



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2831/2016*, **

<i>Communication submitted by:</i>	M.A.K. (represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	27 July 2016
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 2 November 2015 (not issued in document form)
<i>Date of adoption of decision:</i>	13 July 2018
<i>Subject matter:</i>	Extradition to the United States of America
<i>Procedural issues:</i>	Abuse of the right to submit a communication; sufficient substantiation of claims
<i>Substantive issues:</i>	
<i>Articles of the Covenant:</i>	2 (1) and (3), 7, 9 (1) and (5), 10 (1), 14 (1), 15 (1) and 26
<i>Article of the Optional Protocol:</i>	2

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the consideration of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamarian Koita, Marcia V.J. Kran, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, the Committee member Sarah Cleveland did not take part in the consideration of the communication.



1. The author of the communication is M.A.K., a Syrian national living in Spain, born on 1 July 1945. He claims to be the victim of a violation by Spain of his rights under articles 2 (1) and (3), 7, 9 (1) and (5), 10 (1), 14 (1) and (7), 15 (1) and 26 of the Covenant. He is represented by counsel, Isabelle Coutant Peyre. The Optional Protocol to the Covenant entered into force for Spain on 25 April 1985.

The facts as submitted by the author

2.1 The author has worked in international trade all his life, including as an intermediary in the legal arms market. In 2007, the author was approached by representatives of the Government of Nicaragua wishing to purchase arms. It later transpired that they were in fact undercover agents of the Drug Enforcement Administration.

2.2 On 7 June 2007, the author was arrested at Madrid-Barajas airport in Spain, having just arrived from Málaga. He was then informed that the Embassy of the United States of America had issued a note verbale that same day calling for his provisional detention with a view to his extradition, along with two other persons. The note verbale set out charges brought by the United States District Court for the Southern District of New York on 29 May 2007 relating to: (a) conspiracy to aid and abet an organization designated a terrorist organization by the United States; (b) conspiracy to kill United States citizens; (c) conspiracy to kill United States public officials and employees; (d) conspiracy to acquire and use anti-aircraft missiles; and (e) money-laundering. A national arrest warrant dated the same day and issued by the same court was attached.

2.3 On 8 June 2007, Central Investigating Court No. 6 of the National High Court of Spain issued an order for the author to be kept in provisional detention. The author refused to be extradited and requested his immediate release, while denying all the charges brought against him. He submitted that the offence with which he was charged had been “provoked by Drug Enforcement Administration agents” and that an offence committed as a result of provocation (*delito provocado*) could not be the subject of a criminal prosecution in Spain. The author further submitted that the extradition request was politically motivated, as he had allegedly spoken out against the policy of President George W. Bush concerning the war in Iraq and was sympathetic towards Palestine.

2.4 In an order dated 26 October 2007, the fourth section of the Criminal Division of the National High Court issued an opinion in favour of the author’s extradition, on condition that diplomatic assurances were provided that he would not be sentenced to death and that in the event of his being sentenced to life imprisonment, the sentence could be reduced. The order contained a dissenting opinion according to which the sequence of events established by the Drug Enforcement Administration showed that the offence serving as the basis for the extradition request was in fact committed as a result of provocation and, as such, could not be the subject of a prosecution in Spain.

2.5 In a note verbale dated 19 December 2007, the Embassy of the United States in Spain stated that, in the event of the author’s being extradited, the Attorney General would not ask for the death penalty or for life imprisonment and that he would do everything in his power to ensure that the author received a fixed-term sentence.

2.6 On 15 January 2008, the Criminal Division of the National High Court rejected the author’s appeal against the order of 27 October 2007. Three dissenting opinions were issued, according to which the offence serving as the basis for the extradition request had been provoked.

2.7 On 5 March 2008, the Constitutional Court rejected the author’s application for *amparo*.

2.8 On 8 April 2008, the fourth section of the Criminal Division of the National High Court found the diplomatic assurances provided to be sufficient and upheld the decision to extradite the author.

2.9 On 6 June 2008, the Council of Ministers agreed to the rendition of the author to the United States authorities, subject to the conditions and limitations set by the National High Court. That decision could not be appealed. The author claims that he was never notified of the decision in question.

2.10 A few days before the author's extradition,¹ a group of 15 or so hooded men entered his cell in Aranjuez prison in Madrid in the middle of the night, dragged him to a storeroom and beat him until another prisoner raised the alarm. He was then taken to another cell with only a bare mattress and left alone until the following morning. The next day, the author informed the chief of security of the prison about the incident. The chief of security informed him that the intervention had taken place "on orders from outside".

2.11 On 13 June 2008, the author was transferred to the United States on a special flight.

2.12 On 20 November 2008, the author was sentenced to 30 years in prison by the United States District Court for the Southern District of New York. This sentence was upheld by the Court of Appeals of the Southern District of New York for the Second Circuit on 21 September 2011 and by the United States Supreme Court on 14 May 2012. An appeal challenging the legality of the sentence was rejected on 14 July 2014. A petition filed on 24 May 2013 requesting a procedural review for violation of the right to a defence and the illegality of the extradition, given the absence of an extradition order, was rejected on 9 March 2015 by the Court of Appeals of the Southern District of New York.

2.13 The author is being held in a special wing, known as the Communications Management Unit, of Terre Haute prison in Indiana, United States. According to the author, the prison is dubbed "Guantánamo North".

2.14 On 20 December 2010, the author sent a letter to one of the judges of the National High Court of Spain, in which he claimed to have been subjected to acts of violence in early June 2008. In response, his lawyer was informed of the authority competent to hear such claims. On 8 March 2011, the author sent a letter to the judge responsible for handling cases of prison violence. The judge in question did not take any action.

2.15 The author requested a copy of the extradition request from the Clerk of the United States District Court for the Southern District of New York. The Clerk informed the author on 28 July 2014 and 18 May 2016 that his case file did not contain the document in question.

2.16 On 1 June 2016, the author submitted an implementation impact assessment to the Criminal Division of the National High Court of Spain, arguing that he had been sentenced to 30 years in prison and that, given his age, the imposition of such a sentence was at variance with the diplomatic assurances provided by the United States when the extradition request was being processed.²

The complaint

3.1 The author explains that the period of time that has elapsed between his extradition and the submission of the communication is attributable to his transfer to the United States and his placement in solitary confinement in the special prison wing known as the Communications Management Unit, a regime that imposes extreme restrictions on communications. In addition, it has taken several years, until 2014, to obtain the relevant documents.

3.2 He claims a violation by Spain of articles 2 (1) and (3), 7, 9 (1) and (5), 10 (1), 14 (1), 15 (1) and 26 of the Covenant.

3.3 The author asserts that he was never notified of the decision of the Council of Ministers of 6 June 2008 and that no appeal may be made against such a decision. He therefore considers that these acts constitute a violation of his rights under article 2 (3) of the Covenant.

3.4 The author claims that he was subjected to acts of torture during his detention in Spain, a few days before his extradition, and that the State party has not followed up on his complaints. He considers that this failure to act constitutes a violation of his rights under article 7, read in conjunction with articles 2 (3), 9 (1) and 10 (1) of the Covenant.

¹ The author does not know the exact date.

² The author does not provide information on the outcome of the implementation impact assessment.

3.5 The author states that the extradition request that led to his arrest in Spain on 7 June 2007 did not adhere to the principles of the extradition treaty between Spain and the United States.³ He therefore considers that his arrest on 7 June 2007 and his detention have no legal basis and constitute a violation of article 9 (1) of the Covenant. Furthermore, as he has not received compensation, the author also claims a violation of article 9 (5) of the Covenant.

3.6 The author argues that the charges that served as the basis for the request for his extradition related to offences committed as a result of provocation, that they have been falsified and that they are therefore not punishable under Spanish law. He also claims that the request for his extradition was politically motivated. Consequently, he claims that his extradition amounted to a violation of article 14 (1) and (2), read in conjunction with the principle of legality enshrined in article 15 (1) and article 2 (1) of the Covenant.

3.7 The author claims that in the United States he is a victim of violations of articles 2 (1), 7, 9, 10 (1) and (3), 14 (1), (2) and (3) (e), 15 (1) and 26 of the Covenant and that, since these violations are the inevitable and foreseeable consequence of his extradition, the State party bears responsibility for them. He wishes to underline the fact that he was discriminated against on account of his Arab origin and his sympathy for Palestinian nationalism and that he had not enjoyed the presumption of innocence, as his conviction had already been declared a certainty by Drug Enforcement Administration agents during his flight to the United States. The decision to place extreme restrictions on his communications amounts to cruel, inhuman and degrading treatment, especially given the state of his health, which was known to the Spanish authorities, and the additional ill-treatment that he suffered in prison. He further recalls that, despite the fact that Spain was given diplomatic assurances that he would not receive a life sentence, he was in fact sentenced to 30 years in prison, a sentence that far exceeds his life expectancy.

State party's observations on admissibility and the merits

4.1 The State party submitted its observations on the admissibility and the merits of the communication in a note verbale dated 14 July 2017.

4.2 The State party points out that the communication was submitted more than eight years after the exhaustion of domestic remedies in Spain and that the claims made to the Committee are the same as those submitted to the Constitutional Court of Spain eight years earlier, with the exception of the claim of ill-treatment during the author's detention in the country. The State party likewise points out that the author justifies the delay by claiming that he had been obliged to track down certain documents and that he had been unable to contact lawyers outside the United States. However, the author fails to specify which documents or to explain why he was allegedly unable to make contact with his lawyers. The State party asserts that the author and his representatives have at all times enjoyed access to the documentation relating to the extradition proceedings, as confirmed by the author in his statements before the domestic courts. The only document to which he has formally requested access is the original extradition request, with a view to supporting his claims regarding the alleged non-conformity of his extradition with the applicable extradition treaty. However, the State party considers that these claims are unfounded and that they do not fall within the Committee's competence *ratione materiae*. The State party recalls that the extradition order is annexed to the communication submitted to the Committee. It adds that the author and his lawyers were in possession of all the documents required for the submission of the author's complaints to the Spanish courts and to the Committee. The State party considers that the communication constitutes an abuse of the right to submit a complaint, by reason of the time that has elapsed between the exhaustion of domestic remedies and the submission of the complaint to the Committee. It therefore considers that the complaint should be declared inadmissible under article 3 of the Optional Protocol.

³ Extradition treaty between Spain and the United States of America, 29 May 1970, published in *Boletín Oficial del Estado* No. 220/1971 of 14 September 1971.

4.3 The State party maintains that the author's claims that his extradition took place in violation of the extradition treaty between Spain and the United States are unfounded and do not fall within the Committee's mandate.

4.4 As for the acts of torture to which the author was allegedly subjected during his detention in Spain, the State party notes that, to its knowledge, the author never reported the acts to the national authorities and that he has produced no evidence that they actually occurred other than a letter sent to the National High Court of Spain more than three years after the alleged event. The State party concludes that this claim amounts to an abuse of the right to submit a communication and should be declared inadmissible under articles 3 and 5 (b) of the Optional Protocol for failure to exhaust domestic remedies.

4.5 The State party considers that the author's claims that he did not have access to an effective remedy because he was unable to appeal against the decision of the Council of Ministers authorizing his extradition also constitutes an abuse of the right to submit a communication. In this connection, it stresses that that extradition was definitively approved by the National High Court in a case where the author had exhausted all the remedies available to him under Spanish law. The prerogative of the Council of Ministers is restricted to the possibility of not carrying out an extradition if it is a matter of national interest, and this may benefit the person subject to extradition. The State party therefore concludes that the claims concerning article 2 (3) of the Covenant are inadmissible, since there is insufficient evidence to support them.

4.6 The State party notes that the claims concerning articles 9, 14 and 15 of the Covenant relate to judicial proceedings that the author characterizes as a criminal trial. However, as the extradition proceedings did not involve a criminal complaint, article 14 of the Covenant is not applicable in this case. The State party refers here to the communications concerning *Piscioneri v. Spain* and *Kindler v. Canada*.⁴ It therefore considers that these claims should be declared inadmissible *ratione materiae*.

4.7 The State party submits that the Covenant violations that allegedly occurred in the receiving State are inadmissible *ratione loci*. It maintains that the only valid question in this connection is whether, at the time of extradition, it was reasonably possible to foresee that the person subject to extradition might be subjected to inhuman or degrading treatment.⁵ The State party submits that, in his implementation impact assessment submitted to the National High Court of Spain claiming the inadequacy of the diplomatic assurances given by the United States, the author acknowledged that Spain could be considered responsible for the violations that occurred in the receiving State only if it had been reasonably possible to foresee, at the time of extradition, that he might be subjected to inhuman or degrading treatment. In this case, the State party considers that the claim that it was reasonably possible to foresee, at the time of extradition, that the author might be subjected to inhuman or degrading treatment is manifestly unfounded. For these reasons, the State party considers the complaint to be inadmissible.

4.8 As for the merits of the communication, the State party wishes to clarify the facts, given that, according to the jurisprudence of the Supreme Court and the Constitutional Court,⁶ an offence is committed as a result of provocation when an intent to break the law is the consequence not of a conscious decision on the part of the defendant but of the actions of an agent or associate of the security forces who provokes, through his or her actions, criminal conduct that would not otherwise have occurred. No such offence exists when security agents are apprised of criminal activity and infiltrate the group of individuals responsible in order to gain access to information or evidence that will enable them to prevent or punish the crime. In this case, the basis for the extradition was the author's membership of a criminal organization. It was not the conduct of the Drug Enforcement

⁴ See *Piscioneri v. Spain* (CCPR/C/78/D/956/2000), para. 6.3, and *Kindler v. Canada* (CCPR/C/48/D/470/1991), para. 6.1.

⁵ The State party is referring to *Kindler v. Canada*.

⁶ Supreme Court, Decision No. 484/2003 of 13 June 2003, Decision No. 4287/2002 of 12 June 2002 and Decision No. 943/2007 of 25 January 2007. Constitutional Court, Decision No. 11/1983 of 21 February 1983.

Administration agents that gave rise to his criminal conduct, which had begun prior to their intervention and was due to his membership of the criminal organization in question.

4.9 The State party submits that the charges brought against the author relate to acts that constitute criminal activities under Spanish law, as indicated in the court order of 26 October 2007, which states that, in accordance with the legislation in force at the time of the events, the offences for which the author was sought for prosecution in the United States were as follows: (a) conspiracy to commit murder; (b) conspiracy to subvert the authority of the State, its agents or public officials; (c) arms trafficking; (d) trafficking in explosives; and (e) conspiracy to launder money.

4.10 As for the claims that the extradition was politically motivated, the State party recalls that they were considered by the fourth section of the Criminal Division of the National High Court of Spain. In its order of 27 October 2007, the Court found that the claims had not been reasoned, justified or explained by the defence and concluded that the extradition request was based solely on the criminal charges mentioned.

4.11 The State party would also emphasize that it made the author's extradition contingent upon the provision of diplomatic assurances and that the alleged ill-treatment of the author was not foreseeable at the time of extradition.

Author's comments on the State party's observations

5.1 The author submitted his comments on the State party's observations in a letter dated 1 September 2017.

5.2 The author argues that the extradition contested in the communication accounts for the eight years that have elapsed between his extradition and the submission of the communication. He explains that, upon arrival in the United States, he was placed in solitary confinement, where he remains to this day. Up until 9 March 2015, the date of the decision of the Appeals Court of the Southern District of New York rejecting his request for a procedural review for violation of the right to a defence, and because of the illegality of his extradition, the author had attempted to get his rights reinstated by exhausting all available remedies in the United States. It was only when he had exhausted the last available remedy that he approached the Committee.

5.3 The author points out that he was subjected to torture between 16 September and 20 October 2016, in that he was kept in a basement adjacent to boilers emitting unbearable heat and noise, and the situation was brought to an end only after a lawyer filed a complaint with the prison authorities. The complaint resulted in his transfer to another prison.

5.4 The author denies the State party's assertion that his membership of a criminal organization was the basis for the extradition request and points out that the organization to which he belonged had in fact been set up and funded by the Drug Enforcement Administration.

5.5 The author reaffirms that the extradition request did not meet all the required conditions set out in the extradition treaty, as the Embassy of Spain in the United States apparently failed to certify the document, in violation of article 10 of the treaty.

5.6 The author maintains that the United States exerted pressure during the author's extradition proceedings. He considers that this pressure is clearly indicated in the classified reports of the United States Ambassador to Spain published by Wikileaks. He also notes that, in the same reports, the Ambassador details his meetings with the Spanish judge, who, in a decision of 22 March 1995, had found the author not guilty in proceedings instituted in connection with hostage-taking on the cruise ship Achille Lauro in 1985. The author believes that the purpose of the extradition request is actually for him be retried for these acts, in violation of article 14 (7) of the Covenant.

5.7 The author maintains that the State party has a duty to meet the requirements laid down by the judicial authorities for extradition and that they have not been respected in this case, as he was given a prison sentence that exceeded his life expectancy and was subjected to ill-treatment and arbitrary and discriminatory decisions.

5.8 The author reaffirms that he was never notified of the decision of the Council of Ministers. He submits that having access to this decision was all the more necessary because, as shown by the documents published by Wikileaks, the Council of Ministers was seemingly acting in response to the orders of representatives of the United States.

5.9 As for the non-exhaustion of domestic remedies for the alleged acts of torture to which he had been subjected in Spain in June 2008, the author maintains that he had no opportunity to institute proceedings, as he had been extradited almost immediately and had subsequently turned his attention to the proceedings under way in the United States. He also stresses that the Drug Enforcement Administration report dated 17 June 2008 makes it clear that he had reported having been subjected to ill-treatment a few days before his extradition. In this connection, he points out that he informed the chief of security of the prison orally the day after the incident and that he filed a complaint with a judge of the National High Court of Spain in Madrid on 20 December 2010 and a second complaint with the judge responsible for handling cases of prison violence on 8 March 2011. These complaints were not followed up.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering a complaint submitted in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

6.3 The Committee takes note of the State party's argument that the submission of the communication more than eight years after the author's extradition to the United States constitutes an abuse of the right to submit a complaint. It also notes that the author and his representatives have had access to the documentation relating to the extradition proceedings at all times, as demonstrated by the fact that the author has been able to exhaust all available domestic remedies to address the same claims as those submitted to the Committee. The Committee notes that the author was extradited in June 2008 and submitted his complaint in July 2016. It also notes that the author asserts that he has been held in solitary confinement since his arrival in the United States and that, from then on until 9 March 2015, he was attempting to vindicate his rights by exhausting all available remedies in the United States. Lastly, the Committee notes that the author asserts that he approached the Committee only after having exhausted the last remedy available before the United States authorities.

6.4 The Committee notes that the claims submitted by the author in proceedings in the United States are substantially the same as those submitted to the Committee with regard to the legality of the extradition decision and his detention and the subsequent possible violations of his human rights in the United States, which, according to the author, were the necessary and foreseeable consequence of his extradition. The Committee also notes that the last remedy in the United States was exhausted on 9 March 2015 and that the author subsequently submitted an implementation impact assessment to the National High Court of Spain on 1 June 2016. In the circumstances, the Committee cannot conclude that there was an unjustified delay and that these claims therefore amount to an abuse of the right to submit a communication. As regards the author's claims that he was subjected to acts of torture during his detention in Spain, the Committee notes that the author sent a letter to the judge responsible for handling cases of prison violence on 8 March 2011 and has taken no further action since then. The Committee finds that, in these circumstances, the author has failed to provide sufficient justification for the delay of more than five years and that the claim submitted in that connection amounts to an abuse of the right to submit a communication. Accordingly, the Committee finds this claim to be inadmissible under article 3 of the Optional Protocol and rule 96 (c) of its rules of procedure.

6.5 The Committee notes that the State party considers the claim made under article 2 (3), read in conjunction with articles 7, 9, 10 (1) and (3), 14 (1), (2) and (3) (e), 15 (1) and 26 of the Covenant, to be manifestly unfounded and inadmissible, since the extradition was definitively approved by the National High Court of Spain in proceedings in which the author used all the available domestic remedies. The Committee takes note of the author's claim that he was never notified of the decision of the Council of Ministers of 6 June 2008 and that there was no appeal against such a decision. The Committee recalls that the author does not deny that he was able to appeal against the decisions taken by the Spanish judicial authorities that considered the extradition request. The Committee considers that the author has failed to substantiate sufficiently his claims under article 2 (3) of the Covenant and therefore finds the claim to be inadmissible.

6.6 The Committee notes that, according to the State party, the author has failed to prove that it was reasonably possible for the State party to foresee, at the time of extradition, that he might be subjected to inhuman or degrading treatment. The Committee notes that the author has not discussed the extent to which such treatment was foreseeable and has merely stated that it occurred. It notes that the State party sought diplomatic assurances and that the author has failed to explain the reasons why such assurances were not sufficient and the extent to which they were violated. Consequently, the Committee finds that the claims put forward under articles 2 (1), 7, 9, 10 (1) and (3), 14 (1), (2) and (3) (e), 15 (1) and 26 of the Covenant with regard to the events that occurred following the author's extradition have not been sufficiently substantiated for the purposes of article 2 of the Optional Protocol.

6.7 The Committee further notes that, in an order dated 26 October 2007, the fourth section of the Criminal Division of the National High Court of Spain considered the author's claims that the acts serving as the basis for his extradition did not constitute a criminal offence in Spain and issued an opinion in favour of his extradition on condition that diplomatic assurances were given. The Committee also notes that, on 15 January 2008, the Criminal Division of the National High Court considered the author's claims and upheld this decision. The Committee recalls its jurisprudence to the effect that it is generally for the courts of States parties to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice. On the basis of the information before it, the Committee is unable to conclude that the authorities of the State party acted arbitrarily in evaluating the facts and evidence of the case and it therefore considers that the claim is not sufficiently substantiated to be admissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author of the communication.
