



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Ninetieth session
9-27 July 2007

VIEWS

Communication No. 1381/2005

Submitted by: Jaques Hachuel Moreno (represented by
José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 14 November 2003 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 15 April 2005 (not issued in document form)

Date of adoption of Views: 25 July 2007

Subject matter: Initial conviction by an appeal court, with no possibility of
subsequent review

Procedural issues: Exhaustion of domestic remedies

* Made public by decision of the Human Rights Committee.

Substantive issues: Right to review of conviction and sentence by a higher court in accordance with the law, in the case of a conviction by an appeal court that sets aside an acquittal by the court of first instance

Articles of the Covenant: 14, paragraph 5

Articles of the Optional Protocol: 5, paragraph 2 (b)

On 25 July 2007 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1381/2005.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE, ADOPTED IN ACCORDANCE WITH THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninetieth session

concerning

Communication No. 1381/2005**

Submitted by: Jaques Hachuel Moreno (represented by José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 14 November 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2007,

Having concluded its consideration of communication No. 1381/2005, submitted to the Human Rights Committee on behalf of Jaques Hachuel Moreno under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Jaques [sic] Hachuel Moreno, an Argentine national born in Tangiers in 1929. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

1.2 On 16 August 2005 the Special Rapporteur on New Communications and Interim Measures decided that the admissibility and merits of the communication should be examined jointly.

Factual background

2.1 The author states that he was involved in the conflict that affected the Banco Español de Crédito (Banesto), which ended with the bank being placed in administration in December 1993. In November 1994, the prosecutor's office attached to the National High Court charged the bank's president, Mr. Mario Conde, and nine others with offences of misappropriation. According to the author, no complaint had been directed at him. The author testified in this trial in January, September and November 1995. In December 1995 and May 1996 the court in charge of the investigation dismissed requests for the author to be criminally investigated. Nevertheless, on 18 June 1996 the National High Court decided that the author should be investigated in connection with the "Carburos Metálicos" operation, in which a number of people had allegedly appropriated money from Banesto through commercial operations with companies linked to the accused persons.

2.2 The trial of the accused persons was complex. In the course of the hearings, which lasted two years, statements were taken from 470 people. The evidence consisted in the interpretation of various commercial documents and letters, and statements by the accused, witnesses and experts. Assessment of the evidence was a key part of the trial. On 31 March 2000, the National High Court acquitted the author of the offence of misappropriation in the Carburos Metálicos operation, considering the offence to be time-barred. The court considered that between the date of the events (6 April 1990) and the author's first statement after having been charged (30 November 1995), the prescription period of five years laid down for the offence the accused was charged with had ended.

2.3 The prosecutor's office appealed against the judgement. On 29 July 2002 the criminal division of the Supreme Court set aside the author's acquittal, sentenced him to four years' imprisonment for misappropriation, and ordered him to pay Banesto the sum of 1,344 million pesetas, which amount the author had voluntarily paid back to Banesto following his acquittal. The Supreme Court considered that the prescription period applying to the author had been interrupted by the initiation of a prosecution in November 1994, and because in December 1994 one of the other accused had referred to the author. The author was released on 20 September 2002 owing to his advanced age (he was then 73 years old) and the fact that he suffered from a very serious coronary disease.

2.4 On 29 July 2002 the author lodged an application for *amparo* before the Constitutional Court alleging, inter alia, violation of his right to a second hearing, as he had been convicted for the first time by the appeal court that reviewed the judgement handed down at first instance. The author considers that it is not necessary to exhaust this remedy, which was pending at the time the author submitted his complaint to the Committee, given the settled jurisprudence of the Constitutional Court, which denies the right to appeal against conviction when it is handed down for the first time by the Supreme Court.

The complaint

3.1 The author alleges a violation by the State party of article 14, paragraph 5, of the Covenant, on the grounds of failure to respect his right to a review by a higher tribunal of his conviction, which was first handed down at second instance by the Supreme Court. He states that Spain did not enter any reservations to article 14, paragraph 5, of the Covenant to exclude its application to cases of convictions handed down for the first time by an appeal court following acquittal at first instance. He adds that Spanish law provides for situations in which judgements handed down by a division of the Supreme Court are examined by a panel of judges belonging to the Court itself. He refers to the Committee's decisions on communications Nos. 986/2001 and 1007/2001,¹ in which it found that the review by the Supreme Court had been incomplete.

3.2 On the exhaustion of domestic remedies, the author considers that the application for *amparo* before the Constitutional Court has no prospect of success, owing to the said court's settled jurisprudence that it does not recognize the right to a second hearing in cases where a person was convicted by the appeal court following acquittal by the court of first instance.

State party's observations on admissibility and the merits

4.1 In a note dated 27 June 2005, the State party alleged that the communication was inadmissible on the grounds that the author had not included the Constitutional Court judgement in his application for *amparo* and had not shown that he had exhausted domestic remedies or raised the complaint now before the Committee in his application for *amparo* before the Constitutional Court.

4.2 In a note dated 1 February 2006, the State party indicated that in its judgement of 19 April 2004 the Constitutional Court had rejected the application for *amparo* lodged by the author. In the view of the Constitutional Court, the fact that some States parties had introduced reservations to article 14, paragraph 5, of the Covenant was not a decisive factor in the interpretation of that provision, since no objections to those reservations had been raised by other States parties, and they had not been called into question by the Human Rights Committee. According to the State party this provision does not require a re-examination of the facts by a higher court when a person has been acquitted at first instance, nor does it prohibit re-examination, even though the review may result in a conviction. According to the State party, the "reservations" entered by certain States parties to article 14, paragraph 5, of the Covenant are interpretative declarations aimed at retaining the possibility that the review might result in a conviction at the appeal stage; the aim is not to exclude the application of the provision but to clarify what the Covenant means in the first place. It is inconceivable that States which have signed Protocol 7 to the European Convention on Human Rights should retain a practice - conviction for the first time at the review stage - that was directly prohibited by the Covenant. These States do not interpret article 14, paragraph 5, of the Covenant in the same way as the author. The State party refers to the individual opinion of one of the Committee's members in communication No. 1095/2002, holding that the Committee should take into account

¹ Communications Nos. 986/2001, *Semey v. Spain*, Views of 30 July 2003, and 1007/2001, *Sineiro Fernández v. Spain*, Views of 8 July 2003.

the practice of States parties to Protocol 7 to the European Convention on Human Rights, in the sense that it is inconceivable that those States parties, in ratifying the Protocol, should have intended to act in a manner at variance with their obligations under article 14, paragraph 5, of the Covenant.²

4.3 The State party also maintains that article 14, paragraph 5, of the Covenant cannot be interpreted as excluding appeal by the prosecution. Either the right of appeal by the prosecution, and thus the possibility of securing a conviction by the higher court, is recognized; or it is denied, thus preventing the prosecution from challenging the sentence; or an indefinite and interminable series of appeals is set in motion. The purpose of the right referred to in article 14, paragraph 5, is to protect the right to a defence; in the author's situation his right to a defence was not breached, since his claims were considered and ruled upon by two separate judicial bodies.

4.4 The State party asserts that the author's right to a defence was not breached, in line with the purpose of article 14, paragraph 5, since the decision to convict did not introduce new facts or new evidence. If the decision had introduced new facts or new evidence, the right to a defence would indeed have been breached. In this connection, the State party points out that on 22 March 2004 the author secured the annulment by the Constitutional Court of another conviction, handed down for the first time by the Madrid Provincial High Court, on the basis of a reinterpretation of evidence.

4.5 The State party asserts that it makes full provision for review of conviction by means of appeal, and that this situation has been recognized by the European Court of Human Rights, which in its decision of 30 November 2004 on applications Nos. 74182, 74186 and 74191 of 2001³ stated, in respect of the cases heard by the Supreme Court at first instance, that the applicants were able to lodge an application for *amparo* before the Constitutional Court against the decision of the criminal division of the Supreme Court, and thus to avail themselves of a remedy before a higher national tribunal.

4.6 According to the State party, the only discrepancy between the acquittal at first instance and the decision to convict handed down by the Supreme Court was the issue of whether the offence was time-barred in the author's situation; this was precisely the issue that was the subject of the application for *amparo* before the Constitutional Court. The court of first instance, the National High Court, found that the facts and the author's responsibility for the offence of aggravated misappropriation were established, but considered that the offence was time-barred. The Supreme Court did not alter the established facts, but found that the offence could not be considered as time-barred since, in the case of offences committed by a company or an artificial person, criminal prosecution of the artificial person affects all those directly related to that

² Communication No. 1095/2002, *Gomaríz v. Spain*, Views of 22 July 2005, individual opinion of Ms. Wedgwood.

³ European Court of Human Rights, section IV, *Saiz Oceja v. Spain*, *Hierro Moset v. Spain* and *Planchuelo Herreras Sánchez v. Spain*, complaints Nos. 74,182/01, 74,186/01 and 74,191/01, judgement of 30 November 2004, paragraph 1.

person. Interpretation of the issue of prescription was the sole ground of the application for *amparo*, and on this matter the Constitutional Court carried out a full review of the Supreme Court judgement. The State party quotes the paragraphs of the Constitutional Court judgement that relate to review of the issue of prescription and concludes that, even if it were to be understood that a conviction cannot be handed down for the first time in a ruling in cassation, the final review carried out by the Constitutional Court was sufficient and complete in relation to article 14, paragraph 5, of the Covenant.

Author's comments

5.1 The author insists that domestic remedies have been exhausted, since he lodged an application for *amparo* that was dismissed by the Constitutional Court. He adds that the Constitutional Court judgement contains an individual opinion in which one of the judges considered that neither the fact that the reservations entered by some States parties to article 14, paragraph 5, of the Covenant were not objected to by other States parties or called into question by the Committee, nor the fact that Protocol 7 to the European Convention on Human Rights makes an exception of cases where the accused has been tried in the first instance by the highest tribunal, was a decisive factor, since Spain had not entered reservations to the Covenant and was not a State party to Protocol 7 to the European Convention on Human Rights.

5.2 The author states that the Committee has already ruled on the incompatibility of conviction for the first time at first instance by an appeal court. He cites in this regard the Committee's Views concerning the communications *Gomaríz v. Spain* and *Terrón v. Spain*.⁴

5.3 The author asserts that it would not be difficult for the State party to recognize the right of appeal against convictions handed down for the first time by the Supreme Court, since its domestic legislation provides for solutions to similar cases, such as judgements on cases tried in sole instance by the administrative division of the Supreme Court, which can be appealed in a special division of the same court.

5.4 In the author's view, the remedy of *amparo* cannot be considered as a suitable remedy for reviewing matters of fact and of law relating to his conviction, as is argued by the State party. According to the Constitutional Court Act, the Court can never review the facts on which the contested sentence is based. Nor can it review the legal elements constituting the offence of which the accused was convicted. The sole aim of an application for *amparo* is to assess whether there has been a breach of the fundamental rights guaranteed by the State party's Constitution.

5.5 The author underlines that the State party has entered no reservation to article 14, paragraph 5, of the Covenant.

⁴ Communications Nos. 1095/2002, *Gomaríz v. Spain*, Views of 22 July 2005, paragraph 7.1; and 1073/2002, *Terrón v. Spain*, Views of 5 November 2004, paragraph 7.4.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined by any other procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the exhaustion of domestic remedies, the Committee takes note of the State party's contention that domestic remedies have not been exhausted. It notes that on the date of submission of the communication - 14 November 2003 - an *amparo* application before the Constitutional Court was pending. That application was rejected on 19 April 2004. The Committee recalls its jurisprudence that, save in exceptional circumstances, the date used for determining whether remedies may be deemed exhausted is the date of the Committee's consideration of the communication.⁵ It also recalls its jurisprudence that it is necessary to exhaust only those remedies that have a reasonable prospect of success and that, in complaints similar to that of the author, the Committee has considered that the remedy of *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant.⁶ Consequently, the Committee considers that the author has exhausted domestic remedies and that the communication is admissible.

Consideration of the merits

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the State party's arguments that conviction in cassation is compatible with the Covenant, and that the conviction by the Supreme Court was effectively reviewed by the Constitutional Court by means of the remedy of *amparo*. The Committee recalls its jurisprudence that the absence of any right of review in a higher court of a conviction handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant.⁷ In the present case, the Supreme Court convicted the author of the offence of misappropriation on the ground that prescription did not apply, and set aside the judgement handed down at first instance by the National High Court, which had acquitted him on the grounds that the offence was time-barred. The Committee notes that the

⁵ Communication No. 1228/2003, *Lemercier and another v. France*, decision of 27 March 2006, paragraph 6.4.

⁶ Communication No. 1325/2004, *Conde v. Spain*, Views of 31 October 2006, paragraph 6.3.

⁷ Communications Nos. 1332/2004, *García and another v. Spain*, Views of 31 October 2006, paragraph 7.2; and 1325/2004, *Conde v. Spain*, Views of 31 October 2006, paragraph 7.2.

Constitutional Court considered the facts of the case in the course of its review of the constitutional issues raised. However, the Committee cannot agree that that consideration meets the standard set by article 14, paragraph 5, for a review of the conviction.

8. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy which allows a review of his conviction and sentence by a higher tribunal. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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