



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

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

DECISION*

Communication No. 195/2002

Submitted by: Mafhoud Brada (represented by counsel, Mr. de Linares, of the
Action of Christians for the Abolition of Torture (ACAT))

Alleged victim: The complainant

State party: France

Date of complaint: 29 November 2001 (initial submission)

Date of decision on admissibility: 29 April 2003

Date of the present decision: 17 May 2005

[ANNEX]

* Made public by decision of the Committee against Torture.

Annex

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

Thirty-fourth session

concerning

Communication No. 195/2002

Submitted by: Mafhoud Brada (represented by counsel, Mr. de Linares of the
Action of Christians for the Abolition of Torture (ACAT))

Alleged victim: The complainant

State party: France

Date of complaint: 29 November 2001 (initial submission)

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

Meeting on 17 May 2005,

Having concluded its consideration of complaint No. 195/2002, submitted to the
Committee against Torture by Mr. Mafhoud Brada 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 the following:

Decision under article 22, paragraph 7, of the Convention

1.1 The complainant, Mr. Mafhoud Brada, a citizen of Algeria, was residing in France when the present complaint was submitted. He was the subject of a deportation order to his country of origin. He claims that his forced repatriation to Algeria constitutes a violation by France of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by Action of Christians for the Abolition of Torture, a non-governmental organization.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by note verbale dated 19 December 2001. At the same time, the Committee, acting in accordance with rule 108, paragraph 9, of its rules of procedure, requested the State party not to deport the complainant to Algeria while his complaint was being considered. The Committee reiterated its request in a note verbale dated 26 September 2002.

1.3 In a letter dated 21 October 2002 from the complainant's counsel, the Committee was informed that the complainant had been deported to Algeria on 30 September 2002 on a flight to Algiers and that he had been missing since his arrival in Algeria.

The facts as submitted by the complainant

2.1 The complainant, a fighter pilot since 1993, was a member of the Algerian air force squadron based in Bechar, Algeria. From 1994 on, the squadron was regularly used, as a back-up for helicopter operations, to bomb Islamist maquis areas in the region of Sidi Bel Abbes. The fighter aircraft were equipped with incendiary bombs. The complainant and other pilots were aware that the use of such weapons was prohibited. After seeing the destruction caused by these weapons on the ground in photographs taken by military intelligence officers - pictures of dead men, women, children and animals - some pilots began to doubt the legitimacy of such operations.

2.2 In April 1994, the complainant and another pilot declared, during a briefing, that they would not participate in bombing operations against the civilian population, in spite of the risk of heavy criminal sanctions against them. A senior officer then waved his gun at the complainant's colleague, making it clear to him that refusal to carry out missions "meant death". When the two pilots persisted in their refusal to obey orders, the same officer loaded his gun and pointed it at the complainant's colleague, who was mortally wounded as he tried to escape through a window. The complainant, also wishing to escape, jumped out of another window and broke his ankle. He was arrested and taken to the interrogation centre of the regional security department in Bechar third military region. The complainant was detained for three months, regularly questioned about his links with the Islamists and frequently tortured by means of beatings and burning of his genitals.

2.3 The complainant was finally released owing to a lack of evidence of sympathy with the Islamists and in the light of positive reports concerning his service in the forces. He was forbidden to fly and assigned to Bechar airbase. Explaining that servicemen who were suspected of being linked to or sympathizing with the Islamists regularly "disappeared" or were murdered, he escaped from the base and took refuge in Ain Defla, where his family lived. The complainant

also alleges that he received threatening letters from Islamist groups, demanding that he desert or risk execution. He forwarded the threatening letters to the police.

2.4 Later, when the complainant was helping a friend wash his car, a vehicle stopped alongside them and a submachine gun burst was fired in their direction. The complainant's friend was killed on the spot; the complainant survived because he was inside the car. The village police officer then advised the complainant to leave immediately. On 25 November 1994, the complainant succeeded in fleeing his country. He arrived at Marseille and met one of his brothers in Orléans (Indre). In August 1995, the complainant made a request for asylum, which was later denied by the French Office for the Protection of Refugees and Stateless Persons (OFPRA). Since the complainant had made the request without the assistance of counsel, he was unable to appeal the decision to the Refugee Appeals Commission.

2.5 The complainant adds that, since he left Algeria, his two brothers have been arrested and tortured. One died in police custody. Moreover, since his desertion, two telegrams from the Ministry of Defence have arrived at the complainant's home in Abadia, demanding that he report immediately to air force headquarters in Cheraga in connection with a "matter concerning him". In 1998, the complainant was sentenced in France to eight years' imprisonment for a rape committed in 1995. The sentence was accompanied by a 10-year temporary ban from French territory. As the result of a remission of sentence, the complainant was released on 29 August 2001.

2.6 Meanwhile, on 23 May 2001, the prefect of Indre issued an order for the deportation of the complainant. In a decision taken on the same day, he determined that Algeria would be the country of destination. On 12 July 2001, the complainant lodged an appeal with the Limoges Administrative Court against the deportation order and the decision to return him to his country of origin. In an order dated 29 August 2001, the court's interim relief judge suspended enforcement of the decision on the country of return, considering that the risks to the complainant's safety involved in a return to Algeria raised serious doubts as to the legality of the deportation decision. Nevertheless, in a judgement dated 8 November 2001, the Administrative Court rejected the appeal against the order and the designated country of return.

2.7 On 4 January 2002, the complainant appealed against this judgement to the Bordeaux Administrative Court of Appeal. He points out that such an appeal does not have suspensive effect. He also refers to recent case law of the Council of State which he maintains demonstrates the inefficacy of domestic remedies in two similar cases.¹ In those cases, which involved deportation to Algeria, the Council of State dismissed the risks faced by the persons concerned, but the Algerian authorities subsequently unearthed a death sentence passed *in absentia*. On 30 September 2002, the complainant was deported to Algeria on a flight to Algiers and has been missing since.

The complaint

3.1 The complainant considers that his deportation to Algeria is a violation by France of article 3 of the Convention insofar as there are real risks of his being subjected to torture in his country of origin for the reasons mentioned above.

3.2 The complainant, supported by medical certificates, also maintains that he suffers from a serious neuropsychiatric disorder that requires constant treatment, the interruption of which would adversely affect his health. His doctors have considered these symptoms to be compatible with his allegations of torture. Moreover, the complainant's body shows traces of torture.

The State party's observations on the admissibility of the complaint

4.1 In a note verbale dated 28 February 2002, the State party challenged the admissibility of the complaint.

4.2 As its main argument, the State claimed that the complainant had not exhausted domestic remedies within the meaning of article 22, paragraph 5, of the Convention. On the date that the complaint was submitted to the Committee, the appeal to the Bordeaux Administrative Court of Appeal against the judgement upholding the order to deport the complainant was still pending. Moreover, there were no grounds for concluding that the procedure might exceed a reasonable time.

4.3 With regard to the complainant's argument that such an appeal did not suspend the deportation order, the State party maintained that the complainant had the option of applying to the interim relief judge of the Administrative Court of Appeal for suspension of the order. Indeed, the complainant had successfully made such an appeal to the Limoges Administrative Court.

4.4 Secondly, the State party maintained that the complaint submitted to the Committee was not in keeping with the provision of rule 107, paragraph 1 (b), of the rules of procedure that "the communication should be submitted by the individual himself or by his relatives or designated representatives or by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf". However, the procedural documents did not indicate that the complainant designated Action of Christians for the Abolition of Torture as his representative, and it had not been established that the complainant is unable to instruct that organization to act on his behalf. It therefore had to be ascertained whether or not the purported representative, who signed the complaint, was duly authorized to act on the complainant's behalf.

Comments by counsel

5.1 In a letter dated 21 October 2002, counsel set out her comments on the State party's comments as to admissibility.

5.2 In relation to the exhaustion of domestic remedies, counsel pointed out that, in accordance with the general principles of international law, the domestic remedies which must be exhausted are those which are effective, adequate or sufficient, in other words, which offer a

serious chance of providing an effective remedy for the alleged violation. In this case, the annulment proceedings instituted before the Bordeaux Administrative Court of Appeal were still pending. Since that procedure had no suspensive effect, the deportation order against the complainant was enforced on 30 September 2002. Domestic remedies thus proved ineffective and inadequate.

5.3 Moreover, since the complainant was under the protection of the Committee by virtue of its request to the State party not to send him back to Algeria while his application was being considered, he had not considered it worthwhile to launch additional domestic proceedings, in particular interim relief proceedings for suspension.

5.4 In any event, the enforcement of the deportation order despite the pertinent arguments raised in the proceedings before the Bordeaux Administrative Court of Appeal rendered the appeal ineffective. Even if the Court were now to grant the complainant's appeal, it was unrealistic to imagine that Algeria would return him to France.

5.5 In response to the complaint that rule 107, paragraph 1, of the Committee's rules of procedure had not been respected, counsel referred to a statement signed by the complainant in person on 29 November 2001 authorizing the Action of Christians for the Abolition of Torture to act on his behalf before the Committee.

The Committee's assessment in its decision on admissibility of the failure by the State party to accede to its request for interim measures pursuant to rule 108 of its Rules of Procedure

6.1 The Committee observed that any State party which made the declaration provided for under article 22 of the Convention recognized the competence of the Committee against Torture to receive and consider complaints from individuals who claimed to be victims of violations of one of the provisions of the Convention. By making this declaration, States parties implicitly undertook to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it and, after such examination, to communicate its comments to the State party and the complainant. By failing to respect the request for interim measures made to it, the State party seriously failed in its obligations under article 22 of the Convention because it prevented the Committee from fully examining a complaint relating to a violation of the Convention, rendering action by the Committee futile and its comments worthless.

6.2 The Committee concluded that the adoption of interim measures pursuant to rule 108 of the rules of procedure, in accordance with article 22 of the Convention, was vital to the role entrusted to the Committee under that article. Failure to respect that provision, in particular through such irreparable action as deporting an alleged victim, undermined protection of the rights enshrined in the Convention.

Decision of the Committee concerning admissibility

7.1 The Committee considered the admissibility of the complaint at its thirtieth session and declared the complaint admissible in a decision of 29 April 2003.

7.2 Concerning the *locus standi* of Action of Christians for the Abolition of Torture, the Committee noted that the statement signed by the complainant on 29 November 2001 authorizing the organization to act on his behalf before the Committee was in the file submitted to it, and therefore considered that the complaint complied with the conditions set out in rules 98.2 and 107.1 of its rules of procedure.

7.3 On the exhaustion of domestic remedies, the Committee noted that on 2 January 2002 the complainant had appealed to the Bordeaux Administrative Court of Appeal against the ruling of the Limoges Administrative Court upholding the deportation order, and that that appeal had no suspensive effect. Concerning the State party's argument that the complainant had had, but did not pursue, the option of applying to the interim relief judge of the Bordeaux court to suspend enforcement of the deportation order, the Committee noted that the State party had not indicated that the complainant should make such application by a specific deadline, implying that the application could in theory have been made at any time up to the moment when the Administrative Court of Appeal ruled on the merits of the appeal.

7.4 The Committee also noted that the complaint did not constitute an abuse of the right to submit a communication and was not incompatible with the Convention.

7.5 The Committee also noted that on 30 September 2002, after communicating its comments on the admissibility of the complaint, the State party had enforced the order for the deportation of the complainant to Algeria.

7.6 In the circumstances, the Committee considered it ought to decide whether domestic remedies had been exhausted when examining the admissibility of the complaint. In its view it was unarguable that, since the deportation order had been enforced before the Administrative Court of Appeal reached a decision on the appeal, the complainant had, from the moment he was deported to Algeria, had no opportunity to pursue the option of applying for suspension.

7.7 The Committee noted that, when it called for interim measures of protection such as those that would prevent the complainant from being deported to Algeria, it did so because it considered that there was a risk of irreparable harm. In such cases, a remedy which remains pending after the action which interim measures are intended to prevent has taken place is, by definition, pointless because the irreparable harm cannot be averted if the domestic remedy subsequently yields a decision favourable to the complainant: there is no longer any effective remedy to exhaust after the action which interim measures were intended to prevent has taken place. In the present case, the Committee felt no appropriate remedy was available to the complainant now he had been deported to Algeria, even if the domestic courts in the State party were to rule in his favour at the conclusion of proceedings which were still under way after the extradition.

7.8 In the present case, according to the Committee, the essential purpose of the appeal was to prevent the deportation of the complainant to Algeria. In this specific case, enforcing the deportation order rendered the appeal irrelevant by vitiating its intended effect: it was inconceivable that, if the appeal went in the complainant's favour, he would be repatriated to France. In the circumstances, in the Committee's view, the appeal was so intrinsically linked to the purpose of preventing deportation, and hence to the suspension of the deportation order, that

it could not be considered an effective remedy if the deportation order was enforced before the appeal concluded.

7.9 To this extent, the Committee was of the view that returning the complainant to Algeria despite the request made to the State party under rule 108 of the rules of procedure, and before the admissibility of the complaint had been considered, made the remedies available to the complainant in France pointless, and the complaint was accordingly admissible under article 22, paragraph 5, of the Convention.

The State party's submission on interim measures of protection and the merits of the complaint

8.1 The State party submitted its observations on 26 September and 21 October 2003.

8.2 Regarding interim measures (paras. 6.1 and 6.2) and the Committee's repeated view that "failure to respect a call for interim measures pursuant to rule 108 of the rules of procedure, in particular through such an irreparable action as deporting the complainant, undermines protection of the rights enshrined in the Convention", the State party registers its firm opposition to such an interpretation. According to the State party, article 22 of the Convention gives the Committee no authority to take steps binding on States parties, either in the consideration of the complaints submitted to it or even in the present case, since paragraph 7 of the article states only that "The Committee shall forward its views to the State party concerned and to the individual". Only the Committee's rules of procedure, which cannot of themselves impose obligations on States parties, make provision for such interim measures. The mere failure to comply with a request from the Committee thus cannot, whatever the circumstances, be regarded as "undermining protection of the rights enshrined in the Convention" or "rendering action by the Committee futile". The State party explains that when receiving a request for interim measures, cooperating in good faith with the Committee requires it only to consider the request very carefully and try to comply with it as far as possible. It points out that until now it has always complied with requests for interim measures, but that should not be construed as fulfilment of a legal obligation.

8.3 Concerning the merits of the complaint and the reasons for the deportation, the State party considers the complaint to be unfounded for the following reasons. First, the complainant never established, either in domestic proceedings or in support of his complaint, that he was in serious danger within the meaning of article 3 of the Convention. The State party refers to the Committee's case law whereby it is the responsibility of an individual who claims he would be in danger if sent back to a specific country to show, at least beyond reasonable doubt, that his fears are serious. The Committee has also stressed that "for article 3 of the Convention to apply, the individual concerned must face a foreseeable and real risk of being subjected to torture in the country to which he/she is being returned, and that this danger must be personal and present"² and that invoking a general situation or certain specific cases is not sufficient. According to the State party, while the complainant describes himself as a fighter pilot and an officer of the Algerian armed forces who has deserted for humanitarian reasons, he provides no proof. To establish that he is a deserter he has merely presented the Committee with two telegrams from

the Algerian air force addressed to his family home; both are extremely succinct and merely request him “to present himself to the air force authorities in Béchar for a matter concerning him”, without further details or any mention of his rank or former rank. In the State party’s view it is very difficult to believe that the complainant was unable to produce any other document to substantiate the fears he expressed.

8.4 Secondly, even if the complainant did establish that he was a fighter pilot and a deserter, his account contains various contradictions and implausibilities that discredit the fears invoked. In particular, he maintains that in early March, when along with another pilot he refused to participate in bombing operations against the civilian population, he knew that he risked heavy penalties by refusing to obey orders; he points out that such penalties were more severe for officers and, given the situation in Algeria, would have been handed down in time of war and included the death penalty for officers. While the other pilot had been shot on the spot for disobeying orders, the complainant had apparently been released after only three months in prison for the same conduct, his only punishment, once he had been cleared of suspected Islamist sympathies, being that he was forbidden to fly and assigned to the airbase. When he deserted from the airbase and fled to his family’s village, an attempt was supposedly made to kill the complainant with a submachine gun fired from an intelligence vehicle: his neighbour was killed on the spot while he himself - the sole target - escaped once again.

8.5 The State party considers that the complainant’s personal conduct renders his claims implausible. While he claims to have deserted in 1994 on humanitarian grounds as a conscientious objector, consciously exposing himself to the risk of very severe punishment, his humanitarian concerns seem totally at odds with his violent criminal conduct on arrival in France and subsequently. Scarcely a year after supposedly deserting on grounds of conscientious objection, the complainant perpetrated a common crime of particular gravity, namely, aggravated rape under threat of a weapon, and while in prison for that crime showed he was a continuing danger to society by making two violent attempts to escape.

8.6 In any case, the State party maintains that the complainant’s alleged fears cannot be held to represent a serious danger of torture and inhuman or degrading treatment within the meaning of article 3 of the Convention. The complainant maintained that he faced two kinds of danger in the event of being sent back to Algeria: one, the result of his deserting, consisting in the punishment laid down in the Algerian military criminal code for such cases; the other related to the possibility that he might in the future again be accused of Islamist sympathies. The State party considers that the danger of imprisonment and other criminal penalties for desertion does not in itself establish a violation of article 3 of the Convention since these are the legal punishments for an ordinary offence in the estimation of most States parties to the Convention. It is important to note that, although the complainant maintains that punishment in the event of desertion may in extreme cases extend to the death penalty, he does not claim that he himself would incur that penalty. In fact, according to the State party, he could not: it emerges from his own account that his desertion was an individual act, unrelated to combat operations, after he had been suspended from flying and assigned to the airbase, while it emerges both from his written submission and from details of Algerian legislation compiled by Amnesty International and submitted on the complainant’s behalf that the death penalty might possibly be applicable only in the case of a group desertion by officers. Secondly, although the complainant maintains that he was suspected of Islamist sympathies and tortured under questioning after refusing to obey

orders, the State party concludes from the Committee's case law³ that past torture, even where it is established that it was indeed inflicted in circumstances coming within the scope of the Convention, does not suffice to demonstrate a real and present danger for the future. In the present case, the State party stresses that it emerges from the complainant's own written submission that he was acquitted of accusations of Islamist sympathies. The State party further considers that the potential danger of the complainant's facing fresh charges of Islamist sympathies in the future does not seem substantial within the meaning of article 3 of the Convention, nor yet credible in terms of his own account, which suggests that his service file was sufficient for the military authorities to clear him of all suspicion in this regard and he was acquitted of the charges. Besides, it is hardly credible that he would have been released and assigned to the airbase if the military authorities had still had the slightest doubt about the matter. Since they had kept him on the actual airbase, the military authorities had clearly been convinced that not the slightest suspicion of sympathy towards the Armed Islamist Group (GIA) could be held against him. Here the State party notes that no complaint admissible by the Committee could arise out of the complainant's allegations that he had received death threats from armed Islamist groups, since such threats by a non-governmental entity not occupying the country were in any case beyond the scope of the Convention. Similarly, the State party notes that, although the complainant shows with the help of medical certificates that he suffers from a neuro-psychiatric disorder, he does not establish that this disorder, about which he gives no details, could not be adequately treated in Algeria.

8.7 The State party maintains that the dangers alleged by the complainant were given a fair and thorough review under domestic procedures. It recalls the Committee's case law whereby it is for the courts of the States parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the manner in which such facts and evidence were evaluated was clearly arbitrary or amounted to a denial of justice.⁴ The question before the Committee is whether the complainant's deportation to the territory of another State violated France's obligations under the Convention, which means that it should be asked whether, when the French authorities decided to enforce the deportation order against the individual in question, they could reasonably consider in the light of the information available to them that he would be exposed to real danger if sent home. In actual fact, the dangers the complainant said he would face should he be sent back to his country of origin had been successively reviewed in France four times in six years by three different administrative authorities and one court, all of which had concluded that the alleged dangers were not substantial. In a judgement of 8 November 2001, the Limoges Administrative Court rejected the appeal against the deportation order submitted by the complainant on 16 July 2001 and the decision establishing Algeria as the country of destination, opening the way to enforcement of the order. The court considered that the complainant's allegations "lacked any justification". The complainant, who appealed the judgement to the Bordeaux Administrative Court of Appeal on 4 January 2002, makes no claim to the Committee that the manner in which the evidence he produced was evaluated by the Court of Appeal "was clearly arbitrary or amounted to a denial of justice". The complainant's application for political refugee status to the French Office for the Protection of Refugees and Stateless Persons (OFPRA) had previously been rejected, on 23 August 1995, on the grounds that he had not submitted sufficient evidence to prove that he was personally in one of the situations for which article 1 (A) (2) of the Geneva Convention relating

to the Status of Refugees provides. The complainant had subsequently refrained from submitting his case to the Refugee Appeals Commission (CRR), an independent jurisdiction which carries out de facto and de jure reviews of OFPRA decisions, thus acquiescing in the decision taken in this regard. The complainant's situation had again been reviewed by the Minister of the Interior on 19 December 1997 further to the circular of 24 June 1997 on the regularization of the residence status of certain categories of illegal aliens, which allows prefects to issue residence permits to individuals who claim to be at risk if returned to their country of origin. Once again, the complainant limited himself to stating that he was a former member of the Armed Forces who had deserted from the Algerian army and been threatened by the GIA. For want of details, and in the absence of any justification for his allegations, his application was rejected. Once more, the complainant did not contest this decision in the competent domestic court. Before determining Algeria as the country he should be deported to, the prefect of Indre had conducted a further review of the risks he would run if returned to that country.

8.8 In the State party's view, by the day the deportation order was enforced, the complainant's situation must be said to have been fairly reviewed without him showing that he would be in serious and present danger of torture or inhuman treatment if returned to Algeria. The State party argues that the complainant continues to fail to offering evidence of such danger to support his complaint to the Committee.

8.9 In the circumstances, the State party was persuaded that the complainant's appeal to the Committee was but a device to gain time, thus abusing the State party's tradition, hitherto always respected, of suspending enforcement of a deportation order pending the Committee's decision on the admissibility of a complaint.

8.10 The State party explains that despite this delaying tactic the French Government would have acceded to the Committee's request for interim measures, albeit non-binding ones, if keeping the complainant, a demonstrably dangerous common criminal, in France had not also presented a particularly disproportionate risk to public order and the safety of third parties when set against the absence of any real benefit the complainant could hope to derive from his appeal. It was a fact that, during his first year in France, the complainant had committed aggravated rape, threatening his victim with a weapon, for which crime he had been imprisoned in July 1995 and sentenced by the Loiret Criminal Court to 8 years' imprisonment and a 10-year judicial ban from French territory. He had furthermore demonstrated the firmly-rooted and persistent nature of the danger he represented to public order by two violent attempts to escape during his imprisonment, in September 1995 and July 1997, each punished by a term of eight months' imprisonment. In a situation that was extremely prejudicial to public safety, the State party explains that it nevertheless delayed enforcement of the deportation order long enough for a final review of the complainant's situation, to see whether he could be kept in France as the Committee wished. Once again, he was found not to have substantiated his alleged fears; in the circumstances, there was no justification for continuing to hold in France an individual who had more than demonstrated that he was a danger to public order and whose complaint to the Committee was quite clearly no more than a ploy to gain time, despite the obvious good faith of the human rights associations which had supported his application. The State party particularly stresses that house arrest would not have provided any guarantee, given the complainant's violent history of escape attempts. In the circumstances, the State party concluded that sending the complainant back to

his country of origin was not likely to give rise to a “substantial danger” within the meaning of article 3 of the Convention.

8.11 As to the complainant’s current situation, the State party explains that the Algerian authorities, from whom the French Government requested information, reported on 24 September 2003 that he was living in his home district of Algeria.

Comments by counsel

9.1 Counsel submitted comments on the State party’s submission on 29 October and 14 November 2003. On the binding nature of requests for interim measures, counsel recalls that in two cases⁵ where States parties to the Convention carried out deportations contrary to the Committee’s opinion, the Committee found that action further to its terms of reference, which could include the rules of procedure under which suspension had been requested, was a treaty obligation.

9.2 Concerning the reasons put forward by the State party for enforcing the deportation order, counsel maintains that the complainant trained as a fighter pilot in Poland. Furthermore, according to counsel, his criminal act and his two escape attempts a year earlier did not mean that he would not have rebelled against bombing operations on civilian populations: counsel describes the considerable unrest in the Algerian army at the time, as illustrated by the escape of an Algerian lieutenant to Spain in 1998. As for the State party’s contention that the complainant had not shown he was in serious danger of being tortured if he were returned to Algeria, since past torture not sufficing to establish the existence of a real and present danger in the future, counsel contends that the complainant actually was tortured, that modesty made him very reticent about the after-effects on his genitals, that he had to be treated for related psychiatric problems, and that the administrative court had been told only very vaguely about the torture, while a medical certificate had been submitted to the Bordeaux Administrative Court of Appeal. As to the future, counsel submits that the possible charges against the complainant, aggravated by the facts of his desertion and flight to France, made the danger of torture, by the Algerian military security in particular, sufficiently substantial to be taken into consideration. The State party argues that the dangers alleged by the complainant had already been reviewed thoroughly and fairly under domestic procedures; counsel acknowledges that OFPRA rejected the complainant’s application for refugee status - on what grounds counsel does not know, since the application was declined while the complainant was in prison. Counsel also acknowledges that the complainant did not refer his case to the Refugee Appeals Commission (CRR). She points out that the Limoges Administrative Court likewise refused to overturn the decision establishing Algeria as the country of return although the interim relief judge had suspended the decision. Lastly, the complainant’s more detailed submission to the Bordeaux Administrative Court of Appeal should have urged the administration to greater caution and, thus, to suspend his deportation.

9.3 Concerning the danger represented by the complainant and the risk to public safety, counsel maintains that he committed a serious act, but did not thereby pose a serious risk to the general public. On 18 March 1999, the complainant married a French citizen and had a

daughter. When he left prison, no immediate attempt was made to deport him although the Administration could have again tried to do so. According to counsel, it was only following a chance incident, in the form of a dispute with security officers, that the deportation order was reactivated.

9.4 In relation to the complainant's present situation, counsel considers that the State party's information is incorrect. She states that neither she nor his family in France have any news of him and that his brother in Algiers denies that he is living at the address given by the State party. Even if the complainant was where the State party said, remote though it is, counsel questions why there is no word from him: it could indicate that he is missing.

Supplementary submissions by counsel

10. On 14 January 2004, counsel submitted a copy of the decision by the Bordeaux Administrative Court of Appeal of 18 November 2003 overturning the judgement of the Limoges Administrative Court of 8 November 2001 and the decision of 23 May 2001 in which the prefect of Indre ordered the complainant to be returned to his country of origin. Concerning the decision to expel the complainant, the Court of Appeal reasoned as follows:

“Considering

that [the complainant] claims that he was subjected to torture and, several times, to attempted murder on account of his desertion from the national army because of his opposition to the operations to maintain order directed against the civilian population;

that in support of his submissions to the court and concerning the risks of inhuman or degrading treatments to which his return to this country [Algeria] would expose him, he has supplied various materials, and notably a decision of the United Nations Committee against Torture concerning him, which are of such a nature as to attest to the reality of these risks;

that these elements, which were not known to the prefect of Indre, have not been contradicted by the minister of the interior, internal security and local liberties, who despite the request addressed to him by the court, did not produce submissions in defence before the closure of proceedings;

that, in these circumstances, [the complainant] must be considered as having established, within the meaning of article 27 bis cited above of the ordinance of 2 November 1945 [providing that “an alien cannot be returned to a State if it is established that his life or liberty are threatened there or he would be exposed to treatment contrary to article 3 of the European Convention], that he is exposed in Algeria to treatments contrary to article 3 of the European Convention on Human Rights and Fundamental Freedoms;

that, as a result, his request for the annulment of the decision to return him to his State of origin taken by the prefect of Indre on 23 May 2001 is well-founded”.

The State party's comments on the supplementary submissions

11.1 On 14 April 2004, the State party contended that the question before the Committee was whether *refoulement* of the complainant to another State violated France's obligations under the

Convention; in other words whether, when the French authorities decided to enforce the deportation order they could reasonably think, in the light of the information available to them, that Mr. Brada would be exposed to substantial danger if sent home. The State party alludes to the Committee's case law holding that an individual claiming to be in danger if returned to a specific country is responsible, at least beyond reasonable doubt, for establishing that his fears are substantial. According to the State party, however, the complainant had produced no evidence before either the administrative court or the administrative authorities to substantiate his alleged fears about being returned to Algeria. The interim relief judge of the Limoges Administrative Court, to whom the complainant appealed against the decision of 29 August 2001 to deport him to Algeria, suspended the decision as to where the complainant should be deported pending a final judgement on the merits, so as to protect the complainant's situation should his fears prove justified. Noting, however, that the complainant's allegations were not accompanied by any supporting evidence, the Administrative Court subsequently rejected the appeal in a ruling dated 8 November 2001.

11.2 Ruling on 18 November 2003 on the complainant's appeal against the ruling by the Limoges Administrative Court of 8 November 2001, the Bordeaux Administrative Court of Appeal found that, given the seriousness of his crimes, the prefect of Indre could legitimately have considered that the complainant's presence on French territory constituted a serious threat to public order, and that his deportation was not, in the circumstances, a disproportionate imposition on his private and family life.

11.3 The court went on to overturn the judgement of the Limoges Administrative Court and the decision by the prefect of Indre to remove the individual in question to his country of origin on the strength of article 3 of the European Convention on Human Rights and article 27 bis of the order of 2 November 1945 prohibiting the deportation of an alien to a country where it is established that he would be exposed to treatment contrary to article 3 of the Convention.

11.4 According to the State party, particular stress should be placed on the fact that, in so doing, the Administrative Court of Appeal based its ruling on evidence which, it noted expressly, was new. It deduced that, in the circumstances, the complainant's allegations must be considered well-founded unless contradicted by the Minister of the Interior, and thus overturned the decision establishing the country of destination.

11.5 The State party stresses that the court's proviso - unless contradicted by the Ministry of the Interior - should not be understood to indicate that the administration was prepared to acknowledge that the complainant's submissions were compelling. The court was unable to take account of evidence produced by the administration for the defence only because of the rules on litigious proceedings deriving from article R.612.6 of the Code of Administrative Justice: the defence brief produced by the Ministry of the Interior reached the court some days after the termination of pre-trial proceedings.

11.6 Furthermore, the State party explains that the key point on which the court based its decision is the very decision the Committee used to find the present complaint admissible. In pronouncing on admissibility, however, the Committee did not take any stand on the merits

of the complaint, nor on the establishment by the complainant, beyond reasonable doubt, of the facts he invoked, since they could only be evaluated in the context of the decision on the merits of the complaint. The State party concludes that, given the reasoning behind it, the decision by the Administrative Court of Appeal does nothing to strengthen the complainant's position before the Committee.

11.7 This being so, the State party alludes to the Committee's recently reiterated view that it is for the courts of the States parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the manner in which such facts and evidence were evaluated was clearly arbitrary or amounted to a denial of justice.⁶ The ruling by the Administrative Court of Appeal shows precisely that the manner in which the domestic courts examined the facts and evidence produced by the complainant cannot be regarded as clearly arbitrary or tantamount to a denial of justice.

11.8 In conclusion, the State party maintains that France cannot be held to have ignored its treaty obligations by removing the individual in question to his country of origin after checking several times, before arriving at that decision, that the complainant could not reasonably be considered to be exposed to danger if he was sent home. With regard to the Committee's case law, it cannot be supposed that the French authorities could reasonably have considered that he would be exposed to real danger in the event of being sent home when they decided to enforce the deportation order against him.

Comments by counsel

12. In her comments of 11 June 2004, counsel maintains that the State party violated article 3 of the Convention. She adds that she had had a telephone conversation with the complainant, who said he had been handed over by the French police to Algerian agents in the plane; on leaving Algiers airport in a van, he was handed over to the Algerian secret services who kept him in various different venues for a year and half before releasing him without documents of any kind, apparently pending a judgement, the judgement *in absentia* having been annulled. The complainant claims he was severely tortured.

Consideration of the merits

13.1 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture upon return to Algeria. The Committee observes, at the outset, that in cases where a person has been expelled at the time of its consideration of the complaint, the Committee assesses what the State party knew or should have known at the time of expulsion. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.

13.2 In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country

does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances. In deciding a particular case, the Committee recalls that, according to its General Comment on article 3 of the Convention, it gives “considerable weight” to the findings of national authorities.

13.3 At the outset, the Committee observes that at the time of his expulsion on 30 September 2002, an appeal lodged by the complainant with the Bordeaux Administrative Court of Appeal on 4 January 2002 was still pending. This appeal contained additional arguments against his deportation that had not been available to the prefect of Indre when the decision of expulsion was taken and of which the State party’s authorities were, or should have, been aware still required judicial resolution at the time he was in fact expelled. Even more decisively, on 19 December 2001, the Committee had indicated interim measures to stay the complainant’s expulsion until it had had an opportunity to examine the merits of the case, the Committee having established, through its Special Rapporteur on Interim Measures, that in the present case the complainant had established an arguable risk of irreparable harm. This interim measure, upon which the complainant was entitled to rely, was renewed and repeated on 26 September 2002.

13.4 The Committee observes that the State party, in ratifying the Convention and voluntarily accepting the Committee’s competence under article 22, undertook to cooperate with it in good faith in applying and giving full effect to the procedure of individual complaint established thereunder. The State party’s action in expelling the complainant in the face of the Committee’s request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee’s final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.

13.5 The Committee observes, turning to issue under article 3 of the Convention, that the Bordeaux Administrative Court of Appeal, following the complainant’s expulsion, found upon consideration of the evidence presented, that the complainant was at risk of treatment in breach of article 3 of the European Convention, a finding which would could encompass torture (see paragraph 10.1 above). The decision to expel him was thus, as a matter of domestic law, unlawful.

13.6 The Committee observes that the State party is generally bound by the findings of the Court of Appeal, with the State party observing simply that the Court had not considered the State’s brief to the court which arrived after the relevant litigation deadlines. The Committee considers, however, that this default on the part of the State party cannot be imputed to the complainant, and, moreover, whether the Court’s consideration would have been different remains speculative. As the the State party itself states (see paragraph 11.7) and with which the Committee agrees, the judgment of the Court of Appeal, which includes the conclusion that his expulsion occurred in breach of article 3 of the European Convention, cannot on the information before the Committee be regarded as clearly arbitrary or tantamount to a denial of justice. As a

result, the Committee also concludes that the complainant has established that his removal was in breach of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the deportation of the complainant to Algeria constituted a breach of articles 3 and 22 of the Convention.

15. Pursuant to rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps the State party has taken in response to the views expressed above, including measures of compensation for the breach of article 3 of the Convention and determination, in consultation with the country (also a State party to the Convention) to which the complainant was returned, of his current whereabouts and state of well-being.

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

Notes

¹ The complainant refers to the Chalabi and Hamani cases.

² U.S. v Finland, Complaint No. 197/2002, Views adopted on 1 May 2003.

³ Ibid.

⁴ G.K. v Switzerland, Complaint No. 219/2002, Views adopted on 7 May 2003.

⁵ Núñez Chipana v. Venezuela, Complaint No. 110/1998, Views adopted on 10 November 1998; and T.P.S. v. Canada, Complaint No. 99/1997, Views adopted on 16 May 2000.

⁶ Op.cit.