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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2996/2017*, **

Communication submitted by:	José Antonio Sainz de la Maza y del Castillo (represented by Diego Fernández Fernández)
Alleged victim:	The author
State party:	Spain
Date of communication:	16 September 2015
Date of adoption of Views:	21 July 2021
Subject matter:	Right to due process and a second hearing
Procedural issues:	Exhaustion of domestic remedies; case already submitted to another procedure of international settlement; lack of substantiation
Substantive issues:	Right to review; right to due process; right to a hearing by a competent, independent and impartial tribunal
Article of the Covenant:	14
Articles of the Optional Protocol:	2; 3; and 5 (2) (a) and (b)

1. The author of the communication is José Antonio Sainz de la Maza y del Castillo, a Spanish national born on 27 July 1950. The author alleges that the State party has violated his rights under article 14 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Diego Fernández Fernández.

Facts as submitted by the author

2.1 The author was a director of the company Obras y Casas S.A., which failed to file corporate income tax returns in 1987, 1988 and 1999 and failed to file a value added tax return in 1988, causing the Public Treasury to incur a loss of 928,639,356 pesetas (approximately $6 million). The Public Prosecution Service therefore filed a complaint against the author as a director of the company during those years, and against two of his

* Adopted by the Committee at its 132nd session (28 June–23 July 2021).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Wafaa Ashraf Moharram Bassim, Mahjoub El Haiba, Furuya Shuichi, Kobauyah Tchamdja Kpatcha, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, José Manuel Santos Pais, Soh Changrok, Hélène Tigroudja and Gentian Zyberi.

associates, for allegedly having committed several offences against the Public Treasury under article 349 of the Criminal Code in force at the time of the events.

2.2 This complaint led to the initiation of summary proceedings, the investigative stage of which was overseen by Madrid Court of Investigation No. 43. Once all the preliminary proceedings had been completed, the Public Prosecution Service and the counsel for the State filed charges against the author and his associates, resulting in a trial that took place at Madrid Criminal Court No. 18.

2.3 In late 2005, following the oral proceedings, Madrid Criminal Court No. 18 handed down a judgment acquitting the defendants on the ground that the subjective element of the offence was not sufficiently substantiated, since the evidence provided no basis for concluding that the defendants were administrators in fact as well as in law and that they had therefore acted with intent to evade tax. The prosecution appealed this decision. On 11 May 2006, the First Division of the Provincial High Court of Madrid declared the appeals to be well founded in view of the flawed reasoning on which the acquittal was based and, in so doing, declared the judgment null and void and returned the case to the Criminal Court so that it could issue a new decision.

2.4 Criminal Court No. 18 issued a new judgment, acquitting the defendants once again. This decision was challenged by the prosecution and, on 10 December 2009, the Provincial High Court of Madrid decided once again to declare the acquittal null and void because it was based on flawed reasoning and to request that the Criminal Court should issue a new decision.

2.5 On 21 January 2011, Criminal Court No. 18 issued its third judgment in the case, acquitting the author and the other accused persons. The prosecution submitted a further appeal against this judgment to the Provincial High Court of Madrid, which decided to hold a hearing to rule on the appeals. The basis of the appeals filed by the prosecution was that the lower court had made an error in the assessment of the evidence. In the prosecution's view, the evidence showed that the author had acted as a director of the company and that he had been aware of, and permitted, the failure to file the tax returns at issue in the proceedings because he was a fully fledged member of the board of directors and was authorized to file them himself.

2.6 On 30 April 2012, the Provincial High Court of Madrid upheld the appeals and convicted the author of committing four offences against the Public Treasury, with the special mitigating circumstance of undue delay, sentencing him to imprisonment for 6 months and 1 day for each offence and to a fine of three times the amount of tax evaded.

2.7 The author states that this judgment was at odds with the account of the proven facts in the acquittal handed down at first instance and that it constituted an assessment of the documentary evidence and the personal evidence presented in the oral proceedings, without any contradictory evidence being heard, since, although a new hearing was held, no evidence was put forward at that hearing other than the author's answers to general questions about his acknowledgement or denial of the truth of the allegations. On 29 May 2012, the author was notified of his conviction, which was not subject to appeal.[1]

2.8 On 20 June 2012, the author's lawyer filed a written submission with the Provincial High Court to affirm that he would no longer be defending the author and to request a suspension of the 20-day time limit for filing an exceptional application for annulment of the proceedings.

[1] Until the Criminal Procedure Act was amended on 5 October 2015 (Act No. 41/2015), judgments handed down by provincial high courts could not be appealed in courts of second instance, with the exception of judgments handed down in cases tried by jury, which could be appealed before the high courts of justice of the autonomous communities: "Judgments handed down by provincial high courts and at first instance by the judge presiding over the court at which the jury trial is taking place, shall be appealable before the civil and criminal division of the high court of justice of the autonomous community in question" (Criminal Procedure Act, art. 846 bis (a)). See paragraphs 9.3 and 9.5 of the present Views.

2.9 On 3 July 2012, the First Division of the Provincial High Court of Madrid issued an order in which, after expressly referring to the request to suspend the time limit for filing an application for annulment of the proceedings, it agreed to join the application to the proceedings and send it to the reporting judge.

2.10 On 22 November 2012, the author's new lawyer filed a written submission on the author's behalf in the form of an exceptional application for annulment of the proceedings, under article 241 of the Organic Act on the Judiciary, which would overturn the judgment of the Provincial High Court of Madrid of 30 April 2012.[2] He alleged that the above-mentioned decision violated the right to a fair trial and the right to be presumed innocent, which are recognized in article 24 of the Constitution,[3] because a conviction had been handed down by a higher court after an acquittal by a lower court had been overturned on the basis of personal evidence that was not put before the appeal court and because the account of the proven facts had been altered. On 6 December 2012, the Appeal Chamber of the First Division of the Provincial High Court of Madrid rejected this application, stating that the requested annulment was based on alleged procedural errors that left the author without a defence and were not reported during the trial. It also stated that the deadline by which to apply for annulment was within 20 days of notice of the judgment and that the change of lawyer did not allow the proceedings to be restarted from an earlier point for the specified purposes.

2.11 On 5 February 2013, the author filed an application for *amparo* against the above decision on the ground that his right to effective judicial protection had been violated because his application for annulment had been dismissed as time-barred, despite the fact that he had requested an extension of the deadline on the ground that his lawyer had changed. The author also considered it manifestly wrong that he should have been expected to report the alleged irregularity during the proceedings when it did not occur until a later stage (i.e. when the judgment was issued). The author also considered that the principles of orality, immediacy, adversarial proceedings and defence were violated, since the decision in question was taken without any new evidence being submitted. On 6 June 2013, the Constitutional Court dismissed the application for *amparo* on the ground that there had been "no manifest infringement of a fundamental right eligible for protection under the remedy of *amparo*".

2.12 On 12 December 2013, the author filed an application with the European Court of Human Rights. On 18 September 2014, the European Court, sitting in a single-judge formation, dismissed the application on the ground that it failed to meet the admissibility criteria set forth in articles 34 and 35 of the European Convention on Human Rights.

Complaint

3.1 The author affirms that the State party has violated his rights under article 14 of the Covenant as he was convicted by a judgment, issued on appeal by the First Division of the Provincial High Court of Madrid, against which no remedy is provided for in the domestic legal system. However, pursuant to article 241 of the Organic Act on the Judiciary, the author filed an exceptional application for annulment of the proceedings, which was rejected as inadmissible. The author complains that the written submission was considered to have been filed late, without the court having taken into account that his lawyer had resigned or that he had expressly requested a suspension of the time limit for the filing of the application until a new lawyer had been appointed so that the author would not be left without a defence. He argues that the order rejecting the exceptional application for annulment of the proceedings constitutes an arbitrary, unreasonable and patently erroneous decision and that such

[2] At the time of submission of the complaint, the author did not specify the date on which the appeal had been filed.

[3] Article 24 of the Constitution provides that:

"1. All persons have the right to effective protection by the judges and courts in the exercise of their legitimate rights and interests and in no case may they lack a proper defence.

2. Likewise, all persons have the right of access to an ordinary court predetermined by law, the right to a defence and the assistance of counsel, the right to be informed of the charges against them, the right to a fair public trial without undue delay, the right to submit evidence relevant to their defence, the right not to testify against themselves, the right not to confess guilt and the right to be presumed innocent."

applications are the only, albeit limited, procedural remedy available against such a conviction.

3.2 The author alleges a violation of the fundamental right to adversarial proceedings, the right to procedural equality, the right to be presumed innocent and the right to a public hearing, all on the basis that he was convicted by a higher court without any evidence having been put forward. In his case, as a full public hearing was not held at the appeal stage, the higher court judge reassessed the defendants' statements without the author having been able to submit the necessary evidence, as no opportunity was given to hear the witnesses and expert witnesses again. He therefore requests that the State party be required to declare that the decisions against him are automatically null and void.

3.3 In particular, the author claims that the State party has violated his right to have his sentence reviewed by a higher tribunal under article 14 (5) of the Covenant, since his conviction by the First Division of the Provincial High Court of Madrid could not be reviewed. The author adds that, since the Constitutional Court also failed to admit the application for *amparo* in connection with the same issue, no court has ruled on the issue concerned, which constitutes a violation of his fundamental rights to a fair trial and access to a court. In accordance with the Committee's jurisprudence in this regard, the right to a second hearing in criminal matters, provided for in article 14 (5) of the Covenant, has therefore been violated. This violation could not be reported to a domestic court owing to the absence, at the time of the events, of such a right from the domestic legal system and to the fact that the Constitutional Court had issued several rulings establishing that this was the case.[4]

Request by the State party for additional documentation

4. In its observations of 19 December 2017, the State party requests additional documentation regarding the author's exhaustion of domestic remedies. The State party requests a copy of the written submission objecting to the holding of a public hearing of the accused on appeal and a copy of the application for annulment of the proceedings, which the author had filed against judgment No. 120/2012 of 30 April 2012 of the Provincial High Court of Madrid. That copy should specify the time at which the application was submitted, its contents, and the date on which the new lawyer was appointed, since the resigning lawyer submitted his resignation on 20 June 2012 (four working days before 26 June 2012, the deadline for filing the application for annulment of the proceedings) and the resignation was processed by the court on 3 July 2012 (nine working days after it had been submitted), when the deadline for the application for annulment of the proceedings had already expired.

Author's reply to the State party's request for additional documentation

5.1 In his observations of 29 June 2018, the author argues that the State party's request for additional documentation is inadmissible, as the State was the prosecuting party in the proceedings against him and therefore has access to the requested documentation. The author takes the view that the State party is unnecessarily prolonging the proceedings before the Committee, as it requested information with a view to challenging the admissibility of the communication when the time limit for the submission of its observations on the merits had almost expired. The author therefore requests that the Committee continue the procedure.

5.2 Furthermore, the author considers the documentation requested by the State party irrelevant to the issue raised in his complaint. He argues that his objection to a second hearing before a higher court has nothing to do with the exhaustion of domestic remedies. In objecting to this hearing, he was exercising his legitimate right to a defence. The author objected to the holding of a second hearing before a higher court on the ground that, under the applicable legislation, it could not be held under the same conditions as the first instance hearing and would not be accompanied by the necessary safeguards owing to the time that had elapsed since the events under investigation (more than 20 years) and the fact that two of the accused persons had died.

[4] The author cites Constitutional Court judgments No. 120/1999 of 28 June 1999 and No. 60/2008 of 26 May 2008.

5.3 The author explains that, once the hearing had taken place, and in view of the circumstances in which it was held and the decision handed down by the Provincial High Court, an application for annulment of the proceedings was filed, followed by an application for *amparo*, in which it was alleged that the hearing had not provided the accused with the necessary safeguards and that he had been convicted by a higher court on the basis of personal evidence that had not been heard by the Court, constituting a clear violation of the right to the proper administration of justice and to a fair trial. The author's objection to the hearing on the ground that it would be held in a way that would have failed to safeguard his rights, and the subsequent complaint that the manner in which it was actually conducted did not safeguard his fundamental rights, is not in any way inconsistent but is a legitimate exercise of the right of defence and the right to report the possible violations that have been occurring at each stage of the proceedings against the author.

5.4 In the author's view, what is relevant to the question of whether remedies have been exhausted is that he was acquitted by the court of first instance of the charges brought against him; that an appeal was filed against that decision by the Public Prosecution Service and the counsel for the State; that the Provincial High Court issued a decision, on appeal, overturning the lower court's judgment and convicting him of four offences against the Public Treasury; that he filed an exceptional application for annulment of the proceedings related to this judgment; that this application was ruled inadmissible by the Provincial High Court; and that an application for *amparo* against the decisions of the Provincial High Court was submitted to the Constitutional Court. He affirms that the application for annulment of the proceedings and the application for *amparo* were the only mechanisms available in national law by which he could challenge such a decision. In both applications, it was alleged that a judgment had been handed down without the appeal court having heard the personal evidence submitted in the oral proceedings and that a hearing had been held at which the accused had merely been summoned and asked to comment on his guilt, which in no way fulfilled the need for the sentencing court to hear all the personal evidence that had been heard at the trial and assessed by the Criminal Court in reaching its decision to acquit the author.

5.5 The author also believes that there are no reasons relevant to the case that would justify the State party's request for a copy of the application for annulment of the proceedings or its request to know the date on which his new lawyer was appointed. He reiterates that, on 20 June 2012, he filed a written submission informing the court that this lawyer would no longer be defending him. This submission was filed before the expiry of the legally established 20-day period for filing the above-mentioned application for annulment of the proceedings, which ended on 27 June 2012. In addition, the above-mentioned submission expressly requested that, "as this lawyer was preparing an application for annulment of the proceedings and the judgment handed down in those proceedings, I would ask that, in order to avoid any prejudice to the interested party, the time period for filing the application for annulment of the proceedings be suspended until a new lawyer is found to defend the author's interests".

5.6 The author notes that at no time did the court rule on the resignation submitted by the author's lawyer or on the request to suspend the time limit for filing the application for annulment of the proceedings. In view of the circumstances, the author proceeded to appoint a new lawyer, even though the court had not issued a decision requesting that he do so. Once this lawyer had been appointed, a written submission was filed on the author's behalf, in the form of an exceptional application for the annulment of proceedings, in order to overturn the judgment issued by the Provincial High Court of Madrid on 30 April 2012. This application was submitted within the existing time limit.

5.7 In the author's view, the application for annulment of the proceedings could be considered to have been submitted late only if the court had issued a decision requesting that he should appoint a new lawyer within a certain time limit, ruling on the requested stay of proceedings, and specifying the number of days remaining in that period, and if this time limit had been exceeded.

5.8 He adds that the Constitutional Court's decision on the application for *amparo* shows that it was not submitted late. In considering the admissibility of applications for *amparo*, the first matter to consider is the time limit. Therefore, if the application for the annulment of proceedings filed prior to the application for *amparo* had been filed after the deadline, the

court would have issued a decision of inadmissibility on the ground that the application had been submitted late. However, the Constitutional Court issued a decision not to admit the author's application for *amparo* as there had been "no manifest infringement of a fundamental right eligible for protection under the remedy of *amparo*". This decision demonstrates that all domestic remedies have been properly exhausted and that the additional documentation referred to by the State party is unnecessary.

State party's observations on admissibility and the merits

6.1 On 7 January 2019, the State party submitted observations on the admissibility and the merits of the communication, arguing that it should be declared inadmissible for failure to exhaust domestic remedies under article 5 (2) (b) of the Optional Protocol.

6.2 The State party argues that the author has failed to exhaust domestic remedies in connection with the alleged violation of his right to have his sentence reviewed by a higher tribunal, under article 14 of the Covenant. The author has never claimed a violation of this right before the domestic courts.

6.3 The State party argues that neither the application for annulment of the proceedings nor the application for *amparo* refers to the alleged violation of the right to have a criminal conviction reviewed by a higher tribunal. Furthermore, the author did not raise this point in his submission objecting to the appeal or at the appeal hearing. According to the ruling issued by the Provincial High Court on 6 December 2012, which dismissed the appeal, the author's arguments were based on the application for annulment of the proceedings, in which he maintained that he had been deprived of his right to a defence because he was convicted on appeal, without any evidence of the subjective element of the tax offence being put forward, and that his conviction was based on documents and reports which, in his view, did not serve to prove that element and were improperly assessed.

6.4 In the application for *amparo*, the author claims that it was unreasonable for the application for annulment to have been declared inadmissible on the ground that it was time-barred, that the personal evidence heard at the trial stage should have been heard again and that the principle of the presumption of innocence had been violated. In the order of 6 December 2012, the Provincial High Court, referring to the order of 24 July 2012, pointed out that the violation had not been reported at the hearing and that no personal evidence had been heard, since expert opinions constitute documentary evidence. Furthermore, the State party notes that the author's written submissions do not specify which evidence was improperly assessed.

6.5 With regard to the author's view that article 14 was violated because the personal evidence should have been heard again at the appeal hearing, the author claimed that he had not stated this at the time and that he had objected to the hearing on the ground that it would not be accompanied by the same safeguards as the oral proceedings. The State party submits that the Committee's jurisprudence clearly indicates that domestic remedies must be exhausted and that the author's doubts about the effectiveness of such remedies do not exempt him from exhausting them. The State party takes the view that the author cannot validly argue that his allegation regarding the holding of the hearing would have had no effect on whether personal evidence would be heard again and that he was under an obligation to exhaust domestic remedies, irrespective of his opinion on their viability.

6.6 The State party submits that the communication should be declared inadmissible for lack of substantiation under article 2 of the Optional Protocol. It takes the view that the Committee's jurisprudence clearly indicates how this ground of inadmissibility should be interpreted.[5] With regard to the alleged violation of article 14 of the Covenant on the basis that the application for annulment of the proceedings was not admitted, the author notes that the Constitutional Court considers it to have been submitted within the time limit. In addition, the Provincial High Court contested all the arguments put forward by the author on the merits, affirming that the issues that he raised should have been raised at the hearing – whose purpose was the resubmission of personal evidence – and that he did not do so. The author objected

[5] See *X and Y v. Netherlands* (CCPR/C/117/D/2729/2016), para. 4.3; and *J.P.D. v. France* (CCPR/C/115/D/2621/2015), para. 4.5.

to the holding of the hearing and to the submission of personal evidence at the hearing. However, in the application for annulment of the proceedings, and in the application for *amparo*, he argued that such evidence should have been resubmitted, which is completely contradictory.

6.7 In addition, the author attended the public hearing, where he was able to defend himself both directly and through his lawyer and where documentary evidence was considered and debated by the prosecution and the defence. The State party believes that it has complied with the Committee's jurisprudence, cited by the author, concerning the need for appeal hearings to be held in the presence of the defendant.[6]

6.8 Lastly, the State party asserts that a reading of the judgment issued by the Provincial High Court of Madrid shows that it did not engage in arbitrary interpretation or a denial of justice but based its reasoning on the strict terms of the appeal, that is, a review of the documentary evidence. It should be added that the author does not deny that an offence was committed or question the amount of tax evaded, which was established by the expert reports of the Public Treasury. He denies only his liability for the tax and his intention to evade it, both of which claims are based on documentary evidence and on the fact that, in accordance with case law, administrators in law and in practice may be considered perpetrators.

6.9 The State party's secondary request is that the Committee dismiss the communication on the merits, on the ground that article 14 of the Covenant has not been violated. As the author did not submit any evidence for appraisal at the appeal hearing, article 14 of the Covenant cannot be considered to have been violated.[7]

6.10 The State party notes that, although the author stated in the initial communication that he was submitting the application for annulment of the proceedings for the Committee's consideration, he did not attach it to the communication and has refused to provide it when that request was repeated.

6.11 The State party notes that the author objected to the holding of the appeal hearing because it would not be possible to assess the personal evidence on appeal. His objection was based on his opinion that he was not the perpetrator of the offence and that there had been no intent to evade tax. The public appeal hearing was attended by the defendant, who exercised his right to defend himself before the court at the beginning and end of the hearing. The State party notes that, as the President of the Chamber pointed out at the start of the hearing, the appeal involved only a review of the documentary evidence and not a review of the personal evidence submitted at the trial before the lower court.

6.12 With regard to the author's objection to the holding of the public hearing, the State party notes that, according to the judgment, such hearings are mandatory procedures, in line with the jurisprudence of the Constitutional Court. The judgment involves a re-evaluation of the documentary evidence, not of the personal evidence, since the author denies, not that tax evasion (failure to file tax returns and the subsequent failure to pay the tax owed) was committed, but that he intended to evade tax and perpetrated the offence in his capacity as a company director. The judgment stresses the author's status as the perpetrator of the offence and his intent to evade tax, which is why it sets out an assessment of the documentary evidence. The judgment splits into eight sections the documents that prove that the author was an administrator, not only in law, but also in fact:

> All these documents prove that, in numerous and significant financial transactions, the accused acted as part of, and on behalf of, the company. It must therefore be concluded that he participated in its financial development and, in view of the significant number of business transactions in which he was involved, could not have been unaware of his responsibilities to the Public Treasury. In short, the judge's unexplained assertion that there was insufficient evidence that the accused acted as a director or representative of the company is contradicted by the significant amount of documentary evidence in the case, on which the judgment is silent. … None of the personal evidence … contradicts the documentary evidence and it is clear that, without

[6] See Human Rights Committee, *Karttunen v. Finland*, communication No. 387/1989, para. 7.3.

[7] The State party cites general comment No. 32 (2007), para. 39.

any assessment of the former, the judgment is unreasonable in that it fails to take into account the abundant and extensive documentary evidence referred to above.

6.13 The State party alleges that, in his communication, the author attempts to argue that the judgment involves a re-evaluation of the personal evidence in that it "copies and pastes" from the initial judgment, but he omits to mention that some of it consists of quotations from the initial judgment that refer to other previous judgments, all apparently with the intention of conveying a false impression of the judgment.

Author's comments on the State party's observations on admissibility and the merits

7.1 In his observations of 19 May 2019, the author affirms that the State party's request for the communication to be declared inadmissible for failure to exhaust domestic remedies is baseless. The right to have a criminal conviction reviewed by a higher tribunal, in accordance with article 14 of the Covenant, which has been violated, has not been recognized in the Spanish legal system, despite the fact that article 10 (2) of the Constitution provides that the "provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those rights and liberties ratified by Spain", while article 96 provides that "validly concluded international treaties, once officially published in Spain, shall be part of the domestic legal order". This represents a clear breach of several decisions issued by the Human Rights Committee in this regard, since Spain has been condemned for violating article 14 (5) of the Covenant and reminded to take measures to prevent similar violations from occurring in the future but has taken no such measures.[8]

7.2 In addition, the Committee's jurisprudence has consistently established that, while the initial burden of proof is on the author to show that he or she has exhausted, or attempted to exhaust, all appropriate domestic remedies, if some domestic remedies turn out to be unavailable, as in the present case, the burden is on the State party to provide evidence of the continued availability and effectiveness of such remedies. The author reiterates that the violation of article 14 (5) of the Covenant could not be challenged in domestic proceedings, since that right is not recognized in the legal system, as established in numerous decisions issued by the Constitutional Court. In response to that argument, it was incumbent on the State party to demonstrate the existence of an available and effective domestic remedy by which to report a violation of article 14 (5) of the Covenant in the Spanish legal system, which it did not do.

7.3 With regard to the violation of article 14 of the Covenant on the ground that the personal evidence should have been heard again at the appeal hearing, the State party argues that domestic remedies have not been exhausted because this issue was not raised at the hearing. In this connection, the author reiterates that, as the President of the Chamber pointed out at the start of the hearing, the appeal involved only a review of the documentary evidence and not a review of the personal evidence submitted at the trial conducted by the lower court. This statement, made at the start of the hearing, shows that the author's lawyer was not entitled to make any statement concerning the Chamber's assessment of the personal evidence, much less request that such evidence should be heard. Only when the judgment had been handed down, and it had been ascertained that the decision had involved an assessment of the personal evidence, was the author able to use the only mechanism provided for in the domestic legal system to challenge a conviction by the higher court, albeit to a very limited extent. In that regard, he submitted an exceptional application for annulment of the proceedings, which was wrongly found to be inadmissible.

7.4 The author states that his defence lawyers had not the slightest doubt that it was impossible for evidence to be submitted to the higher court in the same conditions as it had been submitted to the trial court. This is because, at the time of the events, article 790 of the Criminal Procedure Act, on challenging sentences handed down in summary proceedings, was worded in such a way as to establish that the applicable legislation in the State party's domestic legal order did not provide, under any circumstances, for the submission to a higher court of evidence that had been submitted to a lower court. It provided only for requests for

[8] The author cites *Gomáriz Valera v. Spain* (CCPR/C/84/D/1095/2002), para. 6.4.

the submission of evidence that it had not been possible to hear at first instance, proposals for the submission of evidence that had been wrongly found to be inadmissible and proposals relating to evidence that had been admitted but not heard for reasons not attributable to the applicant. It should not be forgotten that, in any event, it was not for the defence to propose that personal evidence should be heard by the higher court but for the prosecution seeking the conviction of the acquitted defendant. In any event, it was incumbent on the State party to show that it was possible, under Spanish law, for all the evidence to be re-examined by the Provincial High Court and that such a possibility might have been admitted if it had been raised in some form of appeal to the domestic courts.

7.5 The author maintains that the fact that the Constitutional Court considered the application for annulment of the proceedings to have been filed in time does not remedy the violation of the author's rights, since it does not mean that the application was admitted by the competent body (the Provincial High Court) or that the decision provided for in the law, duly substantiated and reasoned, was obtained. Although the order issued by the Provincial High Court dismissing the application for annulment contains brief references to the issues raised in the application, this order cannot be considered a duly reasoned decision, based on the law, because the explanations provided in it are clearly insufficient and because it does not comply with the procedure established in the Organic Act on the Judiciary for the annulment of proceedings.

7.6 The author affirms that, under rule 90 of the Committee's rules of procedure, it is for the Secretary-General, and not the State party, to request clarification or additional information from the author of a communication on certain issues. However, he has included this documentation with his submission, so that the Committee can see that he has never had any intention of hiding information of any kind.[9]

7.7 The author insists that special consideration must be given to the fact that the decisions that were the subject of his complaint resulted in his conviction, on appeal, after he had been acquitted at first instance. He considers the State party to be unnecessarily prolonging the present proceedings by requesting an extension of the time limit for the submission of observations on "admissibility", after the expiry of the two-month time limit established for that purpose in rule 97, and by improperly extending the six-month time limit established in the rules of procedure. This extension is causing the author very serious harm since, even if the Committee were to find that the alleged violation of his rights had occurred, he would already have served the entirety of the prison sentence unlawfully imposed by the national courts.

7.8 The author rejects the claim that the judgment involves an assessment of the documentary evidence but not of the personal evidence. Although the Appeal Chamber asserts that only documentary evidence was assessed, the following statements indicate the contrary:

> None of the personal evidence (the statements made by the deceased Mr. I, the witnesses, the accused himself and the deceased C.J. – a director of the company – before the investigating judge) contradicts the documentary evidence. Without undertaking an assessment of the former, it is clear that the judgment is unreasonable because it does not take into consideration the abundant and extensive documentary evidence referred to above, acts of omission being the subject of the accusation.

According to the author, to hold that none of the personal evidence contradicts the documentary evidence already implies that the former is being evaluated, even if only to deny that it has any value. Furthermore, to decide to give weight to certain documents but not to the statements of the accused and the witnesses also implies an evaluation of that evidence. In the present case, the trial judge considered, after hearing the evidence, the witness statements to have greater value than the documentary evidence. In the author's view, it is

[9] The author provides a copy of his written submissions objecting to the appeals filed by the Public Prosecution Service and the counsel for the State (document No. 1); a copy of the written submission filed on the author's behalf, containing an exceptional application for annulment of the proceedings (document No. 2); and a copy of the record of the author's appointment of a new lawyer (document No. 3).

not uncommon for the information formally recorded in certain documents to be inaccurate. This was taken into consideration by the trial court, which, after hearing the evidence, took the view that the statements made by the accused persons and the witnesses were more credible than the information contained in certain documents. The author points out that the above-mentioned reports are not only documentary evidence; rather, their validity was assessed during the oral proceedings, when their authors were questioned and their statements were evaluated by the trial court. Therefore, the Appeal Chamber's consideration of the reports also entailed an assessment of personal evidence, even though it was not heard.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee notes that the author filed an application regarding the same facts with the European Court of Human Rights and recalls that, when Spain ratified the Optional Protocol, it entered a reservation excluding the Committee's competence in matters that had been or were being examined under another procedure of international investigation or settlement. However, the Committee notes that, on 18 September 2014, the European Court of Human Rights, sitting in a single-judge formation, dismissed the application as inadmissible for failure to meet the admissibility requirements set out in articles 34 and 35 of the European Convention on Human Rights, without specifying the ground of inadmissibility. The Committee notes that the decision of the European Court simply indicates that the application fails to meet the applicable admissibility criteria, without providing further information.[10] Accordingly, the Committee considers article 5 (2) (a) of the Optional Protocol not to constitute an obstacle to the admissibility of the communication.

8.3 The Committee also notes the State party's argument that the author has not exhausted domestic remedies in relation to the alleged violation of his right to a second hearing, since he did not invoke this right either in his exceptional application for annulment of the proceedings before the Provincial High Court of Madrid or in his application for *amparo* before the Constitutional Court. The Committee recalls its jurisprudence to the effect that only those remedies that have a reasonable prospect of success need be exhausted.[11] In the present case, the Committee notes that article 241 (1) of the Organic Act on the Judiciary states that:

> Applications for the annulment of proceedings shall generally not be admissible. On an exceptional basis, however, persons who have or should have had standing as parties may make an application in writing for the annulment of proceedings on the ground of violation of any of the fundamental rights referred to in article 53 (2) of the Constitution in cases where it was not possible to report the violation prior to the issuance of the decision terminating the proceedings and where this decision is not subject to challenge by means of ordinary or extraordinary remedies.

The Committee also notes that article 241 (2) of the Organic Act on the Judiciary states that "if the application for annulment is granted, the proceedings shall be restored to the state immediately preceding the violation that gave rise to the annulment and the legally established procedure shall be followed". The Committee notes the extraordinary and limited nature of applications for the annulment of proceedings, and also takes the view that this remedy would not have allowed the judgment handed down by the Provincial High Court of Madrid to be reviewed by a higher court. In this connection, the Committee notes that, at the time of the events, both domestic law and the established position of the Constitutional Court, as reaffirmed in judgments refusing applications for *amparo*, regarding the review of

[10] See *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2.

[11] See, for example, *Gómez Vázquez v. Spain* (CCPR/C/69/D/701/1996), para. 10.1; *Semey v. Spain* (CCPR/C/78/D/986/2001), para. 8.2; *Alba Cabriada v. Spain* (CCPR/C/82/D/1101/2002), para. 6.5; *Prieto v. Spain* (CCPR/C/87/D/1293/2004), para. 6.3; and *Villamón Ventura v. Spain* (CCPR/C/88/D/1305/2004), para. 6.3.

convictions handed down by a higher court was clear, with the result that neither the application for annulment of the proceedings nor the application for *amparo* had any chance of success and were therefore ineffective remedies in the circumstances of the case.[12] Accordingly, the Committee considers domestic remedies to have been exhausted in relation to the allegations made under article 14 (5).

8.4 The Committee notes the State party's argument that the author has failed to exhaust domestic remedies in relation to the other alleged violations of article 14, as he did not state at the time of the appeal proceedings before the Provincial High Court that personal evidence should be heard again and that he was under an obligation to exhaust domestic remedies, irrespective of his views on their viability. The Committee also notes the State party's argument that the application for annulment of the proceedings was submitted late. In this connection, the Committee notes the author's argument that he was unable to confirm whether personal evidence had been assessed until after the Provincial High Court had handed down its judgment, at which point he submitted an exceptional application for annulment of the proceedings. The Committee notes that this was the only remedy available in domestic law by which the author could challenge, albeit in a very limited manner, the higher court's decision to convict him. The Committee further takes the view that the State party has failed to demonstrate how the author could have raised the issue of the alleged violations of article 14 during the oral proceedings with any chance of success. The State party has also failed to explain how, in the particular circumstances of the case at hand, the timely submission of an application for annulment of the proceedings would have been an effective means of protecting the rights invoked before the Committee. Accordingly, the Committee considers domestic remedies to have been exhausted in relation to the other allegations made under article 14 of the Covenant.

8.5 The Committee also notes the State party's assertion that the author's allegations of other violations of article 14, in connection with his conviction by the Provincial High Court of Madrid, have not been sufficiently substantiated, as required under article 3 of the Optional Protocol, and that a reading of the Provincial High Court of Madrid's judgment of 30 April 2012 shows that it did not engage in arbitrary interpretation or a denial of justice but based its reasoning on the strict terms of the appeal. The Committee recalls that, according to its settled jurisprudence, the assessment of facts and evidence is, in principle, a matter for national courts, unless it was manifestly arbitrary or amounted to a denial of justice.[13] The Committee takes the view that the information provided by the parties throughout the process does not allow it to conclude that the national courts have acted arbitrarily in the evaluation of evidence or in the interpretation of national legislation, and it is therefore not for the Committee to intervene in this respect, once it has verified the detailed reasoning of the courts and the consistency of the line of argument used.[14] In the light of the above, the Committee concludes that the author's allegations of other violations of article 14 are insufficiently substantiated and declares them inadmissible under article 3 of the Covenant.

8.6 The Committee considers the author's allegations under article 14 (5) to have been sufficiently substantiated and to meet the other requirements of admissibility, and proceeds to consider them on the merits.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

9.2 The author alleges a violation of his right to have his sentence reviewed by a higher tribunal under article 14 (5) of the Covenant, since there was no effective mechanism that would have enabled him to appeal the conviction handed down by the First Division of the Provincial High Court of Madrid on 30 April 2012 or to request that his conviction and sentence be reviewed by a higher tribunal. The author argues that this decision was not

[12] Ibid.

[13] See *Cañada Mora v. Spain* (CCPR/C/112/D/2070/2011), para. 4.3; *Manzano et al. v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4; and *L.D.L.P. v. Spain* (CCPR/C/102/D/1622/2007), para. 6.3.

[14] See *X and Y v. Spain* (CCPR/C/93/D/1456/2006), para. 8.3.

subject to appeal and that, in the circumstances of his case, there is no effective remedy available in the State party by which to request a review of a conviction brought by a higher court. He argues that exceptional applications for the annulment of the proceedings are limited in nature. In this respect, the Committee notes that the State party has not explained how the application for annulment of the proceedings, if it had been filed in time, would have enabled the author to have his sentence reviewed by another, higher court.

9.3 The Committee recalls that article 14 (5) of the Covenant establishes that everyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a higher tribunal according to law. Article 14 (5) is violated, not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance cannot, following acquittal by a lower court, be reviewed by a higher court.[15] The Committee recalls that the phrase "according to law" is not intended to mean that the very existence of a right to review should be left to the discretion of the States parties. Although a State party's legislation may provide, in certain circumstances, for the trial of an individual, because of his or her position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to have his or her conviction and sentence reviewed by a court.[16]

9.4 In the present case, the Committee notes that there was no available effective remedy whereby the author could request that his conviction and sentence, handed down on appeal, be reviewed by a higher court. Accordingly, the Committee finds that the State party violated the author's rights under article 14 (5) of the Covenant.[17]

9.5 The Committee notes that, in 2015 (subsequent to the facts of the present communication), the State party enacted new legislation providing that judgments handed down by provincial high courts may be appealed before the criminal division of the high court of justice of the autonomous community in question.[18] The Committee believes that this legislation may prevent violations such as the one found in the present communication, since the judicial authorities of a higher court are able to review convictions and sentences handed down and thus provide an effective remedy.

10. The Committee, acting under article 5 (4) of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 14 (5) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full redress be made to individuals whose rights have been violated. Accordingly, the State party is under an obligation to provide the author with appropriate redress, including a remedy that allows his conviction and sentence to be reviewed by a higher tribunal. The State party should also take every measure necessary to prevent such violations from recurring and to ensure full compliance with its obligations under article 14 (5) of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory and subject to its jurisdiction the

[15] General comment No. 32 (2007), para. 47.

[16] See *Terrón v. Spain* (CCPR/C/82/D/1073/2002), par. 7.4. See also general comment No. 32 (2007), paras. 45–47; and *Velásquez Echeverri v. Colombia* (CCPR/C/129/D/2931/2017), para. 9.4.

[17] *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.4; *I.D.M. v. Colombia* (CCPR/C/123/D/2414/2014), para. 10.4; and *Gómez Vázquez v. Spain*, para. 11.1.

[18] In 2015, the State party amended its legislation by adopting Act No. 41/2015 of 5 October 2015, amending the Criminal Procedure Act (Act No. 1/1882) with a view to streamlining criminal justice and strengthening procedural safeguards, incorporating a new article 846 ter into that Act, paragraph 1 of which provides that:

> Decisions that terminate proceedings, owing either to lack of jurisdiction or to their dismissal, and that overturn judgments handed down by provincial high courts, or the Criminal Division of the National High Court at first instance, may be appealed before the civil and criminal division of the high court of justice of the autonomous community in question and the Appeals Chamber of the National High Court, respectively, which shall resolve the appeals by means of a judgment.

rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information on the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views and to have them widely disseminated.