentially fourfold: (a) lack of standing on the part of the complainant, who does not claim to have been tortured by Spanish authorities nor became a party to the Spanish criminal proceedings against General Pinochet; (b) failure to exhaust domestic remedies, including an appeal in *amparo* to the Constitutional Court; (c) *ratione personae*, since the alleged torture was not committed by Spanish authorities, but by agents of the Chilean State, and because General Pinochet was not on Spanish soil; and (d) lack of competence *ratione materiae*, since no article of the Convention imposes an obligation on a State party to demand extradition of a person suspected of torture.

6.4 With respect to the State party's argument that the complainant lacks standing to bring the communication, the Committee notes that the complainant claims that he was arrested by members of the Chilean police and subjected to beatings and other ill-treatment. While those acts occurred outside of Spain, and before the entry into force of the Convention, the complainant does not claim a breach by Spain of his right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment. Rather, the complainant contends that Spain is in breach of a current obligation under the Convention to investigate fully and prosecute alleged acts of torture falling within its jurisdiction, and, in furtherance of that obligation, to pursue the extradition proceedings to the furthest extent possible. For the complainant to be a victim of the alleged violation, however, he must be personally and directly affected by the alleged breach in question. The Committee observes that, in the present case, the complainant was not a civil party to the criminal proceedings in Spain against the alleged offender, General Pinochet, nor did his case form part of the Spanish extradition request. Accordingly, even if General Pinochet had been extradited to Spain, the complainant's situation would not have been materially altered (at least without further legal action on the

complainant's part). The Committee considers, as a consequence, that the complainant has failed to demonstrate that, at the time of the communication, he was a victim of the alleged failure of the State party to abide by the contended obligation under the Convention to exhaust the full measure of avenues open to it in the attempt to procure the alleged offender's extradition.

6.5 Moreover, with respect to (b), the Committee notes that the complainant did not engage domestic remedies in Spain by becoming a civil party to the proceedings to obtain the extradition of General Pinochet. Further, with regard to his complaints against the Spanish Minister for Foreign Affairs, the Committee notes that the complainant did not make use of the remedy of *amparo*, which the State party contends is an available and effective remedy, citing a number of cases before the Constitutional Court in support of this proposition, whereas the complainant claims that*amparo* would not have resulted in any relief, citing relevant case-law. In the circumstances, the Committee is not in a position to decide that recourse to such remedies would have been a priori futile and thus not required for purposes of article 22, paragraph 5 (b) of the Convention.

6.6 With respect to (c), the Committee notes that the complainant's claims with regard to torture committed by Chilean authorities are *ratione personae* justiciable in Chile and in other States in whose territory General Pinochet may be found. However, to the extent that General Pinochet was not in Spain at the time of the submission of the communication, the Committee would consider that articles 13 and 14 of the Convention invoked by the complainant do not apply *ratione personae* to Spain. In particular, his "right to complain to, and to have his case promptly and impartially examined by, [the] competent authorities", and his claim to compensation would be justiciable vis-à-vis the State responsible for the acts of torture, i.e. Chile, not Spain.

6.7 With respect to (d), the Committee observes that the State party possesses extraterritorial jurisdiction over acts of torture committed against its nationals. The Committee recalls that one of the objects of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is to avoid any impunity to persons having committed such acts. The Committee observes that, based upon the State party's law, and in conformity with articles 5, paragraph 1 (c), and 8, paragraph 4, of the Convention, the State party sought the extradition of General Pinochet for trial in Spain. There is every indication that Spain would have brought General Pinochet to trial, once he were to be found on its territory, further to the indictment of 4 July 1996 of the Juez Central de la Audiencia Nacional de España. The Committee observes, however, that while the Convention imposes an obligation to bring to trial a person, alleged to have committed torture, who is found in its territory, articles 8 and 9 of the Convention do not impose any obligation to seek an extradition, or to insist on its procurement in the event of a refusal. In this connection, the Committee refers to article 5, paragraph 1 (c), of the

Convention, pursuant to which a State party shall take the necessary measures to establish its jurisdiction over the offences referred to in article 4 "when the victim is a national of that State if that State considers it appropriate". The Committee considers this provision to establish a discretionary faculty rather than a mandatory obligation to make, and insist upon, an extradition request. Accordingly, the complaint falls *ratione materiae* outside the scope of the articles of the Convention invoked by the complainant.

7. The Committee against Torture consequently decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the complainant.

---

* The following members of the Committee participated in the examination of the present complaint: Peter Burns, Guibril Camara, Sayed El-Masry, Alejandro Gonzalez Poblete, Andreas Mavrommatis, Ole Rasmussen, Alexander Yakovlev and Yu Mengjia. Pursuant to Rule 103, paragraph (1) (c), of the Committee's Rules of Procedure, Mr. Fernando Mariño Menendez did not participate in the consideration of this case.

** Pursuant to Rule 113 of the Committee's Rules of Procedure, an individual opinion signed by one Committee member is appended.

[Done in English, French, Russian and Spanish, the English, French and Spanish texts being the original versions.]

Individual opinion of Committee member Mr. Guibril Camara, dissenting in part

I share the ultimate conclusion of the Committee that this case is inadmissible, but only on the basis of some of the reasons advanced by the majority of the Committee. I fully subscribe to the majority's reasoning as set out in paragraphs 6.4

and 6.5 to the effect that the author is neither a "victim" in the present case in the sense of article 22, in that he was not a party to the proceedings against Pinochet in Spain, nor that it has been demonstrated that the exhaustion of domestic remedies in the form of an appeal of *amparo* to the Constitutional Court would be a priori futile. It would have been consistent with the Committee's practice, once the inadmissibility of this case became clear on either or both of these formal grounds, to conclude its consideration at that point. Instead, for reasons that are not clear from the text of the majority's decision, the majority has elected to engage in a complex discussion on the scope of the jurisdictional articles of the Convention which would have been more appropriately considered under the merits of the case had it been admissible. In procedural law, the first action of a judicial or quasi-judicial body, such as the Committee, is to satisfy itself that it is appropriately seized of a matter; this has always been the Committee's previous practice. And should it not be appropriately seized thereof, notably in the case of inadmissibility, the sole decision to be taken, after having indicated the reasons therefor, should be to conclude with declaring the case inadmissible without delving into its merits.

In my view, the majority has come to a premature interpretation of articles 5, 8, 9, 13 and 14. The majority considers that, as article 5 provides for jurisdiction to be exercised by a State party in cases where the victim is a national of that State "if that State considers it appropriate", a State possesses a discretion at all points of an investigation and prosecution as to whether it should pursue proceedings in such a case. This view neglects a variety of issues:

(a) It would appear to follow from the scheme of the Convention, including the placement of article 5 and its surrounding articles, as well as the entirety of the text of article 5, that the option in article 5, paragraph 1 (c), is to leave to States the ability to elect, when implementing the Convention into domestic law, whether or not they will confer, in principle, jurisdiction over nationals who are extraterritorial victims of torture upon their investigative and prosecutory bodies. The *travaux préparatoires* and State practice look to confirm that the option contained in article 5, paragraph 1 (c), is aimed at the adoption of generally applicable norms of criminal law by which a State party confers upon its authorities of the ability to investigate and prosecute any and all such cases. Spain, among other States, has elected to exercise that option and confer such extraterritorial jurisdiction upon its investigative and prosecutory authorities. It was pursuant to this jurisdiction, which was confirmed by proceedings in the Audiencia Nacional at an early stage, that the Spanish authorities were able to initiate their investigation of General Pinochet. It is therefore difficult to understand why the discretion in article 5, paragraph 1 (c), should, for States parties that have made the election to assume such jurisdiction, thereupon further extend to each individual case investigated and prosecuted pursuant to this jurisdiction. In this light, it seems that the majority has confused, on the one hand, the possibility to assume a (usually legislative) norm of general application concerning investigation and prosecution of acts of falling within article 5, paragraph 1 (c), with, on the other hand, the pursuit of each individual

case.

(b) The majority's reasoning that the discretion contained in article 5 has further meaning beyond that outlined and that the Convention does not require an extradition request to be made is difficult to square both with the majority's own emphasis on the object of the Convention to deny impunity and to the consistent theme running through the Convention that States parties with jurisdiction over an alleged act of torture should exercise such means at their disposal to bring the alleged offender to justice. The majority's view of the "discretion" in article 5 significantly weakens the likelihood that alleged offenders in cases of torture of extraterritorial nationals will be brought to justice, certainly as compared to the cases in article 5, paragraph 1 (a) and (b), where no such discretion applies.

Even if the Committee is correct that the Convention does not operate to require a State to lodge an extradition request in a case where it has jurisdiction under its law, the Committee fails to explain why it should also be concluded that extradition proceedings should be able to be discontinued at any point. There are strong policy reasons, again derived from the scheme and object of the Convention, that an extradition request, once made, should be prosecuted through to its conclusion. It does not follow that to allow a discretion on whether to initiate an extradition request also requires a discretion effectively to discontinue the request at any time to be afforded.

Even if it is correct that the Convention allows a discretion to discontinue requests for extradition, the majority wholly fails to address the central point in this case as to which body should be exercising such a discretion. The Committee's consistent preference has been, in numerous contexts, for judicial resolution of allegations of torture arising within a State party. In this case, the State party's legal order confers upon its judiciary the ability to investigate cases of extraterritorial nature, to prosecute such cases, to seek extradition requests and to assess the legal implications of decisions in extradition requests and to draw the necessary conclusions. Accordingly, the State party's judiciary in this case determined that there were grounds for a legal challenge to the Home Secretary's decision to terminate the extradition proceedings. Another branch of the State party's government, having theretofore acted in an essentially administrative capacity, frustrated the judicial decision to appeal the Home Secretary's decision by failing to transmit it to the English authorities. It is more than questionable whether such an exercise of "discretion" by the executive is consistent with the principles underlying the Convention, and with the expressed will of the international community to end impunity for the authors of crimes against humanity. The majority's decision in effect deprives the author of the ability to exhaust domestic remedies in respect of the issues raised, being avenues which the State party itself recognises have not been exhausted, and of thereafter returning before the Committee.

For these reasons, I consider the majority's view expressed in paragraphs 6.6 and 6.7 to be premature and, in any event, unnecessary to the Committee's final decision.

(Signed) Guibril Camara

[Done in English, French, Russian and Spanish, the English and French texts being the original versions.]